

Housing and Property Chamber First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

STATEMENT OF DECISION: in respect of an application under section 48(1) of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/LA/20/0926

Flat 10, Braal Castle, Halkirk, Caithness, KW12 6XE (“the Property”)

The Parties:-

Mr Cameron Chapman, Culbo Farm Cottage, Culbokie, Dingwall, IV7 8JX (“the Applicant”)

CCL Group Ltd t/a CCL Property, 62 High Street, Moray, IV30 1BU (“the Letting Agent”)

Tribunal Members

Ms Helen Forbes (Legal Member)

Mrs Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Letting Agent has not complied with paragraphs 17, 20, 124 and 125 of the Code of Practice for Letting Agents (“the Code”) as required by the Housing (Scotland) Act 2014 (“the Act”) and issues a Letting Agent Enforcement Order (“LAEO”).

The decision is unanimous.

Background

1. By application dated 13th March 2020, the Applicant applied to the Tribunal for a determination on whether the Letting Agent had failed to comply with sections 17, 20, 23, 24, 54, 76, 118, 119, 120, 123, 124 and 125 of the Code. The Applicant included written representations and timeline, notice to the Letting Agent dated 12th February 2020, copy email and letter correspondence between the parties including complaints correspondence, copy short assured tenancy agreement, copy tenant information pack, and copy Form AT5 with the application.

2. By decision dated 18th March 2020, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.
3. By letter dated 10th September 2020, the Letting Agent lodged written representations.

The Hearing

4. A hearing took place by teleconference on 19th October 2020. The Applicant was in attendance. Mr David Pickering, Director, attended on behalf of the Letting Agent.

Submissions by the Applicant

5. The Applicant said his case was as set out in his detailed application and invited the Tribunal to ask any relevant questions.
6. The basis of the application is that the Letting Agent has failed to return the sum of £640 to the Applicant, following the termination of the tenancy agreement between the parties. The background to the case is that during the period from 17th November 2016 to 30th January 2017, the Applicant experienced problems with the heating in the Property. He had to move out of the Property twice due to inadequate heating. Electrical works were carried out to resolve the problem. On 3rd February 2017, the Applicant emailed the Letting Agent's Sarah Craven to request rent relief equivalent to two months' rent (Email 46). Thereafter, matters were discussed by telephone between the Applicant and Ms Craven, who agreed to discuss matters with the landlord.
7. Around the same time, the Applicant requested permission to have his pet dog in the Property. The tenancy agreement did not allow pets in the Property without the prior written consent of the landlord in writing (clause 6 of the tenancy agreement), which consent would not be unreasonably withheld. Telephone discussions took place between the Applicant and Ms Craven in this regard, and it was proposed that any rent relief be used as an additional deposit in respect of permission to have the dog in the Property. By email dated 14th March 2020 (Email 49) Ms Craven informed the Applicant as follows:

Further to our phone conversation a few minutes ago, I am happy to confirm that the landlord has agreed to allow you to have your dog at your flat in Braal Castle [...] I will arrange for a rent repayment to be added to your deposit.

It was the understanding of the Applicant that his tenancy deposit now amounted to the equivalent of three months' rent, one of which had been paid at the start of the tenancy, with an additional two months' rent, which had been granted to him as rent relief, to be added to the deposit.

8. Following the termination of the tenancy agreement on 28th December 2019, there was correspondence between the parties concerning the deposit and it became apparent to the Applicant that only one month's rent was held by Safe Deposit Scotland ("SDS"), this being the deposit he had paid at the start of the tenancy. Ms Craven no longer worked for the Letting Agent by that time.
9. Investigations were carried out by the Letting Agent, and by email dated 28th January 2020, Mr Pickering informed the Applicant that no further deposit had been lodged with SDS, and no evidence of any agreement regarding the rent relief or the dog deposit could be found. A payment of £150 was offered to the Applicant as a gesture of goodwill.
10. Thereafter, the matter proceeded through the Letting Agent's complaints procedure, with a final response issued by letter dated 5th March 2020. At this time, the Letting Agent mentioned that only two months' rent can be taken by way of deposit and that it would be illegal to take more than two months' rent. The investigation concluded that the compensation offered to the Applicant for the period during which there were issues with the heating was that he would be allowed to have a pet in the Property and have one month's rent added to his tenancy deposit. The Letting Agent offered the Applicant £320 (one month's rent) and £100 as a goodwill gesture.
11. Responding to questions from the Tribunal, the Applicant said he and Ms Craven had carried out much of their discussion by telephone. He found Ms Craven to be very helpful. It was Ms Craven's idea to divert the two months' rent relief, which she referred to as 'clawback' to SDS as part of the deposit. The Applicant was receiving regular emails from SDS, and he received one just after this agreement was reached. The emails do not refer to a particular sum. He would have had to log in to SDS to ascertain the sum held, and he had not done so. He assumed the sum held was three months' rent. He was aware that at least two other tenants in the block of flats paid an extra two months' rent as a deposit to be allowed to keep a dog in their flats. The Applicant said he thought he may have met the landlord on one occasion but all contact was through the Letting Agent.

Response on behalf of the Letting Agent

12. Mr Pickering said Ms Craven was fully trained and very competent. He had looked through everything in this case and discussed matters with the landlord. The landlord, who usually corresponded by email, had no record or recollection of agreement having been made on the matter of rent relief or the request to have a dog in the Property. The landlord has several properties and would not be expected to remember the details of every agreement. There had been no amendment made to the deposit held by SDS. It was unlike Ms Craven not to action an amendment to the deposit if such an agreement had been reached. There was no paperwork to state that any agreement had been reached.

13. Responding to questions from the Tribunal, Mr Pickering conceded that verbal agreement may have been reached, but Ms Craven would not have agreed to three months' rent being held as a deposit, as this would not be legal, in that no more than two months' rent can be taken as a tenancy deposit. The gesture of goodwill, a reasonable sum, had been made to reflect that an agreement may have been reached. Mr Pickering did not think a period of two months' rent relief was agreed.
14. Responding to questions from the Tribunal as to how the Letting Agent and a landlord would usually deal with the matter of rent relief, Mr Pickering said there would usually be a rent-free period. In this case, it was a possibility that the landlord had agreed that the Applicant could keep his dog at the Property as recompense for his trouble with the heating, and that one month's rent should go to SDS as an increase in the deposit. Similar arrangements had been made in the past where there was damage to property. Ms Craven had not added one month's rent to the deposit held with SDS. Mr Pickering said he could not explain why she had not done so and said it looked like an error. She had left shortly after this issue arose.
15. Mr Pickering said each case involving a pet was dealt with on a case by case basis, but it was usual that an extra month's deposit would be taken. Responding to questions from the Tribunal, Mr Pickering said he believed the Letting Agent had a written dog policy and he thought it formed part of the tenant information pack. The Letting Agent ceased operating as a Letting Agent on 23rd March 2020. Mr Pickering confirmed that no tenant had been asked for three months' rent as a deposit.

Response from the Applicant

16. Responding to questions from the Tribunal, the Applicant was adamant that other dog owners had told him they had paid three months' rent as a deposit in order to be allowed to keep their dogs in the flats.
17. The Applicant said, in response to the suggestion that, for the sum of £320, he could keep his dog at the Property, he would never have agreed to such an arrangement. He would have terminated the tenancy rather than agree to that. He pointed out that there was no mention of a dog policy in the tenant information pack (Document 04). Another tenant, without a dog, had been asked to pay £550 deposit. There was no uniformity in the deposits paid and no evidence of clear policies being applied. He and Ms Craven had agreed two months' rent relief would be granted and this would be used as a deposit in relation to the dog.
18. The Applicant said he had felt he was entitled to more than two months' rent relief as the problem continued for more than two months, but he was happy to agree to this amount, and he would not have agreed to less.
19. The Applicant said that the email provided to him by Mr Pickering on 5th March 2020 was at odds with the representations sent to the Tribunal on 10th September 2020. He felt that, throughout his dealings with Mr Pickering, the

latter had tried to remove the background narrative and had not shown goodwill in anything he had done.

Response on behalf of the Letting Agent

20. Mr Pickering said he had tried to come to a compromise. No evidence of a deposit equalling three months' rent had been found. He had made an offer as a gesture of goodwill. Responding to questions from the Tribunal, he said that the Letting Agent had never held any extra money from tenants in respect of pet deposits. All deposits were held by SDS.

Paragraph 17

21. Paragraph 17 states: *You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants).*
22. The Applicant felt there had been a sense of dishonesty about the situation. He had kept copious records, whereas the Letting Agent claimed there were no records and no evidence. It was his position that the Letting Agent had been disingenuous and had not followed a process until a formal complaint was made. The staff should have realised it was a complaint at an earlier stage and processed it accordingly.
23. Mr Pickering said he accepted something had gone wrong but felt they had been transparent throughout.

Paragraph 20

24. Paragraph 20 states: *You must apply your policies and procedures consistently and reasonably.*
25. The Applicant submitted that there was no pet policy as it was not in the tenant information pack. There was no consistency and tenants had been asked for different amounts for deposits. The failure to return the deposit was in breach of this paragraph.
26. Mr Pickering said the pack had been updated to include a pet policy. It had not been sent out to existing tenants.

Paragraph 23

27. Paragraph 23 states: *You must ensure all staff and any sub-contracting agents are aware of, and comply with, the Code and your legal requirements on the letting of residential property.*
28. The Applicant said he would not have agreed to the retention of three months' rent as a deposit if he had known it was illegal. He assumed Ms Craven did not realise it was illegal. She appeared to think it was reasonable and then

failed to action it by depositing the sum. Mr Pickering was responsible for the actions of his staff.

29. Mr Pickering said Ms Craven was fully trained to level three certificate, as was the member of staff that took over from her. The directors are trained to level six. The agency had internal processes, checks and procedures. The Letting Agent had taken responsibility for the error and offered fair compensation.

Paragraph 24

30. Paragraph 24 states: *You must maintain appropriate records of your dealings with landlords, tenants and prospective tenants. This is particularly important if you need to demonstrate how you have met the Code's requirements.*
31. The Applicant said that all telephone calls should have been recorded in the tenant file and this had not been done.
32. Mr Pickering said he accepted something had been agreed and not recorded. He would have expected all discussions to be recorded as the system provides for that.

Paragraph 54

33. Paragraph 54 states: *You must agree with the landlord the criteria and process for managing and approving tenancy applications from prospective tenants.*
34. The Applicant said it was obvious there was agreement between the Letting Agent and the landlord that the deposit in relation to a pet was an extra two months' rent, but this was not recorded.
35. Mr Pickering said there was a process for managing and approving tenancy applications, that was always followed.

Paragraph 76

36. Paragraph 76 states: *You must have appropriate written procedures and processes in place for collecting and handling rent on the landlord's behalf. These must set out how the late payment of rent will be handled and the legal requirements on tax deductions from rent received on behalf of non-resident or overseas landlords and the subsequent payment and reporting requirements. This should outline the steps you will follow and be clearly, consistently and reasonably applied.*
37. The Applicant said this is central to the issue. The Letting Agent had failed to take responsibility for the staff and this was not appropriate. It is not acceptable that Mr Pickering has taken the stance that, because there is no record of the agreement reached, he will not refund the sum agreed with Ms Craven.

38. Mr Pickering said the Letting Agent followed the procedures it has in place for the collection and handling of rent.

Paragraphs 118 – 120 and 123 – 125

39. These paragraphs relate to client accounts and state:

118. You must have robust and transparent written procedures for handling client money.

119. You must keep adequate records and accounts to show all dealings with client money.

120. You must be able to account immediately to them for all money held on behalf of clients.

123. You must regularly record and monitor all transactions and reconcile these monthly as a minimum.

124. You must ensure clients' money is available to them on request and is given to them without unnecessary delay or penalties, unless agreed otherwise in writing (for example to take account of any money outstanding for agreed works undertaken).

125. You must pay or repay client money as soon as there is no longer any need to retain that money. Unless agreed otherwise in writing by the client, you should where feasible credit interest earned on any client account to the appropriate client.

40. The Applicant reiterated his previous submissions. The Letting Agent's failure to maintain proper records, to submit his deposit to SDS and their refusal to refund the money to him constituted a breach of these paragraphs.

41. Mr Pickering submitted that the Letting Agent has all the relevant and proper procedures in place in relation to client money. They have to show their insurers that they have written procedures. In this case, he believed that agreement had been reached with the landlord, but that it was for one month's rent to be added to the deposit. All rent is paid to the landlord and accounts are reconciled on a weekly basis. The money in question here did not constitute client money.

Submissions on Loss

42. The Applicant said he could not quantify the time and effort put into this matter, particularly the gathering of evidence and presentation of his case, but it was considerable.

43. Mr Pickering said he was content to leave any decision in this regard to the Tribunal.

Current Position

44. Mr Pickering clarified that, as of 23rd March 2020, the company no longer manages properties and they have asked to be removed as a letting agent. All properties have been handed over to other agents.

Findings in Fact

- 45.
- (i) The Applicant entered into a short assured residential tenancy agreement in respect of the Property that commenced on 1st March 2016 and ended on 28th December 2019.
 - (ii) There was a contract between the Letting Agent and the landlord to manage the Property.
 - (iii) In the period between 17th November 2016 and 30th January 2017, the Applicant experienced problems with the heating in the Property which led to him having to vacate the Property on occasion.
 - (iv) Thereafter, discussions took place by telephone and email between the Applicant and the Letting Agent's Sarah Craven regarding rent relief in respect of the period of disruption.
 - (v) Ms Craven informed the Applicant verbally that the landlord had agreed to rent relief or clawback equivalent to two months' rent.
 - (vi) After some discussion, Ms Craven informed the Applicant that the landlord had agreed to allow him to keep a pet in the Property.
 - (vii) It was agreed between Ms Craven and the Applicant that the two months' rent relief would be added to the Applicant's tenancy deposit in order that he could have his pet in the Property.
 - (viii) No additional sum was added by the Letting Agent to the tenancy deposit held with SDS.
 - (ix) No written record of the discussion or agreement reached was entered on the tenant's file by Ms Craven.
 - (x) The Letting Agent failed to accept the Applicant's account of the agreement reached.

Determination and Reasons for Decision

46. The Tribunal took account of all the documentation provided by parties and their written and oral submissions.

Paragraph 17 of the Code

47. The Tribunal did not find that the Letting Agent had been dishonest in their dealings with the Applicant; however, the Tribunal found that the Letting Agent had not been open, transparent and fair in its dealings with the Applicant, by refusing to return in full the equivalent of two months' rent at the end of the tenancy, failing to investigate matters thoroughly, and coming to a conclusion with no evidential basis. The Tribunal found the Applicant to be open, honest, credible and reliable in his evidence. He had suffered for a period in excess of two months in respect of the heating issues at the Property. The Tribunal considered that the absence of any refusal of the proposal put forward by the Applicant to Ms Craven in his email of 3rd February 2017, and the terms of Ms Craven's email of 14th March 2017, strongly indicated that agreement was reached to the effect that two months' rent would be credited to the Applicant in respect of the period of disruption at the time of the heating issues. The Tribunal accepted, on the balance of probabilities, that the Applicant was granted a period of two months' rent relief. It follows, therefore, that when Ms Craven said the rent repayment would be added to the Applicant's deposit, she, at that time, believed that two months' rent could be added to the Applicant's deposit.

48. The Tribunal noted that Mr Pickering had initially offered £150 to the Applicant, after allegedly thoroughly investigating the issues. At that time, no concession was given that any agreement might have been reached between the Applicant and Ms Craven. The position did not change until the complaint went through the formal complaints procedure, by which time Mr Pickering appears to accept that an agreement was reached, albeit a different agreement to that alleged by the Applicant. The Tribunal found the position taken by Mr Pickering, namely that the agreement was that one month's rent relief would be added to the Applicant's deposit and the other month's rent relief forgone, effectively as payment to be allowed to keep his pet in the Property, was not credible or likely, and there did not appear to be any evidence to support it, nor did Mr Pickering provide any such evidence.

49. The Tribunal, therefore, found there to have been a failure to comply with this paragraph of the Code.

Paragraph 20 of the Code

50. The Tribunal found that the Letting Agent had failed to comply with this paragraph of the Code by failing to apply their procedures consistently and reasonably at the end of the tenancy agreement, in that they failed to return the sums owed to the Applicant.

Paragraphs 23 and 24 of the Code

51. The Tribunal was unable to make any findings in regard to these paragraphs given that the behaviour complained of, namely Ms Craven's failure to comply with legal requirements by agreeing to lodge two further months' deposit with SDS, failing to lodge any additional deposit with SDS, and her failure to

maintain proper records of her dealings with the Applicant and the landlord, occurred before the Code came into force on 31st January 2018. The Tribunal observed that, had the behaviour complained of occurred after the Code came into force, it is likely they would have made a finding of non-compliance with the Code in respect of both paragraphs.

Paragraph 54 of the Code

52. The Tribunal did not find a failure to comply with this paragraph. There was insufficient evidence before the Tribunal to make such a finding. The Tribunal was unable to give weight to the hearsay evidence put forward by the Applicant in regard to the amount of deposit paid by other pet-owning tenants, and the Tribunal was unable to find that the Letting Agent routinely took three months' rent as a deposit where pets were allowed in properties.

Paragraph 76 of the Code

53. The Tribunal did not find a failure to comply with this paragraph. The Tribunal accepted the evidence of Mr Pickering that such procedures and processes are in place.

Paragraphs 118 – 120 and 123 – 125 of the Code

54. The Tribunal found that the Letting Agent had failed to comply with paragraphs 124 and 125 of the Code, by failing to make the Applicant's money, agreed as rent relief, available to him on request without unnecessary delay, and by failing to repay the client money as soon as there was no longer a need to retain that money, namely at the end of the tenancy.

55. The Tribunal accepted the evidence of Mr Pickering in relation to paragraph 118, that the Letting Agent has robust and transparent written procedures for handling client money, as this is an insurance requirement.

56. The Tribunal was unable to make findings in regard to paragraphs 119, 120 and 123, as the behaviour complained of occurred before the Code came into force.

Observations

57. The Tribunal found both the Applicant and Mr Pickering to be credible and reliable witnesses. The Tribunal was grateful for the exemplary and comprehensive presentation of the application and associated documents by the Applicant. The Tribunal appreciated that Mr Pickering was in a difficult position in trying to investigate matters and answer the evidence put forward, given that he was not involved in any of the discussions or agreements reached between the Applicant and Ms Craven.

Proposed Letting Agent Enforcement Order (“LAEO”)

58. Having determined that the Letting Agent has failed to comply with the Code, the Tribunal must make a LAEO. The Tribunal is required by section 48(7) of the Act to require the Letting Agent to take such steps as it considers necessary to rectify the failure. Section 48(8) provides that payment of compensation may be made by the letting agent to the Applicant as the Tribunal considers appropriate for any loss suffered by the Applicant as a result of the failure to comply with the Code.

The Tribunal determined to make an LAEO as follows:

1. “The Letting Agent must pay to the Applicant within 21 days of the issue of this Order the sum of £640 which constitutes the two months’ rent relief agreed.
2. The Letting Agent must pay to the Applicant within 21 days of the issue of this Order the sum of £500 as compensation for the loss suffered by the Applicant due to the failures of the Letting Agent to comply with the Code.”

Right of Appeal

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Legal Member and Chairperson

19th October 2020