

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Statement of decision: Section 48(7) Housing (Scotland) Act 2014

Reference number: FTS/HPC/LA/19/0485

The Parties:

Andrew McKenzie, 4/3 82 Barrland Street, Glasgow, G41 1AJ ("the Applicant")

Central letting Services Ltd, 737 Pollockshaws Road, Glasgow, G41 2AA (" the Letting Agent")

Tribunal Members:

Josephine Bonnar (Legal Member)

DECISION

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Letting Agent has failed to comply with Section 47 of the Letting Agent Code of Practice (" the Code") as required by Section 46 of the Housing (Scotland) Act 2014 and determines that a Letting Agent Enforcement Order ("LAEO") should be made.

Background

1. By application dated 14 February 2019 the Applicant applied to the First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") for a determination that the Letting Agent had failed to comply with the Letting Agent Code of Practice. The Applicant stated that the Respondent had failed to comply with Section 47 of the Code.
2. On 4 March 2019, a Convener on behalf of the President, referred the matter to a Tribunal for a determination. A hearing was assigned to take place at Glasgow Tribunals Centre, Room 112, 20 York Street, Glasgow on 26 April 2019.

3. The Applicant lodged a number of documents with his application including part of a tenancy agreement and copy emails sent to and by the Letting Agent. In advance of the hearing the Applicant confirmed that he wished to attend a hearing. The Letting Agent lodged written representations together with some documentation and advised that they did not wish to attend the hearing.
4. The Tribunal issued a direction to parties requiring them to lodge additional information and documentation. In response to the direction the Applicant lodged receipts for payments to the Letting Agent. The Letting Agent lodged a copy of the Applicant's tenancy agreement for 82 Barrland Street, Flat 4/3, Glasgow and a copy of its management contract with the Landlord.

The Hearing

5. The hearing took place before the Tribunal on 26 April 2019. Due to an administrative issue, the Ordinary Member of the Tribunal was not present. The Applicant was present. The Respondent did not attend and was not represented. The Legal Member and Chair of the Tribunal advised the Applicant that she was considering proceeding with the hearing, in the absence of the Ordinary Member, in terms of Regulation 33 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, rather than adjourn the hearing. The Applicant confirmed that he was content for the matter to be determined by the Legal Member alone. The Legal Member therefore determined that the hearing would proceed.
6. The Applicant advised the Tribunal that he considered the Letting Agent to be in breach of Section 47 of the Code in relation to certain payments he and the joint tenant, Shauna Morrissey, had been asked to make to the Letting Agent. Firstly, both he and the joint tenant had been asked to pay £39 as an administration fee, for their application checks to be "fast tracked". This meant that the application checks would be carried out within 4 days, rather than the standard 14 days, which allowed the Applicant and the joint tenant to move into the property more quickly. Secondly, an administration fee of £90 had been charged for the Letting Agent to carry out and process a guarantor application, when it was determined by the Letting Agent that the tenants did not meet certain application criteria. Lastly, the Applicant stated that a call out fee of £65 had been charged by the letting agent, when the agent had to come to the property to assist the tenants to get into the property when they thought that they had been given the wrong keys. The Applicant explained that the call out had, in fact, been unnecessary as he had been given the right keys. The Applicant advised that the three charges were premiums which the Letting Agent is not entitled to charge by virtue of Sections 82 and 90 of the Rent (Scotland) Act 1984 ("the 1984 Act") and therefore breached section 47 of the Code. The Applicant confirmed that he and the joint tenant remain in occupation of the property.

7. In its written representations the Letting Agent confirmed that the tenants had been charged £39 each for "fast tracking" their applications and £90 for the guarantor application. They explained that the charges in question were not premiums in terms of the 1984 Act because they "were paid by their own choice and not made as a condition of the grant, renewal or continuation of their tenancy as defined by the legislation. They chose to proceed via a chargeable process oppose to one that does not charge". They further explained that had the tenants chosen the standard application process, rather than the fast track one, no charges or fees would have been incurred. With regard to the guarantor charge, they explained that this had to be paid because the tenants did not meet the criteria for getting the tenancy, without additional security being provided. Again, they chose this process. They were offered an alternative, namely, to pay their rent in advance, which would not have incurred a charge. Lastly, the Letting Agent advised that the £65 call out charge has not yet been paid by the tenants. It is however due and does not amount to a premium prohibited by the legislation.
8. In response to the explanation contained within the written representations, the Applicant confirmed that he accepted that the £39 charges had not been a pre-requisite to the grant of the tenancy, and that he and the joint tenant had agreed to pay the charges to get into the property more quickly. Furthermore, the charges were not paid because the tenants were concerned that they were competing with other applicants, and therefore felt under pressure to pay for the "fast track" process. However, he referred the Tribunal to Section 82(2) of the 1984 Act which makes it an offence to receive a premium "in connection with" the grant of a tenancy and stated that he did not consider it necessary for the payment to have been a condition of the grant for the section to apply. With regard to the guarantor charge, he stated that this had also been incurred "in connection with" the grant of the tenancy but was also required for the grant of the tenancy. The alternative, paying large amounts of rent in advance, was not reasonable or affordable, and therefore not an option available to them.
9. The Applicant conceded that he had more difficulty with regard to the call out charge, although he still maintained that it amounts to a prohibited premium. The Legal member of the Tribunal directed the Applicant to clause 37j of the Applicant's tenancy agreement which stipulates that a call out charge of £65 is due where a tradesman is called out to the property and it is established that there is "no fault or that the tenants are at fault". The Applicant accepted that the charge was not incurred before the lease had been signed, but afterwards, when the tenants were moving into the property. However, he advised the Tribunal that he considered the charge to amount to a premium which had to be paid for the continuation of the tenancy and was paid to the Letting Agent in connection with that continuation. He also pointed out that it was the agent, and not a tradesman, who had come to the property regarding the keys. He concluded by saying that the letting Agent has not asked for payment of the £65 although it is anticipated that this will be deducted from a £200 payment that he and the joint tenant had paid, described as an advance of rent, although he now doubts whether that payment should have been required.

Findings in fact

- (i) The Applicant is a tenant of the property at 82 Barrland Street, Flat 4/3 Glasgow. The joint tenant is Shauna Morrissey.
- (ii) The Letting Agent manages the property for the Landlord.
- (iii) The Applicant and the joint tenant both paid a fee of £39 for their application to become tenants of the property to be expedited by the Letting Agent.
- (iv) The Applicant and the joint tenant paid a fee of £90 for a guarantor application to be processed in connection with their tenancy of the property.
- (v) The Applicant and the joint tenant have been notified that they are liable for a call out charge of £65 although this has not yet been paid.

Reasons for Decision

- 10. The Tribunal considered the terms of the application, the documents, the written representations submitted by the Respondent and the evidence led at the hearing.
- 11. Regulation 7 of the Letting Agent Code of Practice (Scotland) Regulations 2016 regulations states "if a landlord or tenant (including former landlord or tenant) believes that a letting agent they have let a property through or from has failed to comply with the code they must notify the letting agent of this in writing, (this includes electronic communications) so the letting agent can take action to resolve the matter". This is required before an application to the Tribunal can be made. The Tribunal notes that the Applicant notified the Respondent of his complaints by email dated 16 January 2019 and sent a further email on 9 February 2019 which notes that as no response has been received an application to the Tribunal would be made. The Tribunal is satisfied that appropriate notification of the complaint was made to the Letting Agent.
- 12. Section 47 of the Code states " You must comply with all relevant legislation on the charging of fees and premiums or making loans to tenants and prospective tenants in the private rented sector" Section 82(1) of the 1984 Act states " Any person who as a condition of the grant, renewal or continuance of a protected tenancy, requires the payment of any premium or the making of any loan (whether secured or unsecured) shall be guilty of an offence under this section" 82(2) states "Any person who, in connection with the grant, renewal or continuance of a protected tenancy, receives any premium shall be

guilty of an offence under this section” Section 90(1) defines a premium as “any fine, sum or pecuniary consideration, other than the rent, and includes any service or administration fee or charge”. The Tribunal notes that the application is based on an alleged breach of section 47 of the code and not 48 which specifically refers to a failure to comply with Section 82 of the 1984 Act. However, the Tribunal is satisfied that section 47 would also apply to a failure by a Letting Agent to comply with this section as it refers to “all relevant legislation”. The Tribunal is therefore of the view that if the payments made by the Applicant and the joint tenant were premiums in terms of section 82 and 90 of the 1984 Act that a breach of section 47 of the code would be established.

13. The Tribunal notes that the payments by the Applicant and the joint tenant to “fast track” their application were not required for the grant of the tenancy. This is not disputed by the Applicant. Furthermore, the desire to get the process completed quickly was not motivated by a concern that they might lose the property. It also appears that the Letting Agent did not put any pressure on the Applicant to choose this route, although the availability of the faster option does seem to take advantage of applicants who might have a pressing reason to select this option. It was also noted that no evidence was put forward by the Letting Agent that the faster option caused additional costs to be incurred by them.
14. The position regarding the guarantor administration fee is somewhat different. The Tribunal is not persuaded by the argument put forward by the Letting Agent that the tenants had another option. The documentation submitted includes an email to the tenants which states that either they would have to provide a guarantor or “pay the rent for the term of the tenancy in advance”. The latter is clearly a wholly unreasonable option, particularly as the tenancy is a private residential tenancy which has no fixed term.
15. The Tribunal considered the Sheriff Court case of **Michael Cross and others v Aberdeen Property Leasing. 2013 WL 7090858**. Three students raised a small claims action against their Letting Agent for recovery of an administration fee paid by them as part of the application process for the lease of a property. The action was defended on the basis that such an administration fee was now prohibited, but that when the fee had been charged in 2009, the wording of the legislation had been different, as the words “includes any service or administration fee or charge” were only added to section 90 of the 1984 Act by Section 32 of the Private rented Housing (Scotland) Act 2011. Sheriff Lewis rejected that argument, finding in favour of the pursuers, on the basis that the additional words did not change the definition of premium but only made it “crystal clear to all involved in residential leasing that administration fees ought not to have been imposed and ought not to be imposed” (paragraph 10). The Sheriff also concluded that “To obtain the rental of a property from the defender the pursuers had to complete an application form. The application form had to be accompanied by payment of an administration fee of £125 plus vat”. This fee “was a condition of the grant of the assured tenancy” and amounted to “a pecuniary

consideration in addition to the rent". (Paragraph 10).

16. The Tribunal proceeded to consider the three payments identified in the application as premiums in terms of the 1984 Act.
17. **The fast track administration fee.** The Tribunal is not satisfied that this payment amounts to a prohibited premium in terms of the 1984 Act. The Tribunal is of the view that Section 82(2) cannot be read in isolation, as is suggested by the Applicant, but must be read in conjunction with Section 82(1). The latter prohibits the charging of a premium, the former prohibits the receipt of same. In the circumstances of this application before the Tribunal, this fee was not "a condition" of the grant of the tenancy, as in the case of Michael Cross. Had they opted for the standard application process the tenants would not have had to pay it. Furthermore, the Letting Agent did not pressure the tenants to choose the fast track process or indicate that they might miss out on the property if they did not do so. Had this been the case, the Tribunal may have reached a different conclusion. However, as the grant of the tenancy was not conditional upon the payment of the fee, the latter does not appear to be a prohibited premium, an accordingly no breach of the Code is established.
18. **The guarantor administration charge.** The Tribunal is satisfied that this fee is a prohibited premium in terms of the 1984 Act. The tenants had to pay the fee for the guarantor application to be processed. Without the payment, they could not secure the tenancy. The only alternative, that they pay a potentially huge (and possibly incalculable) sum of money in advance, is clearly unreasonable. It is not a genuine alternative. Applying the sheriff's reasoning in the Michael Cross case, it is clear that as the Applicant and the joint tenant had to pay the £90 fee to secure the rental of the property the Letting Agent was in breach of section 82 of the 1984 Act, and accordingly a breach of the Code has been established with regard to same.
19. **The call out charge.** The Tribunal is not persuaded that this charge was or is to be made as a condition of the lease continuing. The tenants had been granted a lease of the property. They had been provided with a set of keys. They had signed a tenancy agreement agreeing to pay a call out charge if they called out a tradesman in circumstances where there was no need or where they had caused the situation which required that attendance. Their call to the letting agent was due to error on their part. The Tribunal is satisfied that the charge in question is not a premium in terms of the 1984 Act and that no breach of the Code is established in relation to this charge.
20. The Tribunal therefore concludes that the Letting Agent is in breach of Section 47 of the Code with regard to the guarantor application fee charged to the Applicant. The Tribunal determined that a Letting Agent Enforcement Order should be made in favour of the Applicant requiring the letting Agent to review its application process so that no charges are incurred by tenants who are asked to provide a guarantor for tenancies, to refund the fee charged to the Applicant and to pay compensation to the Applicant for his time and inconvenience in the sum of £100.

Appeals

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.

Josephine Bonnar, Legal Member
1 May 2019