



**Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 48 of the Housing (Scotland) Act 2014**

**Chamber Ref: FTS/HPC/LA/19/1036**

**Re: Property at 88 Burnvale, Livingston, EH54 6DQ (“the House”)**

**Parties:**

**Mr William Murray, 130 Oldwood Place, Livingston, EH54 6UX (“the Applicant”)**

**Elliott Estates, 1037 Sauchiehall Street, Glasgow, G3 7TZ (“the Letting Agent”)**

**Tribunal Members:**

**Neil Kinnear (Legal Member) and Ahsan Khan (Ordinary Member)**

**Decision**

**The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”):**

- (1) determined that the Letting Agent has failed to comply with paragraphs 66 and 105 of the Letting Agent Code of Practice under Section 46 of the Housing (Scotland) Act 2014; and**
- (2) awarded expenses as taxed by the Auditor of the Court of Session against the Letting Agent, on the basis that the Letting Agent through unreasonable behaviour in the conduct of the case has put the Applicant to unnecessary of unreasonable expense in respect of the expense to the Applicant and his wife of preparing for and attending the Hearing of 30<sup>th</sup> May 2019, in terms of Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.**

**Background**

This is an application dated 1<sup>st</sup> April 2019 for a determination that the Letting Agent has failed to comply with paragraphs 66 and 105 of the Letting Agent Code of Practice brought in terms of Rule 95 (Application to enforce letting agent code of

practice) of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

The Applicant provided with his application copies of his notification to the Letting Agent of the failure to comply, evidence of service of the notification, and various correspondence and e-mails.

The Tribunal issued a written Direction to the Parties dated 15<sup>th</sup> May 2019 to provide full details regarding the transfer of the business of 247 Property Letting to the Letting Agent in relation to the Property at 88 Burnvale, Livingston, including any legal documentation, contracts and transfers of undertakings and liabilities in relation to such transfer, in so far as within the possession and knowledge of the Parties.

The Applicant responded to indicate that he had no such details. The Letting Agent has failed to respond to the Direction.

The Letting Agent indicated in advance of the Hearing that it would not attend, but that it wished to send written representations, copies of which it provided.

### **The Hearing**

A hearing was held on 30<sup>th</sup> May 2019 at George House, 126 George Street, Edinburgh. The Applicant appeared, and was not represented. He was accompanied by his wife, Mrs Yvonne Murray. The Letting Agent's Mr Kavanagh appeared, and was not represented. The Applicant expressed surprise that the Letting Agent appeared, standing its previous intimation to the Tribunal that it would not appear and it providing written representations.

The Applicant and his wife both gave evidence to the Tribunal and explained that the Letting Agent had acted as the Applicant's letting agent in respect of the House for a number of years, before the tenant gave notice and left it on 25<sup>th</sup> January 2019.

The complication in this matter, is that the Applicant's original letting agent was 247 Property Letting, who acted for him in relation to the House from the commencement of the tenancy in 2010. 247 Property Letting and its business was taken over by another letting agent, Residential Letting, who continued to act for the Applicant in relation to the House.

In due course, Residential Letting and its business was taken over by the Letting Agent, who in turn continued to act for the Applicant in relation to the House. The Applicant thought that the Letting Agent took over the business in around 2016.

The Applicant explained that he was never informed of the various business changes, save for being contacted to provide him with replacement telephone numbers for his letting agent. He had initially dealt with 247 Property Letting's Mel Wright, and he continued to deal with her both at Residential Letting and at the Letting Agent.

The Applicant explained that the Letting Agent fulfilled its duties properly until the end of the tenancy of the House, and up until that point he was generally satisfied with the service it gave him.

However, the Applicant was contacted by his former tenants in around late February 2019 reporting that they were having great difficulty in obtaining repayment of their deposit paid at the commencement of the lease to 247 Property Letting.

The Applicant carried out checks with the three approved tenancy deposit schemes, which revealed that the deposit had not been lodged with them.

The Applicant's former tenants were able to send him a copy of the receipt given to them by 247 Property Letting dated 24 September 2010 for the deposit the tenant paid to 247 Property Letting of £525.00.

The Applicant then engaged in e-mail correspondence with the Letting Agent. He e-mailed the principal of the Letting Agent, Mr Nicholas Aderinto, on 16<sup>th</sup> March 2019 making a formal complaint against the Letting Agent for failing to comply with paragraphs 66 and 105 of the Letting Agent Code of Practice in respect that it failed to ensure compliance with the legislation concerning the lodging of the tenancy deposit, and that it failed to manage the tenancy deposit properly.

The Applicant received no response to that complaint, but subsequently received a short e-mail from the Letting Agent on 25<sup>th</sup> March 2019 stating "that we are working with the tenant with regards to the deposit return and we are also looking to resolve this issue as soon as possible". He suspected that the Letting Agent would do nothing to resolve the issue and was "deflecting" the problem away from itself.

The Applicant replied by e-mail that same day pointing out that as "the deposit monies were paid by the tenant to yourselves i.e. 247 property letting and provided evidence surely this is suffice to repay the monies".

The Letting Agent in turn replied later that day stating "You are aware that we are not 247 Letting, we are however agreeable in assisting your tenant in any way that we can". The Applicant did not know what the Letting Agent meant by this, and again suspected that it intended to do nothing.

The Applicant replied in the afternoon of the 25<sup>th</sup> March 2019, stating "I am fully aware that you are not 247 Letting, however the business was transferred to Residential Letting and subsequently to Elliott's and in my view all paperwork /monies should have transferred. No meaningful response or monies received by COB Tuesday 26<sup>th</sup> March and I will be escalating to the appropriate authorities".

The Applicant advised that he received no further responses from the Letting Agent, and thereafter brought this application. He paid £525.00 from his own resources to his former tenant in respect of return of their deposit on 16<sup>th</sup> March 2019.

The Applicant sought an order that the Letting Agent had failed to comply with paragraphs 66 and 105 of the Letting Agent Code of Practice, and payment of £525.00 in respect of the deposit.

In response, the Letting Agent's Mr Kavanagh gave evidence to the Tribunal. He explained that he was employed as a very junior administrator by the Letting Agent, had not been with the Letting Agent for very long, and knew very little regarding the history of the matters raised in this Hearing. He had been told to attend by the Letting Agent's principal, Mr Aderinto, who was unavailable today.

Mr Kavanagh accepted that the Letting Agent had taken over and acquired the business of Residential Letting, which had in turn earlier taken over and acquired the business of 247 Property Letting. He accepted that the Letting Agent had acquired the business, responsibilities and liabilities of 247 Property Letting and of Residential Letting.

Mr Kavanagh explained that Mel Wright worked for a cleaning company associated with the business of his employer, but did not really know the details of that. He indicated that Mel Wright often "helped out" the Letting Agent and dealt with phone calls to it.

Mr Kavanagh accepted that the Letting Agent was in breach of Paragraphs 66 and 105 of the Letting Agent Code of Practice on the basis that the Applicant had explained in his evidence, and was not in a position to dispute any of what the Applicant had said. He confirmed that the Letting Agent would pay the Applicant the amount of the deposit of £525.00.

### **Statement of Reasons**

The Letting Agent admitted at the Hearing the breaches of the Letting Agent Code of Practice in the respects and for the reasons explained by the Applicant.

The Tribunal also considers that the Letting Agent is in breach of paragraphs 66 and 105 of the Letting Agent Code of Practice in the following respects.

With regard to paragraph 66, the Letting Agent accepted that it bore responsibility for lodging the tenancy deposit on the Applicant's behalf, and accepted that it did not comply with the legislation concerning the lodging of the deposit in an approved scheme in terms of the *Tenancy Deposit Schemes (Scotland) Regulations 2011*.

With regard to paragraph 105, the Letting Agent accepted that it managed the tenancy deposit on behalf of the Applicant, and did not take reasonable steps to come to an agreement with the tenant about deposit repayment, nor did it make a claim to the relevant deposit scheme (albeit that the deposit had, in fact, never been lodged with any such scheme).

The Tribunal has power to order that the Letting Agent pay to the Applicant such compensation as it considers appropriate for any loss suffered by the Applicant as a result of the failure to comply.

The Tribunal considers that the Applicant has suffered financial loss as a result of the Letting Agent's failure to comply, in respect that he had to pay from his own resources the sum of £525.00 to his former tenant by way of return of their deposit.

As a result, the Tribunal will order the Letting Agent to pay to the Applicant the sum of £525.00 as compensation for that loss.

Finally, Mr Kavanagh had been asked previously by the Applicant and at the Hearing by the Tribunal for the Letting Agent's letting agent registration details. Mr Kavanagh indicated that the Letting Agent had applied for registration in late September or 1<sup>st</sup> October 2018, and it had received an acknowledgement of the application which was still being processed.

The Tribunal will order the Letting Agent to provide details of its application for letting agent registration, including the date when application was made and the progress of the application.

The Applicant asked the Tribunal to make an award of expenses in his favour at the conclusion of the Hearing.

Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended provides:

“(1) The First-tier Tribunal may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense.

(2) Where expenses are awarded under paragraph (1) the amount of the expenses awarded under that paragraph must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made.”

The Tribunal should note its dissatisfaction with the conduct of the Letting Agent in this application. The Letting Agent failed to respond to a Direction given to it, and the Tribunal will report that failure to the appropriate authorities.

The Letting Agent indicated that it would not attend the Hearing, and instead provided written representations to the Tribunal apparently refuting any breach of the Letting Agent Code of Practice on its part and alleging that no evidence had been provided by the Applicant or his former tenant that the deposit had been paid. The Letting Agent also stated in its written representations that if such evidence was produced, then it would repay the deposit amount “as a gesture of goodwill”.

The Applicant had provided a copy of the receipt given to his former tenants by 247 Property Letting dated 24 September 2010 for the deposit the tenant paid to 247 Property Letting of £525.00 with his application to the Tribunal. That had been copied to the Letting Agent with all the application papers when it was served with this application, so the Letting Agent had received the evidence of the payment of the deposit receipt. Despite that fact, it produced a written representation saying that no such evidence had been produced. The Letting Agent also did not fulfil its offer to repay the amount of the deposit made in its written representation.

At the Hearing, the Letting Agent departed from the position outlined in its written representations and admitted the breaches as above-noted. Had it done so in

response to the application, and before this Hearing, the Applicant would not have had to prepare for a contested application Hearing.

Indeed, the Tribunal considers that it would have been able to make a decision without a Hearing in terms of Rule 18 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended, if the Letting Agent had adopted the position it took at the Hearing at an earlier stage of these proceedings.

All of that being so, the Tribunal considers that the Letting Agent through unreasonable behaviour in the conduct of its case has put the Applicant to unnecessary or unreasonable expense, and will award expenses against the Letting Agent and in favour of the Applicant to cover the expense to the Applicant and his wife of preparing for and attending the Hearing today.

The Applicant should prepare an account of the expense to the Applicant and his wife of preparing for and attending the Hearing of 30<sup>th</sup> May 2019, and submit that to the Tribunal, which will remit it to the Auditor of the Court of Session to tax and report.

## **Decision**

The Tribunal determined that the Letting Agent has failed to comply with paragraphs 66 and 105 of the Letting Agent Code of Practice, and will make a letting agent enforcement order requiring the Letting Agent to:

- 1) Pay to the Applicant within fourteen days from the date of service of the letting agent enforcement order the sum of £525.00 as compensation for loss suffered by the Applicant as a result of the failure to comply;
- 2) Provide to the Tribunal within fourteen days from the date of service of the letting agent enforcement order details of its application for letting agent registration, including the date when application was made and the progress of the application.

The Tribunal will also make an order for an award of expenses as taxed by the Auditor of the Court of Session against the Letting Agent, on the basis that the Letting Agent through unreasonable behaviour in the conduct of the case has put the Applicant to unnecessary or unreasonable expense in respect of the expense to the Applicant and his wife of preparing for and attending the Hearing of 30<sup>th</sup> May 2019, in terms of Rule 40 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017* as amended.

## **Right of Appeal**

**In terms of Section 46 of the Tribunal (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.**

**Neil Kinnear**

**Legal Member/Chair**

**Date 13 June 2019**