Statement of Decision of the Housing and Property Chamber of the First-tier Tribunal for Scotland on an Application made under Section 48 of the Housing (Scotland) Act 2014

Property: 3 Neil Gordon Gait, Blantyre G72 0AP ("the Property")

Chamber Reference: FTS/HPC/LA/18/0574

Greg Hanley, residing at 11 Pommeron Parade, Belfast BT6 9FX ("the Applicant")

Letting Hamilton Limited, incorporated in Scotland under the Companies Acts (SC507543) and having their Registered Office at 4d Auchingramont Road, Hamilton ML3 6JT and trading as Location ("the Respondents")

Tribunal Members – George Clark (Legal Member/Chairperson) and Ann MacDonald (Ordinary Member/Surveyor)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal'), having made such enquiries as it saw fit for the purposes of determining the application, determined that the Respondents had failed to comply with the Letting Agent Code of Practice.

Background

1. By application received on 12 March 2018, the Applicant applied to the Housing and Property Chamber of the First-tier Tribunal for Scotland under Section 48 of the Housing (Scotland) Act 2014 ("the Act") for a determination that the Respondents had failed to comply with the Letting Agent Code of Practice ("the Code of Practice") set out in the Letting Agent Code of Practice (Scotland) Regulations 2016, as amended.

2. The application stated that the Applicant considered that the Respondents had failed to comply with their duties under Paragraphs 21, 26 and 124 of the Code of Practice.

Findings of fact

9. The tribunal makes the following findings of fact:

    - The Respondents are letting agents appointed by the Applicant. Accordingly, their work on his behalf falls within the definition of letting agency work in Section 61(1) of the Act and they are subject to the requirement to comply with the Letting Agent Code of Practice which came into force on 31 January 2018.
    - On 14 February 2018, the Applicant notified the Respondents of his belief that they had failed to comply with the Code of Practice, as required by Section 48(4) of the Act.
    - The Applicant originally entered into a letting agency agreement with Martin & Co (UK) Limited. Under the heading "Rent Collection Service", the agreement states that the letting agents will account to their clients for rent received, less their commission, fees and any agreed outgoings, taxes and VAT and remit funds to their clients' accounts within 4 banking days of receipt. It points out that it can take between 3 and 5 days for funds to clear through the banking system.
    - In September 2012, the Respondents withdrew from the Martin & Co franchise and their notification of that, contained in an e-mail of 13 September 2012, states that "The agreements we have with both landlords and tenants move over on exactly the same terms."
    - The Respondents' "Landlord Terms and Conditions" document does not make any reference to timescales for remitting funds to landlords' accounts.
    - In relation to Termination of Service, the "Landlord Terms and Conditions" document provides that where the Respondents have introduced the tenant where the tenancy is still active, a landlord client has the right to terminate their agreement by giving 31 days' written notice but will be liable to pay the Respondents "a termination penalty 6 months of the current Management Fee and this will be payable on the date of termination."

Reasons for the decision

10. The Tribunal accepted the evidence presented by the Applicant in his application and later written representations. The Respondents had not made any representations to the Tribunal, so had not sought to contradict any of that evidence.

11. The Tribunal noted that the e-mail records, provided by the Applicant, began on 23 November 2016, when the Applicant expressed concern that, having accepted on 16 November that the last couple of rental payments had been slightly later and that the Respondents had waived their next management fee as a gesture of goodwill, the next statement still showed the management fee. On 29 December 2016, the Applicant had e-mailed

the Respondents, concerned that the rent for that month had not been remitted to him. In their response, the Respondents said that they were due to transfer incoming moneys within 7-10 working days of receipt. In March 2017, the Applicant again raised the issue of his not having received rent payments timeously. The Applicant advised that the tenant paid his rent on the 16th of each month, but payments had not been passed on to the Applicant until 8 February (January rent) and, as at 7 March, he had still not received the remittance for February. On 24 April 2017, he e-mailed the Respondents to say that he was still waiting for the March rent and on 31 July 2017, the Applicant complained that he had not received any rent since 31 May. He sent further chasing e-mails on 16 and 21 August.

12. On 22 August 2017, the Respondents said that the late payment covering June and July would be with the Applicant no later than Thursday 24 August, but this did not happen until 29 August and did not take account of 2 months' management fees which the Respondents had agreed to refund. The Respondents said that they would arrange for this sum (£65.34) to be transferred "ASAP". It had not arrived by 11 October, when the Applicant reminded the Respondents that he had not received a rental payment since 29 August 2017 and that the one prior to that had been 30 May. Despite 14 further e-mails, some of which received "holding" replies, the remittance to the Applicant's account was still outstanding on 9 January 2018, when Mr Kenny Stenhouse e-mailed the Applicant to say that he could see from the account that £429.66 had been sent on 27 January 2018 and on 14 November 2017 and that £495 had been sent on 18 October.

13. On 16 January 2018, having been advised on 12 January by Gillian Herron, his main point of contact with the Respondents, that she was going through all the payments of rent made to him over the last year, the Applicant e-mailed Mr Stenhouse with a spreadsheet taken from his own records. It showed that the rental payments made by the tenant on 16 November and 16 December 2017 were still outstanding, along with the refund of management fees for these 2 months. The total amount due to him was £990.

14. On 2 February 2018, the Applicant notified the Respondents that he believed they had failed to comply with Paragraphs 21, 26 and 124 of the Code of Practice. On the following day, Mr Stenhouse responded to say he understood everything had now been resolved, but the Applicant reminded him that the rent for November, December and January, refunded fees and the deposit had still not been transferred to his bank account. Mr Stenhouse insisted that it had been sent and promised to send a detailed statement. The Applicant then replied that he was expecting £1914.66, being 2 months' rent (with management fees refunded) at £495 per month, the January rent less management fee (£429.66) and the deposit (£495).

15. Later that day (3 February 2018), the Applicant confirmed by e-mail that he had received £962.28. but was not sure how this was made up. He asked for the balance of £952.38 to be in his account by close of business on 5 February. On 9 February, Gillian Herron e-mailed the Applicant to advise that they could not remit the deposit without confirmation from the tenant that he was happy for them to do so. She also told the Applicant that they had deducted the termination fee from their remittance of 3 February. The Applicant responded that he was fine with the approach on the deposit, but that he had stated from the outset that he was not prepared to pay the termination fee, as it was the Respondents who had been in breach of contract on numerous occasions by not passing on rent in a timely manner. He repeated that he was also still owed a refund of management fees for November and December 2017, because of the late payments. The Applicant repeated his position in an e-mail of 14 February 2018.

16. The tenant contacted the Applicant on 16 February to say that he had confirmed to Gillian Herron that he wanted his deposit returned to the Applicant. On 21 February, the Applicant confirmed to the Respondents that he had not yet received it.

17. On 13 April 2018, the Respondents e-mailed the Applicant to say that they had considered his complaint and accepted that their standard of service had fallen, but that they were not prepared to waive the termination fee which was set out in their agreement. A final payment of £495 had been processed and would clear in the Applicant's account in the next 7 days. As at 27 April 2018, the Applicant had not received this payment, but he had, in any event, made it clear to the Respondents that he did not accept their view in relation to the termination fee.

18. Paragraph 21 of the Code of Practice provides that letting agents must carry out the services they provide to landlords or tenants using reasonable care and skill and in a timely way.

19. Paragraph 26 of the Code of Practice states that letting agents must respond to enquiries and complaints within reasonable timescales and in line with their written agreement.

20. Paragraph 124 of the Code of Practice sets out that letting agents must ensure clients' money is available to them on request and is given to them without unnecessary delay or penalties.

21. The Tribunal was of the view that all 3 Paragraphs could be considered together, as they all related to the same factual situation as narrated in the preceding paragraphs 11-17 of this Statement of Decision. The Tribunal accepted that the Respondents' obligation to comply with the Code of Practice only arose on 31 January 2018, but regarded it as necessary to narrate the previous correspondence in order to understand the situation as it was at the date of the application. The Applicant had sent dozens of e-mails to the Respondents in response to an ever-worsening position regarding delays in the time the Respondents were taking to remit to him

the rental payments they had received from his tenant. This situation did not improve after 31 January 2018. The Tribunal was also unable to agree with the view of the Respondents that they had 7-10 working days from receipt within which to pass money on. They had stated in their e-mail of 13 September 2012 that the agreements they had with landlords and tenants moved over on exactly the same terms as had been in place with Martin & Co, and that company's terms and conditions stated that funds would be remitted within 4 banking days. There was no evidence to suggest that the Respondents had asked for or that the Applicant had agreed to any change in that procedure and no basis in their contract for the Respondents saying that they had 7-10 days to pass funds on. The contract stated 4 banking days and all payments should therefore, have been initiated within that time frame.

22. The Tribunal agreed with the Applicant that there was no justification for the Respondents' imposition of a termination fee. The Tribunal accepted the view of the Applicant that the only reason the contract was terminated arose from persistent failures by the Respondents and ongoing breaches of contract on their part. The Tribunal accepted the Applicant's assertion that, but for these breaches, he would not have terminated the contract when he did and determined that it would be inequitable for him to be required to pay the termination fee. By repeatedly failing to account timeously to the Applicant for rents received by them, the Applicant had been left with no practical option but to terminate the contract.

23. The Tribunal held that the Respondents had failed to carry out the service to the Applicant using reasonable care and skill and in a timely way. As they had made no representations to the Tribunal and had not attended or been represented at the hearing, the Tribunal could not determine whether there was within the accounts department of the organisation a policy of delaying payments after they had been authorised by the staff with whom the Applicant was normally corresponding, but there was no doubting the fact that there had been persistent delays in paying over to the Applicant moneys that were lawfully due to him and this continued beyond 31 January 2018. He had still not received the return of his tenant's deposit, which the Respondents claimed to have sent on 13 April 2018. It appeared to the Tribunal that the Respondent's system for paying moneys due to the Applicant were, at best, chaotic. Accordingly, the Tribunal upheld the Applicant's complaint under Paragraph 21 of the Code of Practice.

24. The Tribunal also upheld the Applicant's complaint under Paragraph 26 of the Code of Practice. The Applicant had spent months trying to obtain the moneys due to him and it appeared that the Respondents did not have a complaints procedure in place. The complaints procedure in the contract with Martin & Co (UK) Ltd could no longer apply and the Tribunal held that there was clear evidence of delays in responding to the Applicant's enquiries and complaints.

25. The Tribunal also upheld the Applicant's complaint under Paragraph 124 of the Code of Practice. There was clear evidence of persistent and repeated delays in remitting money requested by the Applicant and unnecessary penalties had been applied. These were the management fees in respect of the months of December 2017 and January 2018 and the termination fee in respect of the termination of a contract which had been regularly breached by the Respondents. In addition, the Respondents had not refunded the tenant's deposit despite repeated requests from the Applicant to do so.

26. The Tribunal determined, therefore, that the Respondents' failure to comply had resulted in a loss to the Applicant the sum of £952.38. This comprised the tenant's deposit of £495, the management charges for the rental months of December 2017 and January 2018 (£130.68) and the refund of the termination fee of £362.70 and that a Letting Agent Enforcement Order should be made in respect of the failure by the respondents to comply with the Code of Practice. The Tribunal also determined that the Order should incorporate a requirement to pay to the Applicant the sum of £952.38 to compensate him for the loss suffered as a result of the failure to comply.

27. The decision of the tribunal was unanimous.

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

G Clark

Signed
Date: 22 June 2018

Legal Member/Chairperson