

Housing and Property Chamber

First-tier Tribunal for Scotland



Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) issued under Section 26 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('The Procedure Rules') in an application under section 48 of the Housing (Scotland) Act 2014 ('The Act').

Chamber Ref:FTS/HPC/LA/23/0323

4 (1F1) Springvalley Terrace, Edinburgh, EH10 4QD ('the Property')

The Parties:

Dr Brian Shannan, 21 Yewlands Crescent, Edinburgh, EH16 6TB ('the Applicant')

The Flat Company, 61 A Queen Street, Edinburgh, EH2 4NA ('the Respondents')

Tribunal members:

Jacqui Taylor (Chairperson) and Ann Moore (Ordinary Member).

Background

1. The Applicant is heritable proprietor and Landlord of the Property 4 (1F1), Springvalley Terrace, Edinburgh, EH10 4QD.
2. The Respondents are the Letting Agent appointed by the Applicant to manage the letting of the Property.
3. The Flat Company are registered letting agents.
4. By application dated 16th January 2023 the Applicant applied to the Tribunal for a determination that the Respondents had failed to comply with the following Sections and Paragraphs of the Letting Agent Code of Practice ('The Code'):

Section 2: Overarching Standards

Paragraphs 17,24 and 27

Section 5: Management and Maintenance

Paragraphs 74 and 75

5. By Notice of Acceptance by Martin McAllister, Convener of the Tribunal, dated 2nd March 2023 he intimated that he had decided to refer the application (which application paperwork comprises documents received on 1st February 2023) to a Tribunal.

6. The Applicant had sent the Respondents notification of his complaints before he made the application to the Tribunal. The letter of notification was dated 28th December 2022 and was in the following terms:

Section 17 of the Code: The Flat Company provided inspection reports, but failed to record that the tenants were smoking and his property was affected by nicotine. This is a breach of sections 17 and 74 of the Code.

Section 24 of the Code: When asked to provide details of the action the Flat Company had taken to make the tenant aware of the breach of the tenancy he was unable to provide any documentary evidence. This is a breach of section 24 of the Code.

Section 27 of the Code: The failure to report the damage in the inspection reports and to alert the tenant of the breach of the tenancy agreement is a breach of section 27 of the Code.

Section 75 of the Code: The Flat Company failed to provide any evidence that they had alerted the tenant of the breach of the tenancy agreement. If he had been alerted, he had the type of tenancy that would have allowed him to end the tenancy. His property was ruined by nicotine and they failed to alert the Applicant of this in the Inspection Reports and they failed to provide evidence they had alerted the tenant. This is a breach of section 75 of the Code.

7. The parties Written Representations

7.1 The Applicant's Written Representations.

The Property was subject to significant damage caused by his tenant's smoking which was a breach of the tenancy agreement. The tenancy explicitly asked for a non smoking tenant. The damage was such that his Property was uninhabitable and the Council acknowledged this by agreeing to a council tax exemption on these grounds.

The Flat Company provided the Applicant with inspection reports but failed to record that the tenant was smoking and that the Property was damaged by nicotine (Code paragraphs 17 and 74). In one of the reinspection reports it states that the Property was stained and yellow from time. This is a misrepresentation as smoke damage is not just about appearance but the stench of nicotine pollution which is pervasive and rendered the Property uninhabitable. It was not time but the actions of the tenants.

The Flat Company did not provide any documentary evidence showing that they had advised the tenant that they had breached the tenancy agreement. He referred to an email from the Letting Agent which states that the Tenant did not have an email address but they were sure actions were taken. They should have kept records of the breach and updated him on it. (Code paragraph 24).

He questioned if proper vetting of the Tenant had been carried out.

The 2011 inspection report shows that the Property was in good order (apart from the condition of the external windows). The walls and ceilings were painted white and so would have needed repainting. However, the doors, skirtings and other wooden surrounds such as windows had been oiled/ varnished and are a key selling point of the Property. They did not require updating. Due to the nicotine and smoke damage everything had been impregnated. There is no mention in the inspection report of the smoke damage/ stench of smoke which was so pervasive that the property was uninhabitable. This is a breach of paragraphs 27,74 and 75.

The Letting Agent repeatedly mentioned that the house needed to be redecorated from 2018. This was only to the walls and ceilings. The agent broke paragraph 75 of the Code as nothing was done to alert the Tenant to the breaches of the tenancy. Had he decorated the Property throughout the tenancy the fresh decorations would have been subject to continued smoke damage.

If he had been alerted earlier to the breach of the tenancy he could have brought the tenancy to an end following the appropriate procedures.

Failure to alert him meant that the Property was subject to unnecessarily prolonged exposure to nicotine damage and rendered many items in the flat unusable. All the electrical fittings in the Property had to be replaced. He provided photographs of the items as evidence. Although the kitchen was made of pine and was a little dated it was in solid order but it needed to be replaced as the nicotine damage was so extensive. Numerous coats of paint and remedial treatment were necessary to hide and remove the nicotine.

The damage to the Property by excessive nicotine caused the following additional losses:

- (i) Instead of redecoration taking a month to get the property back on the market the removal of electrical fixtures and fittings and remedial action to remove the stench and staining by years of nicotine exposure meant the Property was off the market for three and a half months. (£1750).
- (ii) The new kitchen (£1600).
- (iii) The electrical sockets and light fittings and additional paint (£204).

7.2 The Respondents' Written Representations.

The Flat Company have a large amount of data missing regarding the communication with Mr Shannan and his tenant which an IT company is currently trying to retrieve.

However, despite this missing information they believe they have enough evidence and information to refute the entirety of this claim with the information they have available.

The Flat Company has managed Mr Shannan's property since September 2001 and they have photographs, invoices for minor maintenance works and correspondence going back until when they first took on the Property. The most important aspect of their rebuttal of Mr Shannan's claim is that in the 21 years they managed the property there had been no significant investment in the Property despite consistent recommendations from The Flat Company. This fact is undisputed between The Flat Company and Mr Shannan. To clarify this means that in 21 years Mr Shannan did not carry out any significant painting works, he did not replace the kitchen or the bathroom, he did not treat or repair or replace any of the flooring, he did not repair or replace any of the fixtures or fittings and he did not replace any of the major appliances.

Therefore, they believe that Mr Shannan's claim that that the tenant's smoking habits caused damaged to the Property is entirely negligible because irrespective of whether or not the tenant was smoking any rented property with no significant refurbishment over the course of 21 years would of course require full refurbishment and replacement of fixtures and fittings irrespective of a tenant's habits.

This has been independently confirmed by the fact that they made a claim against the tenant's full deposit, on the insistence of Mr Shannan, and it was rejected by LPS on the grounds that no works had been carried out for the entirety of this tenant's 12 year tenancy.

Unfortunately for The Flat Company, they cannot find the records of the inspections carried out between 2011 and 2017 although they do have a record of these being carried out if not the inspections themselves.

Mr Shannan claims that none of these inspections mention the tenant's smoking, however, they know that they do but until they can produce these inspection reports, they cannot back that up.

However, it is worth noting that Mr Shannan does not disagree that these inspections were carried out but unfortunately, he does not seem to have copy of them either to reinforce his claim that none of them mention smoking.

They have a painting quote from 2017 that specifically mentions nicotine which they produced.

Considering the detail of the Applicant's application:

“My flat was subject to significant damage caused by my tenant's smoking, which was a breach of the tenancy agreement. The damage was such that it was uninhabitable, the Council acknowledge this by agreeing exemption on these grounds.”

As stated above it is not the smoking that has caused the damage to the Property although they are sure it has not helped. This Property would have required a full refurbishment due to the fact no investment was made in the Property during the 12 years of this tenancy or in the previous 9 years that they were managing the Property.

Furthermore, the council tax exemption is no proof of smoking damage as a council tax exemption is based on the property requiring renovation significant enough that the Property would not be habitable throughout said renovation. After 21 years of little or no significant investment they know the Property required complete renovation as they obtained some quotes for this and had made recommendations for renovation in 2018, 2019, 2021. They had also made recommendations for works for this Property as far back as 2010 to replace the bathroom prior to this tenancy, which were ignored. They know that both recommendations regarding renovation and maintenance were made from 2011 to 2017 but unfortunately, they do not yet have the documentation to show this.

“The Flat Company provided inspection reports, but they failed to record that the tenants were smoking and that my property was damaged by nicotine – this is a breach of the Code of Practice for Letting Agents (Code 17 and Code 74)”

It is worth highlighting that Mr Shannan does not state that that The Flat Company did not provide inspection reports or that these reports did not make recommendations. He simply states that these inspection reports did not highlight that the tenant was smoking and that this smoking is what damaged the Property. The Letting Agent Code of Practice Paragraph 17 states as follows: 17. You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants). At all times and with all our dealings we were open and honest with Mr Shannan and made recommendations as to how to improve and maintain his Property. This is proven by the inspection reports from 2018 onwards and the attached report from 2010 where painting and refurbishment of the bathroom is recommended. Mr Shannan has also not disputed that they made similar recommendations throughout the period of 2011 to 2017. Mr Shannan did not take their recommendations or invest any money in his Property. In fact, having not spent any significant amount money on his Property in the 12 years of this tenancy means that he made a significant saving and so has faced no financial impact whatsoever. According to the guide from the Tenancy Deposit

Company LPS Mr Shannan could have been reasonably expected to carry out the following works over this tenant's 12 year tenancy:

Hall and Landing redecorated x3

Living room redecorated x2

Kitchen replaced x2

Bathroom x2

Bedroom redecorated x2

Flooring x3

Washing Machine x3

Oven x2

Fridge x2

These above renovations and replacements do not even take into consideration the 9 years prior to this tenancy.

Paragraph 74 of the Code, which states: 74. If you carry out routine visits/inspections, you must record any issues identified and bring these to the tenant's and the landlord's attention where appropriate (see also paragraphs 80 to 84 on property access and visits, and paragraphs 85 to 94 on repairs and maintenance).

Once again it is not in dispute that inspections were carried out or that recommendations were made but simply that the issue of smoking was not highlighted. While they know that smoking was highlighted in the previous inspections they cannot show it, however, they believe this to be a moot point because had Mr Shannan carried out the renovations they had recommended over the course of the 12 year tenancy then the Property would not have been in the poor state of repair that it was irrespective of whether or not the tenant was smoking.

When asked to provide what action The Flat Company had taken to make the tenants aware of the breach of the tenancy you were unable to provide any documentary evidence. This is a breach of the Code of Practice for Letting Agents (Code Paragraph 24).

Unfortunately, this particular tenant did not have an email address so communication with her was done via phone and letter. The tenant was advised on several occasions via letter and phone not to smoke in the property and Mr Shannan had been made aware of this. However, as yet their IT company has not been able to find the letters sent to the tenant which were saved to their system. They are confident these will be found before the Tribunal hearing takes place. They have also

tried to contact the tenant to see if she would appear as a witness to confirm that she had received written and verbal warnings that she was not allowed to smoke in the property but unfortunately, they have not been able to contact her.

You have failed to provide any evidence that you alerted the tenant of the breach to the tenancy agreement. If I had been alerted, I had the type of tenancy agreement that would have allowed me to end the tenancy. My property was ruined by nicotine, and you failed to alert me of this in the inspection reports and you failed to provide evidence that you alerted the tenant. This is also a breach of the Code of Practice for Letting Agents (Code Paragraph 75).

Although they cannot, at present, show the inspection reports highlighting to Mr Shannan that the tenant was smoking, or the letters sent to the tenant advising that she should not be smoking this does not support Mr Shannan's argument. Even though smoking would have been a breach of the tenancy this does not mean they would have been able to evict the tenant on this basis. It is clear that there is no guarantee that a tenant can be evicted for smoking especially from a property which had had no investment or works carried out for such a long period. Furthermore, as you can see from the estimate from WL Forrest dated 28.04.17, it highlights that part of the process of the painting works would be to clean the nicotine from the walls. This quote, which was rejected by the landlord, was as the result of an inspection carried out in 2017 which highlighted the issue of the tenant smoking. Therefore, it is a clear indication that the Landlord was not prepared to take action either to upgrade his property or to try and evict the tenant when he was fully aware the tenant was smoking in 2017. In fact the Landlord himself states in his email "I never opened quotations as I had no intention of getting the work completed". This is irrefutable proof by the Landlord's own admission that he never had any intention of upgrading his Property or carrying out works that would mean the Property would be returned to him in a reasonable standard. It is exactly for this reason, the Landlord's decision to ignore any recommendations or work or maintenance, that he found the Property in the condition it was when he took it back and not for any negligence on the part of The Flat Company. Furthermore, the inspection carried out in 2018 was carried out by Dietrich Zank who is one of the founders of The Flat Company and who carried out several inspections for this Property over this tenancy of 12 years. He has clearly highlighted the issue of smoking in this report in 2018 and it stands to reason that he would have brought this to the attention of the Landlord in any of the previous inspections he would have carried out in this Property.

Due to the extensive smoke damage my flat took from 20th June until September to make habitable. If this was general redecoration it would have taken weeks. I lost at least 2 months of rent.

At the end of a twelve year tenancy more than just "general decoration" would be required. Mr Shannan did not renovate his property during the full 21 years that they

managed it. Therefore, any renovations carried out to the Property would have been required irrespective of whether or not the tenant was smoking based on her 12 year tenancy alone.

In fact, the argument can be made the Landlord made a huge saving by having such a long term tenant in his Property who was prepared to pay rent without any significant upgrades to the Property.

In conclusion, they believe they have shown they carried out their duties as Letting Agents and carried out inspections and informed the Landlord of required works as Mr Shannan agrees.

The only area for disagreement is whether or not Mr Shannan and the tenant were informed about the issues of smoking. They have shown the Landlord was informed in 2017 and took no action because as he states himself, he had no intention of carrying out recommended works. Unfortunately, it is the case that the Landlord is trying to hold The Flat Company financially responsible for the renovation of his Property because they have been unlucky to have lost a section of documentation proving otherwise and this should not be permitted just as it was not permitted for the tenant's deposit to be paid to the Landlord for exactly the same reason.

8. The First Case Management Discussion.

An oral Case Management Discussion ('CMD') by conference call took place in respect of the application on 15th May 2023 at 10am.

The Applicant attended on his own behalf.

The Respondents were represented by Matthew Wilcken, a Director of the Flat Company.

8.1. Documents provided:

The parties agreed that the following documents had been submitted:

- (i) Inspection Reports dated 2010, 2011, 2018, 2019 and 2021.
- (ii) The copy estimate from WL Forrest dated 28th April 2017, which is a quotation for redecorating the Property and refers to nicotine.
- (iii) A letter signed by Audrey Watson dated 28th March 2023 which gave a description of the property when she visited it on 30th June 2022. She describes the nicotine damage to the Property.
- (iv) Photographs of a light pendant, electrical socket and kitchen tiles taken at the end of the tenancy.

(v) A copy of the Letting Protection Service adjudication guidance note which includes a section headed 'Usual Life Expectancy Guides.'

8.2The parties' oral representations are as follows:

Section 2: Overarching Standards of Practice

Paragraph 17. You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants).

Applicant's Oral Representations:

He originally instructed the Flat Company to manage the letting of his property as he read an article in the Scotsman newspaper which detailed the service they offered and it referred to tenant insurance.

At the start of the tenancy to Susan Kerr in 2011 the Property was in a good condition. The 2019 condition report referred to nicotine damage. He had not been advised that the tenant was a smoker and the nicotine damage that was being caused to his Property before this date.

The Respondents' Oral Representations:

Mr Wilcken explained that the tenant insurance referred to by the Applicant was insurance against the tenant defaulting on rent payments. It was not insurance for maintenance required to the property.

He referred the Tribunal to the 2010 Inspection report which states that the windows and the bathroom would benefit from repair/ upgrading.

He referred the Tribunal to the 2017 quotation from WL Forrest which refers to the nicotine damage.

His company changed IT servers in 2018 and he is struggling to retrieve copies of emails sent to the Applicant from 2011 to 2017. He is not confident if they can be retrieved but he will continue to chase the IT consultants to retrieve them.

The Applicant has made no investment to the Property since 2001. The Property needed a complete renovation due to the lack of investment irrespective of whether or not the tenant had been a smoker.

The tenant was evicted from the Property on non fault grounds as the lease had been a short assured tenancy.

Paragraph 24. 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.

Applicant's Oral Representations:

The Respondents have admitted that they do not have records from 2011 to 2017, albeit that they are trying to obtain copies.

He confirmed that he received the estimate from WL Forrest but he did not open the attachment or read the estimate as he intended to carry out any works required at the end of the tenancy. He carried out works to the Property in 2003 and 2009. These works included painting the walls white in 2008. Also, in 2018 he replaced the cooker and in 2019 he replaced the washing machine.

The Respondents' Oral Representations:

He is hopeful of retrieving the missing records which he believes will exonerate the Respondents.

The fact that the Applicant has confirmed that he did not open the email attachment containing the estimate from W L Forrest demonstrates that the Applicant had no intention of investing in the Property during the tenancy.

He confirmed that the tenant did not complain that the Property was below the repairing standard.

Paragraph 27. You must inform the appropriate person, the landlord or tenant (or both) promptly of any important issues or obligations on the use of the property that you become aware of, such as a repair or breach of the tenancy agreement.

Applicant's Oral Representations:

The Respondents should have advised the Applicant that the tenant was smoking in the Property in breach of the conditions of her tenancy and they failed to do so.

The Respondents' Oral Representations:

The missing data will show that the Respondents advised the Applicant that the tenant was a smoker. Mr Wilcken joined the company eight years ago. He has spoken with previous members of staff who managed the Property and they confirmed to him that they had advised the Applicant that the tenant was a smoker. He acknowledged that some of the inspection reports do not specifically refer to nicotine damage. He explained that this is due to the fact that the tenancy was a long tenancy and some of the property managers who had prepared the particular reports had assumed that the Applicant was aware of the position.

He confirmed that the Flat Company does not keep a record of conversations they had with tenants. The only records that will be available are emails sent to the Applicant which he hopes to be able to provide to the Tribunal.

Section 5: Management and Maintenance

Paragraph 74. If you carry out routine visits/inspections, you must record any issues identified and bring these to the tenant's and landlord's attention where appropriate.

Applicant's Oral Representations:

He received no notice from the Respondents that the tenant was a smoker before 2018.

The Respondents' Oral Representations:

The Flat Company currently carry out two inspections per annum. He is trying to locate the missing inspections reports and will provide the Tribunal with copies once they have been located.

Paragraph 75. Breaches of the tenancy agreement must be dealt with promptly and appropriately and in line with the tenancy agreement and your agreement with the landlord.

Applicant's Oral Representations:

At the start of his contract with the Respondents he advised them that he did not want a smoker renting his Property. At the end of the tenancy in 2022 the Property was uninhabitable. The Respondents should have advised him that the tenant was a smoker as soon as they became aware of the position. It took him over three months to renovate the Property at the end of the lease in 2022. The damage was due to the fact that the tenant had been a smoker. Everything had to be replaced and the Property was off the market for over three months. He carried out the repainting of the Property himself. He arranged for contractors to install the new bathroom and kitchen. In connection with his claim for compensation he advised that he wished to withdraw the claim for the replacement kitchen. His claim comprises loss of rent and replacement of the electrical sockets and light fittings damaged by nicotine and the additional paint required.

The Respondents' Oral Representations:

He does not accept that it had to take three and a half months to renovate the Property. The Property is a one bedroom flat. His company had offered to arrange for contractors to carry out the works required and had contractors been employed he suspects they would have taken less than a month to complete the required work.

In addition, the Property would have been in a better condition at the end of the tenancy in 2022 if the Property had been decorated throughout the tenancy. The Tenancy Deposit Company did not make a deduction from the deposit as the Property had not been decorated during the period of the tenancy. He referred the Tribunal to the LTS guidance note which details the usual life expectancy of fittings and decoration of rented properties that has been produced.

8.3 Outcome of the First Case Management Discussion.

The Tribunal continued the Case Management Discussion to enable the parties to produce the following documents to the Tribunal.

The Applicant has to produce:

- (i) A copy of invoices and receipts to support his claim for compensation.
- (ii) Evidence that the Applicant stipulated to the Respondents that any tenants must be non smokers.
- (iii) Any additional inspection reports available.

The Respondents have to produce:

- (i) A copy of the lease in favour of the tenant Susan Kerr.
- (ii) A copy of the Terms of Business Letter issued by the Respondents to the Applicant.
- (iii) A copy of the article in the Scotsman newspaper detailing the work of the Flat Company, referred to by the Applicant.
- (iv) A copy of any emails from the Respondents to the Applicant advising him that the Tenant was a smoker.
- (v) Any additional inspection reports available.

9. Additional Written Representations from the Applicant

The Applicant provided an Excel sheet for expenditure/loss with supporting receipts. The relevant details were confirmed at the Second CMD. They are as follows:

light switches and caulk	7.12
caulk	2.24
paint	14.99
paint	22.00
Electric shower	52.00
paint	26.00
filler, sugar soap and paint	16.97
Cement	5.98
Vent	1.09

pipe cutter and junction box	4.22
conduit clips	4.06
receipt co alarm	14.99
trv	6.99
fuses	4.50
paint	26.00
Curtain rings	6.00
Wax oil	42.99
Floor varnish	32.00
Light fittings	21.88
Total	£312.02

He also provided an annotated copy of the 2017 lease. Clause 28 states that there shall be no smoking in the Property.

10. Additional Written Representations from the Respondents.

10.1 The Applicant claims he did not want a smoker in his property. No evidence has been produced to show that the Applicant requested or insisted that we find a non-smoking tenant for his property.

10.2 The Applicant claims The Flat Company knowing allowed a tenant that smokes to sign a lease which states smoking is not permitted in his property. There is no evidence to support this claim. The earliest evidence we have of the tenant smoking in the property is from the quote from one of our painters in 2017 which the landlord claims he never saw. The subsequent inspections also highlight the smoking and our recommendations. However, as neither the landlord nor The Flat Company have a copy of the inspections from 2011 to 2017 so there is nothing on file to show the tenant was smoking during that period and was therefore in breach of her tenancy.

10.3 The Applicant claimed the property was in good order before the tenant moved in and that damage was caused by the tenant smoking. As has already been shown and reinforced by LPS decision on the deposit the fact that no money had been spent on this property for such a significant amount of time means that the claim damage is not enforceable as everything in the property had already passed what would be considered to be its natural life span. This includes fixtures and fittings

which Mr Shannon has already confirmed have not been replaced for several years. The further proof of this is that there are items in the property which the landlord.

10.4 The Applicant is claiming for loss of rent and council tax due to the duration it took to renovate the property. It can be assumed that the property would require full decoration and significant repair after a 12-year tenancy with very little in the way of decoration or renovation irrespective if the tenant was a smoker or not. As the landlord decided to do much of the work himself and it is this that has caused the delays. The Flat Company was in no way responsible for the works carried out and so cannot be held liable for how long they took to complete. I believe one of our many reputable contractors could have completed the works in a week to 10 days given the size of the property which is a perfectly reasonable time frame for a property of this size.

10.5 The Applicant claims the tenant should have had insurance to cover the cost of the damage. Unfortunately, had the tenant had insurance none of these works would have been covered by insurance as they all fall under wear and tear because of the duration of the tenancy. Had the property been regularly decorated and maintained throughout the tenancy as recommended this would have been different. However, had the property been regularly decorated and maintained this case would not be necessary at all. It is extremely frustrating that we do not have the inspections from 2011 to 2017, however, the question is as to whether or not The Flat Company carried out their duties as a letting agent and whether or not Mr Shannon has faced and financial loss due to how The Flat Company managed his property. Mr Shannon has already agreed that we did carry out inspections but that our failing was not to alert him his tenant was smoking. However, this has not affected Mr Shannon financially as the amount of renovation carried out would have been necessary whether the tenant was a smoker or not. The only other claim is for the duration of the works which cannot be The Flat Company's responsibility as we did not carry out the work. Finally, at the end of the tenancy The Flat Company offer to arrange for the works to be carried out by our contractors and have the property ready for a Festival Let in in August of 2022 showing we were confident we would have had the property ready for occupation in less than a month. We also offered to manage the property for free for 4 months including the festival as a gesture of good will.

The also provided a copy of the article from 2001 and a copy of Brian Shannon's management contract.

11. The Second Case Management Discussion.

An oral Case Management Discussion ('CMD') by conference call took place in respect of the application on 11th December 2023 at 10am.

The Applicant attended on his own behalf.

The Respondents were represented by Matthew Wilcken, a Director of the Flat Company.

11.1 The parties' oral representations are as follows:

Section 2: Overarching Standards of Practice

Paragraph 17. You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants).

Applicant's Oral Representations:

Several clauses of the 2017 lease were inaccurate. Clause 28 states that there shall be no smoking in the Property. The Respondents must have known that the Tenant would not comply with that provision of the lease. Also, Clause 10 states that the Property is in good decorative order. The Property had already been affected by nicotine damage in 2017. Consequently, the Respondents were not being honest, open and transparent as the lease was inaccurate.

The Respondents' Oral Representations:

The crux of the Applicant's claim is whether he was financially affected by the matters detailed in the application. It is the Respondents' position that the items in the Property were beyond their life span and the replacement of these items and the redecoration of the Property would have been necessary whether or not the tenant smoked in the Property.

Paragraph 24. 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.

Applicant's Oral Representations:

The Respondents have clearly not maintained the required records as they have been unable to provide copies of any emails from the Respondents to the Applicant advising him that the Tenant was a smoker and copies of the reinspection reports from 2011 to 2017.

The newspaper article states that the Tenants will be asked to obtain insurance. He expected to see evidence that the Respondents had written to the Tenant asking her to make an insurance claim and advising her not to smoke in the Property. No documentary evidence evidencing these matters has been produced.

He has a policy of redecorating the Property at the end of each tenancy.

The Respondents' Oral Representations:

Mr Wilcken referred the Tribunal to the terms of business he has produced. At the top of page two the terms of business states that the Respondents will actively

encourage tenants to take out insurance. However, the insurance would only cover accidental damage it would not cover the cost of damage caused due to the Tenant breaching the tenancy agreement by smoking.

He also conceded that the Tenant was smoking in the Property before 2017.

However, the Landlord did not replace many items in the Property during the tenancy and many items had not been replaced for 21 years. Also, the Applicant did not decorate the Property during the term of the tenancy. Had the Tenant not smoked in the Property it would still have needed to be redecorated at the end of the tenancy.

Paragraph 27. You must inform the appropriate person, the landlord or tenant (or both) promptly of any important issues or obligations on the use of the property that you become aware of, such as a repair or breach of the tenancy agreement.

Applicant's Oral Representations:

No additional comments.

The Respondents' Oral Representations:

No additional comments.

Section 5: Management and Maintenance

Paragraph 74. If you carry out routine visits/inspections, you must record any issues identified and bring these to the tenant's and landlord's attention where appropriate.

Applicant's Oral Representations:

No additional comments.

The Respondents' Oral Representations:

No additional comments.

Paragraph 75. Breaches of the tenancy agreement must be dealt with promptly and appropriately and in line with the tenancy agreement and your agreement with the landlord.

Applicant's Oral Representations:

The Respondents have conceded that the tenant had been smoking in the Property before 2017. The Property should not have been allowed to get into such a poor condition badly affected by nicotine.

The Respondents' Oral Representations:

Mr Wilcken explained that unfortunately the Respondents do not have records from 2011 to 2017. He tried to contact the Tenant but was unsuccessful. The fact that the Tenant had been smoking in the Property would not have been a ground of eviction. However, he accepted that the lease was a short assured tenancy and notice could have been served on the Tenant at the end of the Short Assured Tenancy.

11.2 Closing comments:

11.2.1 Dr Shannon referred the Tribunal to the items detailed in the spread sheet he had provided. He clarified that he was not seeking the cost of the replacement bathroom or kitchen. The remaining items detailed in the spread sheet are additional expenses incurred beyond the usual cost of redecorating the Property at the end of a tenancy. Due to the amount of nicotine damage additional paint was required and fittings had to be replaced. He was claiming two months rental as it took him two months to redecorate the Property.

As detailed in the application, the losses he is claiming are:

(i) Rent (£1750) and

(ii) The electrical sockets and light fittings and additional paint (£204).

He reflected that he could have asked for a refund of the management fee charged by the Respondents but he chose to apply for the loss of rent during the period of redecoration instead.

11.2.2 Mr Wilcken explained that his company had offered to arrange for contractors to carry out the redecoration works and the contractors would have taken a significantly shorter time to complete the works. Dr Shannon was completing the works himself and consequently the works took longer. He emphasised that as the Tenant had resided in the Property for 12 years the Property would have needed to be completely redecorated at the end of the lease regardless of the nicotine damage.

He confirmed that his company's annual maintenance charge was approximately £697 per annum.

12. Decision.

12.1 Findings in Fact

12.1.1 Dr Shannan is owner of the Property, 4 (1F1), Springvalley Terrace, Edinburgh, EH10 4QD.

12.1.2 Dr Shannan purchased the Property in 1993/4 and first rented out the Property in 2001.

12.1.3 The Property is a small one bedroom flat. The accommodation includes, living room, bedroom, kitchen, bathroom and hall.

12.1.4 The Respondents are the Letting Agent appointed by the Applicant to manage the letting of the Property.

12.1.5 The Respondents first started letting out the Property for the Applicant in 2001.

12.1.6 Susan Kerr had leased the Property from October 2010 to June 2022.

12.1.7 The rent was originally £510 per month and increased to £780 per month.

12.1.8 The Tenant had paid a deposit of £780 which had been lodged with LPS.

12.1.8 LPS returned the deposit to the Tenant in full as the Tenant had resided in the Property for twelve years there was no evidence of the Landlord having carried out redecoration works during the period of the tenancy.

12.1.9 The Respondents prepared the 2017 lease in favour of the Tenant Susan Kerr dated 3rd August 2017.

12.1.10 The 2017 lease was a short assured tenancy.

12.1.11 Clause 28 of the 2017 lease in favour of Susan Kerr states 'Within the subjects there shall be no smoking.'

12.1.12 The Respondents did not advise the Applicant that the tenant was smoking in the Property before the 2019 inspection report.

12.1.13 The Respondents did not have records pertain to the tenancy during the period from 2011 to 2017.

12.2 Section 2: Overarching Standards of Practice

Paragraph 17. You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants).

The Applicant's complaint is that the Respondents did not advise him that the Tenant was smoking in the Property before the 2019 condition report.

The Tribunal had issued the parties a Direction dated 16th May 2023. One of the requirements of the Direction was that the Applicant was required to provide the Tribunal with evidence that the Applicant had stipulated to the Respondents that any tenants must be non smokers. The Applicant did not provide this evidence to the Tribunal. The only stipulation before the Tribunal that the Tenant must not smoke in the Property is the terms of clause 28 of the 2017 lease in favour of Susan Kerr which states 'Within the subjects there shall be no smoking.'

The Respondents received an estimate from W L Forrest, Painter and Decorator, dated 28th April 2017 which refers to 'wash off nicotine'. The Applicant states that he did receive this estimate but he did not read it. The estimate confirms that the Respondents had been advised of the fact that the tenant was a smoker in 2017. The Respondents have not provided evidence that they specifically advised the Applicant that the tenant was smoking in the Property. The Respondents have been unable to produce evidence that they did advise the Tenant to stop smoking in the Property.

The 2018 condition report does not refer to nicotine damage and only refers to staining.

The 2019 condition report refers to the décor being 'thick with nicotine stains'.

The Tribunal determine that the Respondents have breached Paragraph 17 of the Code of Practice by not being honest and open with the Applicant by advising him that the Tenant was a smoker in breach of clause 28 of the 2017 lease before the 2019 condition report prepared following the inspection on 4th April 2019. The Tribunal do not consider the estimate from WL Forrest to be sufficient notification as the Applicant did not read the estimate and the Respondents did not specifically advise the Applicant that the Tenant was smoking in the Property.

At the second CMD the Applicant also refers to the Respondents breaching Paragraph 17 of the Code of Practice by preparing the 2017 lease which states that the tenant must not smoke in the property whilst knowing that they she was a smoker. This is a fresh complaint that was not part of the original application and was not intimated to the Respondents before the Applicant made his application to the Tribunal. The Applicant did not notify the Tribunal or the Respondents that he wished to amend his application to incorporate this additional complaint. Consequently, the Tribunal are unable to consider this supplementary complaint.

Paragraph 24. 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.

The Applicant's complaint is that the Respondents do not have records from 2011 to 2017 evidencing the fact that they advised the Tenant that she was breaching the tenancy by smoking in the Property. The Respondents accept that they do not have these records due to the change to digital records.

The Tribunal determine that the Respondents have breached Paragraph 24 of the Code of Practice.

Paragraph 27. You must inform the appropriate person, the landlord or tenant (or both) promptly of any important issues or obligations on the use of the property that you become aware of, such as a repair or breach of the tenancy agreement.

The Applicant's complaint is that the Respondents did not advise the Applicant that the tenant was smoking in the Property in breach of the conditions of her tenancy.

As already stated, the Tribunal had issued the parties a Direction dated 16th May 2023. One of the requirements of the Direction was that the Applicant was required to provide the Tribunal with evidence that the Applicant had stipulated to the Respondents that any tenants must be non smokers. The Applicant did not provide this evidence to the Tribunal. The 2017 lease contained the stipulation that the tenant should not smoke in the Property. The 2019 inspection report includes reference to nicotine staining.

The Respondents have been unable to provide the Tribunal with any other evidence that they advised the Applicant that the Tenant was smoking in the Property.

The Tribunal determine that the Respondents have breached Paragraph 27 of the Code of Practice by not reporting to the Applicant between 2017 and 2019 that the Tenant was smoking in the Property in breach of clause 28 of the 2017 lease.

Section 5: Management and Maintenance

Paragraph 74. If you carry out routine visits/inspections, you must record any issues identified and bring these to the tenant's and landlord's attention where appropriate.

The Applicant's complaint is that the Respondents did not advise him that the tenant was a smoker before 2019.

The Respondents have been unable to provide the Tribunal with any evidence that they advised the Applicant that the Tenant was smoking in the Property before the 2019 inspection report.

As already stated, the Applicant has been unable to provide the Tribunal with evidence that the Applicant had stipulated to the Respondents that any tenants must be non smokers. However the 2017 lease contained the stipulation that the tenant should not smoke in the Property. The 2019 inspection report includes two references to nicotine staining. The description of the hall is 'Property heavily stained from smoking'. The description of the Lounge is 'as previously noted décor is thick with tobacco stains and also from the age of paint.'

The Tribunal determine that the Respondents have breached Paragraph 74 of the Code of Practice between 2017 and 2019.

Paragraph 75. Breaches of the tenancy agreement must be dealt with promptly and appropriately and in line with the tenancy agreement and your agreement with the landlord.

The Applicant's complaint is that the Respondents did not advise the Applicant that the tenant was a smoker when they first became aware of this fact and they have

provided no evidence that they wrote to the Tenant advising her that she was in breach of clause 28 of the 2017 lease

The Respondents have not provided any evidence that they wrote to the tenant regarding the fact that she was breaching the 2017 tenancy agreement by smoking in the Property. The Tribunal determine that the Respondents have breached Paragraph 75 of the Code of Practice.

13 Outcome.

13.1 The Applicant is claiming reimbursement of loss of rent (£1750) caused by the additional time it took him to decorate the Property due to the nicotine damage caused by the tenant and reimbursement of additional materials and fittings required due to the nicotine damage (£204).

13.2 The Respondents position is that they are not liable for these sums as the Applicant had not decorated the Property since the start of the tenancy in 2010 and the fittings referred to by the Applicant were due to be replaced and also that the Applicant took longer to decorate the Property by completing the work himself and not employing a contractor.

13.3 The Tribunal do not accept the Applicant's claim for loss of rent (£1750) and reimbursement of additional materials and fittings required due to the nicotine damage (£204) for the following reasons:

The Tribunal's determinations regarding the Respondents failing to take action in relation to the fact that Tenant was smoking in the Property relate to the period from 2017 to 2019, as detailed above. On a balance of probabilities the nicotine damage to the Property occurred over a longer period of time.

The Applicant chose to carry out the works himself instead of employing a contractor. Had he employed a contractor the works would have taken significantly less time as the Property is a one bedroom flat.

The Applicant had not decorated the Property or replaced the fittings referred to by the Applicant throughout the duration of the tenancy (during the period October 2010 to June 2022).

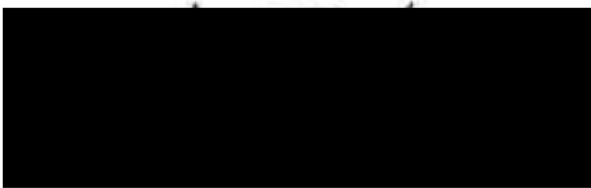
The Applicant did not take steps to terminate the tenancy in 2019 when he was advised that the tenant was smoking in the Property. The tenancy was a short assured tenancy and notice could have been given to the tenant to vacate the property at the time.

13.4 However, the Tribunal acknowledges that the Applicant has suffered stress and inconvenience as a result of breaches of sections 17, 24, 27, 74 and 75 of the Code of Practice and proposes to make the following Letting Agent Enforcement Order:

‘The Letting Agent must pay the Applicant £150 for the inconvenience he had suffered as a result of the breaches of the Code of Practice. The said sums must be paid to the Applicant by 31st January 2024.’

14. 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.



SignedDate 14th December 2023

Chairperson