



First-tier Tribunal for Scotland (Housing and Property Chamber) Under the Housing (Scotland) Act 2014 (“The Act”)

Reference Number: FTS/HPC/LA/23/1085

Re: 13 Lade Braes Lane, St Andrew, Fife (“the Property”)

The Parties:

Dr Gavin Irvine, Mr Mihkel Vestli, (“the Applicants”)

Thistle Property & Letting Limited (“the Respondent”)

Tribunal Members:

Andrew McLaughlin (Legal Member) & David Godfrey (Ordinary Member)

Decision

[1] The Respondent has not failed to comply with the Letting Agent Code of Practice (“The Code.”)

Background

[2] The Applicants apply for an order under Section 48 of the Act for a determination that the Respondent has failed to comply with the Code.

The Alleged Breaches

[3] The Applicants allege that the Respondent has breached standards 16, 19, 82 and 129 of the Code. The complaints are as follows:

Standard 16- *"You must conduct your business in a way that complies with all relevant legislation."*

[4] This relates to an allegation that the Respondent failed to comply with *The Private Residential Tenancies (Prescribed notices and forms) (Scotland) (Regulations) 2017* in that they failed to send the required Rent Increase Notice under Regulation 3 and Schedule 2.

Standard 19 *"You must not provide information that is deliberately or negligently misleading or false"*.

[5] This relates to an allegation that the Respondent sent the Applicant rent invoices for £975.00 when they ought to have known that the correct rent was £1,100.00.

Standard 82 *"You must give the tenant reasonable notice of your intention to visit the property and the reason for this. At least 24 hours' notice must be given, or 48 hours' notice where the tenancy is a private residential tenancy, unless the situation is urgent or you consider that giving such notice would defeat the object of the entry. You must ensure the tenant is present when entering the property and visit at reasonable times of the day unless otherwise agreed with the tenant"*.

[6] This relates to an allegation that the Respondent inappropriately entered the Property without permission or prior notification to effect a non-urgent repair.

Standard 129- *“When you contact landlords, tenants or guarantors who owe you money, you or any third party acting on your behalf must not act intimidatingly or threateningly. Nor must you knowingly or carelessly misrepresent your authority and/or the correct legal position”.*

[7] This relates to an allegation that the Respondent misrepresented their legal position when they stated in an email *“You will have by now received the decision from the First Tier Tribunal and they have confirmed both the £1100 figure and the £1300 figures as correct, so we would appreciate payment of the rent arrears as soon as possible”.*

[8] The Application was defended on the basis that the Respondent states that no breaches of the Code were committed.

[9] There had been a previous Case Management Discussion and The Tribunal had made case management orders in the form of Directions regulating the conduct of the case. Both sides had fully set out representations addressing their respective positions on the issues in dispute.

The Hearing

[10] The Application called for a Hearing at 10 am on 8 December 2023 at Endeavour House, Greenmarket, Dundee. The Applicants were personally present. Mr James Sinclair was present on behalf of The Respondent.

Preliminary matters

[11] Neither party had any preliminary matters to address.

[12] The Tribunal heard evidence from both Applicants and from Mr Sinclair. Each party had the opportunity of cross examining each witness. The parties also had the opportunity of making closing submissions at the conclusion of evidence. The Tribunal asked questions throughout. Having heard from parties, the Tribunal made the following findings in fact.

Findings in fact

- I. *The Applicants rented the Property under a Private Residential Tenancy which commenced in July 2018;*
- II. *The Respondent took over management of the Property from another letting agent, Rollos, on 16 August 2021. When Rollos transferred over the tenancy documentation they failed to inform the Respondent that the contractual monthly rent was now £1,100.00 having been increased from £975.00 effective from either August 2021 or January 2022. There are conflicting dates in the papers and the oral testimony given. The actual date is however immaterial for the purposes of this Tribunal.*
- III. *When they started managing the Property, The Respondent began sending the Applicants invoices for rental payments at the erroneous sum of £975.00. The Applicants stopped their standing order and began paying this lower figure manually each month. The Applicants didn't point out to the Respondent or in any way query why they appeared now to be being charged a lower sum which they knew previously had been increased;*
- IV. *The landlord was incapacitated and in hospital at the time and was not available to inform the Respondent that the correct rent which should have been being paid was £1,100.00;*
- V. *The Respondent then sought to increase the rent to £1,300.00 and emailed the Applicants about this on 5 April 2021. The Respondent failed to intimate a valid Rent Increase Notice as required by The Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017. The Applicants had*

- in any event expressed the view that this was “a remarkable increase in rent” notwithstanding that they knew full well the rent was previously £1,100.00 per month. The correct Rent Increase notice was not intimated until 14 June 2022;*
- VI. *Ultimately the proposed rent increase was opposed by the Applicants who applied to the Tribunal for a rent assessment which ultimately confirmed on 28 July 2022 that the rent was fairly set at £1,300.00 per month and was lawfully due at this rate from 15 September 2021. The Applicants paid the back rent due from 15 September 2021 onwards;*
- VII. *The Respondent has now sought to recover the difference between the rent actually paid by the Applicants from August 2020 until September 2021 which was £975.00 when it should have been £1,100.00. The Applicants dispute that they are liable for these backdated sums;*
- VIII. *The Applicants contend that by sending invoices for the sum of £975.00 at the time and now subsequently looking to recover the underpayments, the Respondents are acting in breach of their Obligations under the standard 19 of the Code;*
- IX. *The Respondent has not breached standard 19 of the Code. The Respondent has acted reasonably based on the information that they had and are perfectly entitled to seek to recover sums which they say remain lawfully due by the Applicants to the landlord. The Applicants are entitled to oppose this. It does not follow that the Respondent has breached the Code in how they have acted. They have neither been reckless nor careless in sending invoices for the wrong amount to the Applicants and were acting on the information they had, having taken reasonable steps to ascertain the facts of the situation.*
- X. *On Sunday 19 June 2022, the Applicants communicated to the Respondent that there was a problem with their kitchen sink draining. The Applicants then left for the day. They returned to find that the Respondent had entered the Property whilst they were out and sought to effect a repair. The Applicants express the view that there was no necessity to access the Property without their consent and*

that the situation was patently not urgent. They alleged the Respondent violated their privacy and breached standard 82 of the Code;

- XI. *The Respondent's Mr Sinclair expressed the view that as an experienced tradesperson, a kitchen sink in an upstairs flat that isn't draining can be a serious issue, as it could result in further plumbing issues throughout the building.*
- XII. *The contemporaneous emails exchanged between the parties do not suggest that Mr Sinclair considered the matter as urgent and there is no record of him conveying this to the Applicants or asking for further information in order to make an informed decision about whether or not the situation was urgent;*
- XIII. *The Respondent may very well have considered the situation as urgent but failed to adequately communicate this. That may be a failing of some sort but not necessarily a breach of standard 82 of the Code;*
- XIV. *There is insufficient evidence to conclude that Mr Sinclair is being dishonest about whether he thought it was an urgent matter. The fact that there is only one single instance to consider provides a limited body of evidence from which to draw the necessary adminicles of evidence to support such a finding;*
- XV. *The Applicants contend that the Respondent breached standard 129 of the Code by sending an email which they allege sought to mislead the Applicants by having them believe that they had been found liable for the additional back rent between August 2020 and September 2021. The Respondent did no such thing. The Respondent sent an email that said the following "You will have by now received the decision from the First Tier Tribunal and they have confirmed both the £1100 figure and the £1300 figures as correct, so we would appreciate payment of the rent arrears as soon as possible";*
- XVI. *This does not amount to a breach of standard 82 of the Code. The Respondent in no way tried to trick the Applicants or mislead them about the legal position. The Respondent was acting in the best interests of their client and trying to recover the underpayments of rent in a business-like manner.*
- XVII. *The Respondent emailed the Applicants on 5 April 2021 indicating an intention to increase the Applicants' rent to £1,300. They failed adequately to comply with*

the terms of The Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 which prescribes a mandatory rent increase notice. The Applicants were well informed and challenged the Respondent about this. As a result, the Applicants successfully delayed the increase in their new rent coming into effect.

- XVIII. *The Respondent was ignorant of the requirements of The Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 at the time. The Respondent did at least appreciate the need to give three months notice which was reflected in their email;*
- XIX. *The Respondent may very well have made similar mistakes at the same time in respect of other properties that they managed;*
- XX. *Even though the Respondent made an error in this issue, it does not necessarily follow that they did not conduct their business in a way that complied with all relevant legislation;*
- XXI. *There is an insufficient basis for any finding that the Respondent has breached standard 16 of the Code.*

Reasons for decision

[13] Dr Gavin Irvine primarily gave evidence on behalf of the Applicants. Mr Vestli gave evidence but principally only to confirm that he agreed with the evidence given by Dr Irvine and had nothing else to add.

[14] Dr Irvine came across as someone who was hoping to capitalise on any mistake the Respondent might have made. He seemed to be suggesting that the Respondent's conduct was outrageous. That didn't make sense and the Tribunal wondered if there were other issues that were provoking such strong feelings that the Tribunal was not aware of. It did however appear clear to the Tribunal that it would have been obvious to the Applicants that they were being charged the old rent of £975.00 instead of the higher figure of £1,100.00 when the Respondent took over management of the Property.

The Applicants were happy to stay quiet and try and capitalise on that error. They sent emails to the Respondent at the time pointedly asking if there was a “*new tenancy*”. Those emails were opportunistic and studiously ignored the glaringly obvious issue of the rent. The Respondents were under no compulsion to assist the Respondent in paying the higher figure but the notion that the Applicants are now pursuing the Respondent for trying to fix the mistake appears perverse. It seems clear that it is up to the Respondent to pursue any claim they have for under payments of rent against the Applicants. The Respondents are obviously entitled to defend that Application and ultimately a separate Tribunal would decide matters. None of this amounts to a breach of the Code.

[15] Dr Irvine’s evidence in respect of the alleged breach of Standard 16 of the Code seemed viewed only through tunnel vision. The evidence was that the Respondent bungled a rent increase by not using the necessary form. This actually was to the benefit of the Applicants because it delayed the rent increase coming into effect. The Applicants are clearly capable and effective advocates for themselves and their attention to detail is noteworthy. But it does not follow that because the Respondent was under a misapprehension about what was needed to increase the rent, that they do not “*conduct their business in a way that complies with all relevant legislation.*” That standard of the Code could just as well mean that letting agents require to have their tax and corporate affairs in order and comply with health and safety legislation in the workplace. It seems heavy handed to suppose that any time a letting agent makes a mistake in respect of the legally complex and constantly evolving subject matter of private tenancies, that it follows that they have breached this standard of the Code. The Tribunal are not prepared to accept that proposition. It goes too far and is not justified. Similarly, it just seemed inappropriate to find that on this occasion any other standards of the Code founded upon were established.

[16] Mr Sinclair came across as well-meaning and genuine in his evidence. There were some matters which led the Tribunal to consider that he may have been relatively short

of experience in as a letting agent at the time as this was one of the Respondent's first ever properties that they managed. Whilst the Tribunal are not identifying any breaches of standards on this occasion, the Tribunal was pleased to hear that on reflection, the Respondent would have handled certain situations differently and this would inform his practise going forward. That approach may serve the Respondent well going forward.

Andrew McLaughlin

Legal Member

Date 21 December 2023