

Housing and Property Chamber
First-tier Tribunal for Scotland



**First-tier tribunal for Scotland (Housing and Property Chamber)
("the tribunal")**

Decision on Preliminary Issue and Application:

Housing (Scotland) Act 2014 (the 2014 Act), Section 48(6)

**First-tier Tribunal Housing and Property Chamber (Rules of Procedure)
Regulations 2017 ("the 2017 Rules"), Rule 95**

The Letting Agent Code of Practice ("the Code of Practice")

Chamber Ref: FTS/HPC/LA/22/4028

Parties:

**Dr Naheed Rashid, address unknown, United Arab Emirates, formerly residing
at 253 The Murrays, Edinburgh, EH17 8UT
(the Applicant)**

**Factotum, 63 Dublin Street, Edinburgh, EH3 6NS
(the Respondent)**

Tribunal Members:

Ms Susanne L M Tanner KC (Legal Member)

Ms Eileen Shand (Ordinary Member)

DECISION

- 1. The Respondent, in arranging two consecutive short lets for the Property on behalf of the Applicant for the period from 17 to 30 July 2022 and 1 August to 1 September 2022, was not "*carrying out letting agency work*", in term of Section 61 of the Housing (Scotland) Act 2014 (the 2014 Act).**
- 2. Because the Respondent was not carrying out letting agency work at the material time, the tribunal does not have jurisdiction to deal with the**

Application alleging breaches of the Letting Agent Code of Practice (the Code).

3. The decision of the tribunal is unanimous.

STATEMENT OF REASONS

Relevant Procedural Background

1. The Applicant made an application to the tribunal (the Application) alleging that the Respondent had failed to comply with the Letting Agent Code of Practice (the Code) related to the letting of the Property for a period over summer 2022.
2. The case was allocated to a First-tier Tribunal. On 19 May 2023, at a Case Management Discussion, that tribunal heard submissions on the Respondent's preliminary issue that the tribunal did not have jurisdiction because the Respondent was not carrying out letting agency work at the material time, therefore the Code did not apply to the circumstances. Without hearing evidence, that tribunal decided that it had jurisdiction to consider the application, the Code applied and the Applicant's Application should be considered. Before considering the substance of the Application, that tribunal granted leave to appeal its decision of 19 May 2023 to the Upper Tribunal.
3. The Upper Tribunal allowed the appeal and remitted the case to a differently constituted First-tier tribunal to reconsider the case (2023UT46; UTS/AP/23/0024). In the decision, Sheriff McCartney provided dicta about the applicable law and the way in which the preliminary issue of jurisdiction in the case might be approached by the tribunal by use of a route map to fact finding. This is discussed further below in the section dealing with the applicable law.
4. The case was allocated to this tribunal (hereafter 'the tribunal'). The tribunal issued a number of Directions to regulate procedure and to require both parties to do specified things, including production of the contact record between the parties and the contracts relating to the lets in question.
5. The Applicant became a resident in the UAE prior to this tribunal's determination, so options were explored as to how the Applicant might give evidence to the tribunal, given that the UAE is not a country which allows residents to give remote evidence to tribunal proceedings in Scotland. As the Applicant said that she was unable as a result of work and family commitments to travel to give evidence in Scotland at any time, or to do so remotely from a country which allowed evidence to be given to tribunal proceedings in Scotland, it was agreed that she would lodge a sworn affidavit.

6. A Case Management Discussion (CMD) videoconference was fixed for 21 October 2024 to hear evidence and oral submissions on the preliminary issue only. This allowed the Applicant's participation to the extent of having the opportunity to cross examine the Respondent's witness, to lead any witnesses she wishes (which she declined to do) and to make oral submissions to supplement written submissions.
7. In advance of the CMD, the Applicant lodged:
 - a. Sworn affidavit dated 28 August 2024; and
 - b. Written submissions.
8. The Respondent lodged
 - a. Written submissions dated 17 October 2024;
 - b. Contracts for lets of the Property in July and August 2022, dated 23 May 2022; and credit note of 25/10/22.
 - c. Communications ledger between the parties.

CMD videoconference: 21 October 2024, 1000h

9. The Applicant attended the CMD. Mr Boisseau from the Respondent attended the CMD.

Evidence

10. Ms Moon was called as a witness by Mr Boisseau. Her evidence on the pertinent points is summarised below:
 - a. Ms Moon was the letting agent who dealt with the Applicant at the material time. She first met the Applicant at the Property in around May 2022. From the start of her dealings with the Applicant, Ms Moon's understanding was that the Applicant had already agreed a Private Residential Tenancy (PRT) of the Property to start from around September 2022 although Ms Moon did not know the exact date on which the Applicant's tenants were moving in. Ms Moon understood that the Applicant would be dealing with and managing that tenancy herself. Ms Moon understood that the Applicant wished to instruct the Respondent to arrange a let of the Property for the gap only and that the let was not to go beyond September 2022. The Applicant told Ms Moon that she had not previously dealt with letting agencies and that she normally did her own PRTs. The Applicant told Ms Moon that this was the first time she had sought professional advice about letting the Property.

- b. During a meeting, Ms Moon described to the Applicant the Respondent's terms for short term lets and festival lets, including the commission rates for each, which are different from those for PRTs. Short term contracts are holiday let contracts and they are not PRTs. The dates are agreed and they are brought to an end on the end date. Short term lets are priced Per Calendar Month (PCM) and have a commission rate of 17% plus VAT. Festival lets (in the month of August), are priced per week rather than PCM and have a commission rate of 20% plus VAT. The Festival rates are generally higher because it is the Festival period. Sometimes £5,000 to £10,000 is paid for properties for the month of August. The Respondent uses the same type of contract for both short term and Festival lets. It is headed 'Landlord's Rental Agreement'. Ms Moon referred to the contracts which were lodged with the tribunal. The Respondent obtains the home address of the guest and it is included in the contract. Under no circumstances is the let property on short term / Festival contracts to be the guest's main residential property.
- c. In around May 2022, the Respondent arranged two consecutive lets for the Property in summer 2022, a short term let and a Festival let. Both agreements were with the same named person, Mr Dean, who worked at one of the Edinburgh Festivals and was looking for accommodation for members of his cast and technicians for part of July and the whole of August 2022. The rentals were related to the guests' festival work. The guests' home addresses were provided by Mr Dean.
- d. The total rental across the two contracts was only for the 6 week period from mid July until 31 August. There were two different commission rates, 17% plus VAT for the short term let and 20% plus VAT for the Festival let. Both agreements were signed. The first short let was from 17 July to 31 July (Bundle page 91). The net rent due was £482.90. The Commission rate was 17% plus VAT, which was £103.13 plus VAT. From 1 August until 1 September there was a 4 week festival let (Bundle page 94). The net rent due was £3952.00. The Commission rate was 20% plus VAT, which was £1040 plus VAT.
- e. Around the time that the agreements were signed, the Applicant contacted Ms Moon and asked for an explanation about the commission rates. Ms Moon said that she responded with an explanation by email about the two different rates and that the explanation was followed up by phone call between the Applicant and Ms Moon's colleague.

11. The Applicant was given the opportunity to cross examine Ms Moon. The Applicant declined to do so, stating that she had no questions for Ms Moon and that she agreed with what Ms Moon was saying because that is how things happened
12. The Respondent did not lead any other witnesses.
13. The Applicant said that she relied on the evidence in her sworn affidavit. She did not wish to call any other witnesses.

Written and Oral Submissions

14. Prior to the CMD both parties had lodged written submissions which were considered by the tribunal and crossed to the other party.
15. At the CMD, the Applicant stated that she had been abroad for a week without internet prior to the CMD and had not had a chance to read Mr Boisseau's written submission dated 17 October 2024.
16. The tribunal adjourned and both parties were given the opportunity to lodge supplementary written submissions after the CMD by specified dates.
17. The Applicant lodged a supplementary written submission dated 31 October 2024.
18. The Respondent lodged a supplementary written submission dated 4 November 2024.
19. Each submission was passed to the tribunal and crossed to the other party.
20. The tribunal considered all evidence and submissions before reaching its decision on the preliminary issue.

Summary of parties' evidence and submissions on the preliminary issue

Respondent

21. The Applicant insists on its preliminary plea that at the material time in July and August 2022, it was not carrying out letting agency work in terms of the 2014 Act.

22. The factual basis of the Respondent's submission is that both lets (17 to 31 July 2022 and 1 August to 1 September 2022) were fixed term short lets to individuals who were working at the Edinburgh festivals and were not using the property as their principal home(s).
23. As such, the Respondent argues that the Respondent is exempt from the Code in respect of these two lets.
24. The principal evidence relied upon by the Respondent is the oral evidence of Ms Moon (summarised above), the contracts for July and August 2022 (Bundle pages 91 and 94), and the communications log between the parties around the material time.
25. In its supplementary submission, the Respondent submitted that at the time its services were engaged by the Applicant, she informed the Respondent that she already had a PRT for the coming academic year from September 2022. The Respondent assumed, considering the previous PRT and the ensuing PRT already in place, that the Applicant would be aware, as a 'responsible person' (landlord) of the rights and notice periods observed for a PRT and the fact that a PRT has no ish date. Further a PRT must be to one or more tenants being individuals, not an institution or company. Additionally, the preamble/missives leading up to the final agreement, also entertained the tenants' wishes and needs. It was submitted that Mr Dean's staff did not wish to register for council tax, open utility accounts etc for a 5-week period. The Respondent submitted that it would have been neglectful had it proposed a PRT to the Applicant. Indeed, the Respondent stated that it would have refused such a request had the Applicant been insistent and, as a PRT would have embraced the jurisdiction of the Code of Practice, the Respondent would have declined her business under section 31 of that Code.
26. The Respondent further submitted that the issue of two contracts was explained to the Applicant in 2022. The Respondent submits that this was part of the preamble between the parties. The Applicant wanted the full period of the stay to be at the full higher festival price. Mr Dean of Edinburgh International Festival argued, as did the Respondent, that the lesser rent, outwith the August period, would be fairer and that the Respondent would also reduce its commission for the July period. The two contracts were intended to facilitate the reduced rent for July 2022 at the reduced commission rate. What would normally attract two agency fees for two contracts only attracted one agency fee saving both parties, albeit entailing a reduced income to the Respondent. The Respondent submitted that it was an exercise in 'ease of accounting' and there was no deception to avoid referral to the Letting Agent Code of Practice.

27. The Respondent submitted that the Applicant read the terms, agreed to the final contracts and signed the agreements.

Applicant

28. The Applicant submits that the Respondent was carrying out letting agency work in relation to the two consecutive lets in July and August 2022.

29. The evidence relied on by the Applicant is her sworn affidavit dated 28 August 2024. However, she did not challenge the evidence of Ms Moon led by the Respondent despite the fact that there were some inconsistencies between the Applicant's evidence and that of Ms Moon, as discussed further in the tribunal's reasons, below.

30. The Applicant accepted in her evidence that at the time she instructed the Respondent, she had already let the Property from September 2022 and that she intended to personally manage that tenancy. She accepted that she instructed the Respondent to find a let to 'fill the gap' in summer 2022. However, she maintained that she thought that what was being arranged by the Respondent on her behalf was a PRT and not short or holiday let or lets.

31. In her supplementary written submission, the Applicant submitted that there were four areas in respect of which the parties were in dispute:

- a. The terms of the Instruction by the Applicant to the Respondents and understanding of both parties thereon;
- b. The confusion and purpose behind there being 2 contracts or rental agreements;
- c. The type of letting that took place and
- d. The nature of a PRT, requiring the property to be a "dwelling".

32. It is the Applicant's submission that she instructed the Respondents as letting agents on the basis of the 'normal definition of letting', which she submits is the act of letting or leasing a house or property to someone else as their home where they pay rental sums for so doing. She submitted that a landlord's letting agreement is, to her, a lease or tenancy agreement. She submitted that she was seeking a similar arrangement to that which she arranged herself but for a shorter period to '*fill the gap between tenants*'. She said that she instructed the Respondent to obtain a tenancy agreement with an agreed rental amount and duration with the resulting tenant being unconnected to her. She submitted that she instructed the Respondent to carry out '*letting agency work*'. She submitted that no instruction was given by her to obtain a '*short term let*' or '*Festival let*'. She said that she was unaware of any legal import of the word '*short term*',

understanding it related to the duration and not the type of lease. She said that she telephoned to clarify matters following the email dated 23 May 2022 from the Respondent to her. She maintained the same argument in submissions that subsequent to that telephone call she thought that a PRT was being arranged.

The Applicable Law

33. The Upper Tribunal decision of Sheriff McCartney (2023UT46; UTS/AP/23/0024) provides the applicable law for the preliminary issue of jurisdiction.

34. The regulation of letting agents is found in Part 4 of the Housing (Scotland) Act 2014 (the 2014 Act). Section 46 of the 2014 Act requires letting agents to adhere to the Code. To be brought within the requirement to abide by the Code, the person must be carrying out “letting agency work” in terms of section 46(1)(a). The definition of “letting agency work” is in the 2014 Act, section 61, which provides:

“(1) For the purposes of this part, “letting agency work” means things done by a person in the course of that person’s business in response to relevant instructions which are-

(a) Carried out with a view to a landlord who is a relevant person entering into, or seeking to enter into a lease or occupancy arrangement by virtue of which an unconnected person may use the landlord’s house as a dwelling, or

(b) For the purpose of managing a house...

(2) In subsection (1), “relevant instructions” are instructions received from a person in relation to the house which is, or is to be, subject to a lease or arrangement mentioned in subsection 1(a), and (b) “occupancy arrangement”, “unconnected person”, “relevant person” and “use as a dwelling” are to be construed in accordance with section 101 of the 2004 Act.”

35. The 2004 Act mentioned in section 61(2), above, is the Antisocial Behaviour etc. (Scotland) Act 2004. An “occupancy arrangement” is defined as:

“... any arrangement under which a person having the lawful right to occupy a house permits another, by way of contract or otherwise, to occupy the house or, as the case may be, part of it; but does not include a lease;”

36. Section 83(1)(b) of the 2004 Act refers to “an unconnected person may use the house as a dwelling”. In section 83(6), various scenarios are listed as not falling within the definition of “the use of a house as a dwelling” (s 83(b)

(a) to (o)). Sheriff McCartney, at para [27] of the Upper Tribunal decision states: *‘Two particular parts of s83 (6) of the 2004 Act are potentially relevant for this case. One is s83 (6)(d) where “a house is being used for holiday accommodation”. The second is s83(6)(n), where the house is being used as a short term let.’*

37. At para. [28], Sheriff McCartney states: *‘The nub of the issue is this. If a letting agent has been involved in arranging accommodation used as a holiday let or as a short term let, the Code of Practice does not apply to that letting agent’s work in arranging the let, even though they have in the ordinary sense of the words, acted as a letting agent.’*

38. At para. 36 of the decision, Sheriff McCartney suggested that the tribunal might approach its fact finding with the following route map in mind, having regard to the various statutory definitions:

‘1. Has the letting agent arranged for a relevant person to occupy the landlord’s property?

2. If so, has a lease or occupancy arrangement sought to be entered into?

3. If so, is the person an unconnected person?

4. If so, is the property being used as a dwelling.’

Findings in fact

39. The Applicant is the registered proprietor of the Property.

40. The Applicant is an experienced landlord and prior to May 2022, she self-managed the letting of the Property.

41. As a result of her prior management of the Property, the Applicant was aware of the nature and requirements of a Private Residential Tenancy in or around May 2022.

42. In or around May 2022, a Private Residential Tenancy of the Property came to an end.

43. The Applicant arranged a new Private Residential Tenancy of the Property to commence in around September 2022, which she intended to manage herself.

44. The Applicant instructed the Respondent to obtain a let to fill the gap between in or around June 2022 to on or around 1 September 2022.

45. The Applicant had not previously instructed the Respondent in respect of letting or management of the Property.

46. The Applicant met a representative of the Respondent at the Property to discuss her requirements.
47. Following that meeting, in May 2022, the Respondent informed the Applicant in writing and by telephone that they would use their short term and Festival contract for the period in question.
48. The Respondent arranged on behalf of the Applicant for two consecutive lets of the Property from 17 to 31 July 2022 and from 1 August to 1 September 2022, both with the same person, who was arranging accommodation for short term Edinburgh Festival workers engaged by his company.
49. The first short let for the period from 17 July to 31 July had a total net rent of £482.90 and a Commission rate of 17% plus VAT, which was £103.13 plus VAT.
50. The second short let was a Festival let from 1 August until 1 September 2022, with a net rent of £3952.00 and a Commission rate of 20% plus VAT, which was £1040 plus VAT.
51. Those using the property during both short lets provided their permanent home addresses to the Respondent and they were included on the contracts which were entered into between the Respondent, the individual arranging the lets on behalf of the Festival workers and the Applicant.
52. Council tax was included in the rental payments for both short lets.
53. The Applicant signed the two short term let contracts.
54. The Respondent remitted the net rentals of £482.90 and £3952.00 to the Applicant.

Findings in fact and law

55. The Respondent was acting in the course of its business in response to instructions from the Applicant.
56. The Respondent arranged for the Applicant to enter into two consecutive occupancy arrangements for the Property, by virtue of which unconnected persons were entitled to use the Property for the fixed periods of 17 to 31 July 2022 and 1 August to 1 September 2022, respectively.

57. Those using the Property in terms of the occupancy arrangements were not using it as a dwelling in terms of section 61 of the 2014 Act and section 101 of the 2004 Act, because it was being used as a short term let for both occupancy arrangements.
58. At the material time from 17 July to 1 September 2022, the Respondent was not carrying out letting agency work in terms of section 61 of the 2014 Act.

The tribunal's determination regarding the preliminary issue

59. Reference is made to the tribunal's findings of fact and findings of fact and law. The tribunal was satisfied that at the material time and in respect of the two fixed term short lets from 17 to 31 July and from 1 August to 1 September 2022, in the name of Mr Dean, for use by Festival workers engaged by his company they were short term lets and the individuals staying in the Property were not using the Property as a 'dwelling' in terms of the 2014 Act; thus, the Respondent was not carrying out letting agency work for the purposes of Section 61 of the 2014 Act.
60. The contemporaneous documentation lodged with the tribunal confirmed and supported the evidence of Ms Moon from the Respondent. In particular, the contact log between the parties included an entry 23 May 2022 at 4:30 (Respondent's Bundle, pages 9-12 of 64), below. The bold/underline is matters which the tribunal considered important and on which it invited submissions from both parties prior to reaching its decision:

'From: Jordain Moon <jordain@factotum.co.uk> Sent: Monday, May 23, 2022 4:30 PM

To: Naheed Rashid <rashidna@yahoo.co.uk> Subject: Re: 11371 - Lady Lawson - Enquiry

Good afternoon, Thank you for your email.

***As you are new to short-term letting**, I will provide a brief overview of how the process works.*

*Factotum offer Long term, short term, and festival contracts. **The short term and festival contract will apply in this instance.***

We can offer to look after your property whilst you have long term tenants in, that way your property would remain with factotum throughout the year. Let me know if this is something you would be interested in.

***Short term contracts can typically last between 1 week to 4 months. The contract is normally signed on a fixed term**, for instance the let you just agreed to 17/06/22 to 01/09/22. The rental agreement document is sent to the landlord and the tenant separately via sign request, where a signature and date would be required on the form. This is done electronically to save paper; however, we can post one to yourself at your request. We do require this to be returned to us, usually within a week of issuing the document.*

*Your copy of the landlord agreement would include your name and address, along with the name of the lead tenant and **tenant's permanent address** - this confirms who the contract is between. Along with this, **the document will clearly state the lease period and note the rental amount.** ...'*

61. The tribunal also considered the terms of the contracts between the Applicant and Mr Dean, which were signed by the Applicant. They were each headed 'Landlord's Rental Agreement'. The relative rental and commission rates are specified. The tribunal accepted the evidence of the Respondent that the reason two contracts were used was to account for the different rental and commission rates that applied for the Festival period in August from those in July. The rental payments were said in the contract to include council tax.
62. The Applicant was unable to satisfy the tribunal that her interpretation of contracts she entered into should be preferred to that of the Respondent, given the documentary evidence which included the two contracts, the communications log between the parties and the unchallenged evidence of Ms Moon.
63. The tribunal preferred Ms Moon's evidence to that of the Applicant, namely that the Respondent arranged two consecutive short term lets or occupancy arrangements for the Property in summer 2022. They were short term lets rather than holiday lets because the individuals using the Property were engaged by Mr Dean to carry out work at the Edinburgh festivals. The Applicant's position that she thought at the material time in or around May 2022, that the Respondent was being instructed by her to secure a PRT was unsustainable, particularly as she herself used the phrase 'fill the gap' in her evidence, with reference to the vacant period before the PRT she had arranged to commence in September 2022. A straightforward interpretation of the contractual documentation and the communications between the parties clearly supported the Respondent's position that the lets which were being arranged for the Applicant's property in summer 2022 were short, or holiday lets to 'fill a gap' (the Applicant's own phraseology, as above) between a Private Residential Tenancy which had finished before summer 2022 and one which the Applicant had arranged to commence in or about September 2022.
64. The Applicant's own evidence was that she was an experienced landlord who had, prior to engaging the Respondent, managed the letting of the Property and was due to do again from the commencement of the new PRT in autumn 2022. As a private landlord she knew, or ought to have known, that had the letting agent arranged a Private Residential Tenancy for the void period in the summer (which the Respondent denied), the tenants in such a tenancy would have security of tenure and could only have been evicted on one of the grounds in the Private Housing (Tenancies)(Scotland) Act 2016 (the 2016 Act), which

would have left the Applicant unable to fulfil the Private Residential Tenancy which she had already entered into. Therefore, the tribunal did not accept the Applicant's evidence on the material point that the two lets in July and August 2022 were PRTs, or that she had a reasonable basis to think that they were.

65. The individuals using the Property in both periods were not using it as a dwelling, in the meaning given to it by section 61 of the 2014 Act and the connected definition in section 101 of the 2004 Act, as outlined above.

66. It is observed by the tribunal that it the application of the legislative provisions in the 2014 Act means that a letting agent business which, acting on the instructions of a property owner, arranges a short term let for a Property which lasts, as a matter of fact, for around six weeks, is exempt from the requirements of the Code; while the same business arranging a PRT to commence on a given date is not, despite the fact that a PRT which could be terminated with 28 days' notice from a tenant. However, a short term let is a different legal creature from a PRT. Parliament determined that those carrying out business in arranging short term lets and holiday lets on behalf of a property owner should be exempt from the application of the Code and that is captured in the 2014 Act, section 83(6)(n). The tribunal must apply the applicable law to the facts of the case. In this case, the Respondent was not carrying out letting agency work for the purposes of section 61 of the 2014 Act in arranging the two said short terms lets of the Property on behalf of the Applicant.

67. The consequence of the tribunal's decision on the preliminary issue is that the Code does not apply and the tribunal does not have jurisdiction to deal with the allegations in the Application that the Respondent has failed to comply with the Code.

Appeals

A party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

Ms Susanne L M Tanner KC
Legal Member and Chair

3 March 2025