

Housing and Property Chamber

First-tier Tribunal for Scotland



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

Chamber Ref: FTS/HPC/LA/21/0494

Re: 31/13 Simpson Loan, Quatermile, Edinburgh, EH3 9GG (“the Property”)

The Parties:-

Dr Mark Worsley, 14 Cranston Crescent, Lauder, Scottish Borders, TD2 6UB (“the Applicant”)

GSL (Glasgow Sales and Lettings), 27 Oswald Street, Glasgow, G1 4PE (“the Respondent”)

Tribunal Members:-

Alastair Houston - Chairing and Legal Member
Eileen Shand - Ordinary Member (Housing)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (‘the tribunal’), having considered the submissions of the parties and documents lodged by them, determines that the Application should be refused.

1. Background

- 1.1 The present application is an application under section 48 of the Housing (Scotland) Act 2014 (the Act) made to the tribunal by the Applicant. The application was made in terms of section 48 and rule 95 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations (“the Rules”).
- 1.2 The Application comprised of the application form and supporting documentation, including copies of the written agreement between the parties relating to the management of the property and the written agreement between the Applicant and Style Plus Group Ltd (“Style Plus”) relating to the latter’s use of the property. Copies of emails between the parties were also lodged.

2. The Hearing

- 2.1 The hearing took place on 13 May 2021 by way of teleconference. The Applicant appeared personally. The Respondent was represented by Ms Sharon Campbell, director of the Respondent and she was also accompanied by Ms Cassie Mitchell, property manager employed by the Respondent.
- 2.2 The Tribunal had considered the application and accompanying documentation in advance of the hearing. When the hearing commenced, the Tribunal advised the parties that the hearing was to be used to determine a preliminary issue that had arisen, namely whether the Tribunal could competently deal with the dispute between the parties, given the terms of the agreements which accompanied the application.
- 2.3 The Tribunal heard from the Applicant. He confirmed that he had entered into an agreement with the Respondent to manage the property. Under that agreement, the Respondent was to identify a "corporate tenant" as he did not wish to let the property on a private residential tenancy. The Respondent was to manage any agreement with the party identified. The Applicant was not aware of the identity of Style Plus at the time of the commencement of the agreement with them, the Respondent having prepared the written agreement and signed on his behalf, nor of their intentions in respect of the property. He later learned of their identity and his understanding was that they were not occupying the property in any way, rather they were to sub let it to business travellers. He was not aware if they had ever sub let the property to any such individuals.
- 2.4 The Tribunal then heard from Ms Campbell on behalf of the Respondent. She confirmed that Style Plus had been identified as a corporate tenant. Whilst the Respondent had prepared the agreement with them they were not involved in any arrangements that Style Plus then made for the property. She was aware that Style Plus intended to let the property to individuals known to them who required accommodation for business purposes. Style Plus provided furnishings and cleaning services to those individuals. The Respondent had no involvement in any agreement between Style Plus and any other individual nor did they provide any services. Ms Campbell understood that only one individual had occupied the property for two days following the commencement of the agreement with Style Plus until its termination.

3. Findings In Fact

- 3.1 On 15 February 2020, the Applicant entered into an agreement with the Respondent to act as their agent and provide services in terms of the written agreement between them.
- 3.2 On behalf of the Applicant, the Respondent entered into an agreement with Style Plus, dated 3 March 2020, which permitted the use of the property as serviced apartment.

- 3.3 Style Plus are a limited company who were to make the property available to unnamed individuals requiring accommodation in connection with business travel.
- 3.4 Style Plus did not occupy the property to any extent.
- 3.5 The services provided by the Respondent extended insofar as the agreement between the Applicant and Style Plus.

4. Findings In Fact And Law

- 4.1 The Respondent did not carry out any letting agency work within the meaning of section 61 of the Housing (Scotland) Act 2014 (“the 2014 Act”) in respect of the Property.
- 4.2 The Letting Agent Code of Practice (“the Code of Practice”) did not apply to the agreement between the parties and the application under section 48 of the 2014 Act to enforce

5. Reasons For Decision

- 5.1 In this application, the Applicant sought to enforce the Code of Practice under section 48 of the 2014 Act. The extent of the application of the Code of Practice is governed by section 46 of the 2014 Act, which states:-

46 Letting Agent Code of Practice

(1) The Scottish Ministers may, by regulations, set out a code of practice which makes provision about—

- (a) the standards of practice of persons who carry out letting agency work,*
(b) the handling of tenants' and landlords' money by those persons, and
(c) the professional indemnity arrangements to be kept in place by those persons.

(2) The code of practice is to be known as the Letting Agent Code of Practice.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate on a draft of the code of practice.

Furthermore, the term “letting agent”, as it appears in Part 4 of 2014 Act, is defined by section 62 as a person who carries out letting agency work. In turn, letting agency work is defined by section 61 of the 2014 Act, which states:-

61 Meaning of letting agency work

(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 (including in particular collecting rent, inspecting the house and making arrangements for the repair, maintenance, improvement or insurance of the house) which is, or is to be, subject to a lease or arrangement mentioned in paragraph (a).

(2) In subsection (1)—

(a) “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.

(3) The Scottish Ministers may by order—

(a) provide that “letting agency work” does not include things done—

(i) on behalf of a specified body, or

(ii) for the purpose of a scheme of a specified description, or

(b) otherwise modify the meaning of “letting agency work” for the time being in this section.

(4) A scheme falling within a description specified by the Scottish Ministers under subsection (3)(a)(ii) must be—

(a) operated by a body which does not carry on the scheme for profit, and

(b) for the purpose of assisting persons to enter into leases or occupancy agreements.

It therefore appears to the Tribunal that, for an agent to be deemed to be carrying out letting agency work and, accordingly, subject to the Code of Practice, they must either be doing things in response to instructions from a landlord seeing to enter into, or providing management services in connection with a property which is subject to, or is to be subject to, a lease or occupancy agreement whereby an unconnected person will be using the property as a dwelling.

- 5.2 The term “use as a dwelling” has the meaning given by section 101 of the Antisocial Behaviour etc. (Scotland) Act 2004 (“the 2004 Act”) which, in turn, refers to section 83(6) of the 2004 Act, which states:-

(6) For the purposes of subsection (1)(b), the use of a house as a dwelling shall be disregarded if—

(a) the house is being used for the provision of—

(i) a care home service (as defined in [paragraph 2 of schedule 12 to the Public Services Reform (Scotland) Act 2010]2);

(ii) a school care accommodation service (as defined in [paragraph 3 of that schedule]3);

*[...]*⁴

(iv) a secure accommodation service (as defined in [paragraph 6 of that schedule]5);

[(v) an independent hospital (as defined in subsection (2) of section 10F of the Public Services Reform (Scotland) Act 2010 (asp 8));

(vi) a private psychiatric hospital (as defined in that section);

(vii) an independent clinic (as defined in that section); or

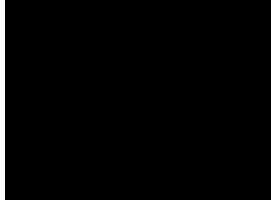
(viii) an independent medical agency (as defined in that section);]

Section 86(6) does not give an overarching meaning of “use as a dwelling”, rather, it lists a series of uses of a property which would result in a property not being used as a dwelling. The Tribunal has considered the Supreme Court judgement in the case of *R (N) v Lewisham LBC* [2015] AC 1259, which concerned protection afforded to occupants in England by virtue of the Protection from Eviction Act 1977. In that case, the Court held that the word “dwell” did not have any technical meaning and that “dwelling” could be equated with one’s home. Although the case concerned different English legislation, the Tribunal notes the absence of any technical definition of “dwelling” in the 2014 Act, beyond the list of accommodation exempted by virtue of section 86(6) of the 2004 Act, therefore, the Tribunal is of the opinion that “dwelling” ought to be afforded its ordinary meaning, namely, a place where a person lives or their home.

5.3 Given that interpretation, the Tribunal does not consider that the agreement between the Applicant and Style Plus could be considered a lease or occupancy agreement whereby the property was to be used as a dwelling in terms of section 61 of the 2014 Act. Style Plus are a limited company and, in the Tribunal’s opinion, are incapable of occupying the property as their home. Any management or services provided by a commercial lease or agreement between a landlord and a limited company could not therefore satisfy the definition of letting agency work contained within section 61 of the 2014 Act. If the Tribunal is incorrect on that point, then it becomes necessary to look at the factual circumstances in the present case. It was not in dispute that Style Plus were not occupying the property, nor did they ever intend to. Rather, they were to enter into separate agreements with individuals to which the Applicant and Respondent were not party. In those circumstances, the Tribunal would reach the same conclusion in that the services provided by the Respondent under their agreement with the Applicant and in connection with the Applicant’s agreement with Style Plus is not letting agency work in respect of which the Code of Practice can be enforced.

5.4 Section 48 of the 2014 Act allows a landlord to apply to the Tribunal for a determination as to whether a letting agent has failed to comply with the Code of Practice. The statute does not permit the Tribunal to consider any other disputes between a landlord and agent. Accordingly, as the Tribunal has found that the Code of Practice does not apply in the present application, it must be refused.

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.



Alastair Houston
Legal Member and Chair

Date: 14 May 2021