Housing and Property Chamber
First-tier Tribunal for Scotland

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

Chamber Ref: FTS/HPC/LA/19/1726

Re: Property at 14 South Street, St Andrews, Fife (Room 14) ("the Property")

Parties:

Ms Thalia Ostendorf, residing at 13 Straiton Way, St Andrews, Fife, KY16 8HT ("the Applicant"), represented by Mr Seamus Johnstone MacLeod, Living Rent, Edinburgh

Rollos, Solicitors and Estate Agents, 6 Bell Street St Andrews Fife ("the Respondent") represented by Mr James Martin, Solicitor and Ms Susan Laing HMO Administrator, both of Rollos, Solicitors

Tribunal Members:

Ewan Miller (Legal Member) and Colin Campbell (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal'), following direction from the Upper Tribunal after a successful appeal by the Applicant, had further considered matters and determined that the Respondent had breached Paragraph 82 of the Letting Agent Code of Practice (Scotland) Regulations 2016 ("the Code"). As a result, the Tribunal determined that a further Letting Agent Enforcement Order ("LAEO") should be made as undernoted, ordering the Respondent to pay the Applicant a further sum of £200.

The Decision was unanimous.

Background

1. Reference is made to the original Determination of the Tribunal dated 17 February 2020. The Tribunal had found that the Respondent had breached Paragraph 17 of the Code. The Tribunal had found that the Respondent had not breached Paragraphs 28, 82 & 85 of the Code.

2. The Applicant accepted the Tribunal's original determination that there had been no breach of Paragraph 28 & 85 of the Code. However, the Applicant disputed the Tribunal's finding that there had been no breach of Paragraph 82 of the Code and sought leave from the Tribunal to appeal the decision. The Tribunal, on reflection, accepted that it may well have erred in its interpretation of Paragraph 82 of the Code and granted permission for the Applicant to appeal to the Upper Tribunal.

3. Paragraph 82 of the Code states:-

   "You must give reasonable notice of your intention to visit the property and the reason for this. Section 184 of the Housing (Scotland) Act 2006 specifies that at least 24 hours notice must be given unless the situation is urgent or you consider that such notice would defeat the object of the entry. You must ensure that the tenant is present when entering the property and visit at reasonable times of the day unless otherwise agreed with the tenant"

4. The Tribunal, at the original hearing, had had concerns about the practicality of Paragraph 82 in relation to the Property (a large 14 bed HMO property) and the frequency with which visits would be required to the Property and its communal areas. It had focussed on (a) the second sentence of Paragraph 82 and the challenge of ensuring that all tenants were present and (b) whether notification was required to the same degree if access was only being take to communal areas within the Property as opposed to the individual bedrooms occupied exclusively by tenants within it. The Tribunal had taken the view that notification, whilst beneficial, was not mandatory in relation to the communal areas.

5. The Upper Tribunal, by decision dated 21 February 2021, determined that the Tribunal had erred in its interpretation of Paragraph 82. The rationale of the Upper Tribunal is set out at Paragraphs 10 to 21 of its decision. In brief summary, the Upper Tribunal was satisfied that the use of the word "property" in Paragraph 82 of the Code not only covered those areas let exclusively to the Applicant but also to any areas let in common with other tenants, such as communal kitchens, and bathrooms as are often found within HMO properties. The Upper Tribunal also determined that the Tribunal had erred in focussing on the second sentence of Paragraph 82. That related to a question as to the extent of the obligation imposed by that sentence on the letting agent to ensure that all tenants were present. However, the behaviour of the Respondent that the Applicant objected to was in relation to a failure by the Respondent to ensure that notification had been given to the Applicant in advance i.e. in breach of the first sentence of Paragraph 82. In essence, The Tribunal had erred in its decision that notification did not necessarily need to be given when taking access to common parts and had failed to properly consider whether the first sentence of Paragraph 82 had been adhered to.

6. The Upper Tribunal noted that whilst there was some reference in the narrative of the decision that suggested that the Tribunal had accepted that the Respondent had taken access to common parts of the Property without the appropriate notice, unfortunately the Tribunal had failed to make findings of fact and set out its reasons in this regard and focussed solely on its erroneous interpretation of Paragraph 82. Accordingly, the Upper Tribunal remitted the matter back to the Tribunal to make findings in fact based on the evidence before it in relation to whether there had, in fact, been a breach of Paragraph 82. In the event that the Respondent was found on the facts to be in breach of Paragraph 82 then the Tribunal would require to consider the grant of a LAEO in consequence of the breach.

7. The Tribunal was grateful to the Upper Tribunal for its guidance on the matter and considered again the evidence before it. The Tribunal was in little doubt that access had been taken to communal parts of the Property without notification being given to the Applicant in terms of the first sentence of Paragraph 82 for the following reasons:-

    - In an email of 28 January 2019 the Respondent apologised to the Applicant for tradesmen turning up announced. It was clear notification had not taken place;
    - The Respondent also stated in the same email that they do try to get tradesmen to call before arriving – this was not consistent, in the view of the Tribunal, with a process where formal notification always took place;
    - In a response by the Applicant to the Respondent on 29 January 2019 she highlighted that another unannounced visit had occurred that day. This was not disputed in any response exhibited to the Tribunal or denied at the hearing;
    - On or around 5 April, the Respondent's took entry to communal areas of the larger building to post a decision to leave under the door of the Applicant's bedroom. This was confirmed via email by the Respondent on 5 April. It was also confirmed by the Respondent's representatives at the hearing. It was not disputed that no notification had been given as required by Paragraph 82
    - On 20 April 2021 in response to a clarification question from the Tribunal the Respondent confirmed by email at paragraph 3 that notification was not always sent to all tenants and sometimes one tenant was asked to inform other tenants of upcoming access arrangements.

8. For the reasons set out above, the Tribunal was satisfied that Paragraph 82 had been breached by the Respondent. The Tribunal noted again, as per their original decision, that the Respondent did not appear to have ever taken access to the Applicant's individual room without notification. The Respondent was also hampered in relation to access arrangements as the landlord of the Property employed a separate party to manage certain other works such as fire alarm tests. The Respondents did appear to have a proper management system to allow it to carry out notifications but it appeared there had been lapses in using it on all occasions. Nonetheless, it was clear, given the decision of the Upper Tribunal, that

there had been access to communal areas without notification and that this was a breach of Paragraph 82 of the Code.

9. The Tribunal made the following findings of fact:-

- That on or around 28 and 29 January and 5 April all 2019, access was taken by parties instructed by the Respondent to communal parts of the Property;
- That no notification of these visits had been given to the Applicant as required by the Code and the Applicant's lease;
- That, by the Respondent's own admission, there had been other occasions where no notification had been given or notification had been given by an inadequate means such as asking one tenant to advise others

10. In light of the above findings of fact, the Tribunal determined that the Respondent had breached Paragraph 82 of the Code in that reasonable notice of intention to visit the Property had not been given. In terms of s46(7) of the Housing (Scotland) Act 2014, where the Tribunal determines that a letting agent has failed to comply it must require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure.

11. The Tribunal considered what steps may be necessary to rectify the failure. The Tribunal noted that the Respondent appeared to have in place an appropriate property management system in place that could readily email notifications to tenants of properties it managed. The Respondent was now aware that taking access to communal areas required notification. The Respondent was no longer managing the Property in any event. In the view of the Tribunal there were no actions required from the Respondent as the Respondent was now aware of what was required and had the software to ensure this occurred. The Tribunal did, however, note the comment of the Upper Tribunal at para 20 of its decision that *"Notification is a prior and separate obligation of great importance. Tenants who are given notice by a letting agent that entry is being taken are in a position to decide how they wish to deal with the proposed entry. The failure to notify leads to entry being taken without any prior knowledge on the part of individual tenants"* The failure to notify could lead to a tenant being disrupted whilst cooking or even carrying out their personal ablutions. It was apparent that the Applicant had been upset by the lack of notification and had highlighted this to the Respondents on several occasions without their procedures being changed. In the circumstances the Tribunal was satisfied that a modest further payment should be made to the Applicant by the Respondent. The Tribunal was satisfied that £200 would be an appropriate further amount

12. **Decision**

The Tribunal determined that, following upon the Upper Tribunal decision and the re-consideration of the evidence by the Tribunal in relation to Paragraph 82 that in addition to the breach of Paragraph 17 of the Code, the Respondent had breached Paragraph 82 of the Code. The Tribunal resolved to make an LAEO obliging the Respondent to make payment to the Applicant of the sum of £200 within 30 days of the date of service of the LAEO

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.

03/05/2022

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Legal Member/Chair **Date**