

Housing and Property Chamber

First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

Statement of Decision: Section 48(7) Housing (Scotland) Act 2014

Reference number: FTS/HPC/LA/20/1904

Wendilane Limited (“the Applicant”)

Edzell Property Management (“the Respondent”)

Tribunal Members:

Andrew McLaughlin (Legal Member), Janine Green (Ordinary Member)

Background

The Applicant seeks a determination that the Respondent has failed to comply with paragraphs 21;26; 29 (a); 30; 32(a) 32 (b); 32 (f); 32 (i); 32(k); 32(m); 32 (p); 32 (q),78; 107;110;112;117;118;120;121;123 and 124 of the Letting Agent Code of Practice contrary to s48 (1) of the Housing (Scotland) Act 2014.

In support of the Application, the Applicant had produced a large volume of email correspondence between the parties together with a copy of the “*Management Agreement*” that appeared to form the written contract between the parties. The Tribunal was also satisfied that all of the alleged breaches of the Code had been intimated to the Respondent prior to the lodging of this Application in satisfaction of s48 (4) of the Housing (Scotland) Act 2014 and appropriate time had been given to the Respondent to respond.

The Hearing

The Application called for a Hearing by Conference call at 10 am on 2 June 2021. The Applicant was represented by Ms Nommiselo Nene, who is the Applicant's sole director and shareholder. The Application and information about how to join the conference call had been served on the Respondents by Sheriff Officers on 14 April 2021.

There was no appearance by or on behalf of the Respondent. The Tribunal noted that there had similarly been no appearances by or on behalf of the Respondent at the two previous callings of the Application.

On the basis that the Respondents had fair notice of the Hearing, the Tribunal decided to proceed with the Hearing in the absence of the Respondent. The Tribunal began hearing evidence from the Ms Nene. This took the form of the Tribunal asking Ms Nene to comment on each alleged breach of the Code and to refer the Tribunal to any of the emails or documents that supported her position. The Tribunal carefully questioned Ms Nene who sought to take the Tribunal through the list of alleged breaches in chronological order.

Ms Nommiselo Nene

Ms Nomiselo Nene resides in London and works in financial services. She owns three properties through her company, Wendilane Limited.

The Application relates to the Respondent's management of single property at Flat 3/2 Craig Street, Govanhill G42 8ND.

The Applicant acquired this Property in March 2018 and Ms Nene advised that it had been marketed for sale by the Respondent and it was sold with a sitting tenant as an investment property. The rent received was to be £450.00 a month subject to a deduction of a 10 per cent management fee plus VAT which would be retained by the Respondent.

Ms Nene had first become aware of the Respondent when she was recommended to contact them through a South African networking group of which Ms Nene was a member.

When Ms Nene purchased the property, she completed a form which included providing her own bank details to the Respondent for the purposes of receiving the rental payments. This was part of the document described as the "Management Agreement" between the parties which the Tribunal had before it.

Ms Nene gave a detailed picture of her difficulties with the Respondent right from the start of her business relationship with them.

In essence, Ms Nene's grievances could be categorised into four main complaints. First of all, she was aggrieved that the Applicant did not receive rental payments when expected. No payments at all were received from when the Applicant first purchased the property in March 2018 until September 2018 when, after much chasing, the Applicant finally received what they were due and which they should have received in March or at the latest April of 2018. Part of the issue also included a lack of clarity about whether payments would be received in the month the rent was received or in the month after. The Management Agreement simply referred to receiving payments on the 10th of the month.

There were other occasions when the Applicant didn't receive rental payments that they were entitled to. Ms Nene highlighted another month in September 2019 when no rent was received and had to be chased for and also another whole six-month period between March 2020 and September 2020 when once again no rent at all was received without explanation.

Ms Nene highlighted that there was nothing ever to suggest that the Respondent had not received the rental payments from the tenant as the unfortunate pattern appeared to be that ultimately after extensive chasing the money would be paid out in full without any real explanation given.

The second principal grievance was that Ms Nene frequently attempted to complain about the way the Respondent was treating her but these complaints were never addressed or in any way taken seriously from Ms Nene's perspective. There was nothing to suggest her complaints were given any respect or attention at all. Numerous emails asking to address various issues appear to have simply been ignored.

The third principal complaint Ms Nene had against the Respondent was that the Respondent made it almost impossible for her to take her business elsewhere by moving agencies. Ms Nene gave evidence that she had informed the Respondent that the Applicant wished to take their business elsewhere as early as November 2018.

There was a copy email referred to from January 2019 referring to the previous expressed wish to change agencies and which attempted to try and hurry this up.

Ms Nene gave evidence that it was not until September 2020 that the Respondents actually made it possible for the Applicant to change agents by returning the keys to the property to the Applicant's new agent and by making the necessary financial arrangements. Ms Nene referred to her management agreement with the Respondent

and acknowledged that it provided for the giving of six month's notice before changing agents -but in reality it took the Applicant two months short of two years.

Ms Nene described this as hugely frustrating. She was a busy professional and she had hoped that engaging a lettings agent would save her time and hassle but instead the opposite was the case.

The final principal aspect of the Applicant's complaint was that the Respondent's charges were not clearly explained and seemed somewhat made up on the spot. Ms Nene gave evidence that when she first met with the Respondent she had been asked to pay £125.00 to transfer over the tenancy which was not referred to anywhere in the Respondent's terms of business.

The Respondent also demanded a payment of £350.00 to allow the Applicant to change agents- again this a cost mentioned nowhere in the management agreement. This sum was never paid by the Applicant. Finally though, when the Respondent did eventually facilitate the transfer of agency, there was an unspecified deduction on the ledger for £450.00. Ms Nene had no idea what this was for and it was not referred to at all in the management agreement. Ms Nene considered that it appeared to be taken as some sort of closing administration charge despite this never being explained to the Applicant or referred to anywhere in the management agreement.

The Tribunal noted that these above complaints had been moulded to fit into virtually all the alleged breaches of the Code. It was these grievances that were the main complaints and Ms Nene had thought it prudent to base her case on as many grounds as possible. The Tribunal went through each alleged breach with Ms Nene and noted that each alleged breach was in essence a rehearsal of these same points. Ms Nene did concede that the alleged breach of 30 (f) was perhaps dubious as she couldn't provide any evidence to support the allegation that the Respondent had not acted appropriately with the deposit. There was another complaint that the Respondent had failed to display their registered letting agents number on their correspondence. The Tribunal could certainly not see it on the management agreement or on the emails sent to the Applicant.

The Tribunal found Ms Nene to be a credible and impressive witness. She had diligently supplied the Tribunal with all the relevant information and could direct the Tribunals to documents and emails to back up each point that she was making. She didn't seem prone to exaggeration but instead appeared genuinely frustrated by what she described as being the very poor service her business received.

The Specific paragraphs of the Code referred to in the Application which are said to have been breached in the Application are as follows:

21. You must carry out the services you provide to landlords or tenants using reasonable care and skill and in a timely way.

26. You must respond to enquiries and complaints within reasonable timescales and in line with your written agreement.

29. In your dealings with potential landlord clients you must:

Services provided and fee charges

a) provide clear and up-to-date written information about the services you provide and the charges (inclusive of taxes) for them;

30. You must agree with the landlord what services you will provide and any other specific terms of engagement. This should include the minimum service standards they can expect and the target times for taking action in response to requests from them and their tenants.

32. Your terms of business must be written in plain language and, alongside any other reasonable terms you wish to include, must clearly set out:

Core services

(a) the services you will provide to that landlord and the property they relate to. For example, tenant introduction, lettings service and full management service;

(b) the duration of the agreement and the date it commences;

(f) your management fees and charges (including taxes) for your services, and your processes for reviewing and increasing or decreasing this fee;

(i) if a tenancy deposit is to be taken, who will lodge the deposit with one of the approved schemes;

(k) how you will communicate (including the use of electronic communication with landlords and tenants, and the timescales within which you could be reasonably expected to respond to enquiries;

(l) your procedures for handling complaints and disputes between you and the landlord and tenants and the timescales within which you could be reasonably expected to respond;

(m) how a landlord and tenant may apply to the Tribunal if they remain dissatisfied after your complaints process has been exhausted, or if you do not process the complaint within a reasonable timescale through your complaints handling procedure;

(p) if you hold client money, how you handle clients' money; confirmation that you hold client money protection insurance or equivalent protection through another body or membership organisation and that further details (such as the name of your provider, your policy number and a summary of the policy) are available from you on request;

(q) clear information on how to change or end the agreement and any fees or charges (inclusive of taxes) that may apply and in what circumstances. Termination charges and related terms must not be unreasonable or excessive.

78. *You should inform the landlord in writing of the late payment of rent, in line with your written procedures or agreement with the landlord.*

107. *You must take all reasonable steps to ensure your letting agent registration number is included in all relevant documents and communications in line with your legal requirements under the 2014 Act.*

110. *You must make landlords and tenants aware of the Code and give them a copy on request, electronically if you prefer.*

112. *You must have a clear written complaints procedure that states how to complain to your business and, as a minimum, make it available on request. It must include the series of steps that a complaint may go through, with reasonable timescales linked to those set out in your agreed terms of business*

117. *In this section "client money" means money held or rent collected on behalf of a prospective tenant, tenant or landlord (including former tenant or landlord). This section only applies if you hold and handle client money.*

118. *You must have robust and transparent written procedures for handling client money.*

119. *You must keep adequate records and accounts to show all dealings with client money.*

120. *You must be able to account immediately to them for all money held on behalf of clients.*

121. *You must ensure you hold client money in one or more separate and dedicated client bank accounts with a bank or building society authorised by the Financial Conduct Authority, separate from your main business or private accounts.*

122. *You must have written confirmation from any bank or building society where a client account is held that the following conditions apply:*

(a) that all money standing to the credit of that account is client money; and

(b) that the bank or building society is not entitled to combine the account with any other account or exercise any right to set-off or counterclaim against money in that account for any sum owed to the bank or building society on any other of your accounts it holds.

123. *You must regularly record and monitor all transactions and reconcile these monthly as a minimum.*

124. *You must ensure clients' money is available to them on request and is given to them without unnecessary delay or penalties, unless agreed otherwise in writing (for example to take account of any money outstanding for agreed works undertaken).*

These standards were discussed with Ms Nene who was carefully questioned by the Tribunal on each alleged breach of the Code.

Findings in fact

Having heard from Ms Nene and considered the Application together with the emails and documents produced in support of the Application, the Tribunal made the following findings in fact.

1. *The Applicant acquired Flat 3/2 Craig Street, Govanhill G42 8ND ("The Property") in March 2018;*
2. *The Property was marketed for sale by the Respondent and it was sold to the Applicant with a sitting tenant as an investment property;*
3. *The rent received was to be £450.00 a month subject to a deduction of a 10 per cent management fee plus VAT which would be retained by the Respondent from the rent paid out to the Applicant;*
4. *Ms Nene had first become aware of the Respondent when she was recommended to contact them through a South African networking group of which Ms Nene was a member;*
5. *When Ms Nene purchased the Property she completed a form which included providing her own bank details to the Respondent for the purposes of receiving the rental payments. This was part of the Management Agreement between the parties which the Tribunal had before it and which set out the contractual relationship between the parties;*

6. *The Applicant received no rental payments at all from when the Applicant first purchased the Property in March 2018 until September 2018;*
7. *The Applicant also, without any explanation, received no rental income for the month of September 2019;*
8. *The Applicant also received no rental income for another six-month period between March 2020 and September 2020;*
9. *The Applicant was never provided with any explanation as to why the rental payments received were not paid out to the Applicant during these separate periods;*
10. *There is no evidence that the sitting tenant at the Property had ever failed to pay rent to the Respondents during the periods referred to;*
11. *The Applicant complained several times about the services provided by the Respondent but there was nothing to suggest these complaints were given any respect or attention at all. Numerous emails asking to address various issues appear to have simply been ignored by the Respondent;*
12. *The Respondent thwarted the Respondent from taking her business elsewhere and did not provide any explanation about why they were seemingly unable or unwilling to cooperate with the Applicant about transferring the management of the Property to another provider;*
13. *The Applicant first informed the Respondent that the Applicant wished to take their business elsewhere in November 2018. It was not until September 2020 that the Respondents facilitated the transfer by returning the keys to the property to the Applicant's new agents and making the necessary financial arrangements.*
14. *When the Applicant took over the landlord's interest in the Property, the Applicant was asked to pay £125.00 to transfer over the tenancy which was not referred to anywhere in the Respondent's management agreement;*
15. *The Respondent also demanded a payment of £350.00 to allow the Applicant to change agents which is again a cost not mentioned anywhere in the management agreement. This sum was ultimately never paid by the Applicant. However, when the Respondent did eventually facilitate the transfer of the management of the Property, there was an*

unspecified deduction on the ledger for £450.00. What this cost is for cannot be established from any terms contained within the management agreement or from any other information before the Tribunal;

16. Ms Nene was hugely frustrated by the consequences of the poor service the Applicant received at the hands of the Respondent;

17. The Respondent's management agreement is deficient as it fails to properly identify the Respondent's charges in a manner that can be readily understood;

18. The Respondent's complaints handling procedure is unsatisfactory in that there is no evidence that any such policy exists or that the Applicant's complaints were in any way entertained;

19. The Respondent has failed to adequately pay out the rental income received at the Property to the Applicant or provide any explanation as to why it could not been timeously paid;

20. The Respondent does not appear to display their letting agent registration number on all relevant documents and communications in line with their legal requirements under the 2014 Act as per paragraph 107 of the Code;

Decision.

Having made the above findings in fact, the Tribunal considered that the Respondent has failed to comply with paragraphs 21; 26; 29 (a); 30; 32 (a) 32 (b); 32 (f); 32(k); 32(m); 32 (p); 32 (q),78; 107;110;112; 120; and 124 of the Letting Agent Code of Practice.

Having made this finding, the Tribunal makes a Letting Agent Enforcement Order.

Letting Agent Enforcement Order ("LAEO")

The Tribunal determined that the Respondents should be ordered to provide evidence to the Tribunal of how they have addressed the breaches of the Code identified by the Tribunal in this decision and orders compensation to be paid by the Respondent to the Applicant.

The Respondent is accordingly ordered to provide to the Tribunal, within 21 days, evidence of having established a complaints procedure which is to be issued to all new clients and existing clients on request and which informs clients of how any complaint should be made and timescales for response. This procedure should also inform clients of their rights to raise an Application to the Housing and Property Chamber as per paragraphs 110 and 112 of the Code.

The Respondent is also ordered to provide to the Tribunal, within 21 days, evidence of having revised their standard management agreement to accurately identify to clients how the Respondent's charges are calculated and to provide in clear and concise language the typical costs involved in the provision of the Respondent's services including ending or transferring management of any property and any other set up charges. The management agreement should also refer to the timescales for responding to communications in respect of the Respondent's general service standards.

The Respondent is also ordered to confirm to the Tribunal, within 21 days, that their letting agent registration number is included in all relevant documents and communications in line with their legal requirements under the 2014 Act as per paragraph 107 of the Code.

The Tribunal also considers that it is appropriate to award the Applicant compensation.

The Tribunal finds that the Applicant has paid a management fee for services which have not been adequately provided including 13 months when the Applicant did not receive any rental payments without any explanation.

The Tribunal considers a suitable mechanism for calculating this compensation is by multiplying the costs of the management fee charged by the months in which no rental income was paid out to the Applicant. There were 13 months when the management fee was charged with no rent paid out which means 13 charges of £45 plus VAT totalling £702.00. This sum should be awarded to the Applicant as compensation.

In addition to this, the Tribunal considers that the sum of £450.00 which was deducted from the closing balance paid out to the Applicant should be returned to the Applicant in full, meaning that total compensation of £1,152.00 should be paid to the Applicant.

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.



Legal Member