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 Sections 46 and 48 of the Housing (Scotland) Act 2014 and Paragraphs 17, 19, 21, 23, 26, 27, 28, 30, 32m, 37, 39, 43, 55, 57, 62, 69, 73, 85, 86, 90, 94, 102 and 108 of the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016 ("the Regulations")

Chamber Ref: FTS/HPC/LA/20/1509

Parties

Mrs Marilyn Henderson Wilson, 9 James Inglis Crescent, Cupar KY15 4GX ("the Applicant")

and

Fife Properties Limited, having a place of business at 22 Bonnygate, Cupar KY15 4LE, incorporated in Scotland (SC301960) and having their Registered Office at Caledonian House, Links House Leven KY8 4HS ("the Respondents")

Tribunal Members: George Clark (Legal Member) and Lori Charles (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondents had failed to comply with Paragraphs 17, 19, 21, 26, 37, 39, 73 and 108 of the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016 and that the Respondents should pay to the Applicant the sum of Four Hundred Pounds (£400) by way of compensation. The Tribunal determined that the Respondents had not failed to comply with Paragraphs, 23, 27, 28, 30, 32m, 43, 55, 57, 62, 69, 85, 86, 90, 94 and 102 of the Code of Practice.

Background and Summary of Applicant's Written Representations

1. By application, received by the Tribunal on 10 July 2020, the Applicant sought an Order in respect of the Respondent's failure to comply with the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016 ("the Code"). The Applicant's complaint was that the Respondents had failed to comply with paragraphs 17, 19, 21, 23, 26, 27, 28, 30, 32m, 37, 39, 43, 55, 57, 62, 69, 73, 85, 86, 90, 94, 102 and 108 of the Code. A number of the individual matters complained of alleged failure to comply with more than one paragraph of the Code.

2. The Applicant provided the Tribunal with further written representations on 1 October, 15 and 27 December 2020 and 8 January 2021, the last of which included a Summary of her complaint. She stated that she and her husband were first time landlords when they engaged the Respondents. They had been unaware of some of the tenant's responsibilities and the Respondents had not ascertained liability for repairs. The Applicant had paid for repairs that she felt the tenant should have paid for.

3. At the end of the first tenancy, the Respondents had requested permission to refund the tenant's deposit. The Applicant had declined to allow it as she had not seen the Property herself and, on inspecting it, she felt that the check-out report had been far from thorough and was not sufficiently detailed. She had complained to the Respondents and, not having received from them advice on how to proceed, she had started to clean up the Property for an incoming tenant. She had also provided the Respondents with a large number of photographs and comments in support of the claim that the deposit should not be returned to the Tenant. The Respondents had submitted the claim to SafeDeposits Scotland (SDS) for adjudication.

4. The Applicant had been disappointed with the outcome of the adjudication and had asked the Respondents to provide her with the evidence submitted but had been advised by the Respondents by email that "with the claim being closed we no longer have access to the evidence provided via Safe Deposit Scotland". This, she said, was a misleading statement, as the Respondents had their own SDS account, which they could have accessed. The Applicant questioned whether this was a mere error on their part, and she hoped that the Tribunal would question the Respondents in detail on this point, as she felt it was crucial to understanding the factors underlying the whole complaint with regards to overarching standards and management and maintenance.

5. The Property was re-let and at the end of the second tenancy, the check-out report was, the Applicant stated, again far from thorough and lacked detail. Having learned from the comments of the SDS adjudicator at the end of the first tenancy, the Applicant had asked the Respondents to arrange an updated Inventory of the Property, so that she had evidence to make a claim against the second tenant's deposit. The Respondents had failed to carry out this instruction and, in their response of 25 September 2020 to her complaint, they had omitted to explain this failure. Once again, the Applicant was suspicious of their motive, suggesting that an updated Inventory would have highlighted their lack of thoroughness in relation to the checkout report.

6. As a result, the Applicant had contacted SDS and had been provided immediately with the links to their website, where the Applicant saw the representations that had been made by the first tenant. These had included references to safety issues including breaches of statutory electrical safety requirements, and problems that been reported to the Respondents of which the Applicant had not been made aware at the time, including potentially dangerous issues and a broken soap dish which had left a young family with a very dangerous ragged-edged ceramic soap dish. It had become clear that the first tenants had been very frustrated by aspects of their tenancy and the Respondents felt that they were being blamed for delays and problems of which they had been unaware. The Respondents, in their letter of 25 September 2020, had implied that "interference" by the Applicants during the arbitration had resulted in some decisions in favour of the tenant and that some quotes for remedial work had also been "obstructed" and "this was a big influence on the final decision by SDS".

7. A huge amount of communication had taken place between the Parties in an effort to progress the claim. On 7 May 2019, the Respondents had confirmed that quotes for repairs would be obtained, yet two days later, a member of the Respondents' staff had advised the tenant that the Applicant had not confirmed what she was claiming for. The submission had not been lodged with SDS until 16 July 2019. A very significant delay had been attributable to the repair of the conservatory door, which should have been carried out when it was first reported by the tenant on 26 February 2019.

8. It was apparent from the information now available to the Applicant that comments she had added to explain the photographs she had provided to be part of the claim to SDS, and two photographs that she regarded as "highly relevant" had not been submitted. Information from a third party had also not been included and information about the reason for the tenant not being allowed to rectify the problems had been significantly condensed. The view of the Applicant was that these shortcomings by the Respondents had caused significant delays and this had resulted on the Applicant being penalised by SDS.

9. The Applicant disagreed with the Respondents' statement in their written representations (summarised below) that they had nothing to gain by not making

the best submission possible to SDS. Her view was that a good outcome for her of the adjudication would have highlighted the inadequacies of the checkout report. She believed that her comments had not been sent with the photographs because they would have exposed the Respondent company to scrutiny. The SDS adjudicator had said that they "would have expected to have been provided with an updated check-out report or statement from the inventory company." As a result of the information provided by the tenant to SDS and the failure of the Respondents' inspector to provide photographic evidence or details of a broken soap dish left in a dangerous condition, the Applicant questioned whether the quarterly inspections by the Respondents had involved visits to the Property.

10. The Respondents had failed to acknowledge their responsibility to ensure the electrical contractor complied with the Code of Practice when they had fitted a smoke alarm instead of a heat detector in the kitchen.

11. In their response of 25 September 2020 (summarised below) the Respondents had indicated that a claim for non-payment of rent had been submitted to SDS, but the evidence did not substantiate this statement.

12. The Applicant had become aware that a landlord has the right to respond to a tenant's submission to SDS, but the Respondents had not given the Applicant the chance to do so. This had prejudiced the Applicant's claim. The Respondents' response to this denial of rights had been dismissive, disrespectful and extremely arrogant and had offered no apology.

13. The Applicant had hand delivered her initial letter of complaint of 24 February 2020 to the Cupar office of the Respondents. As she received no response, in a letter of 8 July 2020, she formally intimated to the Respondents that she had complained to the Tribunal. She accepted that she had used a wrong street number on both letters, but there was no doubting the fact that the second letter had reached the Respondents, and the first letter had been hand delivered by the her. In their written representations, the Respondents had used the Applicant's error to claim they had never received the original letter of complaint.

14. The Applicant's complaints under Section 2 of the Code of Practice ("Overarching standards of practice") were that the Respondents' process in relation to the claim to SDS at the end of the first tenancy lacked honesty, transparency and fairness (paragraph 17), in that they did not tell the Applicant of her right to respond to the tenant's submission, as a result of which the adjudication must have been influenced adversely against her, because she had lost the opportunity to strengthen her case by making further observations. They had given her false information in asserting that as the claim was closed, they no longer had access to the evidence presented via SDS (paragraph 19). There had been a lack of care and skill in the carrying out of quarterly inspections and the tenant's submissions to SDS indicated a number of problems reported to the Respondents but not passed on by them to the Applicant (Paragraph 21 of the

Code). The Respondents had failed to pick up that a smoke alarm instead of a heat sensor had been fitted in the kitchen and that only one alarm was sounding when they were meant to be interlinked. The fitting of the alarms had been organised by the Respondents who are responsible for ensuring compliance with legal requirements (Paragraph 23 of the Code). The Applicant's letter of complaint, hand delivered to the Respondents' office in Cupar, should have been acknowledged within 3 working days, with a full response within 15 working days. No response was received (Paragraph 26 of the Code). The Respondents had failed to deal with some concerns raised by the tenant in February 2019 and had failed to report them to the Applicant (Paragraph 27 of the Code). These could have had safety and repairing standard consequences. They included the conservatory door issue. The Applicant had not complained of being charged for the cost of repairs without consent. Her complaint was that the Respondents should have assessed who was liable for damage. There was no evidence that the Respondents had made any attempt to do so. The Applicant should not have been charged for them as she considered the tenants had shown a lack of care. The Respondents' Head of Lettings had spoken to the Applicant on the telephone (after the Applicant had complained to office staff about the first check-out report) in a tone that she found to be very intimidating (Paragraph 28 of the Code).

15. Under Section 3 of the Code of Practice ("Engaging landlords"), the Applicant stated that no target times for taking action in response to request from tenants were provided in the tenancy agreement, which indicated only that problems would be dealt with as soon as is reasonably practical. The Respondents had failed to take action on a number of complaints from the tenants and, where they did take action, there was no evidence of them having followed them up to ensure the work was carried out or that the tenants were satisfied (Paragraph 30 of the Code). The complaints procedure outlined in the managing agreement stated that a full response will be sent within 15 working days and also stated the process for escalating a complaint if the matter remained unresolved. No information on applying to the Tribunal was provided in the managing agreement and no response had been received to the Applicant's complaint (Paragraph 32m of the Code). The Applicant had given written notice of termination on Wednesday 8 January 2020, with instructions to the Respondent to transfer the keys, documents and tenant referencing to another agent, but the Respondents had proceeded to try and organise another Inventory and draw up a lease for new tenants. This caused great confusion for the Applicant and the staff at the new agency and the keys and other documentation had not been handed over until Monday 13 January, the day before the new tenants were due to move in. The Respondents had not provided the written confirmation that they were no longer acting for the Applicant, as required by the Code of Practice (Paragraph 37 of the Code)

16. Under Section 4 of the Code of Practice ("Lettings"), the Applicant complained that the Respondents had erected a lettings board at the Property without her permission (Paragraph 39 of the Code). There was no evidence that the

Respondents had told the tenants that “no smokers” had been specified. The Applicant would not have given them the tenancy if she had known that they smoked (Paragraph 43 of the Code). The Applicant had never received information on applications made on the property. The Respondents had phoned with information about prospective tenants, but nothing had happened for a long time as the Applicant was waiting for the Respondents to make a recommendation (Paragraph 55 of the Code). The managing agreement stated that the Respondents would take up tenant references when they could, but no tenant references had been taken up for the current tenants and as a result, the Applicant was unable to obtain rental protection insurance (Paragraph 57 of the Code). The Applicant had not been given a copy of the first tenancy agreement so, as a new landlord, she was unaware of her responsibilities (Paragraph 62 of the Code). The Inventory provided to the first tenants gave them one week to raise any issues. They had complained two weeks later about a few issues, but there was no record available to the Applicant from the tenants’ perspective of how the Respondents dealt with the issues (Paragraph 69 of the Code).

17. The Applicant’s complaints under Section 5 of the Code of Practice (“Management and maintenance”) were that the service did not meet the standards stated in the tenancy agreement and Code of Practice. As the Applicant did not have a copy of the tenancy agreement, she paid for a number of repairs which should have been charged to the tenants, including the broken soap dish, damaged bath panel, damaged blinds, a damaged light fitting in the kitchen and incorrect alignment of the conservatory door, which the Applicant felt was caused by overuse as a result of the tenants being smokers, aggravated by the tenants forcing it and the Respondents failing to deal with it when it was brought to their attention (Paragraph 73 of the Code). From information provided by SDS, the Applicant had become aware that the first tenants had complained on a number of occasions about a smoke alarm going off in the kitchen every time the oven was used. In July 2018, the tenants had included photographs which clearly indicated that it was a smoke alarm and not a heat sensor. The Respondents had been negligent in not noticing this and the fact that the detectors were not interlinked. This breach of legislation was not picked up in four quarterly inspections and two checkout reports completed by the Respondents’ staff or in two Inventories completed by different independent companies (Paragraph 85 of the Code). The first tenants had complained on 26 February 2019 about the conservatory door, the bathroom tap being stiff and the kitchen light fitting hanging off the wall. There was no indication that any of these issues were addressed and they were still evident when the tenants vacated the Property in April 2019 (Paragraphs 86 and 87 of the Code). When the Respondents indicated to the tenants that they would ask their contractor to deal with the issue of the alarm and provided timescales for this, there was no evidence that they had a means of monitoring the contractors to ensure the issue of the alarm was rectified, and no action appeared to have been taken by the contractor on two occasions (Paragraph 94 of the Code).

18. In relation to Section 6 of the Code of Practice ("Ending the tenancy") the Applicant stated that on two occasions, the check-out reports provided by the Respondents were well below the standard she would expect of a competent agent. They were neither properly and thoroughly completed nor sufficiently detailed. No reference to the Inventory was made in either report, and the Applicant believed that the person who completed the first report had never been in the Property before, so was not in a position to assess how it compared to the start of the tenancy. The assessment of dilapidation was not properly addressed and there were various items that the Respondents should have recorded as damage caused by the negligence/deliberate acts of the tenants and not fair wear and tear. The checkout report at the end of the second tenancy had been, in the opinion of the Applicant "an utter disgrace". It stated that the Property had been cleaned to an acceptable standard, but this had not been the case. The Applicant made specific reference to the condition of the bathroom and the en-suite and to the carpets. She had asked the Respondents on 31 December 2019 to prepare a new Inventory to be compared to the original one and then to claim against the tenant's deposit for cleaning, re-laying carpet edges, lifted by the tenant without permission, and carpet cleaning. The Applicant had followed up this request on 7 January 2020 and, having received no response, the Applicant terminated the agreement on the following day (Paragraph 102 of the Code).

19. Finally, under Section 7 of the Code of Practice ("Communication and resolving of complaints") the Applicant referred to the failure to respond to complaints made by the tenants on 26 February 2019, failure to respond to the Applicant's request of 31 December 2019 for an Inventory to be carried out and failure to acknowledge and respond to the Applicant's letter of complaint of 24 February 2020 (Paragraph 108 of the Code).

20. The Applicant, in view of the wide range of complaints, wished a partial refund of fees paid to the Respondents. She also claimed £1,350 loss of rental due to having to defer entry for the second tenant while the dispute over the deposit and reinstatement of the Property were ongoing. She wanted to be reimbursed the cost of replacing the smoke detector with a heat sensor and of interlinking the alarms (£144.60), the cost of removing rubbish (£50), one week's rent which the first tenants had refused to pay, and which the Respondents had failed to pursue when requested to do so (£225) and the cost of the repair to the misaligned conservatory door (£48). In addition, the Applicant sought reimbursement of costs that she felt should have been the liability of the tenants under both tenancies. The Applicant also contended that the amount awarded by SDS would have been higher if she had been given the opportunity to see the Respondents' submissions and to see and respond to the tenants' submissions.

Summary of Respondents' Written Representations

21. The Respondents provided written representations by letter dated 18 December 2020. They included a copy of their written response to the Applicant of 25

September 2020, which is here summarised first. It was sent after the Applicant applied to the Tribunal.

22. With reference to the first letter of complaint sent to them on 24 February 2020, it had been stated on the Applicant's own admission that the letter was not delivered to the correct office address. The letter had not been in their possession for some time but when it was finally received it was reviewed. They struggled to comprehend how an error in delivery on the part of the Applicant had now resulted in a claim of dishonesty by the Respondents.

23. The process with SDS had been handled within the guidelines set out by the deposit scheme and had been carried out with honesty, transparency and fairness throughout. The deposit scheme was there to act as an impartial third party. The Applicant was correct in saying that landlords have a right to respond to tenants and all responses are documented on the SDS account for review. The SDS account in the present case was registered to the Respondents and, as they were the managing agents, any correspondence or submissions had to be made by them on the Applicant's behalf. The adjudication process and final decisions regarding deposits are ultimately in the hands of SDS and outwith the control of the Respondents. At no point were the adjudicators influenced otherwise in favour of any party and this could be seen in the online submissions.

24. In the numerous responses to SDS made on behalf of the Applicant and from the tenant, it was clear that some intermittent embellishments of the facts had been provided by the tenant. It was clearly explained that, in order to proceed with making a claim on the deposit, the Respondents needed to allow the tenant the opportunity to return and rectify any issues at the Property, but this could not happen, as the Applicant was already carrying out work to rectify things. Some of the Applicant's proposals had looked for the Property to be returned to pristine condition, which in the eyes of an SDS adjudicator, is not always acceptable.

25. The Respondents apologised if the reaction from their office staff when the Applicant's husband had been at the Property at the same time as the second tenant was due to move in had been received as too firm but said that some tenants would be uncomfortable and might see it as intrusive. The Respondents had not told the second tenants that the Applicant lived abroad.

26. The tenant under the first tenancy had proposed paying rent only for the final 3 weeks instead of 4 weeks. This was not normal, but the Respondents were required to relay it to the Applicant and, as dealings with the tenant had become fractious, the Applicant had reluctantly accepted the proposal. As, however, the tenant did not adhere to an agreement allowing access for viewings, a claim for this non-payment had also been submitted to SDS.

27. At no point during the Applicant's agreement with the Respondents had items for repair been charged or deducted without prior knowledge or consent.

28. The Respondents then dealt with the alleged failures to comply with the Code of Practice. They stated that quarterly inspections are designed to record the general condition of a property, to avoid cases of serious damage or disrepair going unnoticed. They are not designed to be invasive or overly intrusive to a tenant. It is unreasonable to try and micromanage an individual within any premises during a tenancy. Items may be raised on these interim inspection reports or an end of tenancy check list. At the point of recording them, it could not be stated exactly who would be responsible for rectifying an issue as it would require a process of investigation.

29. The Respondents had arranged for a SELECT qualified electrician to carry out an EICR, which included hardwired, interlinked smoke/heat detectors. It was brought to the Respondents' attention at the end of the last tenancy that the heat detector installed in the kitchen was in fact a smoke alarm. Heat detectors and smoke alarms are, they said, remarkably similar in appearance to the untrained eye. The liability for this error would be with the electrician and the Respondents believed that this was taken up with the contractor at the time. The contractor was instructed to reattend the Property and rectify the issue.

30. In relation to the requirement to respond to enquiries within reasonable timescales, the Respondents repeated that it was unreasonable to expect a timely acknowledgement of correspondence that was incorrectly delivered.

31. All concerns and issues reported by a tenant during a tenancy are recorded and relayed to any landlord within an acceptable timeframe. Important issues are deemed to be items for attention if they will be detrimental to the property and could result in significant damage or expense. Minor issues such as a stiff tap and loose fitting do not fall into that category.

32. The Respondents did not accept that they had communicated with the Applicant in an intimidating way. No communications whether in person or over the telephone had been other than pleasant and they had never been abrupt, regardless of the situation.

33. The Respondents accepted that no specific timescales were provided in their initial Agreement regarding dealing with tenants' issues raised during a tenancy. They said that the Agreement stated that "problems will be dealt with as soon as it is reasonably practical after having been notified of the need to do so". As repairs and issues could arise across a broad spectrum, it would be unrealistic to stipulate timescales. There were many other factors to consider, including contractors.

34. The Respondents were aware that the Agreement and paperwork signed in 2017 did not make reference to the Tribunal, but all their literature now references it.

35. The Applicant's notice to terminate the Agreement had raised several issues, as the Respondents were already in the process of putting everything in place for a new tenant to enter the Property. The Applicant had initially agreed that the Respondents should continue to set up the imminent move to avoid disruption to the new tenants, but this decision was later revoked. The Respondents referred to copies of emails of 9 January 2020 showing the Applicant's agreement for the Respondents to proceed with the Inventory and move pack. Further, there had been discussions with the new letting agency regarding the collection of keys and the relevant paperwork which was mutually agreed without any objection.

36. The Respondents admitted that an advertisement board had been erected at the Property when the Applicant had requested otherwise. They apologised for what they said had been an oversight on their part.

37. The Respondents said that they implement a no smoking policy in all their managed properties. The pre-tenancy terms which the tenants had signed clearly stated they would not smoke or keep pets at the Property, but if a tenant was smoking outside the property, that was extremely hard to enforce.

38. The Respondents were not required to supply written correspondence regarding every applicant who was a prospective candidate but, as the Applicant had stated, they had been in contact with the Applicant to advise of interested parties. As the final decision was up to the Applicant, it was only natural that the Respondents would follow up with the Applicant to get that decision. At that stage with any rented property, they would have anxious applicants looking for an answer, not due to a lack of income, as the Applicant had suggested.

39. Landlords were not generally provided with a copy of the tenancy agreement in a management situation unless they specifically requested it. Landlords' responsibilities were set out in their Agreement with the Applicant which was signed in 2017.

40. All the Respondents' Inventories are subject to a 7-day period in which the tenant can query any discrepancies they find. Issues raised over this period and indeed two weeks later can only be noted and dealt with accordingly. The Inventory cannot be altered after the 7-day period.

41. There had been items damaged during the tenancy beyond what would be regarded as general wear and tear. These had all been included in the claim to SDS regarding the deposit. Some items, such as over-use of an entrance door to the Property would raise questions for the adjudicator.

42. All exit inspections and sign out reports are carried out in the same format to stay in line with the requirements of the deposit scheme. They need to include a general overview of the property's condition, including damage and any items for immediate attention. The report itself is to record if the property is clean, cleared

or damaged in any way. Ideally there is also a visual aid such as pictures or video. With both sign out reports carried out at the Property there had been numerous pictures taken to support the fact that there were areas affected by more than wear and tear. In addition, the Applicant had submitted a vast number of pictures. All of this evidence had been submitted to SDS to assist them in the decision-making process. It was unfortunate that the Applicant found the method of these reports unacceptable, but this method of obtaining compensation where it was rightfully required had never posed an issue previously. There was a limit to what could constitute a claim and some of the more meticulous findings do not always hold up in the adjudication process. The Respondents added that it was also apparent that the frustration and interference during this process had also resulted in some decisions in favour of the tenant.

43. The Respondents found the claim against them for loss of rent in between the tenancies while the previous tenant's deposit was in dispute to be unreasonable, particularly as, during that period, the Applicant had stated an intention to terminate letting and to put the house up for sale. The Respondents had attended the Property with the Applicant and her husband to discuss these options, along with other agents, to compare the costs of doing so. The cost of repairs and gardening were all costs which had been claimed through the deposit scheme at the time. The amount awarded to the Applicant had been deemed acceptable to the adjudicator, so the Respondents should not be held liable for the shortfall.

44. In conclusion, in their letter of 25 September 2020, the Respondents felt that the tenant's lack of care had been evident in areas of the Property and this had been noted at the point of exit. If the Applicant had allowed the Respondents to operate in the usual manner, there might have been a better chance that they would have been awarded some compensation from the deposit.

45. In their written representations contained in a letter of 18 December 2020, signed by Mr Richard Cook, Lettings Director, received by the Tribunal on 29 December 2020, the Respondents repeated much of the content of their letter of 25 September 2020, but added further comments. They stated that, on receiving the initial letter of complaint, their Mr Parker had made several unsuccessful attempts to call the Applicant's husband to discuss the matter. When the complaint had reached the desk of Mr Cook, he had immediately "reached out" to the Applicant for further feedback, and, although this had not been well received, he had continued from that point to correspond in a timely manner. He enclosed his previous written correspondence (the letter of 25 September 2020) for reference.

46. Mr Cook could not see how a member of staff could have indicated that they had no access to the information sent to SDS, as they always had access to their SDS account. The evidence and submissions could still be accessed. There had been what he described as "an astounding amount of evidence", both photographic and written, submitted. This included a combination of the Respondents' and the Applicant's own findings. If there had been an omission of

two photographs from this “plethora of evidence”, Mr Cook could only assume it had been a slight human error, but he did not see how this could have had any detrimental effect on the adjudicator’s final decision, unless they showed extensive damage to the Property. SDS had awarded the tenant the full deposit amount and this had been due to several mitigating factors, one of which having been the way in which the tenant’s exit process had been obstructed at times by the Applicant. All reports of damage and potential repairs brought to the Respondents’ attention had been recorded and ultimately relayed to the Applicant in periodical feedback and quarterly inspections. Items such as the damaged soap dish and the alignment of the patio door had not been fully brought to light until the exit inspection was conducted, and compensation for these had been claimed from the tenant’s deposit. At no time had the Applicant been denied the opportunity to make comment on the tenant’s representations to SDS.

47. The Applicant had contended that the Respondents had told the second tenant that the Applicant lived abroad. All that had been communicated to the tenant was that the Applicant was abroad in Japan. The tenant’s perception had been that the Applicant and her husband resided there. In any event, Mr Cook failed to see that the point was relevant.

48. The Respondents did not find it acceptable that they should incur the cost of damages resulting from the tenant’s lack of care or the fact that the assessment of who was responsible for the repairs was not carried out. Mr Cook referred again to the vast amount of evidence that had been submitted to SDS as a claim against the deposit.

49. All members of the team at Fife Properties were fully aware of the legal requirements of a private rented residence. They had had a certified contractor sign off on the fire detection system and had no reason to believe anything was not compliant. Mr Cook appreciated that there may have been pictures of the alarm in inspection reports, as there is with all alarms in the inspection, to ensure they are in place and present.

50. All the Respondents’ inventory and check-in lists are conducted by an accredited and authorised third-party contractor and, apart from the present case, they had never received any feedback to question the integrity of the reports.

51. The paperwork in respect of references for the current tenants had been included by Mr Cook in his last correspondence in order to demonstrate that the Respondents did in fact carry out the necessary checks on the tenant. There had been no legal obligation on the Respondents to pass them over, as they had not been paid for by the Applicant, who had, by that time, intimated termination of the contract with the Respondents. The cost had been borne by the Respondents.

52. The tenants now residing at the Property had been introduced by the Respondents to the Applicant and the new agents without any fee being charged

and, despite the unfortunate and abrupt decision to terminate the contract without notice, the Respondents had passed everything over to avoid any upset for the Applicant or the prospective tenant. Clear arrangements had been made with the new agent to collect paperwork from the Respondents' Cupar branch and these had been fulfilled without any obstruction.

The Hearing

53. A Hearing was held by means of a telephone conference call on the morning of 18 January 2021. The Applicant participated in the Hearing. The Respondents were neither present nor represented. The Legal Chair advised the Applicant that she could take it that the Tribunal Members had read and were familiar with all the written representations received from the Parties. There had been a considerable volume of written representations from the Applicant. The Applicant agreed with the Tribunal's view that the main areas of concern, which had given rise to her complaints were shortcomings in the check-out reports, the dealings with SDS regarding tenancy deposit refunds (including reputational damage to the Applicant), issues regarding repairs that had not been reported to the Applicant and the manner in which the Respondents had dealt with her complaint.

54. The Applicant told the Tribunal that the Respondents had been involved in the management of two tenancies of the Property. This had included two check-out reports. The standard that the Respondents had applied was inadequate. The Respondents had failed to submit to SDS, in relation to the return of the deposit at the end of the first tenancy, reference to aggregate sacks in the garage and had failed to make it clear to the adjudicator that the sum being claimed in respect of gardening did not include the work that the Applicant and her husband had instructed themselves. The Applicant's complaint was also that the Respondents had said they could not access the information after the adjudication had been completed. This was patently untrue.

55. The Applicant's letter of complaint had been hand delivered to the Respondents' Cupar office, with the request that it be passed on to Mr Parker, so the fact that it contained an error in the address of the Respondents was irrelevant, but the Respondents had used it as an excuse for not responding to the complaint. They had only responded after she sent them the formal notification of her application to the Tribunal.

56. The Respondents had said that Mr Parker had made numerous attempts to contact the Applicant's husband, but so far as the Applicant could ascertain, he had only made one such attempt, at a time when her husband was ill. No voicemail messages had been left, but, in any event, the application had been made by her and not by her husband.

57. The Respondents had failed to tell the Applicant that the tenants had reported a broken soap dish. The tenants had sent in a photograph showing it was a ceramic soap dish. Had the Applicant known about the problem, she would have attended to it immediately, as it represented a danger to the tenants and their three children. The Applicant did not know whether or when the tenants had taken the soap dish down, as the Respondents had failed to communicate with her on the matter.

58. Mr Cook had referred in the Respondents' written representations to "interference" on the part of the Applicant and her husband in the dealings with SDS in relation to the refund of the deposit at the end of the first tenancy. He had not provided any evidence of what he meant by "interference". The Applicant had provided a series of emails to show the efforts she had made to try and move forward the submissions to SDS. It would not have been an issue if the Respondents had carried out their obligations in respect of the check-out report. The Applicant would have been dealing with issues reported by the tenant back in February 2020, namely the conservatory door and light fittings had she been told about them. The only matters that had been reported to them during the tenancies had been damage to a wall and damage to a bath panel, which the Applicant had then replaced.

59. The problem with the conservatory door had never been reported to her and she had only discovered it when she went to the Property after the first tenant moved out. The Applicant and her husband had been in Japan when the first tenant left. Most people do not use a conservatory door on a regular basis, especially in the winter. The tenants were, however, using it to access the garden every time they were smoking, and it was being banged shut for two months after it was reported to the Respondents. The SDS adjudicator had rejected the claim for this, as it had not been included by the Respondents in the check-out report as a matter for attention.

60. An electric light fitting was still hanging down when the tenants left but was not mentioned in the check-out report. Questioned by the Tribunal, the Applicant said that the Respondents had mandated authority to carry out repairs up to £100 without reference to the Applicant.

61. The first tenants had complained to the Respondents that the alarm in the kitchen was repeatedly going off and had provided them with a photograph which showed that it was a smoke detector rather than a heat detector, but the Respondents had not dealt with it and had not informed the Applicant.

62. The Applicant told the Tribunal that she and her husband might have suffered damage to their reputation as landlords, as the submissions to SDS were available for view on their website. They indicated the frustration felt by the first tenants that complaints to the Respondents had not been dealt with. This

reflected badly on the Applicant, who knew nothing about the complaints, and it would have influenced the view of the SDS adjudicator.

63. The Respondents had stated in their written representations that a claim for one week's rent had been included in the submissions to SDS, but this was not the case, as it was not mentioned in the adjudication report.

64. The Applicant confirmed to the Tribunal that the second tenant had received a full refund of his deposit. She had felt that a claim could not go forward without an Inventory being prepared and she had instructed the Respondents to carry out this work. They had failed to do so,

Findings of Fact

65. The Respondents acted as letting agents of the Applicant and her husband from an unknown date in 2017 until 8 January 2020.

66. There were two tenancies of the Property during the period that the Respondents acted as letting agents for the Applicant. The first tenancy ended on 16 April 2019 and the second tenancy began on 27 June 2019 and ended in late December 2019, the check-out report being dated 30 December 2019.

67. The Respondents did not, by 16 April 2019, deal with issues raised with them by the then tenants on 25 February 2019 relating to the patio door, light fittings and a smoke detector in the kitchen.

68. On 13 May 2019, the Applicant's husband told the Respondents by email that he was unwilling to accede to a request by the tenants to be allowed access to the Property to rectify any issues.

69. On or about 24 February 2020, the Applicant hand delivered a letter of complaint to the Respondents at their office in Cupar.

70. The Respondents did not respond to the letter of complaint until 28 July 2020.

71. The Respondents did not withhold from the SDS independent adjudicator any significant material that the Applicant asked them to pass on to the adjudicator in connection with the deposit, at the end of the first tenancy.

72. The request to SDS for refund of the deposit to the Applicant was submitted by the Respondents by 31 May 2019.

73. On 31 July 2019, the Respondents advised the Applicant that the case had been sent to the adjudicator as of 16 July 2019.

74. On 31 December 2019, the Applicant asked the Respondents to carry out an Inventory. The Inventory was not carried out.

75. The Applicant terminated the agreement with the Respondents, without notice, on 8 January 2020.

Reasons for the Decision

76. The Tribunal considered carefully all the evidence before it, both the lengthy written representations and the evidence presented by the Applicant at the Hearing.

77. The Tribunal noted that the application had proceeded under a large number of Sections of the Code, but the alleged facts relevant to all of them were the same. The Respondents had failed to inform the Applicant about a number of issues raised by the first tenants during the tenancy and had failed to address those issues before the tenancy ended. This had caused frustration to the tenants, which had been expressed in their submissions to SDS regarding return of the deposit and had reflected badly on the Applicant and her husband as landlords. This would have been taken into account by the adjudicator and may have resulted in the tenants' views being favoured. The problem had been compounded by the inadequate content of the check-out report, which omitted some matters that the Applicant had instructed should be included and also by the fact that the Applicant had not been told by the Respondents that she had the right to comment on the tenant's submissions. The Respondents had then falsely told the Applicant that, as the adjudication was closed, they could no longer access the submissions that had been made to SDS. When the Applicant had made her complaint to the Respondents, they had used the fact that the address in her letter contained an error to contend that they had never received it, when it had in fact been hand delivered to their office in Cupar. When the second tenancy ended, the Applicant had instructed the Respondents to carry out an updated Inventory, so that it could be used by the Applicant in the SDS adjudication on the tenancy deposit. The Respondents had failed to carry out that instruction.

78. The Applicant did not provide with her application or any of her written representations a copy of the Agreement between the Parties. Accordingly, the Tribunal was unable to assess the performance of the Respondents against the obligations they had undertaken in that Agreement. It had, however, been stated by both Parties that it was entered into in 2017, so the Tribunal noted that it pre-dated the publication and coming into force of the Letting Agent Code of Practice on 31 January 2018. It would not, therefore, have been a requirement at the time for it to make reference to the Tribunal.

79. On 31 July 2018, the tenants reported to the Respondents a problem with the smoke alarm at the Property. It had gone off the previous evening and, as it did

not stop, the tenants had disconnected it. They attached pictures of the alarm. The case papers included a reply from the Respondents saying that they would chase the contractors who were dealing with these issues, but the copy of that email did not show its date. Although the Tribunal did not see any evidence as to what happened after that, the alarm must have been reconnected as, on 14 January 2019, the tenants reported that they were “really having a problem with the smoke alarm above the oven”. They said it was going off continuously when they were using the oven. On 26 February 2019, the tenants reminded the Respondents of maintenance issues, namely the “smoke alarm in kitchen, kitchen light fittings hanging, family bathroom basin tap very stiff, conservatory sliding door skew and can’t lock”.

80. The Respondents, in their response to the Applicant’s letter of complaint, said that they had arranged for a SELECT qualified electrician to carry out an “Electrical Installation Certificate” on the Property which included hardwired, interlinked smoke/heat detectors They stated that they retained a copy of the Certificate, but they did not provide the Tribunal with a copy by way of evidence. At the end of the second tenancy, however, it had been brought to their attention that the “heat detector” installed in the kitchen was in fact a smoke alarm. They contended that both detectors are remarkably similar in appearance so to the untrained eye could easily be mistaken. Liability for this error would fall back on the electrician and the Respondents believed this was taken up with the contractor at the time. The contractor had been instructed to reattend the Property and rectify the issue.

81. The Applicant’s view was that the Respondents ought to have noticed from the photographs provided by the tenants that the alarm in the kitchen was a smoke detector rather than a heat detector. The Tribunal noted, however, that the tenant who sent the original email had commented that her husband was an electrician. It was not, of course, his responsibility to identify the problem, but he disconnected it and did not appear to have noticed that it was the wrong device. This tended to add some weight to the Respondents’ argument that smoke and heat detectors are very similar in appearance to the untrained eye.

82. The Tribunal concluded that some work had been done between July 2018 and January 2019, as the detector in the kitchen had been reconnected but, in the absence of documentary evidence from the Respondents as to when this was done and by whom the work was carried out and, not having had sight of the Certificate to which the Respondents had referred, the Tribunal was unable to determine whether the issue had persisted from July 2018 until the end of the tenancy on 16 April 2019 or whether it had re-emerged in January 2019.

83. The Tribunal noted the strongly-held view of the Applicant that the adjudication in relation to the deposit in the first tenancy would have been more favourable to her had the Respondents presented all the submissions she asked them to include and had the check-out report been more thorough. For their part, the

Respondents stated that they had included the Applicant's written submissions and photographs and that they had included a claim for one week's rent. They contended that what they described as "interference" by the Applicant, and the fact that the Applicant had already started work to put right the issues in the Property, meaning that Invoices could no longer be obtained to back up some of the claims, had impacted on the final award by the adjudicator. They also indicated that the fact that the Applicant had not been prepared to allow the tenants to go back to the Property to rectify issues would have been noted by the adjudicator.

84. The Applicant also complained that she had not been advised by the Respondents of her right to comment on the submissions made by the tenant to SDS and that this had denied her the right to strengthen her case. The SDS website states that once a tenant has submitted evidence, a copy of it is sent to the landlord/agent, who will have 5 working days to comment. It stresses, however, that this stage is not for providing further evidence and that the adjudication will not consider any further evidence, even if the landlord/agent provides it, and will only take comments into consideration. The Tribunal noted that it appeared that the Applicant's intention would have been to add to the submissions already made on her behalf, including submitting explanations which she had provided with the photographs she had sent to the Respondents and stating that the next tenant had specifically asked the Respondents to arrange for the carpets to be cleaned. These submissions, had the Applicant made them at that stage, would not have been considered by the adjudicator. The Applicant also listed a number of observations that she would have made, had she seen the tenant's comments, but the Tribunal was satisfied that the adjudicator would have been fully aware that the tenant's version of events was at odds with the representations made on the Applicant's behalf.

85. The Applicant stated in her written submissions that the application to SDS had not been made until 17 July 2019. The Tribunal held that that was incorrect. The Respondents had confirmed in an email of 31 May that they had put in the request for the deposit. On 31 July, they advised the Applicant that the case had been sent to the adjudicator as of 16 July. This was a step that would have been taken by SDS themselves, not by the Respondents. The Tribunal was satisfied from copy emails provided by the Respondents, that the application to SDS was made by the date of their email to the Applicant of 31 May 2019.

86. It is not the function of the Tribunal to revisit decisions on tenancy deposits made by independent adjudicators and the view of the Tribunal was that the position taken by both Parties was speculation. The Applicant's view was that the Respondents had not presented everything she had asked them to and that the tenant's submissions cast the Applicant in a poor light, which would have affected the outcome. The Respondents insinuated that there had been "interference" by the Applicant, who had also carried out some work herself, thus making it impossible to present quotes based on the condition of the Property when the

tenant vacated it and that this had resulted in some decisions being made in favour of the tenants. The Tribunal had no way of knowing whether the factors stated by the Parties had been to the detriment of the Applicant and could not make a finding that they had. The Tribunal was not satisfied that any matter of consequence had not been before the adjudicator, apart from the claim for rent.

87. The Tribunal had seen the Report of the independent adjudicator. The disputed deposit was £900, and the adjudicator allocated £220 to the Applicant and the balance of £680 to the tenant. The adjudicator stated that, as the conservatory door runner was not mentioned in the Items for Attention section of the check-out report, no award could be made for it. The soap dish had been removed during the tenancy. The adjudicator awarded £50 against a claim for £180 which would have covered the conservatory door runner, the soap dish and marks on the window-sill. The claim had included £260 to contribute to the cost of cleaning and two invoices totalling £456 had been provided in respect of a deep clean of the Property and the carpets. The adjudicator noted that the tenant had stated that the carpets had been thoroughly cleaned at the end of the tenancy. The adjudicator accepted that some additional cleaning was required to restore the Property to the condition documented in the original Inventory, but the check-out report had only identified some minor cleaning issues and no dirt or dust had been identified on the carpets. The award was, therefore, limited to £80 to avoid constituting betterment. A claim for £160 for gardening was supported by an Invoice, but the check-out report recorded the rear garden as being reasonably well maintained with the grass recently cut. Some weeds were also noted as being present in the front and side areas. Noting that the Invoice included the cutting of bushes and grass in addition to general garden maintenance, the independent adjudicator made a reduced contributory award of £50. In relation to a claim for redecoration (£300), the tenant had stated that the marks on the walls were the result of fair wear and tear and, upon assessing the evidence provided, accounting for the size of the marks and taking fair wear and tear into account, the adjudicator awarded £40 in respect of this item.

88. The adjudicator stated that a landlord is only entitled to compensation for loss in the intrinsic value of the décor or, if replacement is justified, a proportion of the renewal costs in relation to the loss of useful life of the décor, which was estimated at between 3 and 5 years depending on the room and accounting for wear and tear, which is subjective and based on the circumstances.

89. The adjudicator confirmed that the landlord (the Applicant) had identified deficiencies additional to those noted at the time of the check-out inspection, so the Tribunal was satisfied, on the balance of probabilities, that the material provided by the Applicant to the Respondents had been included in the submissions to SDS. The adjudicator did, however, add that, in such a situation, he would have expected to have been provided with evidence to show that the landlord had notified the inventory company of these additional items and, if that company thought that any additional findings were valid, the adjudicator would

have expected to have been provided with an updated check-out report or statement from the company. The Tribunal did not see any evidence to indicate that the inventory company had been made aware of, and invited to comment on, the additional items identified by the Applicant.

90. The Tribunal determined, on the balance of probabilities, that the Respondents did not include a claim for one week's rent in the submissions to SDS. There was no mention of it in the portions of the Report of the independent adjudicator provided to the Tribunal, and, although the Tribunal had not seen a complete copy of that document, the front page listed "Matters in Dispute and Amounts Claimed" and rent was not included on the list. The Respondents had stated that they had included it in the claim but had not provided evidence to support their statement. Amongst the documentation provided with the Applicant's written representations, however, was an email from Mr Cook to the Applicant of 6 May 2019 in which he said that he did not think that the claim for one week's rent would be upheld by SDS.

91. The Tribunal's view was that, apart from the claim for rent, the Respondents had submitted to SDS the material provided by the Applicant. There may have been a small number of photographs omitted, but there was no evidence to suggest that the adjudicator did not have virtually all of the representations by the Applicant. The Respondents had confirmed in an email of 2 August 2029 that they had submitted the Inventory, the lease, the signout, the pictures taken both by the Applicant and themselves and all invoices for work carried out at the end of the tenancy.

92. As the Tribunal was satisfied that the Respondents had forwarded to SDS representations and photographs provided by the Applicant and as the Tribunal was not, in any event, prepared to revisit the decision of the adjudicator, it was not prepared to make an Order requiring the Respondents to reimburse any costs which the Applicant considered should have been recovered from the outgoing tenants.

93. The Tribunal noted that the first check-out report included comments by the tenants that the patio door seemed to be sticking on its runner when closing, that the soap dish on the wall above the bath had become detached during the tenancy and that a tap was difficult to shut off. These matters had all been reported to the Respondents some weeks before and had not been remedied during the tenancy. The Applicant had been concerned about a cracked soap dish being a danger to the tenant's children, but the Tribunal noted that it was not present at the time of the check-out report and concluded that it must have been taken off by the tenant, presumably for safety reasons. The Tribunal noted the Applicant's contention that the issues with the conservatory door were the result of its being used by the tenant to access the garden in order to smoke outdoors. The Tribunal did not accept that this was the case. Even if the conservatory door had, as a result of the tenant smoking outside, been used more frequently than

might have been anticipated, there was no evidence to indicate that the tenant had in any way mis-used the door so as to cause it to cease to function properly. The door had eventually been fixed at a cost of £48.

94. The second check-out report was carried out on 30 December 2019 and on the following day, the Applicant, as she was unhappy with it, asked the Respondents to arrange for a new Inventory, so that it could be compared with the Inventory at check-in. The Applicant complained that this had not been carried out by 7 January, but the Tribunal noted that the email had been sent at 23.16 hours on 31 December, that 1 and 2 January were public holidays and that 4 and 5 January were the weekend, so the failure to prepare an Inventory by 7 January or by the time the agreement was terminated on the following day was not unreasonable. In addition, the Applicant had stated in her written representations that after she had given notice on 8 January 2020, the Respondents had proceeded to try and organise another Inventory. The Tribunal also held that it was not reasonable to require or expect that the person checking the Property at the end of a tenancy would be the same person who had seen it at the beginning. The Respondents had not been involved in the refund of the deposit to the second tenant. As the Applicant had terminated the contract before any representations to SDS could be made, the Respondents could not be held liable for any costs which might not have been recovered by the Applicant through an adjudication in which the Respondents had taken no part.

95. The Tribunal accepted the evidence of the Applicant that her initial letter of complaint had been hand delivered to the Respondents on or about 24 February 2020. It might have taken a few days thereafter to be relayed to the addressee, Mr Parker, but the Tribunal did not accept the contention of the Respondents that they had not received it because of an error in the address. The Respondents did not acknowledge it or provide a substantive response until the end of July, and the response was not issued until after the Applicant advised the Respondents on 8 July that she had made an application to the Tribunal.

96. **The Tribunal then considered the application under each Section of the Code of Practice.**

97. **Paragraph 17** states *"You must be honest, open, transparent and fair in your dealings with landlords."* The Tribunal held that the Respondents had failed to comply with this requirement when they told the Applicant, by email on 2 August 2019, that they no longer had access to the evidence provided via Safe Deposit Scotland. They must have had some method of providing the Applicant with copies of the representations they had made to SDS and the supporting documentation which accompanied their representations, even if that was not "via" the SDS portal. The Respondents had themselves stated in their written representations to the Tribunal that the evidence and submissions could still be accessed. The Respondents had, therefore, not been open, transparent and fair

in this regard. **The Tribunal upheld the complaint under Paragraph 17 of the Code of Practice.**

98. **Paragraph 19** states *"You must not provide information that is deliberately or negligently misleading or false."* The Tribunal held that the Respondents had negligently stated that they could not be expected to respond timeously to the Applicant's letter of complaint when, on the Applicant's admission, it had been wrongly addressed. The letter had been delivered by hand to the Respondent's office in Cupar. The view of the Tribunal was that the Respondents had been negligent in not checking how and when the letter had been delivered to them. They appeared simply to have assumed that the reason for their failure to reply to it had been that, because there was an error in the address, it had not reached them. The Tribunal considered that this failure was negligent but did not hold that it was deliberate. **The Tribunal upheld the complaint under Paragraph 19 of the Code of Practice**.

99. **Paragraph 21** states "*You must carry out the services you provide to landlords or tenants using reasonable care and skill and in a timely way".* The Tribunal noted that, on 31 July 2018, the first tenants had reported a problem with the smoke alarm at the Property. They attached pictures of the smoke alarm, which they had disconnected. On 14 January 2019, they had again reported a problem with the alarm in the kitchen and, on 26 February 2019, they had again reminded the Respondents of maintenance issues, namely the "smoke alarm in kitchen, kitchen light fittings hanging, family bathroom basin tap very stiff, conservatory sliding door skew and can't lock". The Tribunal was unable from the evidence before it, to determine whether the issue reported on 14 January 2019 was a long-standing matter, as the alarm had been reconnected, which indicated that some work had been carried out. The Tribunal could not, therefore, hold that the Respondents had delayed dealing with the issue from July 2108 until April 2019, but determined that even a delay from January to April was unacceptable, given the health and safety implications for tenants of a defective smoke and heat detection system. There was no doubting that the Respondents knew of the problem in January 2019, not just "at the end of the final tenancy", as they had stated in their written representations. Accordingly, **the Tribunal upheld the complaint under Paragraph 21 of the Code of Practice** but, as the Respondents' duty in this matter was to the tenants who had reported the issue and not to the Applicant, the Tribunal was unable to make any award of compensation to the Applicant. The Tribunal noted that the Applicant had stated that a failure such as this had put her in a bad light as regards the tenants and that the decision of the SDS adjudicator would have been influenced by that, but the Tribunal rejected that argument as speculation.

100. **Paragraph 23** states *"You must ensure all staff and any sub-contracting agents are aware of, and comply with, the Code and your legal requirements on the letting of residential property".* **The Tribunal did not uphold the complaint under Paragraph 23 of the Code of Practice.** No evidence had been presented

to suggest that the Respondents' staff or sub-contracting agents were not aware of the Code and their legal requirements on the letting of residential property. The evidence of the Respondents was that they had instructed SELECT registered electrical contractors. It is not part of letting agent's responsibilities to micro-manage the work of contractors instructed by them, nor are letting agents deemed to have expert knowledge of the technical requirements of smoke and fire detection systems. They were entitled to rely on the competence of suitably qualified contractors and that was what they had done. The Tribunal had made a finding that some work must have been carried out following the report of the tenants in July 2018 that there was a problem with the detector in the kitchen. The Respondents had also stated that the contractor had been instructed to reattend the Property and rectify the issue.

101. **Paragraph 26** states *"You must respond to enquiries and complaints within reasonable timescales and in line with your written agreement."* The Tribunal had not seen a copy of the contract between the Parties, so was reliant on the general requirements set out in Paragraph 26. **The Tribunal upheld the Applicant's complaint under Paragraph 26 of the Code of Practice.** It had determined that the Applicant had hand-delivered her letter of complaint dated 24 February 2020 and the Tribunal did not accept the Respondents' contention that, as there was an error in the address, they had not received it. The view of the Tribunal was that they had received it on or very shortly after 24 February 2020 but had failed to respond until the end of July. On any view, they had failed to respond within reasonable timescales.

102. **Paragraph 27** states *"You must inform the appropriate person, the landlord or tenant (or both) promptly of any important issues or obligations on the use of the property that you become aware of, such as a repair or breach of the tenancy agreement".* The Applicant's complaint was that the Respondents had failed to deal with some concerns raised by the tenants and had failed to report them to the Applicant. These concerns had included a light fitting hanging from the ceiling, the conservatory door and a stiff basin tap. The Respondents submitted that matters such as a stiff tap or a loose fitting did not fall under the category of important issues, as they would not result in significant damage or expense. The Tribunal recognised that "important" was liable to subjective interpretation but, as it was likely that repairs to a stiff tap and loose light fitting would fall within the limit of the Respondents' delegated spending authority, the Tribunal did not consider it necessary for these items to have been reported to the Applicant when they were first raised by the tenants. The conservatory door had first been reported by the tenants in February 2019 and, whilst the ultimate cost of repair had only been £48, there was an argument that it should have been reported to the Applicant at the time, as the cost of repair would at that time have been unknown, the Tribunal could not determine that it might not have fallen within the delegated authority of the Respondents. The Tribunal had already determined that the Respondents had failed to deal with the issues in a timely way but **did not uphold the complaint under Paragraph 27 of the Code of Practice**.

103. **Paragraph 28** states *"You must not communicate with landlords or tenants in any way that is abusive, intimidating or threatening".* There was evidence that exchanges between the Parties had at times been robust, but the Tribunal was not satisfied that any communication by the Respondents had been abusive, intimidating or threatening. **The Tribunal did not uphold the complaint under Paragraph 28 of the Code of Conduct.**

104. **Paragraph 30** states *"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".* The Applicant did not provide the Tribunal with a copy of the agreement between the Parties, so **the Tribunal was unable to uphold a complaint under Paragraph 30 of the Code of Conduct**, which relates to the agreement between landlords and letting agents, not to the terms of tenancy agreements.

105. **Paragraph 32m** states *"Your terms of business...must clearly set out 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".* **The Tribunal did not uphold the complaint under Paragraph 32m of the Code of Conduct**, as, whilst the Tribunal had not seen it and could not refer to it for its terms, the contract between the Parties pre-dated the coming into force of the Letting Agent Code of Practice on 31 January 2018 and the Respondents had stated in their written representations that reference to the Tribunal was now included in their contracts.

106. **Paragraph 37** states *"When either party ends the agreement, you must…give the landlord written confirmation you are no longer acting for them. It must set out the date the agreement ends: any fees or charges owed by the landlord and any funds owed to them; and the arrangements including timescales for returning the property to the landlord - for example, the handover of keys, relevant certificates and other necessary documents. Unless otherwise agreed, you must return any funds due to the landlord (less any outstanding debts) automatically at the point of settlement of the final bill."* The Tribunal accepted that, technically, this Paragraph had been breached, but in the context of their being dismissed without notice and in very short order having handed over paperwork to a new letting agent, the Tribunal found the Respondents' failure to be excusable. The Applicant had not indicated that there had been any issues in relation to the Respondents' final bill. Accordingly, **the Tribunal upheld the complaint under Paragraph 37 of the Code of Conduct** but did not regard the failure as meriting any order for compensation.

107. **Paragraph 39** states *"You must get the landlord's permission for advertising and marketing a property, including the erection of a lettings board".* The

Respondents accepted that, as a result of human error, a board had on one occasion been erected without the Applicant's consent and they had apologised for that oversight. **The Tribunal upheld the complaint under Paragraph 39 of the Code of Conduct** but did not consider that any compensation should be awarded to the Applicant as a result of this one-off failure.

108. **Paragraph 43** states *"You must give prospective tenants all relevant information about renting the property – for example, the type of tenancy; the rent; the deposit; other financial obligations such as Council tax; any guarantor requirements and what pre-tenancy checks will be required at the outset".* **The Tribunal did not uphold the complaint under Paragraph 43 of the Code of Conduct**. No evidence had been provided to support the contention of a failure by the Respondents to comply with this Paragraph. The Applicant had merely stated that there was no evidence that the tenants had been told that no smoking was permitted in the Property, but the onus of proving a failure to comply rests with the Applicant and she provided no evidence of any omission on the part of the Respondents.

109. **Paragraph 55** states *"You must inform the landlord in writing of all applications made on the property as soon as possible, unless agreed otherwise with the landlord, along with all relevant information about the offer and the applicant".* **The Tribunal did not uphold the complaint under Paragraph 55 of the Code of Practice**, as it related to the first tenancy and the agreement between the Parties and the commencement of that tenancy pre-dated the publication of the Code of Practice**.**

110. **Paragraph 57** states *"You must agree with the landlord what references you will take and checks you will make on their behalf".* The Applicant had said in her written representations that the managing agreement stated that the Respondents would take up tenant references when they could, but no tenant references had been taken up for the current tenants and as a result, the Applicant was unable to obtain rental protection insurance. The Tribunal has not seen the contract between the Parties, so cannot make a finding as regards the obligations it imposes on the Respondents with regard to taking up references. Accordingly, **the Tribunal did not uphold the complaint under Paragraph 37 of the Code of Conduct** but noted that, in relation to the current tenants, assuming the new agents had checked the paperwork they were given the day before the tenancy started, they would have noticed if it did not contain references for the tenants.

111. **Paragraph 62** states *"If you prepare a tenancy agreement on the landlord's behalf*, *you must ensure it meets all relevant legal requirements and includes all relevant information (such as the name and address of the landlord; type; length of tenancy where it is a short assured tenancy; amount of rent and deposit and how and when they will be paid; whether it is a house in multiple occupation; as well as any other responsibilities on taking care of the property, such as upkeep*

of communal areas and the cleaning required at the end of the tenancy); and any specifically negotiated clauses (for instance whether there will be landlord or agent inspections/visits) agreed between the landlord and the prospective tenant. The agreement must also include the landlord's registration number". **The Tribunal did not uphold the complaint under Paragraph 62 of the Code of Conduct**. The Applicant's position was that she had not been sent a copy of the tenancy agreement, but she provided no evidence to suggest that the Respondents had failed in their obligations under Paragraph 62.

112. **Paragraph 69** states *"If the tenant is not present for the making of the inventory, you should ask them to check it to raise, in writing, any changes or additions within a specific reasonable timescale. Once agreed, the inventory should be signed and returned".* **The Tribunal did not uphold the complaint under Paragraph 69 of the Code of Conduct**. The Applicant was arguing that there was no record available to her from the tenant's perspective as to how the Respondents had dealt with issues raised by the tenants a few weeks into the tenancy, but this had no relevance to the Respondents' duties under Paragraph 69 of the Code of Practice.

113. **Paragraph 73** states *"If you have said in your agreed terms of business with a landlord that you will fully or partly manage the property on their behalf, you must provide these services in line with relevant legal obligations, the relevant tenancy agreement and sections of this Code".* The Applicant's complaint was that the services provided by the Respondents did not meet the standards stated in the tenancy agreement and Code of Practice. She referred again to the fact that, as she did not have a copy of the tenancy agreement, she had paid for a number of repairs which she felt the Respondents, in accordance with the tenancy agreement, should have charged to the tenants, as the items were recorded as being in good condition at the start of the tenancy. These included the broken soap dish, a damaged bath panel, damaged blinds, the damaged light fitting in the kitchen and the incorrect alignment of the conservatory door which was caused by overuse as a result of the tenants being smokers and aggravated by the tenants forcing it and the Respondents failing to deal with the issue when it was first brought to their attention.

114. The Applicant had not provided the Tribunal with a copy of the agreed terms of business against which the Tribunal could have measured performance and the Tribunal had not seen a copy of the relevant tenancy agreement. There was, however, agreement between the Parties that the Respondents had agreed to fully or partly manage the Property. The damaged bath panel had been replaced, new vertical blinds had been installed, the broken soap dish had been taken down and the other repair items had been reported by the tenants on 26 February 2019 and included in the check-out report. The tenancy had ended on 16 April 2019 and the SDS adjudicator had considered them in the context of the refund of the deposit. The Tribunal had made a finding that the Respondents had not dealt quickly enough with the matters raised in the email of 26 February 2019

and that they had failed to comply with the Code in that regard, but there was no evidence to support the contention that the services by the Respondents had not been provided in line with relevant legal obligations or the relevant tenancy agreement, which the Tribunal had not seen. T**he Tribunal, however, upheld the complaint under Paragraph 73 of the Code of Practice**, as it had found that the Respondent had failed to comply with a number of Paragraphs of the Code.

115. **Paragraph 85** states *"If you are responsible for pre-tenancy checks, managing statutory repairs, maintenance obligations or safety regulations (e.g. electrical safety testing, annual gas safety inspections; Legionella risk assessments) on a landlord's behalf, you must have appropriate systems and controls in place to ensure these are done to an appropriate standard within relevant timescales. You must maintain relevant records of the work".* **The Tribunal did not uphold the complaint under Paragraph 85 of the Code of Practice**, as it had not seen a copy of the agreement between the Parties, but neither had it seen any evidence that the Respondents did not have appropriate systems and controls in place as required by Paragraph 85. There was no evidence that the Respondents had not arranged for suitably qualified contractors to carry out any required testing or inspections. The Applicant's complaint had been about the smoke alarm in the kitchen, but the Tribunal had already determined that the Respondents had been entitled to rely on the competence of the suitably qualified electrical contractors that they had instructed.

116. **Paragraph 86** states *"You must put in place appropriate written procedures and processes for tenants and landlords to notify you of any repairs and maintenance (including common repairs and maintenance) required, if you provide this service directly on the landlord's behalf. Your procedure should include target timescales for carrying out routine and emergency repairs".* **The Tribunal did not uphold the complaint under Paragraph 86 of the Code of Practice**, as no evidence had been provided to indicate that such written procedures and processes were not in place.

117. **Paragraph 90** states *"Repairs must be dealt with promptly and appropriately having regards to their nature and urgency in line with your written procedures".* The complaint here related again to the conservatory door, bathroom tap, kitchen light and smoke alarm in the kitchen. The Tribunal had not seen the written procedures of the Respondents, so was not able to determine what they undertook to do in respect of repairs timescales. The Tribunal had already determined that the Respondents had failed to comply with Paragraphs 21and 26 of the Code but, as it had not seen the written procedures on which the Paragraph depends, **the Tribunal did not uphold the complaint under Paragraph 90 of the Code of Practice.**

118. **Paragraph 94** states *"You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided".* The Applicant accepted

that the Respondents had indicated to the tenants that they would ask their sub-contractors to deal with the issue of the alarm and had provided timescales for this but stated that there was no evidence of the Respondents having a means of monitoring the actions of the sub-contractors to ensure the issue of the alarm was rectified, as a result of which no action appeared to have been taken by the contractor on two occasions. The Tribunal held that the Applicant's complaint was speculation and was not supported by any evidence that had been presented to it. Accordingly, **the Tribunal did not uphold the complaint under Paragraph 94 of the Code of Practice.**

119. **Paragraph 102** states *"If you are responsible for managing the check-out process, you must ensure it is conducted thoroughly and, if appropriate, prepare a sufficiently detailed report (this may include a photographic record) that makes relevant links to the inventory/schedule of condition where one has been prepared before the tenancy began".* The Applicant provided very lengthy written representations regarding the check-out reports prepared at the end of each of the two tenancies. Her basic complaint was that they were not properly and thoroughly completed and were not sufficiently detailed. They also did not make reference to the Inventories completed at the start of the tenancies. She listed a large number of items which she had identified during her own inspections which demonstrated to her that the Property had not been left in the apparently acceptable condition indicated in the check-out reports.

120. The Respondents, in their response to the Applicant's letter of complaint, stated that all their exit inspections and sign out reports are carried out in the same format to stay in line with the requirements of the tenancy deposit scheme. Both reports for the Property had been accompanied by numerous pictures to support the fact that there were areas affected by more than wear and tear.

121. The Tribunal noted that the wording of Paragraph 102 refers to making relevant links to the Inventory prepared before the tenancy began and the Tribunal noted that the check-out reports did not do that, but the adjudicator had been sent a copy of the Inventory relative to the first tenancy and would have had regard to it in reaching a decision, so the Tribunal did not consider that the Applicant had been prejudiced by the fact that the check-out report did not make specific references to the original Inventory. The adjudicator is completely independent, and it was clearly stated in the adjudication that all evidence submitted by the parties had been considered by the adjudicator, even if it was not referred to specifically in the report. The Respondents were not involved in the process or recovery of the deposit at the end of the second tenancy.

122. The Tribunal accepted that the check-out reports could have been more detailed, but, as the primary use of the reports, failing agreement between the landlord and tenant, was to form a starting point for a claim by the Applicant that the deposit should not be refunded in full to the tenant, the Tribunal was not

persuaded that they were not sufficiently detailed. Accordingly, **the Tribunal did not uphold the complaint under Paragraph 102 of the Code of Practice.**

123. **Paragraph 108** states *"You must respond to enquiries and complaints within reasonable timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and fully as possible and to keep those making them informed if you need more time to respond."* **The Tribunal upheld the complaint under Paragraph 108 of the Code of Conduct** for the reasons set out in its decision under Paragraph 26 of the Code of Practice.

124. The Tribunal recognised that the relationship between the Parties completely broke down. As a result, the dispute between them had become very personal in nature. The Applicant was suggesting that the Respondents had kept the check-out reports brief as, had their content been more thorough, they would have reflected badly on the Respondents' conduct in the management of the tenancies. She also suggested that they failed to implement the instructions of 31 December 2019 to carry out a new Inventory because they knew it would highlight their lack of thoroughness in relation to the second check-out report. For their part, the Respondents implied that there was an alternative agenda in the Applicant's complaint and that if they had been allowed to operate in their usual manner, without "interference" from the Applicant, the outcome of the adjudication regarding the deposit in the first tenancy might have been more favourable to the Applicant. The attitude of both Parties was not helpful to the Tribunal. The Tribunal was not persuaded that the Respondents had acted in bad faith, as the Applicant was suggesting, but was disappointed that the Respondents had not provided copies of their instructions to their electrical contractors in relation to the smoke and heat detector issue or a copy of the "Electrical Installation Certificate" to which they referred in their written submissions. This documentation might have provided them with a complete defence but, at worst, it would have clarified the situation for the Applicant and for the Tribunal. The Respondents had also been incorrect in stating in their written representations that the SDS final decision had awarded the tenant the full deposit amount and it was disingenuous to say that items like the damaged soap dish and the alignment of the patio door were not "fully brought to light until the exit inspection was conducted". The Respondents had known about them for at least seven weeks.

125. The view of the Tribunal was that the Applicant had an unrealistic expectation as regards the condition in which she could expect to find the Property at the end of the two tenancies. Outgoing tenants are not expected to clean properties to a commercial standard and landlords must expect that some deterioration will occur through normal occupancy of a property. The tenancy deposit scheme is in place to provide an unbiased and independent assessment, following representations by both parties. In the present case, the Applicant had provided a substantial body of material in addition to the submissions prepared on her behalf by the Respondents. The refusal to allow the tenants the opportunity to go back

to the Property to try and resolve any issues was not self-incriminatory, as the Applicant contended. It is expected that landlords will afford tenants a reasonable opportunity to remedy alleged defects.

126. Having determined that the Respondents had failed to comply with the Code of Practice, the Tribunal was bound to issue a Letting Agent Enforcement Order and to consider whether the Respondents should be required to pay compensation to the Applicant under Section 48(8) of the Housing (Scotland) Act 2014.

127. As the Tribunal was satisfied that the Respondents had forwarded to SDS representations and photographs provided by the Applicant and as the Tribunal was not, in any event, prepared to revisit the decision of the adjudicator, it was not prepared to make an Order requiring the Respondents to reimburse any costs which the Applicant considered should have been recovered from the outgoing tenants.

128. For the reasons set out in its decisions in relation to Paragraphs 21, 37 and 39 of the Code, the Tribunal decided that no award of compensation should be made in respect of the Respondents' failure to comply with those Paragraphs. The failure to comply with Paragraph 73 was, in essence, a consequence of the failures to comply with other Paragraphs, so the Tribunal made no award of compensation in respect of the failure to comply with Paragraph 73.

129. The Applicant had sought compensation of £1,350 in respect of lost rent, due to the start of the second tenancy being delayed as a result of work that had to be carried out. The Tribunal did not accept this argument. Landlords must expect to have to carry out some work in between tenancies to redress wear and tear or to carry out remedial work, irrespective of who is ultimately found liable to pay for such work. The Applicant had indicated that the failure by the Respondents to attend to the complaint about the conservatory door had contributed to this delay, but it was clear from the papers submitted to the Tribunal that the door had actually been repaired after the second tenancy started, so the Tribunal rejected the application for compensation in respect of "lost" rent.

130. The Tribunal accepted that the Applicant had been caused unnecessary and unwelcome stress and inconvenience as a result of the Respondents' failures to comply with Paragraphs 17, 19, 26 and 108 of the Code of Practice, and, having considered carefully all the evidence, written and oral, presented to it, the Tribunal determined that the Respondents should be ordered to pay to the Applicant compensation in the sum of £400.

The Decision of the Tribunal was unanimous.

Right of appeal

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.

Where such an appeal is made, the effect of the decision and of any order is suspended until the appeal is abandoned or finally determined by the Upper Tribunal, and where the appeal is abandoned or finally determined by upholding the decision, the decision and any order will be treated as having effect from the day on which the appeal is abandoned or so determined.

George Clark 4 February 2021

Legal Member