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

Decision: Housing (Scotland) Act 2014 Section 48 and the First-tier Tribunal for Scotland Procedure Regulations 2017 Rule 26

Reference number: FTS/HPC/LA/22/0405

Re: Property at 43 Earn Court, Grangemouth, FK3 0HT ("the Property")

The Parties:

Mrs Carol Judge, 15 Hillhead Drive, Falkirk, FK1 5NG ("the Applicant")

Taylor William Lettings and Estate Agent, 108A Main Street, Larbert, FK5 3AS ("the Respondent")

Tribunal Members:

Petra Hennig McFatridge (Legal Member) and Elizabeth Currie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the tribunal'), having made such enquiries as it saw fit for the purposes of determining whether the Letting Agent has complied with the Code of Practice for Letting Agents as required by the Housing (Scotland) Act 2014 ("the 2014 Act"), determines unanimously that, in relation to the present Application, the Letting Agent has not complied with the Code of Practice as follows:
Section 2 Numbers 17, 19 and 26
Section 7 Numbers 108

and determined to issue a Letting Agent Enforcement Order ("LAEO") in the following terms:

Within 2 months of intimation of the LAEO the Letting Agent must:-

pay to the Applicant compensation of a total amount of £550 and produce proof of payment of said sum to the Tribunal.

The Tribunal did not find that the Respondent has not complied with the Code of Practice Section 2 Number 24 and Section 5 Number 73

[1] Introduction

On 6 February 2022 an application under S 48 of the Housing (Scotland) Act 2014 (the Act) was made to the tribunal by the Applicant. The application was made in terms of S 48 and rule 95 of The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations (the Rules) and included a copy of the Letting Agent Code of Practice Notification Letter sent to the Respondent by the Applicant in terms of rule 95 (b).

Representations were lodged by the Respondent Taylor William Lettings and Estate Agent (TW) on 13 April 2022 following an application to extend the response period on 18 March 2022, which was granted by the tribunal. These included the documents listed in the Respondent's Inventory of Productions.

The tribunal issued directions dated 13 April 2022 to the parties to regulate the process. In reply the Applicant provided further documents which were received by the tribunal members on 27 April 2022 and sent to the Respondent.

The case called for a Case Management Discussion (CMD) on 3 May 2022 and the Applicant attended, as did Ms Deborah Orr for the Respondents. The CMD note and further directions are referred to for their terms and held to be incorporated herein.

Following the CMD, the Applicant complied with the directions dated 3 May 2022. She provided a reply (115) pages on 31 May 2022 and ultimately lodged a paginated and indexed bundle of documents (189 pages) containing all productions lodged by the Applicant in relation to the case on 13 June 2022.

No reply to the directions were received from the Respondent.

Both parties were issued with notification of the hearing date for the case being 14 July 2022 by email dated 4 May 2022.

On 11 July 2022 the Respondents emailed the Tribunal advising that one of the directors of the company had passed away and that they were seeking a postponement of the hearing as the member of staff representing the Letting Agent was to be taking a family member to a medical appointment. In the email the Letting Agent stated that the claim should be directed at the previous owner of the company and that the Applicant had waited too long with the claim to now proceed. Following a request for further information to evidence the matters raised regarding a postponement in terms of rule 28 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (the rules), the Respondent advised on 12 July 2022 that it was possible for the staff member to attend. The Applicant on 12 July 2022 also by email opposed such a postponement request.

On the day of the hearing, 13 July 2022, Ms Orr forwarded an email dated 30 May 2022 relating to the death of Mr Chisholm.

All documents lodged by both parties are referred to for their terms and held to be incorporated herein for evidential purposes.

[2] The Legal Basis of the Complaints

The Applicant notified the Respondent by letter that she considered they had failed to comply with the undernoted Sections of the Code of Practice for Letting Agents:
Section 2 Numbers 17, 19, 24 and 26
Section 5 Numbers 73
Section 7 Numbers 108

The Tribunal application detailed the following complaints:
Section 2 Numbers 17, 19, 24 and 26
Section 5 Numbers 73
Section 7 Numbers 108

The specific issues raised by the Applicant regarding each item of the Code are set out in the Code of Practice Breach document submitted by the Applicant with the application, which is referred to for its terms and held to be incorporated herein.

[3] Hearing

On 13 July 2022 the Applicant joined the teleconference, as did Ms Orr on behalf of the Letting Agent. Ms Orr advised that she had only now found out that the company would have been able to obtain legal representation and asked if she would be able to obtain this now and if the hearing could be postponed. She stated the reason for not submitting any information requested in the direction was that no such information was available. Whilst Mr Chisholm had not attended the CMD, he had been supporting her and been giving advice to her previously. However, he was not a witness the Respondent would have called at the hearing. She stated again that the company had been acquired in February 2020 by new owners who kept the portfolio and the company name but introduced new document management systems, however, all documents from the relevant time were available to her in preparation of the case. It was still the same business. Companies House records would confirm the change of directors on 21 February 2020. She stated that she was not offering any witnesses on behalf of the Respondent. Ultimately if the Tribunal was not prepared to allow a postponement for legal representation she was in a position to proceed with the hearing.

The Tribunal considered that the Respondent had had ample notice of the case and of the hearing date and could have instructed legal representation at any time since they had been advised of the application. The death of one of the directors had been known to the Respondent since May 2022 and there had been no request for a postponement of the hearing until the 2 days prior to the hearing. It was not clear

from the representations of Ms Orr what additional information the director would have been providing had he been alive, as it was not envisaged that he would be giving evidence and Ms Orr confirmed that he had no further knowledge of the case other than what he had discussed with her. In light of the information available the Tribunal did not consider that a postponement of the case would be appropriate.

The Applicant and Ms Orr confirmed that the CMD note was an accurate record of the CMD.

Both parties referred the Tribunal to their written evidence and representations as their evidence in chief. All references to page numbers in the Applicant's evidence are to the page numbers in the Applicant's bundle.

All references to items in the evidence by Ms Orr are to the Inventory of Productions by the Respondent.

[4] Oral evidence of the Applicant:

Ms Judge referred to her written submissions and evidence as contained in her initial notification letter to TW, the application and her explanations provided in her bundle.

In the email of 29 March 2019 from TW to the tenants (p34) TW wrote they had consulted the landlord about the issues raised in the tenant's email regarding the tenancy and stated "We jointly feel... to continue this tenancy is really not tenable." TW offered to annul the tenancy and refund the monies paid. She had been on holiday at the time and had not been told about this and had not been consulted on this offer. This was her first time renting out property and she was heavily relying on the letting agent employed by her to advise her. She only found out after she returned from holiday that this had happened and at that point agreed that this may have been an appropriate way forward. TW had felt the tenants were the wrong tenants for the property but the tenants ended up staying until July 2021 and by the time she came back from holiday had already rejected the offer made by TW and decided they would stay.

On 16 August 2019 TW had then also agreed by email (p 32) to the tenants that the tenants could lay artificial grass on the decking. This had been against her explicit instructions. In subsequent conversations TW had pretended not to know whether such a covering had been laid. She stated that the decking had been in situ for about 8 years prior to the tenancy starting on 11 March 2019. She had maintained this and the letting agent's comment in the moving in report (p 169) described the decking as VGC (very good condition). Although there had been complaints of the tenants on the state of the decking as soon as they moved in (p32), which had been forwarded to her by TW, she stated that the decking was in an age appropriate condition and all that was required to keep it from being slippery was to brush it and keep it dry. The decking would usually have a life span of between 12 and 15 years. The tenants had sent a 12 page report about dry rot and other complaints and she replied with instructions to keep it clean and brushed and dry. She was never told by TW to do anything else about the decking and if there was action required they should have told her. She had found out about the artificial grass when the windows were repaired in November 2019 and asked TW to investigate this. The conversations

about this were telephone conversations and she was told by TW that they could not do an unscheduled inspection. TW had advised her that they could not do anything further until the next inspection was due in February 2021. The decking is now 11 years old, having been laid in 2011/2012 and has not been replaced but now requires replacement as per the inspection report of 3 November 2021 (p 172-176), which refers to "Rear decking damaged" and provides a photograph. She has not replaced it due to lack of funds but a quote (p 188) advises this would cost £1000. Mrs Judge stated that the replacement is now needed because the decking was covered and thus could not properly dry out (p54). She referred to various sources from the internet (p 178-187) stating that decking should not be covered. She thinks that the decking is now in the condition it is not because of age and wear and tear but that the decking suffered because it was covered by the artificial grass. She stated TW lied to her when they told her they did not know about the artificial grass because they had agreed the tenants could put it down in August 2019, which she only found out about during another case before the Housing and Property Chamber when the former tenants gave her a copy of the consent from TW in August 2021.

She stated when she enquired about this with Mr Nelson in August 2021 he told her the email may be a fraud. TW clearly did not keep proper records as they could not find the email to the tenants when she complained. She had given the date and time when it was sent when she spoke to TW. They could not find it. They then just did not reply any further and thus she finally made the formal complaint on 1 September 2021.

She stated that she holds TW responsible for the premature deterioration of the decking and that they had lied to her and failed to be transparent and honest in their representations regarding the artificial grass.

TW had then lied to her again in October 2020 when she had asked them to find out how long the tenants intended to stay and they had told her first they could not get hold of the tenants and then that the tenants did not know (email 13.10.2020) She stated she had two emails from TW two days apart. She had spoken to the tenants in the course of the other action before the Tribunal and they had told her they had never been asked about this at all.

With regard to the complaint under paragraph 73 Mrs Judge stated she had not been informed the electrician would cut a hole in the back of the kitchen cupboard and TW told her afterwards they could not contact her. This had happened in October/November 2020 and she did not find out until after the tenants moved out in February 2021. She did, however, settle the matter with TW and they did resolve it and she accepted the outcome (p 62-69).

[5] Oral evidence of Mr Laing:

Mr Laing referred to his written witness statement (p 148-149). He explained he is the Applicant's partner and attended the meeting with Mr Dawson because he was retired and could do so without taking time off. Mr Dawson had told him about his involvement with the business and then advised him he had taken special interest in the tenancy as this was one of only two difficult tenancies. He did not state he had given permission to put down artificial grass. Mr Dawson said to him that because

the information about the artificial grass came from the person who repaired the window, TW could not contact the tenants and ask directly about that because the tenants would then ask who had given them that information. Mr Dawson seemed worried about carrying out another inspection so quickly after the last one and it would be done in January/February 2020 when another inspection was due. Mr Dawson told him if the artificial grass was down he would ask when this was done and how it was laid and they would be told not to do it. Mr Laing stated he wondered why this could not be done right now. Mr Dawson agreed at the next inspection something would be done about it. Mr Laing stated that Mrs Judge had then found out from the tenants about the consent so Mr Dawson did know when he had the meeting. There were no minutes of the meeting and no follow up email. It was clear from the email to the tenants that this was sent when Mr Dawson was out of the office but the response was "on his behalf".

[6] Oral evidence of Ms Orr:

Ms Orr advised she was in charge of the Larbert office of TW and had joined the office on 21 August 2021. All the incidents apart from the issue of the reply to the complaint had happened before her time and there was nobody left who had worked there at the time. Her evidence in chief was contained in the documents lodged as the Respondent's defences. She had access to all emails and records and there was no actual written contract between TW and the Applicant. This indicates that such a document had never existed.

She thought that if the email to the tenants in March 2019 mentioned that the offer to cancel the tenancy agreement was the joint position, then TW staff would only do so if they had discussed it with the landlord. There were no documents regarding the tenancy which indicated that the landlord had not agreed and there was only Mrs Judge's word to say this was the case.

Similarly, TW staff would have only advised the tenants that they could put down artificial grass if they had discussed this with the landlord. Although there were no notes of a telephone conversation or email exchange about this on file, there was also nothing on file to suggest that the Applicant had not agreed to artificial grass being put down. It was in any event a sensible compromise to allow this because of the complaints from the tenants that they had slipped and fallen (email 13 August 2019 from tenants to TW) and that the decking was too slippery (email from tenants to TW 14 March 2019) and the landlords comments on the matter (covered in items 5 to 9 of the inventory). Ms Orr repeatedly stated that it was her firm belief that such a consent would not have been issued without the explicit consent of the landlord. She further stated she did not believe that there would have been any substantive damage to the decking between when it was put down and when the Applicant was informed about this in November 2019. She stated if the Applicant had done something about the matter at that stage, her complaint could have been dealt with at the relevant time.

She stated that when the Applicant had asked about how long the tenants intended to stay TW had made enquiries but were not responded to and subsequently the Notice to Leave to the tenants was issued on 5 November 2020. She suggested that the information from the former tenants to the Applicant could and should not be

relied upon. There was no further correspondence about this topic in the file after 13 October 2020.

She stated the reason why the email of 16 August 2019 could not be found initially was that there was too little information about the date, time, heading so that the system could not identify it from the old records. There was now a new system where all emails went into a central point and were then saved from there into the file. The record keeping of TW was fine and all information was ultimately available, even information from the old filing and electronic filing system prior to February 2020. She could not comment on what Mr Nelson had said to the Applicant about the email but he would have made enquiries.

With regard to the reply time to the complaint on 1 September 2021 Ms Orr stated that all complaints now come to her and she delegates to another staff member to deal with them and a response is issued between 10 and 14 days. If the first response is not sufficient the matter goes directly to her to deal with. There are now 2 more staff member and enough staff members to deal with complaints quickly and such a delay would not happen again. At the time the complaint came in there was nobody to refer this back to and she was just catching up.

Ms Orr stated that there was no problem with the record keeping but there just was no documentation to confirm that TW had acted without the Applicant's consent and she was not able to accept that on behalf of TW. Had there been correspondence or notes to that effect it could all have been dealt with before. She stated she would have thought that such matters would have been put in writing. She never met Mr Dawson or Ms Smith, who had sent the emails, and she could not contact Mr Dawson and had no reply from Ms Smith when she left a message for her. Her opinion is all she can provide and she could not say something happened or not, she can only say how she assumes it should have been done. There is nothing in writing to show Mrs Judge did not wish Astroturf to be put down and she cannot imagine that would have been done without her consent. Similarly there was nothing in writing about what had been discussed regarding the tenancy cancellation proposal apart from the email.

With regard to the electrician issue, this had been settled. The consent to the electrician was given to avoid a further call out charge to the landlord at the time and it was not because the electrician was in a hurry. Normally anything up to £100 for repairs would be dealt with by the letting agent.

[7] Submissions: Neither party wished to make formal representations and both referred to their written submissions on file.

[8] Findings in Fact:

The tribunal makes the following findings based on the oral evidence at the hearings and the documents lodged by the Applicant and Respondent:

1. The parties entered into a letting agent agreement for the property at 43 Earn Court, Grangemouth FK3 0HT in or around the start of March 2019.

2. As per clause 1 of the tenancy agreement over the property commencing 11 March 2019 the letting agent provided on behalf of the landlord repairs, complaints, rent payment, notice and out of hours emergency services.
3. The Applicant was the landlord of the said property.
4. The Respondent acted as Letting Agent for the Applicant for the property.
5. The property was rented to the former tenants from 11 March 2019 to February 2021.
6. There was no written agreement between the landlord and the letting agent.
7. The letting agent fee for the tenancy per calendar month was £83.40.
8. The property is accessed by wooden decking.
9. The moving in inspection refers to the decking in being in very good condition.
10. At the start of the tenancy in March 2019 the decking was about 8 years old.
11. The average lifespan of such decking is between 12 to 15 years.
12. The decking is now about 11 years old.
13. An inspection in November 2021 by another letting agent instructed to let the property described parts of the decking as "rotting".
14. The quote for replacement of the decking provided shows an amount of £1,000.
15. The general advice on decking maintenance is to avoid covering decking with a cover which may not allow proper drainage of moisture from the wood.
16. The former tenants complained about the state of the decking on 14 March 2019 to TW referring to fungus being present on the wood. This was sent to the Applicant.
17. On 20 March 2019 the Applicant replied "the condition of the decking is consistent with its age and we do not consider it to be unsafe where it meets the neighboring property."
18. On 24 March 2019 the former tenants advised TW in an email that fungus will eat the timber and will lead to structural failure over time.
19. On 13 August 2019 the former tenants emailed TW to state they had fallen on the decking and wished to put down artificial grass.
20. The Applicant did not grant permission to do so and communicated this to TW around 14/15 August 2019 by telephone.
21. On 16 August 2019 TW wrote to the former tenants on behalf of Mr Dawson "In relation to the artificial grass this is fine for you to put down on the decking however it is asked that this is not stapled to the decking."
22. TW did not obtain the permission of the Applicant for this consent.
23. In November 2019 a window contractor attended the property and reported to the Applicant that artificial grass was on the decking.
24. On 25 November 2019 a meeting took place between Mr Laing and Mr Dawson.
25. Mr Laing raised the issue of the window repair man having seen artificial grass on the decking and having brought this to the Applicant's attention.
26. Mr Dawson stated that he did not know about artificial grass having been laid on the decking by the then tenants.
27. Mr Dawson stated this could not be verified until the next scheduled inspection in January 2020.
28. Mr Dawson stated that if there was artificial grass then that would be dealt with at that time.

29. In January 2020 after a further inspection the landlord was advised that nothing could be done about the artificial grass as this had now been laid and was not fixed to the decking.
30. On 29 March 2019 TW offered the former tenants in an email to "annul the tenancy agreement and provide you with a full refund".
31. The Applicant was not consulted on this offer and was only advised of this after she returned from holiday some time after that email had been sent.
32. She would have agreed to that proposal had she been asked.
33. The former tenants remained in the property until February 2021.
34. On 13 October 2020 the Applicant asked TW to ascertain from the then tenants how long they envisaged to remain in the property.
35. TW replied initially that they had been unable to contact the tenants and in a further communication the following day that the tenants did not know.
36. The former tenants advised the Applicant in August 2021 that they had not been asked by TW how long they envisaged to stay.
37. The former tenants provided the email from TW dated 16 August 2019 to the Applicant in August 2021.
38. TW were initially unable to locate said email in their records.
39. TW as a business changed directors on 21 February 2020, when Mr Dawson retired as director and Mr and Mrs Chisholm took over the business and the portfolio.
40. Correspondence and records under the old management are available and accessible to the current TW staff but are kept on a separate document management system.
41. Some records in the former document management system can only be accessed with detailed search information.
42. Neither Mr Dawson nor Ms Smith continue to work for the business.
43. On 1 September 2021 the Applicant notified the Respondent formally of her complaint about non compliance with the Code of Practice for Letting Agents.
44. Receipt was acknowledged by TW on 2 September 2021.
45. The formal reply to this complaint was issued to the Applicant by the Respondent on 28 December 2021.
46. The response time for dealing with complaints in terms of the complaints procedure is 15 working days.
47. On or around November 2020 an electrician attended the property to install a new hob and oven.
48. TW gave permission for the electrician to cut a hole in the back of one kitchen cupboard to connect the electricity.
49. The backing was repaired and the repair paid for by TW.
50. TW did not contact the Applicant at the relevant time to ask for her permission.
51. The Applicant settled this matter with TW for a 2 months period of free letting agent fees for another property and for TW undertaking to deal with the rent arrears for the property.

[9] Findings in Law and Reasons:

The requirement to comply with the Code of Practice for Letting Agents is considered by the Tribunal on the basis of the actions and omissions of the letting agent

business as a whole with whom the landlord contracted. The Tribunal was satisfied that although the directors and staff may have changed over time, TW as a company was the letting agent with which the Applicant had entered into a fully managed letting agent agreement. Thus the Respondent is the correct respondent for the claim.

Whilst there is no doubt that the change in personnel may have made it difficult for the Respondent to reply to the complaint and to provide first had evidence regarding the matters raised by the Applicant, it is the same Letting Agent business and any such difficulties would have been mitigated if better records had been provided by the former staff members involved at the time.

If the Respondent had wished to lead evidence from former staff members it was up to the Respondent to arrange this.

Ultimately the only oral evidence from the Respondents came from Ms Orr, who had no direct involvement in the management of the property and could admittedly only speak about how she thought matters would and should have been handled.

There was no direct evidence from the former staff members who had dealt directly with the Applicant's tenancy between March 2019 and February 2021 and the only direct evidence on these matters was provided by the Applicant and her partner Mr Laing.

There was also no written evidence which may have documented agreement of the Applicant to the offer to cancel the tenancy or the permission to put down artificial grass on the decking.

The documentation, in particular the email of the Applicant to TW dated 20 March 2019, if anything supported the Applicant's evidence that she did not agree to any repairs or other measures being taken regarding the decking when the former tenants of the property initially complained.

The evidence of Mr Laing supported the evidence given by the Applicant regarding the issue of the consent to install decking given by TW and denied by Mr Dawson.

On balance the Tribunal placed more weight on the direct evidence of the Applicant regarding the failures of TW to consult her before offering to annul the tenancy and on her evidence and that of Mr Laing on the failure of TW to consult the Applicant before consenting to lay artificial grass on the decking. The Tribunal also preferred their direct evidence, which was mutually corroborating, in the matter of whether or not TW had then misrepresented the matter to the Applicant when she enquired about the artificial grass from November 2019 onwards.

The Tribunal also preferred the Applicant's direct evidence regarding her enquiries with TW in October 2020 to the position of Ms Orr, who had no direct knowledge of the matter and could only state that this would have been dealt with appropriately by staff at the time.

Ms Orr pointed out that the above matters were not supported by any written documents in the case management system but also stated all notes etc would be available in that system with appropriate enquiry. However, the absence of notes about telephone conversations with the Applicant does not evidence that these have not taken place.

The Applicant clearly remembered matters well and was able to explain why she waited until September 2021 with a formal complaint to the letting agent about non compliance with the Code of Practice. This was triggered by information she only received in August 2021 from the former tenants in connection with a case before the Housing and Property Chamber. The Tribunal also notes that she had complained about other matters, including the electrician cutting a hole in the kitchen unit, in June 2021 and that this complaint had been appropriately dealt with by the letting agent and settled between the parties. Over all the Tribunal found the evidence from the Applicant credible.

Whilst the Tribunal also considered that Ms Orr on behalf of the letting agent gave the information she did provide honestly, she clearly had no first hand knowledge of the conduct of former staff and simply could not provide her own evidence about matters which took place before she started working with the letting agent in August 2021.

It is admitted by TW that there were breaches of the Code of Practice for Letting Agents numbers 26 and 108 due to the length of time it took TW to reply to the Applicant's letter of complaint. The reply was sent on December 2021 and thus outwith the 15 working days envisaged in the complaints procedure. This was admitted at an early stage and an apology was issued.

[10] Thus the Tribunal finds that the letting agent had not complied with the Code of Practice as follows:

SECTION 2
Overarching standards of practice
17. You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants).

The letting agent had not been transparent in its communications with the landlord and tenant and misrepresented the landlord's instructions to the tenants regarding the permission to put down artificial grass. The letting agent was not honest in the representations to the landlord about the consent they issued to the tenants for the above. The letting agents denied they knew about the artificial grass and thereafter advised the landlord nothing could be done to remove the artificial grass. The letting agent did not represent the position correctly regarding their efforts to establish the information as to when the tenants intended to move out as requested by the landlord. The letting agent lied to the landlord about the consent they had provided to the tenants regarding the artificial grass and pretended to have no knowledge of this when the landlord made enquiries.

19. You must not provide information that is deliberately or negligently misleading or false.

The letting agent had not been transparent in its communications with the landlord and tenant and misrepresented the landlord's instructions to the tenants regarding the permission to put down artificial grass. The letting agent was not honest in the representations to the landlord about the consent they issued to the tenants for the above. The letting agents denied they knew about the artificial grass and thereafter advised the landlord nothing could be done to remove the artificial grass. The letting agent did not represent the position correctly regarding their efforts to establish the information as to when the tenants intended to move out as requested by the landlord. The letting agent lied to the landlord about the consent they had provided to the tenants regarding the artificial grass and pretended to have no knowledge of this when the landlord made enquiries.

26. You must respond to enquiries and complaints within reasonable timescales and in line with your written agreement.
The complaint of the landlord of 1 September 2021 did not receive a substantive reply until 28 December 2021.

SECTION 7
Communications and resolving complaints
Communications
108. *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 complaint of the landlord of 1 September 2021 did not receive a substantive reply until 28 December 2021.

[11] Having considered in detail the email exchanges between the parties, the documents provided and the written and oral evidence from the Applicant and the Respondent, the Tribunal concluded that the Letting Agent did not fail to comply with the Letting Agent Code of Practice in the following ways:

SECTION 2
Overarching standards of practice
24. *You must maintain appropriate records of your dealings with landlords, tenants and prospective tenants. This is particularly important if you need to demonstrate how you have met the Code's requirements.*

The only non compliance alleged and relied on related to the inability of the letting agent to locate the email of 16 August 2019 from TW to the former tenants. The Tribunal can only deal with non compliance of the Code of Practice which have previously been notified to the letting agent and thus the findings of the Tribunal in this regard are limited to this one specific issue.

The Tribunal was satisfied on the evidence of Ms Orr that the letting agent was able to access that email from their own records once it was established when it was sent and who it was sent to and by. She explained in detail that if an email had been sent not via the generic email address the IT department had to be asked to access the

individual's mailbox and to retrieve the individual records. If the details were know the email could be accessed. This is evidence she could speak to from her own knowledge and observation as a member of staff. Whilst it may be the case that the member of staff dealing with the initial enquiry, Mr Nelson, did not retrieve the email at the time, the record of the email was accessible and present in the records of the company and clearly accessed without problem when Ms Orr dealt with the complaint of the Applicant.

SECTION 5

Management and maintenance

73. 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 Tribunal considered the evidence of both the Applicant and Ms Orr with regard to this matter and found that the letting agent had already dealt with the complaint about the hole cut into the kitchen unit at a previous stage in terms of the Applicant's initial complaint about this in June 2021 as this had not met her expectation as to how such a matter should be dealt with. However, the Tribunal was unable to identify from the specific description of the alleged breach in the notification to the letting agent and in the claim form, which specific legal obligation, provision of the tenancy agreement or specific provision of the Code of Practice this incident would be captured by. The Applicant was asked to specify this further in the course of the hearing but was unable to do so. In any event, this issue will have no bearing on the remedy as the Applicant confirmed that this issue had been dealt with and settled in June 2021 between the parties. Thus the Tribunal considers that even if a breach had been established there would be no further action required by the letting agent in this regard.

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[12] Remedies:

Based on the above findings the Tribunal considered further what the consequences of the failures to comply with the Letting Agent Code of Practice should be in terms of S 48 of the Housing (Scotland) Act 2014.

The Act provides: S 48 (7) Where the Tribunal decides that the letting agent failed to comply, it must by order (a " letting agent enforcement order") require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure. (8) A letting agent enforcement order – (a) must specify the period within which each step must be taken, (b) may provide that the letting agent must pay the applicant such compensation as the Tribunal considers appropriate for any loss suffered by the applicant as a result of the failure to comply.

The Tribunal considered that the failings to comply with the Letting Agent Code of Practice in this particular case arose mainly due to the conduct of former staff, who are no longer involved in the company.

The Applicant had not made any motion regarding remedy other than a request in the application for compensation for the cost of replacing the decking and a

reduction in the monthly letting agent fee from March 2019 to February 2021 to reflect the lack of service which could be expected for the fee paid.

The Applicant specified the cost for the decking at £1,000 in terms of the quote provided but also stated the decking had not been replaced and thus no actual invoice was available. The Applicant made a request for the full refund of the letting agent fee for 23 months amounting to £1,918.20

With regard to the motion to order compensation to be paid to the Applicant, the Tribunal must first determine the loss to the Applicant arising out of the breaches of the Code and then in a second step order such compensation as it considers appropriate.

The first question is thus: What loss was caused by a breach of the Code?

The burden of proof for any such loss is on the Applicant. He or she has to evidence the financial loss and the causal link to the breach of the Code of Practice.

The Tribunal considered that with regard to the breaches of the letting agent Code of Practice items 17 and 19 with regard to the offer of the letting agent to the tenant to annul the tenancy in the name of the landlord, although the landlord had not been consulted, there was no financial loss of rent because as a matter of fact the tenancy continued until February 2021.

Similarly regarding the misrepresentations as to the enquiries made with the tenants on how long they intended to stay in the property, no specific loss arose from that.

The Tribunal considered that with regard to the breaches of the letting agent Code of Practice items 17 and 19 with regard to the non disclosure of the consent given to the tenants for placing artificial grass on the decking, the landlord was not advised of said consent by the letting agent from August 2019 onwards and because the information wrongly provided to the landlord by the letting agent the landlord was persuaded not to take any steps to have said artificial grass removed until the tenants moved out in February 2021. There was thus a period of 18 months when the decking was covered by artificial grass, which the landlord did not provide consent for.

However, the evidence to the Tribunal at the hearing was that the decking had been in place for 8 years at the start of the tenancy in March 2019 and continues to be in place at present. Thus the decking is approximately 11 years old by now. The Applicant stated at the hearing that the average lifespan of decking of this nature would be between 12 and 15 years The photographic evidence provided by the tenants in their initial comments on the moving in report shows that fungus growth was present on the decking when the tenancy started. Although the decking was described in very good condition in the inspection report, it is clear from the photographs that the decking was not in a condition as new. The Applicant herself described the condition of the decking in her answer to the letting agent as "consistent with its age", which at the time was 8 years. On balance, based on the information provided, the Tribunal considers that the decking would likely have reached the end of its natural lifespan in approximately one year. The Tribunal

considers that the decking is clearly not in sufficiently bad condition to be replaced as a matter of urgency, which is indicated by the fact that the Applicant has not taken steps to repair it despite continuing to place it on the rental marked through new agents. The Applicant has not provided any specialist report evidencing any premature deterioration of the decking through artificial grass. She has provided some generic information that decking is supposed to be kept dry and that a cover would interfere with the draining of moisture. The Tribunal considers that the Applicant has evidenced at best a 10 % premature deterioration of the decking through having a cover in place which may have led to moisture not draining appropriately. The Applicant has not provided a definite cost of repair. She has provided a provisional estimate of £1,000. Thus the Tribunal considers that on balance the action of the letting agent would have led to a slightly premature ageing of the decking through lack of drainage. The Tribunal considers that this led to a likely loss of £100, being 10 % of the replacement cost of £1000 quoted to the Applicant.

Apart from the direct loss as stated above, the Tribunal further considers that the breaches of numbers 17 and 19 of the Code of Practice overall, and in particular the explicit misrepresentation regarding the consent given to the tenant to place artificial grass against the instructions of the landlord would warrant a reduction in the service provided. The Tribunal considered that a fair reduction of the management fees paid during the relevant period would be £450.

Regarding the delay in dealing with the Applicant's complaint of 1 September 2021 until 28 December 2021 resulting in the non compliance with numbers 24 and 108 of the letting agent Code of Practice: this was admitted and explained due to the change in staff and lack of staff at the time. Since then more staff had been taken on and Ms Orr was able to explain the complaints process now in place the Tribunal considered that no specific remedial action is required. No specific loss was incurred due to the delay. At the time the delay occurred no management fees were being paid by the Applicant as the relationship with the letting agent had terminated prior to 1 September 2021. Thus the Tribunal did not consider that a compensation award is warranted.

The Respondent should note that failure to comply with an LAEO may constitute a criminal offence.

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.

Petra Hennig McFatridge
Legal Member and Chair

Date: 21 July 2022