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 85, 90, 112 and 110 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/22/1412

Property: 62 Vasart Court, Perth PH1 5QZ ("the Property")

Parties

Mrs Deirdre Wood, 3 Allanwater Apartments, Bridge of Allan FK9 4DZ ("the Applicant")

and

A & S Properties, 1 County Place, Perth PH1 8EE (Letting Agent Registration Number 1903094) ("the Respondents")

Tribunal Members: George Clark (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ("the Tribunal") determined that the Respondents had not failed to comply with Paragraphs 85, 90, 102 and 110 of the Letting Agent Code of Practice made under the Letting Agent Code of Practice (Scotland) Regulations 2016.

Background and Summary of Written Representations

1. By application, dated 5 May 2022 and received by the Tribunal on 13 May 2022, the Applicant sought an Order in respect of the Respondents' 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 85, 90, 102 and 110 of the Code.

2. The Applicant stated that repairs to the shower in the Property were not dealt with appropriately (Paragraphs 85 and 90 of the Code). She accepted that the Respondents had taken her round the Property when they were returning the Applicant's keys. There was a lot of wear and tear, which was to be expected, but she had presumed the Respondents had checked the Property thoroughly themselves, as they were paid to do, but it was obvious that they had not bothered to investigate the problems with the en-suite (Paragraph 102 of the Code). The Respondents had not made the Applicant aware of the Code of Practice (Paragraph 110 of the Code). The Applicant stated that she had incurred the cost of repairs to the en-suite, amounting to £9,650, inclusive of VAT. She had put in extra tiling and Parador ceiling and, excluding these items, her loss would be approximately £8,000, inclusive of VAT. This was the sum she wished to be reimbursed. She had arranged the repairs herself, as the Respondents were by then no longer acting as her letting agents and she did not know about the Code of Conduct. The Respondents had not made her aware of the Code of Conduct and it was not mentioned in their contract with her either.

3. The application was accompanied by a copy of her email of complaint to the letting agents. In it, she said that the Respondents had advised her on 4 September 2017 that the then tenant had a problem with spores of condensation dampness appearing on the ceiling and walls and also that the seal around the shower tray required to be changed. The Applicant had paid to have the tray sealed, the affected area repainted and the extractor fan cleaned out. When a new tenant moved in in July 2018 there was no word at the time of black mould or a broken seal. That tenant moved out at the end of December 2018, and a new tenant moved in on 1 February 2019. At that time, she had again paid the Respondents to reseal the shower and fit a new bath panel. The Respondents had not mentioned at that time the black mould.

4. The Applicant stated in the email that she had hoped to sell the Property in 2020 and had intended giving the tenant notice in March. The pandemic had prevented this and the tenant remained in the Property until the end of April 2021. In late summer 2020, she had asked an estate agent to give her an estimate of the selling price. The agent had informed her that the Property was not in a terribly good state, especially the en-suite. He did not go into the details but had said that work would be required before the Property would sell well. The Applicant had alerted the Respondents, who visited the Property and said that it would need a bit of cleaning up but that the tenants would sort it out. The Applicant had taken the Respondents at their word.

5. The Applicant had been unable to visit the Property for 3/4 weeks after the tenant moved out. She had been shocked at the state of the paintwork that someone had done in a completely unprofessional way, and at the state of the en-suite, which had black mould.

6. At a Case Management Discussion on 22 September 2022, which was not attended by the Applicant, the Respondent told the Tribunal that some 10 days after the end of the tenancy, they had carried out an inspection in the presence of the Applicant, who had appeared content with the condition of the Property and had authorised the return in full of the tenant's deposit. The Respondents returned the keys to the Applicant and considered that their agency was at an end. In mid-June, they had received a call from the property's factors to say hat there had been a complaint of water leaking from the Property to the car park area beneath. As they were no longer acting as agents for the Applicant, they put the factors in touch with her and also called her to advise her of the situation. On 21 October 2021, the Applicant had advised them that the estimated cost of repairs was £15,000. They had thought that excessive and offered to have other contractors inspect the damage, thinking the cost of replacing the shower would be nearer £5,000-£7,000. The next they had heard was in February 2022, when the Applicant sent them the invoice from Trades 24 and held the Respondents responsible. The Respondents said there had been an issue with the en-suite about 5 years previously, when the toilet and vanity unit had been replaced due to water leaks. The Respondents had not identified an issue with the shower tray at that time. They said that all the landlords they represented had been contacted in October 2018 with new Terms & Conditions, as a result of the introduction of the Code of Practice. The Applicant had been a client at the time and had signed the new Terms & Conditions in December 2018. The Respondent told the Tribunal that they had lodged letters of 19 February and 12 April 2022 with the Tribunal.

7. Following the Case Management Discussion, the Tribunal fixed a Hearing and instructed the Respondents to submit written representations detailing the issues which they had raised and to lodge the photographs which they said had been referred to in their letters of 19 February and 12 April 2022, which had not been seen by the Tribunal. They were also instructed to submit a copy of the letter or email of October 2018, advising the Applicant of the introduction of the Code of Practice.

8. On 15 November 2022, the Respondents made written representations to the Tribunal. They stated that they had started managing the Property in 2008. During the tenancy, the en-suite required maintenance approximately every 2 years, due to poor sanitary fittings. There was a major strip-out of the en-suite in 2015, folllowing an insurance claim. This was shown in the accounts, copies of which were attached and showed that the Respondents had not neglected the Property. The Respondents also referred to their email to the Applicant of 4 September 2017 as evidence that there was an ongoing issue and "could not

be the cause due to major leak after handing back the property on 13 May 2021." During their 13 years as her letting agents, the Applicant had never inspected the Property and the Respondents had kept her informed of all necessary repairs required and carried out, as was reflected in the property accounts.

9. The Respondents provided the Tribunal with a copy of a letter to the Applicant, dated 1 November 2018. It intimated an increase in their fees and added "due to current regulation changes and our industry being regulated we are becoming ARLA registered and compliant to the letting code of practice (Scotland)." They also provided a copy of an "In-going Report" dated 10 January 2019, which included photographs of the en-suite bathroom, copies of their accounts in relation to the Property and of an email to the Applicant, dated 4 September 2017, advising her that there were spores of condensation dampness appearing on the ceiling and walls and that the seal around the shower tray required to be changed. They had obtained a quote of £150 to seal and repaint and to clean out the extractor an asked the Applicant to advise them on how she would like them to proceed.

10. They had offered to have the repairs inspected and quoted for by their contractors in October 2021, but the Applicant had not responded. Instead, she had works done to improve the Property to achieve a sale and had contacted the Respondents when the sale was concluded. The invoice produced by the Applicant was made out to someone else and contained no reference to the Applicant. The Respondents felt that they were being used as a fall back, as the insurers would not cover these works. The Respondents contended that they were not in any way responsible for the leak.

The Hearing

11. A Hearing was held by means of a telephone conference call on the morning of 13 December 2022. The Applicant participated in the Hearing. The Respondents were not present or 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 that had been submitted by the Parties and that she would not be asked to re-present all the evidence that had already been given in written form.

12. The Applicant told the Tribunal that her selling agents had told her that the condition of the en-suite was not great. When she returned to the Property to clean up, she could see that the base of the shower was not level. the insurance company under the block policy for the building sent contractors to inspect it and the contractors confirmed that the floor supports for the shower unit were rotten. This followed on the reporting by the property factors of a leak of water into the car park beneath.

13. The Tribunal drew the Applicant's attention to Clause 4.5 of the Respondents' Terms & Conditions, which states that "the agents cannot accept responsibility for hidden or latent defects." She said that the Respondents had dealt with the insurance claim in 2015. She had understood that the problem related to the toilet and sink, but the insurers' plumbers had replaced the wall tiles with wet wall boarding. She thought that any dampness issue had been fixed in 2015, when a leak under the shower had been found, but the Respondents had told her that it was just the toilet and sink. When contacted by the Respondents in 2017 to say that the shower needed to be resealed, she had immediately authorised the work, to include painting the en-suite. The Applicant confirmed that there was an extractor fan but no window in the en-suite and that there was vinyl flooring. At the final inspection, she had noticed black mould on the ceiling, walls and skirting boards, but she had thought it was just cosmetic and that she would be able to clean it up and paint it. She asked the Tribunal to consider why, having reported issues in 2015 and 2017, the Respondents had not noticed the underlying cause.

14. The Applicant told the Tribunal that the letter to which the Respondents had referred in their written representations was the only time the Code of Conduct was mentioned. It was when she had spoken to a solicitor after her sale went through that she found out about the Tribunal.

15. Having confirmed that she had no further comments to make, the Applicant left the Hearing.

Reasons for the Decision

16. The Tribunal considered carefully all the evidence before it, namely the written representations of both Parties and the evidence presented by the Applicant at the Hearing.

17. The Tribunal can only have regard to complaints made under specific Sections of the Code of Practice. The Tribunal therefore considered the application under Sections 85, 90, 102 and 110 of the Code of Practice.

18. **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."*

19. The Tribunal noted that the Respondents had provided a copy of an In-going Report dated 10 January 2019, produced by a third-party company. This was a

very detailed condition report, extending to 44 pages, with a large number of photographs. This indicated to the Tribunal that the Respondents have in place appropriate systems and controls as required by Paragraph 85 of the Code of Practice, and the Tribunal did not uphold the Applicant's complaint under that Paragraph.

20. **Paragraph 90** states *"Repairs must be dealt with promptly and appropriately having regard to their nature and urgency in line with your written procedures".*

21. The complaint under Section 90 of the Code of Practice was that repairs to the shower had not been dealt with appropriately. The Tribunal considered carefully all the representations made by the Parties. There was evidence that issues had arisen with the en-suite in 2015 and 2017. The problems in 2015 had been dealt with by the Applicant's insurers, and the Applicant and the Respondents were entitled to assume that the insurers had carried out all appropriate investigations and remedial works. These works were not instructed or overseen by the Respondents. The problem identified in 2017 was a routine repair and, whilst there may have been an undetected underlying cause which meant that the sealant had to be replaced, there was no evidence to suggest that the Respondents should have had any suspicions as to there being a more serious problem. The In-going Report of 10 January 2019 was prepared by an independent third-party company. It contained 14 photographs of the en-suite and the only negative comment was "spot stained (slighty)" on a photograph of the ceiling. The property factors had not reported a leak into the car park below until some months after the last tenancy, and the agency agreement, ended.

22. The view of the Tribunal was that there were no evident warning signs that would have alerted the Respondents to the possibility of an underlying problem in the en-suite and that it was likely that this was a hidden defect, which the Respondents could not have been expected to notice. Accordingly, the Tribunal did not uphold the complaint under Paragraph 90 of the Code of Practice.

23. **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."*

24. The Tribunal had no evidence before it as to whether a check-out report had been prepared when the final tenancy ended, but noted that the Applicant had accompanied the Respondents when the Property was inspected and the keys were handed back to her. She had, following on that inspection, authorised the return to the tenant of the whole tenancy deposit. Accordingly, the Tribunal did not uphold the complaint under Paragraph 102 of the Code of Practice, as the

Applicant had inspected the Property herself and had raised no issue at the time.

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

26. The Tribunal held that, as the Respondent's letter to the Applicant of 1 November 2018 mentioned the Code of Practice, she had constructive knowledge of it. The Tribunal noted that the Complaints Procedure set out in the Respondents' "Terns & Conditions" document, signed by the Applicant on 11 December 2018 does not make reference to the Tribunal, so the Respondents had failed to comply with Paragraph 32j of the Code of Practice, but the Applicant did not include that Paragraph in her application and, in any event, the view of the Tribunal was that she had not suffered any loss as a result.

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 18 January 2023

Legal Member