



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 48(1) of the Housing (Scotland) Act 2014 (Act) and the Rules of Procedure 2017 (contained in Schedule 1 of the Chamber Procedure Regulations 2017 (SSI No.328)) (Rules)

Chamber Ref: FTS/HPC/LA/22/3666

Re: Property at 23 Abbey Court, St Andrews, KY16 9TL (“the Property”)

Parties:

Mr Wilson Jones, 23 Abbey Court, St Andrews, KY16 9TL (“the Applicant”)

Premierlet Limited, 72 North Street, St Andrews, KY16 9AH (“the Respondent”)

Tribunal Member:

Alan Strain (Legal Member) and Elizabeth Williams (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that the Respondent has not complied with paragraphs 16-19, 23, 31, 43, 45, 62-63 of the Code of Practice for Letting Agents (Code) as required by the Act and issues a Letting Agent Enforcement Order (LAEO).

This was an application under Rule 95 of *The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (Rules)* and section 48 of the Act to enforce the Letting Agent Code of Practice (**Code**).

The Tribunal had regard to the following documents:

1. Application and attachments received 6 October 2022;
2. Supporting Documents from Applicant;
3. CMD Note and Direction dated 1 March 2023;
4. Respondent’s Written Representations;
5. Applicant’s Written Representations;
6. Documentation lodged by both Parties in advance of the Hearing.

Hearing

The Applicant participated and represented himself. The Respondent participated and was represented by Ms Carole Davidson (Director).

The Tribunal set out the procedure to be followed at the outset and identified the documents and productions that would be referred to.

The Applicant asserted breaches of paragraphs 16-19, 21, 23-24, 27-29, 31, 38, 43, 45-46, 62-64, 73, 75, 82, 84, 88, 97-98, 100, 108 and 111 of the Code.

Following the CMD on 1 March 2023 and Tribunal Direction of the same date the Parties had lodged comprehensive written submissions on their respective cases which were taken as read by the Tribunal.

Preliminary Issues

The Respondent objected to the minutes of a mediation meeting on 10 August 2022 taken by Ms Claire Gamble and transcript of a telephone call between the Applicant and Mr Mark Howell (**MH**) (husband of the landlord). The Respondent's objection to these documents were that the minutes had not been approved by the Respondent and the Respondent was not Party to the telephone conversation.

Ms Davidson confirmed that she had received the minutes and the transcript in advance of the Hearing. She also confirmed that she had not discussed the accuracy of the transcript of the telephone conversation with MH.

The Tribunal allowed the documents to be admitted in evidence as Ms Davidson could give evidence as to any inaccuracies in the minutes and she could have spoken to MH regarding the transcript but had not done so.

Evidence

The Tribunal then heard evidence from the Applicant. He spoke to his written submissions which were taken as read. He was questioned by the Tribunal members and Ms Davidson.

He gave his evidence in a considered and articulate manner. The Tribunal accepted his evidence as credible and reliable.

Claire Gamble (CG)

The Tribunal then heard from CG. She had taken the minutes of the mediation meeting and confirmed their accuracy. She (as was the Applicant) was a member of of a tenant's organisation called "Living Rent". This was how she had become involved with the Applicant.

CG was questioned by the Applicant, Tribunal members and Ms Davidson.

The Tribunal accepted CG's evidence as credible and reliable.

Mr Barry Will (BW)

The Tribunal heard from BW. He was currently President of the St. Andrew's University Students' Association and also a member of Living Rent.

He had attended the mediation along with the Applicant and CG. He spoke to the accuracy of the mediation minutes and also involvement, dealings with and knowledge of the Respondent. He had knowledge of various issued other students had in dealings with the Respondent.

The Tribunal did not consider BW's evidence regarding other students' dealings with the Respondent to be relevant and disregarded this evidence.

The Tribunal accepted BW's evidence about the mediation meeting as credible and reliable.

BW was questioned by the Applicant, Tribunal members and Ms Davidson.

Ms Carole Davidson (CD)

The Tribunal heard from CD. She spoke to the Respondent's written submissions which were taken as read.

She was questioned by the Tribunal and the Applicant.

Whilst CD had some difficulty recollecting times, dates and events the Tribunal considered that she gave her evidence in a professional and credible manner. The Tribunal accepted her evidence as credible and reliable.

Consideration of the Evidence

The main issue in dispute between the Parties was the inclusion of Clause 1.8 in the Private Rented Tenancy Agreement (**PRTA**) entered into between the Applicant (jointly with another) as tenants and Ms Emily Howell (landlord and client of the Respondent).

Clause 1.8 was in the following terms:

"1.8 START DATE OF THE TENANCY The private residential tenancy will start on 15th January 2022 ("the start date of the tenancy) IT HAS BEEN AGREED BETWEEN LANDLORD AND TENANTS THAT THE LEASED SUBJECTS WILL BE VACATED BY THE TENANTS FROM 9TH JULY 2022 TO 19TH JULY 2022 TO ALLOW THE LANDLORD TO OCCUPY. TENANTS WILL RESUME OCCUPATION FROM 19TH JULY 2022".

The Applicant criticised the inclusion of this provision in the PRTA and the Respondent's dealings with the Applicant with regard to it.

Clause 1.8 had been included at the request of the Landlord's husband to allow him to occupy the Property during the British Open.

The Applicant had been given no option other than to accept this clause and had endeavoured to find out through the Respondent what the specific arrangements for vacating the Property would be and who would have responsibility for utilities etc.. Ultimately, the Applicant did not have to vacate the Property.

CD's evidence was that Clause 1.8 had been included at her suggestion to her client. She had taken legal advice on the terms of the Clause and was aware that it would not have been enforceable. She was of the view that the Applicant could have objected to it but didn't. When questioned by the Tribunal on this she accepted that the Landlord could have refused to let the Property to any prospective tenant that didn't agree to the clause.

The remaining complaints centred around the handling of the Applicant's complaints to the Respondent, visits by contractors without prior notice and delay in providing keys to the Property.

There was no significant factual dispute between the Parties.

Having heard the Parties' oral and written evidence the Tribunal made the following findings in fact:

1. The Applicant entered into a PRTA with EH commencing 15 January 2022;
2. The Respondent were the Letting Agents for EH who dealt with the Applicant on EH's behalf;
3. Clause 1.8 of the PRTA provided:
1.8 START DATE OF THE TENANCY The private residential tenancy will start on 15th January 2022 ("the start date of the tenancy) IT HAS BEEN AGREED BETWEEN LANDLORD AND TENANTS THAT THE LEASED SUBJECTS WILL BE VACATED BY THE TENANTS FROM 9TH JULY 2022 TO 19TH JULY 2022 TO ALLOW THE LANDLORD TO OCCUPY. TENANTS WILL RESUME OCCUPATION FROM 19TH JULY;
4. Clause 1.8 had been included in the PRTA on the advice of the Respondent;
5. The Respondent had taken legal advice on the effect of including Clause 1.8 in the PRTA and that advice was the Clause was unenforceable;
6. The Applicant was not provided with a copy of the PRTA until after the commencement of the tenancy and following payment of the first month's rent and deposit;
7. The Respondent did not provide keys to the Property to the Applicant until 18 January 2022. This was due to the need for new security fobs to be obtained by the Respondent;
8. The Applicant queried the arrangements for vacating the Property directly with the Respondent by emails of 2, 12, 25 April, 8, 16, 24, 27 June and 2 July 2022. The Applicant did not receive a definitive response until 6 July 2022 when he was informed that the Landlord no longer required the Applicant to vacate;
9. The Respondent's email responses to the Applicant prior to 6 July 2022 did not address all of the Applicant's queries regarding utilities, inspection or security and had referred the Applicant to contact MH directly;
10. The Respondent accepted that two contractor visits had been made unannounced (in March and April 2022) due to contractors turning up at the Property whilst in the area. This was done without the Respondent's

- knowledge or agreement. The Applicant complained by email of 19 April 2022 and the Respondent responded by email of 25 April 2022;
11. The Respondent accepted that insufficient notice had been given for one contractor visit;
 12. The Applicant issued a formal complaint to the Respondent by email of 3 August 2022;
 13. The Respondent responded to this complaint by email of 6 August 2022 suggesting mediation;
 14. The Parties attended mediation meeting on 10 August 2022 the minutes for which were a true and accurate record;
 15. The Applicant issued a formal complaint under the Code on 28 September 2022 which was acknowledged by the Respondent by email of 29 September 2022. The acknowledgement stated that the complaint was being forwarded to the Respondent's legal advisers.

Having considered the evidence and made the above findings the Tribunal decided:

(a) Paragraphs 16-19 of the Code

- 16.** You must conduct your business in a way that complies with all relevant legislation.
- 17.** You must be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants).
- 18.** You must provide information in a clear and easily accessible way.
- 19.** You must not provide information that is deliberately or negligently misleading or false.

The Applicant's complaint was that the Respondent failed to conduct themselves in compliance with the Code in their dealings regarding Clause 1.8 and failed to inform him that MH was not his Landlord.

The Tribunal considered and found that Paragraphs 16-19 had been breached by the Respondent in all the circumstances of this case.

Whilst the inclusion of Clause 1.8 was not illegal it was certainly not enforceable and did not comply with the terms of the **Private Housing (Tenancies) (Scotland) Act 2016** (which makes no provision for temporary vacation of a Property).

Including the Clause was not open, transparent or fair as it represented to the Applicant that this was a contractual and enforceable term. It was not clear to the Applicant that this Clause was unenforceable and it was deliberately misleading as it represented to the Applicant that this was an enforceable, contractual clause.

In so far as MH was concerned the Tribunal did not accept that there had been a breach of the Code. The PRTA clearly reflected and identified the Landlord.

(a) Paragraphs 21, 23-24 of the Code

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

23. 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.

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 Applicant's complaint was that the Respondent failed to conduct themselves in compliance with the Code in not dealing with issues in a timely way. Members of the Respondent's staff were used to try and enforce compliance with the vacation of the Property on a temporary basis.

The Tribunal does not accept that the Respondent's dealings with the Applicant breached paragraphs 21 or 24 of the Code. Whilst the Applicant did not receive a definitive response to his emails regarding the temporary vacation of the Property until a few days before the vacation was due to start the delay was down to the Landlord's failure to respond rather than the Respondent who had timeously responded to email queries from the Applicant.

The Tribunal find that paragraph 23 was breached in relation to the incorporation of Clause 1.8 and the Respondent's dealings with the Applicant on behalf of the Landlord which clearly represented this provision as enforceable.

(b) Paragraphs 27-29 of the Code

27. 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.

28. You must not communicate with landlords or tenants in any way that is abusive, intimidating or threatening.

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

Services provided and fee charges

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

Advice

b) offer accurate and unbiased advice on the rental valuation and appraisal of the property. You must not knowingly misrepresent the potential rental valuation;

c) inform the landlord that they need to get consent or delegated authority from all owners, mortgage lenders or other relevant parties before letting the property and the need to ensure relevant insurance cover is in place;

d) if you become aware in the course of your business that a property does not meet appropriate letting standards (e.g. repairing standard, houses in multiple occupation and health and safety requirements), inform the landlord of this;

e) if a landlord is not already registered, inform them of the landlord registration requirements under the Antisocial Behaviour etc. (Scotland) Act 2004([1](#)) and, where necessary, the requirements under the Housing (Scotland) Act 2006([2](#)) relating to houses in multiple occupation;

Conflict of interest

f) if you intend to act for clients who have competing interests or your personal interests conflict, or could potentially conflict, inform the clients as soon as you become aware of it;

Identity checks

g) take reasonable steps to check the identity of each landlord to ensure that they are who they say they are and that they are the legal owners of the property or have permission from the owner or power of attorney – for instance, asking for an official form of identification; proof of address; proof of ownership and, where applicable, landlord registration number or company registration number.

The Applicant's complaint was that the Respondent failed to inform him of his true obligations as a tenant (27). They *explicated* threatened legal action over speaking publicly about their actions (28). The Respondent failed to offer accurate and up to date information to the landlord in communicating the tenant's grievances.

The Tribunal considered that the Respondent had not breached paragraph 27. Clause 1.8 did not relate to the Applicant's use of the Property or repairs or a breach of the PRTA.

The Tribunal did not consider that the Respondent's threat of legal action against the Applicant if he made his complaints public to constitute a breach of paragraph 28. The Respondent was entitled to inform the Applicant that it would enforce its legal rights.

Paragraph 29 relates to the Respondent's obligations to landlords and is not relevant to a claim by a tenant.

(c) **Paragraph 31 of the Code**

31. If you know that a client is not meeting their legal obligations as a landlord and is refusing or unreasonably delaying complying with the law, you must not act on their behalf. In these circumstances, you must inform the appropriate authorities, such as the local authority, that the landlord is failing to meet their obligations.

The Tribunal consider that the Respondent breached this paragraph of the Code by advising and including Clause 1.8 in the PRTA on the Landlord's behalf. The inclusion of Clause 1.8 was in breach of the Landlord's legal obligations (not compliant with the terms of the **Private Housing (Tenancies) (Scotland) Act 2016**). The Respondent should not have acted on the Landlord's behalf in all of the circumstances.

(d) **Paragraph 38 of the Code**

38. Your advertising and marketing must be clear, accurate and not knowingly or negligently misleading.

The Applicant's complaint here is that the Respondent failed to advertise the temporary vacation of the Property.

The Tribunal accepted CD's evidence that the temporary vacation was made clear to the Applicant and was clearly stated in the PRTA. As such there has been no breach of the Code in this regard.

(e) Paragraphs 43, 45-46 of the Code

43. 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.

45. You must make prospective tenants aware of the Code and give them a copy on request, this may be provided electronically.

46. You must not knowingly omit relevant information or evade questions from prospective tenants relating to the letting of the property in line with consumer protection legislation.

The Applicant contends this was breached by the Respondent's failure to fully inform him of the legal position regarding Clause 1.8 and failure to make the Applicant aware of the Code.

The Tribunal considers that paragraph 43 has been breached by the Respondent's failure to make the Applicant aware that Clause 1.8 was not enforceable.

The Respondent stated that a copy of the Code was available on its website. The Tribunal considers that this does not constitute making prospective tenants aware of the Code and accordingly finds paragraph 45 to have been breached.

The Applicant did not refer to any specific consumer protection legislation that it was alleged had been breached. The Tribunal did not find paragraph 46 to have been breached accordingly.

(f) Paragraphs 62-64 of the Code

62. 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 or name and address of the letting agent and the identity 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.

63. If you arrange for the tenancy agreement to be signed, you must give prospective tenants enough time to familiarise themselves with the agreement; give them the opportunity to raise any questions about their rights and obligations under the agreement; give them the opportunity and time to seek independent advice; and give them any other formal documents required before they sign the agreement.

64. At the start of the tenancy, you must give the tenant a copy of the tenancy agreement along with any other relevant statutory documents.

The Applicant contends that the Respondent failed to explain Clause 1.8 was unenforceable, didn't provide him with adequate time to familiarise himself with the contract and didn't provide him with a copy of the PRTA until after commencement of the tenancy.

The Tribunal consider that the Respondent has breached paragraph 62. CD prepared and included the wording of Clause 1.8 in the knowledge that it was unenforceable and in effect represented the Clause to the Applicant as contractual and binding on him.

CD's evidence was that the draft PRTA had been provided and explained to the joint tenant in advance. The Tribunal accepted CD's evidence on this point. The Tribunal also accepted the Applicant's evidence that the Respondent had not provide him with a copy of the PRTA or explained it to him prior to the tenancy commencing. He obtained a copy after its commencement.

The Tribunal consider that the Respondent was not entitled to presume that because a copy had been provided and explained to one tenant that meant that it had fulfilled its obligations to all tenants. The Tribunal accordingly find that the Respondent has breached paragraph 63.

The Applicant was provided with a copy of the PRTA shortly after the commencement of the tenancy. Paragraph 64 was not breached in the circumstances.

(g) Paragraphs 73 and 75 of the Code

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.

74. If you carry out routine visits/inspections, you must record any issues identified and bring these to the tenant's and landlord's attention where appropriate (see also [paragraphs 80 to 84](#) on property access and visits, and [paragraphs 85 to 94](#) on repairs and maintenance).

75. Breaches of the tenancy agreement must be dealt with promptly and appropriately and in line with the tenancy agreement and your agreement with the landlord.

The Applicant contends the communications around Clause 1.8 and delays in giving a full response constituted a breach of these paragraphs along with the unannounced visits by contractors.

The Tribunal does not consider that the Respondent has responsibility for unannounced visits by contractors. The Tribunal notes the email exchange between the Parties about a visit by contractors with less than 48 hours' notice but does not consider this to constitute a breach in the circumstances.

The Applicant did not receive a complete response to his queries regarding arrangements for the temporary vacation until 6 July 2022. The Tribunal finds that any delay in providing this response was due to the Landlord and not the Respondent. The email trail produced shows the Respondent replying to the Applicant and informing him that the Respondent awaits instruction from the Landlord.

Legal obligations with regard to the management of the Property have been complied with.

The Tribunal accepted and found that these paragraphs had not been breached.

(h) Paragraph 82, 84 and 88 of the Code

82. You must give the tenant reasonable notice of your intention to visit the property and the reason for this. At least 24 hours' notice must be given, or 48 hours' notice where the tenancy is a private residential tenancy, unless the situation is urgent or you consider that giving such notice would defeat the object of the entry. You must ensure the tenant is present when entering the property and visit at reasonable times of the day unless otherwise agreed with the tenant.

84. You must make it clear to the tenant or occupier beforehand if a third party will visit the property unaccompanied.

88. You must give the tenant clear information about who will manage any repairs or maintenance, as agreed with the landlord and set out in the tenancy agreement. This includes giving them relevant contact details (e.g. you, the landlord or any third party) and informing them of any specific arrangements for dealing with out-of-hours emergencies.

This relates to the Applicant's contention that there were unannounced visits by contractors and inadequate notice provided for planned visits.

The Tribunal does not consider that the Respondent has responsibility for unannounced visits by contractors. The Tribunal notes the email exchange between the Parties about a visit by contractors with less than 48 hours' notice but does not consider this to constitute a breach in the circumstances.

The Applicant was provided with clear information about contractor visits.

(i) Paragraph 97-98 of the Code

97. The correct procedure for ending a tenancy depends on such factors as the type of tenancy and the reason it is ending. But in all circumstances you must comply with relevant tenancy law and ensure you follow appropriate legal procedures when seeking to end a tenancy.

98. You must have clear written procedures in place for managing the ending of the tenancy (including where the tenancy is brought to an end by the landlord, or by the tenant or joint tenant; the landlord intends to seek eviction and where a tenancy has been abandoned); the serving of appropriate legal notices; and giving the landlord and tenant all relevant information.

The Applicant contends that the temporary vacation provision in Clause 1.8 was ending the tenancy and not appropriate. The tenancy was not brought to an end by the operation of Clause 1.8. It was terminated by the tenants.

The procedure for ending the tenancy was set out in the PRTA and explained to the Applicant in emails from the Respondent.

The Tribunal consider that these paragraphs have not been breached in the circumstances.

(j) Paragraphs 100, 108 and 111 of the Code

100. You must not try to persuade or force the tenant to leave without following the correct legal process.

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.

111. You must not communicate with landlords or tenants in any way that is abusive, intimidating, or threatening.

The Tribunal consider that the ending of the tenancy was at the tenants' initiative and finds no evidence of the Respondent trying to persuade or force the Applicant to leave without following the correct legal process.

Clause 1.8 did not constitute an ending of the tenancy.

The Tribunal considers that all enquiries and complaints were dealt with courteously and timeously by the Respondent.

The Tribunal finds that none of these paragraphs have been breached in the circumstances.

(k) Remedy

Having determined the breaches of the Code by the Respondent the Tribunal considered the impact this had on the Applicant and any losses suffered by him as a direct consequence of that.

The Applicant wishes reimbursement of the rent paid during the tenancy.

The Applicant seeks compensation for the distress and disruption caused at an important time in his student life. Dealing with the temporary vacation of the Property impacted on his dissertation, graduation arrangements and he spent considerable time and energy in obtaining advice.

The Applicant also seeks an apology from the Respondent.

It is clear that the Respondent did not adhere to the Code in the respects identified above. For that reason the Tribunal consider that an appropriate remedy is for the Respondent to pay compensation to the Applicant in respect of the distress, inconvenience and additional time and effort that was involved due to the Respondent's failings.

The Tribunal consider that a fair, proportionate and just amount of compensation in respect of their multiple breaches of the Code would be the sum of £1,400. The Tribunal also consider that it would be fair, proportionate and just for the Respondent to apologise to the Applicant for its conduct and role it played in the incorporation of Clause 1.8 into the PRTA.

The Tribunal made the following Letting Agent Enforcement Order:

- 1. The Respondent shall pay the sum of £1,400 by way of compensation to the Applicant within 21 days; and**
- 2. The Respondent shall issue a written apology to the Applicant for its conduct and role it played in the incorporation of Clause 1.8 of the PRTA within 21 days.**

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

27 June 2023

Legal Member

Date