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

Chamber Ref: FTS/HPC/LA/19/1726

Re: Property at 14 South Street, St Andrews, Fife ("the Property")

Parties:

Ms Thalia Ostendorf, residing at 13 Straiton Way, St Andrews, Fife, KY16 8HT ("the Applicant"), represented by Mr Seamus Johnstone MacLeod, Living Rent, Edinburgh

Rollos, Solicitors and Estate Agents, 6 Bell Street, St Andrews Fife ("the Respondent") represented by Mr James Martin, Solicitor and Ms Susan Laing HMO Administrator, both of Rollos, Solicitors

Tribunal Members:

Ewan Miller (Legal Member) and Colin Campbell (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 the Applicant's application to the Tribunal, determined that the Respondent had breached Paragraph 17 of the Letting Agent Code of Practice (Scotland) Regulations 2016 ("the Code") and determined to make a Letting Agent Enforcement Order as undernoted.

The decision was unanimous

Background

The Applicant was the tenant within a large HMO property located in St Andrews. The Applicant had the use of a bedroom (Room 14) within the Property. There were 13 other residents within the Property, all who had individual rooms.

The Property was managed by the lettings department of the Respondent.

The Applicant was dissatisfied with the service provided by the Respondent. She had 3 principal complaints:-

- that there had been a failure on the part of the Respondent to properly deal with the repair and maintenance of the smoke alarms within the Property;
- that proper notification had not been given to tenants within the Property when access was being taken and that unauthorised entry had taken place;
- that she had been forced to move room within the Property on very short notice and that this had not been handled in an appropriate manner.

Under section 48(1) of the Housing (Scotland) Act 2014, the Code had been introduced and had become effective from 31 January 2018. The Code required letting agents, such as the Respondent, to adhere to its terms.

The Applicant had exhausted the internal complaints procedure of the Respondent. The Applicant still felt that the Respondent had not adhered to the terms of the Code and accordingly she submitted an application to the Tribunal alleging that the Respondent had failed to comply with Paragraphs 82 (giving notice to take entry) and 85 (managing repairs and maintenance. The Applicant, whilst not narrating a specific section, also alleged that the manner in which her room move had been handled had breached the Code. The Tribunal was of the view that this issue had been notified to the Respondent and potentially fell within Paragraphs 17 and 28 of the Code.

The Tribunal had before it at the hearing the following documentation:-

- The Applicant's application to the Tribunal dated 5 June 2019;
- The Code;
- Written representations from the Respondent dated 18 July 2019;
- Written representations from the Respondent dated 17 July 2019

The Hearing

The Tribunal held a Hearing on 15 August 2019 at Caledonian House, Greenmarket, Dundee.

The Applicant was not present but was represented by Mr MacLeod of Living Rent, Edinburgh. The Respondent was represented by Mr James Martin, one of their solicitors and also Ms Susan Laing, the HMO administrator within the lettings department of the Respondent.

Following upon the Hearing, the Tribunal deliberated at length upon the matters before it. The Tribunal had a concern that a more substantial breach may have occurred by the Respondent in that Room 14 within the Property should not have been let at all. A number of information requests were made by the Tribunal following the Hearing to clarify this matter, as is detailed below.

Findings in Fact

The Tribunal found the following facts to be established:-

- The Applicant was a tenant of Room 14 at the Property;

- The Respondent was the managing agent of the Property;

- The Respondent had not breached Paragraph 82 of the Code and reasonable notice, appropriate to the type of Property, had been given;

- The Respondent had in place appropriate systems for maintenance and repair of the items they were responsible for and there had not been a breach of Paragraph 85 of the Code;

- The Respondent had not been responsible for the maintenance and repair of the fire detection system within the Property

- The Respondent had not dealt with the move of room by the Applicant in an open, fair and transparent way as required by Paragraph 17 of the Code. The Respondent had not breached Paragraph 28 of the Code

- The Applicant had suffered unnecessary disruption and distress as a result of the breach of Paragraph 17 of the Code

Reasons for the Decision

The Tribunal considered the 3 alleged breaches in turn:-

Paragraph 82

"You must give reasonable notice of your intention to visit the property and the reason for this. Section 184 of the Housing (Scotland) Act 2006 specifies that at least 24 hours notice must be given unless the situation is urgent or you consider that such notice would defeat the object of the entry. You must ensure that the tenant is present when entering the property and visit at reasonable times of the day unless otherwise agreed with the tenant"

The Applicant's submission was that the Respondent and their tradesmen had been entering the Property without the appropriate notice having been given in terms of Paragraph 82. To substantiate this point, the Applicant highlighted the terms of emails between herself and the Respondent dated, inter alia, 28 January, 29 January, 5 April and 20 May all 2019.

On the face of it, these emails did indicate that the Respondent had taken access to the Property without, on all occasions, notifying all of the tenants within the Property. The emails confirmed, for example, that access had been taken to the Property to allow the delivery of a Notice to Leave on the Respondent.

However, the Tribunal was of the view that in order to assess whether there had been a breach or not, one had to be take in to account the nature and type of the Property. This was a very large HMO with 14 bedrooms. A large property such as this will require numerous maintenance visits. With 14 separate and unrelated tenants there will inevitably be changes in tenants on a frequent basis and this will require visits for viewings, taking inventories, cleaning and the like. The Property is also an HMO. Such HMO properties are subject to separate and rigourous standards and frequent checks are required to be carried out to comply with the HMO legislation.

If one were to take a highly literal interpretation of Paragraph 82 of the Code, then on each occasion access was required to any part of the Property all 14 tenants would require to be notified and indeed all would require to be present. This would, simply put, be completely unworkable and access would rarely be able to be achieved.

The Tribunal was of the view that the Property required to be viewed as having some resemblance to a tenemental property. The stairs, hallways etc were communal areas and the Applicant, the owner and tradesmen would require access to these areas relatively freely. What should not occur, however, is that access be taken to individual rooms within the larger Property. The individual rooms were what were let by the Applicant and others and they were entitled to the full protection of Paragraph 82 in that regard.

In this particular case, the Applicant had made some allegations that access had been taken to individual rooms of others within the Property. This was, however, outwith the ambit of the Tribunal's remit. This did not impact on the Applicant directly and no direct evidence was led on this point other than the Applicant's submission that it occurred. In relation to the Applicant's own room, none of the emails seemed to relate to unauthorised access being taken to her own individual room but rather to the general areas of the Property.

A Notice to Leave had been hand delivered to her room by the Respondent. However, it was confirmed at the hearing that this had simply been slid under her door, rather than her room having been opened up without her consent. The Tribunal viewed this as being similar to a letter being posted through an individual flat in a tenement.

The Tribunal was of the view that a prudent letting agent would try to give notice, where practical, when access was being taken to the communal parts. The communal parts included kitchen and, more importantly, shower facilities and so it was important that intrusions in to these areas were notified so far as possible. It did appear that on a couple of occasions access to communal areas had been taken without notification. However, viewed in the round, it appeared to the Tribunal that the Applicant had a system to notify tenants when access was required to individual

rooms and that notification generally took place for the communal areas. Tenants were aware of the regular monthly and quarterly inspections

The Tribunal was satisfied that there had been no unauthorised intrusion in to the individual room of the Applicant and therefore no breach had occurred.

Paragraph 85

"If you are responsible for pre-tenancy checks, managing statutory repairs, maintenance obligations or safety regulations…you must haveTheThe appropriate systems and controls in place to ensure these are done to an appropriate standard within relevant timescales. You must maintain relevant records of work"

The Tribunal considered the submissions in this regard. There was no suggestion that records had not been maintained and so that aspect did not require consideration.

The Applicant's principal complaint was in relation to the fire system within the Property. There were issues with the fire alarm going off on a regular basis and disrupting the various tenants within the Property. Works had required to be carried out to ensure compliance.

The Respondent did not dispute that there had been issues with the fire system and that it had been a nuisance and works had required to be carried out. However, their position was that the fire system fell outwith their remit. The landlord contracted out this aspect of management to a separate company HMJ Property Maintenance. Any queries or issues that arose were simply passed on by the Respondent to HMJ. A notice had been put up in the Property to highlight that queries in relation to the fire system required to be directed to HMJ and that they inspected and tested the system.

Upon being questioned on this aspect, the Respondent accepted that this was not an ideal situation. They no longer managed the Property and this issue was one of the reasons they had declined to manage it going forward. It was accepted by the Respondent that an individual tenant would not necessarily expect a third party to have responsibility and would expect the letting agent to have overall control and responsibility for all aspects of maintenance and management. Whilst notices had been up it was accepted that they could have been clearer. The Tribunal expressed the view at the hearing that there were some learning points for the Respondent in this regard. This was accepted by the Respondent

The Tribunal considered the point. The Tribunal was satisfied, on the balance of probability, that responsibility for the fire system was not within the Respondent's remit. On that basis, even if there had been errors in how the situation had been handled the Code could not have been breached in this regard by them as it was not their responsibility. The Tribunal did not view the arrangement that was in place as particularly practical or helpful to tenants. Nonetheless, if the fire system did not fall within their duties then they could not be held to be accountable for any failings in relation to it.

Paragraphs 17 & 28

"You must be honest, open, transparent and fair in your dealings with landlords and tenants" (Para 17)

"You must not communicate with landlords or tenants in any way that is abusive, intimidating or threatening" (Para 28)

The final issue between the parties arose out of a demand to the Applicant by the Respondent to move from Room 14 to Room 4 on the 28/29 November 2018.

An inspection had taken place by Fife Council on 28 November. The result of the inspection was that Room 14 had been deemed to be too small to be habitable and therefore could no longer be occupied by the Applicant.

The Respondent was emailed by the Applicant just before 4pm on the 28th advising her to remove her possessions and move to Room 4. At 9.25am on the 29th the Respondent again emailed to confirm that the locks were to be changed at 3pm that day and no access would be given.

The Applicant picked these two messages up at 11.28am on the 29th and requested that the locks not be changed as she would not be home until that evening and needed to access her possessions. The Respondent replied at 11.41 explaining the background but intimating that the locks would still be changed at 3pm. If they failed to block her access to her room then the whole property may be shut down, it was alleged.

Firstly, the Tribunal noted and accepted that both parties were put in an invidious position by the situation that had arisen. The Tribunal accepts that the Respondent required to address the decision by Fife Council to deem the room as being no longer habitable. It was appropriate for the Respondent to move quickly in this regard and to contact the Respondent to explain the position. There is no question that the Applicant did require to move room.

However, the Tribunal did feel that the tone of the correspondence to the Applicant in this regard was lacking. The initial email gave the briefest of explanations as to why the room was now unavailable. It simply told the Applicant she required to move and gave her little by way of explanation, assistance or apology for the inconvenience. The second email was even more brusque and threatened to change the locks on the door of the room. It did not recognise that her possessions were in the room. It stated that no further access would be given after that date – from which the Applicant drew the not unreasonable conclusion that she would lose access to her possessions. Whilst an offer of assistance was made to move her possessions was made the general tone was bullish and unhelpful.

The Tribunal accepted that upon receiving these emails the Applicant had reasonable cause to be upset and alarmed at what was happening. She asked for the locks not to be changed but this request appeared to be refused. The Applicant was not disputing that she would require to remove room but was merely wishing to make sure she retained access to her possessions. Fortunately the Applicant was

able to re-arrange her day and attend at the Property before the deadline to remove her possessions to the other room. However, the general tone of the correspondence was lacking and not the manner in which a tenant should expect to be dealt with. The Tribunal did not see the basis on which the locks needed to be changed. The key fact was that the room was not occupied as living space. It could, however, be used to store items in the interim without breaching the HMO regulations and the Applicant could have access to deal with her possessions at a more leisurely or convenient time.

The Tribunal was satisfied that the language in the emails did not go so far as to breach Paragraph 28 and was not abusive, threatening or intimidating. However, the language, particularly in the initial emails was overly brusque and gung-ho and did not recognise the Applicant's position (a PhD student in the middle of exams). Little explanation was given initially and the emails were generally upsetting to the Applicant, unnecessarily so. Therefore the Tribunal was of the view that the Respondent had not acted in an open or fair way to the Respondent and thus was in breach of Paragraph 17.

The Tribunal was concerned at the fact that the room had been deemed to be uninhabitable by Fife Council. It seemed to the Tribunal that there was a potentially far more serious breach of the Code if the Respondent had let the room but failed to ensure that the room met the required standards or was even licensed at all. The Tribunal discussed the matter further following the conclusion of the matter and determined that it required to have more information on this issue. The Tribunal requested evidence of the correspondence from the local authority as well as plans as to what was covered by the HMO licence. Information was subsequently received from the Respondent in this regard. The Tribunal was concerned to note that the room may have been deemed to be a storage room at one point and not capable of being let out. In response to a further query evidence was provided by the Respondent that the room was licensed.

The Tribunal was still perturbed as to how the situation had arisen, given the minimum space rules had changed some time before. However, it did appear, after further enquiry, that the room had been licensed as it was. The Tribunal made further enquiry as to whether the boiler in the room had been installed at a later date or the layout had changed more recently and, as a result, the floor space had decreased. The Respondents were able to confirm there had been no change. It appeared that Fife Council had simply taken a stricter approach than previously at an inspection of the Property and that had resulted in the room being deemed uninhabitable. The Tribunal was therefore satisfied that the issue had not arisen as a result of any regulatory failure on the part of the Respondent. They had been entitled to be of the view that the room was lettable and licensed and had acted in good faith. It was unfortunate that this had caused the Respondent to relocate when Fife Council re-inspected but there was no breach by the Respondent. The Tribunal had felt obliged to make the further enquiries following the hearing to ensure there was no more serious breach.

Accordingly, the Tribunal was satisfied that the only breach by the Respondent was under Paragraph 17 and the unfortunate manner in which the Applicant had been dealt with. The issue had undoubtedly caused the Applicant some worry and upset.

However, such matters are generally recompensed with a relatively small award. The Applicant had confirmed she had suffered no financial loss. In the circumstances the Tribunal was of the view that £200 was sufficient recompense.

Decision

Accordingly the Tribunal determined there had been a breach of Paragraph 17 of the Code and resolved to make a Letting Agent Enforcement Order (LAEO) obliging the Respondent to make payment to the Applicant of the sum of £200 within 30 days of the date of service of the LAEO

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.

Ewan Miller

17/2/2020

Legal Member/Chair **Date**