



Decision with Statement of Reasons of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 48 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/LA/20/2102

Parties:

Savu Properties Ltd, 276 Glasgow Road, Waterfoot, Glasgow, G76 0EW (“the Applicant”)

Country Let Ltd., 33 Abbeygreen, Lesmahagow, Lanark, M11 0EQ (“the Respondent”)

Tribunal Members:

Nairn Young (Legal Member) and Gordon Laurie (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) (“the Tribunal”) determined that:

- Background

This application seeks compensation for alleged breaches of the Letting Agent Code of Practice (‘LACP’). It called for hearing at 10am on 5 March 2021. The Applicant was represented by Mr Jay Savaliya, one of its directors. The Respondent was represented by its director, Jeanette Harrison.

- Relevant Law

The following provisions are of relevance to this application:

Section 46 of the Housing (Scotland) Act 2014 (‘the Act’) states:

“Letting Agent Code of Practice

(1) The Scottish Ministers may, by regulations, set out a code of practice which makes provision about—

(a) the standards of practice of persons who carry out letting agency work,

(b) the handling of tenants' and landlords' money by those persons, and

(c) the professional indemnity arrangements to be kept in place by those persons.

(2) The code of practice is to be known as the Letting Agent Code of Practice.

(3) Before making regulations under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate on a draft of the code of practice.”

In terms of the powers granted under this section, the Scottish Ministers produced the Letting Agent Code of Practice (Scotland) Regulations 2016, which contained the LACP in its Schedule. This came into force on 31 January 2018.

The following paragraphs of the LACP were referred to (in this context ‘you’ refers to the letting agent in question):

“32. Your terms of business must be written in plain language and, alongside any other reasonable terms you wish to include, must clearly set out:

...

How to change or end the terms of business

q) clear information on how to change or end the agreement and any fees or charges (inclusive of taxes) that may apply and in what circumstances. Termination charges and related terms must not be unreasonable or excessive.

...

Ending the agreement

37. When either party ends the agreement, you must:

a) give the landlord written confirmation you are no longer acting for them. It must set out the date the agreement ends; any fees or charges owed by the landlord and any funds owed to them; and the arrangements including timescales for returning the property to the landlord – for example, the handover of keys, relevant certificates and other necessary documents. Unless otherwise agreed, you must return any funds due to the landlord (less any outstanding debts) automatically at the point of settlement of the final bill.”

Section 48 of the Act states (so far as relevant to this application):

“Applications to First-tier Tribunal to enforce code of practice

(1) A tenant, a landlord or the Scottish Ministers may apply to the First-tier Tribunal for a determination that a relevant letting agent has failed to comply with the Letting Agent Code of Practice.

(2) A relevant letting agent is ... in relation to an application by a landlord, a letting agent appointed by the landlord, ...

(3) An application under subsection (1) must set out the applicant's reasons for considering that the letting agent has failed to comply with the code of practice.

(4) No application may be made unless the applicant has notified the letting agent of the breach of the code of practice in question.

(5) The Tribunal may reject an application if it is not satisfied that the letting agent has been given a reasonable time in which to rectify the breach.

(6) Subject to subsection (5), the Tribunal must decide on an application under subsection (1) whether the letting agent has complied with the code of practice.

(7) Where the Tribunal decides that the letting agent has 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 to the applicant such compensation as the Tribunal considers appropriate for any loss suffered by the applicant as a result of the failure to comply."

- Findings in Fact

1. The Applicant owns a portfolio of properties.

2. From December 2018, it engaged the Respondent to manage certain properties on its behalf.

3. For each property that was to be managed, the Respondent issued a pack to the Applicant, containing:
 - An eight-page document of terms and conditions of engagement titled, “Letting and Property Management Service Agreement” (‘the Service Document’);
 - A two-page document of terms and conditions of engagement titled, “Agency Agreement” (‘the Agency Document’);
 - A document titled, “Management Information and Instructions”; and,
 - A letter explaining the provisions concerning cancellation of the contract during a ‘cooling off’ period.
4. The Service Document was sent already having been executed by the Respondent and, in every case, the Applicant also executed it and returned it.
5. The Agency Document was also executed by the Respondent; but, rather than being executed by the Applicant, a scanned signature from one of its directors was appended automatically by the Respondent, in every case.
6. In every case, the Service Document was drafted as an agreement between the parties and contained a clause which read (so far as relevant to this case [numbering as in the original]):

“11. Changing or Terminating the Agreement

...

11.2 This Agreement will commence as soon as it has been signed by the Owner [i.e. the Applicant] and the Agent [i.e. the Respondent] and it will continue until terminated by either party in writing to the other giving not less

than 3 months' notice. The termination date must be no less than 3 months from the start date of any existing tenancy agreement. Or the landlord can pay 3 months commission to terminate the agreement immediately, which ever both parties have mutually agreed to.

11.3 The Agent hereby reserves the right to terminate this Agreement with immediate effect in the event of any act or omission by the Owner which frustrates the continued performance of the Agent's service under the terms of this Agreement or for any act or omission by the Owner which is in breach of the Owner's obligations under the terms of this Agreement.

11.3 Termination is without prejudice to the Agent's rights to recover from the Owner all sums due to the Agent in terms of this Agreement at the date of termination."

7. In every case, the Agency Document was drafted as the terms of an offer from the Respondent to carry out service and contained a clause which read:

"19) This Agreement will remain in force until terminated by service of three months notice in writing or three months commission by one party on the other provided that we may terminate this agreement ourselves forthwith and without service of notice where payment of commission will still apply in the event of any action or omission by you or your representative which frustrates the continued performance of our Service hereunder."

8. The Agency Documents then purported to confirm acceptance of the offer, above the section where the Applicant's signature was inserted by the Respondent, as follows:

"I wish to appoint you as my Letting and Managing Agents in accordance with the terms and conditions and fees as laid out herein and which I have read, understood and taken appropriate advice on where necessary, in respect of the property appended below."

9. On 19 July 2020, the Applicant gave three months notice of its wish to terminate the Respondent's engagement.
10. On 11 August 2020, the Respondent informed the Applicant that it was terminating the arrangement immediately, due to what it termed 'harassment and receiving emails constantly'.
11. Without accepting that it had breached the terms of the contracts, the Applicant agreed to terminate them as of 11 August 2020.
12. The Respondent gave a final account and returned the funds it held on the Applicant's behalf, with a deduction for three months' worth of commission, totalling £1,997.71.
13. In an email on 11 August 2021, the Applicant disputed this, asserting that the Respondent was only entitled to commission up to the date of termination of the contracts, totalling £210.72.
14. Also in August 2020, the Applicant alleged that it had not been returned keys to properties that were held by the Respondent.
15. The Respondent did not hold any further sets of keys belonging to the Applicant.
16. Following further exchanges between the parties, on 26 August 2020, the Respondent paid the Applicant £998.14, as a goodwill gesture and without accepting any formal liability to do so.
17. The Applicant raised this application on 27 September 2020, alleging breaches of paragraphs 32(q) and 37(a) of the LACP.

- The Parties' Positions

18. The Applicant's position at the hearing was that the terms of the contracts between it and the Respondent were contained in the Service Document. Mr Savaliya, who was appearing on behalf of the Applicant, stated that he was not aware of the Applicant ever having received the Agency Document. On that basis, with reference to the terms of clause 11 of the Service Document, the Applicant submitted that it was entitled to return of the commission that had been withheld that related to the period after termination of the contracts on 11 August 2020. There was nothing in that clause which entitled the Respondent to three months' commission, in circumstances where it terminated the contract early. By failing to return the sum due in full, the Respondent was in breach of paragraph 37(a) of the LACP.
19. Alternatively, if, as the Respondent maintained, the contract was in fact governed by the terms in the Agency Document, and that entitled the Respondent to three months' commission even on early termination at its own instigation, the Respondent was in breach of paragraph 32(q), in that that fee was not clearly indicated and was unreasonable.
20. Separately, the Applicant submitted that the Respondent had breached paragraph 37(a) of the LACP by failing to return keys belonging to it.
21. The Respondent denied any breach of the LACP. Mrs Harrison, appearing on its behalf, stated that she always included both the Service Document and the Agency Document in the pack that she forwarded to the Applicant for each property. She suggested that Mr Savaliya did not recognise the latter document because she did not tend to deal with him, but with his brother in regard to conclusion of the contracts. She stated that Mr Savaliya's brother was aware that she was appending his scanned signature to the Agency Document, because he had asked her to do so early in the course of their business together.
22. On that basis, the Respondent submitted that the contracts between the parties were governed by clause 19 of the Agency Document and that that clause allowed retention of three months' commission, even in circumstances

where the contract was terminated early by it. That provision was not unreasonable, since it would only be exercisable in circumstances where the Applicant's behaviour was such as to prevent the Respondent from providing the service.

23. In relation to the keys, the Respondent submitted that it did not hold any more keys belonging to the Applicant. Mrs Harrison stated that she had not received a full set of keys in relation to every property managed on behalf of the Applicant and that some had also been taken and not returned by contractors engaged by the Applicant itself.

- Decision

24. Insofar as this dispute was one relating to the facts, the Tribunal considered that both Mr Savaliya and Mrs Harrison were credible witnesses, but that Mrs Harrison's evidence was to be preferred. In relation to what documents had been supplied, the Tribunal considered that Mrs Harrison had direct knowledge of the issue, whereas Mr Savaliya did not. In relation to the keys, the Tribunal considered that the explanation given by Mrs Harrison as to why the Respondent did not hold any further sets of keys was credible and there was no evidence presented by the Applicant to refute it. The Tribunal therefore found these facts as presented by Mrs Harrison.

25. Nonetheless, the primary issue in this case is in relation to the contract and the question of what terms apply. That is a matter of law. The Tribunal notes at the outset that it is highly unusual for two different sets of terms and conditions to be issued simultaneously by an agent and it is inevitable that confusion will result from such an approach. That notwithstanding, the Tribunal considers that the agreements between the parties must be taken to be in the terms set out in the Service Document. That is the only written document that was subscribed on behalf of both parties for each property. While the Respondent claimed that she had been given authority to append one of the Applicant's directors' signature to the Agency Document, that could not have been a valid means of executing the agreement and, in particular, is

contradictory to the terms of the purported acceptance itself, which refers to the document having been read by the signer. For that reason, the Tribunal has not found it necessary to make any finding in fact as to whether the Respondent was given such authority: it would have no bearing on its overall findings whether it was or not.

26. It follows that the terms of clause 11 of the Service Document govern termination of the contracts and the Tribunal does not consider that those terms give authority for the Respondent to retain three months' commission where it terminates the contract in terms of clause 11.3. The reference to the sums to be recovered in that clause is only to those due at the date of termination. Although the Applicant accepted termination without agreeing with the purported basis for it, that agreement could not, in itself, constitute agreement to pay three months' commission, in the way envisaged by clause 11.2, without specific words to that effect.

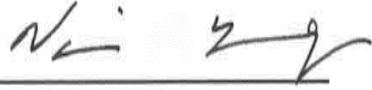
27. For those reasons, the Tribunal found the Respondent failed to comply with paragraphs 32(q) and 37(a) of the LACP, on the basis that its terms regarding termination were insufficiently clear and that it had not returned sums due.

28. The Tribunal therefore made a letting agent enforcement order requiring the Respondent to return the outstanding sum of £788.85 within two weeks. It considered that an order in those terms would be sufficient to rectify the failures in this instance.

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.

A handwritten signature in black ink, appearing to be "N. S. J.", written over a horizontal line.

Legal Member/Chair

Date