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

Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) In an Application under section 48 of the Housing (Scotland) Act 2014

Chamber Ref: FTS/HPC/LA/20/0956

Flat C, 3 Milton Wynd, Turnberry KA26 9LG
("The Property")

The Parties:-

St Andrews Executive Travel Ltd, Brownhills, St Andrews KY16 8PL
("the Applicant")

Key-Lets 12 Parkhouse Street, Ayr KA7 2HH
("the Respondent")

The Tribunal:

Graham Harding (Legal Member)
Mary Lyden (Ordinary Member)

Decision

The First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal') finds that the Respondent failed to comply with paragraphs 40 and 107 of the Letting Agent Code of Practice ("the Code").

The decision is unanimous.

Background

1. By application dated 21 September 2020 the Applicant complained to the Tribunal that the Respondent was in breach of paragraphs 40, 63, 97 and 107 of the Code.

2. By Notice of Acceptance dated 20 October 2020 a legal member of the Tribunal with delegated powers accepted the application and a hearing was assigned.

3. By emails dated 6 November and 15 December 2020 the Respondent submitted written responses to the application.

The Hearing

4. A hearing was held by teleconference on 16 December 2020. The Applicant was represented by its Director Mr Gordon Donaldson and the Respondent by its partner Mr Tim Williamson.

5. By way of a preliminary matter Mr Williamson objected to Mr Donaldson representing the Applicant as the application had been submitted on the Applicant's behalf by its employee Mr Ben Conway. Mr Williamson explained that he had previously specifically requested to be told who was to be representing the Applicant and had been advised by the Tribunal administration that it would be Mr Conway. For the Applicant Mr Donaldson explained that there had never been any intention that Mr Conway would represent the Applicant. Mr Donaldson said he was the sole director of the company and Mr Conway had filled in the application forms. He had subsequently been made redundant. Mr Donaldson went on to say that he was the person who had met with Mr Williamson and was aware of the circumstances. He accepted that as he had never appeared previously before a court or a tribunal, he was not aware of all the protocols. The Tribunal pointed out to the parties that in order to deal justly with the proceedings it required to deal in a manner which was proportionate and as informal and flexible as was practicable. Mr Williamson acknowledged that as Mr Conway was no longer employed by the Applicant, he could not represent the Applicant and in the circumstances agreed that the hearing should proceed. In any event the Tribunal was agreed that it was appropriate for Mr Donaldson to represent the Applicant.

Paragraph 40 of the Code

6. The Tribunal heard from Mr Donaldson that although it was a minor point none of the communications and emails received from the Respondent had included its letting agent registration number ("LARN").

7. For the Respondent Mr Williamson referred the Tribunal to his written submission of 6 November and the recent response from the Scottish Government confirming the LARN was issued on 1 March 2019. He went on to explain that initially the LARN had been included in communications but at some point after 1 March 2019 the firm had upgraded its system from Windows 7 to Windows 10 and due to an oversight the LARN had not been added at that time. The problem was only noticed when Mr Donaldson brought it to Mr Williamson's attention on 12 March 2020. At that point the error was corrected. Mr Williamson confirmed that he had thanked Mr Donaldson for bringing the omission to his attention and in his response to the Tribunal he had offered the Applicant an apology. In response to a query from the Tribunal Mr Williamson confirmed that the LARN was not included on his firm's website but he thought that this was common practice amongst letting agents.

Paragraph 63 of the Code

8. For the Applicant Mr Donaldson submitted that the whole crux of the dispute was that from the first telephone call made on his company's behalf it had always been made clear that the Applicant was looking for a lease for six months. The purpose was to house the company's drivers when there were golf tours in the area to save on the cost of bed and breakfast accommodation. Mr Donaldson said that he and his staff had made it clear to Mr Williamson that the property was only required for six months and that was why the full six months' rent had been paid at the commencement of the lease. Mr Donaldson went on to say that he would have glanced at the lease document before signing it but did not read it closely. He said he had never rented property before and had been very naïve. He explained that after the initial enquiry all communication had been by telephone. He thought now he would put everything in writing. Mr Donaldson said he accepted that the lease said that two months written notice was required to bring the tenancy to an end. He confirmed that Mr Williamson had been very chatty and had not put him under any pressure to sign the document. However, he said that Mr Williamson knew why he wanted the property.

9. For the Respondent Mr Williamson said that he had an obligation to protect his landlord and that there had to be a notice period in the lease. He said that Mr Donaldson was a director of a company and not an ordinary member of the public. He could have asked to make changes to the lease if he had wished. He explained that he had dealt with many companies in the past who had indicated they wished a lease for a short period and had then continued for an extended period. The lease that had been prepared was in a standard form and not specifically drawn up for the Applicant. It could have been adjusted at the request of the Applicant.

10. In response to a query from the Tribunal Mr Williamson confirmed that the Applicant's use of the property for the golf season had been a new area of business.

Paragraph 97 of the Code

11. Mr Donaldson explained again that he and his employees had made it clear that the property was only required for a six-month period and no longer. He submitted that the Respondent had been give six months verbal notice of the Applicant's intention to vacate the property by 30 November 2018. He accepted that the lease provided for written notice not verbal notice.

12. In response to a query from the Tribunal Mr Donaldson confirmed that the keys to the property were handed back to the Respondent on 20 November 2018.

13. The Tribunal referred Mr Donaldson to the provisions of Section 112 of the Rent Scotland Act 1984 which governs the termination of contractual tenancies and which states that a minimum of one month's notice in writing is required if a tenant wishes to terminate a lease. The Tribunal also pointed out that in this case the contractual position in the written agreement was two month's written notice. For his part Mr Donaldson acknowledged that he had again been naïve.

Paragraph 107 of the Code

14. The Tribunal indicated that the evidence under this heading had already been heard in connection with the complaint in respect of Paragraph 40 of the Code.

Expenses

15. Mr Williamson noted that the Applicant had submitted in its application that it had obtained legal advice from MacRoberts, solicitors. Mr Williamson said that he was concerned that the Applicant had ignored that advice as he believed the action was without merit. He therefore wished to ask Mr Donaldson what advice he had received from MacRoberts. For his part Mr Donaldson said he had not contacted MacRoberts until about January or February and had a very brief meeting with a friend there and had been advised that he could make a complaint. Mr Donaldson went on to say that he accepted he had been naive but felt that the Respondent could have made it clearer. He could have been told to remember to put in a written notice. Mr Williamson submitted that the Applicant had been contractually bound by the terms of the lease and that the Tribunal should consider the application to be frivolous, futile and misconceived. The Respondent had been put to unnecessary time and expense to oppose the application and in the event of the application being unsuccessful an award of expenses should be made against the Applicant and referred the Tribunal to the case of **R v North West Suffolk (Mildenhall) Magistrates Court (1998) Env. L.R. 9.**

16. In response to a query from the Tribunal if Mr Williamson thought any lessons were to be learned from the proceedings, Mr Williamson said he would ensure that LARN numbers were on all communications but believed the Respondents had done exactly what they were paid to do which was to protect their landlords.

Findings in Fact

17. For an unknown period but at some time after 1 March 2019 until 12 March 2020 the Respondent omitted to include its LARN on all communications.

18. The Applicant entered into a contractual tenancy with Synergy Rich Solutions Limited that commenced on 31 May 2018 and endured for a period of six months concluding on 30 November 2018 and continuing thereafter three monthly until terminated by either party giving two month's written notice.

19. The monthly rent was £500.00.

20. The lease was prepared by the Respondent.

21. Prior to the lease being drawn up the Applicant's staff in discussions with the Respondent made it clear that the tenancy was only required for the golf season and the property would not be required after the initial rental period.

22. The Applicant's director Mr Gordon Donaldson attended at the property on 31 May 2018 and signed the lease on behalf of the Applicant. He glanced at but did not read the lease before signing it.

23. Mr Donaldson was not put under any pressure to sign the lease without reading it.

24. The Applicant gave written notice on 7 November 2018 of its intention to leave the property on 29 November 2018.

Reasons for Decision

25. It was conceded by the Respondent that due to an oversight there had been a period following a system upgrade that the Respondent's LARN was not included on any communications until this was pointed out by the Applicant's former employee Mr Conway in a communication received by the Respondent on 12 March 2020. As the Respondent's registration was not completed until 1 March 2019 it follows that there would have been no LARN available on any communication between the parties prior to that date. However, the LARN ought to have been included on the emails sent thereafter. The Tribunal was not presented with any evidence to suggest that the failure on the part of the Respondent to comply with paragraphs 40 and 107 of the Code had caused the Applicant a problem and given that the Respondent had taken steps to remedy the issue and had thanked the Applicant for pointing out the problem the Tribunal considered that no further action was required.

26. The Applicant's representative in giving his evidence before the Tribunal presented as very honest and credible if somewhat naïve and on his own admission out of his depth. It was apparent that by not reading the lease and believing that there was an agreement to lease the property for six months only, the Applicant ended up bound for a longer period than necessary by not putting in a timeous written notice to bring the tenancy to an end. That however was not a breach of either Paragraph 63 or 97 of the Code on the part of the Respondent. As far as those paragraphs of the Code are concerned the Applicant was the author of its own misfortune. It has no doubt been a steep learning curve for the Applicant's director Mr Donaldson but it is important to read legal documents thoroughly before signing them.

27. The Code was introduced to strengthen regulation of the letting-agent industry in Scotland and it introduced certain overarching standards of practice for letting agents to follow. Although the Tribunal did not find in favour of the

Applicant with regards to the substantive alleged breaches it did have some concerns. Mr Williamson emphasised that it was his duty to protect his landlord but it should also be borne in mind that the Respondent has a duty to be fair to tenants as well and perhaps if it had been pointed out to the Applicant that it would need to send in a written notice of termination that would have not only avoided these proceedings but ensured a good working relationship for future golfing seasons.

28. The Respondent sought an award of expenses in the result of the Applicant being unsuccessful. In the first place the Applicant has been partially successful in that it was accepted by the Respondent that it had for a period been in breach of the Code by not including its LARN on communications. Secondly it is now well settled that unlike the English tribunal rules in Scotland there is no explicit sanction in the form of expenses for the unreasonable bringing of an application and indeed the Applicant satisfied a legal member at the sifting stage that the application had some merit. Furthermore, awards of expenses are exceptional and should only be made rarely in clear cases where unreasonable behaviour has been made out. A Tribunal may make an award where a party has during the course of proceedings failed to comply with a direction; or persisted in progressing with an application where a clear indication has been given that the application is hopeless; or by introducing new evidence at a very late stage resulting in an adjournment being necessary; or by leading irrelevant evidence or causing disruption. In these proceedings although the Applicant was unsuccessful the Applicant cannot be criticised for the conduct of its case at the hearing and none of the foregoing examples apply and the Respondent's application for expenses is refused.

29. Although the Respondent was in breach of Paragraphs 40 and 107 of the Code the Tribunal did not consider that it was necessary to make a Letting Agent Enforcement Order given that the Respondent had taken steps to correct the omission and had offered the Applicant an apology.

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.

Graham Harding 16 December 2020
Legal member