Housing and Property Chamber
First-tier Tribunal for Scotland

Statement of Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber)

(Hereinafter referred to as "the tribunal")

Under Section 48(6) of the Housing (Scotland) Act 2014 ('the 2014 Act')

Chamber Ref: FTS/HPC/LA/21/2845 and FTS/HPC/LA/21/2847

Parties:

Mr Marton Rosson, 55/2 Buccleuch Street, Edinburgh EH8 9LS

Mr Vojtech Pavlis, 21C Craigmillar Park, Edinburgh EH16 5PE ("the applicants")

Braemore Sales and Lettings, Level 2, 30 Orchard Brae House, Queensferry Road, Edinburgh EH24 2HS ("the respondent")

Tribunal Members:

Sarah O'Neill (Legal Member) and Frances Wood (Ordinary Member)

Decision of the tribunal

The tribunal determines that the respondent has failed to comply with paragraphs 124 and 125 of the Letting Agent Code of Practice ('the code'). The tribunal therefore issues a Letting Agent Enforcement Order. The tribunal's decision is unanimous.

Background

1. By their applications received on 16 November 2021, the applicants applied to the tribunal in terms of section 48 of the 2014 Act and Rule 95 of Schedule 1 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 ('the 2017 rules') to determine whether the respondent had failed to comply with the code. In their applications, the applicant stated that the respondent had failed to comply with paragraphs 124 and 125 of the code.

2. The applications were accepted for determination on 24 November 2021. The two applications were conjoined, as they both concerned the same tenancy and

the same respondent, and the complaints made within the applications were identical.

3. On 10 December 2021, the tribunal administration wrote to the parties, notifying them that a case management discussion (CMD) would be held by teleconference call on 26 January 2022. No written representations were received from any of the parties prior to the CMD.

The CMD

4. A CMD was held by remote teleconference call on 26 January 2022. Both applicants were present on the call and represented themselves. Mr Raphael Bar, Head of Customer Relations, represented the respondent.

5. The tribunal concluded that it was not in a position to make a decision on the application at the CMD. While the facts were agreed between the parties, there were two issues to be resolved: 1) whether the 'guarantee money' constituted 'client money' and therefore whether sections 124 and 125 applied in this case, and 2) if they did apply, whether they had been breached by the respondent.

6. The tribunal therefore decided to postpone the CMD to a later date, to allow for further information to be provided by the parties. The tribunal also noted that it was open to the parties to discuss the matter between themselves and come to an agreement.

7. The tribunal issued a direction to the parties, alongside the note of the CMD and an invitation to consider mediation, on 31 January 2022. This required the applicants to provide by 3 March 2022:

    1) Any written evidence relating to the £1450 'guarantee money' which they each paid to Broughton Property Management (BPM) at the start of their tenancy, including when it was paid, the reasons why it was paid and the basis on which it was paid.
    2) Any further written representations they may wish to make as to why they believed the respondent had breached paragraphs 124 and 125 of the code.

8. The direction also required the respondent to provide by 3 March 2022:

    1) Confirmation of the basis on which the £1450 'guarantee money' was paid by each of the applicants to BPM, including whether:

        a) this money was held by BPM, and subsequently by the respondent, on behalf of the landlord and/or on behalf of the applicants.

b) it was intended that the money should be returned to the applicants at the end of their tenancy.
c) the respondent was required to seek permission from the landlord before releasing the money to the applicants.

2) Any written representations they wished to make as to why they considered that the respondent had not breached paragraphs 124 and/or 125 of the code.

9. Further written representations were received from Mr Rossen on behalf of both applicants on 2 February 2022. A response to the direction was received from Mr Bar on behalf of the respondent on 28 February 2022.

The evidence

10. The evidence before the tribunal consisted of the following:

- The application forms completed by the applicants, which were in identical terms.
- Supporting documents submitted by the applicants with their applications (which were also in identical terms), namely:
  1) continuation sheet with further details of their complaints.
  2) private residential tenancy (PRT) agreement between the applicants and a third co-tenant, Mr Ota Dvorak and the landlord, signed on behalf of the landlord by BPM, dated 25 and 27 September 2020.
  3) PRT agreement between the applicants and a third co-tenant, Mr Botond Levente Gemesi and the landlord, signed on behalf of the landlord by BPM, dated 27 and 29 January 2021.
  4) Copy bank statements showing payments made by Mr Rossen to BPM on 25 June 2021 and 27 October 2021.
  5) Various email correspondence between Mr Rossen and BPM (and copied to Mr Pavlis) dated between 21-30 June 2021.
  6) Various email correspondence between Mr Rossen and the respondent dated (and copied to Mr Pavlis) between 19 July 2021 and 8 November 2021.
  7) Email from BPM to Mr Rossen dated 10 July 2021, advising that it had become part of Braemore Sales and Lettings from 6 July 2021.
  8) Email from the respondent to Mr Rossen dated 21 July 2021 advising that it had acquired BPM.
  9) Copy notification letter dated 14 September 2021 and sent by Mr Rossen to the respondent by email on 15 September 2021, setting out the applicants' complaints under the code.
- Email from Mr Bar to the tribunal administration dated 16 December 2021.

- Written representations received from Mr Rossen on behalf of both applicants on 2 February 2022.
- Written representations received from Mr Bar on behalf of the respondent on 28 February 2022.
- The oral representations of the parties at the CMD and the hearing.
- Email correspondence between Mr Rossen and Mr Farrukh Iqbal of BPM dated between 22 and 25 September 2020, produced by Mr Rossen at the hearing.

Findings in fact

11. The tribunal makes the following findings in fact:

    a) The applicants, together with a third co-tenant, Ota Dvorak, entered into a PRT agreement in relation to a property at 32 (1F2) Hillside Street, Edinburgh EH7 5HB commencing on 25 September 2020.

    b) The third co-tenant had moved out of the property and the applicants had entered into another PRT agreement relating to the property, together with a new co-tenant, Botond Levente Gemesi, on 25 January 2021.

    c) Both PRT agreements had been prepared and signed on behalf of the landlord by the landlord's then letting agent, BPM.

    d) At the start of the first tenancy, the applicants and Mr Dvorak had paid a tenancy deposit totalling £1700, as required by the PRT agreement. The deposit was paid into an approved tenancy deposit scheme.

    e) The applicants and Mr Dvorak had also each paid the sum of £1450, which was equivalent to three months of their respective shares of the monthly rent, to BPM, at the start of the first tenancy.

    f) The applicants were both international students and it was their understanding that this money had been paid in lieu of a UK guarantor, as a guarantee, and would be returned to them at the end of their tenancy.

    g) Mr Dvorak, the third tenant under the first PRT agreement, had paid this sum, which was refunded to him by BPM at the end of his tenancy.

    h) At the end of the first PRT, the sums paid by the applicants were carried forward into the second PRT.

i) The third co-tenant under the second PRT agreement, Mr Gemesi, had a UK guarantor and had not therefore had to pay this sum.

j) On 10 July 2021, the applicants received an email from BPM advising them that BPM had become part of Braemore Sales and Lettings from 6 July 2021.

k) The applicants' tenancy ended on 13 July 2021. The applicants and Mr Gemesi each paid a full month's rent for the last month of the tenancy. At the end of the tenancy, the applicants initiated the return of their tenancy deposit and requested that the 'guarantee money' be returned to them.

l) The tenancy deposit was repaid to the applicants and Mr Gemesi in full following the end of their tenancy.

m) The rent which the applicants and Mr Gemesi had overpaid for the last month of their tenancy was returned to them by BPM shortly after the end of their tenancy.

n) On 21 July 2021, the applicants received an email from Braemore Sales and Lettings advising them that they had acquired BPM. The email stated that, as part of the merger, their records would be safely and securely transferred to Braemore's systems on that date.

o) Mr Rossen requested the return of the 'guarantee money' from the respondent by email and by telephone call on a number of occasions from 24 July 2021 onwards.

p) The money was returned to the applicants on 27 October 2021.

q) The respondent is a registered letting agent (Registration number LARN1905055), which carries out letting agency work in Scotland.

r) The respondent was responsible for management of the applicants' tenancy on behalf of the landlord from 21 July 2021 onwards.

s) The code sets out the standards which all those doing letting agency work must meet. The code came into force on 31 January 2018. The respondent's duty to comply with the code arose from that date.

The hearing

12. A hearing took place by teleconference on 10 March 2022. The applicants represented themselves and gave evidence on their own behalf. Mr Bar represented the respondent and gave evidence on its behalf. None of the parties called any other witnesses to give evidence on their behalf.

The applicants' complaints

13. The applicants complained that the respondent had breached sections 124 and 125 of the code, which state:

> *124. You must ensure clients' money is available to them on request and is given to them without unnecessary delay or penalties, unless agreed otherwise in writing (for example to take account of any money outstanding for agreed works undertaken).*
>
> *125. You must pay or repay client money as soon as there is no longer any need to retain that money. Unless agreed otherwise in writing by the client, you should where feasible credit interest earned on any account to the appropriate client.*

14. Mr Rossen told the tribunal that he had requested the return of the 'guarantee money' from the respondent on behalf of Mr Pavlis and himself on a number of occasions from 24 July 2021 onwards. This was evidenced by numerous emails between the respondent and himself. He had also made a complaint to the respondent about the length of time which it was taking for the money to be returned. He was told that the delay was due to an issue with the respondent arranging IT access to BPM's files, in order to verify that the money was held in BPM's accounts.

15. The £2900 (£1450 each) had finally been repaid to the applicants on 27 October 2021. It had taken 106 days from the end of the tenancy for the money to be released. Mr Rossen said that this was not fair to Mr Pavlis or himself, as they were unable to access their own money for that length of time. As they were students, the sums involved were significant to them and the situation had caused them uncertainty in managing their budget. The applicants did not believe that the failure to repay the money sooner was malicious or deliberate. However, they felt that they should not have had to wait so long for their money to be returned to them.

16. The applicants believed that the respondent had failed to comply with paragraphs 124 and 125 of the code. It was their view that the 'guarantee money' was 'client money' in terms of paragraph 117 of the code, as BPM's representative had asked them to pay it into its client account. The applicants

had paid their rent in full, having actually overpaid the amount due during the last month of their tenancy. Their tenancy deposit had also been returned to them by the approved tenancy deposit scheme. There was therefore no longer any need for the money to be retained once the tenancy ended.

17. The applicants considered that the' guarantee money' should have been refunded to them following the end of their tenancy. They said that it had not made available to them on request or paid to them without unnecessary delay, as required by paragraph 124 of the code. The email they had received from the respondent on 21 July 2021, eight days after the tenancy ended, stated: "*as part of the merger, your records will be safely and securely transferred over to Braemore's systems on Wednesday 21st July."* They argued that the money should have been transferred over on that date and that the three months delay in returning the money to them was unnecessary.

18. They also considered that as they had moved out of the property, having paid their rent in full, and as their final month's rent overpayment and tenancy deposit had been returned, there was no longer any need for the respondent to retain the money, in terms of paragraph 125 of the code. Mr Rossen said that the applicants could think of no reason why there would be any need to retain the money.

19. The applicants had two main goals in making their applications. Firstly, they wished to ensure that the respondent would address the operational issues which had arisen, to ensure that the same thing did not happen to other international students in the future. Secondly, they sought fair compensation for the time that had been involved in pursuing the issue with the respondent and for the inconvenience this had caused them.

20. In their applications, they had suggested that a sum of £443.21 each might be appropriate. This was broken down as follows: £300 for time spent to date resolving the issue; £72 for a late payment charge which they said the respondent would levy under the tenancy agreement; £50 for inconvenience; and £21.21 for compound interest at 5%. They said however that they were willing to accept whatever sum the tribunal considered to be appropriate.

The respondent's submissions

21. Mr Bar did not dispute that the 'guarantee money' had been paid by the applicants to BPM at the start of the first PRT. He said that it was his understanding that the money was paid as three months' advance rent, which would be repaid to the applicants at the end of the tenancy, if the rent was up to date.

22. He accepted that there had been a lengthy delay in returning the money to the applicants. He explained that the respondent had experienced significant difficulties in obtaining IT access to BPM's accounts system following the takeover, and that this had caused the delay. He emphasised that he had believed the applicants when they said the money had not been returned to them. The respondent was unable, however, to release the money until they could be absolutely certain that the money was still being held in the account and had not already been paid out. The only way to ensure that was to access the BPM accounts system, which had taken some time.

23. It was his position that the money was held by BPM on behalf of the landlord as its client, rather than the tenants i.e. the applicants. He said that if it was held on behalf of the applicants, it could not have been in lieu of guaranteeing the rent and would not have served any purpose.

24. Paragraphs 124 and 125 were not therefore applicable to the money in question. He argued in respect of paragraph 124 of the code that the sum may have been available to the landlord on request. Therefore, there had not been a breach of paragraph 124. If the tribunal were to find that 'clients' referred to the applicants at any time, the respondent's position was that the delays were necessary as it had a responsibility to identify whether the money was indeed due to be returned before it could be released.

25. Likewise, he argued in relation to paragraph 125 of the code that it was necessary for the respondent to retain the money until such time as it was confirmed that this could be released. The money had been released as soon as there was no longer any need to retain it.

26. Mr Bar said at both the CMD and the hearing that he had already apologised to the applicants for what had happened and wished to apologise again. He said that the applicants had done nothing wrong. He expressed the view that, even though the respondent did not consider that it had breached the code, the applicants were entitled to fair compensation. He did not consider that the sum suggested by the applicants was reasonable in the circumstances. He had offered the applicants an initial goodwill payment of £50 each prior to the CMD and said at the hearing that he had offered them an increased payment, which they had declined.

Summary of the issues

27. The issues to be determined were: 1) whether the 'guarantee money' constituted 'client money' and therefore whether paragraphs 124 and 125 of the code applied in respect of this money and 2) if they did apply, whether the

respondent had failed to comply with either or both of these paragraphs of the code in respect of the complaints made by the applicants.

Statement of reasons for decision

Whether paragraphs 124 and 125 applied

28. The tribunal notes that section 8 of the code - which includes paragraphs 124 and 125 - is entitled: *"Handling landlords' and tenants' money, and insurance arrangements."* Paragraphs 124 and 125 refer to 'client money', which was defined in section 117 of the code as *'money held or rent collected on behalf of a prospective tenant, tenant or landlord (including former tenant or landlord)*.

29. It was unclear on what basis the 'guarantee' money had been retained by BPM. In an email of 23 September 2020 from BPM, which the applicants produced at the tribunal hearing (with no objection from Mr Bar), it was stated that the money was in respect of three months' rent in advance. The email went on to say:

    "The 3 months in advance rent would be held for the last period of tenancy whenever that may be, you would be required to pay the rent on a monthly basis and inform us when you are moving out and we would draw on the rent held. This arrangement is in lieu of guarantors".

30. Mr Rossen told the tribunal that he had understood that the money was a payment in lieu of a UK guarantor, in case the tenants failed to pay their rent. The tribunal considers that it is difficult to see how this money could in fact be rent paid in advance. Usually where rent is paid in advance, it covers the rent for the initial months of the tenancy, as Mr Bar himself acknowledged, and it would not be repaid to the tenant. Given that the standard minimum period of notice under a PRT is 28 days (and the applicants said that in fact they gave 32 days' notice), it is difficult to see how the drawing down of three month's advance rent to pay for the last three months of the tenancy would have operated in practice. Moreover, this would not have been a practical suggestion given that the third tenant, Mr Gemesi, had not been required to pay this sum in respect of his tenancy.

31. Mr Rossen also told the tribunal that despite what was stated in the email of 23 September 2020 from Mr Iqbal of BPM, that Mr Iqbal had advised him during a telephone call that he should pay the full month's rent for the last month of the tenancy, and that any overpayment would be returned when the tenancy ended, and this had been done.

32. Mr Bar confirmed to the tribunal that it was his understanding that BPM did not have any arrangement with the landlord which required permission to be obtained from the landlord to release the money to the applicants.

33. A tenancy deposit had also been taken from the applicants by BPM, which would normally provide security against unpaid rent. There was therefore a question as to whether the payment of three months' rent upfront may have been an illegal premium required as a condition of the grant, renewal or continuance of a tenancy in terms of section 82 of the Rent (Scotland) Act 1984. Mr Bar admitted that in his experience, it was very unusual for a payment of this type to be paid upfront by tenants. It would have been his expectation that any rent collected in advance would offset the initial period of rent in the property, not the end period.

34. Whether the payment constituted a illegal premium was not, however, the question before the tribunal. The tribunal also accepts that the payment was made, and the tenancy was entered into, before the transfer of business from BPM to the respondent. The tribunal observes, however, that any future requirement for such a payment to be made by a tenant could be found to be an unlawful premium in terms of section 82 of the 1984 Act and in breach of paragraphs 47 and 48 of the code.

35. The tribunal considers that regardless of whether the 'guarantee money' was held for or on behalf of the landlord or the tenant during the tenancy, at the point when the tenancy had ended and it was clear that the rent had been paid and the tenancy deposit returned, the money became the tenants' money. Mr Bar appeared to accept this point but maintained that retaining the monies had been 'necessary' in view of the need to ensure that a large sum of money was not paid out erroneously.

36. The tribunal therefore finds that the 'guarantee money' fell within the definition of 'client money' in paragraph 117 of the code, being money held on behalf of the tenants i.e. the applicants, rather than as money held or rent collected on behalf of the landlord. It was therefore necessary to determine whether the respondent had complied with paragraphs 124 and 125 of the code.

Whether the respondent had complied with paragraphs 124 and 125 of the code

37. Paragraph 124 – the tribunal finds that the respondent has failed to comply with this paragraph of the code. While the tribunal accepted Mr Bar's evidence that there were difficulties in transferring the accounts systems over to the respondent from BPM, it does not agree that the delay which

resulted was therefore a necessary delay. It was not a necessary delay from the applicants' point of view. The respondent was responsible for handling the 'guarantee money' from the date when they became responsible for managing the tenancy of the property. At the latest, that date was 21 July 2021. While there is an argument that this date was 6 July 2021, when BPM told the applicants that the respondent had taken over, it is clear that the respondent had told them that their records would be safely and securely transferred to its systems on 21 July 2021.

38. Once their tenancy ended, given that their rent was up to date, the applicants were entitled to have their money returned to them on request and without unnecessary delay. It was clear that they had always paid their rent and appeared to have been good tenants. As Mr Bar acknowledged, the applicants should not have had to wait so long to have what was a fairly substantial sum paid back to them. Regardless of the difficulties with the accounting system, it was clear that at least one former employee of BPM, who should have been familiar with the applicants' tenancy history, was still working for the respondent in September 2021. The respondent should therefore have been able to ascertain whether the money could be released without waiting for several months to have this confirmed.

39. Paragraph 125 - the tribunal finds that the respondent has also failed to comply with this paragraph of the code. As noted above, while the respondent may have experienced difficulties in transferring the accounts over from BPM, this was through no fault of the applicants. The tribunal considers that there was no longer any need to retain the money following the end of the tenancy and confirmation that the rent had been paid up until the end of the tenancy and that the tenancy deposit should be released to the applicants and the third tenant.

40. The respondent had a responsibility to ensure that the money was returned to the applicants within a reasonable timeframe. That should have taken priority over its own internal systems issues.

Summary of the decision

41. The tribunal determines that the respondent has failed to comply with paragraphs 124 and 125 of the code. It therefore makes a Letting Agent Enforcement Order (LAEO) as required by section 48 (7) of the 2014 Act.

42. Having taken all of the evidence into consideration, the tribunal considers that in all the circumstances a payment of £250 to each applicant would be

appropriate compensation for the distress and inconvenience caused to them as a result of the respondent's failure to comply with the code.

43. The tribunal does not consider that there are any further steps which the respondent requires to take to rectify the failure to comply with the code. Mr Bar has already apologised to the applicants for the failure several times. The tribunal is also satisfied that the operational issues which arose in this case were very unusual and are unlikely to reoccur.

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.

Sarah O'neill
Legal Member

15/03/2022
Date

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

Letting Agent Enforcement Order (LAEO): Section 48(7) of the Housing (Scotland) Act 2014 ("The Act")

Chamber Ref: FTS/HPC/LA/21/2845 and FTS/HPC/LA/21/2847

Parties:

Mr Marton Rosson, 55/2 Buccleuch Street, Edinburgh EH8 9LS

Mr Vojtech Pavlis, 21C Craigmillar Park, Edinburgh EH16 5PE ("the applicants")

Braemore Sales and Lettings, Level 2, 30 Orchard Brae House, Queensferry Road, Edinburgh EH24 2HS ("the respondent")

Tribunal Members:

Sarah O'Neill (Legal Member) and Frances Wood (Ordinary Member)

Whereas in terms of its decision dated 15 March 2022, the First-tier Tribunal for Scotland (Housing and Property Chamber) ('the Tribunal') determined that the respondent has failed to comply with the Letting Agent Code of Practice ("The Code") and in particular that the respondent has failed to comply with paragraphs 124 and 125 of the Code:-

The Tribunal now requires the respondent to take such steps as are necessary to rectify the failures listed above.

The Tribunal requires the respondent to:-

(a) Pay to each applicant the sum of £250, as compensation for the distress and inconvenience caused to them as a result of the respondent's breach of the Code.

(b) Provide documentary evidence to the tribunal of its compliance with the above by sending such evidence to the office of the First-tier Tribunal for Scotland (Housing and Property Chamber) by email or by recorded delivery post.

The Tribunal order that the steps and payment specified in this Order must be carried out and completed within the period of **28 days** from the date of service of this Order.

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.

Please note that in terms of section 51(1) of the Act, a Letting Agent who, without reasonable excuse, fails to comply with an LAEO commits an offence liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Sarah O'Neill **15/03/2022**
Legal Member **Date**