



**Notes on a Hearing of the First-tier Tribunal for Scotland (Housing and Property Chamber) under Section 48 of the Housing (Scotland) Act 2014 (“The Act”)**

**Reference number: FTS/HPC/LA/1150**

**Mr Gary Martin, 52 Briarcroft Drive, Robroyston, Glasgow (“the Applicant”)**

**Premierlet (Glasgow) ,124 B Kirkintilloch Road, Bishopbriggs, Glasgow (“the Respondent”)**

**Tribunal Members:**

**Andrew McLaughlin (Legal Member), Geraldine Wooley (Ordinary Member)**

**Background**

This Application is made under Rule 95 of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017 (“the Rules”), seeking enforcement of the Letting Agent Code of Practice (“the Code”).

The Application itself alleged breaches of Paragraphs 85, 94 104 and 108 of the Code. A Hearing took place on 28 July 2021 and Case Management Orders were made. The Applicant was ordered to lodge a Supplementary Statement of Claim better setting out the substance of the alleged breaches which were insufficiently detailed in the Application. Reference is made to the Hearing Notes and Directions made at that Hearing. Parties were advised that a further Hearing would be assigned which would be treated as a further procedural Hearing.

The Application called for a further Hearing by conference call at 10 am on 13 September 2021.

The Tribunal had noted at this Hearing that the scope of the alleged breaches set out now in the Applicant’s Supplementary Statement of Claim was different from the breaches referred to in the Application itself and those that were before the Tribunal at the previous Hearing.

The Application referred to breaches of paragraphs, 85, 94, 104 and 108 of the Code. Those

were the paragraphs considered by the Tribunal at the previous Hearing. The Supplementary Statement of Claim now referred to alleged breaches of paragraphs 73, 85, 94, 95 and 115 of the Code.

The Tribunal noted that alleged breaches of paragraphs 85 and 94 were the only paragraphs that were common to both the notification email sent to the Respondent, the original Application and the Supplementary Statement of Claim.

The Tribunal determined that in complying with 48 (4) and s 48 (5) of the Act, the Tribunal required to restrict the scope of the Hearing to those grounds which had been put to the Respondent prior to the Application being raised and which were set out in both the original Application and the Supplementary Statement of Claim which was necessary because of the scant detail in the original application.

Accordingly, the Tribunal restricted any evidential Hearing to consideration of whether paragraphs 85 and 94 of the Code had been breached.

### **The Hearing**

The Application called for a Hearing by conference call on 24 November 2021 at 10 am. The Applicant was present with his representative and witness Mr William Martin. The Respondent was represented by Mr Doig, Solicitor. Ms Caroline McGinley, a director of the Respondent, was also present.

### **Preliminary Matters**

The Tribunal began by considering preliminary matters. The Applicant had emailed the Tribunal the day before the Hearing, inviting the Tribunal to “*change*” the decision taken at the earlier Hearing which had determined the scope of the Hearing. The Applicant now requested to increase the scope of the Hearing by including the additional grounds which the Tribunal had expressly excluded at the Hearing on 13 September 2021. In support of this request, the Applicant produced a copy of a letter supposedly sent intimating these additional grounds to the Respondent. The Respondent opposed this request. The Tribunal heard parties on the matter and undertook to consider the matter in an adjournment before the hearing of any evidence commenced.

The Tribunal also raised the issue of how Mr William Martin might give evidence given he was also the Applicant’s representative. It was agreed that Mr William Martin would give his evidence first and then be in a position to act as the Applicant’s representative. Mr Doig confirmed that he had no difficulty with this approach. It was also agreed by parties that although Ms McGinley was not the Respondent and was actually a Director of the Respondent, she would be entitled to remain present throughout in order to give Mr Doig any necessary instructions.

The Tribunal also took care to ensure that all parties and witnesses and the Tribunal itself had before it all the documents which were to be referred to in the Hearing. Subject to some minor administrative matters regarding the location of documents, all parties and

the Tribunal were able to confirm that they had before them all the documentation to be referred to before the hearing of evidence started.

After adjourning to consider the contested preliminary matter, the Tribunal noted that the letter which the Applicant now wished to lodge was actually a document which had already been lodged. The letter lodged the day before the Tribunal was simply a differently formatted version of a letter previously lodged by the Applicant and considered by the Tribunal.

This meant that the letter contained nothing new and there was no reason at all presented as to why the Tribunal should widen the scope of the Hearing given the matter had been carefully considered and comprehensively settled at the previous Hearing.

The Tribunal would begin hearing evidence, having agreed the arrangements for the giving of evidence in advance and ensured that all witnesses and parties had the necessary documentation to hand.

#### *Mr William Martin*

Mr William Martin is the Applicant's brother. He described himself as a self-employed construction manager and is 61 years of age. Mr Martin gave evidence of his own views and opinions about certain damage said to have been caused to the Applicant's shower room. Mr Martin had prepared a report which he had submitted to the Tribunal. Mr Martin spoke to that report and confirmed it as forming the basis of his evidence about the matter.

Mr Martin helpfully described the Property to the Tribunal and the history of the building of an extension to the Property in 2015. Mr Martin spoke to a repair being carried out to the downstairs shower room at the Property in 2019 which Mr Martin considered to be deficient. He spoke to a photograph of the shower room floor following his investigation into the matter and described his findings which supported his view that the repairs carried out to the downstairs shower room were substandard. In essence, Mr Martin gave evidence that in his opinion, the repair works carried out in 2019 were deficient and negligent.

In addition to what was stated in his report, Mr Martin also suggested in evidence that the "*waterproof lining*" may have been cut or removed in the 2019 repair. Mr Martin suggested that the photograph referred to evidenced this.

Mr Martin was carefully questioned by the Tribunal and in particular by the Ordinary Member of the Tribunal who is a qualified surveyor. Mr Doig naturally also had the opportunity to cross-examine the witness.

Mr Martin gave his evidence in a balanced and thoughtful way. Whilst the Tribunal could not ignore Mr Martin's clear personal interest in the matter given that he was the Applicant's brother and representative, the Tribunal did not consider that Mr Martin was being anything other than candid with the Tribunal.

The Tribunal did not consider that his evidence was misconceived or that he was being

disingenuous to help his brother. The Tribunal considered that Mr Martin's evidence was generally technically sound. The main challenge which the Tribunal encountered was determining the relevancy of Mr Martin's evidence to the issues before the Tribunal. The Tribunal was not tasked with assessing whether any repairs carried out to the Property in 2019 were negligent, but rather whether the Respondent had breached paragraphs 85 and 94 of the Code.

### *Mr Gary Martin*

The Applicant himself gave evidence. Mr Gary Martin is 51 years old and is often employed abroad in the aviation security industry. The Applicant had let the Property out with the Respondent for around 6 years primarily because he was living and working abroad.

The Applicant moved back into the Property in March 2021. Mr Martin spoke of the issues around his complaint. The nature of the complaint itself was relatively simple to understand. The issue which gave rise to the Application was that in 2019 repairs had been carried out to the downstairs shower room of the Property whilst the Applicant was abroad and the Property was being managed by the Respondent.

There seemed no dispute that those works had been carried out by someone recommended by the tenant who was residing in the Property at the time. There was also little dispute that the Respondent could not identify who this individual was who carried out these repair works.

The Applicant considered this to be a breach of paragraphs 85 and 94 of the Code because in his evidence the repairs that were carried out were deficient and had caused damage to the Property which had only later become apparent. The Applicant's concern was that he had no idea about the skills and qualifications of the individual who carried out the repairs. The Applicant contended that the Respondent ought to have ascertained the skills and qualifications of the individual who was to carry out the repairs before the work was carried out and by failing to do so, they had failed in their duties under paragraphs 85 and 94 of the Code to the Applicant.

The Tribunal considered the Applicant, much like his brother, to be a genuine and credible witness. However, it was really when the Tribunal and then subsequently Mr Doig in cross examination, put the contemporaneous emails exchanged between the Applicant and the Respondent relating to the repairs in 2019, that the Tribunal felt it was getting to the substance of the issues in dispute.

The Tribunal considers it important to set out these emails in this decision.

On 23 July 2019, Caroline McGinley emailed the applicant as follows:

*"Hi Gary and Lynn, I hope you are both well.*

*Your tenant has reported there is a problem with the living room light. The bulb blew and tripped*

*the switch which they put back on – they did change the bulb but the light is not working for some reason. Is this something Jamie would be able to have a look at? – they did also mention that the grout in the bathroom is coming away from the tiles and they are worried that the water is escaping behind – I thought Jamie might be able to have a look at this also.*

*You can let me know when you can.*

*Regards*

*Caroline McGinley”*

On 20 August 2019, Caroline McGinley emailed the applicant as follows:

*“Good afternoon Gary and Lynn,*

*The electrician has been out and fixed the light circuit in the living room. Our handy man popped out to have a look at the grout in the tiles but it will be too big a job for him, he says that a tiler is required. I don't have a reliable tiler but your tenant has informed me that he knows a good tiler through work that he does. He says that the tiles will need to come up on the floor and reattached to space elevated from the showered area where the water is escaping and regouted. His chap can do this for £200, however, I have said that if you are in agreement to this cost I will need to see a detailed invoice before any payment is made and of course we will be checking the work.*

*Jamie may know a tiler with his line of work which you would prefer to go have a look at it.*

*You can let me know what you think.*

*Many thanks*

*Caroline McGinley”*

On 20 August 2019, the applicant then responded to Caroline McGinley as follows:

*“Hi Caroline*

*Many thanks for the update, more than happy for the tenants contact to do the job for us and appreciate that you will check the work for us.”*

It appears then that the repair works were carried out by the tiler recommended by the tenant. On 3 September 2019, Caroline McGinley then emailed the applicant as follows:

*“Good afternoon Gary & Lynn,*

*We attended the above property and have attached pictures of the tiling and the raised lip from the*

*shower. The tenants are really looking after your property very well indeed and they seem to be very settled at the property.*

*He has handed in the invoice for the work but I am still waiting on receipts for the adhesive etc. that your tenant purchased.*

*Kind regards*

*Caroline McGinley*

It was confirmed that “*Jamie*” who was referred to in the above emails was the Applicant’s son who was in the building industry and who presented a good option to the Applicant for any repairs needed at the Property.

The Applicant was then referred to pictures taken of the shower room after the completed repair works in 2019 which were said to have been taken by the Respondent’s in-house Property Inspector and which were attached to the email sent to the Applicant on 3 September 2019. It was put to the Applicant that these pictures showed the tiles and the downstairs shower room being in good order and a good state of repair.

It appears that following this exchange of emails and photographs in respect of the repair, no further comments or issues arose whatsoever until 18 February 2021 when the Respondents reported to the Applicant that the tenants “*have also advised that there is a leak coming from the downstairs shower area again, which could be the sealant. I am not sure if this is something that you can attend to Gary but can you let me know..*”

It seemed apparent that from September 2019 when the photos of the repaired shower room were sent to the Applicant by the Respondent, there was no further cause for concern regarding the shower room until around 18 February 2021.

The Applicant appeared to acknowledge this and did not appear to contend that the Respondents delayed or failed to inform the Applicant promptly of these further issues arising. Ultimately the Applicant undertook to deal with those matters himself and in so doing, with the assistance of his brother, came to the conclusion that the issues arising in the shower room in February 2021 were a consequence of what they considered to be negligent repairs in September 2019.

It was put to the Applicant by Mr Doig that he had clearly given explicit instructions to the Respondent to proceed to have the repairs carried out by the tenant’s friend. The Applicant’s position was that despite this he had assumed this meant the suitability of the tradesperson would have been properly checked and the work properly inspected afterwards.

It was put to the Applicant that there were clear emails and photographs sent to the Applicant which demonstrated that the work had been checked and this had been intimated to the Applicant in an appropriate manner. It was put to the Applicant by Mr Doig that there was nothing to confirm that it was the same problem which had occurred in September 2019 that had reappeared in February 2021. The Tribunal did not have before

it any definitive evidence about this.

The Applicant also spoke to a quote for renovation works which he said should establish the basis of any award of compensation made in his favour under the terms of s 48 (8) (b) of the Act. The quote was for the sum of £6,156.00 and was from "Naysmith Joinery". The Applicant gave evidence that this was a fair price for the works necessary to repair the shower room whilst Mr Doig suggested the sums were excessive and unreasonable.

The Applicant concluded his evidence and confirmed that he had no other witnesses to give evidence on his behalf.

The Tribunal then began hearing the Respondent's evidence.

### *Ms Caroline McGinley*

Caroline McGinley is 48 years of age and a Director of the Respondent. She was principally responsible for acting as the Applicant's letting agent and point of contact in respect of the Property. Ms McGinley spoke to the emails exchanged between the parties referred to above and also her further interactions with the Applicant when a further leak was reported in February 2021.

Ms McGinley also confirmed that the photographs emailed to the Applicant showing the shower room in supposedly good order had been taken by a colleague who was the Respondent's designated Property Inspector and whose role and experience was said to be well suited to inspecting the repair works and taking the necessary photographs to show the Applicant.

The Tribunal questioned Ms McGinley on whether it was standard practice to recommend that a repair be carried out to a property by a tenant's friend rather than by an approved tradesperson instructed by the letting agency. She confirmed that it was not normal but as per the emails exchanged her agency did not have their own tiler. Ms McGinley conceded that they had not retained any details of the tradesperson who carried out the works and that neither had they retained a copy of the invoice which was settled to the tradesperson on the Applicant's behalf and ultimately paid by the Applicant from the rental payments received.

Ms McGinley's evidence was that the invoice was shredded after having been retained for a year. Ms McGinley also gave evidence that there was nothing to suggest that the subsequent leak which appeared to arise in February 2021 was the same issue that arose in August 2019. Her position was that the Respondent could not be expected to sue the tradesperson who carried out the works in 2019 when they themselves had no basis for considering that those works were negligent.

Mr William Martin questioned Ms McGinley closely and put to her that she had poorly advised the Applicant and by not retaining the invoice or checking the trade person's qualifications, the Respondent had been reckless with the Applicant's property.

After hearing evidence from all witnesses, the Tribunal invited closing submissions.

The Tribunal was tasked with assessing whether or not the Respondent had breached Paragraphs 85 and 94 of the Code. All parties addressed the Tribunal on their respective positions. The relevant paragraphs of the Code in issue are as follows:

***Carrying out repairs and maintenance***

*85. If you are responsible for pre-tenancy checks, managing statutory repairs, maintenance obligations or safety regulations ( e.g. electrical safety testing; annual gas safety inspections; Legionella risk assessments) on a landlord's behalf, you must have appropriate systems and controls in place to ensure these are done to an appropriate standard within relevant timescales. You must maintain relevant records of the work.*

*94. You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided.*

The Tribunal thereafter adjourned to consider its decision with the decision ultimately made being made on a majority basis with a dissenting opinion.

**Findings in fact**

The Tribunal made the following findings in fact on a majority basis.

- I. The Applicant and the Respondent entered into a contract which commenced around August 2014 and under which the Respondent undertook to let out and manage the Applicant's property at 52 Briarcroft Drive, Robroyston, Glasgow;*
- II. In around August 2019 the tenant occupying the Property reported to the Respondent that "grout in the bathroom is coming away from the tiles and they are worried that the water is escaping behind";*
- III. The Respondents acted promptly and reported this matter to the Applicant for his attention by email dated 23 July 2019;*
- IV. The Respondent was candid in confirming to the Applicant that they didn't have the appropriate tradesperson to deal with the problem and in an attempt to be helpful suggested that a contact of the tenant's be used to carry out the work. The Respondent confirmed that the work would cost the Applicant £200.00 The Respondent also queried with the Applicant whether this was something the Applicant might prefer his son Jamie to have a look at it;*
- V. The Applicant gave clear and unambiguous instructions to the Respondent to ask the tenant's contact to carry out the work subject to it being checked by the Respondent.*
- VI. The work was carried out and the Respondent then checked the work and corresponded with the Applicant to confirm this and sent images taken by the Respondent's Property Inspector after an inspection of the works to the Applicant of the bathroom appearing to be in good order;*
- VII. There was then nothing to suggest any further issue arose with the shower room until around 18 February 2021;*



- VIII. *At that point the tenant appeared to report to the Respondent a further leak in the shower room;*
- IX. *The Respondent acted promptly in bringing this to the attention of the Applicant who ultimately decided to deal with that matter himself;*
- X. *The Applicant considers that previous repairs in August 2019 were not adequately carried out and were negligent and that this is the responsibility of the Respondent who canvassed with him the possibility of the tenant's contact carrying out the work;*
- XI. *The Respondent has retained all emails exchanged between the parties and the photographs sent to the Applicant documenting the shower room after the repair works were carried out;*
- XII. *The Respondent cannot confirm the identity of the individual who carried out the repairs and shredded the invoice submitted by that individual after one year.*

### **Findings in law**

Having carefully considered the Application, the documentation submitted and the evidence heard, the Tribunal came to a majority decision to refuse the Application and to decline to make a Letting Agent Enforcement Order.

The Tribunal understood that the Applicant felt aggrieved by the ongoing issues in his shower room but in considering the relevant paragraphs referred to above, could not conclude that the Respondent was in breach of their obligations under the Code.

The Respondent had acted promptly in reporting repairing issues to the Applicant, been candid in confirming they didn't have the appropriate tradesperson in-house and been helpful in suggesting a way forward.

The Respondent had followed through on their assurances to check the works carried out and sent images to the Applicant of the bathroom after the repairs taken by the Respondent's Property Inspector.

The Respondent had retained the emails and photographs exchanged with the Applicant regarding these matters. If these images and emails had not been retained by the Respondent and lodged with the Tribunal, then the Tribunal would not have had a full and proper overview of the issues in dispute as none of these emails had been lodged by the Applicant.

There was nothing to confirm that the repair issue that appeared in 2021 was the same issue that arose in 2019. Even if it had been the same issue, The Tribunal took the view that the Respondent had at all times been candid and open with the Applicant about matters and clearly acted in good faith throughout.

The Tribunal accepted that it was unfortunate that the Respondent had not retained the 2019 invoice but the Tribunal took the view that repair issues appeared to have been resolved as there was nothing to suggest any ongoing issues or problems with the work carried out.

The Tribunal took the majority decision that the non-retention of this one invoice was a minor matter than should not cross the threshold of amounting to a breach of the relevant paragraphs of the Code.

The Tribunal was somewhat dubious of the Applicant's contention that without this invoice they could not possibly locate the individual who carried out the work. It was unclear for example if the Applicant had attempted to locate the tenant and ask them about who carried out the work.

The Tribunal was not tasked with assessing whether the 2019 repair works were negligent but rather whether the Respondent had breached paragraphs 85 and 94 of the Code. The Tribunal concluded by majority that it had not and declined to make any Letting Agent Enforcement Order. The Tribunal considered that the Respondent's systems and controls in place regarding repairs required at the Property were appropriate and that the Respondent had acted quickly in addressing the repair issues identified in the Application. The Tribunal also considered that the facts of the situation did not give rise to any obligation on the Respondent to pursue the tenant's tradesperson in respect of any defective works as alleged by the Applicant.

### **Minority view**

The minority view of the Tribunal was that the Respondent was in breach of paragraphs 85 and 94 of the Code. Although it is clear that the Appellant agreed that the work would be carried out by a friend of the tenant, it was reasonable for the Appellant to rely on paragraph 85 of the Code to ensure that whoever carried out the work could be traced and pursued in accordance with paragraph 94 of the Code should problems arise.

Paragraph 85 obliges Letting Agents to *"have appropriate systems and controls in place to ensure these [repairs] are done to an appropriate standard "*. The Respondent was unable to evidence that any such controls had been in place. They could not identify the tradesperson who had carried out the work, or whether they were qualified to undertake the work to an appropriate standard, or whether the work was covered by a guarantee. As a result, it was clear that the Respondent is unable to meet the obligation of paragraph 94 to *"pursue the contractor or supplier to remedy the defects in any inadequate work or service provided"*.

Paragraph 85 also obliges letting Agents to *"maintain relevant records of the work"*. The Director of the Respondent admitted that the invoice for this work was the only record that was maintained, and that this had been destroyed after a year. Most tradespeople would guarantee work for a period longer than a year, and HMRC requires records to be kept for a minimum of 5 years. Consequently, poor record keeping has several impacts on Landlords, and in this case the breach of paragraph 85 leaves both the Respondent and the Appellant unable to trace the original tradesperson, check on guarantees or ascertain the adequacy of the original repair work.

## **Outcome**

The Application is therefore refused.

**NOTE: This document is not confidential and will be made available to other First-tier Tribunal for Scotland (Housing and Property Chamber) staff, as well as issued to tribunal members in relation to any future proceedings on unresolved issues.**

**LEGAL MEMBER**

**DATE: 22.12.2021**