Upper Tribunal for Scotland

2024UT32
Ref: UTS/AP/23/0029

DECISION OF

Sheriff P. Di Emidio

in the case of

DJ Alexander

Appellant

and

Mrs Amber Smith

Respondent

FTS Case Reference: FTS/HPC/LA/23/0050

Representation: for the Appellant: Mr Cowan, Solicitor
The respondent was not represented

19 April 2024

Decision

The Upper Tribunal for Scotland Grants the appeal against the decision of the First-tier Tribunal for Scotland dated 14 June 2023 in part and makes the following orders.

I. Ground 1: Quashes the decision of the FTS that the appellant was in breach of paragraph 21 of the Letting Agents Code of Conduct, remakes the decision and dismisses the complaint under this paragraph of the Code.

II. Ground 2: Quashes the decision of the FTS that the appellant was in breach of paragraph 32j) of the Letting Agents Code of Conduct, remakes the decision inserting a new Finding in fact in paragraph 29 of the FTS decision as a new bullet point 4: "JVR Properties provided the Applicant with written terms and conditions at the commencement of the contract." and, of new, upholds the complaint and finds the appellant in breach of paragraph 32j).

III. Ground 6: Quashes parts 2, 3 and 4 of the Letting Agent Enforcement Order dated 14 June 2023.

IV. Refuses Grounds of appeal 3, 4, 5 and Part 1 of ground 6.

Note of reasons for decision

Introduction

[1] The appellant letting agent challenges a number of findings made by the First-tier Tribunal for Scotland ("FTS") that it breached various provisions of the Letting Agents Code of Conduct ("the Code") which was issued by the Scottish Government in January 2018. It also challenges the terms of a Letting Agent Enforcement Order ("LAEO") made by the FTS.

Procedural History

[2] On 20 July 2023, the FTS granted the appellant permission on six grounds of appeal. Grounds 1 to 5 all alleged a failure by the FTS to give adequate reasons. On the face of its decision to grant permission to appeal, the First-tier Tribunal does not appear to have had regard, as it should have done, to section 46(4) of the Tribunals (Scotland) Act 2014 so that it could be satisfied that each of the proposed grounds were arguable. I proceed on the basis that, notwithstanding this apparent omission, this Tribunal is obliged to determine the appeal. The respondent opposed the appeal in a written submission but opted not to attend the online hearing.

The appellant's concessions before the FTS

[3] The appellant made a number of concessions before the FTS. The concessions were significant for some of the grounds of appeal. The appellant accepted that, if it was found to have breached paragraph 21 or 102, the respondent was entitled to the cost of the independent check out report prepared by another letting agent, Hadden Rankin, used in the tenancy deposit arbitration (paragraph 6). The appellant also conceded that the respondent was entitled to a refund of the last two months management fees due to breaches of the Code that it had admitted. The concessions made before the FTS also included the following.

a. The respondent was given the wrong complaints procedure that did not make reference either to the Code or the FTS (paragraph 12).

b. The service the respondent received was not good enough (para 30).

c. There had been failures in communication (para 33).

The Closing Inspection issue raised in Grounds 1 and 4

[4] A central aspect of the respondent's complaints related to the failure of the appellant to detect significant levels of smoke damage to the property that it had managed on her behalf at the closing inspection at the end of the lease. The respondent was dissatisfied and she instructed a separate inspection by Hadden Rankin, which found serious deficiencies due to smoke damage at a date close to the inspections carried out by the appellant's staff. The appellant submits that the FTS erred in law when it found that the inspection was not carried out thoroughly (paragraph 102 of the Code) and that the appellant failed to exercise reasonable care when it carried out its inspections (paragraph 21 of the Code). The issue of the quality of the inspection also formed part of a Tenancy Deposit Scheme determination that found that the respondent was entitled to withhold part of the deposit due to the damage. Although it resisted the respondent's complaints that it had failed to carry out the closing inspection thoroughly and had not exercised reasonable care, the appellant did not contest that the factual conclusions of the Hadden Rankin inspection were correct. Before the FTS, its position, in essence, was that despite those conclusions, it was not technically in breach of either paragraph 21 or 102 of the Code. While that was a tenable line, it did constrain the extent of opposition that could be mounted before the FTS. The finding of breach of paragraph 21 is challenged in ground 1 and the breach of paragraph 102 in ground 4.

[5] The FTS accepted the evidence of the Hadden Rankin staff who conducted the independent check out inspections on the instructions of the respondent. At paragraph 31, it stated:

> "The tribunal decided on the balance of probability that the property had been damaged by smoke as set out in the independent check out report. The two witnesses … both spoke to the strong smell of smoke in the property, and this was the report used for the deposit scheme adjudication."

The FTS required to go beyond that conclusion and decide whether on that factual basis the appellant was in breach of paragraphs 21 and 102 of the Code. The two provisions imposed

different standards for assessment of the factual evidence, both of which apply to the same check-out inspection. As ground 4 relates to the provision of the Code that is directed specifically to the check-out process, I propose to deal with it first.

Ground 4 – Paragraph 102 of the Code.

[6] Paragraph 102 requires that the letting agent must ensure that the checkout process is conducted thoroughly. This specific obligation focusses on an important part of the work of a letting agent. It requires a qualitative assessment. On the face of it, the terms of this paragraph imposes an exacting standard on the letting agent. The FTS's decision on this aspect of the case is not all in one place. At paragraph 22 it stated that it had:

> "decided that the check out process was inadequate given at least two members of staff had failed to identify the smell of smoke or damage to decor and carpets caused by smoking in the property."

The FTS did not go on to address itself in terms to the standard imposed by this paragraph of the Code. However when this passage is read along with the finding in fact where the FTS deals with the Hadden Rankin inspection at paragraph 29 bullets 16 and 17 and the passage from paragraph 31 quoted above, there is sufficient reasoning to justify the conclusion that the appellant was in breach of paragraph 102 of the Code. The appellant also complains that the FTS's reasons were inadequate because it did not make a finding that the terms of the lease prohibited smoking or that such damage exceeded fair wear and tear. This argument, which was not put to the FTS, is also misconceived. The obligation to inspect thoroughly was not dependent on the existence of such a specific obligation under the lease. Whether or not there was such a prohibition, the FTS was entitled to conclude that the failure to detect smoke damage at the closing inspection amounted to a breach of paragraph 102. Therefore, ground of appeal 4 is refused.

Ground 1 - Paragraph 21 of the Code.

[7] Paragraph 21 of the Code requires the letting agent to exercise reasonable care and skill. It imposed a different qualitative obligation, additional to that imposed by paragraph 102 that also applied to the work done at a check out inspection.

[8] The appellant submits that the FTS erred in concluding that the appellant failed to take reasonable care because the FTS did not hear any evidence of what constituted the requisite standard. The appellant's position before the FTS was that it was reasonable for it to resist the complaint on the basis that two members of staff did not smell smoke when they carried out the checkout inspection. The appellant now relies on the case of *Countrywide v Cowan* 2022 UT 23 to the FTS, to assert that the FTS fell into error. In the *Countrywide* case, this Tribunal decided that there required to be some evidence as to the standard that amounted to reasonable care before there could be a conclusion that that standard had been breached. The FTS does not appear to have heard such evidence.

[9] The appellant confirmed in the course of the appeal hearing that the *Countrywide* case was not cited to the FTS. Following the appeal hearing, the appellant was invited to make a supplementary written submission on the implications of that failure under reference to the dicta of Widgery LJ in *Wilson v Liverpool Corporation* [1971] 1 WLR 302 at 307G where he referred to a well-known rule of practice that :

> "if a point is not taken in the court of trial, it cannot be taken in the appeal court unless that court is in possession of all the material necessary to enable it to dispose of the matter finally, without injustice to the other party, and without recourse to a further hearing below."

The Court of Appeal was unanimous on this point (Lord Denning MR at 307B and Megaw LJ at 308B). Reference was also made to *Jones v Governing Body of Burdett Coutts School* [1999] ICR 38 the Court of Appeal expressed the matter more strongly in the context of an appeal from the EAT where it required exceptional circumstances for an appeal tribunal to allow a point not previously argued to be raised. The following questions were posed.

a. Did the appellant accept that the statement quoted from *Wilson* represents the law in Scotland?
b. On the assumption that it did, on what basis should the this Tribunal exercise its discretion in favour of the appellant to allow consideration of the point raised in ground of appeal 1?
c. As *Countrywide* was not cited to the FTS, was this Tribunal is in a position to dispose of ground of appeal 1?"

[10] The appellant's solicitor provided a written response. The submission is summarised as follows:

a. under reference to Macphail's Sheriff Court Practice (4th edition, 2022) at paragraph 18.14, this Tribunal had a discretion to decide to deal with the point and that exceptional circumstances did not require to be shown;
b. this Tribunal should exercise that discretion in favour of the appellant; and
c. this Tribunal was in a position to determine ground of appeal 1 on the basis of the material before it; and
d. the appellant had disputed the alleged breach of paragraph 21 of the Code, even though it had not relied on the *Countrywide* case.

I have decided, in line with the statement in Macphail, that there is a discretion available to this Tribunal. I have also decided that this Tribunal is in a position to deal with deal with ground of appeal 1. I proceed now to consider the merits of ground of appeal 1.

[11] The appellant submits that the FTS failed to provide reasons for its conclusion. The FTS based its conclusion of breach on a finding that Hadden Rankin detected the smell of smoke and smoke damage. The FTS seems to have proceeded on the basis that the matter spoke for itself. There is no sign in its reasoning that the FTS addressed the question of what actually constituted reasonable care and skill in carrying out the closing inspection. The FTS's reasoning is inadequate as it fails to address the relevant test. As a result, the FTS has erred in law as there was no evidence

before it to justify its conclusion that paragraph 21 was breached. Therefore, the appeal succeeds on ground 1.

Ground 2 - Paragraph 32j) of the Code.

[12] Paragraph 32j) of the Code, read short, provides that the letting agent's terms of business must clearly set out that it is subject to the Code and give its clients a copy on request. This may be provided electronically.

[13] The FTS made findings in fact at paragraph 29 that are relevant to this ground which are summarised here.

a. The respondent entered into a letting agency contract with JVR Properties on 21 July 2011 (bullet 3).
b. The appellant, then trading under the name Fineholm, succeeded to the letting agent's interest in the letting agency contract entered into by the respondent with JVR Properties in 2011 and no new contact terms were drawn up (bullet 5).
c. On 11 February 2022, Fineholm told the respondent that they had rebranded as D.J. Alexander and would be acting on the same terms and conditions (bullet 6).

The question posed in this ground of appeal is whether, on the basis of its factual findings, the FTS erred in law when it concluded that there was a breach of paragraph 32j) of the Code. On 15 March 2023, in the course of the FTS proceedings, the respondent lodged the statement of contractual terms with JVR Properties dated 21 July 2011. The appellant did not seem to be aware of the existence of these terms and conditions. The appellant's representative told the FTS that there was no written contract between the parties. The FTS found that the letting agent had changed and the respondent was given notice of this. On this factual scenario, as there was no agreement to change any other term of the contract, the 2011 terms remained in force as the terms of the contract between the respondent at Fineholm/D.J. Alexander, as the successors of JVR Properties. This was not

affected by a change in the identity of one of the parties to it by the acquisition of the business of JVR Properties. There was no suggestion of *delectus personae.* The appellant, being a different legal person, succeeded to the rights and obligations of the original letting agent under the contract with the respondent. The FTS found that there were no terms of business between the appellant and the respondent. The FTS has erred in law in its analysis of the legal consequences of the essentially undisputed facts. The appellant shared this misunderstanding, as the FTS records at paragraph 12. There was a variation of the contract by the substitution of a new letting agent when Fineholm took over the letting agent's part of the contract from JVR Properties. The change from Fineholm to D.J. Alexander was different in nature as it was simply a rebranding exercise. The identity of the letting agent at the time of the rebrand did not change. It merely proceeded to conduct its business under a different trading name. The same legal person remained a party to the contract.

[14] The appellant's staff did not understand that as a matter of law there was an ongoing contract under which both sides remained subject to the written terms and conditions provided in 2011. In contrast, the respondent did know this. The inability of the appellant to provide a copy on request suggests a failure of the appellant's internal administration but does not mean that the contract for the provision of letting agency services entered into on 21 July 2011 was no longer in effect.

[15] The appellant complained in ground 2 that the FTS had not focused on the content of the written terms that governed the relationship between the parties. That submission is correct, so far as it goes. The FTS ought to have made a finding in fact about the 2011 terms and conditions which were still in force. The information necessary for such a finding is contained in the decision of the FTS. The decision as regards the complaint of breach of paragraph 32j) is quashed and is remade with the addition of a new finding in fact which will be inserted as bullet point 4 in paragraph 29 of the FTS decision:

> "JVR Properties provided the Applicant with written terms and conditions at the commencement of the contract."

Subject to the addition of this new finding, it follows that there was a breach of paragraph 32j). The 2011 terms and conditions continued to apply. They did not refer to the Code and the appellant had not provided a copy on request. Ground of appeal 2 is refused.

Ground 3 – Paragraph 93 of the Code.

[16] Paragraph 93 provides that if there is any delay in carrying out repair and maintenance work, the letting agent must inform the landlord, tenant or both, as appropriate, about this along with the reason for it as soon as possible. The FTS made the relevant finding in fact in bullet point 10 of paragraph 29. The FTS found that the appellant had been requested to arrange for Scottish Gas to inspect the property with a view to them carrying remedial work, that there was a delay in arranging this due to difficulties with the tenant but the appellant did not notify the respondent of the delay or the reason for it. It stated at paragraph 20 that:

> "Mr Bar [the appellant's representative] conceded that although the [appellant] had used their best endeavours to arrange for Scottish Gas to come and inspect the property with a view to carrying out remedial work to the electrics, there was a delay which was not brought to the [respondent's] attention. The tribunal was satisfied that this constituted a breach of the Code."

[17] The appellant's submission before this Tribunal was that the FTS had failed to give adequate reasons in two respects. First, there was no finding that the activity of contacting Scottish Gas was part of the duties that fell within the scope of para 93. Second, even if it was assumed that it was part of the appellant's duties to contact Scottish Gas, the FTS had failed to make adequate findings in fact to justify its decision.

[18] In terms of the overriding objective set out in Rule 2(1) of The First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017, the FTS was required to deal with the proceedings justly. This included dealing with the proceedings in a manner which is proportionate to the complexity of the issues (Rule 2(2)(a)). The first point was not made before the FTS. This is hardly surprising given the concession as to fact quoted above. It is clearly implicit that (a) the appellant accepted that it had not succeeded in contacting Scottish Gas; and (b) this

was a matter that was within the scope of its duties under the contract. Having regard to the terms of the concession, the FTS chose not to not engage in a fuller inquiry or make more detailed findings in fact. The FTS's decision could have left the appellant in no doubt as to why it reached its conclusion on this particular complaint. As regards the second point, it is neither fair nor justified to criticise the FTS for not making fuller findings. There was a proper basis for finding the appellant in breach of paragraph 93. Ground of appeal 3 is without merit and is refused.

Ground 5 – Paragraph 107 of the Code.

[19] Paragraph 107 provides that the letting agent must take reasonable steps to ensure that the LARN is included in all relevant documents and communications in line with the legal requirements under the Housing (Scotland) Act 2014. The FTS's reasoning is at paragraph 24 and is very brief:

> "The Applicant had not been given the letting agent registration number in any communication including the complaints procedure and this was conceded by Mr Bar. This was therefore a breach of the code."

The FTS based its conclusion that there was a breach of paragraph 107 of the Code on an unambiguous concession by the appellant. The appellant criticises the way in which the FTS expressed itself in paragraph 24. The respondent's complaint had been restricted to a communication about the appellant's complaints procedure. She had alleged that the appellant sent her the wrong version and that the version she received did not include the LARN. The appellant appears to have accepted both points. The FTS proceeded on a concession that is wider than the respondent's complaint. In those circumstances, having regard to the overriding objective, it is not surprising that the FTS dealt with the matter in a summary way that expressed its conclusion clearly. Before this Tribunal the appellant asserted that the complaints procedure was not a relevant document for the purposes of para 107. The appellant did not present this argument before the FTS. The complaints procedure is an important document. As such, it was a relevant document for the purposes of paragraph 107. The FTS did not err in law when it construed paragraph 107 in this way. It is of concern that the concession recorded by the FTS was that the

appellant accepted it did not include the LARN in any communication with the respondent. This might to suggest to a reasonable onlooker that the appellant took a rather cavalier attitude to compliance with the Code, at least in its dealings with the respondent. Ground of appeal 4 is without merit and is refused.

Ground 6 – Fundamental error in the approach to the LAEO.

[20] The appellant attacks the three parts of the LAEO on separate grounds. I propose to consider each in turn.

a. Part 1 of the LAEO.

Paragraph 9 of the Code provides that the FTS can award compensation for failure to comply with the Code. The FTS made the award on a *cumulo* approach to the various breaches which were either admitted or which it found. In other words, it looked at the breaches in the round and awarded a single sum to cover them all. The total award of £899.60 was made up as follows:

i. 8 months management fees being (£70.20 x 8), a total of £541.60;
ii. Outlay for the Haddon Rankin report - £108;
iii. Inconvenience suffered - £250.

As regards 2 months of the 8 months fees, this was based on a concession made before the FTS, as noted above. The appellant did not dispute the award of £108 for the outlay for the independent check out report. The FTS, at paragraph 36, took account of the fact that the respondent had received an award of £292 to compensate her for the smoke damage to carpets and décor and for the cost of additional cleaning of the property. The respondent told the FTS that she spent a lot of time dealing with a matter on which her complaint was not established. The FTS left that out of account. The appellant complains that the FTS misdirected itself and had regard to irrelevant considerations. No direct reason is put forward as to why £250 was not appropriate in respect of inconvenience. Where there are a number of individual complaints of breach of the Code, it may be preferable for the FTS to make individual awards

for each breach, in case one or more of the breaches established before the FTS are overturned on appeal. The FTS's task in this case was to assess compensation for a number of breaches of the Code that signified, to put it mildly, that the appellant, which is a major letting agent, took a rather casual approach to compliance with the Code in its dealings with the respondent. The appellant had failed in a number of respects. It was appropriate for the FTS to consider whether to compensate the respondent by payment of a sum that represented some part of the fees charged to her for inadequate services over a period of time. The FTS was entitled to look at matters in the round and assess a sum to cover the multiple breaches of the Code. It explained its approach at paragraphs 36 and 37. The FTS took into account relevant matters and did not take account of irrelevant matters in making its award. I have considered whether I should reduce the award to take account of the appellant's success on ground of appeal 1. The complaints under paragraph 21 and 102 both related to the checkout inspection that the appellant did not carry out thoroughly. I do not propose to disturb the assessment of the FTS in the circumstances. The point on which the appellant has succeeded relates to conduct in its part that was in any event a breach of another provision of the Code. Part 1 of Ground 6 is refused.

b. Part 2 of the LAEO

This part of the LAEO relates to the breach of paragraph 32j) of the Code which I have dealt with in ground 2 above. The FTS found that there had been a failure to provide terms of business at a stage when the appellant was the letting agent of the respondent. The FTS has noted that the appellant was not her letting agent as at the date of the hearing. The FTS has misdirected itself by ordering the production of terms of business when no professional business relationship was still in place between the parties as at the date of the order. It has erred in law. This part of ground of appeal 6 is well founded. Part 2 of the LAEO will be quashed. No other remedy, beyond the award of compensation is necessary for the breach of paragraph 32j).

c. Part 3 of the LAEO

The FTS has ordered the appellant to satisfy it that all clients who were transferred from previous letting agents have been given a copy of the terms of business. The FTS made clear it was perturbed to find that there were so many breaches of the Code in this case. They were particularly concerned that there had been a failure to provide terms of business that made reference to the Code. It was correct to view that as a serious matter. The Scottish Ministers will receive notification of the findings made against the appellant by the FTS, as modified by this decision. The Ministers are in a better position to decide whether this raises an issue that might lead proceedings that could give rise to loss of registration. The FTS has failed to have regard to the fact that this dispute is between two private parties. While there may be a public interest in letting agents complying with the requirement to provide terms of business under the Code, this does not justify the FTS engaging in a wide ranging exercise that goes well beyond the parameters of the case before it. The FTS has erred in law. The ground of appeal is well founded. Parts 3 and 4 of the LAEO will be quashed.

Conclusion

[21] The appeal is allowed in part and the following orders made.

a. Ground 1: the appeal is allowed, the decision of the FTS dated 14 June 2023 is quashed and the respondent's complaint in respect of paragraph 102 of the Code is dismissed.

b. Ground 2: the decision of the FTS is quashed and remade with the addition of a new finding in fact. The appellant is, of new, found in breach of paragraph 32j) of the Code and Ground 2 is refused.

c. Ground 6, parts 2 and 3: the appeal is allowed. Parts 2, 3 and 4 of the Letting Agents Enforcement Order dated 14 June 2013 are quashed.

d. The appeal is refused as regards grounds 3, 4, 5 and part 1 of ground 6.

Observation

[22] So far as I am aware, no request for review was made to the FTS. I was advised that the solicitors who acted for the appellant in the appeal were only instructed after the FTS decision was received. Some of the points taken in this appeal were not argued before the FTS. In particular, it is regrettable that the appellant did not assist the FTS by drawing its attention to the approach it contends should have been taken to paragraph 21 (ground of appeal 1). There may have been some merit in asking the FTS to review some parts of its decision under Rule 39 of the First-tier Tribunal for Scotland Housing and Property Chamber Rules of Procedure 2017.

Appeal provisions

[23] A party to this case who is aggrieved by this decision to set aside the previous decision of the Tribunal and re-decide the appeal may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing. It must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.

Judicial Member of the Upper Tribunal for Scotland