



DECISION OF

Sheriff Frances McCartney

IN AN APPEAL

Factotum (Scotland) Ltd

Appellant

- and -

Dr Naheed Rashid

Respondent

FTS Case reference: FTS/HPC/LA/22/4028

15 December 2023

The appeal is allowed and the case remitted to the First-tier Tribunal for a further hearing.

Introduction

[1] This matter comes before the Upper Tribunal following the First-tier Tribunal's (FTS) decision of 19 May 2023. Dr Rashid, the Respondent in this appeal, made an application to the FTS seeking orders that Factotum (the Appellants) had breached the Letting Agent's Code of Practice, following the letting of her flat via the Appellants for a period over summer 2022.



[2] An issue arose as to jurisdiction. The Appellant argued that the Code of Practice for letting agents did not apply to the circumstances of this case. The FTS held two case management hearings to consider that issue. After the second of those hearings, on 19 May 2023, the FTS concluded that the Code of Practice did apply, and thus Dr Rashid's application should be considered. Before considering the substance of that application, the FTS granted leave to appeal its decision of 19 May 2023 to the Upper Tribunal on the issue of whether the Code of Practice did apply.

The factual circumstances

[3] The FTS did not make any findings in fact as to the background circumstances. However, some limited facts are not in dispute. It is agreed that Dr Rashid wished to let out her flat for a period over summer 2022, pending long term tenants moving into her property in autumn 2022. She employed the Appellant to find tenants for her, and, in her eyes, act as a letting agent. The Appellant does not dispute that it arranged for a tenant to stay in Dr Rashid's property sometime between mid-July to the beginning of September 2022. The contract between the Appellant and Respondent has not been produced, nor has the contract or contracts with the Appellant's occupants. The Respondent's position was that 2 contracts were entered into; one covering the period of the Edinburgh Festival and another covering a further period. Dr Rashid advised she had been unaware that there was more than one contract (albeit it appears to have been the same or connected persons for both lets), and she was also unaware of the details of the tenant or tenants.



[4] A dispute arose between the parties. It arose initially due to issues raised by the tenant, but also because of Dr Rashid's complaint about the Appellant's treatment of her. Dr Rashid's application to the FTS sought reimbursement of certain cleaning charges and compensation for losses. Her application to the FTS relied on a number of provisions of the Letting Agent's Code of Practice, which she says were breached.

The arguments before the FTS and the FTS's decision

[5] The FTS made its decision following two Case Management Hearings. It appears no evidence was heard (at least in a formal sense, as presumably the FTS heard directly from parties). No findings in fact were made by the FTS. The Appellants argued that the Code of Practice was not applicable to its work for Dr Rashid. The Code of Practice did not apply to this type of let, which was short term in nature. The FTS asked for submissions on this point, and continued the case to a further Case Management Hearing.

[6] Without making a finding as to the type of occupancy arrangement the Appellant had arranged for Dr Rashid, the FTS appears to have concluded the Code of Practice for Letting Agents applies to every entity carrying out letting agency work in Scotland, irrespective of the type of let (para 35 of its decision). It noted the right to make an application to the FTS alleging a breach of the Code was unlimited in terms of s48 of the Housing (Scotland) Act 2014 (para 36 of its decision). It considered s48 (2) did not restrict the definition of letting agent by the type of tenancy under consideration. It therefore concluded the type of let was not relevant, and a complaint could be made irrespective of the type of tenancy which a letting agent had been involved in arranging.

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[7] Accordingly the FTS considered it had jurisdiction to consider the application. It granted leave to appeal its decision to the Upper Tribunal.

The appeal and hearing before the Upper Tribunal

[8] Both parties lodged written submissions in advance. At the oral hearing of 2 November, Mr Boisseau appeared for the Appellant and departed from some of his written submissions. He no longer argued that the FTS had a conflict of interest (he accepted he meant the FTS had no jurisdiction). He also accepted that when referring to certain parts of EU law in his written submission he could not explain whether those Directives applied in Scotland, or which parts might be relevant to this case. He maintained the Appellant's position that the Code was never intended to apply to a holiday or short term let, and the FTS had erred in deciding it did. He could not assist with an analysis of the FTS' judgement beyond that.

[9] Dr Rashid lodged written submissions, including definitions of "short term" and "holiday let". She had researched such definitions from a Scottish Government consultation paper on short term lets published by the Scottish Government on 28 April 2019, and from the Housing (Scotland) Act 2014. Her submissions attempted to assist the Upper Tribunal.

The law

[10] The regulation of letting agents is found in Part 4 of the Housing (Scotland) Act 2014 (the 2014 Act). In terms of Part 4, a register of letting agents is to be set up (s 29). A person included on the register is to be known as a registered letting agent (s 32 (4)). Various duties are placed on



letting agents (ss 36 & 37) and provision is made for removal from the register (ss 38-40) and appeal provisions (s 41). To act as a letting agent without registration is a criminal offence (s 44).

[11] Section 46 requires letting agents to adhere to any Code of Practice issued by the Scottish Ministers. That section reads:

46 Letting Agent Code of Practice

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

- (a) the standards of practice of persons who carry out letting agency work,
- (b) the handling of tenants' and landlords' money by those persons, and
- (c) the professional indemnity arrangements to be kept in place by those persons.

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

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

[12] As can be seen by s 46 (1)(a) above, to be brought within the requirement to abide by the Code, the person must be carrying out “letting agency work.”

[13] The definition of letting agency work is found in s61 of the 2014 Act. That section reads:

“(1)For the purposes of this Part, “letting agency work” means things done by a person in the course of that person’s business in response to relevant instructions which are—

- (a)carried out with a view to a landlord who is a relevant person entering into, or seeking to enter into a lease or occupancy arrangement by virtue of which an unconnected person may use the landlord’s house as a dwelling, or
- (b)for the purpose of managing a house (including in particular collecting rent, inspecting the house and making arrangements for the repair, maintenance, improvement or insurance of the house) which is, or is to be, subject to a lease or arrangement mentioned in paragraph (a).

(2)In subsection (1)—



- (a) “relevant instructions” are instructions received from a person in relation to the house which is, or is to be, subject to a lease or arrangement mentioned in subsection (1)(a), and
 - (b) “occupancy arrangement”, “unconnected person”, “relevant person” and “use as a dwelling” are to be construed in accordance with section 101 of the 2004 Act.
- (3) The Scottish Ministers may by order—
- (a) provide that “letting agency work” does not include things done—
 - (i) on behalf of a specified body, or
 - (ii) for the purpose of a scheme of a specified description, or
 - (b) otherwise modify the meaning of “letting agency work” for the time being in this section.”

[14] No orders have been made by the Scottish Ministers under s61(3). In relation to certain definitions (that is “occupancy arrangement”, “unconnected person”, “relevant person” and “use as a dwelling”) reference is made to s 101 of the 2004 Act. That is a reference to the Antisocial Behaviour (Scotland) Act 2004 “the 2004 Act”). I return to those definitions shortly.

[15] If there is an issue as to compliance with the Code of Practice, s 48 sets out the circumstances in which an application can be made to the FTS to consider an alleged breach. Section 48 (1) reads:

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

A relevant letting agent in terms of s48 (1) is set out in s48 (2):

“(2) A relevant letting agent is –

- (a) in relation to an application by a tenant, a letting agent appointed by the landlord to carry out letting agency work in relation to the house occupied (or to be occupied) by the tenant,
- (b) in relation to an application by a landlord, a letting agent appointed by the landlord,
- (c) in relation to an application by the Scottish Ministers, any letting agent.”



[16] A tenant therefore can only lodge a complaint with the FTS about their own tenancy, and a landlord can only lodge a complaint about a letting agent appointed by that landlord. Scottish Ministers can raise a complaint about any letting agent.

[17] With reference to the definitions of “occupancy arrangement”, “unconnected person”, “relevant person” and “use as a dwelling”, as noted, those definitions are found within the 2004 Act. The definition of “unconnected person” and “relevant person” are not relevant for this case, but the definitions of “occupancy arrangement” and “use as a dwelling” may be.

[18] Accordingly referring to s 101 of the 2004 Act, an “occupancy arrangement” is defined as:

“.... any arrangement under which a person having the lawful right to occupy a house permits another, by way of contract or otherwise, to occupy the house or, as the case may be, part of it; but does not include a lease;”

[19] In addition to understanding whether a property is subject to occupancy under a lease or an occupancy arrangement, it is also necessary to consider whether someone is using the property within the meaning of the phrase “use as a dwelling”. In relation to “use as a dwelling”, it is a slightly different phrase which is further explained by the 2004 Act. Section 83 (1)(b) refers to “an unconnected person may use the house as a dwelling”. In section 83 (6), various scenarios are listed as not falling within the definition of “the use of a house as a dwelling” (s 83 (b) (a) to (o)). I refer to those exemptions further below.

[20] Lastly, no definition of a lease is found in the 2014 Act.



Discussion

[21] As is set out in s61 (1)(a), a letting agent is acting as such for the purposes of the 2014 Act only if the property in question will be let out under a lease or an occupancy arrangement for use as a dwelling.

[22] Turning firstly to the question of a lease, as noted, there is no definition of a lease found in the 2014 Act. Gloag & Henderson define a contract of lease as “one whereby an owner or occupier of land grants exclusive possession of it to a tenant in return for rent, money or goods” (para 35.02 Gloag & Henderson, 15th ed). Whether a lease exists is a mixed question of fact and law. For there to be a lease, there needs to be consensus between the parties over matters such as the duration of the agreement, the rent, the subjects and there needs to be possession of the subjects.

[23] As noted above, the definition of occupancy arrangement is found in s 101 of the 2004 Act. Taken short, it refers to someone having the right to occupy a house, in terms that do not include a lease.

[24] As already noted, in addition to understanding whether a property is subject to occupancy under a lease or an occupancy arrangement, it is also necessary to consider whether someone is using the property within the meaning of the phrase “use as a dwelling”. That is the term used by s 61 of the 2014. As indicated, by s 83(6) of the 2004 Act, a slightly different term is used. The phrase used in s 83(6) is “the use of a house as a dwelling”.

[25] I do not consider that the difference in the phrasing used is of significance. That is because s61 of the 2014 Act refers to the definition of “use as a dwelling” to be “construed in accordance with section 101 of the 2004 Act”. That seems to me to mean that the intent is to define those



phrases as the same, whether the words 'of a house' is in the phrase to be defined or not. Accordingly I consider that "use as a dwelling" should be construed as meaning the same as "the use of a house as a dwelling."

[26] Returning then to the definition found in s101, that sets out by reference to s 83(6) of the 2004 Act, various circumstances where a person who might ordinarily be 'occupying' a property by a lease or occupancy agreement is, nonetheless, excluded from the definition of "using the house as a dwelling". Examples of excluded occupancy include those in care homes and school accommodation.

[27] Two particular parts of s83 (6) of the 2004 Act are potentially relevant for this case. One is s83 (6)(d) where "a house is being used for holiday accommodation". The second is s83(6)(n), where the house is being used as a short term let. In turn, the definition of a short term let refers to Article 3 of the Civic Government (Scotland) Act 1982 (Licensing of Short-Term Lets) Order 2022. In terms of that article, a short-term let is defined as the use of accommodation which is not the guest's only or principal home under a commercial arrangement. The guest cannot be not a family member. Using the accommodation for certain education purposes is also excluded. Further exclusions as to short-term lets are found in Schedule 1 to the Order.

[28] The nub of the issue is this. If a letting agent has been involved in arranging accommodation used as a holiday let or as a short term let, the Code of Practice does not apply to that letting agent's work in arranging the let, even though they have in the ordinary sense of the words, acted as a letting agent.



[29] Accordingly the starting point is to determine whether the Appellant was engaged in letting agency work when acting on behalf of the Respondent. That requires an examination of whether the end result, i.e. the agreement ultimately entered into, falls within the definition of a lease or occupancy agreement (and that no other exclusions apply, such as the parties being related). Whether there was a lease or occupancy arrangement, the person must have been using the property as a dwelling. If not, the letting agent was not engaged in letting agency work within the meaning of the 2014 Act. That would mean the Code and relevant regulations do not apply to the work carried out in arranging the let. If so, the Respondent would not be entitled to seek relief from the FTS for any alleged breaches of the Code.

[30] The decision of the FTS is flawed because of its approach to s48 of the 2014 Act. The FTS was correct at paragraph 24 of its decision to say that letting agency work (within the meaning of the 2014) does not apply to holiday lets or short term lets. However, the FTS then fell into error. In paragraph 25 the FTS concluded that, because s 48 of the 2014 Act does not refer to any restrictions as to who is entitled to make an application to it for determination of a breach of the Landlord's Code, the FTS had "a duty to make a decision on the application." At that point the FTS fell into error.

[31] Section 46 sets out that the Code (together with other statutory duties) applies to those carrying out "letting agency work." Section 61 defines "letting agency work." As noted above, short term lets and holiday lets are excluded from the definition of letting agency work. By s 48 the FTS is given jurisdiction to deal with matters arising as to compliance with the Code. Such a complaint about a relevant letting agent can be made by a tenant, a landlord or the Scottish

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Ministers. A relevant letting agent is then defined by s48(2) in three ways, for each of the categories of tenant, landlord and Scottish Minister. The Scottish Ministers can lodge a complaint about any letting agent (s48 (2)(c)). Tenants can only complain about the letting agent for the house they are residing in (s48 (2) (a)). Landlords can only complain if it is their own property (s 48 (2)(b)).

[32] The FTS fell into error in its confusion as to the interaction of s48 with the other parts of the 2014 Act. At paragraph 18 of its decision it suggests that as s48 (6) places an “absolute duty” on the FTS to determine an application as to compliance with the Code. It placed some weight on the difference in wording in s48 (3) between the three categories that can make a complaint; tenants, landlords and the Scottish Ministers. In particular it appears to be confused by the wording used in s48(2)(b) regarding complaints from landlords. The FTS thought that because the words ‘letting agency work’ do not appear in s 48 (2) (b) that it meant any application by a landlord could be considered by the FTS. It is true that s 48(2)(b) refers to a relevant letting agent, insofar as a complaint by a landlord is concerned, is “a letting agent appointed by the landlord”. However, by s62 of the 2014 Act, a letting agent is defined as “a person who carries out letting agency work”. Accordingly, matters come full circle. A complaint about a letting agent by a landlord can only be made if the work by the letting agent falls under the definition of “letting agency work”. As already noted, that excludes work in arranging or managing holiday and short term lets.

[33] The Upper Tribunal has not heard evidence. It is a matter of agreement that the physical occupation of Dr Rashid’s flat was relatively short. Beyond that, the factual background is unclear. The tenancy was longer than the month or so of the Edinburgh Festival. The Respondent indicated she was unaware of the factual position about the lease and whether there were 2 separate



agreements, and if so, what they were. The Appellants referred, at one point, to the property being used by an individual or entity working in the creative industries. The identity of the parties to the contract is unclear. All of that uncertainty poses some difficulties for the Upper Tribunal in determining if the Appellants were involved in letting agency work within the scheme of the 2014 Act. It is clear that evidence will need to be led on whether there was a lease or occupancy arrangement entered into, to determine whether the scope of work carried out by the Appellants fall within the statutory definition of a letting agent.

[34] The Upper Tribunal has considered whether it should hear evidence in order to determine this appeal (rule 18, Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016). Whilst I am conscious that the Respondent made the application to the FTS as far back as November 2022, it is appropriate to remit the matter to the FTS for a hearing on evidence. It is more likely an earlier hearing date can be accommodated before the FTS. The FTS will wish to consider giving Case Management directions in relation to the production of documents, such as the signed agreements for occupancy, or emails or any other documentation constituting the agreement for occupancy.

[35] In short, the FTS is required to find the facts, and then apply the relevant law to those facts. The facts that require to be found are those to determine the basis on which Dr Rashid's flat was let. Thereafter the FTS requires to apply the statutory framework to those facts to determine if the work by the Appellant on Dr Rashid's behalf fell within the scope of the 2014 Act and the Letting Agent Code of Practice therefore applies.

[36] It might be helpful for the FTS to approach its fact finding with the following route map in mind, making reference to the various statutory definitions provided:



1. Has the letting agent arranged for a relevant person to occupy the landlord's property?
2. If so, has a lease or occupancy arrangement sought to be entered into?
3. If so, is the person an unconnected person?
4. If so, is the property being used as a dwelling?

Disposal

[37] The appeal is upheld insofar as the FTS have erred in law in its interpretation of its jurisdiction. The matter is remitted to the FTS for an evidential or fact finding hearing to take place as to the type of contractual arrangement that was in place relative to the letting of the Respondent's property.

*A party to this case who is aggrieved by this decision 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 and 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.*

Sheriff F McCartney
Member of the Upper Tribunal for Scotland