Upper Tribunal for Scotland

2024UT21
Ref: UTS/AP/23/0039

DECISION OF

Sheriff Ian H Cruickshank

ON AN APPEAL
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)
IN THE CASE OF

Mr Andrew Murray, Mrs Anelis Gaina

Appellants

- and -

Zone letting (Glasgow) Ltd

Respondents

FTS Case reference: FTS/HPC/LA/22/3257

21 March 2024

Decision

Refuses the appeal against the decision of the First-tier Tribunal for Scotland, Property and Housing Chamber dated 20 April 2023.

Introduction

[1] The appellants are Andrew Murray and Anelis Gaina ("the appellants"). This appeal is against a decision of the First-tier Tribunal for Scotland, Property and Housing Chamber ("the FTS") dated 20 April 2023. It relates to failure to comply with the Letting Agent Code of Practice

("the code of practice"). The application was brought in terms of section 48 of the Housing (Scotland) Act 2014 ("the 2014 Act"). The appellants sought to establish that Zone Lettings (Glasgow) Ltd ("the respondents") had failed to comply with paragraphs 64, 68, 90, 91, 93, 111 and 112 of the code of practice.

[2] At first instance the application was partially successful. The FTS found that there had been a failure to comply with paragraphs 90 and 93. A Letting Agent Enforcement Order ("LAEO") was issued requiring the respondents to pay compensation to the appellants in the sum of £250.

[3] The appellants sought a review of the decision. They also sought permission to appeal. On 12 September 2023 the FTS granted permission to appeal on a limited basis. Leave to appeal was granted on the appellant's first ground of appeal which related to the FTS's refusal to uphold a failure regarding paragraph 68 of the code of practice. In relation to three further grounds of appeal (relating to paragraphs 91, 111 and 112 respectively) permission to appeal was refused.

[4] On 31 October 2023 the Upper Tribunal for Scotland (the "UTS") gave consideration to the appellant's application for leave to appeal on the grounds refused by the FTS. The UTS granted permission to appeal on grounds 2 and 4 but refused permission to appeal on ground 3.

[5] As a result of the above, this appeal relates to the refusal by the FTS to find the respondents had failed to comply with paragraphs 68, 91 and 112 of the code of practice. Read in isolation these paragraphs are in the following terms:

Paragraph 68 – If you are responsible for managing the check-in process you must produce an inventory (which may include a photographic record) of all things in the property (for example, furniture and equipment) and the condition of these and the property (for example marks on walls, carpets other fixtures) unless otherwise agreed in writing by the landlord. Where an inventory and schedule of condition is produced, you and the tenant must both sign the inventory confirming its contents.

Paragraph 91 – You must inform the tenant of the action you intend to take on the repair and its likely timescale.

Paragraph 112 – You must have a clear written complaints procedure that states how to complain to your business and as a minimum, make it available on request. It must include the series of steps that a complaint may go through, with reasonable timescales linked to those set out in your agreed terms of business.

[6] This matter was assigned to an appeal hearing which proceeded on 19 February 2024 by WebEx. The appellants attended and represented themselves. The respondents were represented by Scott McKinnon being a letting manager in their employment.

Grounds of appeal

[7] The appellants, in their Form UTS-1 included detailed commentary on why, in each case, the FTS erred in law. I will summarise each ground of appeal concentrating at this stage on the points of law being advanced as I understand them:

1. Paragraph 68 - The FTS erred in law in failing to conclude that the respondents were obliged to provide a signed copy of an inventory in compliance with paragraph 68 of the code of practice. The respondents being responsible for managing the check-in process had failed to produce a signed inventory and the reasoning of the FTS ignored the fact that this was because the appellants had been in dispute as to the terms of that document. The decision of the FTS was wrongly based on the rational that communications between

parties subsequent to the failure to obtain a signed inventory was sufficient. This approach implied that the respondents did not have a responsibility to continue efforts to obtain a signed inventory. Such an approach was contrary to the purposes of paragraph 68 and was inconsistent with the evidence.

2. Paragraph 91 - In upholding a breach of paragraphs 90 and 93 of the code of practice the FTS failed to properly consider whether there was in addition a breach of paragraph 91, particularly in relation to delays around scaffolding works. The FTS failed to consider whether, based on the evidence, there had been a breach of this paragraph. With reference to the review of its decision the FTS's reference to a "typographical error" in not referring to Paragraph 91 was unjustified.
3. Paragraph 112 - The FTS misapplied the law based on its interpretation of the paragraph that "as a minimum, make (a complaints procedure) available on request". In applying the terms of this paragraph to the facts the FTS found that there had been no request made by the appellants but thereafter failed to give appropriate weight to the fact that the evidence showed the appellants were in dispute with the respondents over a number of matters and in fact in a complaints process with the respondents. The ongoing complaints process would have obliged the respondents to have provided a copy of their complaints procedure thus the facts which should have been found established far exceeded the minimum requirement situation as suggested by that paragraph of the code of practice and therefore amounted to a failure to comply.

Submissions before the UTS

[8] I had an opportunity to consider written submissions lodged by both the appellants and the respondents. These were supplemented with oral submissions for both parties at the appeal hearing. I am obliged to both parties for their careful and detailed submissions.

[9] In relation to Paragraph 68 of the code of practice the appellants submitted that the legal and regulatory guidance was clear. The respondents had not produced a signed inventory and they were in default of the paragraph's requirements. The facts accepted by the FTS established that to be the case. The discrepancies or disagreements as to the terms of the inventory, which were the subject of correspondence, did not negate the responsibility on the respondents to arrive at an inventory which was correct and agreeable to both parties. The email correspondence and the comments appended to the document did not constitute a signed inventory for the purposes of the paragraph. The FTS failed to acknowledge that this was not because the appellants had refused to sign the inventory but because the respondents had not continued with the process of arriving at a signed inventory. The appellants had not disengaged from the process of signing an agreed inventory. Any suggestion that they had refused for further meetings was not a correct interpretation of the materials before the FTS.

[10] The appellants referred to two emails, which had been before the FTS, which supported their position evidentially. The FTS had erred in commenting that "there will inevitably be scenarios where agreement on an inventory cannot be reached, and a party may refuse to sign as a result" (at para 45). If this was the rational for the decision reached it did not align with the facts. In the same paragraph the FTS commented that "where a letting agent has made efforts to obtain a signed inventory but cannot due to circumstances out with their control, it would be difficult to find them in breach of this paragraph". The appellants submitted there were no "circumstances out with (the respondent's) control" and the FTS had no basis upon which to reach that conclusion. The FTS was wrong to conclude that the marked version of the inventory

taken with the emails was proof of an agreement between the parties. There was no agreement, the respondents had failed in their duty to obtain a signed inventory and, as a consequence, they were in breach of paragraph 68 of the code of practice.

[11] On the matter of refusing the application under Paragraph 91 of the code of practice it was submitted by the appellants that the facts as found by the FTS were sufficient for a conclusion that the paragraph had not been complied with. In determining sanction the FTS omitted consideration of this paragraph. On review, with reference to sanction, it had been described by the FTS as a "typographical error". It was not that – it was an error of law. Failure to find there had been a breach of this paragraph affected the terms of the LAEO as any element of compensation which could have been attributed to a breach of that particular paragraph had been omitted. Reference was made to the paragraphs of the written decision of the FTS (being paragraphs 47, 49 and 50) where the breaches found established were referred to. An award of £250 for such clear and wide ranging breaches of the code of practice was not sufficient either to compensate the appellants for the effect the breaches had on them and, further, did not properly penalize the respondents from being negligent in their care of other tenants.

[12] In relation to Paragraph 112 of the code of practice the appellants submitted that a proper interpretation of the evidence before the FTS confirmed there had been many issues regarding the property. The appellants had been in dispute with the respondents about these matters but there had never been a written complaints procedure provided. It was not to be found on the respondent's website. The decision of the FTS was predicated on one fact, namely the complaints procedure had not been requested. In the particular circumstances production of a written

complaints procedure would have assisted the appellants. For the FTS to conclude that the only circumstances in which a breach of the paragraph would be established was if there had been a request for the complaints procedure, that did not align with the protection that the code of practice should afford to a tenant. The evidence was clear that despite the severity, duration and frustrations brought about by various issues the respondents never directed the appellants to their complaints procedure nor had it been publicly available. The respondents had produced a copy of their complaints procedure to the FTS albeit the appellants questioned the authenticity of the document or whether it had in fact been in existence at the relevant time.

[13] The respondents submitted there was no error of law in the FTS decision refusing to find a failure to comply with paragraph 68 of the code of practice. Reference was made to the inventory document which gave 7 days for the tenant to check that items were as stated in the inventory or otherwise to correct or report any missing or damaged items within the same period. The inventory went on to state that after the 7 day period "it will be deemed that the tenant accepts the condition as laid down in this inventory". By email the respondents had reminded the appellants to return the signed inventory failing which it would be assumed they had accepted the same. The tenants had sent an extensive reply returning a copy of the inventory with a number of comments and the respondents accepted this and the marked inventory was retained on that basis should there be a dispute. This had been the position stated before the FTS. Furthermore the respondents had thereafter arranged for one of their property managers to meet the appellants at the property but after the initial meeting the appellants continued to raise issues and were not prepared to allow a further visit to further consider

matters. The FTS had been correct to conclude there had been appropriate attempts made by both parties to reach agreement and that the marked version of the inventory, plus email exchanges, was sufficient to find there had been no breach of Paragraph 68.

[14] The respondents referred to the materials before the FTS which were relevant to determining whether there had been a breach of paragraph 91. The FTS had noted that both parties had lodged a high volume of emails showing the respondents had reverted on matters raised promptly. The respondents accepted the FTS's decision in relation to the window complaint albeit they considered the sanction imposed to be excessive but had not appealed that sanction.

[15] With regard to a potential breach of paragraph 112 of the code of practice the conclusions of the FTS were sound in law. The paragraph in question required a complaints procedure to be produced on request. The evidence accepted by the FTS was that the appellants had never requested it. The FTS had also been advised as to the progress of the various issues raised by the appellants. In all the circumstances, on the findings in fact as determined, the FTS were entitled to conclude there was no breach of this paragraph.

Discussion

[16] Section 48 of the 2014 Act allows for a tenant, a landlord or Scottish Ministers to apply to the FTS to enforce the code of practice. For the purposes of this appeal it is unnecessary to consider that section in detail. The code of practice was introduced by the Letting Agent Code of Practice (Scotland) Regulations 2016, SSI 2016/133. It is to be found in Schedule 1 and it is divided into various sections (8 in total) over which there are a total of 137 paragraphs.

[17] The paragraphs which are the subject of this appeal are found under section 4, "Lettings", (paragraphs 68), under section 5, "Management and maintenance" (paragraph 91) and under section 7, "Communications and resolving complaints" (paragraph 112). Although the FTS in this case considered each paragraph separately there will be situations where, in order to decide whether there has been a failure to comply, it may be necessary to consider further paragraphs under each section before reaching a conclusion.

[18] The code of practice is detailed and specific in respect of many services provided by a letting agent. It is a statutory code which does not contain any interpretive provisions. In that respect it will be open to the interpretation given to it by the FTS. Any interpretation has to be justified by the intent or purpose which should properly be given to any paragraph, either read in isolation, or in conjunction with further paragraphs, or in the wider context of the code generally.

[19] Accordingly, it is the function of the FTS to establish what it finds the relevant facts to be. Based on those facts the FTS requires to reach a conclusion in law as to whether, or not, there has been a failure to comply with the code of practice. As part of that exercise the FTS will require to consider and apply its interpretation of the code of practice. The FTS will have a discretion in this regard. To that extent it would be possible for two differently constituted tribunals, each exercising discretion, on the same facts to reach different conclusions without either conclusion necessarily being wrong in law.

[20] The appellants submit that the FTS has either wrongly interpreted the code of practice with regard to the paragraphs in question or it has wrongly applied the code of practice to the

facts. On that basis, this appeal will succeed or fail following scrutiny of the written decision of the FTS. Whilst I will not replicate that in detail I will summarise the relevant parts, and relevant conclusions, of the written decision.

[21] The written decision of the FTS records (at paragraph 18) that evidence was heard at length from both parties. The FTS summarised what had been presented by both parties in paragraphs 17 – 28. The findings-in–fact are recorded in paragraphs 30-40. The FTS provided reasons for the decision it reached in paragraphs 41-55. The FTS noted, at paragraph 41, that it had carefully considered the evidence, both verbal and documentary, as presented by both parties. It further noted that many of the substantive facts were agreed and this was reflected in the duplication of documents lodged by both parties.

[22] Findings in fact relevant to paragraph 68 of the code of practice are found at paragraphs 31 to 34. The FTS found that on 8 January 2021 the respondents emailed an inventory to the appellants requesting comments within 7 days. On 14 January 2021 the respondents sent a further email to the appellants reminding them to return the inventory with comments failing which it would be deemed to have been accepted. On the same date the appellants returned the inventory with comments marked thereon and sent a further list of additional issues with regards to the inventory.

[23] With regard to paragraph 68 of the code of practice the FTS stated it was satisfied that there had been appropriate attempts made by both parties to reach agreement on the inventory. In the absence of a signed version the FTS concluded that the marked version, together with the email correspondence relative thereto, was in effect an agreed inventory between the parties and

the FTS concluded that paragraph 68 had not been breached. On the evidence before the FTS that was a reasoned conclusion which the FTS was entitled to make. It considered all the relevant evidence provided by both parties on this matter and, on its assessment of that evidence, it reached a conclusion justified in law. Despite the criticisms of the appellants the interpretation the FTS gave to paragraph 68 of the code of practice was, on the facts it found established, justified by the intent or purpose of that paragraph and the code generally. Contrary to the position as stated by the appellants, the FTS did not ignore the fact that parties had been in the process of agreeing the terms of the inventory. The FTS was aware of and acknowledged that factual position. The FTS cannot be said to have erred in law in determining there was no failure to comply with paragraph 68 in the particular circumstances it found established.

[24] The FTS upheld the application by finding there had been a breach of paragraphs 90 and 93 of the code of practice. These paragraphs are in the following terms:

Paragraph 90 – Repairs must be dealt with promptly and appropriately having regard to their nature and urgency in line with your written procedures.
Paragraph 93 – If there is any delay in carrying out the repair and maintenance work you must inform the landlords, tenants or both as appropriate about this along with the reason for it as soon as possible.

[25] The above breach in relation to these paragraphs of the code of practice were established based on findings in fact (at paragraphs 36-39) that the respondents had emailed the appellants on 16 February 2022 to the effect that following an inspection there was an issue with draughty windows. Thereafter there was no further contact until 2 May 2022. There was a delay in a potential bathroom refurbishment where quotes for work had been provided to the landlord

who had thereafter not instructed the work to proceed. It was necessary for the respondent to have kept the appellants updated regarding the bathroom works. The FTS also found that the respondents had otherwise responded timeously to emails from the appellants reporting repairs and had arranged for contractors to attend once the landlord's instructions had been obtained. The respondents had also sought information from the property factor where repairs reported were the factor's responsibility (this included issues with scaffolding as referred to in the appellant's submissions on appeal) and had passed this information on to the appellants.

[26] The FTS was entitled to conclude in fact that, with the exception of a complaint about the windows and works potentially to be instructed in the bathroom which formed the basis of the FTS's decision, the respondents had otherwise responded timeously to emails received from the appellants reporting matters for repair. The FTS stated (paragraph 46) that they did not agree with the appellant's position that there had been negligence on the part of the respondents. A high volume of emails had been referred to and these showed prompt responses where possible repair issues were reported by the appellants. The issue of the scaffolding cited by the appellants related to works over which the respondents, as letting agents, had no control.

[27] The FTS found on the evidence that only in relation to windows did the respondents fail to seek the landlord's instructions timeously (therefore a breach of Paragraph 90). Separately, the FTS concluded that the respondents had failed to provide an update on the issue of possible bathroom works (a breach of Paragraph 93). These paragraphs of the code of practice covered the issues where the FTS determined there had been a failure on the parts of the respondents. Looking at all the evidence before it this was a reasonable conclusion to make and there is no

basis in law whereby the decision of the FTS is open to challenge on appeal in its refusal to find there had in addition been a breach of paragraph 91 of the code of practice.

[28] In concluding there had been no breach of paragraph 112 of the code of practice the FTS interpreted the same strictly. The appellants had stated that they had not requested a copy of the complaints procedure. The paragraph stated that, as a minimum, a copy had to be given on request.

[29] The FTS acknowledged the fact that it might have been helpful for the respondents to provide a copy of the procedures and this observation was based on the fact that there had been a high volume of issues raised during the course of the tenancy (the FTS noted that per the appellant's submissions there had been 34 separate repairing issues during the life of the tenancy). That having been observed the FTS went on to state that, in the absence of complaints procedures being requested, the reality of the situation had been that the appellants various concerns had been escalated through the respondents' layers of management in any event. The FTS therefore concluded that against these circumstances, and on its interpretation of paragraph 112 of the code of practice there was no breach. I consider that the interpretation the FTS gave to paragraph 112 was one it could arrive at exercising it discretion reasonably. On those facts and on that reasoning it could be the case that a tribunal at first instance might find that a letting agent would be expected to provide a copy of complaints procedures without a specific request. Equally, as in this case, a tribunal might find that the absence of a request for a copy of a letting agent's complaints procedure would not lead to a breach of that particular paragraph of the code

of practice. Either conclusion could be justified without either being categorised as wrong in law. On that basis the decision of the FTS cannot be successfully challenged on appeal.

Conclusion

[30] Having carefully considered the grounds of appeal, set against the reasoning of the FTS, I have concluded that there were no errors in law in this case. For the above reasons I have concluded that each ground of appeal falls to be refused.

Sheriff Ian Hay Cruickshank
Member

*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*