



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

**Decision on homeowner's application: Property Factors (Scotland) Act 2011
Section 19(1)(a)**

Chamber Ref: FTS/HPC/PF/22/4270

17K Blairmore Road, Greenock, PA15 3JT ("the Property")

Parties:

Mrs Jenny Buckley, 17K Blairmore Road, Greenock, PA15 3JT ("the Homeowner")

River Clyde Homes, Clyde View, 22 Pottery Street, Greenock, PA15 2UZ ("the Property Factor")

Tribunal Members:

Mrs Josephine Bonnar (Legal Member)

Mr Andrew McFarlane (Ordinary Member)

DECISION

The Tribunal determined that the application should be dismissed.

The decision is unanimous.

Introduction

In this decision, we refer to the Property Factors (Scotland) Act 2011 as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors as "the Code"; and the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as "The Regulations"

Background

1. The Homeowner lodged an application with the Tribunal stating that the Property Factor has had failed to comply with Sections 2.1 and 2.5 of the 2012 Property Factors Code of Conduct ("the Code"). Documents were lodged in support of the application including correspondence with the Property Factor and a copy of a written statement of services. A Legal Member of the Tribunal

with delegated powers of the President referred the matter to the Tribunal. A case management discussion (“CMD”) was arranged for 3 May 23 at 10am at Glasgow Tribunal Centre.

2. Prior to the CMD the parties lodged submissions and documents. In their submission, the Property Factor said that the application should be dismissed as the complaints had already been determined in two previous Tribunal cases involving the parties and the doctrine of res judicata meant that they could not be considered again.
3. The CMD took place on 3 May 2023. The Homeowner attended and the Property Factor was represented by Mr Woods, in-house solicitor with the Property Factor.

Summary of Discussion at CMD

4. The Tribunal noted that the complaints relate to the 2012 Code which was replaced on 16 August 2021. A second application in relation to the 2021 Code was also discussed at the CMD and a separate decision has been issued regarding this application. The Tribunal advised the Homeowner that they could not consider any correspondence which was the subject of a previous application or had been the subject of a previous decision of the Tribunal. Mrs Buckley told the Tribunal that she started writing again to the Property Factor in March 2022, as she had still not been provided with the information previously requested. Her application largely relates to the failure by the Property Factor to respond to this correspondence and provide the information. The Tribunal noted that this correspondence took place after the 2021 Code came into force. Mrs Buckley said that the letters she sent contained enquiries about the same 4 points raised in her letter of 4 May 2021, which related to the invoice issued in May 2019 as she had not received a response. This is the only letter which would be covered by the 2012 Code. However, the complaints also relate to the terms of the original WSS. The Tribunal noted that this goes back to 2013 and has been superseded by a new WSS which was issued by the Property Factor in compliance with a Property Factor Enforcement Order. Mrs Buckley said that her issue is that the WSS refers to a management fee which is payable by homeowners. Her complaint is that in her view, according to the WSS, this should have included the scaffolding costs and preliminaries which are included in the invoice from the Property Factor for the new roof. Mrs Buckley also said that her complaint related to statements made by Mr Orr during the previous Tribunal hearings.

The Tribunal make the following findings in fact:

5. The Homeowner is the heritable proprietor of the property.

6. The Property Factor is the property factor for the property.
7. The Homeowner sent a letter containing enquiries to the Property Factor on 4 May 2021. In a decision dated 3 December 2021, the Tribunal determined that the Property Factor had not provided a response to this letter.
8. In a decision dated 21 September 2020 the Tribunal determined that two invoices had contained information which was misleading or false.
9. The Homeowner notified the Property Factor on 9 November 2022, that she intended to make a complaint to the Tribunal that they had breached sections 2.1 and 2.5 of the 2012 Code. The letter referred to correspondence but not to the written statement of services.

Reasons for Decision

10. Tribunal notes that the Homeowner's application largely relates to statements made in correspondence, or a failure to respond to correspondence, from March 2022 onwards. As sections 2.1 and 2.5 of the 2012 Code did not apply during this period, the Tribunal determined that they could not consider the application insofar as it related to this correspondence.

Section 2.1 – You must not provide information which is misleading or false.

11. During the CMD, the Homeowner referred to statements made by Mr Orr, an employee of the Property Factor, during the previous hearings. The Tribunal noted that the evidence had been assessed by the Tribunals dealing with those applications before decisions were issued and that this evidence could not be the subject of a separate application to the Tribunal.
12. The doctrine of res judicata prevents parties from litigating the same matter twice. It applies where there has been an earlier determination by a court or Tribunal in a contested case. The prior determination must have concerned the same subject matter and the same parties.
13. Section 17(3) of the 2011 Act states that, no application may be made to the Tribunal unless – (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out the property factor duties or, as the case may be, to comply with the section 14 duty, and (b) the property factor has refused to resolve, or unreasonably delayed in attempting to resolve, the homeowners concern.”
14. In the letter sent to the Property Factor by the Homeowner on 9 November 2022, the Homeowner sets out the details of her complaints. She refers to an invoice issued to her in May 2019. She also refers to correspondence issued after the previous Tribunal case had concluded. In this correspondence she

asked for information previously requested in her letter of 4 May 2021. She also mentions letters from the Property Factor in January and April 2021.

15. It is not completely clear from the application or the notification letter, which statement or statements is or are said to be "misleading or false". There is reference to a failure by the Property Factor to respond to several letters, but that is not a breach of 2.1 of the Code.
16. During the CMD it appeared that her complaint essentially relates to the content of the May 2019 invoice, and the queries raised by her in relation to same in May 2021. She also referred to the WSS from 2013. She said that the section on the management fee was misleading and false because it suggests that items such as scaffolding are covered by the management fee. The Tribunal noted the following:-
 - (a) Neither the application form nor the letter to the Property Factor dated 9 November 2022 make any reference to the WSS or the management fee.
 - (b) Even if the 2013 WSS was misleading or false regarding the management fee, it has already been replaced as a result of a previous Tribunal decision.
 - (c) It is only the 2013 WSS which is the subject of the complaint, not the current version.
 - (d) The section on management fees in the 2013 WSS does not state that costs such as scaffolding are included. It refers to providing services, organising repairs, attending meetings and states that it is based on staff and other admin costs.
17. In case reference PF/19/3715, the Tribunal considered a complaint under Section 2.1 of the Code in relation to invoices issued by the Property Factor on 29 March 2018, 8 June 2018, and 22 May 2019. The Tribunal determined that the first two invoices contained information which was misleading and false, as they were not consistent with the final invoice issued on 19 May 2019. The Tribunal did not determine that the invoice of 19 May 2019 was misleading or false.
18. In the decision of the Tribunal under case reference PF/21/1295 the Tribunal considered a further complaint by the Homeowner under section 2.1 of the Code which appeared to relate to the same invoices, principally the invoice dated 19 May 2019. The Tribunal noted that the complaint about this invoice raised the same issues as the previous application, namely the information in the invoice about the grant, preliminaries, and extra works. The Tribunal determined that the complaint in relation to the invoice had already been determined in case reference 3715 and therefore could not be considered.
19. The Tribunal is therefore satisfied that the Homeowners complaint about the invoice dated May 2019 under section 2.1 of the Code has already been the subject of a Tribunal determination. As such, the Tribunal cannot consider the

complaint.

20. In relation to the 2013 WSS, this complaint was not notified to the Property Factor before the application was lodged. As a result, it cannot be considered due to the provisions set out in Section 17(3) of the 2011 Act. In any event, it seems wholly without merit, as it relates to a document which has already been superseded and does not state that scaffolding costs and preliminaries are included in the management fee.

Section 2.5 – You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall your aim should be to deal with enquiries and complaints as quickly and as fully as possible and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement.

21. As indicated in paragraph 10, most of the correspondence which is the subject of the complaint under this section cannot be considered because it post-dates the replacement of the 2012 Code. As a result, it can only be considered in connection with an application under the 2021 Code.
22. The Homeowner advised the Tribunal that the only enquiry which pre-dates 16 August 2021, is the letter of 4 May 2021. She said that she had still not received a response. However, in case reference 1295 the Tribunal determined that the Property Factor had failed to provide a response to this letter and upheld a complaint under 2.5 of the Code. The Tribunal is therefore satisfied that this has already been determined and cannot be considered.
23. The Tribunal is therefore satisfied that it cannot consider the application and that it should be dismissed.

Appeals

A homeowner or property factor aggrieved by the decision of the tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.

