Housing and Property Chamber
First-tier Tribunal for Scotland

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/21/1295

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)
Ms Carol Jones (Ordinary Member)

DECISION

The Property Factor has failed to comply with its duties under section 14(5) of the Property Factors (Scotland) Act 2011 Act in that it did not comply with Section 2.4 and 2.5 of the Code of Conduct for Property Factors.

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"

The Property Factor became a Registered Property Factor on 12 December 2012 and its duty under section 14(5) of the 2011 Act to comply with the Code arises from that date.

Background

1. The Homeowner lodged an application with the Tribunal on 26 May 2021. The application states that the Property Factor has breached Sections 2.1, 2.4, 2.5, 3.3 and 5.9 of the Property Factors Code of Conduct ("the Code"). Documents were lodged in support of the application including correspondence with the Property Factor notifying them of the complaints. On 28 June 2021, 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 2 September 2021 at 10am by telephone conference call.

2. Prior to the CMD the Homeowner lodged several additional bundles of documents. The Property Factor also lodged written submissions and a bundle of documents. The CMD took place by telephone conference call on 2 September 2021 at 10am. The Homeowner participated and the Property Factor was represented by Mr Convery, solicitor, who had been instructed by the Property Factor on 30 August 2021.

Summary of Discussion at CMD

3. Mr Convery advised the Tribunal that the Homeowner's complaint under Section 2.1 of the Code has already been determined by the Tribunal in their written decision on application PF/19/3715. He said that the doctrine of Res Judicata applied and that the Tribunal could not entertain this complaint. As he had only recently been instructed, Mr Convery was not able to properly advance this argument and required time to prepare a written submission with legal authority. Mrs Buckley advised the Tribunal that she disputed that her complaint had been already determined. She referred to a letter sent to the Tribunal on 17 June 2021. In this letter she referred to the Tribunal decision which stated that invoices from the Property Factor on 29 March 2018 ("the March invoice") and 8 June 2018 (" the June invoice") breached section 2.1, because these invoices were not consistent with the final invoice/letter dated 22 May 2019 ("the May invoice"). Her complaint in the present application only related to the information in the May invoice in relation to the local authority grant, the "preliminaries" and charges for extra works. The Tribunal noted that the Property Factor would lodge submissions on this issue and that it would be considered by the Tribunal at the beginning of the hearing on the application.

4. The Tribunal noted that Mrs Buckley had provided a list of letters and stated that the Property Factor had failed to respond to these letters. This was the basis of her complaint under Section 2.5 of the Code. Mrs Buckley advised that she had not lodged copies of all the letters but could arrange to do so. Mr Convery advised the Tribunal that he has not yet ascertained if copies of all responses issued to Mrs Buckley can be provided or whether it is accepted that all letters listed were received. He required to take instructions on this and to clarify the position. However, he confirmed that the Property Factor does not dispute that

it was notified of the Code complaints prior to the application being lodged.

5. The Tribunal noted that the complaint made under Section 2.4 of the Code was that the Property Factor failed to consult with the Homeowners prior to instructing the roof repair work. Mr Convery advised that the Property Factor's position is that the letter issued on 4 December 2015, with the grant application form, was the consultation process. Mrs Buckley stated that this letter did not amount to proper consultation.

6. The Tribunal noted that Mrs Buckley refers in the application paperwork to a letter issued to her on 18 January 2021 by the Property Factor. This letter had been issued following an undertaking given by the Property Factor during the hearing in relation to the previous application, that they would provide her with a breakdown of the repair costs and grant funding. Mrs Buckley advised that the letter does not provide details of how the grant figure was calculated and no explanation is provided for the figures specified being different from the figures referred to in the letter she received from the Local Authority in June 2021. This says that a Notice of Payment Grant has been registered against Mrs Buckley's title deeds for £1881.63 and that £753.32 was paid to the Property Factor on her behalf. Mrs Buckley advised that she has not contacted the Local Authority to seek clarification of this contradictory information but could arrange to do so. Her concern is that neither figure is the same as the figure specified by the Property Factor in the May invoice or letter of 18 January 2021, which is £1938.85. Mr Convery advised that the Property Factor believes the information in the Local Authority letter to be incorrect but that he could investigate further the discrepancy between the letters.

7. Mr Convery advised the Tribunal that he wished to replace the written submissions and the bundle of documents lodged by the Property Factor. He also indicated that Mrs Buckley's documents had not been submitted in accordance with the Tribunal's Practice Direction. The Tribunal considered the matter and determined that the Property Factor should lodge a replacement written response to the application within 14 days, to include full details of their argument in relation to the Section 2.1 complaint. If she wished, Mrs Buckley could respond to this submission within 14 days of receipt of same. Both parties were directed to lodge a replacement bundle of documents with an inventory.

8. Following the CMD the Tribunal determined that the application should proceed to a hearing and issued a direction for the production of further submissions and documents. The parties were notified that a hearing would take place by telephone conference call on the 22 November 2021 at 10am. Prior to the hearing both parties lodged written submissions and documents.

The Property Factor's Submissions

9. Mr Convery's submission included an argument that the section 2.1 complaint could not be considered as a result of the principle of Res Judicata. He referred to the written decision with statement of reasons issued by the Tribunal in relation to the previous application. He said that the Tribunal had considered the

initial estimate in the letter of 4 December 2015 ("the December letter") and the March and June and May invoices. The Tribunal concluded that the March and June invoices had been misleading or false and that a breach of section 2.1 had been established. Although not explicit, their failure to comment of the May invoice shows that they did not find this invoice to be misleading or false. As a result. the Tribunal dealing with the present application could not make a determination on the May invoice. In relation to section 2.4 of the Code, Mr Convery said that the letter issued on 4 December 2015 with the grant form was the consultation process. It provided the Homeowner with a named officer to contact for further information and indicated that by signing the grant form, the Homeowner was authorising the work. In relation to 2.5, Mr Convery said he was unable to provide specific information as he had not yet seen the letters in question but said that there had been a large volume of correspondence and it is not claimed that each letter received an individual response as some responses related to several of the Homeowners letters. He also said that the Tribunal should have regard to volume of correspondence and the impact of the pandemic when assessing whether responses had been issued within prompt timescales. He also indicated that all the Homeowners questions had been answered. In relation to Section 3.3 of the Code Mr Convery referred to the annual statement and accompanying letter dated 28 and 29 May 2020 and statement dated 9 March 2021 as evidence that annual statements have been provided. In relation to section 5.9, Mr Convery said that this section did not apply as the Property factor is not a land management company. He also said that the Homeowners had been balloted and had voted against property owners liability insurance.

The Homeowner's response

10. Mrs Buckley states that her complaint under 2.1 in the present application only relates to the May invoice. As suggested by the Tribunal at the CMD, she had contacted the Local Authority to seek clarification of the figures relating to the grant specified in their letter of 21 June 2021. She had spoken to someone on the phone but not yet received confirmation of the position in writing, although an email had been sent to the Property Factor. In a later submission she provided a copy of a letter form Inverclyde Council which confirmed that the amount of the grant was £1938.85. In relation to section 2.4, Mrs Buckley said that there had been no consultation about the roof repair work prior to the 4 December 2015. The letter of 8 December 2015 shows that the homeowners wanted a meeting to discuss the work, but this was refused. The homeowners were told that the work was going ahead and that if they did not complete the grant form, they would have to pay the whole sum themselves. In relation to section 2.5, Mrs Buckley referred to her letter to the Property Factor dated 4 May 2021. She said that she did not receive a reply to this letter or to the letters listed in the letter. The letter also notified the Property Factor of the outstanding enquiries. A response dated 25 May 2021 was received but did not respond to the issues raised in the letter, only notified her that her application to the Tribunal was likely to be rejected. In relation to section 3.3 Mrs Buckley referred to letter of 25 June 2021 which included 2 years of invoices. She advised that she thought that the Property Factor was a land management company in terms of section 5.9, as they employ gardeners to cut the common grassed areas at the

property. She had been billed for property owners' liability insurance in 2019 but in 2020 they had been balloted and told it would no longer be arranged. She had wanted to know why it was required in 2019, but not subsequently.

The Hearing

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

11. The Tribunal advised the parties that they would first consider whether the complaint under section 2.1 could be considered or whether it had already been determined by the Tribunal who dealt with the previous application. Mrs Buckley was asked to provide further information about her complaint. The Tribunal noted that during the CMD, Mrs Buckley had said that her complaint about the May invoice related to information about the local authority grant, preliminaries, and extra works. In relation to the grant, she had referred the Tribunal to the letter of 21 June 2021 from Inverclyde Council and pointed out that the figures specified in this letter were different from those contained in the May invoice and that she had also not been given information about how the grant was calculated. The Tribunal noted that the Local Authority has now issued an email to the Property Factor and a letter to Mrs Buckley, stating that the figures in their previous letter were incorrect and confirming that the amount specified by the Property Factor in the May invoice was the correct figure. In response to questions from the Tribunal. Mrs Buckley said that she is still not happy with the information/figures in the May invoice She said that she does not know how the grant was calculated and referred the Tribunal to her title deeds which include a Notice of Payment of grant of £1881.63. This differs from the figure specified in the May invoice of £1938.85. She also referred to the December estimate and the previous invoices which contained different figures and said that it is not clear which of the figures was correct. She remains confused about the amount of the grant awarded and how this was calculated. She is also unhappy with two of the sums specified in the letter. The first, "New SVP and Bricking Up with render patches" is for £10669.28, and the second "Liquid plastic to flat roofs" for £6814.20. She said that these were extra works, not specified in the original estimate. She also advised that she had queried these charges and was told that they were emergency works. Mrs Buckley said emergency works should not be subject to grant funding. However, at the hearing on the previous application, the Property Factor said that these charges had been included in the original estimate. She was also confused by the charge for "Contractor's preliminaries, overhead costs including scaffolding", of £13643.78 as she thought this should have been covered by the Property Factor's management fee, in terms of the WSS. However, she concluded by saying that her main issue related to the grant figures.

12. Mr Convery referred the Tribunal to the decision with statement of reasons for the previous application and, in particular, to pages 7 and 8 which relate to a complaint about extra works. He said that the Tribunal had accepted the evidence of the Property Factor that these works had been included in the original estimate under different headings and, in any event, a failure to notify

homeowners of extra work would not amount to a breach of section 2.1. Mr Convery also referred to page 5 of the decision, which relates to the Property Factor's evidence in relation to "preliminaries", which Mr Orr said were included in the original estimate but under a different heading. On page 4 and 5 of the decision there is a summary of the contents of the March, June, and May invoices. On page 6 it is stated that the Tribunal determined that the March and June invoices were misleading and false.

13. The Tribunal adjourned to consider the matter and determined that the complaint under 2.1 of the Code had previously been determined by the Tribunal and could not be the subject of a further determination by this Tribunal. The Tribunals reasons are outlined in paragraph 31 to 35 below.

Section 2.4. You must have a procedure to consult with the group of homeowners and seek their written approval before providing work or services which will incur charges or fees in addition to those relating to the core services. Exceptions to this are where you can show that you have agreed a level of delegated authority with the group of homeowners to incur costs up to an agreed threshold or to act without seeking further approval in certain situations (such as in emergencies).

14. Mrs Buckley advised the Tribunal that she purchased the property in 2006. She explained that the ground floor flats have their own back and front doors. Her flat is on the first floor and is accessed via a walkway to the rear of the property. She also has a balcony. There are no common internal areas. There is a common drying green at the rear and garden ground to the front. The grassed areas are maintained by the Property Factor, but the homeowners are not charged for this. There are 17 flats in total. 9 are owner occupiers and the remainder are tenants of the Property Factor, which is a housing association. Mrs Buckley also advised that most years the annual factoring charge is only the management fee although there have been occasional small common repairs.

15. The Tribunal firstly noted that the only reference to consultation with homeowners in the Property Factor's WSS is on page 3, which provides information about core services and what is included in the management fee. The document states that part of the service is, "Liaising with and obtaining the necessary authority from owners where substantial repairs are required" and "Advising owners of all repairs expected to be in excess of £250 prior to instructing works and as soon as possible for emergency or urgent work". Secondly, the Tribunal noted that Mrs Buckley's title deeds indicate that the Property Factors (as successors in title to the Council) are entitled to act as or appoint the property factor as long as they continue to own one of the properties. The deeds also state that the Property Factor is "entitled to require all reasonable maintenance and repairs to be carried out and any such requisition shall be binding on all proprietors of the said dwellinghouses." Lastly, the Tribunal noted the terms of the Property Factor's letter to the homeowners on 4 December 2015. This states, "I write to inform you that we will soon be performing works to improve the common parts of the building. These are essential works that are being conducted now in order to bring the block up to

the Scottish Housing Quality Standard (SHQS), a minimum standard established by the Scottish Government. It is our aim to be on site performing these works in early January" The letter then lists the works which are to be carried out and continues "We have received costs from our appointed contractor Keepmoat for performing these works, the total cost is £63235.24" The letter goes on to provide a breakdown of the share and sum which will be due by Mrs Buckley (3763.26), indicates that payment can be made by instalments and advises that resident owners can apply for grant funding, saying "Enclosed with this letter is a copy of the grant application form, should you wish to apply please complete this form and return it to us in the prepaid envelope." At the conclusion of the letter the homeowner is advised that they can contact the writer "Should you require further information regards these works".

16. Mrs Buckley referred to her written submissions and said that there had been no consultation about the major roof repair work. The December letter arrived without any warning and the owners in the block were all concerned to receive notification of such an expensive repair shortly before Christmas. The letter could not be regarded as consultation as it simply stated that the work was to be carried out. The homeowners requested a meeting to discuss the plans, but this was refused (letter of 8 December 2015 from the property Factor). She signed and returned the grant form because the letter said that she would have to pay the whole cost of her share of the repair if she did not do so.

17. Mr Convery advised the Tribunal that there is no written consultation procedure in the WSS, or otherwise. He stated that section 2.4 does not require a written procedure. However, the WSS is currently being revised and the new document may contain more information about consultation. Mr Convery stated that there are two parts to section 2.4. The first requires there to be a consultation procedure. The second provides for exceptions to that, such as agreed delegated authority. He advised the Tribunal that section 2.4 did not apply to the property because the title deeds allow the Property Factor to decide whether repairs are to be carried out. However, although not required, there had been consultation with the homeowners. The December letter should not be considered in isolation. The letter provided the homeowners with a named person to contact for further information and there is correspondence with Mrs Buckley which establishes that there was further detailed discussion about the project, specifically the letter of 8 December 2015 to Mrs Buckley and a further letter on 10 December 2015, which was issued to all the homeowners. Mr Convery added that prior to the December letter the Property Factor had only carried out preparatory work. In response to questions from the Tribunal about whether there had been consultation about the contractor who was to carry out the work, Mr Convery said that the Code did not specify that this was required. In response to further questions about the lack of notice to the homeowners about the work, Mr Convery stated that communication might have been better but that did not amount to a breach of section 2.4.

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 keep

homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement of services.

18. The Tribunal noted that a response time is stated in the Property Factor's WSS. This says that there will be a response within 10 working days unless extensive investigation is required.

19. The Tribunal noted that Mrs Buckley had lodged a copy of all letters referred to in her letter to the Property Factor dated 4 May 2021. In her application she stated that she had not received a response of any of these letters, including the letter of 4 May. In response to questions from the Tribunal. Mrs Buckley confirmed that five of the letters – 5 January 2021, 25 January 2021, 1 March 2021, 8 March 2021 and 22 March 2021 – had been sent to the Tribunal, not to the Property Factor, and were connected to the previous application and the review request which was made. The Tribunal proceeded to consider the other letters; -

(a) 15 June 2021. Mr Convery referred the Tribunal to the Property Factor's letter of 22 July 2020 which responds to Mrs Buckley's letter of 1 July 2020.The letter of 1 July indicates that an earlier letter had been sent and no response received. However, in the letter of 22 July 2021, the Property Factor states that the letter of 15 June 2021 had not been received by them and that they were unable to provide a response to it unless it was re-sent.

(b) 27 July 2021. Mr Convery said that he was unable to confirm whether this letter had been received or if a response was sent. As a result, he could not contradict Mrs Buckley's position.

(c) The Tribunal noted that the letter of 1 October 2020 simply notified the Property Factor that Mrs Buckley had sought a review of the previous Tribunal decision and provided a copy of that request.

(d) 2 December 2020. Mr Convery advised the Tribunal that there was a response to this letter, sent on 18 January 2021. He conceded that it had been issued outwith the time limit stipulated in the WSS. Mrs Buckley said that although the letter of 18 January 2021 is addressed to her, she received a copy of it from the Tribunal and did not receive the original version from the Property Factor.

20. Mr Convery advised the Tribunal that much of the correspondence in question took pace during periods of COVID 19 restrictions, with staff members working from home. This may have resulted in postal delays and mail going missing.

Section 3.3. You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for. In response to reasonable requests, you must also supply supporting documentation and invoices or other appropriate documentation for inspection or copying. You may impose a reasonable charge for copying, subject to notifying the homeowner of this charge in advance.

21. In the application, Mrs Buckley stated that she had never received an annual detailed financial breakdown. Mr Convery referred the Tribunal to an invoice/statement dated 28 May 2020 and a covering letter of 29 May 2020, both of which had been lodged by Mrs Buckley. The only charge showing on the statement is an annual management fee of £134, broken down into 9 monthly instalments. Mrs Buckley confirmed that she had received this letter and invoice, and that the only charges that year had been the management fee. She was also able to advise the Tribunal that a similar statement had been received the previous year which had included property owners' liability insurance. Following further discussion, Mrs Buckley advised that she did not insist on this complaint and accepted that annual statements had been issued.

Section 5.9. Additional standard for situations where a land maintenance company owns the land. On request you must provide homeowners with clear details of the costs of public liability insurance, how their share of the cost was calculated, the terms of the policy and the name of the company providing insurance cover.

22. Mrs Buckley referred to the various enquiries made by her regarding property owners liability insurance. She said that in 2019 the factoring invoice included a charge for this. In 2020 the homeowners were balloted, and the insurance was discontinued. She was confused because it was not made clear why this insurance was required in 2019 and not in 2020. Mr Convery advised that this type of insurance is not mandatory. The Property Factor had previously obtained it and had absorbed the cost into the management fee. In 2019 they passed the cost onto the homeowners for the first time. When they objected, they were balloted and had voted against continuing with it.

23. In the written submissions Mr Convery stated that this section does not apply as the Property Factor is not a land maintenance company. The Tribunal noted that in terms of the title deeds, and the information provided by Mrs Buckley, the common areas and common garden ground at the property are owned jointly by the homeowners and the Property Factor in its capacity as a social landlord. There does not appear to be any land owned by a third party land maintenance company. Mrs Buckley advised that, as the Property Factor employs gardeners who cut the common grassed areas, she thought this section applied and wanted to know why the property owner's liability insurance had been discontinued.

The Tribunal make the following findings in fact:

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

25. The Property Factor is the property factor for the property.

26. The Property Factor does not have a procedure to consult with and seek approval of homeowners in relation to repairs.

27. The Property Factor did not consult with or seek the approval of the Homeowner in relation to the roof replacement and major repair work carried out at the property.

28. The Property Factor did not respond to the Homeowner's letter of 27 July 2020.

29. The Property Factor did not provide a response to the Homeowner's letter of 2 December 2020 within a prompt timescale.

30. The Property Factor did not provide a full response to the Homeowner's enquiries in her letter of 4 May 2021 and the response on 25 May 2021 was not sent within 10 days.

Reasons for Decision

Section 2.1 of the Code

31. 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. The Tribunal is satisfied that if the Homeowners complaint under section 2.1 of the Code has already been the subject of a Tribunal determination, the Tribunal cannot make a determination on the complaint.

32. At the CMD, Mrs Buckley advised the Tribunal that her current complaint under 2.1 relates only to the May Invoice. This had not been previously determined as the Tribunal had only decided that the March and June invoices had been misleading and/or false. Furthermore, her previous complaint had not related to the grant. She referred to a letter from the local authority dated 21 June 2021 which contained a different figure for the grant than that specified by the Property Factor in the May invoice. She also confirmed that the information which she found to be misleading or false related to the grant, preliminaries, and extra works. Prior to the hearing, both parties lodged correspondence from the local authority received in September 2021 which states that the previous letter contained incorrect information. The figures provided in this correspondence now match those in the May invoice. Mrs Buckley said that she was still not happy with the information provided. She said that she was still not sure which of the various figures provided was the correct one and referred to the previous invoices and the original estimate. She also said that she had still not been told how the grant had been calculated and referred the Tribunal to the title deeds which specify a different figure. It therefore appears that the complaint about the grant figure in the May letter has changed somewhat since the CMD. It no longer relates to the conflict between the Council figures and the Property Factor's

figure, presumably since this has now been clarified. Instead, the complaint is about the fact that the figure in the May invoice is different from those stated in the previous invoices. Mrs Buckley explained that she remains confused about which is the correct figure. In addition, she said that the final invoice contained extra works, not part of the original estimate, and preliminaries which ought to have been covered by the management fee and were also not in the December estimate/letter.

33. The Tribunal considered the decision with statement of reasons in the previous application. The Tribunal noted that the complaints under Section 2.1 included a complaint that the financial information provided had been confusing. In her submission to the previous Tribunal, Mrs Buckley referred to the breakdown provided by the Property Factor in the December estimate, and the March, June, and May invoices. She advised the Tribunal that “these different versions of the costs due were confusing and misleading and she doesn’t understand why the figures have changed. No explanation was provided as to the amount of the grant she had received” (Page 5). The representative of the Property Factor responded stating “The breakdown of costs contained in the initial estimate and final invoice was consistent and costs stated as “preliminaries” in the final breakdown appear to have been included under the heading of roofing costs in the initial estimate. In connection with the grant payments he advised that the final invoices are sent to the Council and the Council pay the grants based on them” (page 5). The Tribunal thereafter concluded that the initial invoices (29 March and 8 June 2018) were misleading and false. (Page 6). On page 7 of the decision the Tribunal noted Mrs Buckley’s evidence to be that there were additional works in the May invoice which had not been included in the estimate. These are the same additional works referred to during her evidence on the present application. In his response during the previous hearing, the Property Factor representative said that they were in the original estimate, under different headings. In their decision, the Tribunal confirmed that they accepted the Property Factor’s evidence on this issue and, furthermore, failure to advise of additional works would not have been a breach of section 2.1 (page 8).

34. It appears from looking at the evidence and submissions in both cases that the previous complaint was about the letters and invoices all containing different figures. In the present application, Mrs Buckley appears to be stating that the May invoice contains different figures from the previous two and the estimate. This is essentially the same complaint, even if the focus is slightly different. The Tribunal is satisfied that the Tribunal in the previous application considered and determined complaints about the same four pieces of correspondence in terms of 2.1 of the Code. This included complaints about the grant figure, the preliminaries, and alleged extra works. The complaint in the present application is substantially the same as in the earlier case. As Mr Convery said in his submissions, the Tribunal must have regard to the “essence and reality of the subject matter in the original and subsequent proceedings”. (Grahame v Secretary of State for Scotland 1951 SC 368). The previous Tribunal did not specifically conclude that the May invoice was or was not misleading or false but their failure to include it in their findings regarding the March and June invoices demonstrates that they did not find the May invoice to be in breach of 2.1.

35. The Tribunal concludes that the doctrine of res judicata applies and the complaint cannot be considered. The Tribunal also notes that any concerns about how the grant was calculated would have to be taken up with the Council since they made the award

Section 2.4 of the Code

36. The Property Factor appears to have a principal and alternative argument regarding this complaint. The first is that this section does not apply to the property, because the title deeds give the Property Factor the right to make decisions about repairs. The secondary argument is that there was a consultation and a consultation procedure. This comprised the December letter and the subsequent correspondence between the parties.

37. There is no doubt that the Property Factor is entitled to determine what repairs are carried out (page 11 paragraph 17 of the title sheet.) It follows that the Property Factor does not require to secure a majority in favour of a repair before it is instructed. However, that does not mean that section 2.4 of the Code does not apply. The use of the word “must” clearly establishes that a procedure to consult and seek approval is mandatory. The title deeds state that if approval is not forthcoming, the Property Factor can still proceed. However, the Homeowners will have had the opportunity to make representations and discuss the proposed work before it is instructed. Section 2.4 only provides for two exceptions. The first is agreed delegated authority. The Property Factor’s WSS indicates that this relates to work up to a value of £250. The second exception allows the Property Factor “to act without seeking further approval in certain situations (such as in emergencies)”. Neither of these exceptions apply to the work which is the subject of the complaint. The Tribunal is satisfied that the Property Factor is bound by the terms of section 2.4.

38. There is no provision in the WSS, or elsewhere, which could be described as “a procedure to consult”. The only reference seems to be in the section which deals with the management fee and core services (Page 3). This includes “advising owners of all repairs expected to be in excess of £250 prior to instructing works” and “liaising with and obtaining the necessary authority from owners where substantial repairs are required”. This indicates that consultation will take place but does not explain how they will do it. Mr Convery did not provide the Tribunal with any details of an established (but unwritten) process which is used by the Property Factor to consult homeowners, but simply referred to the correspondence with Mrs Buckley. The Tribunal is not persuaded that the December letter could be regarded a procedure, or even a part of a procedure, for consulting with or seeking approval from the homeowners. The terms of the letter made it clear that a contractor had already been appointed, the work instructed, and a potential start date identified. As it turned out the work was delayed, but the letter writer clearly envisaged that the work would commence within a few weeks. It is also irrelevant that the homeowners were able to contact a member of staff for further information. This was not a consultation, simply an opportunity to ask some questions about work already instructed. Furthermore, their request for a meeting was refused. The Tribunal is satisfied that the Property Factor has failed to comply with Section 2.4.

Section 2.5

39. The Tribunal is satisfied that there has been no breach of section 2.5 in relation to the letters of 5 and 25 January, 1, 8 and 22 March 2021. These letters were sent to the Tribunal, not the Property Factor, and related (in part) to the previous application. Mrs Buckley thought that the Property Factor was obliged to respond to these letters. However, a party to an application is not required to respond to submissions lodged or questions asked by another party unless directed to do so by the Tribunal. Section 2.5 only applies to correspondence and enquiries sent directly to the Property Factor and not connected to a case being dealt with by the Tribunal.

40. 15 June 2020. The Tribunal is satisfied that Mrs Buckley sent this letter to the Property Factor. However, the letter was sent while pandemic restrictions were ongoing and appears to have gone astray. The Property Factor notified Mrs Buckley on 22 July 2021 that they had not received the letter and suggested that she send them a further copy. It appears that she did not do so. In the circumstances, no breach of 2.5 is established.

41. 27 July 2020. The Tribunal is satisfied that Mrs Buckley sent this letter to the Property Factor. Mr Convery said that he was unable to comment on or contradict her statement that she did so. It appears therefore that the Property Factor concedes that this letter must have been received but no response issued. The Tribunal is therefore satisfied that a breach of 2.5 is established.

42. 1 October 2020. This letter only enclosed a copy of the review request which Mrs Buckley sent to the Tribunal in relation to the previous application. A party is obliged to intimate a copy of a review request to the other party in terms of the Tribunal Procedure Rules, but there is no obligation on the other party to respond. No breach of 2.5 is established.

43. 2 December 2021. The Tribunal was advised that the Property Factor's letter of 18 January 2021 was a response to this letter and is satisfied that this letter was sent, although not received by Mrs Buckley. It is conceded that the response was sent outwith the timescales specified in the WSS. The Tribunal is also satisfied that a delay of 6 weeks between an enquiry and a response could not be regarded as "prompt" and there appears to have been no interim response advising her that the full response was delayed. A breach of 2.5 is established.

44. 4 May 2021. In her application, Mrs Buckley stated that she had not received a response to her very detailed letter of 4 May 2021 and the subsequent letter of 18 May 2021, which notified the Property Factor of her intention to apply to the Tribunal. A response was issued on 25 May 2021. However, as Mrs Buckley pointed out, this letter did not address the complaints in the letter but simply advised her that her application would be rejected by the Tribunal. It could therefore not be regarded as a substantive response to her enquiries and complaints. It was also sent outwith the timescales specified in the WSS. A breach of 2.5 is established.

Section 3.3

45. This complaint was withdrawn by Mrs Buckley during the hearing.

Section 5.9

46. The Tribunal can understand why Mrs Buckley became confused about the property owner's liability insurance. She was charged for this is 2019 and then balloted about it in 2020.Following the ballot, the insurance was discontinued. It appears that no explanation was ever provided for the inclusion in the common charges invoice in 2019 or why it was no longer essential in 2020. However, section 5.9 of the Code only applies where there is land owned by a land management company. From the wording of this section, it appears that public liability insurance is required in those circumstances. However, the common areas at the property are owned in common by the homeowners and the Property factor, in its capacity as a housing association and landlord. There is no third-party land maintenance company involved. In the circumstances, no breach of this section is established.

47. The Tribunal is therefore satisfied that the Property factor has failed to comply with sections 2.4 and 2.5 of the Code.

Proposed Property Factor Enforcement Order

The Tribunal proposes to make a property factor enforcement order ("PFEO"). The terms of the proposed PFEO are set out in the attached Section 19(2) Notice.

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.

Josephine Bonnar, Legal Member
3 December 2021