

# Housing and Property Chamber

## First-tier Tribunal for Scotland



**STATEMENT OF DECISION: in respect of an application under section 17 of the Property Factors (Scotland) Act 2011 and issued under the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 as amended**

**Chamber Ref: FTS/HPC/PF/20/2001**

**53 Rose Street, Aberdeen, AB10 1UB (“the Property”)**

### **The Parties:-**

**Mr Daniel Buda, 7 Silverknowes Dell, Edinburgh, EH4 5QE (“the Homeowner”)**

**James Gibb Residential Factors, 2 Thistle Street, Aberdeen, AB10 1XZ (“the Factor”)**

### **Tribunal Members**

**Ms Helen Forbes (Legal Member)**

**Mr Angus Anderson (Ordinary Member)**

### **Decision**

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) determined that the Factor has failed to comply with the duty in Section 14 of the Property Factors (Scotland) Act 2011 (“the Act”) in respect of compliance with paragraphs 6.1 and 6.4 of the Property Factor Code of Conduct (“the Code”) as required by section 14(5) of the Act. The Factor has also failed in carrying out its property factor duties in terms of Section 17 of the Act.

The decision is unanimous.

### **Background**

1. By application received in the period between 21<sup>st</sup> September and 1<sup>st</sup> November 2020, the Homeowner applied to the Tribunal for a determination on whether the Factor had failed in respect of compliance with paragraphs 1A.a & b, B.c, C.h & D.n, 2.1, 2.4, 3.4, 4.2, 6.1, 6.2, 6.4 and 6.9 of the Code, and in carrying out its property factor duties. The Homeowner submitted copy correspondence between the parties, reports, photographs and correspondence.

2. The Homeowner notified the Factor of the alleged breaches on 7<sup>th</sup> July 2020.
3. By decision dated 17<sup>th</sup> November 2020, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.
4. By email dated 7<sup>th</sup> December 2020, the Factor requested an extension of the time allowed for submissions. An extension to 23<sup>rd</sup> December 2020 was granted.
5. The Factor attempted to lodge written representations and productions electronically on 22nd December 2020. These were not received by the Housing and Property Chamber at that time. They were resubmitted and circulated on 7<sup>th</sup> January 2021.
6. By email dated 7<sup>th</sup> January 2021, the Homeowner made further written representations.
7. By email dated 10<sup>th</sup> January 2021, the Homeowner made further written representations.
8. By email dated 11<sup>th</sup> January 2021, the Factor objected to the late submission by the Homeowner.
9. By email dated 14<sup>th</sup> January 2021, the Homeowner made further written representations.
10. By email dated 14<sup>th</sup> January 2021, the Factor objected to the late submission by the Homeowner.

### **The Hearing**

11. The hearing was held on 15<sup>th</sup> January 2021 by telephone conference. The Homeowner was not in attendance. The Factor was represented by Ms Suzanne Cameron, Mr Nic Mayall and Ms Jennifer Keohane.
12. The Tribunal noted that the Homeowner had previously advised that he would not be attending the hearing. The Tribunal considered the terms of Rule 29 of the Rules. The Tribunal determined that the Homeowner had been given reasonable notice of the time and date of the Hearing. The Tribunal determined that the requirements of Rule 24(1) had been satisfied and that it was appropriate to proceed with the application in the absence of the Homeowner upon the representations of the Factor and the material before the Tribunal

### **Preliminary Issues**

13. The Tribunal considered the Factor's emails of 11<sup>th</sup> and 14<sup>th</sup> January 2021 opposing the late lodging of representations and documents by the Homeowner. The Tribunal decided to allow the late lodging of the

representations and documents received on 10<sup>th</sup> January 2021, in as far as they related to issues previously notified as part of the application, and not in respect of any new issues contained therein. The Tribunal considered it was not the fault of the Homeowner that the Factor's documents were received late. Had the Factor's documents reached the Homeowner and the Tribunal timeously, the Homeowner would have had an opportunity to respond timeously. The Tribunal did not admit the document lodged by the Homeowner on 13<sup>th</sup> January 2021 as it was not legible in its entirety, due to the screenshot of a document at a low resolution that could not be increased to a readable size. It also appeared to address issues that had been settled between the parties.

14. The Tribunal heard from the Factor's representatives regarding the issue of the back door. Ms Cameron said the matter had been concluded the previous day with a refund credited to the Homeowner. The Tribunal noted that the Homeowner had stated that he would withdraw this complaint if payment was made. It was agreed that the matter, mentioned by the Homeowner under reference to a failure to comply with paragraphs 3.4 and 6.9 of the Code, and a failure to carry out property factor's duties (item 5), would be withdrawn from consideration.
15. The Tribunal noted that the Homeowner had withdrawn his complaint in relation to the increase to the float, mentioned by the Homeowner under reference to a failure to comply with paragraph 1.1a.C.h. of the Code and a failure to carry out property factor's duties.
16. The Homeowner had alleged a failure to comply with paragraph 4.2 of the Code, however, he had cited several matters related to debt recovery that did not fall within this paragraph, including disputed debts and compensation that he alleged had been promised but not paid by the Factor. The Tribunal confirmed with the Factor that no interest or late payment charges had been added to the Homeowner's account after the case was accepted by the Housing and Property Chamber and referred to the Tribunal, and during the period that the Tribunal was considering the case. It was agreed that paragraph 4.2 was not relevant and would not be considered.

## **Findings in Fact**

17. The Tribunal made the following findings in fact.
  - i. The Homeowner is the owner and landlord of the Property, which is a flatted dwelling-house within a four-storey granite tenement with two shops at ground level and six flatted dwelling-houses on floors one to three.
  - ii. The Factor registered as a Property Factor on 23<sup>rd</sup> November 2012 under registration number PF000103.
  - iii. The Factor provided factoring services to the block of flatted dwelling-houses from 10<sup>th</sup> April 2017 to 27<sup>th</sup> November 2020.

- iv. At the time of appointment of the Factors, the Homeowner and a representative of the Factor, Mr Neal Wallace, identified objectives of the appointment.
- v. It was identified that works were required to the common stairway, including new carpeting, decoration and works to the back door.
- vi. In the Factor's newsletter of Summer 2017, an article was included about the need for asbestos surveys, including the statement *If your development requires an asbestos survey, we'll be writing out to you in the next month or so to advise costs and timescale etc*. No such letter was sent to the Homeowner.
- vii. A homeowners' meeting was arranged by the Factor for 10<sup>th</sup> April 2018. The meeting was cancelled.
- viii. On 18<sup>th</sup> May 2018, Mr Wallace emailed the Homeowner informing him of a quotation for carpeting the first landing of the common hallway.
- ix. On 18<sup>th</sup> May 2018, the Homeowner emailed Mr Wallace offering to decorate the hallway up to the first floor himself.
- x. On 21<sup>st</sup> May 2018, Mr Wallace emailed the Homeowner stating that he would instruct carpeting of the first landing of the common hallway.
- xi. On 15<sup>th</sup> June 2018, the Homeowner passed receipts for decorating the stairway to Mr Wallace.
- xii. On 21<sup>st</sup> June 2018, the Homeowner asked Mr Wallace by email to arrange a meeting of homeowners.
- xiii. On 22<sup>nd</sup> June 2018, Mr Wallace responded to the Homeowner stating that he would arrange a meeting of homeowners after his annual leave, in late July 2018, and that he had requested a quote for carpeting from the front door to the first landing, and that he had already obtained a quote for carpeting the first landing.
- xiv. On 22<sup>nd</sup> June 2018, Mr Wallace emailed homeowners stating that he would seek a quotation for the carpeting from the door to the first landing of the common entrance and stairway.
- xv. On 6<sup>th</sup> September 2018, following several unanswered emails to Mr Wallace by the Homeowner, Mr Wallace emailed the Homeowner informing him that no payment could be made to him in respect of decoration of the common stairway as there was no agreement from the other homeowners to carry out the work.
- xvi. On 17<sup>th</sup> September 2018, the Homeowner emailed Mr Wallace expressing his concern about the condition of the common hallway

- carpet and consequent health and safety issues, highlighting water ingress at the rear door and concerns regarding the management of the building.
- xvii. An asbestos survey of the building was carried out, and a report dated 5<sup>th</sup> October 2018 provided to the Factor.
  - xviii. The asbestos survey was required under health and safety legislation.
  - xix. The Factor is the "Duty Holder" in relation to the requirement to obtain an asbestos survey. As such, this forms part of the Factor's core services, under duty to manage.
  - xx. On 7<sup>th</sup> December 2018, the Factor invoiced homeowners for their share of the survey cost. This was the first time that the Homeowner became aware of the survey.
  - xxi. On 31<sup>st</sup> October 2018, the Homeowner reported water ingress to the Property and issues with overflowing gutters to the Factor.
  - xxii. On 26<sup>th</sup> November 2018, the Homeowner emailed the local authority with concerns about a lack of progress on communal repairs, and stating that water ingress to the Property was the result of a defective window and missing pointing in the upstairs property.
  - xxiii. On 26<sup>th</sup> November 2018, a representative of the local authority attended at the Property and visited the Factor thereafter to request immediate action on the gutters, pointing and water ingress.
  - xxiv. The gutters were cleaned out on 18<sup>th</sup> and 20<sup>th</sup> December 2018. The pointing was repaired on 20<sup>th</sup> December 2018.
  - xxv. On 12<sup>th</sup> October 2019, the Homeowner reported overflowing gutters and water ingress to the Factor.
  - xxvi. On 23<sup>rd</sup> October 2019, the Factor provided homeowners with quotations for gutter cleaning.
  - xxvii. The gutters were cleaned on 30<sup>th</sup> October 2019, as the result of a tendering exercise, rather than an emergency procedure.
  - xxviii. At some point during 2019, the Factor attempted to arrange an AGM of the homeowners but there was insufficient interest for this to proceed.
  - xxix. On 25<sup>th</sup> February 2020, the Factor wrote to homeowners providing details of three quotations for carpeting work to the common stairway, and enclosing a ballot form.
  - xxx. By email dated 25<sup>th</sup> February 2020, the Homeowner complained to the Factor of insufficient information regarding the carpeting to allow him to

cast a vote. He requested further information regarding the specification of the quotes.

- xxxii. By email dated 27<sup>th</sup> February 2020, the Factor responded to the Homeowner, providing further information on the specification of the quotes.
- xxxiii. On 12<sup>th</sup> March 2020, the Factor wrote to the homeowners regarding various issues including carpeting the common stairway.
- xxxiv. On 23<sup>rd</sup> March 2020, the Factor emailed the Homeowner with further information regarding the proposed carpet and other matters.
- xxxv. On 24<sup>th</sup> March 2020, the Homeowner's father emailed the Factor requesting further information regarding the proposed carpet and other matters.
- xxxvi. On 9<sup>th</sup> April 2020, the Factor respondent to the Homeowner by email regarding the proposed carpet and other matters.
- xxxvii. On 22<sup>nd</sup> May 2020, the Factor wrote to homeowners stating that majority approval for carpeting the common stairway had been received, and a contractor chosen. Advance funds were requested.
- xxxviii. On 12<sup>th</sup> June 2020, the Factor emailed the Homeowner requesting that he provide receipts for the decoration works to the hallway.
- xxxix. On 16<sup>th</sup> June 2020, the Homeowner provided the Factor with a receipt pertaining to decoration works to the hallway.
- xl. The Factor informed the Homeowner that the gutters would be cleaned on 7<sup>th</sup> August 2020.
- xli. The gutters were cleared in early August 2020.
- xlii. The Homeowner attempted to call the Factor for an update on several occasions in mid-August 2020. His calls were not returned by the Factor.
- xliii. On 26<sup>th</sup> August 2020, homeowners were informed that the Factor would cease to provide factoring services to the building on 27<sup>th</sup> November 2020.
- xliv. Prior to 16<sup>th</sup> September 2020, the Homeowner informed the Factor by letter that he was concerned that problems with missing pointing on the building would lead to water ingress to the Property.

- xlv. By letter dated 16<sup>th</sup> September 2020, the Factor informed homeowners that the carpeting work would be cancelled as only one homeowner paid the advance cost. No responses had been received in relation to the ballot on stair redecoration. The Factor also provided a quotation to homeowners for re-pointing works and stated that they were unaware of any water ingress and that the work should be considered as maintenance rather than emergency works and that they would seek quotations.
- xlvi. On 21<sup>st</sup> September 2020, the Homeowner was informed by the Factor that they would no longer speak to him and all communication should be by email.
- xlvii. On 4<sup>th</sup> October 2020, the Homeowner was notified by his tenant of water ingress to the Property. This was reported to the Factor.
- xlviii. On 5<sup>th</sup> October 2020, a contractor visited the building to inspect the damage. No remedial work was carried out.
- xlix. On 19<sup>th</sup> October 2020, repair works were carried out to the pointing by a contractor appointed by the Homeowner. This stopped the water ingress.
  - i. Despite an agreement to carry out monthly inspections of the building, the Factor failed on occasion to carry out the monthly inspection.
  - ii. There was no written obligation upon the Factor to provide monthly inspection reports to homeowners.
  - iii. No programme of works was prepared by the Factor and provided to homeowners.

## **SUBMISSIONS, EVIDENCE AND REASONS FOR DECISION**

### **Section 1 of the Code**

18. The Homeowner alleged a failure to comply with certain paragraphs of this section of the Code, as follows:

The Code states:

*The Written Statement must set out*

#### **Paragraph 1.1a. A.a of the Code**

*A statement of the basis of any authority you have to act on behalf of all the homeowners in the group;*

### **Paragraph 1.1a. A.b.of the Code**

*Where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation.*

### **Paragraph 1.1a.B.c. of the Code**

*The core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service).*

### **Paragraph 1.1a.D.n. of the Code**

*Your procedures and timescales for response when dealing with telephone enquiries.*

### **Representations on behalf of the Factor**

19. Ms Cameron directed the Tribunal to the specific paragraphs of the Factor's Written Statement of Services ("WS") where the required information is set out.

### **Decision of the Tribunal**

20. The Tribunal did not find that the Factor had failed to comply with these paragraphs of the Code. Section 1 of the Code covers the information that must be included in the WS. In this case, the requisite information is included within the WS. The arguments set out by the Homeowner alleging failures to comply with the Code were covered elsewhere within his application and did not constitute breaches of this particular section of the Code.

### **Paragraph 2.1 of the Code**

21. *You must not provide information which is misleading or false*

### **Representations by the Homeowner**

22. The Homeowner alleged that the Factor provided misleading information by stating in their newsletter of Summer 2017 that they would be in touch with homeowners regarding costs and timescale for an asbestos survey. No further contact was made with homeowners until they were billed for the survey, therefore, the article was misleading.

### **Representations on behalf of the Factor**

23. Ms Cameron denied that any misleading or false information had been provided to homeowners.

## **Decision of the Tribunal**

24. The Tribunal did not find that the Factor had failed to comply with this paragraph of the Code. Although the procedure to be followed as outlined in the newsletter was not complied with by the Factor, there was not the necessary intention to mislead at the stage of disseminating the information by newsletter.

## **Paragraph 2.4 of the Code**

25. *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 service. 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).*

## **Representations by the Homeowner**

26. The Homeowner's position was that no consultation took place regarding an asbestos survey carried out and reported on 5<sup>th</sup> October 2018, following intimation in the newsletter of Summer 2017 that the Factor would be in touch with homeowners regarding costs and timescale for the survey. This was not an emergency and the Factor had no authority, delegated or otherwise, to do the work.

## **Representations on behalf of the Factor**

27. Ms Cameron said that homeowners were informed that the survey would take place, through the article in the Summer 2017 newsletter. There was also a letter drafted to homeowners, but it was not issued. This work was required under health and safety legislation. The work forms part of the Factor's core services, under their duty to manage. The cost of the work was under the threshold that requires homeowners' consent.

## **Decision of the Tribunal**

28. The Tribunal did not find that the Factor had failed to comply with this paragraph of the Code. Although not listed in core services in the WS, the Tribunal accepted that the survey was required and authorised under the Factor's duty to manage, and that it fell within the delegated authority. This matter is considered further under failure to carry out property factor duties.

## **Paragraph 6.1 of the Code**

29. *You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for*

*completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.*

### **Representations by the Homeowner**

30. The Homeowner complained that the Factor had failed to act timeously and inform homeowners of progress in relation to gutter cleaning. The Homeowner was aggrieved that the Factor requires approval from the homeowners before carrying out gutter cleaning.
31. The Homeowner alleged that there was water ingress to his property in late 2018 and late 2019. Problems with the gutter were reported by the Homeowner on 31<sup>st</sup> October 2018 and were not attended to until 18th and 20th December 2018, several weeks after the Homeowner had water running into his property. On 26th November 2018, an Aberdeen City Council Inspector asked the Factor to carry out this work.
32. Water ingress was reported to the Factor on 12<sup>th</sup> October 2019 and the gutters were not cleaned for 18 days.
33. In August 2020, the Homeowner reported concerns about vegetation in the gutter to the Factor. No report was received after two weeks. The Factor then notified the homeowners that they were resigning as factors, giving three months' notice. An inspection was carried out by a contractor. The Factor did not respond to the Homeowner's concerns until September 2020, stating there were no concerns with water ingress. On 4<sup>th</sup> October 2020, the Homeowner reported water ingress to the Factor. A visit was carried out on 5<sup>th</sup> October 2020, but no remedial works were carried out. The Homeowner had to find his own contractor to repair the pointing to stop the water ingress.

### **Representations on behalf of the Factor**

34. Ms Cameron said that the Factor has the necessary procedure in place. The gutters were cleaned in 2018, 2019 and 2020. 2018 was an emergency situation, due to water ingress. The following two years were carried out as routine work.
35. In 2018, the required works were already 'on the radar' and in progress when the problem was notified to the Factor by the Homeowner. Responding to questions from the Tribunal as to whether homeowners were kept informed of progress, Ms Cameron referred the Tribunal to an email dated 27<sup>th</sup> November 2018 in this regard.
36. Ms Cameron said that in 2019 and 2020 time was required to ingather funds and this delayed matters. Ms Cameron said there was no record on the Factor's system of water ingress and gutter cleaning being reported by the Homeowner as an emergency in 2019. Ms Keohane said that correspondence was sent out to homeowners on 23<sup>rd</sup> August 2019 regarding the gutter cleaning, and a contractor was instructed on 28<sup>th</sup> August 2019.

37. In July 2020, on inspection, it was noted that the gutters required cleaning. In August 2020, the Homeowner had reported the gutters required cleaning, but he was informed that it could not be carried out until September 2020 due to nesting seagulls. Owners were notified of this on 5<sup>th</sup> August 2020.

### **Decision of the Tribunal**

38. The Tribunal found that there had been a failure to comply with this paragraph of the Code. The gutter problem was reported on 31<sup>st</sup> October 2018 as an emergency, and there was no notification of progress to homeowners by the Factor until 27<sup>th</sup> November 2018.

### **Paragraph 6.2 of the Code**

39. *If emergency arrangements are part of the service provided to homeowners, you must have in place procedures for dealing with emergencies (including out-of-hours procedures where that is part of the service) and for giving contractors access to properties in order to carry out emergency repairs, wherever possible.*

### **Representations by the Homeowner**

40. The Homeowner's position is that, when a report is made of water ingress to a building, this should be an emergency and should be treated as such.

### **Representations on behalf of the Factor**

41. Ms Cameron said that there is a procedure in place for emergencies as required by the Code. It is contained within the WS at paragraph 4.3.

### **Decision of the Tribunal**

42. The Tribunal did not find a failure to comply with the Code in this regard, as the Factor has a procedure in place. The matter of compliance with the procedure was considered further under failure to carry out property factor's duties.

### **Paragraph 6.4 of the Code**

43. *If the core service agreed with homeowners includes periodic property inspections and/or a planned programme of cyclical maintenance, then you must prepare a programme of works.*

### **Representations by the Homeowner**

44. The Homeowner's position is that monthly inspections have not always been carried out, and reporting is poor. No programme of works has ever been issued.

## **Representations on behalf of the Factor**

45. Ms Cameron referred to paragraph 4.8 of the WS and section 06 of the Development Schedule regarding property inspections. It is stated in the Development Schedule that inspections will be carried out on a monthly basis. The gutter cleaning is considered cyclical maintenance. There is no other cyclical maintenance. There is no programme of works.

## **Decision of the Tribunal**

46. The Tribunal found that there has been a failure to comply with this paragraph of the Code by failing to prepare a programme of works. The gutters in this case required more regular maintenance and a programme of works ought to have been prepared. The matter of inspection reports is considered under property factor duties.

## **Failure to carry out property factor duties**

47. The Homeowner stated the following as alleged failures to carry out property factor duties.

1. Not carrying out originally stated objectives
2. Not responding timeously to emergency maintenance issues
3. Instructing works (survey) without authorisation
4. Not providing monthly reports consistently

The Homeowner listed the stated objectives as follows:

- (i) To carry out monthly inspections of the building and to supply written reports.
- (ii) To manage the external maintenance of the building – namely the regular cleaning of the gutters, roof repairs/renewal and the rear outside space.
- (iii) To ensure regular cleaning of the common parts/stairway
- (iv) To gain approval for and manage specific upgrades – namely the replacement of the stairway carpet, repainting of the stairway, replacement of the rotten rear door.
- (v) To advise all proprietors of any other management issues pertaining to the building.
- (vi) To act as manager in case of any emergency repairs.
- (vii) To organise annual proprietors meeting.

On behalf of the Factor, Ms Cameron agreed these were the stated objectives, with the exception of providing written reports.

48. The Tribunal noted certain recurring issues that had been raised by the Homeowner in his submissions in relation to property factor duties, some of

which had previously been discussed, and other which were considered as follows:

### **Inspections/Written Reports**

#### **Representations by the Homeowner**

49. The Homeowner highlighted several missing reports on the Factor's portal. He stated that only 19 inspections had been carried out within 39 months of management.

The Homeowner claimed that the Factor was not carrying out inspections competently, failing to note problems with pointing. Had they done so, issues with water ingress would have been avoided.

#### **Representations on behalf of the Factor**

50. Ms Cameron said monthly inspections were carried out, and only two reports had been missed in the past two years. One was missed due to staff bereavement. Mr Mayall said there was no obligation on the Factor to provide a report. The obligation was only to carry out inspections. Nowhere within their WS does it state that they will report to the homeowners. Reports are for their internal use only. Not all factors provide reports of inspections.
51. Responding to questions from the Tribunal regarding gaps in the schedule of inspections for 2018, Ms Cameron said she was unable to account for this, or say if the inspections had been carried out.

### **External maintenance of the building/Failure to respond to emergency situations**

#### **Representations by the Homeowner**

52. The Homeowner stated in his written representations:

*The matter of water ingress to my flat has been apparent internally on 3 occasions, 2018, 2019 and 2020. On each occasion the water has come in at the same place, immediately above the window to my lounge and down the ingoe sides. In 2018 I speculated that this was because of rotten window directly above mine and missing and defective pointing. My upstairs neighbour replaced their window and cills in late 2018 and Gibbs contractor made pointing repairs. However, the same issue then became evident in 2019 and in 2020. I complained about this to Gibbs and the seemingly common denominator was gutters which were clogged with vegetation and water was seen running down the outside of the building by my tenant. Subsequent inspections have shown holes in the pointing and masonry in the granite walling immediately above my window and at roof level. Even if it was a private matter of rotten window sill in 2018, the gutters were still overflowing and there was still missing pointing from the external wall. In any case the*

*above window had been renewed long before the water ingress in 2019 and 2020.*

### **Representations on behalf of the Factor**

53. Ms Cameron referred the Tribunal to an email from the Homeowner to the Factor dated 26<sup>th</sup> November 2018, where the Homeowner states that the water ingress occurred due to issues with a neighbour's rotten window. The Homeowner had not provided any evidence, such as photographs, to show water ingress to his property.
54. Mr Mayall said there was no evidence of any emergency water ingress being notified to the Factor by the Homeowner in 2019 or 2020.
55. Ms Keohane said water ingress was mentioned in October 2020, but no work was instructed due to the level of debt outstanding from the Homeowner. She had been made aware of issues with the pointing following a contractor's report in 2020 and issues raised by the Homeowner.
56. The Tribunal referred the Factor's representatives to Item 1 lodged by the Homeowner which refers to the gutter and pointing issues in 2020. The Homeowner states therein that he attempted calls to the Factor's Development Manager and Operations Director on several occasions but received no return call. Ms Cameron said she did not believe this to be the case.

### **Common stairway – carpet and decorating**

#### **Representations by the Homeowner**

57. The Homeowner stated in his written representations that the Factor failed to put in place a suitable plan to ensure that the stated objectives were carried out in a reasonable time frame, including the worn carpet replacement, which is a danger to those using the stairway. Stairway issues were to be treated as items requiring immediate attention at the time of the Factor's appointment in 2017.
58. With regard to the decorating of the common stairway, by May 2018, no action had been taken to progress this matter. The Homeowner said he spoke to the Property Manager, Mr Wallace, and suggested that homeowners would carry out the work themselves and be reimbursed on provision of a note of costs. Receipts were passed to the Property Manager on 15<sup>th</sup> June 2018. Despite reminders issued to the Factor, no response was received until 6<sup>th</sup> September 2018 when the Homeowner was informed that they would not reimburse retrospectively.
59. The Homeowner also stated that insufficient information had been provided by the Factor when the carpet issue was addressed more recently.

### **Representations on behalf of the Factor**

60. Ms Cameron said that many of these issues arose before her time. As far as she was aware, there was no appetite from other homeowners to carpet or decorate the common stairway in 2017/2018. After Mr Wallace left the employment of the Factor, the Factor attempted to address this matter on three occasions.
61. Responding to questions from the Tribunal considering the earlier proposed works in 2017/2018, Ms Cameron outlined the normal procedure that the Factor would go through in these situations, which would begin with the Factor requesting quotes from contractors and putting those to the homeowners. This did not appear to have happened here. Ms Cameron assumed there was no appetite for the work, so no quotes were sought.
62. In 2020, Ms Keohane approached the homeowners in respect of the carpet and received a more positive response. Quotes were obtained and a contractor appointed. A funding request was put out to homeowners in March 2020. The work was not carried out as only one homeowner paid. The Homeowner had queried the colour and type of carpet, and the Factor had responded to his concerns.
63. Addressing the matter of the decoration of the stairway, Ms Cameron said the Homeowner took it upon himself to arrange the decoration and submit receipts. He did not consult the other homeowners and the work was not instructed by the Factor. She said she was not aware what discussion had taken place between the Homeowner and Mr Wallace in this regard.

### **To advise all proprietors of any other management issues pertaining to the building**

#### **Representations by the Homeowner**

64. The Homeowner complained that the Factor had carried out an asbestos survey without advising the homeowners sufficiently.

#### **Representations on behalf of the Factor**

65. The Factor's position is that the Factor was authorised to carry out this work as part of its managing duty.

### **To organise annual proprietors meeting.**

#### **Representations by the Homeowner**

66. The Homeowner complained that the Factor had not done enough to arrange meetings despite being asked to do so.

## **Representations on behalf of the Factor**

67. Ms Cameron said an AGM invitation was sent out in 2019 but an insufficient number of homeowners agreed to attend so it did not proceed as it would not have been quorate. Discussions were had with the Homeowner's father about a further meeting in 2020, but the national lockdown has prevented that from happening.

## **Property Factor Duties – Decision of the Tribunal**

68. The Tribunal found that there had been a failure to carry out property factor duties as follows:
69. The Factor failed to carry out monthly inspections. The Factor cited two occasions on which they said there was a legitimate reason for failing to carry out inspections, due to staff absences; however, it was not clear why another employee could not have been asked to carry out the inspections. There was no explanation given by the Factor for the other gaps in the schedule of inspections. The Factor failed to prepare a programme of works and instigate works arising from the inspections, an example being the repeated evidence of choked gutters.
70. Although the Homeowner alleged that providing monthly reports was a stated objective, there was no documentary evidence to that effect before the Tribunal, and the Tribunal accepted that there is no written obligation in the WS to provide written reports. The Tribunal did not, therefore, find a failure in this regard. However, the Tribunal made an observation that it viewed this matter as indicative of poor factoring practice, particularly where absentee landlords are concerned. The landlords are paying for a service that includes monthly inspections. It seems inconceivable that the Factor, in possession of these, should not be required to provide a copy of the monthly inspection report to its clients, this would provide greater transparency, and that the Factor should try to rely on the lack of written obligation as an excuse for failing to provide such reports.
71. There was a failure in relation to gaining approval for and managing the replacement of the stairway carpet and the repainting of the stairway in 2017/2018. Despite repeated reminders and enquiries by the Homeowner in and around 2018, and promises by the Factor to progress the matter, insufficient efforts were made by the Factor to gain quotes and ascertain homeowner support for proposals and to advise owners of the lack of progress and eventual abandonment of the projects.
72. The Tribunal did not find a failure in relation to the issue of the stair carpet in 2020. The Factor responded appropriately and timeously to enquiries made by the Homeowner.

73. There was a failure to respond timeously to emergency maintenance issues in 2018. The timescale between notification of the gutter issues, water ingress and missing pointing, and the eventual action taken, was not appropriate. The Tribunal noted that water ingress may have been contributed to by defects in a neighbouring window, however, the overflowing gutters would have added to the problem.
74. There was a failure to adequately advise all proprietors of a management issue pertaining to the building in respect of the asbestos survey. The Factor failed to advise proprietors properly in advance, despite undertaking, through their newsletter, to provide further information. This matter was indicative of extremely poor practice, and the Factor's attempts to justify its actions, such as describing the works as "emergency repairs" and inactions in this regard to the Homeowner and the Tribunal were entirely unsatisfactory and concerning.
75. The Tribunal did not find that there was a failure to carry out property factor duties in relation to failing to arrange meetings. It is clear that the Factor attempted to do this, and that the meetings did not take place because of a lack of interest from homeowners.

### **Observations**

76. The manner in which papers were submitted to the Tribunal did not assist in the determination of the application. The documentation lodged by the Factor was not satisfactory. The representations were difficult to follow, the productions were not numbered, and the appendices referred to were not marked. It was very difficult to follow the Homeowner's written submissions. It was not helpful that the Homeowner was not present to put forward his case and refer the Tribunal to the relevant documents or parts of his submission. The written representations were included in several documents, submitted at different times, which were repetitive, unclear and difficult to read, often containing screenshots of documents that were too small to read. The chronology of events was extremely difficult to follow as emails were produced in a seemingly random order, rather than a recognisable sequence with format variations throughout the submissions.
77. The Tribunal was unable on the evidence before it to make a finding that the Factor had agreed to the Homeowner carrying out works to the common stairway, for which he would be reimbursed. However, the Tribunal observed that the Factor failed to respond after the receipts were provided by the Homeowner. The Factor ought to have notified the Homeowner immediately that no reimbursement would be made. The delay was not acceptable. As this, and other alleged delays in communications, were not complained of by the Homeowner as a possible failure to comply with the Code, no finding was made in this regard.

## **Proposed Property Factor Enforcement Order (PFEO)**

78. Having determined that the Factor has failed to comply with the Code and failed in carrying out its property factor duties, the Tribunal was required to decide whether to make a PFEO. The Tribunal decided to make a PFEO.
79. In considering the terms of the PFEO, the Tribunal took into account the distress, frustration and inconvenience caused to the Homeowner by the Factor's failures. The Tribunal did not order any reimbursement for works paid but not carried out, reconciliation for fees for unauthorised work or repayment of fees for inadequate service.
80. Section 19 of the Act requires the Tribunal to give notice of any proposed PFEO to the Property Factor and allow parties an opportunity to make representations.
81. A proposed PFEO accompanies this decision. Comments may be made in respect of the proposed PFEO within 14 days of receipt by the parties in terms of section 19(2) of the 2011 Act.

### **Right of Appeal**

82. In terms of section 46 of the Tribunals (Scotland) Act 2014, a party 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.

Legal Member and Chairperson

11<sup>th</sup> February 2021