

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/21/1604

30 Salamander Street, Edinburgh ("the Property")

Parties:

Blue Marmalade Ltd, 36 Dalmeny Street, Edinburgh ("the Homeowner")

Hacking and Paterson, 103 East London Street, Edinburgh ("the Property Factor")

Tribunal Members:

**Josephine Bonnar (Legal Member)
Andrew Murray (Ordinary Member)**

DECISION

The Property Factor has failed to carry out its property factor duties by failing to respond to a report by the Homeowner that a common repair was required.

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 in terms of Rule 43 of the Tribunal Procedure Rules 2017 and Section 17 of the 2011 Act. On 30 August 2021, a Legal Member of the Tribunal with delegated powers of the President referred the matter to the Tribunal. The Parties were notified that a hearing would take place on 11 November 2021. The parties were later notified that the hearing had been converted to a case management discussion (“CMD”) as the Tribunal had identified several preliminary matters which required to be addressed. The CMD took place by telephone conference call on 11 November 2021. The Homeowner was represented by Mr Jennings. The Property Factor was represented by Ms Blair. At the CMD the Tribunal dealt with the preliminary matters and noted the Homeowner’s complaints (detailed in paragraphs 7 and 8).
2. Following the CMD the Tribunal determined that the application should proceed to a hearing. The Property Factor was directed to lodge a written response to the application. The parties were notified that the hearing would take place by telephone conference call on 13 January 2022 at 10am.
3. On 9 December 2021 the Property Factor lodged written submissions in response to the application and some documents. These comprised emails and an email report from IGW Ltd Associates (“IGW”). On 6 January 2022, the Homeowner lodged further documents in response to the Property Factor’s submissions. He stated that he had recently instructed a surveyor to consider certain matters raised in the IGW report but that their report/evidence would not be available prior to the hearing. He indicated that he wanted the Tribunal to consider the evidence when it became available. Shortly prior to the hearing the Homeowner lodged a brief email from the surveyor.
4. The hearing took place on 13 January 2022 at 10 am. The Tribunal noted the terms of the Homeowner’s email of 6 January 2022. The email indicated that the Homeowner had been unable to arrange for the surveyor to inspect and prepare a report because of COVID 19 restrictions and the Christmas holiday period. Following discussions, and a short adjournment, Mr Jennings advised the Tribunal that he was seeking an adjournment of the hearing so that he could arrange to obtain and lodge a report from the surveyor who has been instructed. Ms Blair did not oppose the request. The Tribunal agreed to the request for an adjournment of the hearing.
5. On 5 April 2022, the Homeowner submitted a report from Summers Inman. He sent a copy to the Property Factor at the same time. The Property Factor sent a letter to the Tribunal stating that the report had only been lodged 5 working days before the hearing and that it was irrelevant to the application as it related to new matters which would require to be considered by the Homeowners collectively.

6. The hearing took place on 16 April 2022, by telephone conference call. The Homeowner was represented by Mr Jennings and the Property Factor by Ms Blair.

The Homeowner's complaints

7. **Section 6.1 of the Code.** The Property Factor's procedures for reporting repair and maintenance issues are not fit for purpose and do not work. There is an implied requirement in 6.1 that the procedures are functional. If they do not work, they cannot properly be described as procedures. The Property Factor's submissions lodged prior to the CMD in relation to proposed external works at the property are irrelevant. The complaint does not relate to that proposed work but to the IGW Associates proposal regarding the sealing of the gap at the stack pipes between the property and the two flats above it. The Property Factor has failed to follow through on this repair. They have also failed to provide updates and timescales in relation to that repair.
8. **Property Factor duties.** The Property Factor failed to arrange for the gaps at the stack pipes between the flats and the property to be sealed, although this was recommended by IGW Associates Ltd in a report in February 2020. The Property Factor stated that the owners of the upper flats were not willing to agree to the repair due to the level of disruption involved. This is disputed because the homeowners have informed him that they have not been asked to agree to the work. Although there is no current water ingress into the property, this will recur if there should be a plumbing or boiler leak from one of the flats. Furthermore, an insurance claim in connection with substantial damage caused by a previous leak cannot be progressed until the property is watertight and this repair is required to accomplish that.
9. The Homeowner submitted documents in support of the application. These include a report from IGW Associates (IGW) in February 2020 and email correspondence between Mr Jennings and various members of staff of the Property Factor. Most of this correspondence is with Linda Bennet although the emails relating to the complaint process are with Gemma Hawcroft and the most recent correspondence is with Ms Blair. He also submitted correspondence with Mr Watson of IGW, photographs and a chronology of events. The report from Summers Inman, Construction and Property Consultants is dated 4 April 2022 and is based on an inspection carried out on 21 February 2022. The author of the report makes a number of observations and recommendations. In particular, he indicates that urgent action is required to address the lack of fire stopping between the property and the flats above. He advises that the issues identified are due in part to the lack of a second fire collar but that the incidents of water ingress have also caused damage which requires to be rectified (paragraph 3.2.1). In relation to the issue of water ingress the author of the report states "if there are likely to be relatively regular instances of water escape from the flats above the subject property going forward, particularly due to such issues as inherent plumbing defects within the block, we would conclude that the scenario that the existing arrangement and detailing to this floor penetration poses is not sustainable as this will prevent full fit out of the subject property and potentially lead to further loss for the owners. In order to prevent this issue going forward,

we would recommend the following works, alongside application of one of the two proposed remedial options which offer a waterproofed detail to suit the arrangement around the pipe penetration which is currently concealed by the baths to the 1st floor bathrooms. This work would also provide protection to the fire stop collars, avoiding future water damage and the need for their replacement." The report goes on to detail the proposed remedial work and identifies two possible options, The work involves access to (and the temporary removal of baths in) the upper flats and the report indicates that the work should take 1 to 2 days.

The Property Factors response and written representations

10. The Property Factor denies both the Code and property factor duties complaints. Ms Blair refers to section 5 of the WSS which contains a procedure for reporting maintenance and repair issues. She also disputes the claim that the second part of 6.1 has been breached, since the essence of the complaint is that the property factor did not initiate the repairs which are allegedly required and could therefore not provide any updates on them. She states that the Property Factor has sought authority and funding from the homeowners to allow remedial work to be carried out to address water ingress. This has not been forthcoming and the work has not been instructed as a result. In terms of property factor duties Ms Blair states that the complaint seems to be based on the Code rather than the WSS which provides the Homeowner with details of their services. Furthermore, there has been significant communication with the Homeowner, and they have attempted to meet with him to agree a way forward. Reference is made to several letters to the Homeowners about required repair work. In the December 2021 submissions Ms Blair states that there was confusion about the specific nature of the complaint. The Property Factor had been attempting to address what they understood to be ongoing water ingress. This was based on Mr Jennings' emails. The Property Factor only became aware in October 2021 that the complaint related to the sealing of the stack pipes and that there is no current water ingress. The Property Factor acknowledges that this was raised by Mr Jennings on 2 March 2020 and not acknowledged or answered. However, IGW were told to proceed with the recommendations contained in their report and their proposals for doing so were listed in the Fee Quotation, a copy of which was sent to the Homeowner in July 2020. He did not contact the Property Factor on receipt of this to ask why the stack pipe work was not included. Although Homeowners were not asked for access for the stack pipe work, they were asked for access for investigations into water ingress and this was refused. In October 2021, IGW responded to a request for comments about the stack pipe repair and said that there is no building defect and that the arrangement at the stack pipes is not dissimilar to that found in other buildings. The work which the Homeowner wishes to have carried out would be disruptive and not warranted, given the lack of any defect.

The hearing

11. The Tribunal noted that the Property Factor did not object to the Summers Inman report being considered on the grounds that it had been not been lodged

until 5 April 2022, but because it is not relevant to the application. The Tribunal advised the parties that both would have the opportunity to address it on the relevance of the report and that a decision would be made by the Tribunal thereafter.

The Homeowner's evidence

12. Mr Jennings advised the Tribunal that for more than 2 years the Property Factor failed to act on the recommendation made by IGW Associates, although he was very clear about what was required in his communications with them. He referred to Section 4 of the IGW report (Production 9). This states that they had been asked about a "potential solution to limit any future leaks tracking down the pipe ducts into the shops below". They said that a "potential solution" would be to "apply Sika Liquid Plastics Proprietary Fiberglass Reinforced Coating to the concrete floor slab where the pipe penetrates and extending the coating up the stack pipe approximately 150mm. This would seal the joint between the stack pipe and concrete floor slab however it would not prevent water from seeping through slab joints in instances of substantial leakage". Mr Jennings also referred to an email he sent to the Property Factor (Linda Bennet) dated 2 March 2020 when he made specific reference to the recommendation in the report and asked for this to be actioned. Mr Jennings said that if procedures were in place, that recommendation would have been discussed. The lack of action led to further water ingress. The Homeowners were not notified about this until years later. He then referred to an email he sent on 22 October 2020 to Ian Watson of IGW and copied to Linda Bennet. This relates to proposed flood tests at the property and states that this should not be carried out until "the two soil pipe holes in the slab above my property ...are completely sealed and made watertight". The email then refers to the recommendation made in the report and says that he will only agree to the flood test when he has had confirmation that the holes have been completely sealed. At the bottom of the email there is a paragraph addressed to Linda Bennet, asking her to arrange access to the flats above the property for the soil pipe work. The Tribunal noted that production 24b is a reply to this email, dated the same day, and sent to both the Homeowner and Ian Watson. It states, "we have contacted the flats above and they are not happy to any disruptive work carried out within their flats. The water testing appears to be rejected by both commercial units as it may result in more water coming into your property. Therefore we may have to look at carrying out repairs to the terrace area only." Mr Jennings said that if proper procedures were in place, the Property Factor would have acted on his email requests. He then referred the Tribunal to Production 38, an emailed letter to Gemma Hawcroft dated 20 July 2021, part of the complaints process. In paragraph 5 Mr Jennings again made specific reference to the IGW recommendation and says that it is required. He added that the Property Factor had wrongly assumed that his complaint related to the other works and asked them to address the issue. Mr Jennings also referred to production 32, a form completed by him in connection with the complaints procedure dated 17 June 2021. This also makes specific reference to the IGW recommendation in the section "What is required for us to solve the problem". A further email dated 30 July 2021 (production 40A) again made it clear that Mr Jennings complaint relates to the failure by the Property factor to progress the IGW recommendation. No response was received. Mr

Jennings referred the Tribunal that the Property Factor's claim at the CMD that they had not appreciated that his complaint was about the stack pipes until October 2021. He said that this statement is not valid when the correspondence is reviewed. He said that they have not complied with Section 6.1 of the Code.

13. In his evidence regarding the Property Factor duties complaint, Mr Jennings referred the Tribunal to productions 40 to 41, emails between him and Gemma Hawcroft sent between 30 July and 2 August 2021. He explained that these relate to a proposed meeting and the question of whether the owners of the flats had been asked about access for the IGW repair. There was also discussion about the fact that it is the stack pipe repair which is the issue. Mr Jennings pointed out in his email that Ms Hawcroft's email of 30 July concerns the other proposed work and not the unsealed stack pipes. He goes on to state that the owner of Flat 3 told him that she had not been asked for access and that she was willing to provide this. The response on 2 August only suggests that they have a meeting with Ian Watson. In his response to this email, Mr Jennings again asked when his request for the stack pipe work will be addressed. Mr Jennings said that these emails show that the Property Factor's insistence on a meeting and their failure to escalate his complaint in accordance with their procedures was a failure to carry out their duties. This had been the pattern, pushing his complaint under the carpet. He also disputed Ms Blair's claim that she had not understood the nature of the complaint until the CMD. In correspondence prior to the CMD, she had correctly identified the issue. In relation to the issue of consultation with the owners of the upper flats, Mr Jennings referred the Tribunal to an email from Mr Kelly (Production 52) in which Mr Kelly confirms that he had not been asked for access for the IGW repair. He explained that the other Homeowner has sold her flat but had also told him that she had not been asked. Mr Jennings then referred the Tribunal to Productions 64 to 66, an email exchange regarding his request for evidence of communication with the Homeowners. The Property Factor confirmed that they had no record of any such communication. Production 66 provides a summary of what took place at a face-to-face meeting with Ms Blair, Gemma Hawcroft, Ian Watson, the 2 owners of the upper flats and Mr Jennings. This took place on 28 October 2021. The emails also show that Mr Jennings understood that the Property Factor was arranging to instruct another surveyor.

The Property Factor's evidence

14. Ms Blair referred to production 11A and said that she had conceded at the CMD that the Property Factor had failed to respond to the request about the stack pipe work in March 2020. However, she advised the Tribunal that IGW had been instructed to proceed to the next stage in relation to all work referred to in their report. She said that she had not lodged evidence of this and could not say when they were instructed but an email would have been sent sometime in March 2020. In response, IGW sent the Fee Quotation dated 12 March 2020 (Production 12). There was then a delay due to the pandemic. She referred to production 29A which is a further letter from IGW dated 29 April 2021 regarding

the proposed work. The Tribunal noted that this letter includes a paragraph which states "Internal common pipe stacks have proven to be a problem within these blocks however we understand repairs have been undertaken previously where required therefore no allowance for related works has been made within this tendering exercise." Ms Blair said that this appeared to be a reference to past repair works which had been carried out and not a reference to the work proposed in the report. When IGW were instructed to proceed it was assumed that they were doing so in relation to all proposed work in their report. They were not instructed to exclude the stack pipe repair. Ms Blair referred the Tribunal to production 32 and said that although the form refers to sealing the stack pipes, there are other references to water leaks. It was also accepted that the responses to the written complaints did not address the stack pipe issue, but she wanted to arrange to meet with Mr Jennings to try to resolve matters. Furthermore, the Property Factor is only an administrator. They instructed IGW to project manage as they are surveyors. In relation to production 52, the email from Mr Kelly, Ms Blair confirmed that the owners of the upper flats were not specifically asked about access for the stack pipe work, but they had previously been asked about access for water ingress investigations by IGW.

- 15.** Ms Blair referred to the submissions dated 11 October 2021. She said that the title deeds stipulate that the homeowners are jointly responsible for the maintenance and repair of the property, not the Property Factor. The complaints are also denied because they did make progress regarding the question of water ingress. However, the homeowners would not provide the approval or funding for the work to be carried out. The proposed work regarding the roof terrace was the direct result of investigations carried out in response to Mr Jennings complaints and it was only clarified last year that the work he was requesting was the sealing of the stack pipes. Ms Blair also advised the Tribunal that she had been willing to consider instructing another surveyor, but Mr Jennings said he wanted to instruct his own.

Further evidence and submissions

- 16.** Mr Jennings advised the Tribunal that the repair work referred to in the Property Factor's correspondence is unrelated to his property. He also referred the Tribunal to production 26A and said that this followed a long conversation with Linda Bennet when his complaint was fully discussed. In the email he states, "A defect in the building construction has been identified in a report HK organized from IGW yet HK has failed to act of this". In response Ms Blair said that in this email and another dated 17 June 2020, Mr Jennings says that he needs a solution to water leaks. The emails imply that the leaks are ongoing. She also disputed the use of the word "defect" as this is not what was said in the IGW report. She advised the Tribunal that the proposed roof terrace repair work related to the terrace above Mr Jennings's property.

- 17.** In response to questions from the Tribunal about the Summers Inman report Ms Balr said that this was new information which needs to be progressed. The fire collars have not been mentioned before. This new information should be taken forward and the report is not relevant to the complaints. Mr Jennings disputed this stating that all the damage identified in the report is due to water

ingress. He referred to section 3 of the report which states that the use of a 160mm sleeve for a 110mm pipe is poor practice. He also advised the Tribunal that the report clearly endorses the need for making the seals round the stack pipes watertight.

The Tribunal make the following findings in fact

- 18.** The Homeowner is the heritable proprietor of the property.
- 19.** The Property Factor is the property factor for the property.
- 20.** The Property Factor failed to act upon a request by the Homeowner for a common repair to be arranged.

Reasons for Decision

Section 6.1 of the Code – “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.

- 21.** It is not disputed that the Property Factor has a procedure (in section 3 of its WSS) for reporting repair and maintenance issues. The Homeowner argues that this cannot be considered a Code compliant procedure because it is not fit for purpose and does not work. The Tribunal is not persuaded by this argument as it involves adding words to this section of the Code. Furthermore, it is not the absence of a procedure which seems to be the issue, but the failure by the Property Factor to follow it. The Tribunal is also not persuaded that the second part of the section applies. The Property Factor puts forward a somewhat contradictory argument about this section. They refer to the progress reports given in relation to the other proposed work and also comment that they could not provide updates on work which was not instructed. This is not consistent with their claim that IGW were instructed to progress all work outlined in their report. However, the Tribunal is not satisfied that they actually gave this instruction. The Property Factor did not submit copies of any communications or instructions sent to IGW. There was no oral evidence from Ms Bennet, who dealt with the matter, and Ms Blair could only say that an email “would” have been sent. The work referred to in the report (and in Mr Jennings email of 2 March 2020) was not included in the Fee Quotation provided on 16 March 2021 or referred to in the letter from IGW in April 2021. The Tribunal therefore concludes that the Property Factor could not provide a progress report or timescales for completion because the work was never instructed. Their failure to follow up on Mr Jennings report is certainly unsatisfactory, but it is not a breach of this particular section of the Code.

Property Factor duties

22. In their submissions, the Property Factor stated that the Homeowner's complaint is not about property factor duties and that he has extracted his "complaint" from a section of the Code. They further advise that their duties are as detailed in the WSS, which was not referred to, and that it is the Homeowners who are responsible for maintenance and repair of the common parts. The Tribunal notes that the language used by the Homeowner in the application and correspondence may have caused some confusion. However, it was clarified at the CMD that the complaint is about the failure by the Property Factor to progress the request for the stack pipes to be sealed following the recommendation in the IGW report, not a failure to provide a written response to a complaint about this failure. As Ms Blair pointed out in her written submissions and evidence, the obligation to maintain the common parts rests with the Homeowners in the development. This is in accordance with the title deeds. However, where the Homeowners have appointed a Property Factor to manage the development, the factor's duties derive from the title deeds/deed of conditions (where these make provision for maintenance and repair of the common parts) as well as the WSS. Section 4 of the deed of conditions for the property relates to the Property Manager. This section gives the Property manager the authority to call meetings and deal with maintenance and repair of the common parts (4.1). Clause 9 gives the proprietors rights of access to any part of the block for the repair and maintenance of pipes and other common parts. The WSS also confirms that the Property Factor will instruct common repairs (Section 3). Where a Property Factor has agreed to be appointed to manage a property, they are responsible for arranging repairs to the common parts on behalf of the Homeowners. The Tribunal is satisfied, having regard to the title deeds and the WSS, that it is part of the Property Factor's duties to respond to a report by a homeowner that a common repair is required and to arrange for that repair to be carried out, in accordance with the provisions of the deed of conditions and WSS. For non-emergency repairs they can only instruct work after consultation with the homeowners and once they have the required authorisation and funding. The Tribunal is therefore satisfied that, if the Property Factor failed to act upon the report by Mr Jennings that a repair was required to the stack pipes between his property and the flats above, this would amount to a failure to carry out property factor duties.

23. The Tribunal considered the documents lodged and evidence provided and noted the following:-

- (a) There were 7 episodes of water ingress at the property between June 2017 and 16 August 2020 (Production 59 - Homeowner's chronology). The Property Factor was notified of these episodes.
- (b) In February 2020, the Property Factor instructed IGW Associates to investigate the issue of water ingress. They issued a report which contains several recommendations. In the report they stated that were asked during the

inspection (presumably by Mr Jennings) if there was a solution to limit future leaks tracking down the pipe ducts into the property. They identified a “potential solution”, namely the sealing of the joint between the stack pipes and the concrete floor, although they stated that this would not prevent water ingress if there was “substantial leakage”.(Production 9).

- (c) On 2 March 2020, Mr Jennings emailed the Property Factor and asked them to proceed with the IGW recommendation in relation to the stack pipes. The response, which was sent the same day, did not acknowledge the request. (Productions 11A and B).
- (d) On 16 March 2020 IGW issued a “Fee Quotation” for remedial work at the development. This did not include the suggested stack pipe work which had been suggested in their report. (Production 12)
- (e) On 10 June 2020, Mr Jennings lodged a formal complaint with the Property Factor about the “lack of progress in resolving the water leak” which had been “going on continually for more than 3 years”. The email did not mention the IGW suggested repair or their report. Mr Jennings said that the email followed on from a lengthy telephone conversation and that Ms Bennet was fully aware of the issue. There followed correspondence with Gemma Hawcroft in relation to the complaint. Mr Jennings continued to ask for action to deal with the leak which he described as a “drip into my property persisting”. Ms Hawcroft advised that Reid Roofing had been instructed to investigate the roof patio and IGW to progress the instructed work. However, IGW had indicated that they had been unable to progress matters due to the impact of the pandemic. She also advised that the upper flats had been checked and there were no outstanding repairs required. (Productions 13 – 19).
- (f) On 20 July 2020 the Property Factor issued a letter to all the homeowners with a copy of the fee quotation, explaining that IGW had been instructed to compile a specification for the required work and to manage the project. The homeowners were invited to vote on the proposal. (Productions 20 and 21).
- (g) On 22 October 2020, Mr Jennings emailed Ian Watson of IGW and copied in Linda Bennet. He stated that the gap at the stack pipes must be completely sealed and made watertight before any flood testing is carried out. In a section of the email addressed to Linda Bennet, he asked her to arrange for access to the upper flats for this purpose. She responded the same day to advise that the flat owners were not prepared to allow access for disruptive work and said that the flood testing had been rejected by the homeowners. (24A and b).
- (h) On 26 April 2021, Mr Jennings sent a complaint by email about the lack of progress in resolving water ingress at his property. He referred to the IGW report, but not the specific part of the report which relates to the stack pipe repair. (26A). He asked for the relevant form to be sent out to him for completion.
- (i) On 29 April 2021, IGW wrote to the Property Factor with their Tender Analysis report for the proposed project. The letter indicated that they were proceeding

on the basis that there are defects in the rear raised terrace membrane and the proposed repair work relates to this. There is no specific reference to the stack pipe repair work referred to in their report, but the letter goes on to say, "Internal common pipe stacks have proven to be a problem within these blocks however we understand repairs have been undertaken previously where required therefore no allowance for related works has been made within this tendering exercise." (29A).

- (j) On 29 June 2021 Mr Jennings sent the completed "Application for formal complaint resolution" form to the Property Factor. The form stated that the Property Factor had made no progress "in resolving the water leak at 30 Salamander Street. This leak has been occurring for approximately four years" and "the water leak has never been addressed". The leak continues to persist" (Section 5). In a section headed "What is required for us to solve the problem" Mr Jennings wrote "The holes around the stack pipe need to be sealed to be watertight. The residential property above the unit is leaking – the seal at the joint slab should be sealed". (32). The complaint form was acknowledged, and a detailed response issued on 14 July 2021. This stated that the Property Factor had been unable to progress the raised terrace repair because they did not receive the required authorisation and funding from the homeowners. In response to the section "What is required for us to solve the problem" Ms Hawcroft stated "IGW... did request to undertake flood tests to the raised terrace located at the rear of your commercial until along with core cuts to flats 3 & 4. The homeowners of both flats 3 & 4 located above your property would not permit access to undertake the core cuts investigations as it was confirmed by the insurers that any damage incurred would not be covered."(Production 37).
- (k) On 20 July 2021, Mr Jennings responded to the letter of 14 July 2021 stating "Hacking and Paterson have incorrectly made the assumption that my complaint is related to the works detailed in the letter of 10 May 2021. ...My complaint relates to clause 4.3.2 on page 7 in the inspection report produced by IGW Associates. "At the time of the inspection we were asked if there was a potential solution to limit any future leaks tracking down the pipe ducts and into shops below. A potential solution would be to apply Sika Liquid Plastics proprietary fiberglass reinforced coating to the concrete floor slab where the pipe penetrates and extending the coating up the stack pipe approximately 150mm. This would seal the joint between the stack pipe and concrete floor slab however would not prevent was from seeping through slab joints in instances of substantial leakage"". "This is a relatively simple, non- invasive repair that needs to be carried out in the two flats above" (Production 38).
- (l) On 30 July 2021, Mr Jennings sent an email to Gemma Hawcroft in which he pointed out that an email from her, also dated 30 July 2021, related to the "largescale speculative works" which have "no bearing on my issue". "To reiterate this complaint relates to the unsealed holes in the concrete slab between my unit and the flats above around the two stack pipes" (Production 40c). In response he was asked to attend a meeting. He rejected this suggestion and asked for the complaint to be escalated to the next stage. On 4 August 2021, Gemma Hawcroft sent an email which says that Mr Watson had met with Mr

Jennings on several occasions and advised him that explicit authorisation from the flat owners would be required for the suggested work and that the Property Factor cannot instruct this work as it is internal to the properties in question and of a “private nature”.

(m) On 6 August 2021, IGW sent a letter to the Property Factor in response to an enquiry regarding the disruption involved in carrying out the sealing of the gap at the stack pipes. They indicated that “the proposed coating works would prove beneficial in restricting future water escapes from penetrating into the ground floor commercial premises via the common stack pipe penetrations were passing through the concrete floor/ceiling slab. The repair would not however remove the risk of future water ingress from flats directly above given that there are other routes for water to penetrate”.(Production 45). This was sent to Mr Jennings on 9 August 2021 with a request for a meeting and a comment that the flat owners would require to consent to the work. (Production 46)

(n) The application was accepted by the Tribunal on 30 August 2021. The Notice of acceptance states that the application comprises documents received by the Tribunal between 5 July and 17 August 2021.

24. The Homeowner lodged email correspondence with the Property Factor and IGW from October and November 2021. This relates to a meeting which took place on 28 October 2021. However, this correspondence postdates the application to the Tribunal. For this reason, the Tribunal did not take account of this correspondence when reaching its decision.

25. The Tribunal is also satisfied that the content of the Summers Inman report cannot be taken into account. Firstly, it was obtained after the application was lodged and contains information, findings, and recommendations not available to the Property Factor when it was dealing with the issue of water ingress at the property and Mr Jennings complaints. The recommendations regarding fire stopping are completely new and evidently require to be addressed. However, this was not the subject of the complaint. The report outlines a proposal to deal with water ingress if “there are likely to be relatively regular instances of water escape from the flats above” due to “inherent plumbing defects”. Again, these recommendations were not known to either party at the relevant time, although there may be some similarities with the IGW proposal. In the circumstances the Tribunal is satisfied that it cannot take the content of this report into account when assessing the Property Factor’s actions prior to 17 August 2021.

26. The Tribunal is not satisfied that the Homeowner has established that the work proposed by IGW should have been instructed and carried out in March 2020 or subsequently. The Property Factor would have had to consider the proposed work, establish what was involved and obtain an estimate of the costs. Thereafter they would have had to consult with the homeowners and seek authority for the work and funding if the cost exceeded the level of their delegated authority. However, it is clear from the documents and evidence that the Property Factor did not do this. In particular they failed to act upon the

following: -

- (a) The email of 2 March 2020. The Homeowner specifically asked about the stack pipe repair work. The repair had been referred to in the report which the Property Factor had instructed. The Property Factor concedes that this request was not acknowledged. Their claim that IGW were instructed to proceed with everything in the report was not supported by either documentary evidence or oral evidence from Ms Bennet who was the staff member dealing with matters at the relevant time. Ms Blair advised the Tribunal that she had spoken to Ms Bennet about the case only very generally and could not give an account of what her evidence might have been. The Property Factor did not take steps to ensure that IGW included this work when they moved forward to the next stage of the process.
 - (b) The email of 22 October 2020. This was sent to both IGW and the Property Factor. Ms Bennet responded to say that access would not be provided. However, she had not contacted the flat owners and her comment related to their refusal to provide access for the flood investigations. It appears that she chose to ignore, or failed to appreciate, that the request related to a separate repair.
 - (c) The “Application for formal complaint resolution” form dated 18 June 2021. There are several references in this form to ongoing water ingress. However, there is also a detailed, specific reference to the stack pipe work. This is allegedly addressed in the response but, as Mr Jennings pointed out in his reply dated 20 July 2021, the Property Factor has wrongly focused on the planned roof terrace work and did not address his request.
 - (d) The email of 30 July 2021 which specifically refers to the stack pipes and the relevant section of the IGW report. In her response it is evident that Ms Hawcroft fully understood the issue. She had discussed the matter with Mr Watson before responding. The Tribunal is confused by the description of the work as internal to the flats above and the statement that the owners would need to authorise access. It was conceded at the CMD that the stack pipes in question are common. They are located between the flats and the property. The title deeds stipulate that the homeowners and contractors instructed by them are entitled to access to common pipes for maintenance and repair. Furthermore, the flat owners were never asked for access for this repair, only for the flood tests, which had been rejected by the development because any resulting damage would not have been covered by insurance.
- 27.** The Tribunal is satisfied that until July 2021, the Property Factor did not appear to appreciate the nature of Mr Jennings complaint or chose to ignore it. If it was the former, there is no doubt that the Homeowner contributed to the misunderstanding by his repeated references to ongoing and continuing water leaks. Having considered the correspondence, the Tribunal also notes that his complaints about the issue were not as frequent or persistent as he suggested. However, there were several written requests between 2 March 2020 and 2 August 2021, which specifically asked for IGW proposal to be arranged. Even when the Property Factor acknowledged what was being requested (in early

August 2021) this did not result in appropriate action. The repair was wrongly classed as internal to the upper flats and the Property Factor did not obtain an estimate of the cost involved or arrange to consult with the homeowners.

- 28.** The Tribunal is therefore satisfied that the Homeowner has established that the Property Factor failed to carry out its duties in relation to his request for a common repair at the property.

Proposed PFEO

- 29.** In terms of Section 19(2) of the 2011 Act, a proposed Property Factor Enforcement Order (PFEO) accompanies the decision. The Tribunal has taken account of the potentially misleading information provided by the Homeowner regarding ongoing and constant water ingress in his correspondence with the Property Factor. The Tribunal has also noted that the Homeowner does not appear to have pursued his complaint between October 2020 and April 2021 and that he did not follow up on the Property Factor's failure to respond to his email of 2 March 2020. The complaint email of 10 June 2020 did not refer to the IGW report or the stack pipe repair. Furthermore, he did not respond to the letter of 20 July 2020 enclosing the fee quotation which did not include the stack pipe work. There was no further correspondence from him until 22 October 2020 and again he did not refer to the fee quotation or the report at that time. The Tribunal is therefore not satisfied that the Homeowner pursued his complaint as aggressively as is suggested in his application. The compensation proposed reflects that conclusion.

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.

[REDACTED]

Josephine Bonnar, Legal Member
22 April 2022

