



## **Decision**

**Section 17 of the Property Factors (Scotland) Act 2011 and the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors.**

**Chamber Ref: FTS/HPC/PF/21/3219 and FTS/HPC/PF/22/2246**

**Re: Property at 55 Kelvin Court, Glasgow, G12 0AG (“the Property”)**

**Parties:**

**Mrs Catriona Graham (“the Applicant” and “Homeowner”)**

**Newton Property Management limited, 87 Port Dundas Road, Glasgow, G4 0HF (“the Respondent” and “Property Factor”)**

**Tribunal Member:**

**Martin McAllister, solicitor, (Legal Member) and Robert Buchan, chartered surveyor, (Ordinary Member) (“the tribunal”)**

## **Background**

1. These are applications by Mrs Catriona Graham in respect of the Property in relation to the Respondent's actings as a property factor. The application is in terms of Section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act). The Applicant originally submitted an application in respect of the 2012 version of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (“the 2012 Code”) and, after the tribunal had commenced consideration of the application at a case management discussion on 17<sup>th</sup> March 2022, submitted an application in terms of the 2021 version of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (“the 2021 Code”).
2. The application in terms of the 2012 Code alleges that the Respondent has failed to comply with Sections 1, 2.5, 6.1 and 6.3 of the version of the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors (“the Code”) applicable up to 15<sup>th</sup> August 2021. It also states that the Applicant considers that the Property Factor has not carried out the property factor's duties in terms of the Act. The application was dated 20<sup>th</sup> December 2021 and was accepted by the Tribunal for

determination on 10<sup>th</sup> January 2022. The application was accompanied by a number of documents.

3. The application in terms of the 2021 Code alleges that the Respondent has failed to comply with the Overarching Standards 1, 2, 3, 5, 6, 9 and 11 and Sections 2.5, 2.7, 6.1, 6.3, 6.4 and 6.6 of the Code. It also states that the Applicant considers that the Property Factor has not carried out the property factor's duties in terms of the Act. The application was dated 4<sup>th</sup> July 2022 and was accepted by the Tribunal for determination on 4<sup>th</sup> August 2022. The application was accompanied by a number of documents.
4. For the purposes of this Decision, the two applications are together referred to as "the application." Many of the matters raised by the Applicant are duplications given that the events cross over the two versions of the Code. In submitting the applications, the Homeowner has tried to ensure that the complaints have been comprehensively covered in the two applications.
5. A case management discussion was held on 17<sup>th</sup> March 2022 and Hearings were held by video conference on 31<sup>st</sup> May 2022, 11<sup>th</sup> October 2022 and 8<sup>th</sup> March 2023. Administrative matters were dealt with on 31<sup>st</sup> May 2022 and no evidence was heard. On each occasion, the Applicant was represented by Mrs Ena Jess, a homeowner in the development at Kelvin Court.
6. The Applicant and the Respondent submitted written representations. The Respondent did not participate in either the case management discussion or the Hearings and confirmed that it wish to deal with the application by written submissions alone.
7. In respect of 2012 Code application, the Applicant withdrew reference to alleged breach of paragraph 1 of the Code.
8. In respect of the 2021 Code application, the Applicant withdrew reference to alleged breaches of paragraphs 2.5 and 6.3 of the Code.

#### **Matters not in Dispute**

9. The Applicant and her husband have owned the Property since August 2017. Flat 55 is situated on the ground floor. Kelvin Court is a development of two buildings containing flats which were built in 1938/1939. The development is B listed and is situated in Great Western Road, Glasgow.
10. The properties in Kelvin Court are served by a common heating system.
11. In August 2020, an issue of excessive condensation was noticed in the Property.
12. On 23<sup>rd</sup> September 2020, Alba Heating Engineers identified an issue concerning a fractured pipe and, after removal of asbestos, this was identified as a fractured

communal hot water flow pipe situated partly under the Property and partly under a common area.

13. A quantity of asbestos is and was contained within the underfloor area of the development.
14. The work to repair the water pipe necessitated removal of some asbestos by specialist contractors.
15. The Respondent initiated a claim on the development's insurers and a loss adjuster was appointed.
16. The nature of the work to repair the pipe involved disruptive work in the Property and common area. The Applicant had to move out of the Property and was in temporary accommodation from October 2020 to June 2021. Considerable damage was caused to the Property which has now been repaired.
17. In March 2021, a separate fracture of a communal water pipe under a common area was identified.
18. Asbestos was removed from the area of the second fractured pipe and the pipe was repaired. The work involved disruption to the floor of the common area.
19. In June 2022, asbestos was removed from the underfloor area in the common hallway and subsequently a joinery contractor reinstated the floor. The removal of asbestos in June 2022 was not covered by insurance and was charged to the common charges accounts of the homeowners in the development.

### **Applicant's overarching position**

20. The Applicant's views on the Respondent's actions or failure to act in connection with the repairs issues and their consequences inform her view that the Respondent failed to comply with the 2012 Code and the 2021 Code and also failed to comply with the property factor's duties.
21. The Applicant's belief is that the Respondent did not properly deal with the matters which arose from the fractured water pipes. She believes that the Respondent's actions led to delay in the works being completed and consequently increased the period during which she was required to stay in temporary accommodation.
22. The Applicant believes that the Respondent failed to properly deal with a contract for asbestos removal which led to increased costs being incurred by the insurers.
23. The Applicant considers that actions of the Respondent stopped her from being accommodated in an empty caretaker's flat in Kelvin Court which would have prevented her from staying in temporary accommodation some distance from the Property.

24. The Applicant believes that the Respondent failed to communicate properly with her, failed to take into account the distress caused to her by the length of time she had to be out of the Property and failed to properly respond to her concerns.

## 25. Findings in Fact

25.1 The Homeowner is the proprietor of the Property which is in the development known as Kelvin Court, Great Western Road, Glasgow.

25.2 A fractured hot water flow pipe caused damage to the Property and was identified in September 2020.

25.3 The Homeowner required to move from the Property while repairs were carried out.

25.4 The repairs included removal of asbestos.

25.5 A further repair which also included removal of asbestos was carried out in June 2022.

25.6 In respect of the repair in 2020, the Property Factor intimated a claim to the insurers of Kelvin Court and a loss adjuster was appointed.

25.7 The loss adjuster approved the costs for asbestos removal and the repair.

25.8 The Property Factor failed to maintain appropriate records for Kelvin Court and to ensure that there were adequate provisions in place for the retention of information when property managers left its employment.

## 26. Findings in Fact and Law

26.1 The Property Factor has failed to comply with the 2012 Code and the 2021 Code.

26.2 The Property Factor has failed to comply with the property factor's duties as defined in Section 17(5) of the 2011 Act

## Reasons

27. *Paragraph 2.5 of the 2012 Code: You must respond to enquiries and complaints received by letter or email within prompt timescales. Overall, your aim should be to deal with enquiries and complaints as quickly and as fully as possible, and to keep homeowners informed if you require additional time to respond. Your response times should be confirmed in the written statement*

*Paragraph 2.7 of the 2021 Code: A property factor should respond to enquiries and complaints received orally and/or in writing within the timescales confirmed in*

*their WSS. Overall, a property factor should aim to deal with enquiries and complaints as quickly and as fully as possible, and to keep the homeowner(s) informed if they are not able to respond within the agreed timescale.*

28. Mrs Graham said that the Property Factor knew about the issues with the Property on 23<sup>rd</sup> September 2020 and that it did not respond properly to the report which had been made to it. She said that she was not advised of what was happening and Mrs Jess described the delay of eight or nine weeks before matters progressed as “absolutely disgraceful.”
29. Mrs Graham said that she was not advised about contractors being instructed and that the communication with the Property Factor following the reporting of the issue was poor. Mrs Graham said that, in the period before work on the Property commenced, and in the period afterwards, she often telephoned the Property Factor and that when she did manage to speak to someone, promises to return calls were not met. She said that she was extremely concerned because there was a lot of condensation within the Property and she did not know what was happening.
30. Mrs Jess said that, in relation to the 2021 Code, the thread which runs through the failure to comply with paragraph 2.7 was that the Property Factor did not keep Mrs Graham properly advised on what was happening.
31. The property Factor’s position was that it had properly responded to communications from Mrs Graham within prompt timescales.
32. The tribunal considered the emails which had been lodged by the Applicant, her evidence and the written representations of the Property Factor. In 2020/2021, there were instances where responses took longer than would have been anticipated. From the content of emails sent to the Property Factor, the Homeowner appeared to be suffering frustration in not hearing from the Property Factor. This is demonstrated in the email from the Homeowner to the Property Factor on 5<sup>th</sup> November 2020 which was the fourth email from her asking when work was likely to start and bemoaning the lack of response.
33. The tribunal noted, from emails and productions lodged by the Property Factor, that it had instructed contractors and intimated matters to insurers within a reasonable timescale. It noted that a contractor had initially considered the issue in August /September 2020 to be because of a faulty shower.
34. The tribunal noted from the documents before it and from the oral evidence of Mrs Graham that the issue of the possible use of the caretaker’s flat was one which greatly exercised the Homeowner. The tribunal recognised, from the Documents before it, including the Deed of Conditions, that the granting of permission to occupy the caretaker’s flat was not one for the Property Factor but nevertheless the Property Factor did not consult all the proprietors in the matter and did not timeously respond to concerns raised by the Homeowner.

35. The tribunal recognised the extremely complex nature of the building and the repair. It also recognised that, at the time, there were significant restrictions because of Covid 19. The tribunal determined that, notwithstanding this and, from the evidence before it, the Property Factor had not complied with paragraph 2.5 of the 2012 Code and paragraph 2.7 of the 2021 Code. In respect of paragraph 2.5, the Property Factor had not responded in a timeous manner in relation to the caretaker's flat and, in respect of both paragraphs, had failed to deal with the Homeowner's enquiries in a timely manner.
36. *Paragraph 6.1 of the 2012 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.*
- Paragraph 6.1 of the 2021 Code: This section of the Code covers the use of both in-house staff and external contractors by property factors. While it is homeowners' responsibility, and good practice, to keep their property well maintained, a property factor can help to prevent further damage or deterioration by seeking to make prompt repairs to a good standard.*
- Paragraph 6.4 of the 2021 Code: Where a property factor arranges inspections and repairs this must be done in an appropriate timescale and homeowners informed of the progress of this work, including estimated timescales for completion, unless they have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required. Where work is cancelled, homeowners should be made aware in a reasonable timescale and information given on next steps and what will happen to any money collected to fund the work.*
37. Mrs Jess said that Mrs Graham accepted that the Property Factor had in place procedures for homeowners to report defects. She said that the Property Factor adopted a "hands off" approach to the issues of repair. She said that, after the matter had been reported, the Property Factor allowed two months to pass before action was taken. She said that this was stressful for Mrs Graham. Mrs Graham said that it was clear to her that no one in the employment of the Property Factor was able to deal with a repair of the magnitude which presented itself. Mrs Graham said that it was the loss adjuster who kept her advised of progress.
38. Mrs Graham said that, at no time, was she given an estimate for completion of the works. Mrs Jess said that the Property Factor failed to advise Mrs Graham that it was she who was responsible for organising the reinstatement of the internal parts of the Property. Mrs Graham said that she instructed a multi trade contractor to deal with this.
39. Mrs Jess said that there was a separate issue with a leak from a drainage pipe which was causing mould to the internal wall of the Property. She said that, for some time, the Property Factor failed to identify this as a common repair and had told her that it was a private repair. Mrs Graham said that eventually she had sent a photograph and the Property Factor accepted that it was a common repair and

that it had been referring to the wrong pipe. Mrs Graham said that the matter should have been resolved sooner and would have been if the Property Factor had come on site to inspect.

40. Mrs Jess said that the Property Factors had not arranged for repairs to be carried out in an appropriate timescale. She referred to the common area outside Mrs Graham's flat which was not reinstated after the repairs had been done. She said that Alba, the heating contractor had completed works on 29<sup>th</sup> November 2020 and that the Property Factor should thereafter have arranged for reinstatement of the flooring in the common area. She said that the reinstatement should have been done between November 2020 and June 2022.
41. Mrs Graham said that she had spoken to the loss adjuster about the delay in the reinstatement works and had been told that it was waiting for the Property Factor to respond.
42. Mrs Jess said that she believed that many of the problems experienced by Mrs Graham were as a consequence of the Property Factors appointing four different property managers in the space of two years. She said that the Property Factor appeared not to have arranged smooth handovers from a property manager to his/her successor.
43. Mrs Jess said that, when the heating contractor had completed the works to the pipe, the floor had been left flush but had warped and there had been shrinkage to the area of the hatch which caused an uneven surface. Mrs Graham said that the temporary repair in the common area caused the hatch to loosen and she tripped and had a nasty fall which caused her injury.
44. The tribunal was referred to an email from Mr Murdoch of Alba, heating contractor, to the Property Factor on 16<sup>th</sup> May 2022 where he stated that hatches had been flush fitting against the flooring and that it appeared that there had been movement possibly caused by damp conditions underfloor from another leak.
45. Mrs Jess said that, after the repair to the pipe under Mrs Graham's flat, there had been a repair required to a pipe under an adjacent property and the same common area.
46. Mrs Jess said that these works had been delayed partly as a consequence of the Property Factor not having clear information on what part of the underfloor area had been treated to have asbestos removed. Mrs Graham said that she had believed that all the asbestos in the underfloor area had been removed and that she told the Property Factor this. She said that Enviraz, the specialist contractor which had been involved in asbestos removal before the first fractured pipe could be repaired, should have removed all the asbestos and she thought that it had.
47. The tribunal considered the terms of an email sent by Mrs Graham to the Property Factor on 1<sup>st</sup> April 2022 in relation to the possible removal of asbestos to deal with the most recent repair of a pipe:

*"Honestly Lyndsay, there is no asbestos in the common landing. I don't believe you are instructing this. Its crazy. The asbestos was in the cupboard outside in the common area and it was cut off from everybody a period of time. Enviro have removed asbestos from this area. They charged £38,000 for this and now you are asking Reigart to come to remove from the common area. This means if true we as owners would have been subjected to Asbestos and visitors and workmen. I don't believe it. You will have to prove it to me, otherwise I will take you to task on this. When did Reigart check this out that there was asbestos in the common area? Something not right here? Am I misreading this?"*

48. The tribunal noted, from emails at that time between Mrs Graham and Mrs Jess and the Property Factor, that the Property Factor halted work on the repair of the fractured pipe until matters could be investigated further. Copies of emails from Reigart , the specialist asbestos contractor have been lodged. One email dated 5<sup>th</sup> April 2022 states "*The Control of Asbestos Regulations (CAR 2012) require that unless there is clear evidence that an area is free of asbestos, it should be presumed to contain asbestos.....Taking into consideration that the communal heating system has previously been lagged with asbestos insulation and that the service ducts and solum areas are known to be contaminated with asbestos debris no works in these areas should be carried out without suitable clearance being in place or under fully controlled conditions by a suitably licenced contractor (LARC).*"
49. Works appear to have been paused as a consequence of the representations of the Homeowner. An email from a member of staff of the Property Factor to the asbestos contractor on 5<sup>th</sup> April 2022 stated that she would have to investigate matters further upon her return from holiday. The works eventually proceeded with Reigart removing asbestos prior to completion of the repair of the pipe.
50. On 2<sup>nd</sup> April 2022, Mrs Jess, on behalf of the Homeowner, had contacted the Property Factor with regard to the lack of information on where asbestos was located: "...*the question arises: What information do you have on the presence of asbestos? Where, exactly is it?*"
51. Mrs Jess accepted that asbestos required to be removed. Mrs Graham questioned the cost of the earlier work carried out by Enviraz and said that it should have removed all asbestos which was in the underfloor area.
52. The Property Factor's representations state that it acted as quickly as possible to intimate the claim to the insurers for the development and thereafter to appoint contractors. The representations refer to the Property Factor advising the Homeowner of information when it was available. The Property Factor referred in its representations to having constantly updated the committee of the "constituted owners' association" and of having been in intensive correspondence with the loss adjuster with regard to repair of the flooring in the common area.
53. The tribunal considered the evidence and accepted that issues with the repair were complex. The matter of the fractured pipe had been intimated to insurers and loss adjusters had been appointed. The work involved not only repair of the pipe but also removal of asbestos prior to works commencing. Such works also involved the Health and Safety Executive and were carried out during the period of

coronavirus restrictions. Notwithstanding this, it was clear that the Property Factor did not have an accurate record of the work carried out at the first removal of asbestos. Had it done so, it would have been able to definitively state to Mrs Graham what area had been treated and there would be no reason to pause the works in 2022. The tribunal noted that the Homeowner's position was that the turnover of property managers contributed to the difficulties. The Property Factor's correspondence appeared to confirm this.

54. The tribunal did not find that the fall sustained by the Homeowner was as a direct consequence of any failing by the Property Factor. Whilst the Property Factor had been forewarned of the uneven floor and it took a considerable time to carry out the works, a temporary repair had been effected and the area had been marked with hazard tape.
55. On balance, the tribunal determined that the Property Factor had failed to comply with paragraphs 6.1 of the 2012 and 2021 Code.
56. There was no evidence that inspections were not carried out by the Property Factor after 16<sup>th</sup> August 2021, although the tribunal did consider that it could have been more pro-active with inspections at the time around the original problem with the fractured pipe. The tribunal determined that the Property Factor had not breached paragraph 6.4 of the 2021 Code.
57. *Paragraph 6.3 of the 2012 Code: On request, you must be able to show how and why you appointed contractors, including cases where you decided not to carry out a competitive tendering exercise or use in-house staff.*

*Paragraph 6.6 of the 2021 Code: A property factor must have arrangements in place to ensure that a range of options on repair are considered and, where appropriate, recommending the input of professional advice. The cost of the repair or maintenance must be balanced with other factors such as likely quality and longevity and the property factor must be able to demonstrate how and why they appointed contractors, including cases where they have decided not to carry out a competitive tendering exercise or use in-house staff. This information must be made available if requested by a homeowner.*

58. Mrs Jess said that Mrs Graham considers that the Property Factor did not go through the correct process when Enviraz was appointed to do the initial asbestos removal. She said that it was only after the Tribunal process had commenced that she was aware that another contractor, Abate, had been initially instructed. Mrs Jess said that the first asbestos removal contact had been "handed to" Enviraz and that there should have been at least two tenders. She confirmed that the insurers had paid for the contract. Mrs Jess said that the later work done by Reigart had been cheaper and she queried why it had not been instructed for the earlier work.
59. Mrs Graham said that it had been the loss adjuster who had recommended Reigart and that the Property Factor should have known of its existence and considered it for the first removal of asbestos. Mrs Graham stated that Enviraz was more

expensive than Reigart and that, if the Property Factor had followed proper procedures, the cost of the first asbestos removal would have been less.

60. It was put to Mrs Jess that the cost of Enviraz must have been sanctioned by the loss adjuster. She said that the loss adjuster took a pragmatic view and could not have anticipated what the final cost of all the work would have been. Mrs Jess said that costs such as Enviraz which had been paid by the insurers would have impacted on the renewal premium which had increased significantly.
61. The representations of the Property Factor state that, immediately upon being advised of the initial issue to Mrs Graham's flat, it had instructed Alba, the heating contractors and, when it reported the possible presence of asbestos, the Property Factor raised a purchase order with Abate Asbestos Surveyors on 29<sup>th</sup> September 2020. When Abate intimated that it could not do the work, Enviraz was instructed.
62. The tribunal had no evidence that it could rely on to support the contention of the Homeowner that it would have been cheaper for Reigart to have been appointed for the earlier work. In an ideal world, there would have been a tendering operation for the initial asbestos survey and subsequent removal but this was an emergency situation. Not only was this work requiring to be done during Covid 19 restrictions but the Property Factor had a duty to ensure the matter was dealt with speedily. Enviraz was on site relatively quickly. The tribunal considered it significant that the funding for the initial asbestos work was being provided by the insurers. It considered it reasonable to conclude that the loss adjuster would have exercised due diligence and would not have sanctioned the instruction of Enviraz if she had considered that there was any issue about the costs not being value for money. The Applicant had provided no evidence that the cost of the work carried out by Enviraz had impacted adversely on the insurance renewal premium.
63. The tribunal determined that, in respect of the matters complained about, the Property Factor had not failed to comply with paragraph 6.3 of the 2012 Code and paragraph 6.6 of the 2021 Code.

#### 64. Overarching Standards of Practice (OSP)

The Homeowner's application stated that the Property Factor had failed to comply with the following Overarching Standards of Practice:

OSP1 You must conduct your business in a way that complies with all relevant legislation.

OSP2 You must be honest, open, transparent and fair in your dealings with homeowners.

OSP3 You must provide information in a clear and easily accessible way.

OSP5 You must apply your policies consistently and reasonably.

OSP6 You must carry out the services you provide to homeowners using reasonable care and skill and in a timely way, including by making sure that staff have the training and information they need to be effective.

OSP9 You must maintain appropriate records of your dealings with homeowners. This is particularly important if you need to demonstrate how you have met the Code's requirements.

OSP11 You must respond to enquiries and complaints within reasonable timescales and in line with your complaints handling procedure.

65. Mrs Jess conceded that some of the matters identified in the Overarching Standards of Practice are dealt with in specific paragraphs of the 2021 Code. She was reminded that Property Factors were obliged to comply with the Overarching Standards of Practice from 16<sup>th</sup> August 2021 and not for any period prior to that date.
66. Mrs Jess said that, in relation to OSP1, the Property Factor was obliged to comply with the Codes of 2012 and 2021 and also the property factor's duties.
67. In relation to OSP2, Mrs Jess said that she did not consider that the Property Factor had been dishonest in any dealings with Mrs Graham. Mrs Graham said that she had required to liaise with the loss adjuster on certain matters and that this should have been done by the Property Factor. Mrs Jess said that Mrs Graham should have been allowed to occupy the empty caretaker's flat when she was decanted from the Property and that it was the Property Factor's fault that this was not possible.
68. In relation to OSP3, Mrs Jess said that Mrs Graham was not provided with information on the repairs. Mrs Graham said that, in relation to the complaint about the drainage pipe, the Property Factor supplied her with incorrect information.
69. In relation to OSP5, Mrs Jess said that the Property Factor had not applied its policies in a consistent manner. It had not allowed the caretaker's flat to be occupied by Mrs Graham but had allowed it to be used by roofing contractors as a welfare facility. She said that she did not consider that the Deed of Conditions for the Property allowed for this to be done.
70. In relation to OSP6, Mrs Jess said that she did not believe that the Property Factor had demonstrated that it had used reasonable skill in dealing with the development and the repair issue which has caused the application to be made. She said that the Development had had three property managers in the space of a six month period and she doubted that there was proper training for employees of the Property Manager. Mrs Graham said that the Property Factor had not used reasonable care in identifying whether or not the issue with the drainage pipe was a common repair or something which was the responsibility of Mrs Graham.

71. In relation to OSP6, Mrs Jess said that Mrs Graham and the other homeowners had not been advised of the need for an asbestos survey when the second fractured pipe had been identified.
72. In relation to OSP9, Mrs Jess said that she did not consider that there had been smooth handovers when a property manager replaced another and that there seemed to be poor record keeping.
73. In relation to OSP11, Mrs Jess said that the timeline which she had lodged showed periods of inactivity when matters were not being responded to or dealt with by the Property Factor.
74. The tribunal noted that many of the matters which the Homeowner was relying on to support her view that the Overarching Standards of Practice had not been complied with involved incidents, activity or alleged inactivity prior to 16<sup>th</sup> August 2021. It disregarded these because the Property Factor was not obliged to comply with the Overarching Standards of Practice until that date.
75. The tribunal considered the evidence. It determined that, from 16<sup>th</sup> August 2021, the Property Factor had not complied with all of the Overarching Standards of Practice.
76. The Property Factor did not demonstrate that it had an adequate system of record keeping which would ensure that there could be smooth and efficient handovers when property managers took up post. Two examples are provided here. In a letter to Mrs Graham dated 17<sup>th</sup> November 2021, the Property Factor stated: "*Investigating your complaints has been proven to be extremely challenging as both the previous property managers Andy O'Hare and Alastair Buchanan have now left the company. However, we do have access to their email account.*" In an email from the Property Factor to Mrs Jess dated 22<sup>nd</sup> June 2022, the Property Factor stated: "*Please note that due to Alastair leaving Newton suddenly Lynsey did not get a handover of the development.*" It seemed to the tribunal that the Property Factor, in carrying out its management of the Development should not have had to rely on interrogating email accounts of departed members of staff or the existence of a meeting between a new and departing property manager. Proper records should have been maintained which would have meant that members of staff had the required information to deal properly with the management of Kelvin Court.
77. There were also occasions when the Property Factor could have arranged for safe visits to the Property which could have given staff a better understanding of the works being undertaken, helped enable them to reassure and inform the Homeowner of what was being done and assisted them to provide a timescale for completion. The Property Factor did not demonstrate that, in relation to asbestos removal, adequate records were accessible by it. In all these matters, the tribunal determined that the Property Factor had failed to comply with OSP6 AND OSP11.

## Property Factor's Duties

78. Mrs Jess said that the Property Factor had failed to honour its written statement of services. She said that this was best illustrated by reference to the sections of the Code which form part of the application. She said that the property factor failed to comply with the property factor's duties by not allowing Mrs Graham to occupy the caretaker's flat and in that regard did not follow the terms of the Deed of Conditions for the Property by allowing it to be used as welfare facilities for roofing contractors.
79. In relation to the substantive issue with the caretaker's flat, the tribunal could find no fault in relation to the actings of the Property Factor. This was notwithstanding that it considered that the Property Factor's communications with the Homeowner with regard to the matter could have been better. Mrs Jess had accepted that some homeowners in the development had not been willing to allow the use of the flat for Mrs Graham but her position was that the Property Factor should have effectively allowed the occupation regardless of the views of other owners. The Property Factor was the agent of all the homeowners in the Development and it seemed to the tribunal that it could not go against the wishes of other owners. After all, the caretakers flat is owned in common by all the homeowners in the Development.
80. In November 2020, a neighbour, Mrs Christie sent an email to the Property Factor to bring attention to "*a serious matter regarding an underfloor leak at No.55 Kelvin Court.*" She advised that the leak was progressing across the common landing towards her flat and that the floor seemed very unstable. She added "*The landing is used by the proprietors to gain access to the back door to the garages and bins. The lift is also used by workmen and for deliveries etc. This is a serious Health and Safety issue and needs to be addressed as such.*" The email finishes "*I sincerely hope that this will be dealt with as a matter of urgency.*" The factor responded to the email and included the following: "Please be assured that any subsequent damage to the common or private areas will be covered by the buildings insurers." In the written representations of the Property Factor it is stated: "*At no point was the property manager aware that there was an issue with the floor directly outside Mandy's property.*"
81. The tribunal considered, from the evidence before it, that it is entirely possible that a more rigorous approach by the Property Factor might have allowed the two leaks and associated asbestos removal to be more comprehensively dealt with. The Property Factor's approach was that, since a loss adjuster had been appointed, there was less need for visits to the Property and development. Some of the costs were met from common charges so it would have been expected that the Property Factor would have been more involved.
82. The tribunal determined that the Property Factor failed to visit the Property at times which would have been beneficial to the repairs issue and failed to respond to issues of repair in an adequate manner. In these matters, the Property Factor had failed to comply with the property factor's duties.

## Submissions

83. Mrs Jess said that the issue with the repair needed to the fractured pipe and the subsequent consequences was such a major incident in the life of Mrs Graham. She had to vacate her home and was extremely inconvenienced. She said that whilst financial gain was not what prompted the application to be made, Mrs Graham had suffered financially because some items of clothing had been damaged because of the damp conditions in the Property. Mrs Jess also referred to the injuries and upset sustained by Mrs Graham as a result of the fall in the common area.
84. The written representations of the Homeowner state that clothes were ruined as a result of moths caused by the humidity in the Property prior to the repair being initiated. The Homeowner's estimate of loss of clothing is stated to be £5,000. The representations state that the clothing includes a fox fur hat, suede coat, and woollen hats.
85. The written representations on behalf of the Homeowner state that, as a consequence of her fall, she had to have chiropractic and dermatology treatment and consultations costing £360.
86. The written representations on behalf of the Homeowner state that the Property Factor contributed to the delay in restitution of the Property.

## Property Factor's Submissions

87. The Property Factor's submissions were contained in its written representations
88. The Property Factor produced a number of email exchanges which, it suggested evidenced that it had been in regular contact with the loss adjuster and that it had also kept the owner's committee informed of progress of the works. The representations state that it had pressed the loss adjuster to accept that the necessary repair to the flooring in the common area was connected to the original insurance claim.
89. The Property Factor's representations state that the intervention of the Homeowner caused the works to deal with the asbestos in the common area to be paused.
90. The Property Factor's representations state that, in regard to the repairs, it relied on the loss adjuster who had been appointed.

91. The Property Factor's representations state that it had properly dealt with matters

### Discussion and Disposal

92. The tribunal considered that there was no doubt that Mrs Graham had sustained a difficult experience. Her home was so damaged that she had to move out for a considerable time and she endured a period of uncertainty made more difficult by the coronavirus restrictions in place. The tribunal accepted that the Homeowner's experience had been caused by the fractured pipe.

93. The Property Factor had failed to comply with the Codes and had failed to comply with the property factor's duties. The tribunal considered that, on the balance of probabilities, any shortcomings of the Property Factor would not have materially affected the outcome for the Homeowner.

94. The Homeowner produced no evidence with regard to loss in respect of clothing and no evidence of the causal link of any damage to personal possessions as the result of the Property Factor's failings.

95. The Homeowner produced no medical evidence in connection with the fall which she sustained. In any event, the tribunal did not find that the Property Factor had been responsible for the accident. Nevertheless, the flooring took more than two years to be properly reinstated and the Property Factor could have done more to expedite matter by having, in the words of Mrs Jess, less of a "hands off" approach.

96. In finding that the Property Factor could have been more involved by visiting the Development, the tribunal did have regard to the often now forgotten restrictions and health concerns as a consequence of the covid restrictions and lockdown together with the significant backlog of work for tradespeople and property professionals when restrictions ended.

97. The Homeowner had been put to inconvenience and clearly had an anxious time which the tribunal concluded would have been exacerbated by the Property Factor's failings.

98. Taking all matters into account, the tribunal proposed that, in respect of the breaches of the Codes and the failure to comply with property factor's duties, it should make a property factor enforcement order requiring the Property Factor to pay the sum of £750 of compensation to the Homeowner.

99. In terms of Section 19(2) of the 2011 Act,

"in any case where the First-tier Tribunal proposes to make a property factor enforcement order, it must before doing so-

(a) Give notice of the proposal to the property factor, and

(b) Allow the parties an opportunity to make representations to them."

A document containing the proposed property factor enforcement order is issued of even date with this Decision.

## **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.**

**Martin J. McAllister  
Legal Member  
15<sup>th</sup> June 2023**