Housing and Property Chamber
First-tier Tribunal for Scotland

Decision on homeowner's application:

Property Factors (Scotland) Act 2011 Section 19(1)(a)

Chamber Ref: FTS/HPC/PF/17/0142

Property at 21 Rankin Court, Greenock, PA16 9AZ ("the Property")

The Parties:-

Thomas Kane, 21 Rankin Court, Greenock, PA16 9AZ ("the Applicant")

River Clyde Homes (a company limited by guarantee), Roxburgh House, 102-112 Roxburgh Street, Greenock, Inverclyde PA15 4JT ("the Respondents")

Tribunal Members:-

David Bartos - Chairperson, Legal member
Sara Hesp - Ordinary (Surveyor) member

DECISION

1. The Respondents have failed to move a planter to protect the utilities cover situated adjacent to the centre of the right or south elevation of the tower block Rankin Court, Greenock within a reasonable time which is a failure to carry out a property factor's duty as defined in section 17(5) of the Property Factors (Scotland) Act 2011.

2. The Respondents have failed to issue to the Applicant quarterly invoices including the management fee for the core services in 2017 which is a failure to carry out a property factor's duty as defined in section 17(5) of the Property Factors (Scotland) Act 2011.

3. The Tribunal having no jurisdiction to deal with the complaints of the Respondents' failure to comply with section 14(5) of the Property Factors (Scotland) Act 2011 dismisses those complaints.

4. The Applicant's other complaints are refused.

Introduction

5. In this decision the Property Factors (Scotland) Act 2011 is referred to as "the 2011 Act"; the Property Factors (Scotland) Act 2011 Code of Conduct for Property Factors is referred to as "the Code"; and the rules in schedule 1 to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2016 are referred to as "the Rules".

6. By application received on 18 April 2017, the Applicant applied to the Housing and Property Chamber of the First-tier Tribunal for Scotland ("the Tribunal") for a decision that the Respondents had failed to comply with certain property factor's duties owed to him. In particular he alleged that the Respondents had breached their duties:

(1) In not taking precautions to prevent council refuse lorries from damaging common drain covers within a reasonable period of time;

(2) In not issuing invoices on a quarterly basis;

(3) In not taking reasonable care to charge the person who caused the damage to the front door for the repair works rather than charging homeowners;

(4) In making payments to Inverclyde Council in connection with an external light at the garages when reasonable care would have disclosed that Inverclyde Council did not charge for such lighting;

(5) In not explaining to him the repair requiring to be done to a pathway at the foot of the tower block;

(6) In charging homeowers for repairs to the roof when they should have exercised reasonable care to recover the cost under a warranty from the contractors responsible for the roofworks needing repair.

7. The Applicant also sought a decision that the Respondents had failed to ensure compliance with the Property Factor Code of Conduct as required by section 14(5) of the Property Factors (Scotland) Act 2011 ("the 2011 Act"). The application alleged breaches of sections 1, 2, 6, and 7 of the Code. It did not specify the paragraphs of those sections which were said to have been breached. In response to a direction from the Tribunal, in a letter to the Tribunal dated 28 June 2017 the Applicant clarified that he relied on sections 2.1, 6.9, and 7.1 of the Code. No clarification was given in relation to section 1 of the Code.

8. The application included a covering letter which provided more detail.

Findings of Fact

9. Having considered all the evidence, the Tribunal found the following facts to be established:-

(a) The Property is a flat within the residential tower block known as Rankin Court in Greenock. The Property includes common parts of the block and the area surrounding it. There are over 50 flats in Rankin Court. Some flats, including the Property, are owner-occupied. Most are tenanted.

(b) The Applicant and his wife are co-owners of the Property. He resides there. The Respondents own many of the tenanted flats. The Applicant has acted as secretary of the Rankin Court Tenants and Residents Association ("RCRTA"). He did not hold that post at the time of the Tribunal hearing.

(c) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 12 December 2012. Their duty under section 14(5) of the 2011 Act to comply with the Code arises from that date. They issued a Statement of Services to the Applicant in connection with the Property.

(d) Rankin Court is reached from the main public road by a private road which is owned in common by the flat owners. The road is a cul-de-sac, terminating in a car park. Coming from the main road the private road passes the side of the block on the right side and then bends around to

the car park and the front of the block. There is a wide pavement area for pedestrians separating the roadway from the building itself. On the pedestrian area there are at least 3 square or rectangular utility covers. They are shown:

(1) in the un-numbered fifth photograph (towards the centre of the pedestrian area);

(2) in photographs titled "picture 3" (at the edge of the kerb) and "picture 2" (surrounded by 3 cones and tape and covered by metal sheets); and

(3) in photographs titled "pictures" 2 and 3 to the left of the edge-of-kerb cover and closer to the building.

(e) In 2009 to 2011 there were extensive refurbishment works to block. These had been instructed by the Respondents acting as factors for the homeowners in the block.

(f) In October 2013 the Applicant complained to the Respondents about Inverclyde Council refuse lorries passing over the pedestrian tarmac surface adjacent to the left or south side of the block. The Respondents considered the installation of concrete bollards to prevent this. They later agreed with the Applicant that wooden square planters would be placed on the tarmac to prevent lorry access. By December 2014 the planters had been installed in a line on the pedestrian area parallel to the private road leading to the block.

(g) In 2015 a refuse lorry damaged utility cover (2). The Applicant contacted the Respondents. The Respondents repaired the cover. The Respondents moved one of the planters out of the line and placed it immediately behind the repaired cover so that it would deter trucks from reversing over it.

(h) After this move Applicant placed a single cone over utility cover (1). He sought the moving of a planter to protect that cover from refuse lorries. At a meeting with the Respondents at Rankin Court on 23 May 2017 the Respondents had agreed that one planter would be moved in front of the coned central cover and another two moved forward by approximately 2 feet within the next two weeks. This was set out in the minute of the meeting. The action agreed had not happened by the Tribunal hearing.

(i) By e-mail of 11 December 2016 to the Respondents the Applicant made a complaint under stage 2 of the Respondents' complaints procedure. The e-mail did not contain any complaint of a breach of the Code of Conduct for Property Factors. The Respondents received the e-mail on or about 16 December 2016. The Respondents also received supporting material.

(j) By letter dated 17 January 2017 addressed to Rankin Court RTA, Respondents notified the Applicant of their decisions on the stage 2 complaint. The letter is referred to for its terms which are deemed to be repeated here. The letter indicated that it concluded stage 2 of the complaints process and advised the Applicant that if he remained dissatisfied his remedy was to apply to the Tribunal.

(k) By e-mail of 24 January 2017 to Respondents, the Applicant rejected various findings in the Respondents' letter of 17 January. He made no complaint of a breach of the Code.

(l) Following his application to the Tribunal the Applicant sent letters dated 24 April 2017 to the Respondents complaining of various breaches of the Code. He had not complained to the Respondents under the Code before. By letter to the Applicant dated 27 April 2017 the Respondents stated that the complaint would be dealt with under stage 1 of their complaints process. By e-mail to the Respondents dated 30 April 2017 the Applicant stated that his Code complaints referred to the stage 2 decision already made. On that basis the Respondents removed the Code complaints from their system. Under their complaints procedure the Respondents do not consider complaints already dealt with under stage 2.

(m) The Applicant received invoices dated 1 September 2016 and 7 November 2016. The former contained a quarterly maintenance charge. He has not received any quarterly invoice in 2017.

Procedure and Amendment

10. On or about 12 June 2017 the President of the Housing and Property Chamber of the First-tier Tribunal for Scotland referred the application to the present Tribunal for its determination. This was notified to the parties by letters from the Tribunal's clerk dated 12 June 2017 which also invited the parties to make written representations to the Tribunal and to lodge

supporting documents known as productions. Neither party made written representations (despite the Applicant stating in his response form that he would). The Applicant did lodge various productions.

11. A hearing was fixed to take place at Gamble Halls, 44 Shore Road, Gourock on 9 August 2017 at 10.00 a.m. The date and times were intimated to the Applicant and the Respondents by the said letters of 12 June 2017.

12. By letter of 15 May 2017 to the Tribunal office, the Applicant attached "updated sections" of the Code which he believed the the Respondents had not complied with. These included specific paragraphs of section 1 of the Code, and also sections 2.5 and 3.3. Once appointed the Tribunal understood the Applicant's letter of 15 May 2017 as being a request to amend his application. By direction dated 21 June 2017 and notified to the parties the Tribunal sought to obtain (among other things) written representations from the parties on whether the amendment sought was competent in the light of rule 27 of the Rules.

13. In a letter responding to the Tribunal dated 28 June 2017 the Applicant stated to the Tribunal that he believed that the amendment had been "sanctioned" by the Tribunal. By letter dated 12 July 2017 the Tribunal's clerk notified the Applicant that this belief was unfounded and invited him to in effect re-apply for amendment. Following a letter from the Tribunal's clerk to him dated 25 July 2017 the Applicant stated by letter of 26 July 2017 that he did not wish to amend his application but wished his "representations" to be considered by the Tribunal. In order to avoid misunderstanding, a different clerk to the Tribunal sent an e-mail to the Applicant dated 4 August 2017 in which she notified him that for the avoidance of doubt, the Tribunal would not be considering the specific paragraphs of section 1 of the Code, and sections 2.5 and 3.3 or representations under them.

14. The Applicant responded with an e-mail to the Tribunal dated 5 August 2017 in which he expressed his confusion with the process given that the Tribunal clerk's letter of 25 July 2017 indicated that the Tribunal did not intend to stop

the submission of documents forming "your representations". By letter to the Applicant dated 8 August 2017 and e-mailed to him on the same day, the Tribunal's clerk clarified that if a complaint was not in an application form a tribunal could not consider it (or representations or documents relating to it) unless the form was amended to include the complaint. It also notified the Applicant that he was at liberty to apply for amendment at or before the hearing on the following day, and drew his attention again to rule 27 as notified in the earlier direction.

15. The hearing took place on 9 August 2017 at 10 a.m. at the venue fixed for it. The Applicant attended the hearing. Mr Graham McDowall, Technical Manager of the Respondents attended also.

16. At the outset of the hearing the Applicant requested the Tribunal to allow amendment of his application in terms of his letter of 15 May 2017. The Respondents had no objection to the application in principle. Mr McDowall did however indicate that he had come prepared only to deal with the breaches of factor's duties which had been dealt with by the Respondents in their stage 2 letter dated 17 January 2017. Thus he was not "au fait" with the Respondents' written statement of services. The Tribunal explored with the parties whether there had been any notification to the Respondents of a breach of the Code before the application had been made. The Applicant accepted that he had not mentioned the Code before making the application. He said that his first mention of it to the Respondents was in pro forma letters which he had sent to the Respondents in April after his application had been received by the Tribunal office.

17. The Tribunal considered the terms of rule 27(1). This provides, "No application once made to the First-tier Tribunal may be amended to refer to any failure by the property factor which is not referred to in the notification from the homeowner to the property factor for the purpose of section 17(3)(a) of the [Property Factors (Scotland)] Act."

18. Section 17(3)(a) of the Act provides, "No such application [to the First-tier Tribunal] may be made unless (a) the homeowner has notified the property factor in writing as to why the homeowner considers that the property factor has failed to carry out property factor's duties or, as the case may be, to comply with the section 14 duty".

The reference to the "section 14 duty" is to the duty to comply with Code. The purpose of rule 27(1) and section 17(3)(a) are to allow the factor an opportunity to deal with a complaint before having it brought to the First-tier tribunal. In effect these provisions ensure that an application to the tribunal is essentially an appeal from the factor's decision on complaints already made or the factor's unreasonable delay in deciding such complaints.

19. Prior to the making of the application there was no mention of breach of the Code at all by the Applicant in his notification to the Respondents. Rather his focus was on breach of the property factor's other duties. In these circumstances the Tribunal was driven to conclude that the letter of 15 May referred to failures to comply with the Code which had not been referred to by the Applicant in his stage 2 complaint. That being the case amendment of the application to introduce provisions of the Code was incompetent. The request for amendment was refused.

Jurisdiction

20. Even without the amendment the application contained complaints of breaches of the Code under sections 2.1, 6.9 and 7.1 of which no notification had been given to the Respondents prior to the application. Section 17(3)(a) prevents an application being made in respect of breaches of the Code unless a homeowner has given prior written notification of the breaches to the factor. The Tribunal brought this to the attention of the Applicant and Mr McDowall and invited them to make representations to the Tribunal on whether the Tribunal could deal with the complaints under the Code in the existing application. Neither party had any representations to make and left this issue to the Tribunal. Given that no mention of Code breaches had been made by the Applicant before he lodged his application with the Tribunal,

the Tribunal decided that it had no power (jurisdiction) to decide the complaints regarding the Code in this particular process.

21. Nevertheless having regard to the oral representations made by parties at the hearing and the serious nature of one of the matters raised under the Code, the Tribunal thinks it proper to make observations on the merits of the Code complaints. While the observations under the Code are not binding, they remain important, particularly in relation to section 6.9.

22. In April and May 2017 the Respondents had, correctly, sought to treat his Code complaints as a fresh complaint and this is still an avenue open to the Applicant which if not resolved to his satisfaction could result in a further application to a tribunal.

Evidence

23. The evidence before the Tribunal consisted of:-

- The application form and its attachments
- The Applicant's productions with an inventory and separately in response to the Tribunal's direction
- The oral evidence of the Applicant
- The oral evidence of Graham McDowall
- A sketch plan drawn by the Applicant at the hearing and shown to Mr McDowall
- A Google photograph of the front of the block dated 2016 showing its refurbished stated with disabled ramp produced by the Applicant at the hearing, which Mr McDowall was content to be admitted as a production.

The Hearing

24. The Tribunal found that the Applicant gave oral evidence honestly. However he was vague in relation to the dates of repairs and other communications with the Respondents. He was able to check the dates of his photographs on his tablet at the hearing. His oral evidence, which understandably

overlapped with his submissions, is summarised in the reasoning below. It was accepted except in relation to the dates of work carried out by the Respondents or dates of warnings unless supported by written documents such as the Minute of the meeting of 23 May 2017. The Tribunal found Mr McDowall gave oral evidence honestly. However he was also vague on dates. When he was unable to answer or his information came from others he made this clear. The Tribunal accepted his evidence so far as it related to matters within his own knowledge.

Damage to common drain covers (manholes)

25. The Applicant complained that the Respondents had not taken precautions to prevent council refuse lorries from damaging common drain covers within a reasonable period of time. He explained the layout of the block, the tarmac pedestrian area around it, and the three utility duct covers or manholes which were on the pedestrian area. In about 2011 the council's garbage truck entered onto the tarmac and damaged one of the square covers for an electrical cable duct. Garbage was picked up at the rear of the building to which there was no direct vehicle access. As a response to the damage the Respondents had placed a line of square wooden planters along the edge of the kerb of the roadway to stop lorries from coming onto the pedestrian surface. Despite this lorries were still finding a way onto the tarmac at the end of the line of planters. He had given some warning to the Respondents' Russell Smith but it was probably oral and he could not remember when it had been given. A lorry had then damaged the cover nearest the kerb. He contacted the Respondents. The Respondents repaired the cover. Eventually the Respondents moved one of the planters out of the line and placed it immediately behind the repaired cover so that it would deter trucks from reversing over the cover. He referred to his photographs being picture 1 showing a lorry in the tarmac area before any planters existed, picture 2 on 15 June 2015 showing, picture 3 in October 2015 and picture 4 in 2015. He had placed a cone over the central cover as shown in picture 5. This was because that cover was still vulnerable to lorries passing over it despite the moved planter. At a meeting with the Respondents at Rankin Court on 23 May 2017 the Respondents had agreed that one planter would be moved in

front of the coned central cover and another two moved forward by approximately 2 feet within the next two weeks. This had not happened and the Applicant wanted an order requiring the planter to be moved to protect the central cover in picture 5.

26. The Applicant said that the charge for the cover repair was the £ 273.61 for "making safe pathway at left hand side of court" shown on an invoice dated 1 September 2016 as having been completed on 11 February 2016. However he was unable to explain why that was given as the date of completion when his picture 3 showed it completed in October 2015.

27. For the Respondents Mr McDowall said that the Applicant had first spoken to him about a broken drain cover in 2012 or 2013. The Respondents had carried out repairs and had not charged for them. The Respondents had aimed to ask an independent consultant David Eadie of Currie & Brown to consider the installation of concrete bollards as part of his overall report into works at the block. Then the Applicant had informed him that a resident was interested in gardening and could look after plants in planters instead of bollards. On the basis of this the Respondents had ordered and installed the planters. Plants had been put in although at the time it was not part of the Respondents' gardening maintenance contract. He was unsure if it was now part of the contract. He accepted that warnings of further damage had been made to the Respondents but said that these had not been disregarded. A planter had been moved. There was an issue with refuse collection at Rankin Court. This was because the refuse lorry coming into the cul-de-sac had to turn to go out. In addition Inverclyde Council had said that its refuse collectors were limited in the distance they would walk to pick up the bins which were stored at the back of the building to which there was no vehicular access. David Eadie had spoken to the council in 2014 or 2015 and had learned that a lorry couldn't turn in the car park. Nevertheless there had been no complaints from the council since the installation of the planters. Mr McDowall said that the moving of a further planter should not be too onerous. He would have no difficulty with an order from the Tribunal requiring the Respondents to move the planter. If this caused an extra cost

(and he could not say one way or the other) it would have to be passed to homeowners. The charge for £ 273.61 did not relate to the repaired cover which was on the "right side" of the building looking at it facing the front entrance.

28. From Mr McDowall's submission it appeared accepted by both parties that the Respondents had a duty under their factoring contract to take steps to prevent damage by lorries to the common tarmac pedestrian area around the building including utility covers. That being the case it was implied in that duty that the steps be taken within a reasonable period of time of the Respondents becoming aware of the hazard.

29. The e-mail from the Applicant to the Respondents rejecting the stage 2 decision indicated that the initial complaint had been made in October 2013. Another e-mail from the Applicant dated 21 May 2015 indicated that the planters had been installed in December 2014. Mr McDowall explained how the planters had come to be installed after initial consideration of the possibility of bollards. In the light of Mr McDowall's explanation the Tribunal did not find any breach of factor's duty in the time taken to instal the planters. There was no reliable evidence as to exactly when the Respondents had been warned about the risk of damage to the cover nearest the kerb and when the sole planter had been moved to protect it. In these circumstances the Tribunal found that there had been no breach of the factor's duty to move it within a reasonable period. Nor was there any reliable evidence of additional cost caused through the alleged delayed installation or removal. The Tribunal rejected the suggestion that the charge for £273.61 for making safe the pathway related to repairs to the cover. The date of completion given did not tally with the Applicant's photograph. The location of the cover would not normally be seen as at the "left side of the court".

30. With regard to protection of the central cover the Tribunal found that the Applicant had placed the cone to protect it as long ago as October 2015. From the stage 2 response it was clear that the Respondents were aware that there was an ongoing issue. This was confirmed at the meeting of 23

May 2017 where the Respondents agreed to move the planters to ensure protection of the central cover. A reasonable time had elapsed for this further move without it having taken place. In these circumstances the Tribunal found that the Respondents were in breach of a duty to move the planters to protect the central cover within a reasonable time.

Duty to issue bills timeously

31. The Applicant complains that the Respondents have breached their duty to issue invoices on a quarterly basis. He referred to two e-mails from him to the Respondents dated 14 and 29 May 2015 complaining about lateness of the bills. He had not had a quarterly bill in 2017 at all. He had received an "18 month" bill from the Respondents seeking payment of about £ 700.00 18 months in advance.

32. Mr McDowall agreed that the Respondents had not been the most efficient in biling in certain circumstances. Delay could be caused through requiring to agree an account with a contractor until the costs could be ascertained for invoicing to homeowners. The Respondents' Mr Monaghan had explained this in his e-mail to the Applicant dated 9 December 2016. He was unable to comment further on the 18 month bill. Otherwise Mr McDowall adhered to the Respondents' position that service charges are invoiced in the quarter following the quarter in which they are incurred and as said in his stage 2 letter "the length of time taken for certain repairs to complete" might mean that they were not charged in the "following quarter".

33. Under their written statement of services (on pages 3 and 10) the Respondents have a duty to homeowners to send them invoices for their charges. This has to be carried out to a reasonable standard (2011 Act, s.17(4)). It was accepted by the Respondents that there should be quarterly invoices which included at least the standard service charge. The standard service charge is the management fee for the core services as set out on page 3 and possibly also on page 4 of the written statement of services. The Tribunal found this to be a reasonable standard for the issue of invoices which the Respondents had a duty to follow.

34. The Tribunal has no reason to doubt the Applicant's evidence that no quarterly invoices have been issued in 2017. It found the Respondents in breach of their duty to issue quarterly invoices including the management fee for the core services.

Duty to charge wrongdoer for front door repairs

35. The Applicant complained that the Respondents had a duty to take reasonable care to charge the cost of repairs to the front door to the wrongdoer tenant who had caused them rather than to homeowners. He alleged that the charges in question were shown on the 1 September 2016 invoice as (1) "overhead door closer at front entrance" completed on 14 August 2015 and on the 7 November 2016 invoice as (2) "source and repair electrical fault with door entry system" on 18 August 2016 and (3) a similarly titled charge with the addition of "certain buzzers not functioning" on 14 September 2016. He had paid these charges (his share totalling £ 1.69). He said that there had been a problem with a drug-taking tenant and the Respondents' Mr Monaghan had suggested that the front door had been vandalised. He had asked the Respondents to put in CCTV but Mr Monaghan had not done this. He had been asking for CCTV since 2011. The Respondents had said that CCTV would require 24 hour monitoring but that was not necessary. He was not saying, however that these charges could have been avoided.

36. Mr McDowall stated that carrying out repairs due to vandalism was part of the Respondents' duties. If this entailed costs these would have to be passed to homeowners. Before a cost could be passed to a single tenant clear evidence was necessary that the tenant was the cause. His colleague S. McLeod would be developing the CCTV strategy.

37. The Tribunal considered that there was no evidence that the Respondents had acted unreasonably in charging homeowners generally for the front-door repairs rather than pursuing possible vandals. Factors must act reasonably. It is not part of their duties to pursue an individual suspected of

vandalism in the absence of evidence of their guilt. In the circumstances there was no breach of factor's duty by the Respondents in relation to the door entry charges.

Duty not to charge for external garage light

38. The Applicant complained that the Respondents had a duty to take reasonable care to avoid making payments for lighting to Inverclyde Council when the council did not charge for lighting. His complaint was focussed around a charge for attendance and repair of "an exterior lamp near garages" ordered on 6 September 2016 at a total cost of £ 28.00 for which his share of the charges totalled £ 0.48. He founded on an e-mail from Councillor Vaughan Jones to himself dated 5 April 2017 where the councillor wrote that she had checked with a Robert Graham concerning the street lamps. Mr Graham had informed her that the council had maintained the lights along the road to the car park as they fell into the category of "Public Lighting in private roads". He had also informed her that the Council did not "recharge RCH" for any public lighting, that he could not understand why RCH (the Respondents) had charged residents for replacing lighting, and that he would contact RCH "to get clarification on the issue". There was no follow-up e-mail from the Applicant to Councillor Jones. In the light of the 5 April e-mail the Applicant submitted that the Respondents should not have paid the council and passed such costs onto homeowners. He sought a refund of his share.

39. Mr McDowall stated that the road leading to the Rankin Court building was a private road. He confirmed that the maintenance of it fell within the factoring services provided by the Respondents. He said that the Respondents paid Inverclyde Council for lighting under a contract. He could not say how charges under that contract were calculated. He could not say whether the £28.00 charge was part of the contract between the Respondents and Inverclyde Council. He had no comment to make on the e-mail from Councillor Jones.

40. The Tribunal accepted that the road leading to the Rankin Court building was private. It accepted that maintenance of it and the lighting of it fell within the duties of the Respondents as property factors. This service appears on page 4 of the written statement of services. This means that the Respondents have to secure the lighting of the road. In carrying out this duty they have to take the reasonable care that they would take if they were acting on their own behalf.

41. The Tribunal was presented with direct evidence from Mr McDowall that the Respondents were charged by the council for the lighting and the conflicting indirect evidence of Mr Graham that the council did not "recharge" the Respondents for "public lighting". Mr McDowall was in charge of factoring until earlier this year. The Tribunal had the benefit of his direct evidence. It was unequivocal. In contrast Mr Graham's role in the council is unclear. The Tribunal did not have the benefit of his direct evidence as a witness. Also the e-mail recording what Mr Graham had told Councillor Jones suggested that there might be a reason, unknown to Mr Graham, explaining why homeowners had been charged for lighting. It was unclear what if anything Mr Graham had done subsequent to the e-mail. The e-mail had not been followed up. For these reasons the Tribunal found the evidence of Mr Graham less reliable than that of Mr McDowall whose evidence as to the Respondents being charged by Inverclyde Council for the lighting under a contract was accepted.

42. That being the case the question was whether it had been shown that the Respondents failed in their duty to take the reasonble care when entering into the lighting contract with the council that they would if acting for themselves. The Tribunal had no evidence as to the circumstances in which the contract had been entered into. For example there was nothing shown to the Tribunal that the Respondents should have realised that the council would provide lighting free of charge in any event and should not have entered into the contract. The Tribunal found that there was no breach of duty by the Respondents in relation to the lighting complaint.

Duty to explain repair to pathway

43. The Applicant complained that the Respondents had a duty to explain the repair done to a pathway at the foot of the building. The repair was that with a total cost of £ 273.61 and a date of completion of 11 February 2016 as shown on the invoice of 1 September 2016. Apparently the Respondents' Mr Gourlay had come with a contractor but he, the Applicant had not been consulted at all.

44. Mr McDowall referred to repairs on the non-slip pathway on the ramp for the disabled leading to the front door. These had been carried out by Luddon contractors and involved the lifting and re-laying of the floor surface. This did not appear to relate to the pathway repair which in his stage 2 letter he had said had been carried out by Morris & Spottiswood.

45. The Tribunal found that in their invoice of 1 September 2016 the Respondents sought reimbursement for an outlay of £ 273.61 in respect of "Make safe pathway at left hand side of court". There was no apparent duty on the Respondents to do more than that by way of explanation. The Applicant did not complain that the work had not been done or that he could not identify the work. The Tribunal found that there was no breach of duty by the Respondents in relation to the pathway complaint.

Duty to pursue warranty claim in respect of roof.

46. The Applicant complained that the Respondents had a duty to take reasonable care to recover the cost of roof repairs from a contractor responsible for defective roofworks rather than charging the cost to homeowners. He accepted that the Respondents had made a refund in respect of work to the door leading to the roof. He said that there was still a tenant in Rankin Court with water ingress. He had been told that the Respondents had a 20 year warranty. Mr McDowall said that the Respondents were expecting a report on the roof within the next few weeks.

47. The Tribunal had no evidence that the Respondents had a warranty claim in respect of the roof which they had unreasonably failed to pursue. In these

circumstances the Tribunal found that there was no breach of property factor's duty as complained.

Section 2.1 of the Code

48. Section 2.1 of the Code provides that a factor must not provide information which is misleading or false. At the hearing the Applicant spoke to the Respondents making a false statement in their letter of 9 July 2013 to him and his wife where their Director of Business Support, Jim Aird, wrote "I refer to the works carried out to the above block [Rankin Court] which completed on 3/4/2011, short particulars of which are set out in Part A of the Schedule annexed". Part A of the Schedule in turn stated external investment works had been carried out including "Replacement of Water Storage Tanks". The Applicant told the hearing that the original tanks had been below ground and that they did not have to be taken away. The entry stating that they had been replaced was false. The Applicant added that the inclusion of "Decoration of External Entrance Areas" in Part A was also false or misleading. There had been no such decoration.

49. Mr McDowall's position was that the Respondents believed that issues concerning the list of works in Part A had been dealt with. As noted above, the Tribunal found that it had no jurisdiction to deal with this complaint. It had no comment to make other than to observe that the Respondents' understanding that this issue had been dealt with underlines the importance of a complaint being made in writing to a factor before any application to the Tribunal.

Section 6.9 of the Code

50. Section 6.9 of the Code provides, "You must pursue the contractor or supplier to remedy the defects in any inadequate work or service provided. If appropriate, you should obtain a collateral warranty from the contractor." However it must be implicit that section 6.9 applies only if the factor has been made aware of the defects in service or inadequate work in question.

51. The Applicant referred to an extract from a report prepared by David Eadie of Currie & Brown UK Ltd, building surveyors. On page 13 he pointed to two paragraphs. The first stated that fire door installations to the ground floor new tank room and lobby (including the compartment door between the ground floor lift lobby and the escape stair) had not been constructed as per the approved drawings or to building regulation standards. In particular the doors and frames did not provide 60 minute fire resistance with the surrounding construction being in combustible materials.

52. The second paragraph noted that the ramp serving the rear of the building had not been constructed as per approved drawings or to building regulation standards with the gradient being approximately 1: 8 and greater than the minimum 1: 12.

53. The Applicant's complaint was that the Respondents had done nothing to pursue the original contractor in respect of these inadequacies. He had first raised these issues with Mr Eadie in March 2014. He could not say how much he paid for these works as the bill had not been broken down.

54. Mr McDowall accepted that the Eadie report had been obtained in January 2015. He accepted that he had no real explanation for the delay in pursuing Wates, the main contractor at the time of the refurbishment which included these works. The principal individuals behind Wates had moved on but no letter had been sent to Wates in connection with the defects pointed out by Mr Eadie. He said that the Respondents would be chasing Wates. The doors had not been replaced since the Eadie report.

55. The Tribunal remains greatly concerned over the approach of the Respondents towards these defective pieces of work and in particular to the fire doors which it appears do not meet safety standards. On the face of it the Respondents' continuing inaction is endangering residents. While its observations are not binding, the Tribunal observes that the Respondents might be in breach not merely of section 6.9 of the Code but also of their property factor's duty of maintenance in relation to serious issues of health

and safety. Had the Tribunal power to do so, it would have found a breach of section 6.9. It is of course open in these exceptional circumstances for the Applicant to raise both breaches in a complaint with the Respondents.

Section 7.1 of the Code

56. Section 7.1 of the Code provides,

"You must have a clear written complaints resolution procedure which sets out a series of steps, with reasonable timescales linking to those set out in the written statement, which you will follow. This procedure must include how you will handle complaints against contractors."

57. The Applicant complained firstly that the Respondents had not followed their complaints procedure in removing his complaints of breach of the Code made in April 2017 from their system rather than resolving them. Secondly he complained that the stage 2 decision in Mr McDowall's letter of 17 January 2017 had exceeded the 20 working day time limit set by the Respondents in their written statement of services and complaints procedure. Mr McDowall had nothing to submit under this complaint other than to observe that the timing of his letter was influenced by the holiday period.

58. Had it had power to decide these complaints, the Tribunal would have rejected the first and upheld the second. The first complaint would have been rejected because the Tribunal would have treated the Code complaints in April 2017 as being part of the stage 2 complaint being taken to it and therefore the Respondents would have been following their own procedure in refusing a complaint already covered by a stage 2 decision. With regard to the second element, the critical question would have been whether or not the stage 2 complaint was received on 11 or 16 December 2016. Despite a direction to the Respondents to produce the complaint received on 16 December, they did not do so. The only document evidencing a stage 2 complaint was the Applicant's e-mail of 11 December. There was more than 20 working days between its date and the stage 2 decision letter.

Proposed Property Factor Enforcement Order

59. Having decided that the Respondents failed to carry out their "property factor's duties" as set out above, the Tribunal proposes to make a property factor enforcement order in terms of the document under section 19(2)(a) of the 2011 Act accompanying this decision.

60. Part (1) of the proposed order seeks to provide a remedy to the breach in relation to the planters as offered by Mr McDowall and agreed by Mr McLaghlan and Mr Russell of the Respondents at the meeting of 23 May 2017.

61. Part (2) of the proposal seeks to remedy the breach in late billing. The only invoice with quarterly charge produced to the Tribunal is dated 1 September 2016. On the basis of this invoices should have been due on 1 December 2016, 1 March 2017 and 1 June 2017. The Applicant complains of non-receipt of invoices for 2017.

Court proceedings

62. The parties are reminded that except in any appeal, no matter adjudicated on in this decision may be adjudicated on by a court or another tribunal.

Opportunity for Review, Representations and Rights of Appeal

63. The Applicant and Respondents may seek a review of and make representations to the First-tier Tribunal on this decision and the proposal. Any request for a review or the making of such representations must be made in writing to the Tribunal by no later than 14 days after the day when this decision was sent to the parties. It must state why a review is necessary.

64. The opportunity to make representations and to seek a review is not an opportunity to present fresh evidence, such as additional documents. Bearing in mind that the parties have already had an oral hearing, should the parties wish a further oral hearing they should include with their request

for a review and written representations a request for such a hearing giving specific reasons as to why written representations would be inadequate.

65. If the First-tier tribunal remains satisfied after taking account of any representations that the Respondents have failed to comply with their duties, it must make a property factor enforcement order.

66. In the meantime and in any event, the Applicant or the Respondents may seek permission to appeal on a point of law against this decision to the Upper Tribunal by means of an application to the First-tier Tribunal made within 30 days beginning with the date when this decision was sent to the party seeking permission.

67. All rights of appeal are under section 46 of the Tribunals (Scotland) Act 2014 and the Scottish Tribunals (Time Limits) Regulations 2016. The seeking of a review and the making of representations does not suspend or otherwise affect this time limit.

D Bartos

Signed ....Legal Member and Chairperson

15th August 2017 Date