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/17/0241

Property at 4/25 Gillsland Road, Edinburgh EH10 5BW ("the Property")

The Parties:-

Lorence Fizia and Mrs Kathleen Fizia, 4/25 Gillsland Road, Edinburgh EH10 5BW ("the Applicants")

Bield Housing & Care, registered under the Industrial and Provident Societies Act 1965, 79 Hopetoun Street, Edinburgh EH7 4QF ("the Respondents")

Tribunal Members:-

David Bartos - Chairperson, Legal member
Carolyn Hirst - Ordinary (Housing) member

DECISION

1. The Respondents failed under section 4.2 of their Statement of Services to provide a breakdown of expenditure of the gardening group for the Gillsland Grove Development, Edinburgh from 14 April 2016 to 31 March 2017 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 failed to ensure compliance with section 2.1 of the Property Factors Code of Conduct in their letter of 14 April 2016 to homeowners in the said Development.

3. The Applicants' other complaints are refused.

Introduction

4. 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".

5. By application received on 27 June 2017, the Applicants 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 ensure compliance with the Code as required by section 14(5) of the 2011 Act.

6. The Applicants also sought a decision that the Respondents had failed to comply with certain property factor's duties owed to them.

Findings of Fact

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

(a) In the Merchiston area of Edinburgh at 4 Gillsland Road lies the Gillsland Grove development. The development lies on the north-east side of Gillsland Road. It comprises two buildings, one being a converted 19th century villa, the other being a modern block of flats in an "L" shape. Across both buildings there is a total of 58 flats including the flat of the former warden. The development has an access drive for vehicles, parking places, pavements, a courtyard between the two buildings, and at the rear and side of the modern block and bounded by the rear and side walls of the development, an "L-shaped" area of garden ground. The access drive leading from Gillsland Road is known as Gillsland Grove.

(b) The Property comprises a flat within the modern building together with a one fifty-seventh indivisible share of the ground of the whole development including the access drive and the garden ground. The Applicants are co-owners of the Property. They have been so since 2012. They reside at the Property.

(c) The Property, the common ground and the other houses in the development are burdened by, among others, real burdens in a Feu Disposition ("the Deed") by the Trustees of Bield Retirement Housing Trust to Elizabeth McConnell. The Deed was recorded in the General Register of Sasines for the County of Midlothian on 22 June 1992. It is set out in the Applicants' Land Certificate for title number MID142268 in the Burdens Section at entry No.5.

(d) The Respondents became a registered property factor in terms of the Property Factors (Scotland) Act 2011 on 1 November 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 Applicants in connection with the Property. ("WSS").

(e) On or about 26 April 2017 the Applicants made a written complaint to the Respondents by e-mail. In the e-mail the Applicants complained of a breach of sections 2.1 and 2.4 of the Code.

(f) The Applicants made a second written complaint headed "Official Complaint Regarding Your Intentions to use the Capital Repair Fund for Planters/Summer House/Outdoor Seating/Pergola/Tools". This complaint alleged in addition to the matters in the first complaint, breaches of sections 1.1a, 3.3, and in substance 6.9 of the Code.

(g) On 3 May 2017 the Applicants met with Stuart Dow, the Director of Asset Management for the Respondents. The Respondents replied to the complaints with Mr Dow's letter of 26 May 2017. In that letter the Respondents did not address the alleged breaches of the Code. Rather they addressed four related issues which they specified in their letter. These did not include a breakdown of the expenditure of the Gardening Group.

(h) The Applicants made a third complaint with their e-mail dated 4 June 2017 to the Respondents. In it the Applicants complained of a breach of provisions in their title deeds which provided that the Capital Repairs Fund be held to cover the costs of "major maintenance, repairs and renewals" and not improvements. They also complained of money being given by the Respondents to the Gardening Group comprising a few owners addressed "To whom it may concern" to the Respondents. Finally they complained, again, of the lack of a breakdown of the monies spent by the Group.

(i) The Respondents replied with their e-mail of 15 June 2017. This did not include a written breakdown of the Gardening Group expenditure.

(j) The Applicants remained dissatisfied and by application received by the Tribunal on 27 June 2017 sought a determination that the Respondents had breached the various provisions of the Code and also other property factor's duties based on the Written Statement of Services.

(k) Following the application to the Tribunal, after the holding of the 2017 AGM in September 2017, the Respondents provided to the Applicants a spreadsheet of expenditure of the Gardening Group (covering a period from 30 May 2016 to 20 March 2017).

Procedure and Amendment

8. On or about 28 August 2017 Patricia Pryce a Convener of the Housing and Property Chamber of the First-tier Tribunal for Scotland with delegated powers under section 18A of the 2011 Act, referred the application to the present Tribunal for its determination. This was notified to the parties by letters from the Tribunal's clerk on or about 6 September 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 in response. The Applicants did lodge various productions.

9. A hearing was fixed to take place at George House, 126 George Street, Edinburgh EH2 4HH on 21 November 2017 at 10.00 a.m. The date and times were intimated to the Applicants and the Respondents by the said letters from the Tribunal's clerk which informed the parties of the referral to the Tribunal.

10. With a view to clarification and narrowing of the live issues between the parties, the Tribunal issued a detailed direction dated 11 October 2017 to both parties. The direction required the Applicants to provide a written statement to the Tribunal accompanied by various documents by no later than 1 November 2017. It required the Respondents to provide a written statement with certain documents by no later than 1 November 2017. The direction also allowed the parties to lodge skeleton arguments in response

to the written statements. The Respondents lodged a written statement with certain documents by 1 November 2017. The Applicants were outwith the U.K at the time of the direction and their statement and documents was received by the Tribunal on 7 November 2017. They applied under rule 18(3) of the Rules for their statement and documents to be considered by the Tribunal on the basis of "good reason" for their admission.

11. On or about 17 November 2017 the Applicants informed the Tribunal's clerk that an agreement over the dispute had been reached with the Respondents in principle but that it required to be typed up for final approval. On this basis they sought a postponement of the hearing. By e-mail of the same date the Respondents' then solicitor Mr McKendrick of T.C. Young, solicitors, confirmed that this was indeed the position and also sought a postponement of the hearing. He indicated that it should be finalised by mid December. The Tribunal granted the postponement of the hearing but fixed a fresh hearing at the same venue and time but to take place on 29 January 2018. It also issued a Direction No.2 dated 28 November 2017 in which it directed the parties to notify the Tribunal by no later than 5 January 2018 whether the dispute raised in the application had been resolved and the application could be withdrawn. It also allowed the Applicants' documents and statement in response to the first direction to be admitted into the case albeit late.

12. By e-mail dated 5 January 2018 to the Tribunal the Applicants indicated that while there had been discussions with the Respondents one matter was holding up final agreement, namely the terms of a revised written statement of services. They also lodged a skeleton argument. For their part the Respondents in their e-mail dated 5 January 2018, agreed that this matter remained outstanding. Accordingly the Tribunal issued a Direction No.3 dated 11 January 2018 directing the Applicants to confirm whether certain complaints within their application were still being insisted upon or were to be deemed withdrawn, and to address whether the Tribunal had jurisdiction to consider various complaints. The direction also sought various documents from the Respondents.

13. In an e-mail responding to the Tribunal dated 15 January 2018 the Applicants stated to the Tribunal that they no longer insisted on their application in so far as it alleged breaches of sections 2.1 (maintenance), 3.1 (owners' forum), 4.4 (approval of budge), C3 (minuting), and C4 (balloting) of the WSS. Otherwise they indicated that they adhered to the application. For reasons unexplained, the Respondents' solicitors did not provide the information or documents sought by Direction No.3.

14. The hearing took place on 29 January 2018 at 10 a.m. at the venue fixed for it. The Applicants attended the hearing. Mrs Fizia made submissions on behalf of both Applicants. The Respondents were represented by Mr David MacInnes, Owner Services Manager of the Respondents. The Respondents' Director of Asset Management, Mr Stuart Dow attended also.

Evidence

15. The evidence before the Tribunal consisted of:-

- The application form, including a 5 page letter and its attachments, described and numbered as "folders"
- The Applicants' productions (described as "folders") with an inventory listing 24 folders sent on two separate occasions
- The Applicants' productions numbered 1 to 5 including an income and expenditure account for year 2016/2017 and a budget for 2018/19
- The Applicants' productions numbered in response to the Tribunal's first direction as 1 (d) (i), 1 (e), etc
- The oral evidence of the Applicants
- The Respondents' productions numbered in response to the Tribunal's first direction as 1 to 6
- The oral evidence of Mr MacInnes

The Hearing

16. The Tribunal found that the Applicants gave oral evidence honestly and accepted their evidence. The Tribunal had no reason to doubt the reliability of that evidence. The evidence of Mr MacInnes was given in an honest fashion. However the Tribunal was unable to accept it in relation to specific matters such as the meeting in April 2016, on account of its unreliability.

The Written Statement of Services ("WSS")

Section 1.1 of the Code of Conduct

17. The Applicants complained that the Respondents were in breach of their duty under section 1.1 of the Code the relevant part of which provides,

> "You must provide the written statement:
> . . . to any homeowner at the earliest opportunity (not exceeding one year) if there are any substantial changes to the terms of the written statement."

18. The Applicants' complaint was that there had been changes to two elements of the WSS. Firstly in schedule 4, paragraph 1.3 provided that "Parking at the development is restricted to owners and their visitors. Mrs Fizia submitted that the driveway within the development which she called "Gillsland Grove" was not a private driveway and equally that the parking spaces were not private. She referred to an e-mail from Alan Dunlop of City of Edinburgh Council dated 6 August 2015 replying to Mr Fizia. In it Mr Dunlop wrote that for the Council to adopt a road and place it on the list of public roads there required to be a roads construction consent and a completion of the construction process to the satisfaction of the Council. The Applicants were unable to produce any evidence, however that this process had been completed and that Gillsland Grove had been added to the list of public roads. Mrs Fizia submitted nevertheless that the road was not a private one. She was not able to indicate any change in the status of the road since they had taken up residence and the issue of the existing WSS. Mr MacInnes submitted that the road and parking spaces were private and that even on the road construction consent plan referred to in the Council's e-mail, the parking spaces were not marked as potentially public.

19. Without sight of the full construction consent the Tribunal was not in a position to say whether the parking spaces were potentially public. However on any view the Tribunal was unable to accept how a road or parking places which had not been adopted could nevertheless be public at the present time simply because, if Council processes were followed, it could be placed on the list of public roads in the future. It followed that there was no change of status of the parking places and no breach of section 1.1 of the Code in not sending an altered WSS.

20. Turning to the second element of the WSS said to need updating, Mrs Fizia founded on section 1.4 of schedule 4 of the WSS. This provides that "A concessionary TV Licence is available for those under 74 years old and occupiers require to provide the Manager/Factor with their national insurance number to be able to qualify".

21. Mr Fizia gave evidence that he had been contacted by TV licencing and told that since the warden had ceased to live at the development, the owners did not qualify for a concessionary TV licence. He had then contacted the Respondents and been told that one should still be in place for him and Mrs Fizia as they had a preserved right as existing tenants but that the concession would no longer apply for new residents under 75 years of age.

22. Mrs Fizia submitted that on the basis of this change the WSS should be altered. Mr MacInnes accepted Mr Fizia's evidence as accurate but submitted that the WSS remained accurate for the Applicants.

23. The Tribunal found that given that this change did not affect the Applicants as such it was not substantial so as to merit the issue of an updated WSS to the Applicants. There was therefore no breach of section 1.1 of the Code.

24. However the Tribunal did note that the change appeared to be linked to the withdrawal of the warden (or "Scheme Manager" as he/she is referred to in WSS). The Tribunal observed that such a change (if validly approved by homeowners) might well merit the issue of a fresh WSS to the Applicants (and possibly other homeowners in the development). In such a fresh WSS a change

to section 1.4 of schedule 4 to clarify the position for both the Applicants and future owners of the Property would be appropriate.

Letter regarding residents' meeting of 14 April 2016

Section 2.1 of the Code of Conduct

25. The Applicant complained that the Respondents were in breach of their duty under section 2.1 of the Code which provides,

> "Good communication is the foundation for building a positive relationship with homeowners, leading to fewer misunderstandings and disputes. In that regard:
>
> 2.1 You must not provide information which is misleading or false."

26. The Applicants' complaint was that the Respondents' letter to them of 28 April 2016 addressed to "The Residents of Gillsland Grove" headed "Residents Meeting – Thursday 14th April 2016" was misleading.

27. The letter had the following paragraph:

> "**Proposed Works & Improvements to Grounds**
>
> A Gardening Group will be formed who can look at improvements to the grounds within Gillsland Grove. They would then work directly with Bield and the Gardeners on these proposals. In the meantime it was agreed to accept the quote from Cutmasters for beech hedging to be planted in the gardens adjacent to the rear car park, bollards (or some other way) which will stop cars being parked too close to the building and for moss treatment for the grass. Included in the quote were other matters which can be discussed by the Gardening Group. . ."

Mr Fizia told the Tribunal that he had been at the meeting on 14 April 2016. He had not seen any quote from Cutmasters produced to the meeting. No mention of the quote had been made at all. He had found out about the quote only in October 2016 when a neighbour had been given a copy by the Respondents. It had then been e-mailed to them. His recollection of the meeting was that an ideas group would liaise with Cutmasters and was authorised to spend £ 200. Cutmasters were the Respondents' gardening contractors. He had been forced to send 4 e-mails to the Respondents seeking clarification of the budget for the

gardening group. At his face-to-face meeting with Mr MacInnes the latter had told him that the group had no budget.

28. Mr Fizia accepted that beech hedging and the moving of bollards, both mentioned in the letter and quote had been discussed, but aside from moss treatment none of the other 8 items in the quote such as relocation of the grit bin had been raised at the meeting.

29. Mrs Fizia also relied on an e-mail from a fellow homeowner Tina Welsh to Mr MacInnes dated 16 March 2017 where she wrote that at the meeting it had been agreed that £ 200 would be used for plants from the Capital Fund, agreed that hedging be planted and bollards installed but no sum from any Cutmasters quote had been given to the meeting. Mrs Fizia submitted that in all the circumstances for the letter to suggest that a quote had been accepted was misleading.

30. Mr MacInnes told the Tribunal that the letter, which he had composed, followed the Agenda for the meeting. He said the Cutmasters quote had been discussed at the meeting although it had not been issued to the homeowners present. He had highlighted to the meeting a single figure being the £ 3,756.32 excluding VAT at the bottom of the quote. The quote had 8 items on it and all 8 had been spoken about. The meeting had approved items 1 (beech hedge) and 3 (bollard installation). The rest were to be discussed by the Gardening Group. The Gardening Group had been formed at the meeting. The notice headed "New Gardening Group" had been put up after the meeting. Item 4 in the quote being the moss killer was approved at the meeting but not carried out. Under cross-examination Mr MacInnes accepted that it had not been possible at the meeting to drill down into the quote and provide costs for individual items. On questioning from the Tribunal Mr MacInnes stated that there had been agreement for certain items of work to be carried out without knowledge of their cost but that this had been left to the Gardening Group. He submitted that the meeting had accepted the quote in part and thus the letter was not false or misleading.

31. Mr MacInnes was asked by the Tribunal to comment on his e-mail to Mr Fizia dated 6 February 2017 where he said that "At the meeting a quote from Cutmasters for various works was approved (the total cost of this was slightly over £ 4,500)". He accepted that his use of language in this e-mail was 'wrong'. He was also asked to comment on his further e-mail to Mr Fizia dated 5 March 2017 responding to Mr Fizia's e-mail to him of 4 March asking for minutes of any meeting authorising use of money from the repair fund other than the £ 200. In that e-mail he had written "I wrote to all owners after the meeting where it was agreed to spend monies on the garden and explained that the quote from Cutmasters had been accepted.". Mr MacInnes adhered to his view that the quotation had been in part accepted by the meeting.

32. The Tribunal preferred the evidence of Mr Fizia to that of Mr MacInnes for a number of reasons. Firstly his evidence is corroborated substantially by the e-mail from Ms Welsh. Secondly, it appears that Mr MacInnes had the duty to have a minute of the meeting kept (under the WSS para. C3) but had not carried this out. Without it, he was left with his memory which could lead to erroneous recollection which he accepted had taken place in the February 2017 e-mail. Thirdly, both Mr Fizia and Ms Welsh were clear that £ 200 expenditure had been authorised to be spent by the Gardening Group (which is corroborated by the Group's expenditure spreadsheet) but no mention of this authorisation was made in the letter. Fourthly, it would seem odd for homeowners to be "accepting" only two or three of 7 substantive items in a quotation to be carried out when there was no indication of how much of the overall price they would take up and no request to return to Cutmasters to obtain a reduced quotation for the items in question.

33. Having found as a fact that no mention of any figure from the Cutmasters quotation had been put to the meeting, the Tribunal considered that for the letter to state that it had been "agreed to accept the quote from Cutmasters for beech hedging . . ." was misleading to the ordinary reader. The Tribunal found that this amounted to a breach of section 2.1 of the Code.

Delegated authority for Cutmasters works

Section 2.4 of the Code of Conduct

34. The Applicants complained that the Respondents were in breach of their duty under section 2.4 of the Code which provides,

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

35. The Applicants' complaint was that the Cutmasters quotation was for a total of £ 3,756.62 excluding VAT. It went beyond the core service. Furthermore the expenditure of the Gardening Group amounting to just under £ 4,000 if one excluded the authorised £ 200, also went beyond the core service. Neither element of expenditure had received the written approval of homeowners. They submitted that neither element was covered by a delegated authority. Mr Fizia told the Tribunal that the Gardening Group had bought plants and equipment and when he had asked the Respondents for sight of the receipts, he had been told that it was personal information and not disclosable.

36. Mrs Fizia accepted that the Respondents had repaid £ 4,671.80 into the Capital Repair Fund which had been taken by the Respondents from the fund and used to pay for expenditure of the Gardening Group. She said that that the Applicants had been advised of this by the Respondents on or about 21 November 2017.

37. Mr MacInnes confirmed to the Tribunal that the transfer back into the Fund's bank account had been made before Christmas. He explained that the Capital Repair Fund was held on a separate account with Barclays Bank.

38. On the basis of Mr MacInnes' explanation of the repayment Mrs Fizia, on behalf of the Applicants, informed the Tribunal that the breach of section 2.4 of the Code was no longer insisted upon.

Breakdown of Expenditure

Section 3.3 of the Code of Conduct

39. The Applicants complained that the Respondents were in breach of their duty under section 3.3 of the Code the relevant part of which provides,

> "You must provide to homeowners, in writing at least once a year (whether as part of billing arrangements or otherwise), a detailed financial breakdown of charges made and a description of the activities and works carried out which are charged for."

40. The Applicants complained that they had requested on four separate occasions from the Respondents a detailed financial breakdown of expenditure by the Gardening Group, beginning with an e-mail on 24 November 2016, then a further e-mail, and e-mails dated 5 February and 4 March both 2017. They had not received any such breakdown until they received a spreadsheet of expenditure of the Gardening Group (covering a period from 30 May 2016 to 20 March 2017) after the holding of the 2017 AGM in September 2017.

41. For the Respondents Mr MacInnes told the Tribunal that the Respondents' financial year was from 1 April to 31 March. They aimed to fulfil paragraph 4.2 of the WSS within 6 months of the end of the financial year. He accepted however that in his e-mail of 5 March 2017 to the Applicants he had indicated that the Respondents would provide a "full breakdown of the costs incurred in the garden improvements . . . at the end of the financial year.". This was based on a hope to issue it earlier than the 6 months but this had not been possible.

42. On hearing this explanation, Mrs Fizia, very fairly, indicated that while she and Mr Fizia had expected a breakdown in April, given the requirement in

the Code for no more than an annual breakdown, they were not insisting on this head of complaint.

Pursuit of Cutmasters

Section 6.9 of the Code of Conduct

43. The Applicants complained that the Respondents were in breach of their duty under section 6.9 of the Code the relevant part of which 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."

44. Mrs Fizia explained that their complaint was about the service provided by Cutmasters. Mr Fizia referred the Tribunal to photographs of the garden area before and after the involvement of the Gardening Group. He said that he had been involved in conversations where dissatisfaction had been expressed by homeowners with Cutmasters' work particularly in relation to the shrubbery which had required clearing. Neither Mr nor Mrs Fizia were aware of any complaint about Cutmasters having been made to the Respondents.

45. Mr MacInnes confirmed that no complaints regarding Cutmasters' performance had been received by the Respondents. When asked about the relative responsibilities of Cutmasters and the Gardening Group, indicated that the Respondents would re-issue a proposed remit for the Group ahead of the next meeting with homeowners before the end of February 2018. There having been no specific complaint of inadequate work or service by Cutmasters the Tribunal found that there had been no breach of section 6.9 of the Code by the Respondents.

Duty to provide detailed breakdown of expenditure (written statement)

46. The Applicants complained, separately from the Code, that the Respondents had a duty under section 4.2 of the WSS to provide owners with a detailed breakdown of expenditure, particularly in relation to

maintenance and within a reasonable time. This had been breached in relation to the request for the breakdown of expenditure by the Gardening Group which had been reimbursed by the Respondents. The Applicants relied on their 4 requests already relied on in connection with the section 3.3 Code complaint.

47. Mr MacInnes submitted that the breakdown in the spreadsheet had been provided later than he would have liked. He said that he and the Respondents' Mr Dow had met with the Applicants in July 2017 and "shared" the expenditure information. However he could not recall if the spreadsheet had been given at that time.

48. The Tribunal found that the duty in section 4.2 of the WSS did have to be performed within a reasonable time of any request. It reflected the common law duty of a factor towards his principal. Mr MacInnes had indicated in his e-mail of 5 March 2017 that he would provide the breakdown at the end of the financial year. There was no indication as to any reason why that had not been done. To the Tribunal given the e-mail and the existence of 4 requests up to March 2017 it was reasonable for the breakdown to have been provided by the end of April 2017 at the very latest. Not having done so the Tribunal found that there was a breach of property factor's duty as complained.

Duty to instruct approved contractor (written statement)

49. The Applicants complained, separately from the Code, that the Respondents had a duty under section 1.4 of schedule 1 to the WSS to instruct work to firms included on their approved list of contractors, that from their experience they believed to be reliable and capable of completing the work satisfactorily and at a reasonable cost. They alleged breach of this duty through the Respondents instructing or allowing the Garden Group to instruct the grandson of a homeowner to paint the planters.

50. At the hearing Mrs Fizia accepted that given that the £ 200 spent on the painting of the planters by the grandchild had been repaid into the Capital

Repairs Fund, the Applicants were no longer insisting on this head of complaint.

Duty to investigate complaints (written statement)

51. The Applicants complained, separately from the Code, that the Respondents had a duty under section 1.10 of schedule 1 to the WSS to investigate complaints of unsatisfactory works. However given that the Applicants accepted that they were unaware of any such complaints having been made to the Respondents, the Applicants withdrew this head of complaint.

Rules governing homeowners' decision-making

52. At the hearing it was acknowledged that there was ongoing doubt as to whether the homeowners' decision-making in the Gillsland Grove development was governed by the default provisions in sections 25 to 37 of the Title Conditions (Scotland) Act 2003 Act (possibly as modified by sections 54(5) and 55 of the 2003 Act) or the Tenement Management Scheme of the Tenements (Scotland) Act 2004. Given in their response to the Tribunal's direction the Applicants clarified that they did not rely on breach of the property factor's duties in the real burdens in the 1992 Deed, this was not something that the Tribunal required to decide. It did observe however that on the face of it there appeared to be two tenements at the Development and that this did not sit well with decisions being taken on a Development-wide basis. However parties were informed by the Tribunal that the matter was complex and that they should obtain their own legal advice in this difficult legal area.

Proposed Property Factor Enforcement Order

52. Having decided that the Respondents failed to ensure compliance with section 2.1 of the Code the Tribunal proposed to make a property factor enforcement order in terms of the document under section 19(2)(a) of the 2011 Act accompanying this decision.

53. The Tribunal took the view that had minutes of the meeting of 14 April 2016 been taken, the misleading information in the subsequent letter to homeowners would have been avoided. The proposed order seeks to ensure that proper minutes of meetings are taken in the future and circulated to homeowners, thereby reducing the scope for misunderstandings.

54. The breakdown of expenditure of the Gardening Group now having been given, the monies spent having been repaid into the Capital Repairs Fund, and no compensation being sought by the Applicants, the Tribunal took the view that no proposed order in relation to the breach of section 4.2 of the WSS was necessary.

Court proceedings

55. 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

56. The Applicants 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.

57. 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.

58. 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.

59. **In the meantime and in any event, the Applicants 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.**

60. **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.**

Signed ....Legal Member and Chairperson

14/2/2018 Date