Housing and Property Chamber
First-tier Tribunal for Scotland

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/20/0826

101 Shaw Crescent, Aberdeen, AB25 3BU ("The Property")

The Parties:-

Mr Robert Wilson, residing at 101 Shaw Crescent, Aberdeen, AB25 3BU ("the Applicant")

Atholls Limited, 3 Carden Place, Aberdeen, AB10 1US ("the Respondent")

Messrs Brodies, Solicitors, 31-33 Union Grove, Mannofield, Aberdeen, AB10 6SD ("the Respondent's Representative")

Tribunal Members:
Martin J. McAllister, Solicitor, (Legal Member)
Mike Links, Chartered Surveyor, (Ordinary Member)
(the "tribunal")

Decision

1. **The Tribunal finds that, in relation to the matters in the application, the Respondent has complied with the Property Factors (Scotland) Act 2011 Code of Conduct.**

2. **The Tribunal finds that, in relation to the matters in the application, the Respondent has complied with the Property Factor's duties as defined in Section 17(5) of the Property Factors (Scotland) Act 2011.**

Background

1. This is an application by Mr Robert Wilson in respect of the Property in relation to actings of the Respondent as property factor. The application is in terms of Section 17 of the Property Factors (Scotland) Act 2011 (the 2011 Act). The application alleges that the Respondent has failed to comply with Sections 2.1, 2.4, 6.1, 6.2 and 6.9 of the Property Factors (Scotland) Act 2011 Code of

Conduct for Property Factors ("the Code") and has failed to carry out the property factor's duties as defined in Section 17 (5) of the 2011 Act. During his submissions at the conclusion of the Hearing on 11th March 2021, Mr Wilson withdrew any reference in his application to breach of Section 6.2 of the Code. The application is dated 8th March 2020 and the matter was remitted to the tribunal for determination on 30th June 2020. A Hearing was originally arranged for 29th September 2020 but, for certain reasons, a case management discussion was held on that date instead.

Both parties submitted written representations and documentary evidence. The Respondent submitted witness statements and an affidavit, all of which were adopted by the relevant witnesses when they gave evidence. In this decision the Respondent is sometimes referred to as "Atholls."

The Hearings

2. Hearings were held by audio conference on 16th December 2020, 3rd February 2021 and 11th March 2021. Mr Wilson was present and, on occasion, was supported by Mrs Lorraine Wilson, his wife. He said initially that she may give evidence at some point and Ms Jane Rattray, who was representing Atholls, indicated that she had no difficulty with Mrs Wilson being present throughout the proceedings. Mrs Wilson did not give evidence.

Preliminary Matters

3. The tribunal noted the Respondent"s intention to call witnesses and that the appropriate details had been provided so that they could participate. At the commencement of the Hearing on 3rd February 2021, both parties intimated that they wanted to lodge additional documents. Miss Rattray wanted to introduce documents about the lighting issue which pertained to current progress and things that had occurred since the previous Hearing. Mr Wilson sought to introduce documents which dealt with matters already covered in evidence. His position appeared to be that he had decided to lodge them as a result of the evidence which the tribunal had heard. Ms Rattray objected to Mr Wilson lodging documents which dealt with matters already covered in Hearings on the basis that they had always been in the possession of Mr Wilson and that, had they been lodged timeously, she would have had an opportunity to question him on them when he was giving evidence. She submitted that it would not be appropriate to allow their introduction since the tribunal had already heard evidence on the matters covered in the documents. She contrasted this with the documents she sought to introduce and which she said had not been available on the previous dates when Hearings had taken place. Mr Wilson's position was that, if the tribunal did not allow his documents to be submitted, then it should not allow the Respondent's documents into the proceedings. The tribunal considered matters and determined that there was a distinction between the documents which parties were seeking to lodge. The Applicant should have lodged documents timeously to enable the Respondent to deal with them during the course of the tribunal Hearings. It was not appropriate to allow a party, in the course of proceedings, to lodge documents which could have been lodged previously. The tribunal was satisfied that the

documents which the Respondent wanted to lodge could not have been available prior to any of the previous Hearings. The tribunal allowed the Respondent's additional documents to be lodged and refused the Applicant's motion to allow additional documents to be lodged.

Matters agreed

4. The development of which the Property forms part consist of six blocks of flats and four blocks of townhouses known as Elmhill, Shaw Road and Shaw Crescent, Aberdeen. In this decision, this is referred to as "the Development." The tribunal was referred to Respondent's production R 2/2 which was a drawing showing the layout of the Development. The Property is situated in Block C which is indicated on the drawing. The Development comprises one hundred and nine flatted dwellinghouses and fourteen townhouses. Mr and Mrs Wilson purchased the Property from the developer in 2006. There are areas of hard and soft landscaping and a number of mature trees.
The Respondent was appointed to be property factor from 1st January 2019 after a tendering process.

Findings in Fact

1. **Atholls acted as property factor for the Elmhill Development, Shaw Road and Shaw Crescent, Aberdeen from 1st January 2019.**
2. **Atholls were appointed property factor after a tendering process carried out by the proprietors of the Development.**
3. **The Applicant is chairman of the Elmhill Residents Association and liaised with Atholls in connection with repairs.**
4. **Atholls organised a roof repair to Block C of the Development.**
5. **Atholls organised a repair to the lift in Block C of the Development.**
6. **Atholls obtained advice and quotations and instructed work for matters regarding the provision of lighting at the Development.**

Findings in Fact and Law

1. **In relation to the matters raised in the application, Atholls complied with the Code in terms of Section 14 (5) of the 2011 Act.**
2. **In relation to the matters raised in the application, Atholls has carried out the property factor's duties in terms of Section 17 (1) (a) of the 2011 Act.**

Reasons

Mr Wilson's evidence

5. Mr Wilson said that he was and is chairperson of the Resident's Association and that Atholls were appointed after the residents had gone through a process which sought proposals from potential property factors. He said that a scope of work document had been prepared and a template document had been prepared for tendering property factors to populate. He said that Atholls had submitted a document in response to the tendering

exercise and had then been asked to resubmit using the template document which had been produced by the residents of the Development. He said that Atholls submitted a draft budget and won the factoring contract. Mr Wilson said that the relationship with the Property Factor started well and that monthly meetings took place.

6. Mr Wilson said that he believed that Atholls had not complied with various sections of the Code and he gave evidence on each of the sections where he considered that they had failed.

Paragraph 2.1: You must not provide information which is misleading or false.

7. Mr Wilson said that, prior to the commencement of the factoring contract, there was discussion with Atholls in connection with the scope of work involved. He said that particular areas of concern were raised with them and he said that one was the high level of communal electricity charges. He said that there are a number of street lights in the development. He said that Atholls were asked to investigate the replacement of existing lights with LED bulbs because of cost saving reasons.

8. Mr Wilson said that Atholls advised that it was not possible for the bulbs to be replaced and that, in connection with the street lights, complete replacement of the lighting heads would need to be undertaken. Mr Wilson said that, as far as he was concerned, that was incorrect advice and that the proof of this is that the property factor is currently replacing the street lamp bulbs with LED units. Mr Wilson said that he was told by Atholls that they had taken advice on the matter but that he did not accept that they had.

9. Mr Wilson said that he believed that what Atholls told him was false or misleading. He said that LED bulbs could be installed without changing the lighting head. He said that he was aware that the previous property factor had done this as had Aberdeen City Council when dealing with street lights.

10. Mr Wilson said that Atholls had been asked about the possible installation of proximity switches in some parts of the development and that residents had been promised a proposal in this regard but, as at 16th December 2020, had not received it. *(It should be noted that Atholls provided such a proposal prior to the Hearing on 3rd February 2021).* He said that the need for this installation was because some of the lights were permanently on. He said that Atholls had indicated that proximity or time switches could not be installed without additional cost and that this information had only been provided by them after the application had been made to the Tribunal. Mr Wilson said that Atholls had advised that cost savings achieved by replacing fluorescent tubes with LED units would be minimal but that they did not provide any figures to support this statement.

11. Mr Wilson referred to Atholls' email of 26th December 2018 which was prior to the commencement of their appointment in which they stated: *"As a rule*

we replace all lights with LED units if possible e.g. the bulb unit and or fitting where applicable with a view that they provide a longer life and reduced operating costs."

12. Mr Wilson referred to his written submission where he stated that, during the Residents' Association annual general meeting of 20th August 2019, Atholls were again asked to prepare a proposal to upgrade lighting. The tribunal was referred to the minutes of that meeting: *"Apart from the mandatory EICR the issue of lights being on 24 hours a day was discussed and it was proposed that the Contractor appointed to carry out the EICR should be asked for advice about how best to deal with light and bulb replacement to improve efficiency and reduce electricity bills."*

13. Mr Wilson said that Atholls' advice was that the bulbs in question could not be replaced without replacement of the whole unit. Mr Wilson said that he decided to employ and pay for a contractor to install an LED bulb in one of the light fittings in a communal hallway. He said that he did this without authority of Atholls or the residents of the Development. He said that a contractor employed by him did this on 18th February 2020 and that he had invited Bob Denniston of the property factors to review the replacement but that he declined. Mr Wilson said that the ballast in the light fitting was bypassed by the contractor instructed by him. Mr Wilson said that he assumed that the contractor employed by him was qualified.

14. Mr Wilson said that he did not understand references in the statement of Mr Cheyne to health and safety concerns. He said that the reference to light fittings overheating was incorrect. Mr Wilson said that he spoke to Prolight, the manufacturer of the bulb and that the person he spoke to referred him to the Scottish Government energy saving website. Mr Wilson said that the information he had gathered was supportive of the view that LEDs use less energy and he suggested that the saving per unit could be £24 per annum.

15. Mr Wilson said that there is no danger of a light unit overheating when there has been a LED bulb replacement because the light unit ballast is bypassed. He said that Atholls was still advising that LED bulbs cannot be installed in existing units and that that is false and misleading. He said that due diligence by the Property Factor would have led them to the conclusion that he was correct in what he was stating with regard to replacement of LED bulbs.

16. Mr Wilson referred to page 2 of Scott Denniston's statement at page 2 paragraph 4 where Mr Denniston discloses that there had been discussions prior to the commencement of the management contract about lighting issues and particularly in respect of lights being on permanently.

17. Mr Wilson said that, when the development was built, there was no requirement for emergency lighting to be installed in any of the blocks of flats. He said that there is emergency lighting installed in the underground car parks. He said that the absence of emergency lighting in the flats was a matter of some concern and had been raised with Atholls when they assumed responsibility for

managing the Development. He said that it was only after the application had been submitted to the Tribunal that Atholls had progressed in production of a report on this matter and he said that a quotation for such work had still not been received as at 16th December 2020. *(A quotation was subsequently produced prior to the Hearing on 3rd February 2021).*

18. Mr Wilson said that Mr Kenny Cheyne of Atholls provided misleading information when he told proprietors that fluorescent tubes could not be replaced by LEDs when they failed. Mr Wilson said the Atholls told proprietors that this was the case without backing it up with evidence from contractors which they had consulted. He said that he understood that three contractors had been asked for advice and that two of them said that it was not possible for LED bulbs to be used as replacements and that one contractor stated that but then changed his mind and said that this could be done. Mr Wilson said that he had asked Atholls why the latter contractor had changed its mind and was now replacing Fluorescent tubes with LED bulbs when they failed. He said that he has still not had an answer to his question.

19. Ms Rattray asked Mr Wilson if he agreed that Atholls stated in January 2019 that all lights would be replaced with LED lights and she referred him to Mr Denniston's email to him dated 5th January 2019 (Production R 7) wherein it was stated that Mr Denniston would like the lighting contractor to carry out a survey of the lighting *"with a view to repairing/relocating the nonfunctioning light sensors and providing a cost/benefit analysis of installing LEDs…… whenever possible we now replace all lighting with LED bulbs and if a fitting was required the same would apply."* Mr Wilson agreed that he had received that email. Mr Wilson said that the fact that the lighting contractor was now fitting LED bulbs when Atholls previously stated that this could not be done proves that it was not impossible and that Atholls' statements on the matter were false and misleading. Mr Wilson said that Atholls did not provide any evidence to them that they had sought advice from lighting contractors on the matter. He said that his view is that it is easier for contractors to replace like with like and that, commercially, it is not in a contractor's interest to install replacements.

20. Mr Wilson said that he had sent a number of emails to Atholls directing them to where they would find information on LEDs and the cost benefits of them. Mr Wilson said that he is a chartered engineer and that he had the knowledge to make enquiries and to form a view on the matter.

21. Mr Wilson was referred to Respondents' Production R 74 which is a letter from Graeme Mair Electrical Services dated 11th September 2020 which sets out the difficulties in replacement with LED bulbs. In the letter, the contractor states that there are some issues he would want to make prior to any decision to upgrade the existing light fittings from compact fluorescent to LED retrofit lamps.

The letter highlights five issues:

"1. These types of lamps are susceptible to failure where the lampholder on the light fitting is not in good condition.
2. One significant threat to LED lighting is transient surge events in AC power lines that can cause damage to lighting fixtures. Over-voltage transient surges can occur in AC power lines as the result of nearby electrical equipment being switched on/off. These lamps can fail when the incoming voltage is susceptible to surges.
3. Your client has specified GE LED EM GR 2D retrofit lamp as a direct replacement for the current CFLs. GE Technical data for this product documents that the lamp is to be operated with electromagnetic (EM) ballasts that are approved for compatibility, I cannot confirm if the current ckoke or ballasts fitted fitted are compatible. My concern is that if, for example, chokes are fitted failure rates will be high. Chokes by their very nature of design 'amplify' power surges (spikes). If this is the case, these lamps have the potential to fail before life expectancy. Other retrofit LED lamps are designed to work with Electronic Ballasts. The incorrect lamp could easily be fitted to these fittings by mistake and due to this, we would not recommend the fitting of these lamps.
4. Term of guarantee. If these lamps were to fail within their designed lifespan, it is my experience that clients expect the full cost of replacing the faulty lamps to be met by the contractor. As the risk of failure is high, I am not willing to take this risk of carrying the burden of costs incurred for resources required to replace faulty lamps.
5. These lamps are not suitable for use in emergency fittings.
The installation of pre-manufactured LED retro gear trays designed specifically for this form of upgrade or replacing the complete light fitting would be my recommendation. These items would come with a 5-year guarantee."

22. Mr Wilson maintained that he had found a contractor who considered it appropriate to replace bulbs without replacing fittings.

23. Mr Wilson said that he had a meeting on site with Atholls and the matter of installation of LEDs was discussed. He said that there was a discussion about replacing the car park and communal light fittings with LEDs.

24. Mr Wilson was referred to Respondents' production R75 which was an email dated 17th September 2020 from Pat Jackson of John R Ewan Ltd, a lighting contractor who stated that his recommendation is replacement of fittings rather than installation of LED bulbs into existing fittings.

The email states:

"…. The age of the existing fittings and the fact that they are on 24 hours a day have made both the casing of the fittings, the lamp holders and the cables potentially brittle which could cause faults and lighting failure after they have been worked on. Also, it is nearly impossible to claim on the warranty of these retro fit lamps as it is very hard to show the fitting itself has not caused any potential issue. Having experienced issues with this before we recommended against fitting the components we were shown and instead recommended replacing the entire fitting with a new LED fitting. This would not only come with a 5 year warranty but would also alleviate the potential issues that I have described with the retro fit option."

25. Mr Wilson was referred to the letter from North East Electronic Ltd dated 17th September 2020 which consisted of options put to the Property Factor in respect of *"the Elmhill Lighting Issue."* It sets out three options:

"Option 1: Change complete light fitting to LED (comes with a 5 year warranty)"

We believe option 1 would be the better of the 3 as this would rule out all issues including cosmetic (i.e. cracked front cover), as noted above this comes with a 5 year warranty.

Option 2: Convert existing CFL fitting to internal LED plate.

This option is cost effective and replaces all complete electrical components from the internal existing fitting.

Option 3: Change out existing CFL fitting to LED lamp.

Another cost- effective method. However, this does not remove all electrical components and can lead to further failures although the lamp has been changed.

Option 1 is the most expensive option, option 2 and 3 are of a similar cost.

Atholls has instructed option 2 is the preferred option as they believe this is the most cost effective for their client."

26. Mr Wilson said that North East Electronic Ltd undertook the work of replacement LED bulbs and he agreed that this was after Atholls had gone to two other contractors who would not agree to do the work proposed and that they would only recommend replacement of complete units. Mr Wilson said that, despite North Eastern Electronic doing the work, Mr Kenny Cheyne of Atholls still maintained that installation of LED bulbs could cause over heating of chokes. Mr Wilson said that this is despite Atholls instructing North Eastern Electronic to do this work. Mr Wilson accepted that two of the three contractors did not consider it advisable to replace only the bulbs rather than whole units. Mr Wilson maintained that it is in the interest of contractors to replace whole units rather than bulbs and that this is why he believes that contractors have advised this.

27. It was put to Mr Wilson that, until Atholls had managed to get a report from North Eastern Electronic, they had to follow the advice of the other two contractors which had been consulted. Mr Wilson responded that he had managed to find a contractor- Graeme Hare Electrical and that there was a considerable amount of information on the Scottish Government website. He said that he had provided a lot of information to Atholls and also details of the contractor he had found. Mr Wilson said that he had the trial work done to one light fitting on 18th February 2020 by Graeme Hare Electrical and he said that he did not know if this contractor was registered with NEICIC or accredited with any other approved professional body but that he was sure that he is a qualified electrician. He also said that he did not know if the contractor had public liability

insurance. He said that he had found the contractor by putting the request on Facebook.

28. Mr Wilson said that he had instructed the trial work to the light fitting without obtaining permission from the owners of the properties in the Development.

29. Mr Wilson referred the tribunal to an email from Tyler Reid Electrician which he had lodged and in which he was responding to whether or not replacement with LED bulbs would lead to overheating, that any saving would be minimal and that the bulb would fail. The response from Mr Reid was to the effect that no heating would occur because the ballast would be bypassed. Mr Wilson said that he did not know if Tyler Reid was an accredited electrician.

30. Mr Wilson said that he had consulted the relevant Scottish Government website EnergyEfficientScotland@gov.scot which states *"LEDs are available to fit most fittings and are particularly good for replacing spotlights and dimmable lights, they are more efficient than CFLs and will save you money in the long term."*

31. Mr Wilson said that he also took advice from his son, Andrew Wilson, who is an electrical engineer. When asked if his son had performed a calculation with regard to cost savings by using LED bulbs, Mr Wilson responded that he considered that to be the job of Atholls. He said that it stood to reason that if a bulb used fifty percent less electricity it would be fifty percent more efficient. Mr Wilson said that it is his contention that LED bulbs should be installed when the original bulbs fail. He said that he had obtained advice from Energy Efficiency Scotland which supported his views and that Atholl's statement that cost savings would be minimal was false and misleading.

32. Mr Wilson accepted that, since the General Meeting of 24th February 2020, Atholls had implemented the residents' instructions to replace failed bulbs with LEDs.

33. Mr Wilson accepted that the cost of replacing fittings and bulbs as part of a wholesale replacement programme would be more than £500 for each block of flats.

34. Mr Wilson referred to the quotation from RH Electrical dated 24th February 2020 which he had lodged. He said that this was a quotation which he obtained because he had anticipated that he may have to provide costings for the tribunal. He said that page 1 showed a quotation for replacing existing lights with LED units and that page 2 showed the cost for replacement of the car park heads.

35. Mr Wilson said that Mr Alastair Walker of Atholls had sent him a draft letter on 4th March 2020 which was intended to be sent out to homeowners (Production R 22.) He said that this letter misquoted him and therefore contained false and misleading information. He confirmed that the letter had not been sent to owners.

Paragraph 2.4 of the Code: 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).

36. Mr Wilson said that, prior to appointment, the homeowners provided Atholls with a detailed scope of work and he referred the tribunal to the Excel spreadsheet which he had lodged. He confirmed that a template had been provided to those property factors wishing to submit a tender for the management of the Development.

37. Mr Wilson said that Atholls submitted a draft budget of £109,332.39 in the tendering exercise and that, after they had commenced as property factors on 1st January 2019, this was increased to £116,469.09. Mr Wilson said that this was submitted to homeowners. Mr Wilson said that he had received complaints from homeowners and that he then had discussions with Atholls and was advised that there were a number of reasons which had driven the increase. He said that Atholls did more work on the figures and that a new budget of £113,204.09 was issued.

38. Mr Wilson confirmed that he understood that the budget was just that- a budget. He said that his concern was that the alterations were made without consultation. He said that the revised budget was issued to different homeowners on different dates.

39. Mr Wilson said that, as chairman of the residents' group, he would expect to be advised of increases to the budget and that he was so advised after changes had been made.

40. Mr Wilson referred to the email which he had sent to Jackie Mair of Atholls on 4th February 2019 (Production R 29):

"Your budget has increased from your tender £109,332.79 to £116,469.09. This is not what we had agreed and is considerably more than PMC budget. It is not acceptable to raise the budget without discussion and approval of the owners."

41. Mr Wilson said that he received a response from Jackie Mair of Atholls on 7th February 2019 (Production R 30/1) and that he was given reasons for the increase. He said that his complaint under this section is about communication. He said that, following Jackie Mair's email, there was a meeting with her and that she apologised and said that the second budget had been issued in error. Mr Wilson said that he accepted that there was some justification for the

increases. Mr Wilson said that his emails to Atholls confirmed his view that a budget is a budget and that he did not expect the figures in the draft budget to be set in stone.

42. Mr Wilson said that the changed budget should have been sent to all homeowners. He said that part of the reason for the increase in the budget was the fact that Atholls had included matters which had not been in the contract with the previous property factor. Mr Wilson said that some of the items such as regular gutter cleaning, regular decoration and cleaning of the carpeting in the common areas of the flats had not been included in the contract with the previous factor.

43. Mr Wilson referred the tribunal to Respondents' Production R 3 which is the Scope of Work which Atholls received prior to submitting its tender to the homeowners. He also referred to Respondent's Production R 25 which consisted of the tender documents.

44. Mr Wilson confirmed that he understood that the draft budget submitted by Atholls comprised estimated figures which would be subject to change. Mr Wilson said that he was aware of the Development's insurance claim record for the year 2018/2019 and that he had provided these details to Atholls. He said that Atholls told him that the insurance premium would be increased from that estimated in the draft budget and that this was one reason for the increase in budget costs.

Lift Contract

45. Mr Wilson said that Otis maintained the lifts in the Development and that there was an existing contract when Atholls assumed management of the Development. He said that Atholls could have asked for a copy of the contract before tendering. Mr Wilson was referred to Respondents' production R 73 and he agreed that it was an email sent by Otis to Atholls on 20th December 2018 with a copy of the lift maintenance contract and that this was sent after Atholls had tendered and had been appointed to manage the Development. Mr Wilson said that he was told by Atholls after their appointment that the contract with Otis was for a term of ten years and he confirmed that Atholls would only have known about this after they had tendered for the work.

46. Mr Wilson accepted that there were issues in changing the lift maintenance contract because of the existence of closed protocol autodiallers which would have to be changed if another contractor maintained the lifts and he also accepted the fact that there was a termination penalty clause in the contract with Otis.

47. Mr Wilson confirmed that he was advised by Atholls that the lift maintenance contract with Otis contained a provision for automatic annual increases in costs by 3%.

48. Mr Wilson said that he was aware that the budget submitted by Atholls included costs for the provision of annual gutter cleaning. He said that such

annual cleaning had not been a feature of the contract with the previous property factor.

49. Mr Wilson said that the items causing the increase to the budget were the increased insurance premium, the lift maintenance contract and the gutter cleaning provision.

50. Mr Wilson said that the increases in costs for insurance and lift maintenance were outwith the control of Atholls. He said that the gutter cleaning provision was within Atholls' control. He said that he had no difficulty with the principle of paying for gutter cleaning but it should not have been included because it was not part of the framework tender document.

51. Mr Wilson said that he had concerns about the employment of contractors to do the gutter cleaning and that there had not been consultation with the owners.

52. Mr Wilson said that he had been advised of the increase in costs but that his concern was that every owner should have been advised.

53. Mr Wilson referred the tribunal to Respondent's production R 28. He said this was an email from him to Scott Denniston of Atholls and he was referred to the third paragraph where he had stated:

"I note your comment re gutter cleaning. We did anticipate that there would be additional items to your budget. Please be advised, gutter cleaning was an extra to PMC budget."

54. Mr Wilson accepted that he was sent the revised budget on 15th February 2019. He said that it was not for him to approve a budget but he did correct a couple of typographical errors and returned it to Atholls. Mr Wilson said that he did not object to the revised budget.

55. Mr Wilson was referred to Respondents' production R 35. He confirmed that this was a series of responses from members of the Residents' Committee indicating that they were content with the revised budget.

56. Mr Wilson said that he subsequently had discussions with Jackie Mair of Atholls about the increase in the budget figures. He suggested to her that she should raise the matter at the next AGM and justify the increases. He said that Atholls did not raise it and that he did not raise it either. Mr Wilson was referred to the minutes of the meeting and he confirmed that they included no reference to the matter of the budget. Mr Wilson said that the minutes were prepared by Eleanor Smith, one of the committee members and that they had been checked by him.

57. Mr Wilson said that he had raised concerns about the budget in emails but that he had not lodged these. He said that various owners had raised concerns with him.

58. The tribunal was referred to an email which Mr Wilson had sent to Jackie Mair of Atholls on 4th February 2019 (Production R 29): *"At our meeting on Friday the Owners Committee expressed our concern that you had revised the budget by 10+% over what we had agreed during tendering without our knowledge and/or approval. You agreed to review and revise the budget down. However, you are now preparing to increase the budget yet again!!! Your budget has increased from your tender of £109,332.79 to £116,469.09. This is not what we had agreed and is considerably more than PMC budget. It is not acceptable to raise the budget without discussion and approval of the owners."*

Paragraph 6.1 of the Code: You must have in place procedures to allow homeowners to notify you of matters requiring repair, maintenance or attention. You must inform homeowners of the progress of this work, including estimated timescales for completion, unless you have agreed with the group of homeowners a cost threshold below which job-specific progress reports are not required.

59. Mr Wilson said that he had lodged photographs to assist the tribunal when it was considering matters relating to the leak and the repair to the roof.

60. Mr Wilson said that he lived in a top floor flat and that on 13th December 2019 he reported a roof leak. He said that he didn't believe that he had reported any water ingress to Atholls prior to then. He referred the tribunal to photographs showing the roof with a section of tiles having been stripped. He said that an entire gulley had to be replaced by the contractors, Messrs Graeme W. Cheyne (Builders) Ltd (hereinafter referred to a Graeme W. Cheyne).

61. Mr Wilson said that he had been told by Scott Denniston that a work order had been issued to the contractor. He said that he was later advised that works could not be carried out until approval had been obtained from at least fifty percent of the owners of Block C. He said that it was suggested to him that he pay for the works himself and then try and recover the costs from the other owners.

62. Mr Wilson said that, as far as he was concerned, it was up to the Property Factor to instruct repairs and that approval of fifty percent of homeowners was not necessary. He said that there are thirteen flats in Block C and that he therefore had to get six votes in favour in addition to his own. Mr Wilson said that, in his view, the Tenement (Scotland) Act 2004 set out what had to be done.

63. Mr Wilson said that in the Written Statement of Services there was provision for the Property Factor to instruct work in an emergency situation. Mr Wilson said that he considered the roof work to be an emergency.

64. Mr Wilson gave some history on the problem with the roof. He said that, at the outset of the contract with the Respondent, he had advised them that the

water ingress to his flat had been a serious ongoing problem. He said that the particular issue was that water was getting into the roof void and then penetrating into his flat. Mr Wilson's evidence was that, over many years, attempts had been made to rectify the issue. Mr Wilson said that there had been an issue since 2006 and that some work had been done to the roof when the Property was still covered by the NHBC guarantee. He said that the work carried out under that guarantee had not been successful. He said that a roofing contractor, Graeme W. Cheyne (Builders) Ltd (Graeme W. Cheyne), had previously done work on the roof and that he had been happy with this work.

65. Mr Wilson said that the roofing work had been completed by Graeme W. Cheyne in 2020 and that it had apparently been successful.

66. Mr Wilson said that, prior to the Respondent's appointment as property factor, Graeme W. Cheyne had provided a quotation for the roof works in 2018. Mr Wilson said that he thought that Atholls should have should have instructed works in 2020 on the basis of that earlier quotation. He said that Mr Graeme Cheyne had not been able to action the roof repair after providing the quotation in 2018 because he had suffered a serious illness. Mr Wilson said that he was not sure if he had passed on the 2018 quotation to Atholls when they had been appointed.

67. When questioned, Mr Wilson said that he had been content to wait until Mr Cheyne had recovered from his illness and that this was because he had previously been happy with the work which had been done by him. He said that, during the period of Mr Cheyne's illness, other roofing contractors had carried out roof repairs to the building of which the Property is part.

68. Mr Wilson said that, when the work was contracted for, Atholls did not provide a start date or an estimate of how long the work would take and he said that this was a breach of the Code.

69. Mr Wilson said that, when he saw the updated quotation from Graeme W. Cheyne, it included works additional to the original quotation and he said that this was because Mr Kenny Cheyne, an employee of the Respondent had requested that such work be included. (Mr Kenny Cheyne is sometimes referred to in this decision as "Kenny Cheyne" to distinguish him from Graeme Cheyne.)

70. Mr Wilson said that he had asked for a quote to be obtained which reflected the specification of works included in the original quotation of 2018 and that, when it had arrived, it was the same price as the original quotation.

71. Mr Wilson said that the necessity of obtaining another quotation caused delay and that this concerned him because of ingress of water to the roof void. He said that there had been water ingress to the roof void which took time to penetrate to his flat. Mr Wilson said that Kenny Cheyne had no business in seeking to add additional works to the quotation and had no business in inspecting the roof because he had not been asked to do so.

72. Mr Wilson said that, in the witness statement of Kenny Cheyne, the leak is described as minor and he took issue with that. He said that it was incorrect to define the leak as minor. He said that, because the property factor had sought to have additional work included, extra work was involved for Graeme Cheyne in quoting for this and delay occurred. He accepted that coronavirus restrictions would have caused delay but he said that he felt that such delay would have been reduced had a quotation not been sought for additional work.

73. Mr Wilson said that he was certain that the roofing works could have been completed prior to the Covid-19 restrictions which were imposed in March 2020. Mr Wilson said that there was no action between 13th December 2019 and 15th February 2020 and that, during this period there had been a number of emails from Kenny Cheyne exhorting him to be patient.

74. Mr Wilson said that additional works proposed to instal sealant material between the soffit and wall head were unnecessary. He said that he had formed this view from discussions with the architect who had designed the building.

75. Mr Wilson said that Kenny Cheyne had asked for the roofing contractor to quote for replacement of roof vents. Mr Wilson said that the nearest vent was more than five metres from the source of the leak. He said that this had not been asked for.

76. Mr Wilson said that the roofing work was carried out over three days commencing on 20th July 2020. He said that he had asked Atholls to confirm that the roofing works had been completed. He said that he had been particularly concerned to receive confirmation that a lead diverter had been fitted in the lead gully. He said that this had been part of the quotation and he said that the purpose of the diverter was to divert the flow of water to lessen the pressure on the gutter and hopefully prevent water ingress.

77. Mr Wilson said that the report from Atholls regarding completion of the roof works was not received by him until 11th September 2020 although the roofing contractor had provided a report to Atholls which was dated 24th July 2020. He said that this report from Atholls provided confirmation that the diverter had been fitted. Mr Wilson said that Atholl's delay in providing a report was unacceptable.

78. Mr Wilson accepted that, as someone living in the Property, he had seen that roofing works had been carried out. He acknowledged that he had seen workers on the roof and he also acknowledged that he had no reason to believe that the diverter, included in the quotation, had not been fitted.

79. Mr Wilson referred the Tribunal to Production R 12/1 which was an email from Scott Denniston of Atholls dated 13th December 2019 which stated *"Works order raised to Graeme Cheyne Builders. They should have been in touch and, if not, will be shortly".*

80. The tribunal was referred to Production R13/1 which was an email from Scott Denniston to Mr Wilson dated 19th December 2019. The email referred to

Mr Denniston speaking to Graeme Cheyne, the roofing contractor, who had told him that he had quoted for works "historically" and that, as far as he knew, the works had not been done. The email makes reference to the contractor intending to inspect the roof after the Christmas break.

81. Mr Wilson said that Kenny Cheyne had not been instructed to inspect the roof and that he did not need to do so. He said that he was aware that he was going to inspect and that he had not raised objections to this. He accepted that such an inspection had not been able to take place because of weather conditions.

82. Mr Wilson accepted that a second date for the inspection had been arranged and that he had raised no objection to it taking place but he said that it should not have been done because Kenny Cheyne had not been asked to carry out a roof inspection. His position, which he stated more than once, was that the roof repair should have been instructed based on the quotation provided in 2018.

83. It was put to Mr Wilson that Kenny Cheyne had carried out a joint inspection of the roof with the contractor and he said that he didn't know if this was the case. When Mr Wilson was referred to Production R 14, which was an email to him from Kenny Cheyne dated 6th January 2020 stating that he intended a joint inspection with the contractor ,he acknowledged that he had received the email and that he was aware that there was to be a joint inspection.

84. On being questioned, Mr Wilson accepted that the works carried out to remedy water ingress were those contained in the quotation of 2018 and that the remedy employed in July 2020 was that recommended in that quotation. He said that Atholls had attempted to have work carried out which was additional to the work quoted for in 2018. Mr Wilson said that the homeowners had not agreed to do additional works which had been recommended by Atholls. He said that he had taken advice from the architect of the building who, amongst other things, had not accepted the need for the installation of a foam strip at the soffit and who had told him that the gap where it was proposed to install the strip was an integral part of the design of the building.

85. Mr Wilson was referred to Production R 19 which was a report from Atholls dated 18th February 2020 which detailed the condition of the roof and proposed works. Mr Wilson said that this report included items that did not require to be done.

86. Mr Wilson agreed said that, when Atholls wrote to proprietors seeking consent to the roofing works, he thereafter spoke to some homeowners to facilitate matters and assist in getting the required number of proprietors to approve them to allow the works to go ahead.

87. Mr Wilson was referred to Production R 83/1 which was an email from Kenny Cheyne dated 25th June 2020 advising of progress: *"we are liaising with Graeme Cheyne and will advise when we know he will be undertaking the*

works". Mr Wilson accepted that he had received that email but said that he had not received any subsequent emails with regard to completion of the works.

88. Mr Wilson was referred to Production R 84/1 which he somewhat reluctantly accepted was an email from Atholls dated 6th July 2021 which updated him on the progress of works commencing.

89. Mr Wilson accepted that the report which he received on 11th September 2020 was a report from Atholls which updated him with regard to the roof works but he said that his complaint is that it was not sent in good time.

90. Mr Wilson was referred to Production R 86 and he accepted that this was an email sent to him by Kenny Cheyne on 28th July 2020 enquiring if there was any water ingress and he accepted that this must have been sent after the repairs had been carried out.

91. Mr Wilson said that in his email to him of 18th February 2020, Kenny Cheyne said that he was still awaiting the quotation from the roofing contractor, Graeme Cheyne. Mr Wilson said that he contacted the contractor himself and was told that the quotation had been submitted to Atholls by that date.

92. Mr Wilson said that the lift in Block C was reported to have a fault in December 2019 and that Atholls initially responded promptly. Mr Wilson said that he regarded the lift as an essential part of the building but that Atholls determined that repairs to a lift were not essential and that they had asked owners whether or not they would approve repairs to the lift. Mr Wilson said that he considered it fundamental that the lift be considered an essential part of the building.

93. Mr Wilson said that he had asked Atholls to query a bill that had been received from Otis, the lift contractor, because he considered it to be excessive.

94. Mr Wilson said that Scott Denniston of Atholls had told him that they were sure that owners would agree for the works to the lift to go ahead but that there was a danger of Atholls being exposed if authority was not given.

95. Mr Wilson said that Otis carried out the repair once authority had been given by the owners and that the total cost of the works was £4,674 exclusive of VAT. He said that Atholls had authorised several other works where the cost exceeded £500 and that they had done so without getting specific authority of owners.

96. Mr Wilson said that eleven out of thirteen owners in Block C shared responsibility for the costs of maintenance of the lift. He said that it was worrying for him that, if he had not been able to get authority from the majority of owners, the lift would not have been repaired.

97. Mr Wilson gave examples of other works carried out in the development without specific authority being obtained. He said that the drainage channels of Blocks C and D had work done at a cost of £1200. He said that a tree survey

carried out on the whole development was in excess of what Atholls considered the authorised limit to be.

98. Mr Wilson referred the tribunal to Production R 60 which was a letter to Atholls from Burnett and Reid, Solicitors dated 6th April 2020 which stated that the *"spend per block"* was £500 and that a repair to a lift did not fall into the *"emergency category."*
Mr Wilson said that he did not agree with this advice.

99. Miss Rattray put to Mr Wilson that the cost for the works to the lift was £5603.80 inclusive of VAT and that, when divided amongst eleven homeowners amounted to £509 per property which was more than the limit of £500 for the building. Mr Wilson refused to accept that Atholls should not have proceeded with the repairs to the lift without specific authority and said that they should have exercised discretion on health and safety grounds and instructed the works to be done.

100. When it was put to him that Atholls had followed the legal advice set out in R 60. Mr Wilson refused to accept this and said that he *"didn't know."*

101. Mr Wilson said that he had taken legal advice with regard to interpretation of the Deed of Conditions and that this did not accord with Atholl's position and the legal advice which it had obtained. He said that the letter from the solicitors instructed by Atholls was dated some months after the event.

102. When questioned about the advice he had obtained, Mr Wilson conceded that he had not lodged a copy of such advice and, when pressed, refused to identify who had provided it.

103. Mr Wilson accepted that the lift repairs were instructed on 10th January 2020, that the fault was reported on 28th December 2019 and that authority from homeowners had been obtained prior to the works commencing.

104. Mr Wilson was referred to Production R 53/1 which was an email to Alastair Walker of Atholls dated 16th January 2020 which stated *"I am sure your team has done their very best to expedite repair of the lift."* The email goes on to state that Mr Wilson considers that a lift repair was essential and did not require approval of proprietors. Mr Wilson accepted that the Respondents had taken steps to expedite the works to the lift.

105. Mr Wilson agreed that Otis had accepted responsibility for the delay in the repair being carried out and that he had attended a meeting with two of their employees where this had been explained.

106. Mr Wilson was referred to Production R 61/2 which was a set of minutes of a meeting with Otis and Atholls on 23 January 2020 and which he attended. He was referred to what it had been minuted that he said: *"Expressed the main area of frustration was down to lack of communication from Otis on the matter."* Mr Wilson accepted that he had said this.

107. Mr Wilson agreed that Otis was the incumbent contractor when Atholls had taken over management of the development and that there was a significant penalty to be paid if another contractor were appointed.

The Respondent's evidence

108. Ms Jackie Mair gave evidence and adopted the terms of an affidavit dated 16th September 2020 which had been prepared and lodged by Miss Rattray and which Mr Wilson had a copy of.

109. Ms Mair said that she is a director of Atholls and that her role is to oversee the property management department and the general management of the company. She said that on 28th June 2018, Atholls received an invitation to tender for the management of the Development. She said that the invitation to tender included a scope of works outlining the services to be provided. She said that Atholls submitted a budget which was based on the scope of the tender document. She said that she was thereafter asked to resubmit the budget in a format provided by Mr Wilson so that it would be easier for homeowners to compare the various tenders. She said that the homeowners were very focused on their monthly costs and wanted to reduce these.

110. Ms Mair said that she had a meeting with Mr Wilson on 13th September 2018 at which they discussed the items in the budget and that subsequently he supplied her with more information on common electricity costs as a consequence of which she amended the budget.

111. Ms Mair said that, after Atholls had been appointed to manage the Development, the budget was increased for a number of reasons. These were summarised by her:

a) The allocation of costs amongst owners was not consistent with the provisions of the Deed of Conditions relating to the Development.

b) In trying to arrange a lift maintenance contract with Thyssen Krupp, it was discovered that the autodiallers used in the lifts were of a closed protocol type which meant that only Otis could be called in an emergency and that, in changing to another contractor, there would be significant costs in installation of alternative autodiallers and that there was also a termination penalty in the Otis contract. She said that this meant that the anticipated savings in maintenance of the lifts could therefore not be achieved.

c) The original budget was submitted without the whole history of insurance claims being made available. This led to increases in the common insurance policy.

d) Ms Mair said that the original budget allowed for gutter cleaning costs which it was thought appropriate given the number of trees in the Development. She said that, when asked to resubmit the budget in the approved format, Mr Wilson had asked that these be removed. She said that she did this and that it was then put in the budget as an optional cost. She said that she did not know why

such costs were removed and that it may have been to make the costs more attractive to homeowners. Ms Mair said that when Atholls and PMC (the previous property factor) carried out a handover, a walk round of the Development was done and she said that it was clear that the gutters needed attention because they had become blocked with moss and other debris. She said that gutter cleaning was therefore included in the budget and she said that the outgoing property factor advised that it had obtained quotations for such cleaning and that it therefore must also have considered that such work was necessary. Ms Mair said that the cost of gutter cleaning was not added to the budget in respect of the townhouses in the development.

112. Ms Mair said that she had a meeting with Mr Wilson and two of his fellow committee members on 1st February 2019 and that the three of them told her that the increases in the development budget had resulted in complaints from homeowners and that their priority was to keep costs to homeowners to a minimum. Ms Mair said that at the meeting she looked at the development budget and noticed that the revisions to the budget had not been saved into the master document which had been sent to homeowners. She said that this had been an oversight and that she admitted her mistake at the meeting and apologised. She said that the homeowners at the meeting accepted her apology. She said that the differences in costs were minimal and that she revised the document and circulated to the committee.

113. Ms Mair said that increases to the budget were caused by third party costs outwith the control of Atholls. She said that the original development budget was an estimate of the costs. She said that, in pulling together a budget to provide property management services to a development new to Atholls, some costs are fixed and known but that the majority of costs are unknown and have to be estimated. Ms Mair said that the Committee were kept up to date with the various changes to the budget. Ms Mair said that she prides herself in submitting realistic development budgets and that she would rather submit a slightly higher budget than submit one which was too low.

114. Ms Mair said that Atholls advised Mr Wilson on 21st December 2018 of the increase due to the higher insurance premium as a result of the claims history and also the increased lift maintenance costs. She said that Mr Wilson's response had been that the Committee had anticipated a premium increase and that the budget was still less than that of the incumbent property factor. She said that he also acknowledged the restrictions of the Otis contract.

115. Ms Mair said that at the AGM in August 2019 it was noted that Atholls had received a complaint from one homeowner about the change in allocation of costs as a result of the work done to ensure that these accorded with the Deed of Conditions. Ms Mair said that she had explained why this had been done and that, upon making enquiry of those present, no objections were received from other homeowners about the allocation of costs. She said that Mr Wilson was present at this meeting and that no objections to the development budget were raised at the meeting. Ms Mair said that, if Mr Wilson had any issue with the development budget, she would have expected him to raise it at the meeting. She said that no complaint was received until Mr Wilson

raised his formal complaint in March 2020. She said that he had from February 2019 to raise any issue but did not do so until March 2020.

116. Ms Mair said that lighting in the blocks is permanently on and that Atholls had raised this with homeowners at the AGM in August 2019. She said that the property factor proposed that the electrical contractor instructed to provide an electrical installation condition report be invited to provide advice to improve efficiency and reduce electricity costs. She said that it had been Atholls' plan to carry out a review of the lighting which involved upgrading of light fittings to LEDs.

117. Ms Mair said that some light fittings allowed replacement with LEDs in existing units and that others required replacement of fittings. She said that Atholls' experience is that contractors are reluctant to replace CFL bulbs with LED bulbs without replacing light fittings and she said that LEDs often fail within a matter of months which meant that contractors received complaints about the work they had carried out.

118. Ms Mair said that Atholls tended to favour replacement with LEDs and that they usually got advice from contractors as to the best approach for each development. She said that Atholls would usually always replace a light fitting with an LED light fitting where possible. She said that most contractors would provide a five year warranty on parts and labour for replacement with an LED light fitting.

119. Ms Mair said that the Committee was strongly focused in reducing costs. She said that, given that Atholls had agreed to look at a longer terms solution to the lights being constantly on within stairwells, it would have been illogical and not in the best interests of homeowners to incur costs in altering light fittings to LEDs which may then require to be replaced as part of the overall proposed improvement to stairwell lighting. She said that, prior to lockdown in March 2020, Atholls had been working on a proposal on lighting to present to homeowners. She said that the proposed upgrade with LEDs, motor sensors and changes to some emergency light fittings would be improvements with significant cost implications for homeowners and, that as such, would require approval by a majority of homeowners.

120. Ms Mair said that she did not think it was advisable to start replacing CFL bulbs with LED bulbs because of reliability issues as advised by contractors and that it did not make sense when a larger scale programme for the lighting provision was going to be produced. Ms Mair said that Atholls were now replacing any failed CFL lamps in the stairwells and adapting the light fitting to an LED plate to generate light. She said that it was still her view that adapting the lights is potentially a short term gain unless homeowners rejected a proposed programme of improved provision of lighting throughout the Development.

121. Ms Mair said that ,in relation to the lift repair, she considered that Atholls had followed the correct process. She said that they were in constant touch with Otis to try and expedite the repair as they were aware that the lift required to be

returned to service. She said that she could not see what could have been done differently without homeowners incurring considerable additional costs and she said that the delay in effecting the repair was down to issues beyond the control of Atholls. She said that Atholls kept homeowners advised of progress with regard to the repairs.

122. Ms Mair said that, subsequent to the lift repair, it had been suggested at a meeting of homeowners that consideration be given to amending the threshold of authority for repairs such as this. She said that one way of dealing with this would be for homeowners to set a level of delegated authority for each lift. Ms Mair said that it had been necessary to deal with the lift repair in the way that Atholls had and that was to get authority from homeowners.

123. Ms Mair said that, in Mr Wilson's written submissions, he had stated that he considers that Atholls seem to have an unhealthy association with Otis. She said that the Otis contract had been inherited from the previous property factor and that, of the six other developments with lifts which are managed by Atholls, two contracts are with Thyssen Krupp, two contracts are with Schindler UK, and two contracts are with Otis. She said that it had been Atholls' intention to remove the lift contract for the Development from Otis. She said that Mr Wilson had given no reasons as to why he considered that Atholls had an unhealthy connection with Atholls and she said that she considered it self evident that no such connection existed.

124. Ms Mair said that it was disappointing that Mr Wilson had considered it necessary to make an application to the Tribunal when Atholls had done everything possible to take account of the Committee's wishes, expectations and feedback and to work with it.

125. Ms Mair said that she had discussed lighting issues with her colleague, Scott Denniston and that this included possible replacement of the emergency lighting system.

126. Ms Mair said that the minutes of meetings with residents were prepared by the secretary of the residents' group or Mr Wilson. She said that she assumed that the minutes would have been sent to Atholls when they had been prepared.

127. Ms Mair said that a cost benefit analysis had been done with regard to LED lighting. She said that installation of LEDs would have an effect on reducing electricity costs from £4,677 to £3,500 which would equate to a saving of £11 per proprietor. She said that there was an overall desire to reduce utility costs and she said that there would be real cost savings if sensors were combined with LED lights. She explained that some lights were on permanently. She said that a programme of replacement with lights linked to sensors would reduce costs on the relevant units by 50% which would mean a saving to each proprietor of £21.

128. Ms Mair could not remember if the lighting issues were discussed at the meeting on 24th February 2020 but she thought that they might have been

touched upon. Ms Mair said that an LED bulb could be installed in units but would have no warranty but that a replacement LED plate and bulb would come with a warranty She said that, as an alternative, a complete LED light fitting could be installed. She said that the cost of a LED plate was £30, a LED fitting was £33/35 exclusive of VAT and that there would be labour costs in addition. She said that she thought around three could be fitted per hour.

129. Ms Mair said that there are around two hundred lights across the six blocks so replacement costs would be significant. She said that there would be a significant cost if the lights were replaced at one time. She said that, when lights fail, they are being retrofitted with LED plates.

130. When questioned by Mr Wilson, Ms Mair confirmed that, in the budget submission, some items had been included which had not been asked for and that there had required to be some adjustment. She said that the budget had to be modified to reflect the lift contract. She said that, as she had already referred to, there had been a mistake in figures in the original budget which was issued to homeowners.

131. Ms Mair said that she could not recall if the reasons for an increase in the budget had been dealt with at the AGM following its release. She said that the budget also had to be adjusted because of the updated insurance claims history becoming known. She said that gutter cleaning had been included because, on a walk round of the development, considerable growth had been noted in gutters. Ms Mair confirmed that the requirement for gutter cleaning had been added without the instruction of owners but that they had approved the amended budget which included these works.

132. Ms Mair said that she accepted that the minutes of 24th February 2019 made reference to replacement of all lights with LEDs. She said that there had been discussions with Atholls about replacement of lights.

133. Ms Mair referred to Production R 27/1 which was an email from Scott Denniston to Mr Wilson dated 21st December 2018 where he states *"we have a gutter clean in the budget but had not anticipated having to carry one out in January, we would have expected them to be done thus it will now be the case that we will do two cleans during 2019 January and circa Nov/Dec."*

134. Ms Mair referred to Production R 28/1 which was an email from Mr Wilson in response to R 27/1 and in which he states *"I note your comment re gutter cleaning. We did anticipate that there would be additional items to your budget. Please be advised, gutter cleaning was an extra to PMC budget."*

135. Ms Mair accepted that there had been discussions about things for the development which would have cost more than was allowed for in the budget. Such things were planters and shrubs. Ms Mair said that the point she thought was important was that she had prepared an adjusted draft budget which the owners, including Mr Wilson had approved.

136. Mr Scott Denniston gave evidence and adopted his witness statement which had been lodged with the Tribunal and a copy of which had been provided to Mr Wilson.

137. Mr Denniston said that he is a property manager with Atholls and that his role is to provide property management services to ensure that communal aspects of a development are maintained in good order and attending to any repair and maintenance issues which may arise.

138. Mr Denniston said that he had most day to day involvement with management of the Development and dealing with the Committee.

139. Mr Denniston said that in Atholls' initial inspection of the Development, it had noted that all interior lighting in the blocks was on twenty four hours each day, seven days per week. He said that this included the exterior lights at block entrances. He said that Atholls did not consider this to be cost effective and that it may have been that originally the Development had timers which, over the years had been replaced. Mr Denniston said that he recalled raising the possibility of installation of photocells and he said that some lights in the Development were operated by photocells. He said that stairwells had no natural light but he said that this did not mean that lights had to be on twenty four hours per day for seven days per week. Mr Denniston said that he was advised by Mr Wilson at that time that there was only emergency lighting in the lower car parks of blocks 49-68 and 69-88. Mr Denniston said that this would be in line with the version of the Scottish Building Standards which were applicable when the Development was constructed.

140. Mr Denniston said that the question of lighting was discussed at the Annual General Meeting which took place on 20th August 2019. He referred to the Minutes of that meeting (Production R 36). He said that there had been discussion about mandatory EICR testing and that the issue of constant lighting was also discussed. He said that it had been proposed by Mr Wilson that the contractor appointed to do the EICR work be invited to provide advice about how best to deal with light and bulb replacement to improve efficiency and reduce electricity bills. Mr Denniston said that the contractor carried out the EICR testing but was unable to commit to carrying out the lighting survey requested because of workload issues.

141. Mr Denniston said that Atholls approached three electrical contractors, explained the position and asked for feedback. These were John R. Ewan Ltd, North East Electronics Ltd and GM Electrical Services. He said that all were advised of Mr Wilson's request to replace compact fluorescent lamp ("CFL") type bulbs. He said that all three raised concerns about replacing CFL bulbs with LED bulbs because, unless the associated light fitting is also changed the LED bulb may overheat and fail. Mr Denniston said that the contractors' reports were Productions R 74, R 75 and R 76.

142. Mr Denniston said that ,in March 2020, North East Electronics accepted Atholls' instructions on the basis that they would, where a light fitting was obsolete, replace any failed lamps (not fittings) with a retro-fit LED plate light

which provides a similar wattage output to a CFL bulb but has lower running costs. Mr Denniston said that this has continued to be the case for any lamp failures and he said that, until North East Electronic accepted the instructions in March 2020, Atholls had no alternative but to instruct replacement of the light bulbs like for like because they were acting on advice from contractors.

143. Mr Denniston said that he discussed the matter of lighting in his email exchanges with Mr Wilson of 4th and 5th January 2019 (Productions R 6 and R 7). He said that Mr Wilson emailed him on 4th January 2019 requesting that a contractor survey the lighting system with a view to repairing and relocating non-functioning light centres and providing a cost benefit analysis of installing LED bulbs. Mr Denniston referred the tribunal to his response contained in his email to Mr Wilson dated 5th January 2019: *"We will have proposals for lighting, as a rule and wherever possible we now replace all lighting with LED bulbs and if a fitting is required the same would apply."* Mr Denniston said that Atholls agreed that, where there is an option to carry out a straight swap, changes to LED bulbs would take place. He said that, where an actual light fitting has failed, it was replaced with a new LED light fitting. He said that Atholls generally wait for a light fitting to fail then replace the light fitting with an LED unit which would come with a full five year warranty including any labour. He said that retro fitting existing light fittings would only provide a warranty for the plate itself not the labour. He said that this would apply to external lighting including car park lighting.

144. Mr Denniston said that, after initial repairs had been carried out, Mr Wilson said that he was disappointed that the replacement bulbs were CFLs and not LEDs. He said that this was when Mr Wilson said that a CFL bulb can be swapped out and use an equivalent LED lamp by changing the internal light fitting and wiring. Mr Denniston stressed that three contractors had advised against doing so. Mr Denniston said that the professional advice of the contractors was followed by Atholls. He said that the advice was that altering the light fittings was not a practical solution.

145. Mr Denniston said that Mr Wilson emailed him on 14 February 2020 to advise him that he would seek his own advice and obtain a quotation from his own electrician and change one light fitting (Production R 8). He said that Mr Wilson informed him that he had instructed a contractor who had provided the advice that LED bulbs use around half the energy of CFL bulbs although producing similar light and that internal light fittings may require to be replaced if the bulbs fail so may require to be replaced in any event (not just because LED bulbs were being used).

146. Mr Denniston said that he had no recollection of Mr Wilson sending him any quotation from his electrician or being advised of the identity of the contractor. He said that he did notice on the Grampian Business Finder webpage that Mr Wilson was requesting quotations for this work on 17th September 2020 and the tribunal was referred to Production R 77 which showed that Mr Wilson appeared to be seeking an electrician to quote for *"replacement of 120x2D CFL bulbs with LED."* Mr Denniston said that he noted that this was after Atholls' solicitors had sent written submissions in response

to the application. Mr Denniston said that Mr Wilson had sent Atholls a photograph of the lamp which he had arranged to be changed in his block and the tribunal was referred to Production A 9 which was that photograph.

147. Mr Denniston said that he did not accept that he had refused to inspect the unit which Mr Wilson had arranged to have replaced. Mr Denniston said that, by email dated 17th February 2020, he had advised Mr Wilson that he was seeking to prepare a proposal for homeowners to cover:

(a) Retro fit to existing light fittings where they are in suitable condition and are compatible.
(b) Complete replacement of all light fittings with LED equivalent with a five year warranty on both materials and labour.
(c) Complete replacement of all light fittings with some sensor- based lighting to further reduce the amount of lighting being on unnecessarily with a five year warranty.
(d) Same as previous option but to include emergency light fittings because there are none in the Development.

148. Mr Denniston said that, to change existing light fittings to emergency lights, it is his understanding that it can only be achieved if all lighting in a block is upgraded to the same. He said that his lighting proposals were based upon new LED fittings of which one per foyer and one per staircase level in stairwells would be an emergency fitting and the remainder being sensor based to reduce time and also providing saving in running costs. Mr Denniston said that such an upgrade and improvement to lighting within each block would be a considerable capital expenditure and long- term investment by the owners.

149. Mr Denniston referred the tribunal to Production R 9 which he said was an email to Mr Wilson in which he explained that some heads in the car park lighting may not be suitable for a straight LED swap. He said that this was the case with two of the lamp posts where he was advised by Claymore Electrical that the supplier advised that there was no LED equivalent. Mr Denniston said that replacement of a lamp head is expensive and that he thought that it would be irresponsible to spend around £600 for such work together with the additional cost of a cherry picker for access and labour. He said that other changes were carried out by installation of LEDs for sodium based bulbs.

150. Mr Denniston said that he costs incurred in replacing CFL bulbs with LED bulbs throughout the stairwells would be far in excess of Atholls' authorised level of expenditure and that it could not accept unilateral instructions on this matter from Mr Wilson.

151. Mr Denniston said that Mr Wilson called him on 13th December 2019 and reported that there was water ingress to his property. He said that Mr Wilson also sent him an email on the matter (Production R 11) which had photographs attached. Mr Denniston said that he raised an emergency work order with Graeme Cheyne, contractor who attended at around 4.30 pm on that say and carried out a temporary repair. Mr Denniston said that he considered the water ingress to be minor and that it only occurred in certain weather conditions. He

said that he did not consider that the matter warranted being treated as an urgent repair.

152. Mr Denniston said that the roofing contractor closed for the festive period. He said that he contacted Mr Wilson on 19th December 2019 to advise that the contractor would carry out a roof inspection. He said that he had a discussion with Mr Wilson as to whether or not a claim could be made on the original developer or if an insurance claim should be made. Mr Denniston said that Mr Wilson's instructions were to have Graeme W. Cheyne inspect the roof and advise on what repairs were required.

153. Mr Denniston said that, in respect of the roof repair, his colleague Kenny Cheyne took over management of the matter. He said that he was better qualified to do so because he is a chartered building surveyor. He said that this was also because of information which Mr Wilson provided which indicated that water ingress to his property had been a recurring problem. He said that he understood that Stewart Milne, the original developer had replaced windows because of water ingress and that the developer had been on the roof numerous times to try and resolve issues of water ingress. He said that the previous property factor had instructed a roofing contractor to inspect and remedy the same issue and that Mr Wilson had arranged for Graeme W. Cheyne to provide a report in February 2018 or thereabouts and that this report highlighted the causes. Mr Denniston said that the particular problem with the roof was not new and that it predated Atholls' involvement as property manager of the Development.

154. Mr Denniston confirmed the information given by Ms Mair with regard to the process of tendering and producing a draft budget. He said that on 20th December 2018, Atholls received an email from PMC, the previous property factors indicating various outstanding issues and repairs required at the Development including a quote for gutter cleaning costs.

155. Mr Denniston said that on 21st December 2018, he emailed Mr Wilson to advise that there would be an increase in the budget and that the email (Production 27/1) gave the reasons for the increase.

156. Mr Denniston said that Atholls had not anticipated that a gutter clean would have been required in January 2019 in addition to one in November/December 2019.

157. Mr Denniston said that the lift maintenance contract which was in existence at the time Atholls took over management of the Development was with Otis. He said that it had been intended that an alternative contractor would be appointed but that, when Atholls had sight of the existing contract, problems in doing this became clear because of the penalty payable upon termination of the contract and the fact that new auto diallers would have to be installed. Mr Denniston described Otis as having the Development in *"golden handcuffs."*

158. Mr Denniston said that another reason for the increase in budget was the increased insurance premium as a result of the insurance claims record being made available.

159. Mr Denniston referred the tribunal to Production R 28 which was an email from Mr Wilson to him. The email stated that Mr Wilson noted the position with regard to gutter cleaning and that he had anticipated that there would be additional items to the budget. The email also noted the issues with the Otis contract and that, although it seemed expensive to change the autodiallers, the homeowners had little choice in staying with Otis. Mr Denniston said that Mr Wilson also accepted the position with regard to the insurance costs.

160. Mr Denniston said that a revised budget was issued to Mr Wilson on 7th February 2019 and that it had been reduced by £3,025 to £113,204.09.

161. Mr Denniston referred to Production R 31/1 which was a minute of a meeting held between Mr Denniston, Mr Wilson, Ms Mair and Kenny Cheyne on 8th February 2019. He said that the budget was discussed at the meeting and that it had been explained that the increases had been due to unforeseen circumstances.

162. Mr Denniston said that on 15th February 2019, he emailed Mr Wilson to seek the Committee's opinion on the revised budget and that Mr Wilson had responded confirming that the calculated costs were correct (Production R3 2). He referred the tribunal to Production R 33/1 which was an email from Mr Wilson dated 20th February 2019 in response to the draft budget and which stated *"I have had two+ my own response, makes three in favour of the latest rev from Jackie. I feel sure I would have received comments if anyone was in disagreement."*

163. Mr Denniston said that on 20th February 2019 he emailed members of the Committee asking if they were happy to proceed on the basis of the revised budget. He said that a majority of the members of the Committee responded indicating that they approved the revised draft budget.

164. Mr Denniston said that, as far as he was aware, the draft budget was approved in February 2019 and that no homeowner raised the matter again until Mr Wilson submitted his complaint in March 2020.

165. Mr Denniston said that there had been an email exchange with Mr Wilson on 14th February 2020 which arose because a homeowner requested information from Atholls on what was deemed to be a budget overspend relating to winter maintenance. Mr Denniston referred the tribunal to the terms of Mr Wilson's email (Production 38/1): *"In my humble opinion a budget is just that. It is unreasonable to hold Atholls to account for £67.05 overspend. I would like to confirm I am very pleased with the service provided by you and the team at Atholls."*

Ms Rattray put questions to Mr Denniston.

166. He said that one of the responsibilities he had for the Development was pulling together a lighting proposal for consideration of the owners. He was referred to Production R 87/1 and said that this was a letter to the Committee dated 20th January 2021 with a proposal in respect of lighting for the Development. He said that it provided a breakdown of contractors' costs for alternative proposals. Mr Denniston said that Mr Wilson had received a copy of this letter and had provided a response which was Production R 88. Mr Denniston said that he could not remember if any other member of the Committee had responded.

167. Mr Denniston said that he had had discussions with Mr Wilson about retrofitting LEDs to lighting units when they failed. Mr Denniston said that he had discussions with a number of contractors who had not been keen to carry out such work because of the technical difficulties. Mr Denniston referred to the contractors' reports which had been referred to earlier in the Hearing.

168. Mr Denniston said that initial advice from contractors was that it was not good practice to fit LEDs into existing fitments but that eventually Atholls had found a contractor willing to fit LED plates which bypassed the existing ballast unit in the light fitments. He said that such work came with a warranty.

169. Mr Denniston said that agreement had been reached that, whenever a light fails, it would be replaced with an LED plate. Mr Denniston distinguished this from fitting an LED unit to exiting ballast.

170. Mr Denniston said that a separate lighting issue at the Development was the absence of sensors which meant that some lights were permanently lit. He said that there would be advantages to electricity costs if some lights were replaced with sensor units which had LEDs.

171. Mr Denniston said that the car park area had a variety of different lighting heads. He said some were low energy bulbs and that there were no equivalent LED replacement units. He said that Mr Wilson said that this was not the case and that such units could be replaced with LED units. He said that such work would entail the removal of the light holder and internal gear. He said that Mr Wilson disputed this and had said that only the internal gear required to be replaced. Mr Denniston said that his view was arrived at from taking advice from electrical contractors. He said that failed lamps are now being replaced with LED units.

172. In questioning from Mr Wilson, Mr Denniston said that there had been general discussions with the owners with regard to reducing electricity costs and he thought that LEDs would have been referred to in such discussions. Mr Denniston said that he did not know, at the time there had been discussions about the lamp posts, that Aberdeen Council had replaced fitments in the manner suggested by Mr Wilson.

173. Mr Denniston said that he did recall that Mr Wilson said that potentially there could be savings of 50% of electricity if lighting units were changed.

174. Mr Denniston said that the Minutes of the Annual General Meeting of 20th August 2019 (Production R 36) were compiled by the residents' committee and submitted to Atholls. He said that these Minutes would have been reviewed by them before being issued to owners. He said that there had been a delay in issuing those particular Minutes to owners and he explained that this was because of concern about them identifying a particular owner who had removed a Juliet balcony. He said that it would not necessarily have been aware to other proprietors that this had been removed because it was to the rear of the block involved. He said that eventually the information which would have identified the particular owner had been removed and the Minutes were issued. He said that the issue with the Juliet balcony had been resolved.

175. In respect of the lift repair, Mr Denniston said that he had been informed on 28 December 2020 that the lift was not working and that he immediately reported it to Otis, the contractor responsible for carrying out repairs. He said that he received a report that the lift had been repaired and was operational. He said that, on 29th December 2020, he was told that the lift was not working again. He said that he reported the fault to Otis and heard nothing more until 6th January 2021 when a proprietor had reported that the lift was out of commission and that an Otis sign confirming this had been posted at its door. He said that he contacted the Otis Service Delivery Manager and that he had been made aware that the door operator had failed and that the costs of repair would be around £5,000. Mr Denniston said that Mr Wilson was overseas at that time.

176. Mr Denniston was asked about obtaining alternative quotations from other lift contractors and he explained that, since Otis had the contract for lift maintenance, any repairs done by another contractor would not have any warranty from Otis and that there could be difficulties with regard to future maintenance. He said that termination of the Otis contract was not feasible because of the termination penalty clause in the contract and the cost of installation of alternative autodiallers.

177. Mr Denniston said that Mr Wilson's position was that such a repair to the lift should have been classed as emergency work but that he disagreed and he said that the cost was well beyond Atholls' remit for instructing repairs. Mr Denniston said that specific authority of a majority of proprietors had to be obtained. Mr Denniston said that it was his recollection that it took three to four days to achieve the majority of proprietors required to instruct the works. He said that he contacted some of the owners on 6th January 2020 and some on 7th January 2020 seeking approval for the lift repairs. He said that he chased responses.

178. Mr Denniston referred the tribunal to Production R 42 which was an email from Mr Wilson dated 7th January 2020 and which stated: *"I do not hold Atholls to account for a situation which is clearly beyond your control. I would have thought this repair comes under essential maintenance?"* Mr Denniston said that he responded stating that he did not deem it an essential repair and that a lift was not essential. He said that Mr Wilson emailed Mr Alastair Walker of Atholls on 7th January 2020 (Production R 46/2) referring to *"building*

regulations." The email states that Mr Wilson considers that Atholls is failing to carry out essential repairs in a timely manner as required by the Property Factors (Scotland) Act 2011.

179. Mr Denniston's evidence was that, since there was an alternative means to access the flats, the repair of the lift was not essential. He pointed out that the lift should not be used in emergencies such as a fire. Mr Denniston said that the property factor's view was supported by legal advice which it had obtained.

180. Mr Denniston said that he chased Otis to have the repair completed and gave evidence of the involvement of Jim Lindsay, the Otis service manager. He said that he was told that there was a difficulty in accessing particular parts but that Mr Wilson disputed this because he said that he had been able to find stockists for it and suggested that Otis use a third party supplier for the parts. Mr Denniston said that he had told Mr Wilson that Otis would not use third party parts or third party contractors because of guarantee issues.

181. Mr Denniston said that the repair became protracted because of delays by Otis. He said that the repair was instructed once authority had been obtained. He said that, at the time, he had been unaware that Mr Wilson's wife had health issues which meant that she could not easily use the stairs. He said that, unfortunately, the lift had not been repaired before the return of Mr and Mrs Wilson from abroad.

182. Mr Wilson put to Mr Denniston that, building regulations require a lift in a block of this height and that, because of the Tenement (Scotland) Act 2004, the repair should have been instructed without authority. Mr Denniston said that the current Building Standards could not be applied to a building in existence before the particular set of Building Standards was in force and that legal advice was taken on the matter. He also said that there was a Deed of Conditions for the Property and that the Tenements (Scotland) Act 2004 therefore did not apply.

183. He said that he sympathised with Mrs Wilson's situation but described the factor's position as being "between a rock and a hard place."

184. Mr Denniston contrasted the lift repair with one which he would consider an emergency. He said that, for example, if there had been a hole in the building where water was coming in, consideration may have been given to proceeding to carrying out a repair without specific authority of owners if it required to be done to protect the fabric of the building. He said that such a consideration did not arise with regard to the lift repair. He said that Atholls' views on whether the lift repair was essential or not were confirmed by Burnett and Reid, Solicitors and that the tribunal had sight of a copy of a letter from that firm of solicitors dated 6th April 2020. Mr Denniston said that he considered that Atholls had followed the correct procedure and had acted in line with the provisions of the Deed of Conditions relating to the Development.

185. Mr Denniston said that Mr Wilson attended a meeting with Mr Alastair Walker and Kenny Cheyne on 14th January 2020 about the lift repair and that

on 16th January Mr Wilson emailed Mr Walker (Production R 53/1) indicating that he considered the lift repair to have been essential but that *"he was sure Atholls had done their very best to expedite repairs of the lift at Block C."* He drew the tribunal's attention to another part of the email where Mr Wilson acknowledges that Atholls' *"hands were tied"* and which stated that *"If Atholls proceeded without approval, owners may refuse to pay. We have agreed a compromise, where Atholls will request owners to pre- approve any future repairs to the lift and thus avoid any unnecessary delay."*

186. Mr Denniston said that Mr Wilson had suggested that a contractor he had identified be appointed to maintain the lifts on the expiry of the Otis contract. Mr Denniston said that he told Mr Wilson that he had contacted Otis about possible earlier termination of the contract, that he had been advised that there would be a financial penalty and that he had asked what this would be. Mr Denniston referred the tribunal to Production R 54 which was an email from Mr Wilson to him and which stated *"I really appreciate your efforts on our behalf."* This email went on to state that homeowners were receiving poor service from Otis.

187. Mr Denniston said that he continued to chase Otis to complete the repair and provided the tribunal with a considerable amount of detail in this regard. He said that he emailed homeowners on 21st January advising that the parts had arrived in Aberdeen. He said that the lift was functioning once more on 22nd January 2020.

188. Mr Denniston said that the early termination penalty payable to Otis was £7,333.95.

189. Mr Denniston said that he organised a meeting with Otis to discuss the delay in getting the repair effected. In addition to Mr Denniston, the meeting was attended by two representatives from Otis, Mr Wilson, Mr Walker and Ms Mair. He said that Otis apologised for the delays in having to parts delivered to the Development and took full responsibility for the problems caused. He said that Otis advised that the parts had to come from France. He said that Mr Wilson had said at the meeting that the main cause of his frustration was the lack of communication from Otis and that he also said that the costs charged were excessive and wanted detail of them. Mr Denniston said that this was later supplied by Otis. Mr Denniston said that a representative of Otis said that it would have been highly unlikely that another supplier would have had the required parts in stock.

190. Mr Denniston said that, as far as he was concerned, Atholls did everything possible to have the lift back in working order and he said that the documents lodged with the tribunal demonstrated that it had diligently pursued the lift maintenance contractor in this regard.

191. Mr Denniston said that Ms Mair had advised Mr Wilson that it did not make financial sense for early termination of the existing lift maintenance contract.

192. Mr Denniston said that Atholls had noticed a Facebook post by Mr Wilson that he had concerns about the alarm buttons on the lift not working. He said that Atholls, at their expense, had them checked by an Otis engineer and that they were found to be operational.

193. Mr Denniston said that he was unclear why Mr Wilson had raised a formal complaint. He said that the budget had been approved and that Mr Wilson had waited until March 2020 to raise the matter. He said that his complaint was only weeks after Mr Wilson's email to him where he had said *"I would like to confirm that I am very pleased with the service provided by you and the team at Atholls."* (Production R 38/1.)

194. Mr Denniston said that, in relation to the lifts and maintenance, Mr Wilson had not responded to Alastair Walker's email of 4th March 2020 (Production R 22) with an alternative wording to the draft letter which he had been provided with and that this letter had never been issued to homeowners.

195. Mr Denniston said that the water ingress had been ongoing since at least 2014 and that NHBC had been involved when the Development was still under its guarantee. He said that the first report to Atholls about water ingress was on 13th December 2019 and that he had actioned it the same day. He said that the roof was repaired in July 2020 when the coronavirus restrictions allowed and that it had been significantly tested in adverse weather since then. He said that Mr Wilson is no longer experiencing water ingress. He said that between the matter being raised in December 2019 to July 2020, Atholls had rectified a problem which had been outstanding for at least six years with the developer and the previous property factor. He said that the matter would have been resolved in three to four months had there not been the Covid -19 restrictions.

196. Mr Denniston said, that once he was aware of the lift breakdown, he attempted to have the repairs expedited as quickly as possible. He said that he was not comfortable about issuing a works instruction which would cost each proprietor £509 when Atholls have an authorised spend budget of £500 for the whole block as to do so would mean that it was acting outwith their scope of instruction from the homeowners. He said that it could possibly expose Atholls to a liability in respect of the costs incurred. He said that authority had been quickly obtained and that the delay in getting the lift working was wholly down to the shortcomings of Otis. He said that, in his view, the fact that he arranged a meeting with the senior representatives of Otis demonstrated that he had gone above and beyond what was required.

197. Mr Alastair Walker adopted the terms of his statement which had been lodged with the tribunal and which Mr Wilson had a copy of.

198. Mr Walker said that he is a chartered surveyor and is the managing director of Atholls Limited. He said that his role is to oversee the running of the business and to carry out surveying work as well as assisting Atholls' Property Management Department by carrying out site inspections and dealing with more complex matters. Mr Walker said that he has over forty eight years'

experience as a Chartered Valuation Surveyor formerly referred to as a Chartered General Practice Surveyor.

199. Mr Walker said that, whilst he was aware of the management contract for the Development, he became involved in communications with Mr Wilson when he contacted him on 20th October 2019 when he lodged a complaint that Atholls had not dealt with essential maintenance of the Development in a timely manner and had not distributed the Minutes of the AGM meeting of 2019 and had not actioned items which had been discussed at that meeting. He said that he had directed Mr Wilson to address the complaint to Mr Denniston and that on 15th December 2019, Mr Wilson had advised him that matters had been resolved and thanked him for his assistance.

200. Mr Walker said that he understood the difficulties in trying to carry out a straight swap of light units as each type of bulb requires its own current input and filters.

201. Mr Walker said that, on 7th January 2020, he received an email from Mr Wilson which was headed "Customer Complaint" and related to the fact that Mr Denniston did not deem the lift repair to be an essential repair. He said that the email referred to Atholls *"again failing in their duty to carry out essential repairs in a timely manner as required by the Property Factors (Scotland) Act 2011."*The email also referred to Mr Wilson instructing his own solicitor in the absence of a prompt response.

202. Mr Walker said that he responded to Mr Wilson on 9th January 2020 (Production R 47) confirming that he was happy to meet with him. He said that his email also stated that Atholls had sought legal advice from Messrs Burnett and Reid, solicitors, whose advice was that, whilst the absence of a lift was a major inconvenience, it was not an essential repair which could be carried out without first consulting the affected proprietors. He said that the legal advice was that the proprietors be consulted and a majority agreement be obtained given that the proposed costs per block exceeded the property factor's authorised spend limit of £500. Mr Walker said that his email to Mr Wilson contained an offer to arrange to meet with him. He said that the email contained the following *"The code of conduct requires that a factor must set out their Authority to Act to proprietors. As we detailed in page 12 of our Welcome Pack, we only have authority to authorise repairs up to £500 per block without seeing the proprietor's agreement. We would be completely exposed to challenge for not following the correct procedures without first having consulted the affected proprietors. Ultimately we would not expect any owner to refuse their consent for the required works and whilst they may not be too happy about having to pay such a large sum of money it is very much to their advantage to have the lift working again as soon as possible."* Mr Walker said that he told Mr Wilson that Atholls had contacted the owners in the Applicant's block to seek consent to the lift repair works. Mr Walker said that he had advised Mr Wilson that another contractor could not be used to carry out the repairs because it would not make financial sense to do so.

203. Mr Walker said that he met Mr Wilson on 14th January 2021 and that his colleague Kenny Cheyne also attended the meeting. He said that he told Mr Wilson that Atholls could write to the owners in the Development to seek their agreement to treat lift repairs as essential so that future repairs could be expedited and he said that he reiterated at that meeting that the legal advice was that repairs to the lift could not be considered essential. Mr Walker said that Mr Wilson told him that legal advice he had obtained was at odds with that and that he had been advised that lift repairs were essential in terms of the Deed of Conditions. Mr Walker said that he asked for a written copy of the legal advice but that Mr Wilson declined. Mr Walker said that the idea of writing to proprietors to get authority for future repairs was rejected by the three people at the meeting because it was felt that it was unlikely that there would be majority agreement for such a course of action.

204. Mr Walker said that, at the meeting of 14th January 2021, he suggested that Atholls could write to owners in blocks where there were lifts seeking agreement to increase the spend limit for lift repairs to £1,000 per flat. He said that Kenny Cheyne suggested that, to cap costs, the spend limit should be set at £10,000 per block rather than £1,000 per flat without the need to revert to individual owners. He said that a number of other management issues were discussed at the meeting.

205. Mr Walker said that he emailed Mr Wilson on 4th March 2020 (Production R 22) suggesting that Atholls write or email proprietors seeking to increase the spend level for lift repairs to £10,000 per block. Mr Walker said that Mr Wilson responded by email on 5th March (Production R23) and informed him that he objected to the wording of the proposed letter but that he did not specify the basis of his objection. The email indicated that Mr Wilson thought that Mr Walker had misquoted him in the draft letter. Mr Walker said that, as a consequence of the email from Mr Wilson, no letter was sent to proprietors seeking a change to the limit of spend.

206. Mr Walker said that Mr Wilson complained that the proposed wording in the letter was inaccurate and misleading but provided no information as to why he thought it was so. Mr Walker said that Atholls wrote to Mr Wilson on 10th March 2020 (Production R 24) and called upon him to specify the basis on which he considered the draft letter to be inaccurate. Mr Walker said that no specification was provided by Mr Wilson.

207. Mr Walker said that he was aware of the roof repair carried out on July 2020 but that he did not know many details because his colleague Kenny Cheyne dealt with it. Mr Walker was asked if, at the time of the roof repair, he was aware of any discussions about it being an essential repair or that it should be done because of the terms of the Tenement (Scotland) Act 2004. He said that he had no recollection of either matter being discussed.

208. Mr Walker said that the authorised limit of expenditure which Atholls had in respect of each block in the Development was £500 and that cost of the work which required to be done to the roof was therefore far in excess of that.

209. Mr Walker said that he remembered important parts of a conversation which he had with Mr Wilson in January 2020 with regard to the lift. He said that it took place a few days after the lift had been repaired. He said that Atholls had got legal advice as to whether or not the proposed repair of the lift could be constituted as essential and that they had been told that it was not. He said that he had to chase the solicitor on a number of occasions to provide such advice in writing and that it was not received until the letter of 6th April 2020 (Production R 60). Mr Walker said that Atholls could not authorise the repair of the lift and incur costs above the £500 per block limit. He said that his company could have been exposed to complaints from other proprietors and could potentially been financially liable.

210. Mr Walker said that the Property Factors (Scotland) Act 2011 does not provide property factors with statutory powers to exceed their allocated spend limit contracted for unless the repairs are essential to protect the fabric of the building. He said that it was his view that, had Atholls proceeded with the lift repair without prior approval of the owners, it would have been acting in breach of the Code.

211. Mr Walker said that Atholls did not carry out a risk assessment regarding access to and from Block C and that it is not industry standard practice for a property factor to perform a risk assessment at a domestic property. He said that, to the best of his knowledge, there is no legal or technical requirement to carry out such a risk assessment. He said that there is signage in each block advising that the lifts are not to be used in the event of fire. He said that only the stairs could be used to evacuate the building in the event of an emergency.

212. Mr Walker said that he had responded properly to the complaint raised by Mr Wilson. He said that he struggled to understand why some matters complained about concerned items such as the budget which had occurred some fifteen months previous to the complaint being rasied. He said that he had detailed to Mr Wilson the reasons for changes to the budget and he said that the vast majority of works in the Development have been carried out after consultation with and agreement of the Committee.

213. Kenny Cheyne adopted the terms of his written statement which had been lodged with the Tribunal and a copy of which had been sent to Mr Wilson.

214. Mr Cheyne said that he is a Director of Building Consultancy at Atholls and that he is a Chartered Building Surveyor and that his governing body is the Royal Institute of Chartered Surveyors. He said that he has a BSc (Hons) degree in building surveying and he said that his role is to develop the building consultancy department at Atholls, provide support to the property management department and assist with the general management of the company. He said that, prior to starting work with Atholls in February 2019, he worked in another company as a senior building surveyor.

215. Mr Cheyne said that, in January 2019, Mr Wilson requested that the compact fluorescent lamps (“CFL”) bulbs in the blocks at the Development be replaced with an LED alternative and he referred to email exchanges with

regard to this (Production R 6). He said that Atholls sought recommendations and guidance from three electricians and that there were difficulties in identifying a contractor who would accept instructions to replace CFL bulbs with LED bulbs. He said that an LED bulb requires a different light fitting than a CFL bulb. He said that a "choke" and a "ballast" are both elements of control within the light's running gear. He said that Atholls was advised by these electricians that the particular light fittings at the Development contain, as part of their running gear, a "choke." He said that a choke is commonplace fluorescent style light fittings and that its purpose is to limit the electrical current to prevent it reaching critical levels. He said that advice from electrical contractors was that, if an LED bulb was installed in such gear, it would fail if there was a spike in electricity and, if not, its lifetime would be significantly reduced. He said that it would therefore be false economy to take that course of action.

216. Mr Cheyne said that the recommendations from the electrical contractors were for the light fittings to be replaced as it would be more economical because there would be a guarantee. He said that he considered this to be safest option. Mr Cheyne said that this was reported to Mr Wilson on 17th February 2020 and that he disagreed with the advice which had been received and that the light fittings contained a ballast.

217. Mr Cheyne said that, having taken further advice from an electrician, Atholls was advised that a ballast is a newer form of choke and is a type of electrical resistor which has a greater control of spikes in electricity but that, depending, on the electrical rating of the ballast, it may not be suitable for a replacement LED bulb. He said that the information given to Atholls from the three electricians was that both chokes and ballasts can be bypassed to provide direct electrical feed to the lamp holder but this is not recommended as there are associated health and safety concerns and it may lead to shortening of the expected LED lifespan.

218. Mr Cheyne said that, at a meeting of owners on 24th February 2020, the issue of the LED replacement lightbulbs was discussed and he referred the Tribunal to the minutes of that meeting (Production R 10). He said that Mr Wilson proposed that all CFL bulbs be replaced by LED bulbs as and when the bulbs fail and not upon failure of the light fittings. He said that a cost benefit analysis carried out by Atholls showed that the cost efficiencies of LED bulbs was minimal and he said that Ms Mair advised owners of this at the meeting. Mr Cheyne said that he explained to those at the meeting the difference between replacement bulbs and replacement light fittings and he said that he advised the homeowners that the most economical solution would be replacement of the light fittings on failure, not the individual parts (the light bulbs). He said that the advantage of replacement of the fitting was a warranty for workmanship and parts as against replacement of parts alone where a warranty would not include workmanship.

219. Mr Cheyne said that Atholls' advice to owners was not to replace CFL bulbs with LED bulbs on the basis of minimal cost savings and possible failure of LED bulbs due to overheating of the light fittings. Mr Cheyne said that Mr Wilson told the meeting that he disagreed with this advice. Mr Cheyne said that

it was agreed at the meeting that, even though it would be more expensive to do so that, when the light fittings fail, they are to be replaced with LED light fittings and bulbs and he said that Atholls have implemented those instructions.

220. Kenny Cheyne said that Mr Wilson reported water ingress to his property on 13th December 2019 and that Graeme W. Cheyne attended the same day and reported to Atholls that the cause of the ingress was that a large area of roof channelled into a small section of gutter. He said that the contractor advised that the issue was compounded by ineffective previous repairs and that these were contributing to rather than alleviating the water ingress.

221. Kenny Cheyne said that this was the same cause of water ingress as had previously been identified by Graeme W. Cheyne and which had been reported by that contractor to Mr Wilson on 14th February 2018, prior to the commencement of Atholls' management of the Development.

222. Kenny Cheyne said that the recommendation from the contractor was for installation of a water diverter to slow the flow of water and undertake repairs to the lead to stop capillary action and to clear moss and debris from the roof. He said that it was the same works recommended by the contractor in 2018. Kenny Cheyne said that his understanding is that the works were instructed in 2018 but that, due to ill health of the contractor, the works could not be done. He said that, during a conversation, Atholls were led to believe from Mr Wilson that the scope of works as identified by Graeme W. Cheyne had been passed to another contractor to be undertaken. Kenny Cheyne said that the opinion of Graeme W. Cheyne was that none of the works which had been identified in 2018 had been carried out. Kenny Cheyne said that it was recommended that he carry out an inspection to ascertain what works required to be done.

223. Kenny Cheyne said that Mr Wilson's flat is on the top floor of a building around twenty four metres in height and that, because of its height and position, it is exposed to changeable weather conditions. He said that inspections of the roof by the contractor and him had to be postponed on two occasions because of adverse weather conditions. He said that Mr Wilson was updated on progress. He said that he believed Mr Wilson understood the difficulties in carrying out an inspection and he referred the Tribunal to Production R 16 which is an email from Mr Wilson to Mr Cheyne in which he states *"Hi, Kenny, Many thanks for the updates. I would not wish anyone to risk going on the roof until the weather improves. Very Best Regards, Bob."*

224. Kenny Cheyne said that a joint detailed examination of the roof was carried out on 21st January 2020 and he said that, following this, it was agreed that Graeme W. Cheyne's quotation from 2018 was to be reviewed to include repair works between the wall head and soffit boards which was reported to Mr Wilson as being the most likely cause of water ingress during northerly weather conditions. Mr Cheyne said that he kept Mr Wilson advised of progress and he referred the Tribunal to Productions R 17 and R 18 which were emails he sent to him.

225. Kenny Cheyne said that Atholls issued a report to owners of Block C on 18th February 2020 (Production R 19) and that this stated that a gutter was being overwhelmed due to the volume of rain water occasioned from the weather conditions experienced.

226. Kenny Cheyne said that the gutter problem had been identified by Graeme W. Cheyne prior to Atholls' involvement with the Development. He said that costs quoted relied on a verbal quote from the contractor but that a written quote was not produced by the contractor until 16th March 2020. He said that a quote had been received on 28th February 2020 but that this did not include the work which it had been identified was required to the wall head and soffits.

227. Kenny Cheyne said that he had been let down with regard to a start date for work and he said that the quotation which was issued on 16th March 2020 was sent to Mr Wilson on 27th March 2020. He said that national lockdown measures prevented the works commencing.

228. Kenny Cheyne said that, unknown to him, Mr Wilson engaged his fellow owners in the block and advised them that the work to the wall head and soffits was to be excluded. He said that Mr Wilson never shared his reasons for this and that he did not press him on the matter. He said that this was against Atholls' advice but that there was no dialogue with owners on the matter. He said that the owners' instructions were followed and the works to the wall head and soffits were not carried out. He said that authority from owners for these restricted works was not obtained until 13th April 2020.

229. Mr Cheyne said that Atholls instructed the contractor to do the restricted works but also advised Mr Wilson and the other proprietors in Block C that the works instructed would not eliminate the water ingress experienced during certain weather conditions.

230. Mr Cheyne said that, when lockdown working restrictions were eased, the roofing contractor had a backlog of work and that it also had issues with regard to the requirement of some employees to shield. He said that Mr Wilson complained that the roofing works were not progressing quickly enough. He said that Mr Wilson did not take into consideration the contractor's outstanding workload and the working restrictions under which it had to operate. Kenny Cheyne said that Graeme W. Cheyne advised Atholls that Mr Wilson had contacted them direct seeking information and a potential start date for works.

231. Kenny Cheyne said that, during the conversation between Mr Wilson and Mr Denniston at the time the leak was reported in December 2019, it was the understanding of Atholls that the water ingress experienced was only during adverse weather conditions and not every time there was rain. Mr Cheyne said that, in an email to him from Mr Wilson on 6th July 2020, he was asked *"would you be patient with water dripping through your roof when it rains?"* Mr Cheyne said that Mr Wilson contradicted himself in a later email to Atholls dated 28th July 2020 when he stated *"Please be advised, we only have water ingress as and when there is a combination of persistent heavy rain and strong wind. It appears that the volume is more than the gutters can handle leading to overflow*

and penetration through the soffit boards." Mr Cheyne said that the later email confirmed his original understanding of the relatively minor nature of the water ingress and that it also confirmed his view of the need for the recommended repairs to the wall head and soffit boards.

232. Mr Cheyne said that, in relation to emergency lighting at the Development there are two options. He said that the first is to change every fitting to a suitable emergency light fitting and the second is to install a second circuit with the required emergency light fittings. He said that normal practice is for a dedicated circuit to be installed. He said that either option would exceed the authorised level of spending which Atholls had and that a vote of owners would be required.

233. Mr Cheyne said that Atholls has no trace of an email from Mr Wilson on 1st January 2019 requesting that emergency lighting be fitted in the communal areas. He said that, in the course of monthly walk rounds of the Development with Mr Wilson, he never raised the question of light fittings with Atholls. He said that Mr Wilson never provided a copy of the email of 1st January 2019.

234. Mr Cheyne said that on 12th January 2020, Atholls noticed on the Elmhill Residents Facebook Forum page that Mr Wilson had posted that he had tried the lift alarm and that, in his opinion, it had failed. Mr Cheyne said that, on noticing the post, Atholls had reported the matter to Otis, the lift maintenance contractor. He said that it inspected the lift alarm that evening and that it found no fault.

235. Mr Cheyne said that during a meeting on 14th January 2020, Mr Wilson advised that there had been a fault with the alarm in the lift. He said that he asked why Mr Wilson had posted this on the Facebook page but had not reported the matter to Atholls. He said that Atholls have emergency procedures in place which are detailed in the contract with owners. He said that Mr Wilson said that he had reported it but was not able to say to whom the report had been made. Mr Cheyne said that Mr Wilson has not provided a copy of the report to Atholls which he said he had made.

236. Mr Cheyne said that, in order for Atholls to understand fully how lift alarms work, a meeting with Otis was arranged. He said that this had been at Atholls' expense. He said that Atholls arranged for the testing of all six lift alarms and that they were found to be in good working order. He said that, following the inspection, Ms Mair reported the findings to Mr Wilson on 28th February 2020.

237. Mr Cheyne was referred to Applicant's Productions Tab 5-P.9. Mr Cheyne said that this was a report prepared by Atholls on 10th September 2020 which had been sent to owners on 11th September 2020. Mr Cheyne said that this report was prepared by him once he was satisfied that all the roofing works had been completed.

238. Mr Cheyne said that the contractor had completed the majority of the work in July 2021 but that a lead rainwater diverter in a box gutter had not been

installed until later. He said that the contract included the provision of this and he surmised that the contractor did not have the necessary materials to complete the work in July 2020. He said that he did not want to issue a report to owners until he was certain that the rainwater diverter had been fitted.

239. Mr Wilson referred to paragraph 20 of Mr Cheyne's written statement about a Facebook page for Elmhill Residents. Mr Wilson asked how Mr Cheyne could have got access to this when it was a closed page. Mr Walker said that at the time he was referring to, it was an open page and that he was able to access it.

240. In response to Mr Wilson's questioning, Mr Cheyne said that he had not been told about the water leak problem until Mr Wilson had reported water ingress in 2019. He said that, subsequent to the report of water ingress to Block C, he had been made aware that there had previously been issues. He said that Mr Wilson may have told Mr Denniston but that he was not privy to that conversation.

241. Mr Cheyne was referred to a photograph of the roof (Production R 19/3) He said that this is one of the photographs attached to the report on the roof prepared by Atholls and dated 18th February 2020. Mr Cheyne said that there had been a quotation by the roofing contractor dated 2018 but that, in his view, this was incomplete and did not include all the work which he thought was necessary following upon his inspection of the roof. Mr Cheyne said that there was a space between the wallhead and soffit where there should have been a sealant material and that this was missing. When challenged by Mr Wilson on the matter, Mr Cheyne insisted that, in some places, the sealant material was missing.

242. Mr Cheyne said that vent covers were replaced and he confirmed that the final quotation by the contractor matched that which it had provided in 2018.

243. Kenny Cheyne was referred to Production R 21 and he said that this was the quotation from Graeme W. Cheyne from 2018. He said that the full quotation had only been received from the contractor on 16th March 2020. Mr Cheyne said that this was the quotation in what he described as its full format.

244. Mr Cheyne said that he could not have proceeded with instructing the work until he had a written quotation and that he would never proceed, in 2020, with issuing instructions to have works carried out based on a quotation from 2018. Mr Cheyne, in answer to a question from Mr Wilson, said that he had not been instructed in 2019 to have the work in the quotation carried out. He said that he is not and had not been involved in day to day management of the Development. Mr Cheyne said that he could not recall any conversation with Mr Wilson as to why the quote of February 2018 could not be implemented.

245. Mr Cheyne said that, if faced with a quotation from a contractor which was two years old, he would ask for it to be refreshed. He confirmed that, in fact, the cost in the two estimates had been the same after deduction of the

works which the owners had not authorised. He said that he considered that he would have been negligent in not getting an updated quote.

246. Mr Cheyne said that, as a result of his inspection of the roof, he had identified work which required to be done and he referred to an area shown in Photograph 1 of Production R 19. He described how, in certain weather conditions, he believed that there would be water ingress because of a gap at the wall head. He said that there was missing sealing material and he said that this may have been an oversight at the time of construction or have been a deliberate omission to allow ventilation. He said that, in his view, there was sufficient ventilation from other places.

247. Mr Cheyne said that he formed the view of work requiring to be done as a result of his expertise as a chartered building surveyor. He said that the quoted costs of the additional works was £2,875 which would have been shared amongst thirteen proprietors.

248. Mr Cheyne said that, when the roof repairs were being done, Mr Wilson had never indicated to him that he considered the repairs to be an emergency repair under the Tenement (Scotland) Act.

Submissions

Paragraph 2.1 of the Code

249. Mr Wilson said that, prior to its appointment, Atholls had been advised of the scope of work and that it had been aware of the concerns about the high usage of electricity. He said that it had been aware of the fact that, in the Development, there were 25 street lights, 78 car park lights and over 200 communal lights.

250. Mr Wilson said that he had requested that lights be upgraded to LEDs as and when bulbs failed.

251. He asked the Tribunal to accept that the Property Factor had supplied false and misleading information with regard to the replacement of the street lighting when it stated that they could not be replaced with LED units. He said that this was now being done. He said that the Property Factor's statement that the street lights could only be replaced with LEDs if the fitting was replaced was false.

252. Mr Wilson said the Property Factor's statement that cost savings from installation of LEDs would be minimal was wrong. He said that, during the AGM on 20th August 2019, he had produced an estimate of cost savings and that these were around £7,000.

253. Mr Wilson said that he had asked for the lighting to be upgraded to LEDs and that this was now being done. He said that this had only started when an application had been made to the Tribunal.

254. Mr Wilson said that, on 4th March 2020, Mr Alistair Walker had produced a draft letter to Mr Wilson who said that it had been intended to be sent to owners. Mr Wilson said that the contents of this draft letter were misleading and he said that it misquoted him. Mr Wilson said that a revised letter was prepared.

Paragraph 2.4 of the Code

255. Mr Wilson said that Atholls had submitted a budget upon being invited to tender for the work and that they had issued a budget with a total cost of £109,332.79 and that this had increased to £116,469.09 without him being consulted.

256. Mr Wilson said that, on 13th December 2019, he had reported water penetration and he said that this was a recurring problem. He said that it was wrong for Atholls to categorise this as a small leak.

257. Mr Wilson said that he had been told that a work order had been issued to the roofing contractor when it had not and was later advised that the work was not being done until a majority of owners authorised it.

258. Mr Wilson said that he spoke to some owners in an attempt to facilitate the obtaining of authority. He said that it was his position that authority from owners was not required because of the Tenement (Scotland) Act 2004 which defines damage to property and work on a roof as emergency. He asked the Tribunal to accept that nowhere in the Act did it say that consideration of it is excluded because of the existence of a Deed of Conditions or when there is a property factor.

259. Mr Wilson said that the previous property factor did not require consent by more than 50% of proprietors before carrying out works.

Paragraph 6.1 of the Code

260. Mr Wilson said that he repeatedly asked Atholls for a report confirming that the roofing works had been completed. Mr Wilson said that the roofing contractor had produced a report to Atholls on 24 July 2020 but that this was not communicated by them to owners until 11th September 2020.

Paragraph 6.9 of the Code

261. Mr Wilson said that the contractor for the lift repair had quoted somewhere in the region of £5,600 to repair the door opener in the lift in Block C. He said that work had to be carried out by Otis because the owners were contractually tied to them. He said that he was unhappy about the cost of the work and had asked Atholls to challenge the costs. He said that he considered the labour costs to be excessive. He said that he thought that Otis overcharged

for the works which it carried out. He said that he thought its invoice was excessive.

Property Factor's duties

262. Mr Wilson asked the Tribunal to accept that, in its actings in the matters on which evidence had been heard, Atholls had not complied with the property factor's duties. He said that Atholls frequently had excuses for why things requested of them were not done. He said that, initially, Atholls had monthly meetings with owners at which it produced spreadsheets showing the works ongoing or contemplated but that these had been abandoned long before the Covid-19 restrictions.

263. When asked about the ongoing relationship with Atholls, Mr Wilson said that they had served notice that they wanted to stop managing the Development.

Ms Rattray referred to the written submissions which had been lodged

Paragraph 2.1 of the Code

264. Ms Rattray said that the Applicant's position was that her clients had provided false or misleading information with regard to LEDs. Ms Rattray said that the Respondent did not dispute that LEDs are more efficient with regard to energy use but that Mr Wilson had not lodged any evidence with regard to the extent of energy saving and replacement of LEDs before the expiry of the lifetime of the existing bulbs.

265. Ms Rattray said that, on appointment in January 2019, there were a number of tasks in an action list prepared by the committee of residents. She said that the Respondents turned to the lighting issues early in 2020 and that a proposal was finally submitted to homeowners on 20th January 2021.

266. Ms Rattray said that, in January 2021, the Applicant had requested a cost benefit analysis with regard to replacement of bulbs with LEDs and that the Respondent agreed that this would be done as and when possible.

267. Miss Rattray said that the Respondent had difficulty in identifying a contractor to do the work and that three contractors had advised the Respondent that the work could not be done without modification or replacement of the light fittings.

268. Miss Rattray said that, in March 2020, a contractor was identified who was prepared to replace bulbs with LED plates and that this would be done only when lights failed. She said that the Applicant accepted in evidence that this was the case.

269. Ms Rattray referred to the minutes of the meeting of 24th February 2020 where it was noted that Kenny Cheyne had indicated that cost savings would

be minimal if units were replaced throughout the development rather than replacement of a unit when it failed.

270. Miss Rattray said that the Respondent's position was that it would not be to the advantage of the Development to replace all the fittings as part of a programme. She said that, at the meeting, it was agreed that light fittings should be changed to accommodate LEDs but only when lights failed.

271. Miss Rattray said that her clients could not act on the unilateral instructions of Mr Wilson and that a programme of replacing with LEDs throughout the Development would have exceeded the Respondent's level of authority.

272. Ms Rattray said that the Respondent had a reasonable belief that the car park lights could not have LEDs retrofitted.

273. Ms Rattray said that pulling together the lighting proposal had taken time and that a proposal had been put to homeowners in January 2021. She said that the Applicant has indicated that he does not want to progress the proposal and that her clients have no information on the matter from other homeowners.

274. Miss Rattray said that the information provided by the Respondent with regard to lighting was not false and misleading and was provided on the basis of advice received and information which had been gathered.

275. Ms Rattray said that the Applicant had referred to a draft letter prepared by Mr Walker and that it contained false information. She said that this letter was a draft and had not been issued to homeowners and that, even if it contained false and misleading information, which is not accepted, it could not fall into the category of being false and misleading.

Paragraph 2.4 of the Code

276. Miss Rattray said that her clients have a procedure as required by this section of the Code. She said that the budget had been provided on the basis of information received and that it was a draft budget.

277. Miss Rattray said that the Respondent had been asked to submit a draft budget in a prescribed form and had done so. She said that, after discussion an amended budget had been produced. She said that homeowners had approved the budget. She said that the Respondent had not been made aware of the insurance claims history and the terms of the lift contract prior to submission. She said that, although gutter cleaning had not been asked to be included, the Respondent, on inspecting the development thought that it was necessary. She said that homeowners, including Mr Wilson, approved the budget.

278. Miss Rattray asked the Tribunal to note the difficulties encountered in changing the lift maintenance contract and how that would impact on costs.

279. Ms Rattray said that it was a matter of admission by the Applicant that gutter cleaning costs were approved. She said that the Applicant knew about the increase in the budget.

280. Ms Rattray said that the Respondent contacted homeowners seeking approval of the revised budget. She said that a majority of the resident's committee approved the budget and that the Respondents proceeded to manage the Development on the basis of the revised budget.

281. Ms Rattray said that the Respondents were in regular contact with the Applicant and that he did not raise any issues about the budget. She asked the Tribunal to note an email of the Applicant to the Respondent when he had stated that a budget was a budget and that they could not be held to be accountable for any increase in costs. She said that the Applicant accepted this in evidence.

282. Miss Rattray said that the Respondent was appointed on the basis of the revised development budget and that the Applicant raised no concerns about the budget until the complaint he made to the Respondent as a precursor to the application to the Tribunal.

283. Ms Rattray asked the Tribunal to find that the Respondent has not breached Paragraph 2.4 of the Code.

Paragraph 6.9 of the Code

284. Miss Rattray said that the lift broke down in December 2019 and that it was logged and actioned on the day the failure was reported. She said that Otis failed to report the outcome. She said that the repair required exceeded the authorised sum for repairs to the block and that therefore repairs could not be instructed until authority had been obtained. She said that the authority from homeowners was obtained quickly and that the lift was fixed by 21st January 2021. He said that Otis accepted that the delay in repairing the lift had been their fault.

285. Ms Rattray said that the Applicant attended a meeting with Otis on 24th January 2021 where it accepted responsibility for the delay. Ms Rattray asked the Tribunal to accept that the Respondent had diligently pursued Otis and that repair by a third party contractor would not have been feasible.

286. Miss Rattray said that the quotation from Otis had been sent to homeowners and that they had approved repairs without questioning the amount

Paragraphs 2.1, 2.4 and 6.9 of the Code relating to roof repair

287. Ms Rattray asked the Tribunal to find that there had been no evidence to suggest that the Respondents had provided false or misleading information with regard to the roof repair.

288. Ms Rattray said that authority from owners had to be obtained before any repair could be instructed. She said that there had been issues with the roof since the Applicant had purchased the Property and asked the Tribunal to accept that the leak on 13th December 2019 had been due to extreme weather conditions.

289. Ms Rattray said that contractors had effected a temporary repair on the same day that the water ingress had been reported.

290. Miss Rattray said that authority for the repairs had to be obtained and that an inspection of the roof had to be carried out in clear conditions. She asked the Tribunal to consider it reasonable that such a roof inspection should be carried out.

291. Miss Rattray said that, on 28th February 2020, the Respondent received a quotation from the roofing contractor but that this was not a full quote and that this was produced towards the end of March 2020. Miss Rattray said that the Applicant was kept updated by the Respondent. She said that the Applicant accepted that he had received emails updating him.

292. Miss Rattray said that lockdown on 23rd March 2020 had obviously prevented work progressing but that the Respondent had been efficient in getting a date for commencement of work.

293. Miss Rattray asked the Tribunal to consider it significant that the Applicant reported no further water ingress between the time he had reported the issue and the work being done.

294. Miss Rattray said that the report on the roofworks had been issued on 11th September 2020 when the Respondents were confident that all the works had been done.

295. Miss Rattray submitted that the Respondent had been diligent in arranging for the roof work to be done and that, but for the Covid-19 restrictions, they would have been completed sooner than they were.

296. Ms Rattray said that it was significant that the issue with water ingress had been in existence for many years prior to the involvement of the Respondents.

297. Miss Rattray said that it was her position that the Tenements (Scotland) Act 2004 was not relevant because there was a Deed of Conditions for the Development. Her position in respect of the Act was in respect of the repair to the lift and the roof. She asked the Tribunal to accept that neither of these was an emergency repair.

298. Ms Rattray said that the Tenement (Scotland) Act 2004 Act exists, in part, to assist proprietors of tenemental property where there was no means of agreeing arrangements for repairs to be carried out. She referred the Tribunal to Section 4 (a) which states that the scheme set out in the Act will apply unless *"a tenement burden provides procedures for the making of decisions by the owners."* Ms Rattray asked the Tribunal to accept that the existence of the Deed of Conditions contained within the title of the Property meant that the 2004 Act could not apply.

299. Miss Rattray said that the Respondent communicated transparently with regard to the roof repairs and that no evidence was before the Tribunal which suggested that it did not.

300. Ms Rattray said that, in relation to paragraph 6.9 of the Code, the Respondent only became aware of the issue with the roof when the water ingress was reported in December 2019.

301. Ms Rattray submitted that, in relation to the lift repair and Otis, the Respondent had diligently pursued the contractor to come back to repair the lift after the initial repair.

302. Ms Rattray asked the Tribunal to find that there was no evidence to suggest that the Respondent had failed to carry out the property factor's duties in terms of the 2011 Act.

Expenses

303. Ms Rattray said that she was making no motion in regard to a finding of expenses in favour of the Respondent but that she intended to reserve her position in the matter and may want an opportunity at some future date to address the Tribunal.

Discussion

304. In coming to its determination, the Tribunal had to decide, on the balance of probabilities, whether or not the Respondent has complied with the Code and carried out the property factor's duties.

305. The Tribunal required to assess the evidence which had been led with regard to credibility and reliability.

306. The Tribunal found the evidence of the Respondent's witnesses to be entirely credible and reliable. They displayed a level of care and professionalism which was impressive and this was borne out by the supporting productions which had been lodged.

307. The Applicant was credible in most matters but the Tribunal formed the view that he had very entrenched views about some matters and that this

sometimes led him to give evidence which could not be supported by documentation. There were very few issues where, in fact, the Tribunal had to make a judgement about credibility but where there was a conflict of evidence, it preferred that of the Respondent's witnesses. The Tribunal did not always find the evidence of the Applicant to be reliable and he could sometimes be disingenuous when asked direct questions. On more than one occasion he refused to accept a particular thing to be correct until he reluctantly did so when referred to a production such as an email which clearly set out that he should have accepted it to be correct. Another example of Mr Wilson not being helpful in giving evidence is his insistence that he took legal advice about a matter, asked the Tribunal to accept what he said the advice to be but refused to disclose who he had received it from.

308. In considering matters, the Tribunal identified particular issues or themes and determined that it would be useful to deal with each in turn.

The Budget

309. There was a considerable amount of evidence on this matter and no real conflict of evidence which required to be resolved.

310. In simple terms, Atholls were asked to tender for the contract to manage the Development. It did so and produced a draft budget.

311. This draft had to be revised for issues described by the Applicant as being "outwith Atholls' control."

312. What the Applicant took issue with was that the budget included gutter cleaning. No evidence was led by the Applicant to suggest that such gutter cleaning was not necessary but what did concern him was that the costs for this should not have been included in a budget but be dealt with as an additional cost.

313. The Tribunal came to the view that whether the gutter cleaning should have been in as a core feature of the budget or not was irrelevant and that what was relevant was whether or not there was breach of the Code and, in particular paragraph 2.4.

314. Proprietors, including Mr Wilson, had a copy of the budget which included gutter cleaning and that budget was approved. Gutter cleaning has proceeded on that basis.

315. The Tribunal had difficulty in understanding why the Applicant has made a complaint on this matter some fifteen months after he was aware of the budget and also in circumstances where he had raised no substantive objection at the time and, indeed has stated that, as far as he is concerned "a budget is a budget."

316. In relation to issues around the budget, the Tribunal found no breach of the Code or the property factor's duties.

The Lighting Issue

317. The Tribunal has no expertise in electrical matters but it did not require to have such expertise to determine whether or not the Respondent had dealt properly with this issue.

318. The question of lighting at the Development was not straightforward. The Tribunal accepted that, at the outset of its management contract, Atholls was aware that matters required to be addressed in relation to lighting.

319. The Tribunal accepted that the issue was not just about LEDs but also about a possible improvement scheme to instal an emergency lighting system and to avoid lights being on permanently.

320. It was clear that Mr Wilson had fixed ideas on the sustainability of installation of LEDs in existing systems. He even instructed his own electrician to instal a LED in one of the common lighting units. It was surprising to the Tribunal that he would have thought this appropriate considering that he instructed the work without authority of owners or knowing whether or not the particular contractor was accredited or had professional indemnity insurance.

321. In contrast to Mr Wilson's approach, the Respondent took advice and this advice was against taking the course of action in relation to LEDs which Mr Wilson favoured. Atholls took the advice from three electrical contractors. For them to go against the advice of three separate contractors would have been wrong and the Tribunal agreed with Mr Walker that, to do so, may have been in breach of the Code.

322. The Tribunal did not consider it relevant that some units are now being replaced with LEDs.

323. The Tribunal considered that the Respondent was right to be cautious and followed good practice in this matter. It found the evidence of Mr Cheyne and Mr Denniston to be helpful where they explained the issues with regard to ballasts and chokes. It considered that Mr Wilson took a somewhat simplistic approach to these matters and it preferred the evidence of Mr Cheyne where he detailed the possible problems dealing with ballasts and chokes.

324. The Tribunal determined that the Respondents followed advice from contractors. The Applicant's position appeared to be that, in the Respondents not following what he wanted to do in relation to LEDs and providing contrary information obtained from contractors, it was providing false and misleading information. The Tribunal found no evidence of this.

325. In relation to the lighting issue, the Tribunal found no breach of the Code or that the Respondent had failed to carry out the property factor's duties.

The Tenements (Scotland) Act 2004

326. This is an Act which, in broad terms, deals with two principal issues. It provides a helpful definition of tenemental property and also sets out a scheme for ensuring that there is a system for proprietors to arrange repairs of the tenement.

327. The Applicant invites the Tribunal to consider that, in terms of the Act, Atholls should have carried out repairs to the roof and the lift without requiring to get authority from owners. He said that the Act provides for such work if it is considered to be emergency or if it is required for health and safety reasons.

328. The Tribunal had no difficulty in accepting Ms Rattray's position that the 2004 Act did not apply because a Deed of Conditions was in place. In any event, had there not been a Deed of Conditions, certain processes would have had to be followed in terms of the Act before any repairs could have been carried out.

The Building Standards

329. The Applicant's position is that the repair to the lift should have been deemed to be essential and therefore carried out without the need for approval because the current edition of Building Standards requires a building the height of Block C to have a lift.

330. The Building Standards applicable at the time of construction of Block C did not require a lift because otherwise it would have had one.

331. The Tribunal considered the Applicant's submission on Building Standards to be irrelevant because one could not apply them retrospectively but, in any event, even if Block C had been built under current Building Standards, it did not consider that this would obviate the need for approval for a repair in terms of the Deed of Conditions.

Mr Walker's draft letter

332. The Applicant asked the Tribunal to find that a draft letter prepared by Mr Walker and sent to him for approval contained false and misleading information.

333. It appears that Mr Wilson considered that the letter, as drafted, misquoted him.

334. It appeared that the letter drafted by Mr Walker was done with the best of intentions to try and provide a solution so that lift repairs could be carried out with more expedition.

335. The letter was a draft and was not sent to anyone other than the Applicant who had produced no convincing evidence to show that it was false or misleading.

336. In relation to the draft letter, the Tribunal found no breach of the Code or that the Respondent had failed to carry out the property factor's duties.

The roof repair

337. It was not a matter of contention that there had been an issue with water ingress for some time.

338. The Applicant's position is that the Respondents should have instructed the repair without obtaining approval from proprietors in Block C because it was an essential repair and that they also caused delay in getting the works done because they insisted in carrying out a roof inspection and in adding additional works.

339. The tribunal accepted that a works order for a temporary repair had been issued the same day that the water ingress had been reported.

340. Mr Denniston said that, had there been an issue where there was a danger to the fabric of the building, he would have considered it to be an essential repair but that he did not consider this to be case with the particular water ingress to the Property.

341. The Tribunal accepted that the issue of water ingress was long standing. Mr Wilson said that it was an essential repair but, in an email, stated that the water ingress only occurred in certain weather conditions.

342. The Tribunal accepted that the issue with water ingress was not essential. It was a matter which had occurred for many years. Mr Wilson's evidence in this regard was persuasive. He said that a quotation had been obtained from a contractor in 2018 and that, because of illness, that contractor had been unable to complete the works. He said that he had been content to wait for that contractor because he was good. This hardly demonstrated a matter which was urgent.

343. The Applicant took issue with Mr Kenny Cheyne undertaking a roof inspection. Mr Wilson was very forceful in this regard stating that he had no business in carrying out such an inspection and that he had not been asked to do so. Mr Wilson also said that Atholls should have proceeded on the basis of the 2018 quotation without inspection.

344. It was clear from emails before the Tribunal that Mr Wilson was aware that a roof inspection was to be done and that he raised no objection.

345. It is not every property factor which would have a chartered building surveyor in its ranks and the Tribunal could not understand the Applicant's insistence that it was not necessary for him to inspect. It may be because his inspection identified additional work which the Applicant did not want to get done. Mr Cheyne was clear in stating that he did not believe that the works done would deal with all water ingress. Time will tell.

346. The Tribunal considered that no reputable property factor would instruct works based on a historic quotation and that it was appropriate for Atholls to have Graeme W. Cheyne's invoice refreshed.

347. In relation to the matter of the roof repairs, the Tribunal determined that there was no breach of the Code and that Atholls carried out the property factor's duties.

The lift repairs

348. The Tribunal accepted that it must have been extremely concerning for Mr and Mrs Wilson when the lift was out of commission. Their flat is on the seventh floor of Block C and Mrs Wilson has health issues.

349. The Tribunal was impressed with the efforts Atholls had made to have the lift repaired and, in fairness to Mr Wilson, he appears not to have a complaint in this regard as is borne out by his emails (example Production R 54). Not only did Atholls chase the repair but they arranged a meeting with Otis to discuss the matter and involved Mr Wilson in this and they also tried to explore ways to increase the threshold of spending authority in connection with future lift repairs.

350. Where the applicant does have an issue is in relation to the cost of the repair and the need for getting authority from proprietors to have the works done.

351. Mr Wilson considers that Atholls should have challenged Otis with regard to the cost of the works. The Tribunal considers that Mr Wilson appears not to have appreciated the contractual position with Otis and the lack of choice. One witness referred to its "golden handcuffs." Mr Wilson had the opportunity to raise the matter at the meeting with Otis and did so to no effect.

352. The fundamental point with regard to the quotation for the repair is that the proprietors in Block C, including Mr Wilson, approved the quotation for repair. It did not seem reasonable to the Tribunal that, against that background, a property factor could be expected to challenge the cost after the works have been done especially because of the "golden handcuffs situation."

353. The Applicant considers that the lift repair should have been considered essential and said that the legal advice he obtained supported that. He said that, on that basis, Atholls should have proceeded without seeking approval of owners. Mr Wilson did not lodge a copy of that legal advice and even refused to divulge its source.

354. The Respondents had legal advice that the lift repair was not essential and that, had they proceeded without authority, they may have been held liable.

Emails from Mr Wilson appeared to support that he recognised this as a possibility.

355. In relation to the lift repairs, the Tribunal determined that there was no breach of the Code and that the Respondent had carried out the property factor's duties.

Summary

356. The Tribunal found that the Respondent had carried out the property factor's duties and, in relation to the application, had complied with the Code.

357. The Tribunal noted that the Respondent had indicated their desire to resign from management of the Development and considered it unfortunate. Based on the evidence it had heard and the documents lodged, the Tribunal considered the Respondent to be responsible and professional property factors with the advantage of being able to call on inhouse professionals such as a chartered building surveyor to assist in management of properties. It is to be hoped that the Development's new property factors provide an appropriate service to homeowners.

Expenses

358. The Tribunal noted that Ms Rattray wanted the matter of expenses to be reserved. It determined that, should she want to make a motion in respect of expenses, it would require to be made in written form within twenty one days of this Decision being issued. If such a motion were made, the Tribunal would issue a direction on future procedure to allow parties an opportunity of making representations.

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 of the First-tier Tribunal for Scotland
5th April 2021