Decision of the First-tier Tribunal for Scotland (Housing and Property Chamber) (formerly the Homeowner Housing Panel) issued under the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 in an application under section 17 of the Property Factors (Scotland) Act 2011 ('The Act').

Chamber Ref:FTS/HPC/PF/18/3466

2/7, Craufurdland, Brae Park Road, Barnton, Edinburgh, EH4 6DL ('the Property')

The Parties:

George Allan residing at 2/7, Craufurdland, Brae Park Road, Barnton, Edinburgh, EH4 6DL ('The Homeowner')

James Gibb Residential Factors, 4 Atholl Place, Edinburgh, EH3 8HT ('the Factor)

Tribunal members:

Jacqui Taylor (Chairperson) and Andrew Taylor (Ordinary Member).

Decision of the Tribunal

The Tribunal determines that the Factor has not failed to comply with sections 1 and 2.1 of the Property Factor Code of Conduct and has not failed to comply with the property factor duties.

The decision is unanimous.

Background

1. The Factor's date of registration as a property factor is 23rd November 2012.

2. The Homeowner is proprietor of the Property in terms of Land Certificate MID74534. He purchased the Property jointly with Long Kin Fong on 7th June 2013.

3. By application dated 9th August 2018 the Homeowner applied to the First- tier Tribunal (Housing and Property Chamber) for a determination that the Factor had failed to comply with the following sections of the Property Factor Code of Conduct ('The Code') and also failing to carry out the Property Factor's duties.

- Section 1: Written Statement of Services.

  Various sections

- Section 2: Communication and Consultation.

  Sections 2.1

- Section 6: Carrying out Repairs and Maintenance

  Section 17(5)

4. The application had been notified to the Factor.

5. By Minute of Decision by David Bartos, Convener of the First- tier Tribunal (Housing and Property Chamber), dated 16th January 2019, he intimated that he had decided to refer the application (which application paperwork comprises documents received in the period 19th December 2018 to 15th January 2019) to a Tribunal.

6. An oral hearing took place in respect of the application on 22nd August 2019 at the George House, Room D10, 126 George Street, Edinburgh, EH2 4HH.

The Homeowner appeared on his own behalf accompanied by Long Kin Fong, co proprietor of the Property.

The Factor was represented by, Nic Mayall and Angela Kirkwood, Director and Operations Director respectively of James Gibb Residential Factors, 4 Atholl Place, Edinburgh, EH3 8HT

At the beginning of the hearing the parties confirmed and agreed the following facts, which were accepted by the Tribunal:-

- The Property 2/7, Craufurdland, Brae Park Road, Barnton, Edinburgh, EH4 6DL comprises a second floor flat within a development of 37 flats
- The Factor is property factor of the Homeowner's Property.
- The residents association for the development of which the Homeowner's Property is part is the Craufurdland Proprietors' Association (CPA).

Preliminary matters

The Factor had sent the Tribunal Administration an email on 20th August 2019 and had provided:

(i) A timeline/ history of events and issues surrounding Garage 13, which had been provided to the Factor by Craufurdland Proprietors Association (CPA).

(ii) An email opinion from North Facades Limited dated 19th July 2019.

(iii) A survey report by Structural Design Consultants Limited dated 19th August 2019.

Mrs Taylor advised the parties of the terms of Tribunal Rule 22 which provides that documents must be lodged with the Tribunal no later than 7 days prior to any hearing. However Rule 22(2) states that before the Tribunal allows a document to be lodged late the Tribunal must be satisfied that a party has a reasonable excuse.

Mr Mayall explained that they had lodged these productions late as he had only recently received the survey report following receipt of the authority to obtain the report from the CPA the previous week. He explained that it would be useful to the Tribunal to be able to take account of the details in the late productions.

Mr Allan advised that he did not consider that it was reasonable for the Factor to lodge these productions late. The report by Structural Design Consultants Limited was an extensive document and he had not had a proper opportunity to consider it. When asked if he wished the Tribunal to postpone the hearing to allow him time to consider the document he advised that this was not necessary.

On balance the Tribunal determined that the Factor had a reasonable excuse for lodging the productions late and allowed them to be lodged and considered by the Tribunal.

The parties' representations and the Tribunal's decisions:

Opening Statement

Mr Allan explained that his complaint relates to the subsidence that has affected his garage Number 13. His garage is the west most garage in the block of eight west most garages at the development. Garages 12 and 13 have been most affected by the subsidence. Mr Allan showed the Tribunal a video on his lap top which had been taken in 2014. It was raining and it showed the flow of surface water which he stated is inundating the substrate. The surface water was pooling on the monoblock paving in front of his garage (Number 13).

He referred to the report by Structural Design Consultants Limited, which had been lodged by the Factor late. He explained that the report recommended that a CCTV investigation is carried out. He expressed concern that such an investigation may not be sufficiently objective and it would not explain what is happening under the monoblock surface. He proposes that the problem is resolved by an independent survey of the monoblock roadway, both topographical and physical by mutual agreement, independent and qualified consultants.

The Homeowner's application set out the detail of his complaint as follows:

'The complaint is that the Factor has been inconsistent, made incorrect and inappropriate decisions in its dealings regarding the condition and need for repairs to the roadway which in turn is suspected of aggravating the damage to our private property- garage 13. Their opinions and advice on the issue are conflicting and include informing the CPA that no remedial works are required, contrary to that of industry professionals.

The inappropriateness of the Factor's decisions, regarding the settlement/subsidence issue is outlined as follows:

(a) The Factor has refused to take action to ascertain if settlement /subsidence damage evident in the communal roadway and the private property of the adjoining garage block are linked ie reasonably responsible action would be to have a professional survey of the area to determine its condition and provide recommendations for remedial action, if required. To date no action taken.

(b) The Factor acknowledges that the roadway is experiencing settlement, with undulations and ponding in places and surface water discharging through the gaps that have opened up in the monobloc surface. The managing director of the Factor inspected the roadway and decided that there was no need for remedial works, that water ingress through the monoblocs is not, in itself, unusual and, natural drainage appears to be working as it should. The opinion ignores the following aspects of the issue:

(i) The Factor disregarded professional reports supporting the view that surface water discharging through the gaps in the monoblocs is penetrating the substrate and in all likelihood washing away the fine particles under the garage structure (ie aggravating the existing structural damage, which itself is apparently the result of long term on-going subsidence.)

(ii) Innate logic suggests that under the effect of gravity, surface water would follow the terrain from high ground to lower ground, in this case, the direction of the garage block. The ground to the rear of the block is lower and at the rear of garage 13 sits circa 80 cm below the level

where the roadway abuts the garage floor slab. The ground to the rear of the garage block continues to slope downhill towards the north and north west.

(iii) The managing director of the Factor appears to disregard his predecessor's recommendation on this issue. When requested by the CPA in 2014, his predecessor advised that it was not within the Factor's professional remit to survey the suspected settlement/ subsidence taking place. Instead advising that specialists should conduct a survey to determine the extent of any problem.

Any repairs undertaken by garage owners within their own units could only be considered unsatisfactory and temporary until the suspected and probable cause ie surface water inundating the substrate through the monoblocs of the settled/ subsided roadway surface is dealt with. This statement is supported by the recurring subsidence damage to garage 13 following extensive structural works in 2005.'

The Code Complaints.

The Homeowner's application stated that he considered that the Factor had failed to comply with the various sections of the Code of Conduct.

Section1: Written Statement of Services.

Sections 1.1a-A &B

'1.1a For situations where the land is owned by the group of homeowners
The written statement should set out: A. Authority to Act.
a. a statement of the basis of any authority you have to act on behalf of all the homeowners in the group;
b. where applicable, a statement of any level of delegated authority, for example financial thresholds for instructing works, and situations in which you may act without further consultation;
B. Services Provided
c. the core services that you will provide. This will include the target times for taking action in response to requests for both routine and emergency repairs and the frequency of property inspections (if part of the core service);
d. the types of services and works which may be required in the overall maintenance of the land in addition to the core service, and which may therefore incur additional fees and charges (this may take the form of a 'menu' of services) and how these fees and charges are calculated and notified.'

The Homeowners' complaint.

Mr Allan accepted that Section 1 of the Code of Conduct had been complied with. He explained that the CPA and the Factor entered into a service agreement in 1999. He also confirmed that he had received a copy of the Factor's Written Statement of Service which had been provided, as required by the Property Factors (Scotland) Act. He had queried if the 1999 Agreement was still in force and as a result of that query the CPA and the Factor had signed an agreement terminating the 1999 Agreement this year.

The Factor's response.

The Factor's Written Statement of Services complies with section 1 of the Code. It sets out the Authority to Act and the Services Provided, as required.

The Tribunal's Decision.

The Tribunal determine that there has been no breach of Section 1 of the Code. The required Written Statement of Services had been provided by the Factor.

Section 2: Communication and Consultation.

2.1: 'The Factor must not provide information which is misleading or false.'

The Homeowners' complaint.

The Homeowner had lodged with the Tribunal an email chain between himself and the Factor for the period 3rd June 2016 to 10th July 2018. He advised the Tribunal that he considered that parts of the emails sent by the Factor to himself contain statements that are misleading or false.

(i) The email from Mr Mayall to Mr Allan dated 5th March 2018.

This email stated in part:

'it has always been our position that if there was any definitive evidence to support that subsidence to the garages was being caused by factors in the common areas, we would look to take action. To date this has not been the case. You have engaged a consulting engineer (McColl Associates') to report on subsidence/ movement but, despite numerous requests for a full copy of the report, this has not been forthcoming. We have received excerpts of the report

but simply cherry picking sections of a full engineers report is a largely pointless exercise and proves nothing.'

Mr Allan explained that the expressions 'definitive evidence' and 'cherry picking' were misleading.

He advised that the Report that he had obtained from Bruce Shaw Property Consultants dated July 2017 was, in his view, clear in its terms. The report concluded that 'The roadway in front of the garages requires to be resurfaced to avoid the potential for further damage being caused to the garage structures from uncontrolled water discharge through the pavioured surface. Also the surface water drainage provisions require improving to ensure rainfall is more efficiently and swiftly discharged into the drainage system.' He advised that for the Factor to disregard the excerpt of the report that he had provided was inappropriate and misleading.

(ii) Email from Mr Mayall to Mr Allan dated 10th April 2018, which email stated 'Thank you for your email. As per my previous communication, I await receipt of the full McColl Associates Report.'

Mr Allan explained that this email was sent in response to his email dated 3rd April 2019 which was a lengthy email. He considered the email dated 10th April 2018 to be misleading as his email did not full answer all the points he made in his email of 3rd April.

(iii) Email from Mr Mayall to Mr Allan dated 1st May 2018.

Mr Allan explained that the section of the email which states 'There has been historic and possible ongoing movement to your garage...' is not accurate as it does not acknowledge that the movement is ongoing.

He also stated that the three numbered paragraphs of this email are not accurate.

'(1) This has not been ignored and I attach a copy of a memo to you by our Douglas Weir (June 2014) which summarises the position in detail but also advises that, given the lack of agreement from garage owners, he advises that any report is carried out at your costs. My understanding from Mr Weir, is that you subsequently instructed McColl Associates directly to survey and report to you. A full copy of this report is yet to be forthcoming.

(2) Water ingress through monoblock joints is not, in itself unusual, and video evidence is not conclusive that this is a contributory factor to ongoing movement.

(3) The Bruce Shaw report is inconclusive and merely states that water ingress via the monoblock may be a factor. We have not had sight of a full copy of the McColl Associates report so cannot comment on the content.'

He considers this email to be economical with the truth. He did not agree to provide a copy of the report. Also the Bruce Shaw report he obtained and which was lodged by him as a production for the Tribunal makes it clear that the substrate is being infiltrated. He does not consider that it was for himself to provide the evidence that was requested by the Factor.

(iv) Email from Mr Mayall to Mr Allan dated 3rd July 2018.

The email stated: '*My own conclusions are consistent with Mr Weir's previous advice. You chose originally to engage your own consultant engineer to assess the movement issues with your garage and you have chosen not to share the findings of the report. Our conclusion from this is that the report may not support your assertions. If this is not the case, then providing a copy of the McColl report will provide a way forward. The matter is in your own hands.'*

Mr Allan explained that the email is misleading as false as he never agreed to share the report. Also the letter from Mr Weir dated 11th February 2014 stated that the survey would be carried out at minimal cost to the homeowners. Mr Weir had stated that the report would cost approximately £275 plus Vat. In terms of the written statement of services the Factor has delegated authority to spend £20 per resident. Mr Allan advised that the Factor could have obtained the report as it was within the cost of the delegated authority as there are 38 owners within the development.

The Factor's representations.

(i) The email from Mr Mayall to Mr Allan dated 5th March 2018.

Mr Mayall and Mrs Kirkwood explained that they do not consider any aspect of this email to be misleading. They explained that they needed to see the full report from McColl Associates. They could not act on an excerpt from the report.

(ii) Email from Mr Mayall to Mr Allan dated 10th April 2018, which email stated 'Thank you for your email. As per my previous communication, I await receipt of the full McColl Associates Report.'

Mr Mayall explained that they do not consider any aspect of this email to be misleading, it is a statement of fact.

(iii) Email from Mr Mayall to Mr Allan dated 1st May 2018.

Mr Mayall explained that he does not consider any aspect of this email to be misleading. The email contains statements of fact.

(iv) Email from Mr Mayall to Mr Allan dated 3rd July 2018.

Mr Mayall and Mrs Kirkwood explained that if a report was obtained it would have to address the common area in front of the garage and the garage itself. The report that Mr Allan had obtained addressed both areas. It was outwith the Factor's delegated authority to obtain such a report. They cannot obtain such a report without consent of CPA and/ or the proprietors.

The Tribunal's Decisions.

(i) The email from Mr Mayall to Mr Allan dated 5th March 2018.

The Tribunal acknowledge, and make a finding in fact, that the area in front of the west block of garages is a common part of the development. The Deed of Conditions by Hambly Limited recorded GRS (Midlothian) 30th July 1987 (Entry 4 of the Burdens Section of Land Certificate MID74534) states that the ' .....access paths, roads and parking areas ... are collectively referred to as 'Communal Areas'.

The Factor only has authority to instruct maintenance and repairs to the common parts of the development, albeit that prior authority of the CPA and / or residents may be required.

The Factor does not have authority to instruct maintenance and repairs to property owned exclusively by Mr Allan, namely Garage 13.

The Tribunal determined that this email was clear in its terms and it was not false or misleading. The Factor has explained that they required definitive evidence to support Mr Allan's position that the subsidence had been caused by factors in the common area. The Factor also explained that they require sight of the full report by McColl Associates and an excerpt is not sufficient. The Tribunal find that the expressions 'definitive evidence' and 'cherry picking' are not misleading or false.

(ii) The email from Mr Mayall to Mr Allan dated 10th April 2018, which email stated 'Thank you for your email. As per my previous communication, I await receipt of the full McColl Associates Report.'

The Tribunal determine that this email is not false or misleading. The email is a statement of fact.

(iii) **The email from Mr Mayall to Mr Allan dated 1st May 2018.**

The Tribunal determine that this email is not false or misleading. The Tribunal consider that the email details statements of fact.

(iv) Email from Mr Mayall to Mr Allan dated 3rd July 2018.

The Tribunal determine that this email is not false or misleading. The email sets out the factual position.

Section 6: Carrying out repairs and maintenance.

Mr Allan advised that he was withdrawing this part of his application.

Alleged Breach of Property Factor Duties.

The Homeowners' written representations.

Mr Allan's application states that the factor has failed to comply with the Property Factor's duties detailed in the following:

(i) Agreement between the Association of Joint Owners and the Agent: James Gibb - May 1999.

References: 1.2; 1.4; 1.7; 1.12; 2.1; 6.1;8.1;8.2; 8.3; 8.4; 8.5; 10.1 and Annex (a) & Agreement E clauses 1.4 & 2.1

(ii) Title Deed for 2/7 Craufurdland, EH4 6DL- 17 June 2013.

Burdens D Section: D3, (4); D7, (seventeen); D8, (nineteen); D9, (tertio) & DII, (First)

(iii) Property Factors (Scotland) Act 2011 - Code of Conduct for Property Factors

(iv) JGRF Written Statement of Services

(v) JGRF Development Schedule, Craufurdland - May 2018. Sections 01 & 02

(vi) Areas of roadway responsibility in Craufurdland:

City of Edinburgh Council letter 29th April 2013.

Site Plan of City of Edinburgh adopted areas in Craufurdland.

The Homeowner also provided the Tribunal with the following reports:

1. Report by McColl Associates dated October 2014.

The report, in summary, refers to the fact that repairs were undertaken to garage 13 in 2005 and these repairs were insufficient. It also advises that there are shortcomings and deficiencies in the common areas, including drainage problems. They recommended that a drainage channel be constructed along the western end of the garage development and that localised regrading of the paviors be carried out to ensure that water does not flow freely towards the garages 13 and 12.

2. Report by Bruce Shaw Property Consultants Limited dated 6th July 2017.

The report states that the garages numbers 12 and 13 have been inspected by them on a number of occasions since 2015. It is stated that the ground at the rear of garage 13 is below the level of the roadway. It is also stated that it is not possible to be more definitive without further investigation but it is feasible that the amount of water passing through the paviored surface at the front of the garages could be a causal factor in the movement related problems being experienced at the rear. The report concludes that the road in front of the garages needs to be resurfaced to avoid the potential for further damage being caused to the garage structures from uncontrolled water discharge through the paviored surface. Also the surface water drainage provisions require improving to ensure rainfall is more efficiently and swiftly discharged into the drainage system.

The Homeowners' oral representations.

Mr Allan advised the Tribunal of the timeline of events.

The subsidence affecting garages 12 and 13 was recognised in 2005. The title deeds provide that the land around the garages is common property and consequently the Factor is responsible for maintenance and repair of this area. The problem stems from the fact that the cause of the subsidence has never been established. The Homeowner referred to emails from 2014 which in his view demonstrate that the need for a survey was clear.He referred to an email to the Factor from Anderson Strathearn, solicitors dated 17th December 2018 which states that the Factor is not responsible for carrying out repairs to the individual garages. Mr Allan explained that he accepts that the garages are not common property.

In connection with the 1999 Agreement Mr Allan acknowledged that the Factor had never given him a copy of the 1999 Agreement. He explained that he wrote to CPA on 19th February 2019 and asked them to clarify an administrative matter. He asked if the 1999 agreement had been terminated. He received a reply from Roy Heyes on behalf of the CPA dated 21st February 2019 which explained that he could find no evidence that it had been cancelled. Mr Allan explained that it is his position that the Factor has not complied with the specified sections of the 1999 Agreement. For

example section 1.2 of the Agreement and annex (a) states that the Factor will (in summary) inspect the common parts of the property and this obligation does not include inspecting a Property or preparation of a schedule of dilapidations.

He referred to the email from Mr Mayall to himself dated 3rd June 2016 which states that 'at the request of the CPA he visited the site to inspect the area of monoblock immediately in front of Mr Allan's garage. Having seen the area (and viewed your short video) I am not necessarily of the opinion that there is an issue with the existing drainage that would require remedial action as the natural drainage in the monoblock appears to be working as it should'.

Mr Allan explained that the Factor went above and beyond day-to-day management by inspecting the area in front of his garage and declaring it outwith the Factor's remit.

The Homeowners position is that the Factor failed in their property factors duties by not obtaining a survey to determine the cause of the subsidence in the communal land ex adverso the Homeowners' garage.

CPA said they would do nothing further until the homeowner provided a full of the survey report that they he had obtained.

The Factor's written representations.

- 11th February 2014: The Factor wrote to the garage owners advising them of the on-going issue of subsidence in garage 12 and 13 and advising them of the cost of carrying out a professional survey.
- They received objections from garage owners and the survey was not carried out.
- They wrote to the garage owners on 25th July 2014 outlining a provisional agreement that a survey be arranged to look at the subsidence to garage 13 and that should no issues be found the cost of the survey would be met by the Homeowner and anyone else who wanted to contribute.
- A meeting of the garage owners was held on 20thAugust 2014. At the meeting the Factors advised that several owners had contacted them to say that they were not in favour of instructing the survey. The Homeowner commissioned his own survey on 31st July 2014 with McColl Associates, structural engineers. At the meeting the Homeowner agreed to share the report with the Factor, who in turn would share it with any owners. The meeting also instructed additional works to the gutters.
- In June 2014 the Homeowner provided an extract from the McColl Report but they advised that such an extract required to be taken in the context of the full report. No full report was forthcoming.

- Instead of providing the Factor with a full copy of McColl's report the Homeowner commissioned another report from Bruce Shaw in July 2017. The report focused on the drainage of the monobloc as opposed to the structural deficiencies within the garage block.
- The Homeowner had provided a full copy of the McColl Report with his application to the Tribunal and this was the first time that they had been provided with a full copy of the report. They reflect that the full report was not provided as it highlights the fact that the original work to the garage was not carried out properly and it should have been picked up by the Homeowner's surveyor at the time of purchase.

  The Factor provided the Tribunal with a copy of a report by Paul Thomson, chartered engineer, on behalf of SDC Limited, dated 19th August 2019. The report concluded that the settlement had been caused by a combination of natural settlement, design matters and possible settlement due to external factors including drainage of soft ground condition locally. He recommended that a CCTV drainage survey should be carried out. He states that there may be a public sewer local to the area which should also be investigated. He concluded that once the condition of the drainage is established it will determine the next steps for the building.

The Factor's oral representations.

Mr Mayall advised that the 1999 Agreement was superseded by the Agreement issued to the Homeowners in 2012/2013 following the introduction of the Code of Conduct for Property Factors. The 1999 Agreement would not have been issued to Mr Allan.

Mr Mayall explained that the Factors did not walk away from their obligations. They went through the correct process. They did not have authority to do anything beyond what had been authorised by the CPA.

Mr Mayall also explained that the CPA did not wish a survey to be instructed until they had seen Mr Allan's full survey report. The Factor can only proceed with common repairs or reports on common property with the authority of the CPA unless the matter is an emergency.

The Tribunal's Decision.

During the hearing it was clear to the Tribunal that the subsidence of garage 13 had been going on for a long period of time and a complete timeline of events had not been provided by the parties. The Tribunal required full details of the timeline of

events to enable them to reach a determination. Accordingly they issued a Direction in the following terms:

'The Factor is required to provide the Tribunal with copies of all Minutes of:

(i) Craufurdland Proprietors' Association (CPA) Committee Meetings
(ii) CPA AGMs and
Craufurdland West Block Garage Owner's meetings(iv) Copies of any Proposals, Specifications or Quotations in connection with the common paved area adjacent the West Garage Block presented by the Factor to the CPA.
during the period 7th June 2013 to August 2019 and also

(v) A copy of the agreement between the Factor and the CPA agreeing to terminate the 1999 Agreement.
(vi) A copy of the invoice for (or evidence of the cost of) the report by the Structural Design Consultants dated 19th August 2019.'

In response to the Direction the Factor provided copies of the documents that had been requested. The documents provided by the Factor were copied to the Homeowner.

The Tribunal considered the documents that had been provided together with the written representations made by the parties and make the following findings in fact:

1. Garage 13 had been affected by subsidence before the homeowner purchased the Property.
2. The area of ground around the Homeowner's garage is common property of the heritable proprietors of the development.
3. There were regular meetings and correspondence between the Factor and the CPA and the matter of the subsidence was regularly considered.
4. Douglas Weir (Managing Director of the Factor in 2014) confirmed in July 2014 that the Factor would arrange a survey.
5. Following that confirmation in August 2014 the CPA advised that they did not support the commissioning of the survey that had been proposed by Douglas Weir. There was no subsequent instruction from the CPA to obtain a survey.
6. The Homeowner had obtained two surveys of garage 13.
   6.1 The Report from McColl Associates dated October 2014.
   The report describes the background to the subsidence affecting garage 13. It refers to remedial works being carried out in 2005 and describes those works as being insufficient as they do not address the underlying problems. It states that a surveyor exercising a reasonable standard of duty of care should have noticed the severe structural movement that had taken place to the garage.
   The report also addresses the condition of the common areas and states that there are deficiencies in one or more of the design/ construction criteria as there are depressions and rutting to the surface and water falling on the surface is not allowed to drain satisfactorily.
   This report was only provided to the Factor in full in 2019 after the Homeowner submitted his application to the Tribunal.
   6.2 The Report from Bruce Shaw dated 6th July 2017.

The report concludes that the roadway in front of the garages needs to be resurfaced to avoid the potential for further damage being caused to the garage structures arising from uncontrolled water discharge through the paviored surface. The surface water drainage provisions require improving to ensure rainfall is more efficiently and swiftly discharged into the drainage system.

7. The Factor had obtained a survey from Structural Design Consultants dated 19th August 2019. The report concluded that the settlement was a combination of natural settlement, design matters and possible settlement due to external factors including drainage or soft ground condition locally. It recommended that a ground drainage check be carried out to ensure that there is no damage or leaks which can cause settlement of the property. A CCTV survey was recommended.
8. The 1999 Agreement was an agreement between CPA and the Factor. It was cancelled in May 2019 and the Minute of Cancellation was produced to the Tribunal.

The Homeowner has stated that the Factor failed to comply with the duties specified in the documents that he had referred to and the Property Factor duties referred to in the summary of his application.

Considering the Homeowner's claim that the Factor has failed to comply with the property factor duties in the specified documents:

(i) Agreement between the Association of Joint Owners and the Agent: James Gibb - May 1999.

The 1999 Agreement is a contract between the Residents Association and the Factor. The Homeowner did not receive a copy of the agreement from the Factor until he asked for a copy in February 2019. The Homeowner's contract with the Factor was the separate Written Statement of Services.

The Tribunal determine that there are no property factor duties owed by the Factor to the Homeowner which stem from the 1999 Agreement as the Homeowner was not a party to the 1999 agreement and only became aware of its existence in 2019.

The Tribunal were not addressed on any potential jus quaesitum tertio.

(ii) Title Deed for 2/7 Craufurdland, EH4 6DL- 17 June 2013.

Burdens D Section: D3 (4); D7 (Seventeen); D8 (Nineteen); D9, (tertio) & DII, (First)

Section D3(4) refers to the Deed of Conditions recorded GRS (Midlothian) 30 July 1987.

Section D7(Seventeen): This section states that a Factor will be appointed who will be responsible for instructing and supervising the common repairs and maintenance

of the Blocks of Flats and the Communal Areas ....in accordance with these presents.
Section D7 (Nineteen): The Residents are required to join a Residents Association and the residents have power to call residents meetings etc. A majority of votes at a Residents Meeting can order common or mutual operations, maintenance, repairs etc.
Section D9 (Tertio): A majority of votes at a Residents Meeting can delegate to the Factor whole power and authority to take charge of all matters pertaining to the maintenance and preservation of the communal areas, the common property ...
Section D 11(First): This section defines the Common Areas of the development.

The Tribunal acknowledged that the parties agree that the area of ground around the Homeowner's garage number 13 is common property of the development.

The Homeowners complaint is that the Factor should have instructed a survey of the common area around the Homeowner's garage without waiting for the Residents Association to approve the survey.

The Title conditions provide that a majority of votes at a Residents Meeting can order common or mutual operations, maintenance, repairs etc. They do not place the Factor under a duty to instruct a survey of common property if it has not been approved by a majority of the residents.
Consequently, the Tribunal determine that the Factor has not breached the terms of the specified sections of the Land Certificate.

(iii) Property Factors (Scotland) Act 2011 - Code of Conduct for Property Factors

Introduction: Legal Requirement to Comply; Annex A: Meaning of Property Factors' Duties.
Annex A refers to section 17(5) of the Property Factors (Scotland) Act 2011 and defines property factors duties as being duties in relation to the management of the common parts of land owned by homeowners.

The Homeowner has not specified what property factor duties he believes the Factor has not complied with under this section and accordingly the Tribunal are unable to consider this point further.

(iv) JGRF Written Statement of Services (Page 4, Section 2. I. & 2.3 - August 2017. 2.0 Authority to Act. 3.0 Services Provided. 6.0 Communication Arrangements.)

Section 2.1: 'James Gibb Residential Factors were appointed to manage the communal areas of your development. Our management is the result of either, appointment by the developer, by a decision of the majority of the homeowners, by custom and practice or by formal business acquisition.

Section 2.3: Our authority to act includes the management of:

- Routine maintenance contractors
- On-going repair works.
- Emergency repairs
- Utilities and utility bills (where applicable)
- Project work
- Block Insurance (where applicable).

Section 3.0

Section 3.1: James Gibb residential factors provides an extensive range of services for the communal areas in each of its developments. In general, communal includes all parts of the development under shared ownership.

Section 3.2: The services provided cover the maintenance, management and repair of the 'communal' areas detailed in section 03 of your development schedule.

Section 6: This section explains the procedures for making enquires of the factor and timescales for responses.

The Homeowner has not specified what property factor duties he believes the Homeowner has not complied with under this section and accordingly the Tribunal are unable to consider this point further.

(v) JGRF Development Schedule, Craufurdland - May 2018. Sections 01 & 02 Authority to Act.

0. I Authority to Act.

Management Appointment Date 1999.

0.2 Level of Delegated Authority.

James Gibb's Authority to Act for non emergency repairs is £20 plus Vat per household.

The Homeowner has not specified what property factor duties he believes the Homeowner has not complied with under this section and accordingly the Tribunal are unable to consider this point further.

(vi) **Areas of roadway responsibility in Craufurdland**:

- City of Edinburgh Council letter - 29 April 2013.
- Site Plan of City of Edinburgh adopted areas in Craufurdland.

These documents show that the area in front of garage number 13 is not adopted.

The Tribunal find that these documents do not create property factors duties. The Homeowner has not specified what property factor duties he believes the

Homeowner has not complied with under this section and accordingly the Tribunal are unable to consider this point further.

Considering the Homeowner's claim that the Factor has failed to comply with the property factor duties in the summary of his application namely that the Factor has made inconsistent decisions and has refused to take action to ascertain if the settlement/ subsidence damage evident in the communal property and the privately owned garage block are linked.

The Factor is under a duty to act as a professional factor. The Tribunal were mindful that the test for breach of professional duty, as decided in the case *Hunter v Hanley* 1955 SC 200, is whether the professional took a course of action that no reasonable professional person would have taken.

The sources of property factors duties referred to by the Homeowner place the Factor under a duty to carry out repairs to common property if authorised by a majority of the owners or the Residents Committee, unless the repair is an emergency in which case they can proceed without this prior authority.
The Homeowner's reports from McColl Associates and Bruce Shaw were not definitive in their terms.
It has not been suggested by the Homeowner that the condition of the common ground around his garage required an emergency repair. The subsidence being affected by his garage was an issue that had been on-going since before he purchased the Property. In the absence of approval by the Residents Association (CPA) the Factor was not under an obligation to do more than they had done. The Tribunal do not consider that the Factor took action that no reasonable factor would have taken given that the Homeowner did not provide a full copy of the report by McColl Associates until it was provided with his application to the Tribunal, the conflicting evidence in the reports and the absence of a majority authority of the homeowners to take matters further.

The Tribunal acknowledge that the Factor did initially confirm that the survey should be instructed (July 2014) and then changed their mind saying that the Residents Association did not support this (August 2014).

The Factor is as a matter of law agent for the Homeowners. The Factor changed their position on instructing the survey as the homeowners changed their mind. This is a valid reason for the Factor changing their position.

The Tribunal find that the Factor has not failed to comply with the stated property factor duties.

Appeals

In terms of section 46 of the Tribunals (Scotland) Act 2014, a party 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.

J Taylor

Signed Date: 27th November 2019

Chairperson