

Questions submitted by Property Managers Association Scotland (PMAS):

Q 1. Can HOHP consider as part of the application, questions relating to common interest/common repairs, for example “is this application for a common repair/matter? / is the factor acting for just you in this matter, or a body of Owners? / is the complaint supported by the majority of Owners? (if relevant)

A. The answer to this lies in the Property Factors (Scotland) Act 2011 which sets out the jurisdiction of the panel.

Section 17(1) states that it is a homeowner who may apply to the panel for determination of whether a property factor has failed to carry out property factor’s duties and to ensure compliance with the Code of Conduct (referred to as the “Section 14 duty”).

A “homeowner” is defined in Section 10(5) and means

(a) an owner of land used to any extent for residential purposes the common parts of which are managed by a property factor, or

(b) an owner of residential property adjoining or neighbouring land which is—

(i) managed or maintained by a property factor, and

(ii) available for use by the owner.

It can be seen from these definitions that ho hp can consider questions of common repairs and the published ho hp decisions show that Homeowner Housing Committees have made determinations on these issues where there are service complaints relating to the property factor. The Act does not provide that a majority of homeowners need support the application brought by a homeowner.

Office bearers from owner associations have sought to bring group actions for a majority of residents within a development. Applications by an owner’s association are not competent within the provisions of the Act. However, there is nothing to prevent homeowners making identical applications and naming the same representative to attend and represent them at an ho hp hearing. This has occurred in one case where the panel received 146 applications from 74 homeowners from one development. The Committees have power to deal with such applications together at one hearing. To aid case management for the panel and the parties, it was agreed, with the co-operation of all parties at a case management meeting, that 2 lead applications would be selected and the final decisions by the committee or on appeal in these lead applications would be applied to all the other cases. That procedure has been successful and all 146 applications were determined on 1 day at 2 hearings. This demonstrates the flexibility of the proceedings as the regulations do not specifically mention the procedure for taking lead cases. This process saved time and expense and potentially higher costs to the parties should there have been appeals.

Q 2. Can HOHP annual report be incorporated on HOHP website ?

A. Yes. It now appears on the HOHP website page "How we can help". Future annual reports will be published. As the numbers of reports grow over the years, we will have a separate section on the website for annual reports.

Q 3. Should the HOHP make it clear to the owner that they should not put matters on hold re paying accounts and interacting with the factor pending an application?

A. Hohp are a judicial body and as such do not provide advice about whether parties should or should not make payment of accounts issued by the property factor. That is not within our remit.

We do encourage parties to communicate with each other to try to resolve any dispute and to continue to do so even at the stage where an application has been referred to a Homeowner Housing Committee for a determination of an application.

Q 4. Whilst it is appreciated that the President role is not to 'assess' each applications merits, can she confirm that her role includes ensuring that all applications meet the Property Factors (Scotland) Act 2011 Section 17 tests along with the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 regulations 5 and 6 tests prior to deciding on refusal, referral to a committee or to mediation?

A. Yes. The compliance of the homeowner with Section 17(3) (a) is considered after an application is received as are matters of compliance with Regulation 5 and 6; jurisdictional issues including issues relating to when the failures are alleged to have occurred; and examination of whether there are grounds to consider rejection in terms of Section 18(2).

Q 5. With the Legislation in its infancy with all parties, the homeowners, Property Factor and HOHP on steep learning curves, does the President agree there is benefit in promoting a working party (with representation from all parties) to assist in streamlining and improving the process for the benefit of all concerned?

A. The introduction of the tribunal user group may go some way to achieve what the questioner seeks. The purpose of the group is to provide a discussion forum, providing the opportunity to discuss current issues of interest to user representatives and to provide updates on the current operation of the panel and proposed future developments. A copy of the Terms of Reference of the user group appears on the website.

However, it is to be remembered that hohp are a judicial body and it is not appropriate for the panel to engage in working parties as described.

Q 6. With 82% of all decisions made by Homeowner Housing Committees being relative to (“private sector”) property factors does the President agree it would be beneficial for the hohp to have more industry related experience and representation in their committees from newly appointed panel members suitably qualified in this area?

A. This is best answered by explaining the appointment process for hohp members.

Prior to the commencement of the 2011 Act, an appointment round for hohp members was carried out by Scottish Ministers. The process was administered by a justice policy division of Scottish Government using the public appointment process.

Members’ vacancies were advertised in the national press and some professional journals and applications were sought for the positions of legal chairs, surveyor members and housing members. The applicants for the position of legal chairs were open to solicitors and advocates; surveyor members had to be chartered surveyors; and housing members had to have qualifications and / or experience of housing/ land management/ building repairs/ or factoring issues.

The following extracts appeared in the application pack under the heading Role Description for housing members.

“Role Description

Because of the wide ranging nature of possible complaints under the Property Factors (Scotland) Act and the wish to deploy housing members to cover all aspects of the work of hohp and prhp, we welcome applications from a wide range of persons with a background of working in housing, building repairs, land management or factoring.

We have identified persons who are or have been employed as environmental health officers; planning officers; trading standards officers; housing officers; contractors in the housing and land management industries; and employees of land management companies and factoring companies, as persons who may possibly possess the experience necessary to perform the role of housing member, although applications are not restricted to persons with these backgrounds and we look forward to hearing from all persons who feel that they meet the criteria.

Conflict of Interest

If persons are currently employed or instructed by a property factor, then this may lead to a conflict of interest situation although such conflicts may be able to be appropriately managed. If there is the potential for such conflict situations, then full details should be provided in the application form at the appropriate section.”

To ensure fairness, the competency based appointment process involved the personal details of applicants being removed from the applications before the applications were assessed and marked according to a scoring scheme on the essential criteria. The best candidates were selected for interview.

There was considerable interest in the positions and this led to a high volume of applications which were in most instances of a very high standard. The Scottish Ministers selected the candidates for appointment to the positions solely on merit. You will see from the Role Description that employees of land management companies and factoring companies were specifically invited to apply.

The qualifications of members appointed are shown on a schedule to the annual report and appear on the website. Details on the backgrounds of those appointed were published by Scottish Government.

Appointed members come with experience in property management and housing related matters and ideally they also had specialist experience and skills in specific areas covered by the Code of Conduct. This allows the panel, when specialist issues of dispute arise, to match the skills of members to the matters in dispute.

Conflict of interest situations are managed by ensuring that members declare an interest and recuse themselves from cases where, having read the papers, they identify there is a conflict. Members receive guidance about what constitutes a conflict of interests. Members do not sit on cases where they are familiar with the parties. When papers are sent to members, they are asked to complete a form which includes a prompt to check and declare any conflict of interests which they identify having read the file. This ensures that such issues are dealt with in advance of a committee hearing.

Q 7. Does the President consider that the HOHP application process, which entitles one homeowner who shares title and common property with others (in the case of a traditional tenement which may extend to 7 or so other joint title holders, or in more modern property may extend to dozens of others or in larger property can extend to hundreds of others) acting in their own interests and on their own initiative, is an inequitable situation to prevail and would the President agree this position is contradictory to the established ethos of common property maintenance administration, enshrined in Title Deeds, Deeds of Conditions, the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2044, which calls for, generally, democratic decision making?

A. The President's role is a judicial one to apply the law which has already been passed by the Scottish Parliament. The person who posed the question may wish to raise such matters with Scottish Government housing policy officials who consider legislative changes.

Q 8. Has the Committee considered charging an application fee to any potential claimant, which could be returned if complaint is upheld in their favour? If so, would they also consider retaining the fee and putting it towards to the costs incurred by the PM or indeed the Committee, where the claimant fails to prove their case? This is currently the process for raising a claim with the NHBC or raising a small claims action through the court, there are fees involved. If this were to become part of the process would the committee not consider that this could reduce the amount of vexatious de minimus complaints that are raised. If the claimants cannot afford the fees, should there not be an eligibility process for determining this and means tested process to be put in place to ensure fairness to all.

A. The legislation does not give powers to a Committee or the President to charge fees for an application or to award expenses following a determination.

There is a provision in the Property Factors (Scotland) Act 2011 at Section 26 for recovery of costs in relation to certain applications or orders from property factors. The decision on this issue rests with The Scottish Ministers who have decided fees should not be charged.

For convenience Section 26 is detailed

- “The Scottish Ministers may by regulations make provision about the recovery of relevant costs from property factors where—

(a) the president of the homeowner housing panel refers an application to a homeowner housing committee under section 18(1) (a),

(b) a homeowner housing committee makes a property factor enforcement order against a factor.

(2) In this section, “relevant costs” means costs incurred by—

(a) the homeowner housing panel,

(b) the president of the panel,

(c) homeowner housing committees,

in relation to the exercise of functions conferred by sections 16 to 25 of this Act.

(3) Regulations under subsection (1) may in particular—

(a) provide for charges to be imposed on property factors,

(b) provide for charges to be imposed in either or both of the circumstances referred to in subsection (1),

(c) provide for different charges to be imposed in different cases or different classes of case,

(d) confer functions (including functions relating to the imposition and determination of charges) on—

(i) the homeowner housing panel,

(ii) the president of the panel,

(iii) homeowner housing committees,

(e) make provision about how charges may be recovered.

(4) The Scottish Ministers must, in exercising their functions under subsection (1), secure that the income from any charges imposed by virtue of the regulations does not exceed the relevant costs.

(5) Regulations under subsection (1) may modify any enactment (including this Act).

(6) Regulations under subsection (1) are not to be made unless a draft of the statutory instrument containing the regulations has been laid before, and approved by resolution of, the Scottish Parliament.”

Q 9. Why are the committee not obligated to advise the PM in a timely manner as to who will be sitting on the panel and appearing on behalf of or alongside the complainant during a pre-arranged hearing? Why is the PM obligated to confirm to the panel who will be attending on behalf of the PM firm, surely in order to be unbiased the same should apply for both side? A conflict of interest could be an issue between a potential panel member and a member of the PM firm, which would not be known until the day of hearing if details of the panel where not made known ahead of time.

A. The list of members who may sit on Homeowner Housing Committees are published on the hohp website. The Panel do disclose in advance as a matter of routine the number and type of members sitting on a committee. The committee members identify themselves at the start of a hearing. Identifying members at the hearing avoids the risk of parties trying to contact them in advance to discuss the case.

As mentioned in answer to a previous question the issue of conflict of interests is a matter on which guidance is given to members and prompts are given to ensure committee members address this issue in advance of a hearing and recuse themselves if there is a conflict. Members are best placed to identify conflicts.

The provisions in relation to representation are contained in Regulation 7.

“Representation

7. (1) A party may act in person or be represented by any person.

(2) Where a representative begins to act for a party, the representative must notify the committee and the other party of that fact as soon as practicable.

(3) A representative acting for a party may on behalf of that party do anything that these Regulations require or permit that party to do.

(4) Where a representative ceases to act for a party, the representative must notify the committee and any other party of that fact and, if known, of the name and address of any new representative as soon as practicable.

(5) Notification under paragraphs (2) and (4) may be given orally at a hearing to the committee and to any other party present, but must otherwise be given in writing.

(6) If the committee are satisfied that there is a good reason, they may refuse to permit a particular person to assist or represent a party at a hearing.”

Although the hohp administration seeks details of any representatives from both parties in advance of the hearing, that information is sometimes not provided despite reminders and it is only orally at the hearing that notification is provided. This complies with the terms of regulation 7(5).

It is fair to say that lack of notification of representatives is not an issue confined to one group of parties.

Q 11. Will the HOHP be advised of the failure by either party to agree to mediation if suggested by the President? This may affect the level of compensation awarded in any PFEO, if appropriate.

A. The Panel arrange the mediations and will be aware of whether mediation is taken up or not by the parties. It is possible that the Committee may be able to surmise from the papers submitted to them that mediation has been offered to parties.

Mediation is entirely voluntary and the issue as to whether a party agrees or does not agree to engage in mediation is not a matter which should affect the level of compensation awarded.

Q 12. At what point does the HOHP jurisdiction start and stop when a client has also raised in addition to an HOHP complaint, a complaint to FCA, or, as raised a claim against the Property Factors PI insurance? Where does the HOHP sieving process start, do they expect to take priority over other agencies, or, insurers, bearing in mind that insurers will be instructing the PF provide info/perhaps cease dialog, and FCA, will expect their processes to be followed.

A. The jurisdiction of hoHP starts with the submission of an application. If there are proceedings on-going in a different forum about the same issues, then a party can make a request for the proceedings at hoHP to be sisted (suspended) to await the outcome in the decision in the other forum. A decision on such a request will be made on a case by case basis.

Section 19 (4) of the 2011 Act may be relevant. This provides that subject to the appeal provision in Section 22, no matter adjudicated on by the homeowner housing committee may be adjudicated on by another court or tribunal.