

Questions submitted by Property Managers Association Scotland (PMAS) 2015

Q 1. The Property Managers Association considers that it is appropriate that any Application made by an Applicant should be reported to the property factor, whether or not the Application was progressed successfully. Why does the HOHP consider that it is not appropriate to notify the registered property factor when an Application is made? Why does the HOHP consider that it is not appropriate to notify the registered property factor when an Application is refused?

President's response -The Homeowner Housing Panel and the President must operate within the legislation. Section 18 (4) and (5) of the Property Factors (Scotland) Act 2011 states

"The president must, as soon as practicable after rejecting an application, give notice of the rejection—

(a) to the homeowner, and

(b) where the president is aware of the name and address of a person who acts for the homeowner in relation to the application, to that person.

(5) Such a notice must—

(a) set out the reasons for the rejection, and

(b) explain the procedure for appealing against it."

There is no provision in the legislation for the registered property factor to be notified when an application is rejected. The legislation specifically provides that a notice of rejection is to be sent to the homeowner or the homeowner's representative and no mention is made of the property factor. If the intention was that this was to happen the legislation would provide for this.

It follows that if the legislative intention was that the property factor be notified of the receipt of initial paperwork from the homeowner or at the stage when an application is made and considered by the President in terms of Section 18(1) of the Act, the legislation would specifically provide for this and in that event there would most certainly be a provision in the legislation to notify the property factor of the outcome of the President's decision either to refer or reject the application.

Regulation 8(1) of the Homeowner Housing Panel (Applications and Decisions) (Scotland) Regulations 2012 provides that it is at the stage of providing notification of referral to a committee that the property factor is given a notice setting out the detail of the application, stating that the President has decided to refer the application to the committee for determination; and specifying a date by which written representations are to be made. "Party" is defined in the regulations in Regulation 2 as including the homeowner, the property factor and any person listed as a party to the proceedings. This is the first occasion that the legislation provides for intimation of the application on the property factor.

Q 2. Employment Tribunals have recently imposed a mandatory Application fee. Given there is no deterrent to Applicants making vexatious, frivolous or time wasting Applications, does the HOHP consider it appropriate for the Scottish Government to institute an Application fee, payable by Applicants.

President's response - The legislation does not give powers to a Homeowner Housing 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.

Housing Policy response - The Scottish Government has no current plans to introduce a fee for homeowners applying to the Homeowner Housing Panel.

Q 3. Why does the HOHP Annual Report distinguish between Commercial Property Factors, Social Landlords and Local Authorities, when the legislation deems each of these parties to be a registered property factor, all covered identically under the same legislation and Code of Conduct?

President's response - Section 2 (1) (a) and (c) applies to Commercial Property Factors and Sections 2 (1) (b) and (d) applies to Local Authorities and Housing

Associations. The Act states all come under the definition of a property factor that have to be registered but distinguishes the different group types.

When considering what information to provide in the annual report, I considered the expectation of users and looked at annual reports of other tribunals and regulatory bodies. It is often the case in annual reports that information is provided in relation to different party groups. For example the Scottish Legal Complaints Commission (SLCC) reports on number of complaints received against each practitioner type and it shows separate figures for complaints against solicitors and complaints against advocates; the Scottish Public Service Ombudsman (SPSO) annual reports give figures and provide information on complaints against public sectors groups such as health, housing associations, local authorities, Scottish Government and devolved administrations, etc.; and in the Additional Support Needs Tribunal Scotland (ASNTS) annual report provides a list of the education authorities in Scotland who are respondents to applications before the tribunal and how many applications have been received relating to each respondent.

I felt an approach similar to ASNTS of listing the names of respondents, which in this case would be registered factors, and the number of applications determined during the year against each was unnecessary, and I have adopted an approach in the first HOHP annual report of reporting on the groups which are separately distinguished in Section 2 of the Act.

Q 4. The HOHP 2013 Annual Report identified the following:-

- Total registered factored properties – 554966

Housing Policy - Total projected number 225,000 prior to implementation of Act

Source: http://webarchive.nationalarchives.gov.uk/20140402142426/www.offt.gov.uk/shared_offt/reports/comp_policy/oft1046.pdf

- Applications (excluding multiple applications for same property) – 170

Housing Policy - It was estimated that there would be a total caseload of 340 applications to the HOHP per annum

- Applications which went to a Hearing with a published Decision – 28

Housing Policy - No projection available prior to implementation

- Applications which went to a Hearing and were upheld/partly upheld – 20

Housing Policy - No projection available prior to implementation

- Property Factor Enforcement Orders issued – 12

Housing Policy - No projection available prior to implementation

- HOHP Budget 2013/14 - £340,200

Housing Policy - The above budget was less than estimated. The projected cost for Year 2 (2013/14) was £470K (based on 340 applications)

How do these statistics compare with projections in 2012, when the HOHP came into operation?

President's response - There were 333 applications received during 2013. That was 7 applications short of the projected number of applications. It would be accurate to say that there were a number of developments for which multiple applications were received. The Tribunal dealt with these efficiently so that the applications relating to one development were considered together where possible. As a result of good case management considerable savings were made on the projected costs. The ability to continue to make these savings will depend on the future spread of cases received, the complexity of the cases, the ability to hear multiple applications together, and the number of applications rejected and withdrawn.

Q 5. Can you explain examples of, or in what circumstances, you offer mediation.

President's response – I have noticed when reading applications that a number of complaints could probably be resolved by better communication between the parties. This is also borne out by the findings in the annual report for 2013 where cases are withdrawn following upon prompting homeowners to notify or re-notify complaints before I consider referral of applications to a Committee for determination. There are also a number of cases where I have assumed that the complaints have been

resolved as homeowners have been prompted to notify or re-notify and we hear nothing further. A breakdown of the figures for 2013 shows that 37% of the findings of failure to comply with the Code of Conduct relate to communication and consultation issues. Therefore, mediation seemed to me a useful tool to allow parties to exchange information and views in an informal way and to explore ways of resolving the dispute to their mutual satisfaction. I do not restrict the offer of mediation to communication complaints and I have suggested mediation in a high proportion of cases. Evidence suggests that mediation in most cases, whether it results in a settlement agreement or not, helps to improve relations between the parties, which is particularly helpful if parties are in a continuing contractual relationship such as that of homeowner and property factor.

The offer of mediation is made at the point that the case is ready for referral to a Committee for determination. Some cases are obviously better suited to mediation than others and the circumstances of the case are considered in deciding if an offer of mediation should be made. It is probably easier to explain in general terms the cases which I do not think are suitable for mediation and do not offer it.

Examples of cases where mediation is unlikely to be offered -

1. If it is clear from the papers that either party wishes to raise legal challenges or debate legal issues - that is not an environment for mediation and a committee approach is appropriate.
2. If the case involves a point of principle or practice which may have an impact on others, the confidentiality of mediation may not be appropriate.
3. If criminal conduct is alleged, that would make the case unsuitable for mediation.
4. Mediation depends on the agreement of both parties. Sometimes by the time applications have been received by the panel the correspondence passing between parties is of a high conflict nature where it is unlikely that the parties would engage in any sort of meaningful dialogue with each other. In these cases mediation is likely to be a waste of time and just fuel frustrations.
5. If there appears no scope for negotiation.
6. Where meetings between the parties have already taken place and mediation is unlikely to succeed.

7. If a mediation in relation to the dispute has taken place already and been unsuccessful.

8. If the same issues of complaint are being raised repeatedly against a property factor by a number of homeowners and the confidentiality of mediation is not appropriate.

Q 6. Given that the largest proportion of registered factored units are handled by “Commercial Property Factors”, why is there no relevant commercial property factoring experience among the 68 panel members?

President’s response - Prior to the commencement of the 2011 Act, an appointment round for ho hp 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 ho hp and pr hp, 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. The assumption is wrong that there is no relevant factoring experience on the panel of members.

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. Can a homeowner who is no longer a homeowner by virtue of relinquishing title, be classified as a potential Applicant? If so, does the HOHP have a view on a cut-off point? For example, should a former homeowner be barred from making an Application after a specific period of time, e.g. 6 months, 2 years etc.?

President's response – I think this is best answered by referring to the decisions of Homeowner Housing Committees who have expressed views in relation to this issue. Committees have taken the view that depending on the circumstances an application may be considered.

The legislation does not specify a cut-off point. 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 this issue with Scottish Government housing policy officials who consider legislative changes.