

## Scottish Parliament Region: Highlands and Islands

Case 200500875: Shetland Islands Council

### Summary of Investigation

#### **Category**

Local Government: Housing; Right to Buy

#### **Overview**

The complaint relates to the sale of land owned by the Council, which subsequently restricted Mr and Mrs C's access to their former home which they rented from the Council. Mr and Mrs C decided to move into another council house but were unhappy that this move affected their discount entitlement and their right to buy the new property.

#### **Specific complaints and conclusions**

The Complaints from Mr C that I have investigated concerned:

- (a) the Council's failure as landlord to protect Mr C's interests as their tenant (*partially upheld*);
- (b) the Council's failure to make clear to him the implications for discount entitlement should he and his wife move to another council house (*not upheld*); and
- (c) the Council's handling of the applications they submitted to purchase the house into which they moved (*not upheld*).

#### **Redress and recommendation**

The Ombudsman recommends the Council apologise for their contribution to the deterioration in relations between Mr and Mrs C and their former neighbour.

The Council accepted this recommendation and the Convener of the Council sent a letter of apology to Mr and Mrs C.

## **Main Investigation Report**

### **Introduction**

1. On 8 July 2005 the Ombudsman received a complaint from a council tenant (referred to in this report as Mr C) that Shetland Islands Council (the Council), as his landlord, had not responded appropriately to his complaints about his neighbour who is an owner occupier. He also claimed that in offering him another house, the Council had not explained to him the implications for tenant's discount should he apply to purchase the house into which he moved.

2. The complaints from Mr C which I have investigated concerned:

- (a) the Council's alleged failure as landlord to protect Mr C's interests as their tenant;
- (b) the Council's failure to make clear to him the implications for discount entitlement should he and his wife move to another council house; and
- (c) the Council's handling of the applications they submitted to purchase the house into which they moved.

### **Legal background**

3. In terms of the Housing (Scotland) Act 1987 a tenant like Mr C, who had been a tenant of a public housing authority for the qualifying period, was entitled to a maximum discount of 60% (70% for flats). This altered from 30 September 2002 with the commencement of the Housing (Scotland) Act 2001 and the Housing (Scotland) Act 2001 (Scottish Secure Tenancy etc) Order 2002. The previous distinction in discount between flats and houses was removed. The maximum discount is now set at 35% of the market value or £15000 (whichever is the lower) and is reached after 20 years occupation of the relevant house. Where a tenant had a right to buy immediately before that date, the right continues on the old terms until his or her tenancy is terminated, or it is assigned, or it passes by succession to anyone except the deceased tenant's spouse or equivalent partner or surviving joint tenant. The 2002 Regulations permit an exception where the (more favourable) old discount rules can continue to apply after an agreed termination of a tenancy, namely where the landlord has decided to demolish the house and has made alternative accommodation available. Where a tenancy is terminated involuntarily by court proceedings for recovery of possession, the old rules on discount only continue where the reason for the termination was on one of seven

grounds defined in grounds 9 to 15 of Schedule 2 of the Housing (Scotland) Act 2001.

4. Section 23 of the 2001 Act sets out a tenant's right to a written tenancy agreement and information. Sub-section 23 (4) requires a landlord, before the creation of a Scottish secure tenancy, to provide the tenant with information about (a) the tenant's right under Part III of the 1987 Act to purchase the house which is the subject of the tenancy; and (b) information about the obligations which the tenant is likely to incur if that right is exercised.

### **Investigation**

5. The investigation was based on documentation supplied by Mr C and the Council's response to a written enquiry. Mr C had the opportunity to comment on the Council's response to the enquiry. Both Mr C and the Council have had the opportunity to comment on a draft of this report. Not all the information obtained has been included in this report. However, I am satisfied that nothing of significance has been omitted.

6. Mr C and his wife have been council tenants since 1971. In 1980 they moved to a semi-detached council house at 5 X Street. The adjacent semi-detached house at 3 X Street was formerly owned by Scottish Homes but was sold in 1995 to the sitting tenant (Neighbour 1). Mr C understood from speaking with previous tenants of his house that they had had unrestricted access since the houses were built in 1947 from the rear of 5 X Street to an adjoining area used by the Council as a site for lock-up garages. Mr and Mrs C stated that they are both disabled and had used the rear access daily during their tenancy and had erected a gate on their boundary fence.

#### **(a) The Council's alleged failure to protect Mr C's interests**

7. Mr and Mrs C understood that Scottish Homes had conveyed to Neighbour 1 a triangular area of land to the rear of 3 X Street where Mr C's rear gate was situated without reserving a specific right of access to the Council or their tenants at 5 X Street. Neighbour 1 also purchased a council owned garage in 1999 which he demolished, and later also purchased from the Council an area of derelict ground adjoining that garage. Mr C was not consulted on the last sale.

8. The Council informed me that, while they were not clear what provoked the initial deterioration in relations between Mr C and Neighbour 1, the dispute came to focus on the access at the foot of their gardens.

9. The Council stated that the houses at numbers 3 and 5 X Street stand side by side near the street, each with a long rear garden running down south-westwards in the direction of another road (Y Street) which runs roughly parallel to X Street. The garden of 5 X Street abuts that of the house at 2 Y Street. The garden of 3 X Street abuts a site of lock-up garages reached from Y Street. All four properties meet at a point. While 5 X Street and the garages were council properties, 3 X Street and 2 Y Street were originally owned by Scottish Homes. The garden of 3 X Street was not fenced right down to its bottom boundary. It had thus been possible for persons to walk to and from the garages from Mr C's house by way of land pertaining to Neighbour 1's house. Neither the Council nor Scottish Homes had envisaged that such access would be taken. There was no path or other works constructed to facilitate such access. No provision was made for it in the title deeds. The open nature of the corner made it convenient for access to be taken, and this was done not just by Mr C, but apparently also by some members of the public to get from X Street to either the garages or to Y Street. The Council stated that Housing Department records showed that Mr C complained to the Council and Scottish Homes in 1990 and 1991 about such access being taken by the public. He requested that the Council construct a six-foot-high fence to prevent access. The former Council refused to authorise this. When Neighbour 1 constructed a similar fence along the same boundary, this became the main source of Mr C's grievance since it restricted his access as it did that of the general public.

10. The Council said that it was with the stated intention of preventing the unauthorised access by the general public that Neighbour 1, when purchasing the garage from the Council, asked to buy the adjoining area in the corner of the garage site. The Council stated that, in agreeing to this request and selling the area to Neighbour 1, they acted in accordance with their policy on the disposal of land and that there was no requirement in terms of that policy or in law for Mr C to have been informed of the sale.

11. From correspondence supplied by Mr C, it appears that he discussed matters with a solicitor in the Council in 2001 following a problem with Mr C's dog entering

into Neighbour 1's property. Mr C consulted solicitors (Mr C's solicitors) in the summer of 2002 and they wrote to the Council on his behalf. Neighbour 1 also complained to the Council about the potential danger to a side extension he had constructed of sycamore seedlings Mr C had planted.

12. Mediation was offered to both parties by the Housing Service in November 2002. Further incidents occurred in 2003. The police and both neighbours' elected representatives were contacted.

13. The Council said that they made efforts to attempt to find a solution to the problem of establishing a formal access to the rear of 5 X Street. An opinion from a Professor of Conveyancing was sought. The Council's in-house surveyor was instructed to survey the area to ascertain the precise boundaries of the relevant properties at 3 and 5 X Street and 2 Y Street. The survey revealed that Neighbour 1 was possibly occupying a slightly larger area than was included in his title. The prospect of obtaining an access from the garden 2 Y Street was explored, as was taking access around the rear of two of the garages and possibly moving them. In addition it was suggested to Neighbour 1 that the Council give him title to the extra area he occupied in exchange for him conveying to the Council a strip for a path to give Mr C access. The Council said that while these attempts to resolve the situation were being canvassed, Mr C's own actions possibly hardened Neighbour 1's resolve. The potential solutions were being explored when Mr and Mrs C actively pursued another option which involved their rehousing.

*(a) Conclusion*

14. I am satisfied that while the seeds of tension between Mr and Mrs C and Neighbour 1 had already been sown, the Council's disposal of land to the neighbour was the source of a further deterioration in relations between the neighbours. The Council were not obliged to sell additional land to Neighbour 1, and in so doing they were not obliged to consult with Mr and Mrs C. While the sale ultimately had unfortunate consequences, it need not have lead to a situation where Mr and Mrs C required to move home. Had Mr and Mrs C stayed, it might have been possible for the Council to have negotiated an alternative access for example with the owner of 2 Y Street. When Mr and Mrs C expressed a desire to move, the Council facilitated this and they offered reasonably generous assistance. I partially uphold this complaint.

*(a) Redress and recommendation*

15. The Ombudsman considered that any remaining injustice from the Council's actions could be resolved through an expression of regret. The Convener of the Council wrote to Mr and Mrs C on 28 June 2006 expressing regret that prior to the sale of the land, there were no procedures to give anyone with comments, observations or objections the right to draw attention to these issues. Such sales are now handled by Council Asset and Property Services' staff and procedures are utilised to manage various estates to minimise or avoid conflicts. The Convener also expressed regret that Mr C was put to the trouble of raising issues with the Ombudsman's office.

**(b) The Council's failure to clarify the full implications of the move to 33 Y Street**

16. Mr C informed me that he and his wife had been extremely reluctant to leave their home at 5 X Street. They had identified an empty property at 33 Y Street that they would be prepared to move to as a means of resolving the animosity which had built up between their household and Neighbour 1. Mr C understood that he would receive an *ex gratia* payment for the move and that he would not be out of pocket. In the event he had had to leave sheds etc. behind, rooms in the new house were slightly larger and none of his existing carpets fitted. As a result, Mr C had been considerably out of pocket. He was also aggrieved that, without checking with him as to whether he might want them, the Council had asked the previous tenant of 33 Y Street to remove floor coverings.

17. Mr C was further aggrieved that he was not properly informed of the effect that a move would have on his right to buy his new home. He stated that his move was enforced on him as a consequence of deteriorating relations with his neighbour and the Council's failure to achieve a voluntary solution to the access problem. Had he exercised his entitlement to require the Council to ensure continuance of the unrestricted rear access, then litigation would have involved them in substantial costs. Mr C considered the transfer had been made on housing management grounds and that his right to buy his council house under the more advantageous discount available to him under the Housing (Scotland) Act 1987 rather than under the new Housing (Scotland) Act 2001 should have been preserved.

18. The Council's Chief Executive stated that the possibility of Mr and Mrs C moving house was first canvassed when Mr and Mrs C met with him and the Council's Head of Housing Services on 5 November 2003. The Chief Executive stated that Mr and Mrs C had indicated that they would like to consider such a move, if a house became available. It was agreed at the meeting that they might be given 'first refusal' on any similar-sized house that became available in Lerwick. One such property which proved acceptable to Mr and Mrs C, namely 33 Y Street, became available at the end of November 2003. According to the Council, Mr and Mrs C demanded that the Council pay them a sum of money in addition. It was agreed to pay them the sum of £1,600. The terms on which this sum was offered were set out in a letter from the Acting Divisional Manager – Legal to Mr C's solicitors dated 3 December 2003. It was subsequently agreed to pay, in addition, a contribution towards legal expenses of up to £350 plus VAT in the event of the Scottish Legal Aid Board exercising a right of claw-back against the main payment. These sums were offered and accepted by Mr and Mrs C through their solicitors in full and final settlement of any claims of any nature which they might have against the Council arising from the matter.

19. The Council explained the basis on which they attempted to resolve the matter. Firstly, they regarded it as doubtful whether Mr and Mrs C being deprived of access would have given rise to a sustainable cause of action by them as tenants against the Council as their landlords. They also considered it uncertain as to whether an enforceable right of access existed in respect of the disputed land which could be exercised against Neighbour 1, or any other purchaser, even before the Council through selling to him made such access unenforceable. They say that that action may not have altered the legal position. There was, however, doubt in the matter, and it seemed to the Council that Neighbour 1's acquisition of the land proved the catalyst for their taking matters into their own hands to block up the corner, and deprive Mr C and his family of access.

20. The Council's aim in settling the matter was primarily to resolve a neighbourhood dispute which partially involved their tenants and to provide a solution acceptable to those tenants. It was not based, as asserted by Mr C, on a concern to avoid Court action. The solution of moving house was not forced on Mr and Mrs C by the Council, but offered when they themselves had indicated their

willingness to move. Other potential solutions were still being actively explored at the time. According to the Council, when formal agreement to the terms of settlement was still awaited from Mr and Mrs C's solicitors on 3 December 2003, Mr and Mrs C presented themselves at Housing Services and demanded the keys. They stated that they wished to move regardless of the terms of the Council's offer and handed the Head of Housing a letter from Mr C's medical consultant in support of their position. They had wanted to accept the offer verbally there and then. The Head of Housing asked them to consider the matter overnight and then to instruct their solicitor to respond formally. When that response was received, the move proceeded and a cheque of £1,600 was paid to Mr and Mrs C.

21. With regard to the formal documentation required under section 23 (4) of the 2001 Act, the Council confirmed that their standard Scottish Secure Tenancy agreement sent to Mr and Mrs C with the offer of tenancy on 9 December 2003 stated that they may have the right to buy their house under Part III of the 1987 Act as amended by the 2001 Act and that the price and other terms would be decided in terms of those Acts. They pointed out that further information had been requested by Mr and Mrs C's solicitors (following issue of the letter of 3 December 2003) and had been supplied to him.

22. The Council said that in the following month Mr and Mrs C wrote to the Council to claim a further £10,360 in out of pocket expenses in moving home and to submit a complaint. The Council repudiated the claim and referred to the original settlement of the previous month. Mr and Mrs C wrote again to the Council on 23 February 2004. A meeting was arranged with Mr and Mrs C at the Council offices which was attended also by the Council's monitoring officer. At the meeting it was agreed to pay Mr and Mrs C a further £800. Mr and Mrs C accepted this and the bases for payment were set out in a letter to Mr and Mrs C from the Council's Head of Legal and Administration of 5 March 2004. This was countersigned by Mr C on 8 March 2004 and returned. The cheque was subsequently cashed.

23. With specific reference to Mr and Mrs C's knowledge of the effect moving house would have on their discount entitlement, the Council said that this point was raised by their solicitors. Their solicitors spoke with an officer of the Council's Legal Services following the issue of the settlement letter of 3 December 2003. The Council's legal officer confirmed what the effects would be. Mr and Mrs C's

solicitors thereafter confirmed that their clients still wished to proceed. The Council maintained that the fact that the point was raised with the Council implied that the answer was recounted as advice to Mr and Mrs C by their solicitors but that was a matter between Mr and Mrs C and their solicitors. The issue, however, resurfaced subsequently when Mr and Mrs C applied to buy their new home.

*(b) Conclusion*

24. Mr and Mrs C were legally represented at the time they identified the property at 33 Y Street. The Council say that Mr and Mrs C's solicitors were provided with information on the effect of a transfer of house on Mr and Mrs C's right to buy discount. It was basically for Mr and Mrs C and their solicitors to weigh up the consequences of the move. In all the circumstances I do not uphold this complaint.

25. With regard to the Council's obligations under Section 23 of the 2001 Act, these appear to me to have been met.

**(c) The handling of Mr and Mrs C's applications to buy 33 Y Street**

26. Mr and Mrs C did not contact the Council again until, in late 2004, they applied to purchase their new home at 33 Y Street. In response to that application, an offer was made to Mr and Mrs C on 24 January 2005. The house was valued by the District Valuer at £75,000. The discount on that price, calculated in terms of Section 62(3) of the Housing (Scotland) Act 2001, was £15,000, leaving a net purchase price of £60,000. Mr and Mrs C were unhappy at the amount of discount awarded and what they saw to be a high valuation. After reading the Scottish Executive booklet 'Buying Your Council House', they considered that their right to the higher discount should have been preserved. Mr and Mrs C then enlisted the assistance of their Member of the Scottish Parliament (the MSP) who wrote to the Chief Executive on their behalf on 16 February 2005. The MSP stated that it was his understanding that, where tenants are required to move by their landlord, then their right to buy entitlement (from the 1987 Act) is protected. The protection of entitlement related to such reasons as the landlord wishing to demolish or renovate the property, overcrowding or for other housing management reasons which the MSP believed to be pertinent to Mr and Mrs C's circumstances.

27. The Chief Executive acknowledged the MSP's letter on 23 February 2005 enclosing a copy of his letter of 8 February 2005 to Mr and Mrs C. He indicated

that, because of the short timescales involved, Mr and Mrs C should consult a solicitor on the terms of the offer made on 24 January 2005. He promised to respond in full the following month. He wrote at length to the MSP on 16 March 2005 detailing the circumstances which had given rise to Mr and Mrs C moving house. He considered that Mr and Mrs C had not been required by the Council to move home and they had instructed solicitors whose advice ought to have included the whole legal consequences of Mr and Mrs C accepting the offer of settlement. With regard to the recent application to buy 33 Y Street, the Council did not have discretion to increase the amount of discount beyond that provided for in the Housing (Scotland) Act 2001. In the Chief Executive's view Mr and Mrs C's case did not fall within any of the statutory exceptions which permit the old rules to apply. He stated that it would, therefore, be improper and illegal for the Council to apply the old rules.

28. Mr and Mrs C's first application to purchase lapsed. In early June 2005, however, they decided to reapply and the MSP wrote again to the Chief Executive on their behalf on 8 June 2005. The MSP maintained the view from his reading of the regulations that tenants of a particular landlord who have lived in a succession of houses with the same landlord still had rights in relation to discount levels pertaining to their time as tenants with the particular landlord. He asked for the matter to be further investigated. He also queried on behalf of Mr and Mrs C why the previous valuation of £75,000 had reflected a significant increase in market value of £20,000 in one year and whether an independent valuation could be obtained.

29. The Chief Executive responded to the MSP on 23 June 2005 stating that since Mr and Mrs C's original tenancy had been terminated by agreement, their current right to buy was governed by the terms of the 2001 Act and not the 1987 Act. Although their previous qualifying tenancies still counted towards the calculation of discount, they did so at lower rates and subject to a lower maximum discount. The Chief Executive further pointed out, with regard to the valuation of the property, that all houses sold by Shetland Islands Council under right to buy legislation were valued by the District Valuer, who was independent of the Council. The Chief Executive welcomed the fact that the MSP had advised Mr and Mrs C to seek independent legal advice on the interpretation of the law.

30. After obtaining information from Mr C and the MSP, I made enquiry of the Council on 26 July 2005.

31. In their response of 28 September 2005, the Council stated that Mr and Mrs C queried the previous valuation on the grounds that they believed the house to be a defective type covered by the Housing Defects Act 1984. The District Valuer informed the Council that he had to agree with Mr and Mrs C that his earlier valuation of £75,000 had been on the high side. He was prepared to make some allowance for the 'Cruden's effect' on the local market. The District Valuer's second valuation reduced the market value by 10% to £67,500.

32. The Council made a fresh offer to Mr and Mrs C valuing their house at £67,500 with full discount of £15,000; this reduced the net price to £52,500. In informing me of this, the Council stressed that the reduction did not arise as a result of any alteration to the percentage of accrued discount. The Council maintained that the statutory position was quite clear. The circumstances of Mr and Mrs C's termination of their previous tenancy of 5 X Street did not constitute one of the seven grounds identified on Schedule 2 of the Housing (Scotland) Act 2001. At the time of responding to my enquiry, the Council's offer to sell in respect of the second application remained open for acceptance. As an alternative, Mr and Mrs C could, on the advice of their solicitors (if advised and they had grounds to assert a contrary position), formally request within one month that the Council amend the calculation of discount to the old rates. When that request was refused, they could then refer the matter to the Lands Tribunal for Scotland.

33. At the date of issuing this report, Mr and Mrs C had applied again to buy their home.

*(c) Conclusion*

34. I see no evidence that the Council have mishandled Mr and Mrs C's applications to purchase their new home. The Council are clearly of the view that the grounds detailed in the 2001 Act do not apply to preserving discount. It is not properly for this office to take issue with the Council's legal interpretation. The route identified at paragraph 33 provides a means of resolving the issue. In the event of a further application, it would be open to them to qualify the Council's offer to sell then, should the Council reject the qualification, they may appeal to the

Lands Tribunal for Scotland. The Lands Tribunal affords a forum to establish whether the Council's view of the 2001 Act and regulations is reasonable. I do not, therefore, uphold this aspect of complaint.

29 August 2006

**Explanation of abbreviations used**

Mr C	The complainant
The Council	Shetland Islands Council
Neighbour 1	Mr C's former neighbour, owner of 3 X Street
5 X Street	Mr and Mrs C's former home
3 X Street	Neighbour 1's home
2 Y Street	A property with a common boundary to the rear of 5 X Street
33 Y Street	Mr and Mrs C's current home