

## Scottish Parliament Region: Mid Scotland and Fife

### Case 200401690: Fife Council

#### Summary of Investigation

##### **Category**

Local government: Legal and administration, Land burdens and servitudes

##### **Overview**

The complaint from Mr C arose from a dispute over whether a servitude right of access existed for a plot acquired over land purchased in 1986 by Fife Council's predecessor. Notwithstanding that the dispute arose over a legal issue, there were shortcomings by Fife Council.

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

The complaints from Mr C that I have investigated are that:

- (a) Fife Council delayed unduly between 4 March 2002 and October 2003 in applying to the Keeper for a rectification of Mr C's title to the Plot (*upheld*);  
and
- (b) the Council failed to take the legal action as suggested by the Keeper to declare the servitude extinguished (*not upheld*).

##### **Redress and recommendations**

The Ombudsman recommends that the Council:

- (i) apologise to Mr C for the identified delay; and
- (ii) make a payment of £500 to him.

## **Main Investigation Report**

### **Introduction**

1. On 13 December 2004 the Ombudsman received a complaint from a property owner in Fife (referred to in this report as Mr C). He was aggrieved that Fife Council (the Council) maintained that a servitude right of access for a plot of land (the Plot) in his ownership had been extinguished and that, while they had said that they would apply to the Keeper of the Registers of Scotland (the Keeper) to have the matter resolved, the issue remained outstanding. He complained that the Council delayed unduly in making the application. When it was unsuccessful, the Council did not take action as suggested by the Keeper to resolve the legal issue.

2. The complaints from Mr C that I have investigated are that:

- (a) the Council delayed unduly between 4 March 2002 and October 2003 in applying to the Keeper for a rectification of Mr C's title to the Plot;
- (b) the Council failed to take the legal action as suggested by the Keeper to declare the servitude extinguished.

3. The principal issue underlying the complaints is a point of law upon which the Ombudsman's office is unable to adjudicate. It was made clear to Mr C in a telephone discussion on 27 January 2005 with my colleague that restrictions in the Ombudsman's jurisdiction prevented the office from looking into matters of infringement of title and whether the servitude had been extinguished at law. These were properly matters for the courts.

### **Investigation**

4. I have not included in this report every detail investigated, but I am satisfied that no matter of significance has been overlooked. Both the Council and Mr C have had the opportunity to comment on a draft of this report.

5. Mr C has property interests in a Fife village. His complaints concern a fenced off plot of land (the Plot) next to a tidal estuary that adjoins the site of a former linoleum works.

6. Mr C maintained that he and his predecessors in title since 1927 enjoyed a servitude right of access and egress to the Plot by means of a 360 metre long

roadway running eastwards from a nearby lodge to a public road in the town centre. This servitude right is recorded in the property section of the title sheet for the Plot in the Register of Sasines. Some time prior to 1942, the former linoleum works owners, at their expense, entirely reconstructed a former farm road to make it capable of carrying heavy traffic with a minimum width of 7 metres (23 feet). There is evidence in the form of a memorial to counsel of 1 February 1945 that the then owners of the works had concerns about unrestricted movement of the general public through the middle of what was then a working factory.

7. According to the Council, in the subsequent forty years, any former servitude right of access which may have existed was lost by non-use. Mr C, who was not an interested party until some years later, disputed this. He maintained that the former owners of the Plot and he himself used the access as a route to take boats to and from adjoining moorings and, while the road existed, it was also used by others.

8. The Council's statutory predecessors, North East Fife District Council, acquired the former linoleum works by way of a conveyance granted by the then owners and recorded by the Keeper in the General Register of Sasines (Fife) on 9 January 1986. The Council maintained this was a statutory conveyance under section 80 and Schedule A of the Land Clauses Consolidation (Scotland) Act 1845.

9. As a result of a subject access request for information, Mr C obtained a letter dated 3 June 1999 from solicitors acting for the then owners of the Plot to the Council's Legal Services stating that they had concluded missives (on 24 May 1999) with Mr C, and that his clients had a servitude right of free access for wheeled vehicles of the road running east and west from a lodge to a specified road. A Council internal memorandum of the same date (3 June 1999) confirms that the Legal Section had informed Mr C that as the Council's title to the former linoleum works was by way of a Schedule A conveyance, all land obligations, burdens and servitude rights affecting the former linoleum works site had been extinguished.

10. According to correspondence from the Registers of Scotland, registration of the Plot on 18 January 2000 proceeded on a disposition by the then owners, a private company with fishing interests, in favour of a company (the Company) of

which Mr C was a director. The disposition specifically mentioned the existence of a servitude right of access. Mr C's personal interest in the Plot arises from his purchasing it from the Company. On 24 September 2001, Mr C submitted an application to the Keeper to register the Plot in his name.

11. Correspondence from Mr C indicated that the Council's Law and Administration section were aware by 25 January 2002 that Mr C had sought to register title with the servitude right of access. A subsequent letter of 4 March 2002 to Mr C from a Council complaints officer stated that the Council did not consider that Mr C's title was accurate. The Council intended, therefore, to take the matter up with the Land Register of Scotland 'with a view to resolving this matter once and for all'.

12. Some nineteen months later, on 6 October 2003, a Senior Case Officer at the Registers of Scotland wrote to Mr C informing him that an application for rectification of title had been submitted by Fife Council to the Keeper. In that application they had requested the Keeper to remove the servitude right of access in the property section of the Title Sheet for the Plot. Mr C was advised that the access road described on his title fell within the extent of the subjects acquired by the Council under their statutory powers and the 'servitude can now be considered as being extinguished following the recording of the statutory conveyance'. Mr C was requested to return the Land Certificate for the Plot to enable the Senior Case Officer to complete the application for rectification.

13. On 10 October 2003 the former Chief Executive of the Council wrote to Mr C informing him that the Council had made application in terms of section 9 of the Land Registration (Scotland) Act 1979 to rectify the Land Certificate in respect of the Plot by deleting the alleged servitude right of access affecting the Council's retained land which the Council considered had been legally extinguished.

14. Mr C wrote to the Registers of Scotland on 11 October 2003 asking that the application for rectification be rejected. He indicated that removal of the servitude right of access would, literally, land lock the Plot. The Senior Case Officer replied on 10 November 2003 stating that he had informed the Council of Mr C's objection and had requested them to supply evidence that would establish that the

necessary statutory procedures were undertaken in respect of the compulsory acquisition.

15. Following further correspondence from Mr C, the Senior Case Officer wrote to the Council for clarification. He subsequently advised Mr C by letter of 26 January 2004 that he was giving the Council until 13 February 2004 to provide a response, failing receipt of which, the application for rectification would be rejected.

16. The Senior Case Officer wrote again to Mr C on 19 February 2004 stating that, in the absence of any evidence that the rights of third parties were considered at the time of the conveyance in 1986, the Keeper had no choice but to reject the application for rectification as it could not be proved beyond a reasonable doubt that any pre-existing servitude was extinguished. The servitude referred to in the Title Sheet for the Plot might, therefore, be a pre-existing servitude stated expressly and in that instance there would be no inaccuracy to rectify. The case worker informed Mr C that the Council had been informed that the Keeper had no power to arbitrate between the parties' conflicting opinions and that, in the absence of an amicable agreement, court action would be required by the Council to have the servitude extinguished. A letter in similar terms was sent to the Council that same day.

17. On 1 March 2004 a solicitor in the Council's Planning and Environment Team (Officer 1), who had worked with the former District Council, wrote to Mr C confirming that the Council's position was that the servitude no longer existed. The basis for that view was that the Council's title was by way of a statutory conveyance under the provisions of Section 80 and Schedule A of the Land Clauses Consolidation (Scotland) Act 1845. Since the Council's title was recorded within the 60 day limit, the servitude was extinguished.

18. The land released by the demolition of the former linoleum works became part of the planned regeneration of the waterfront in the town. As part of preparatory works the Council excavated the road to install a drainage pipe. Although the whole width of the roadway was closed, Mr C was not provided with a temporary vehicle crossing. In an e-mail of 10 May 2004 to the Council's former Chief Executive, Mr C requested the provision of temporary infill to allow access for his vehicles. He requested that his e-mail be regarded as a formal complaint. In

the absence of a reply, Mr C sent a reminder on 5 July 2004 insisting on full reinstatement of the roadway. He requested a meeting.

19. On 9 July 2004, the former Chief Executive wrote to Mr C apologising for his failure to respond to Mr C's e-mail of 10 May 2004 within 28 days. He stated that he considered the Council's position had been fully set out in correspondence, most recently on 1 March 2004. The Chief Executive stated that he did not consider that a meeting with Mr C would be either appropriate or useful.

20. Mr C contacted the local councillor on 23 November 2004 and the Council's solicitor on 3 December 2004, after contractors had sealed off both ends of the road over which his title gave him right of access. This physically denied him the ability to use the route. A Council officer informed Mr C on 19 December 2004 that the Council had no plans to include another road in their landscaping proposals. Subsequently, they replaced the straight route of the 7 metre wide roadway with a less direct 1.5 metre wide path, with lighting columns, diverted northwards toward the waterfront.

21. Mr C's complaint was submitted to the Ombudsman's office on 13 December 2004.

22. In amplification of his complaint, Mr C, recognised that he could take legal action against the Council for denying him his right of access through recent landscaping works, but considered that would be an unreasonable burden on him. He felt that the onus lay with the Council, following the letter of 19 February 2004 from the Registers of Scotland, to take an action of declarator to establish that the servitude right of access had been extinguished.

23. Enquiry of the Council was first made on 2 March 2005. The former Chief Executive responded on 4 April 2005. He confirmed that the retained files of the former authority were unfortunately limited in what they revealed about the conveyances.

24. The former Chief Executive stated in his letter of 4 April 2005 that there had been no formal review of the Council's position following receipt of the Keeper's letter of 19 February 2004. He maintained that the letter did not impact materially

on the Council's legal position. The letter should not, in his view, be construed as the Keeper supporting Mr C's view that the servitude claimed by him remained in existence. The Keeper's letter had stressed that he had no power to arbitrate between the parties' conflicting opinions on the extinguishment of the servitude. Further the Keeper's decision was not a formally binding decision upon the Council akin to a decree granted by a court. The service on whose account the site is listed had not issued any instructions to raise court proceedings of declarator to assert that the servitude had been extinguished. The former Chief Executive did not consider that further application to the Keeper would be appropriate given the limited options available to the Keeper. He did not consider that resolution of the dispute could be easily brought about given the entrenched positions of Mr C and the Council in what was in his view essentially a legal dispute. The former Chief Executive referred also to the possibility of a buy-out of Mr C's interests by a local trust under the auspices of the Community Land Fund. Finally, he mentioned that on 25 February 2005, a liquidator had been appointed in respect of the company of which Mr C was a director and the Council understood that a question had arisen concerning the quality of Mr C's title to the Plot.

25. A copy of the Council's response was sent to Mr C on 15 April 2005 to give him the opportunity to comment. Mr C responded in various letters. He confirmed on 5 May 2005 that he had spoken with a long serving senior employee of the former owners of the Plot. According to Mr C, the former employee had confirmed that the former District Council had not consulted with his company as should have happened with a statutory conveyance.

26. On 20 May 2005, having received further information from Mr C, I wrote to the former Chief Executive asking him to clarify the Council's position as statutory successors of the District Council. I asked him to confirm whether any extant servitude rights had previously been extinguished before the former District Council's purchase of the former linoleum works or had the former District Council been cognisant that a servitude right existed and notified and compensated the then owners? I also sought to clarify further the Council's administrative actions subsequent to the Keeper's letter of 19 February 2004 which strongly implied that the Council should seek an amicable agreement, failing which it would be open to them to take court action.

27. The former Chief Executive stated in his reply of 21 June 2005 that the Council did not consider a servitude right of access existed through the former linoleum works at the time the site was acquired; the right having been lost by prescription following on from non-use of the right of access. The former Chief Executive stated that, in the event a right of access did exist and the Council were wrong about the right having been lost because of non-use, then the act of acquiring the site by way of a Schedule A conveyance under the 1845 Act had the effect of terminating any servitude right of access. The former Chief Executive maintained that whether or not compensation was paid in respect of loss of the right is irrelevant to the validity and effect of the Schedule A conveyance. The former Chief Executive maintained that existing case law supported the Council's position. He repeated that the complaint came down to a difference of opinion on a point of law. He considered the Council's position to be entirely justified and reasonable. Mr C had a remedy available by himself raising an action of declarator. Since the Council did not consider a right of access exists, and as it was not presently being exercised, he saw no reason for the Council to invest any public money on an action of declarator. A copy of the former Chief Executive's response was sent to the Mr C on 24 June 2005.

28. The complaint was then the subject of internal discussion within the Ombudsman's office. In a telephone conversation with Mr C on 26 July 2005, he stated he would welcome a recommendation being made to the Council that they take legal action to regularise the position. It was made clear to Mr C, however, that the Ombudsman's office could not instruct the Council to take legal action. A decision was taken on 22 August 2005, in terms of the Ombudsman's then complaints handling procedures, to issue a Preliminary View. This was done in the form of a letter to the former Chief Executive of 30 August 2005. The letter rehearsed the history of the matter. I considered there was evidence of administrative shortcoming by the Council. Despite the Council's previously stated intent to resolve the matter, the Council had not provided evidence that they had formally reviewed their position and their implementation of works had physically denied Mr C the ability to use the route in question.

29. I recommended that an appropriate remedy would be for the Council to review the current position and if necessary, to report the matter comprehensively to the appropriate committee of the Council in order that officers were given a clear



mandate to act either a) to engage in discussions with Mr C with a view to resolution of the matter or, b) in the absence of resolution, to raise an action of declarator. A copy of the letter of 30 August 2005 was sent to Mr C.

30. On 30 September 2005, the former Chief Executive responded to the Preliminary View, stating that under section 7(8) of the Scottish Public Services Ombudsman Act 2002 the Ombudsman must not investigate any matter in which the person aggrieved has a remedy by way of proceedings in a court of law unless the Ombudsman is not satisfied in the particular circumstances it would be reasonable to resort or to have resorted to the remedy. He was of the view that no explanation had been given of why it would be unreasonable for Mr C to raise an action of declarator as the 'aggrieved party'. The former Chief Executive considered that a recommendation that the Council should seek to raise an action of declarator would set an undesirable and unnecessary precedent. In terms of Fife Council's Scheme of Delegation, the Council's Head of Law and Administration had delegated authority to 'institute, defend or appear in any legal or tribunal proceedings', and consequently there was no reason for the Council's position to be formally reviewed following the Keeper's decision. The former Chief Executive accepted that there had been an unacceptably long delay between the letter of 4 March 2002 and making application to the Keeper for rectification of title (in October 2003) and stated that he would be prepared to offer financial recompense to Mr C if the Ombudsman considered it appropriate. However the former Chief Executive maintained that any injustice to Mr C was minor when seen in the context of a long outstanding dispute. The former Chief Executive indicated that while he was happy to submit a report to committee he was unsure that any useful purpose would be served.

31. The Council's response was received on the day (3 October 2005) the Ombudsman's complaints handling procedures changed. The Council and Mr C were informed by letters of 5 October 2005 that the complaint would be treated as an investigation and would result in a report to be laid before the Scottish Parliament.

32. A report was prepared by the Council's Head of Law and Administration on 20 October 2005 and was submitted to the relevant local committee on 9 November 2005. The report rehearsed the argument contained in the former

Chief Executive's letter of 30 September 2005. It also referred to issues involving the winding up of the firm of which Mr C was a director and the transfer of the Plot to him. The report concluded that the dispute between the Council and Mr C was a legal matter and consequently fell outside the Ombudsman's jurisdiction. While the Council accepted that there was a delay in making the application to the Keeper for rectification, the Council did not consider that this delay amounted to maladministration or that Mr C suffered any prejudice or injustice.

33. The minute records that the Committee considered the Head of Law and Administration's report of 20 October 2005. They agreed that, in their view, the dispute between Fife Council and Mr C was a legal dispute and, therefore, fell outwith the Ombudsman's jurisdiction. They agreed also to request that the Head of Law and Administration continue to make representations to the Ombudsman on that basis. A copy of the report and relevant minute was sent by the Council's Legal Services Manager on 22 November 2005 without further comment.

34. For his part, Mr C responded with regard to the suggestion of financial recompense referred to in the former Chief Executive's letter of 30 September by submitting a 'claim' to this office on 14 November 2005 of £400 per week from 1 December 2000 to 12 November 2005 inclusive totalling £102,400 plus an additional £250 for hire of a crane and interest.

35. By late 2005, Mr C had submitted a subject access request for information to the Council and had obtained a substantial amount of documentation. He had not had the opportunity fully to consider it. At his request, we met on 8 March 2006. Mr C indicated at that meeting that he felt that the Council were obliged to go to court and that he wanted reinstatement of his access. He indicated that he held title and the matter of payment for the Plot was 'sorted out' between the liquidator and his bankers. Mr C stated that he considered the Council's actions breached his Human Rights under Article 1 and Protocol 1.

*(a) Conclusions*

36. The Council are right to assert that the primary issue in this complaint is a legal matter of which Mr C was aware in 1999. It is clearly not the function of the Ombudsman to usurp the role of the courts or to arbitrate in respect of the legal issues. Further the Ombudsman's office cannot instruct a listed authority to take

legal action to resolve a matter. Mr C, however, had, and continues to have, a legal remedy available to him. While sympathetic to Mr C's view that that would be unreasonable, his basic entitlement to assert his servitude right, remains unaltered.

37. I consider that the Council delayed unduly for some nineteen months in following up their stated intent on 4 March 2002 to resolve matters 'for once and for all' by applying for a rectification of title. That delay amounts to maladministration which was an injustice to Mr C. I uphold that aspect of complaint.

*(a) Recommendations*

38. The Ombudsman recommends that Fife Council:

- (i) apologise to Mr C for their identified delay; and
- (ii) make a payment of £500 to him.

*(b) Conclusions*

39. On the second head of complaint, I accept that the Council were not obliged to accept the suggestion of the Keeper, following the refusal of their request for rectification, to apply to the courts for a declarator that the servitude right had been extinguished. They could not be instructed or directed by the Keeper (or the Ombudsman) in this instance. In line with my Preliminary View, the matter was reported in an appropriate way to committee and they had the opportunity to issue fresh instructions. They chose neither to engage in dialogue with Mr C to reach a settlement nor to instruct their officers to raise a court action. That has no effect on Mr C's entitlement himself to raise an action. While I am disappointed that matters have not progressed, I do not find that Mr C has sustained injustice as a result of maladministration. I do not uphold this aspect of the complaint.

31 October 2006

**Explanation of abbreviations used**

Mr C	The complainant
The Plot	A parcel of land to which Mr C has registered title with a servitude right of access over adjoining land acquired by the Council's predecessor
The Council	Fife Council
The former Chief Executive	The Council's Chief Executive prior to June 2006
The Keeper	The Keeper of the Registers of Scotland
The Company	A Company of which Mr C is a Director
Officer 1	A solicitor in the Council's Planning and Environment Team