

**Scottish Public Services Ombudsman Act 2002**Report by the Scottish Public Services Ombudsman of an  
investigation into a complaint against:East Ayrshire Council

1. My predecessor, the former Commissioner for Local Administration for Scotland (the Commissioner), received a complaint from the tenant of an East Ayrshire Council house in Kilmarnock (Mr X). Mr X was aggrieved about the Council's actions as housing authority, in intimating to him that they intended to raise proceedings to recover possession of his home on grounds of his prolonged absence without their prior permission. In particular, he complained that:

- (a) officers refused to accept his explanation that he had not breached his conditions of tenancy and had informed the Council (through Financial Services) that he would be absent from his home for an extended period while on contractual work in Jersey and that he would effectively be threatened with unemployment if he returned before the contract ended;
- (b) the officer's own record of a meeting with him on 26 June 2002 stated that he was told that if he did not return from Jersey, then a court order for recovery of possession would be obtained;
- (c) although he was in fact in Kilmarnock at the time, the Council acted heavy-handedly the very next day (27 June) in serving a notice of proceedings for recovery effective for a six month period commencing on 8 August 2002;
- (d) the grounds for the notice issued were inappropriate to his circumstances, in particular, he had no current rent arrears and no spouse;

- (e) the Council was inconsistent in stating that he had been told he need not return from Jersey yet the Area Manager stated in his letter to his solicitor of 30 August 2002 that his occupation of his tenancy would be monitored and the Notice of Proceedings would not be withdrawn; and
- (f) although he was visited by a housing officer on 7 August, following his permanent return from Jersey, she had not by the end of 2002 made personal contact with him again.

2. Mr X claimed injustice in that he lost financially in losing his secure employment in Jersey. He said he had been unable to find permanent employment since returning but had been doing jobbing work with agencies. He was also concerned that the existence of the Notice of Proceedings on his housing file would have a prejudicial effect on any future application by him to purchase his home.

#### Legal Background

3. In terms of the Local Government (Scotland) Act 1975 under which his office operated, my predecessor was unable under Schedule 5 Paragraph 1, to investigate the commencement or conduct of civil or criminal proceedings before any court of law. The Commissioner decided that he was not debarred by that section from looking at the circumstances of the issue of the Notice of Intention to Raise Proceedings and he made enquiries of the Council on 18 September 2002. The Council's comments were received after the office of the Scottish Public Services Ombudsman came into being on 23 October 2002. After verifying details of the complaint with the complainant, I decided to investigate the complaint on 30 January 2003.

#### Administrative Background

4. Sections 5 and 6 of the Council's Tenancy Agreement which Mr X signed state:

##### 5 Your responsibilities as a Tenant

You must do the following:

- Live in the home and not run a business from it
- Tell us if anyone moves into or out of your home

#### 6 Permission

You must have our written permission before you do any of the following:

- Leave the home empty for more than 30 days at a time

#### The Investigation

5. I obtained the Council's comments on the draft summary of complaint which I had previously agreed with the complainant. My investigating officer interviewed the complainant and his mother at his parents' home. He also inspected the Council's files and interviewed officers of the Council and the Local Member.

#### Council Tax Matters

6. The complainant, a single man in his twenties and a carpenter to trade, was allocated his present home – a two bedroom upper four-in-a-block flat in a popular area of Kilmarnock in November 2000. On 17 November 2000 he signed the tenancy agreement with a commencement date of 20 November 2000 and Finance were notified that he should be added to the council tax database from that date. He subsequently confirmed to the Director of Finance that he was the sole occupier and was awarded a 25% single person's discount on 10 January 2001. On 22 January 2001, he contacted the Finance Department stating that whereas he had become a tenant from 20 November 2000, the house had been unoccupied and unfurnished until he moved in on 13 December 2000. An exemption for the period 20 November 2000 to 12 December 2000 was awarded and a corresponding amendment to the single occupancy discount made on 7 February 2001. A replacement council tax bill for 2000/01 was issued on 13 February 2001 and was paid in full on 28 April 2001. Following the issue of the council tax notice for 2001/02 on 5 March 2001, the complainant's mother contacted the Finance Department requesting a list

of all council tax exemptions and this was issued to her on 22 March 2001. The list issued however did not include the basis on which the 50% discount for an empty property or second home was calculated.

7. The records of the Council's Finance Department indicate that Mr X paid his council tax (net of 25% discount) in ten instalments by direct debit, ending with a final payment for 2001/02 on 28 January 2002. Also on that date, however, Mr X called at the council tax office in Kilmarnock and said he wished to claim 50% discount as he had been resident in Jersey since October 2001. On 31 January 2002 a 50% discount application form was issued to Mr X at his parents' address. This was signed by Mr X on 7 February 2002, returned by his mother on 8 February and on 11 February the 25% discount was cancelled and a 50% discount applied from 8 October 2001. This left the account for 2001/02 overpaid and a refund was processed and subsequently issued on 5 March 2002. When the council tax notice for the forthcoming financial year 2002/03 was issued on 24 February 2002, the 50% discount continued to apply and the net monthly payments which the complainant elected again to pay by direct debit commenced on 28 April 2002. He made the initial requested payments on 28 April and on 28 May 2002.

8. On the council tax discount application form signed by Mr X on 7 February 2002, he certified he was the tenant of his home and that 'it is not my sole or main residence as from 8<sup>th</sup> October 2001'. He did not supply any of the three specific details requested to support the application for discount, namely:

- 1 Copy of council tax notice at main address showing (your) name
- 2 Copy of bank statement at main address, showing (your) name
- 3 Proof of not paying UK taxes plus copy of work visa, if staying abroad

9. The Council's Revenues Manager (Officer A) informed my investigating officer that the Finance Department had no record prior to 28 January 2002, that Mr X was mainly resident in Jersey and he noted the claim was made retrospectively. While the complainant ticked a box stating he was a 'tenant', there was no system in place automatically to

check with the Housing Department as to whether that tenancy was with East Ayrshire Council. Officer A stated that the instance of holiday homes in East Ayrshire's area was rare and most claims were made by persons working abroad. Officer A freely accepted that not enough enquiries were made to establish whether Mr X met the qualifying criteria for the 50% discount to be awarded and that he had supplied none of the three specific pieces of information detailed at paragraph 8 above. Officer A indicated that it could not be construed that an application for second home discount was a request for permission to vacate a council owned property for a period of time. In his view, Mr X had not deliberately misled Finance. He had applied for a discount to which he felt he was entitled and the Finance Department, who had duly awarded the 50% discount, had not made sufficient enquiries before granting the additional discount.

#### Report of a Housing Repair

10. Mr X informed me that he had been employed in Jersey from October 2001 on a contract which was due to last a year and in his absence he had made arrangements for the regular payment of his rent and council tax by direct debit. His mother and father lived nearby. They had visited the property regularly to air and heat it. His father had also undertaken redecoration and internal repairs.

11. At interview, Mr X's mother (Mrs L) informed my officer that it was after a visit she had paid to the flat in June 2002 that the circumstances of the complaint arose. She had noticed a large hole on a tarred mutual path at the property, which was hazardous to the downstairs elderly neighbour. Accordingly, she telephoned the Housing Department on 13 June 2002 to report the repair and said she spoke to a housing officer (Officer B), who had demanded to know why it was she who was reporting the repair rather than her son. Mrs L had indicated that her son was in Jersey whereupon, according to her, Officer B had demanded to know what he was doing there and his address and telephone number. Mrs L was surprised at Officer B's insistence but did not give Officer B her son's address in Jersey.

12. Officer B told my officer that her job generally embraced estate management and tenant arrears and also occasional requests for permission to leave a council tenancy unoccupied. As part of her duties she also took calls for requests for repairs and issued appropriate job lines for housing inspectors. She recalled taking the telephone call from Mrs L and issuing the line for the repair, which was subsequently effected. She recalled that Mrs L had volunteered that her son was in Jersey. She had then asked if he had sought permission to be absent from his flat for a period of more than 30 days, because to her recollection no request had been made and certainly none had been granted. Mrs L had then said that the council tax office had been made aware that her son was out of the country and had in fact granted him a 50% discount on council tax. Officer B had then indicated that permission from the landlord was needed for extensive periods of non-occupation. At this, Officer B recalled that Mrs L had become defensive. Officer B said she would like to speak to Mr X as to his intentions and asked Mrs L for his address and telephone number in Jersey, in order that she could speak with him. Mrs L had not disclosed this.

13. Officer B told my officer that she had found it strange that a council tenant had been given a second home discount and had to her recollection never come across a similar situation before. She first telephoned the Council Tax Section, who confirmed that a 50% discount was in place and then e-mailed the Operations Manager, Housing and Technical Services on 17 June 2002:

(ADDRESS)

'I have discovered that the current tenant of this address is not living at this address on a permanent basis. I am currently pursuing him to occupy or terminate the tenancy.

However, when I contacted the Council Tax Section, they confirmed that they have granted a 50% discount on his council tax bills as a 'second home discount' from 8.10.01. I have spoken to [the Assistant Area Manager – Officer C] re this and she has advised me to contact you to have this raised with the Council Tax Section so that this does not happen again.'

14. The Operations Manager (Officer E) forwarded this e-mail to Officer A, noting:

'From our point of view, we stipulate that a council house should be the main place of residence and we would not agree to it being regarded as a second home.'

15. Officer A informed Officer C that they would review the award of the 50% discount. A week later on 24 June 2002, they reconsidered the circumstances and decided that whereas Mr X was indeed living in Jersey while employed there, it was his intention to return to his council home in Kilmarnock and that the Kilmarnock property was therefore deemed to be his main residence. Replacement council tax bills for 2001/02 and for 2002/03 were issued on 25 June and a letter was sent from Finance to Mr X at his parents' address confirming the decision to cancel the 50% discount. (Payment of the outstanding amount for 2001/02 was received by Finance on 17 July 2002.)

Events leading up to the issue of the Notice of Intention to Raise Proceedings to Recover Possession

16. Mrs L told my officer that she had been very concerned about the telephone call with Officer B on 13 June 2002, had spoken to her son in Jersey over the weekend, and on 17 June telephoned the Director of Homes and Technical Services (the Director), concerned that her son's circumstances were being investigated simply because she had telephoned to report a repair. She said that this was the one and only telephone conversation she had had with the Director and that she had found him 'rude' and 'insulting'.

17. The Director subsequently provided a note of that telephone conversation on 17 June 2002 in response to the Commissioner's enquiries. He stated:

'[Mrs L] had rung me to establish why we were asking questions (about her son). I explained to her, at some length, that our standard missives contained a requirement for the individual who

was renting the house to actually occupy it. If he or she was not occupying the house then we would seek further information from them with a view to determining whether or not we ought to recover the house. That would depend on the circumstances of each individual case and might, for example, also depend on whether or not the house was in demand. Mrs L pointed out that her son was receiving a discount from our Council Tax Division on the basis that he was not occupying the house. I indicated to her that I suspected that this was a discount based on the fact that the house was a second home, ie, that he was receiving a 50% discount. However, that was a fact to be discovered.

'I had some considerable difficulty pointing out to Mrs L that it was not sufficient for her son to pay his rent but that particularly since he was the tenant of a house in a high demand area it was also important that he occupied the house. If he was not occupying the house then we would have to consider the circumstances of his case and come to a decision as to whether or not we should seek to recover the house. That was information which we would seek therefore, to obtain information from him and based on that would come to some view or conclusion on the matter. After some considerable debate with her in which I found it necessary to repeat the train of logic on a number of occasions, notwithstanding that she failed to accept it, she indicated to me that she would ask her son to fly up and discuss the matter with us. I indicated to her forcefully and on a number of occasions that it was unnecessary for him to do that. This is the kind of information which we could obtain from him by way of telephone calls or by writing. So far as we were concerned it was not necessary for him to leave his job to do this.'

18. Following that telephone conversation, Mrs L spoke again with her son whom she says was so upset at the threat of losing his house that he decided to return home by air from Jersey on 20 June 2002.



19. Also on that day, Officer D wrote to Mr X both at his Jersey address and at his Kilmarnock address asking him to contact her to discuss his non-occupation of his home.

20. An arrangement was then made for Mr X and his mother to meet with Officer B and her colleague (Officer E) and this interview took place between 12.15 pm and 12.45 pm on 26 June 2002. Officer B's note states:

'I advised [Mr X] that the purpose of this discussion was to find out his intention with regard to his tenancy. He stated that he did not wish to terminate it.

'I advised that he must therefore occupy his tenancy. He wanted to know what his options are, ie, if he didn't return what would we do? I advised that he was in breach of his tenancy agreement and that under the Housing (Scotland) Act 1987 we could go to court and ask for a Court Order for Recovery of Possession under Part 1 Paragraph 5 of Schedule 3. I then read this Section out.

'[Officer E] advised that the Court would decide whether or not to grant this. [Mrs L] stated on numerous occasions that her son had not breached his tenancy agreement as he had notified EAC that he was not occupying on a permanent basis by contacting the Council Tax Section as the tenancy agreement states that you should contact the local council office and does not specify housing office.

'[Officer E] explained that [Mr X]'s tenancy agreement was with Housing and that [Mr X] was aware that he contacts housing for repairs and to pay his rent.

'[Mrs L] produced an airline ticket and asked that it be noted. [Officer E] advised that as per her discussion with [the Director], [Mr X] could have contacted by phone or letter to discuss this and did not need to fly back to attend this discussion.

'[Mr X] asked if we would be willing to not take legal action until his current contract expired around Oct/Nov this year. I advised that I would have to check with my manager and get back to him ASAP'.

21. Officer B's note also recorded that Mr X stated that he had returned from Jersey some four times between October 2001 and 26 June 2002 and had stayed at his flat on each occasion for about 7 days. She confirmed to my officer that she had, in preparation for the meeting, taken a (blue) form on which Mr X could apply to terminate his tenancy. The form was not offered for signature. (Mrs L recalls that the form was presented for signature but her son declined to sign; she also later calculated that Mr X had returned more than four times to his home in the period in question.)

22. A further file note records that Officer B spoke with her superiors and telephoned Mr X back that afternoon to say that the Notice of Intention to take proceedings to recover possession would be served:

'... and after 6 weeks we would be instituting court action after that date to recover the tenancy for non-occupation. [Mr X] asked when we want him to return. I stated immediately but we could not take court action until 6 weeks after the (Notice of Intention) was served.

'He does not want EAC to take him to court and he will contact me on his return to allow me to visit and check that he is occupying. I advised that if he hadn't contacted by 8/8/02 I will visit to check before instructing court action.

'[Mrs L] wanted to know if we could wait till 2/9/02 before thinking about taking legal action as she was going on holiday (to Jersey) and could help her son move his things back in her car. I advised as before, that when (Notice of Intention was served) – if property not occupied then court action would be instructed.'

23. The following day, 27 June 2002, the Notice of Proceedings for Recovery of Possession was served on Mr X at both his Kilmarnock and his

Jersey address, under the Housing (Scotland) Act 1987, stating that at any time in the six month period beginning on 8 August 2002 the Council might raise proceedings for possession of his home on the following grounds:

1. Rent lawfully due from the tenant has not been paid or any other obligation of the tenancy has been broken.
  
5. The tenant and his spouse have been absent from the house without reasonable cause for a continuous period exceeding 6 months or have ceased to occupy the house as their principal home.

24. Following the meeting on 26 June, Mr X returned to Jersey and resumed his work on the contract but made arrangements to terminate both his let and his employment and to book a ferry crossing for his car. In his absence, Mrs L contacted his local councillor (Councillor F) and also her Member of the Scottish Parliament. Meanwhile, on 9 July 2002, Mr X requested and subsequently obtained access to his personal housing files.

25. In early July 2002, Councillor F raised the matter with the Director who wrote to Mr X in Jersey on 5 July 2002 enclosing his notes of his telephone call on 17 June 2002 with his mother (paragraph 17 above).

26. On 12 July 2002, Mr X telephoned Officer C from Jersey and said he intended to return from Jersey on 5 August 2002 and would contact Officer B on 6 August 2002. Mr X then made arrangements to book his car on a ferry to enable him to return with his carpentry tools to Kilmarnock.

27. On the day of his return from Jersey (6 August 2002), Mr X's solicitors wrote, on Mr X's instructions, to Officer B challenging the Council's grounds for recovery of possession of the property, on the basis that he had never been in arrears of rent and had not been absent from the house without reasonable excuse for a continuous period exceeding six months. He had been working on a fixed term contract in Jersey which had now come to an end and he had not stayed absent from the

property continuously for a period exceeding six months. He had made regular return visits staying at the property. The property had not been abandoned and, during the times when he had been away, he had ensured family members had attended the property who had assured themselves that it was in a safe condition and heated adequately. The solicitors asked for confirmation that eviction proceedings would not ensue and that the notice of proceedings would be cancelled. Further, they requested confirmation that the notice of intention would be removed from their client's tenancy records as the notice was 'unjustified in the first instance'.

28. Also on 6 August 2002, Mrs L telephoned Officer B to advise her that her son had returned that day. Officer B stated that she would have to visit Mr X at home. An appointment was made for Mr X to visit Officer B in her office, which was also attended by Mr X's father and one of Officer B's colleagues. Mr X and his father indicated that they considered it an invasion of Mr X's privacy for Officer B to visit his home. Officer B's notes state that she had considered that necessary to investigate his occupation of his tenancy and that visits would be carried out on a regular basis. Officer B and a housing inspector visited Mr X's home on 7 August 2002 when both his parents were present. The housing inspector took an electricity reading.

29. On 14 August 2002, Mr X complained to the Commissioner.

30. In the meantime, the Area Manager responded directly to Mr X on 28 August 2002, in respect of his solicitors' letter of 6 August 2002 (paragraph 27). The Area Manager replied that for legal reasons the Council required to quote ground one referring to rent lawfully due in all notices of proceedings and that in terms of ground five, the Council considered that the tenancy obligations had been deemed broken through non-occupation. The Area Manager wrote a further letter to Mr X's solicitors on 30 August 2002, in which he confirmed that the Notice of Intention to take Proceedings would remain in place and Mr X's tenancy would be monitored until the Homes Department was satisfied that Mr X's Kilmarnock address was being occupied as his principal home.

31. Enquiry was made of the Council into the complaint on 18 September and in particular to the allegation that undue pressure was put on Mr X to return. In the Council's response of 14 November 2002 their Administration Officer stated:

'With regard to the issue that [Mr X] had to leave his employment on Jersey [the Director of Homes and Technical Services] has maintained that [Mrs L] was told on a significant number of occasions both by himself and by the Area Housing Team with whom [Mrs L] was also in contact, that there was no requirement for her son to leave his work but that he could contact the Housing Department by telephone and talk to the officers in connection with the matter and that if he happened to be in the area then [Mr X] was perfectly entitled to come and speak to the housing officers about the matter ...

'... The Director totally refutes the allegation that undue pressure was applied to [Mr X] which led him to cancel a contract and return immediately to Kilmarnock. The Director maintains that [Mr X] was regularly advised, as was his mother, on several occasions both by the Director and a variety of other members of the Housing staff, that the Notice was being served but there was no need for him to return to deal with the matter. The Director maintains that [Mr X] could have dealt with the matter through his mother who was acting on his behalf and also, if required, employ legal representation if [Mr X] considered that that was appropriate ...'.

32. After checking an earlier draft with the complainant, I decided to issue a summary of complaint to the Council on 30 January 2003, seeking their response to six specific points (set out at paragraph 1 above).

### **The Council's written responses to the heads of complaint at Paragraph 1**

33. The Council's response to the intimation to investigate was included under cover of a letter from their Administration Manager, dated 17 February 2003, which included a memorandum of 6 February 2003 from their Director of Homes and Technical Services responding to each of

the six points and providing a general concluding comment. The Director's response is detailed below:

**(a) The Council's failure to accept Mr X's explanation (paragraph 1a)**

'[Mr X's] missive not only requires him to pay his rent on time and to keep the house in good order in general terms but also specifically to occupy it. In the event that he is not going to occupy the house for any length of time (that is, greater than 30 days) then he must seek his landlord's consent and the appropriate way for him to do that is to contact my department to discuss the matter with them. [Mr X] did not do that. Instead in effect what he did was to say to us at the Homes department that he was occupying the house as his full and main residence, whilst separately going to the Finance department, without contacting the Homes department and seeking a 50% discount on his council tax. My staff do not have access to council tax information. When therefore we discovered, through notification by his mother, that he was not in occupation of the house we sought further information to determine whether or not any action was appropriate. Specifically his mother then became agitated and concerned and indicated that she would tell him to return, at the same time giving up his job. She was specifically and clearly told by my staff and by myself on a number of occasions that it was not necessary for him to do that. There was no requirement by us that he should give up his work. We did however need to speak to him about the matter and that he could contact us by telephone or in writing at any stage. We reiterated to him on a number of occasions that it was not necessary for him to give up his job. Indeed I personally reiterated that on a number of occasions to his mother, although she kept insisting that he would do that. (The Director has since conceded [Mrs L's] recollection that she only ever spoke to her directly once, on 17 June 2002.)'

**(b) The Council's own record of a meeting on 26 June stated that if Mr X did not return from Jersey then a court order for recovery of possession would be obtained**

'What [Mr X] was told was that he was obliged by the terms of his tenancy to occupy the house on a full time basis. He was further told that

we would need to discuss that matter with him and that were he to return then it would be appropriate for him to call in and see us about it. Failing that he could contact us either through a representative or by telephone. [Mr X] was also told that the process of applying to a court for recovery of possession might take some considerable time and that therefore there would be plenty of opportunity for this matter to be further discussed and for us to consider whether or not it was appropriate to proceed based on such information as we would obtain from him.'

**(c) The Council acted heavy-handedly in issuing on 27 June Notice of Intention to take Proceedings**

'We have clear evidence from [Mr X] and from his mother that he was not occupying the house. We were therefore entitled to take that action bearing in mind that the process would take some considerable time and that we could monitor that while the Notice of Intention was in operation. That is not a heavy handed way of proceeding. It is simply an indication that we believed [Mr X] to be in breach of his tenancy conditions and that we were correct in acting appropriately in relation to that. We had legitimate grounds upon which to proceed and time in which to consider and debate this matter with [Mr X].'

**(d) The grounds for the notice were inappropriate to his circumstances**

'The grounds for the notice, where they refer to the question of rent arrears and spouse, were a direct quotation from the legislation on the subject. The Housing (Scotland) Act sets out a number of grounds upon which possession might be recovered. The first of these is a general ground and I quote 'Ground 1 – rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy has been broken'. It was explained to [Mr X], and subsequently to his solicitor, that the ground upon which we were seeking recovery of possession was the part which refers to any other obligation of the tenancy having been broken. For the sake of complete accuracy however we had quoted the entire section of the Housing (Scotland) Act 1987. The other ground upon which we quoted from the Act was in relation to ground 5 and again I quote 'The tenant and his spouse have been absent from the house without reasonable cause for a continuous period exceeding six months or have

ceased to occupy their house as their principal home'. We were perfectly aware that [Mr X] had no spouse. Nonetheless, again for the sake of completeness and accuracy, we quoted the section from the Act in full. Again I stress that we made it clear to [Mr X] and to his solicitor that this was why we had done that. [Mr X] specifically asked us to ensure that our files were accurate and we gave him that undertaking. When the files are examined, they will reflect [Mr X's] circumstances.'

**(e) The Council were inconsistent in stating Mr X need not return from Jersey**

'We stated in our letter to [Mr X's] solicitor on 30 August that we would monitor his occupation of (his tenancy). I think that is an entirely consistent and appropriate approach. We had been made aware that [Mr X] was not occupying the premises. We made it clear to him that we needed to discuss that with him and to talk with him about it but that it was not necessary for him to give up his job and that we could have that conversation by telephone or by a representative. We would also make arrangements to speak to him as and when he happened to be in Kilmarnock since he said that he did return from time to time. Equally we made it clear to him that his missive required him to occupy the house and not just to pay the rent for it and that it was perfectly appropriate that we should continue to monitor the matter to determine whether or not to action the notice for possession. There is no inconsistency in that at all.'

**(f) Mr X complained that while he had been visited by Officer B at his home on 7 August 2002, she had not by 30 December 2002 made further personal contact**

'[Mr X] was visited by [Officer B] on the 7<sup>th</sup> of August and at that meeting he indicated to her that he was currently working and was rarely likely to be in the house. If we were therefore to visit the house and find him not in we would leave a card and he would make representations through his father. Our notes clearly indicated that specific agreement. There were then a number of further visits made on 6 September, 10 October and 27 November and on each occasion [Mr X] was not present in the house and a card was left and subsequent contact made with him or his father. All of that was by direct agreement with [Mr X] himself.'



34. Finally, the Director made the general comment that he was unclear as to the exact nature of Mr X's contract. He did not understand this to have been a 'permanent' contract. As to Mr X's contention that he had not been in permanent employment since his return, on the dates when officers had visited, Mr X was not actually found to be at home and it was his understanding that Mr X had not made application for housing benefit.

35. With reference to the effect of the existence of the notice of proceedings on a future application to purchase, the Director stated that the rules relating to council house purchase were quite clear. Provided Mr X continued to occupy the flat and was otherwise entitled to purchase, then those proceedings would have no effect. The notice of intention to proceed had by 6 February 2003 lapsed. Continual monitoring had led to the housing officer being satisfied that Mr X was currently in occupation. Subsequent failure to occupy could however lead to Mr X himself re-opening the matter.

#### **Additional points emerging at interview**

36. At interview with my officer on 9 May 2003, Mrs L stated that she had only spoken with the Director of Housing and Technical Services once (on 17 June 2002). She recalled that both he and the local councillor whom she subsequently contacted had stated that action was being taken against her son primarily because her son's flat was in a 'popular area', rather than being in an area where there was a difficulty in finding tenants. She doubted whether the Council would have acted against her son if he lived in a poorer area and his rent was up to date. Officers A and B both indicated at interview however that the same course of action would be taken irrespective of the location of the property and provided examples of this operational practice being implemented in areas of lower demand.

37. Mr X mentioned that he had been working in Jersey on a contract which was due to finish in late September and which had the security of continued work at the one location. Since he returned on 6 August 2002, he had only been able to find work as a jobbing carpenter.

38. Officer D told my officer that, in general, requests from a tenant to be absent from his or her tenancy were not granted for more than six months in the first instance. In exceptional circumstances a longer period might be permitted and the council would consider again exceptionally a subletting, provided proper safeguards were in place.

39. My officer sought to clarify from the Director his statement that it was not necessary for Mr X to return and that he could have remained in Jersey (to attend to such contractual duties as he had). The Director indicated that even if Mr X had been found not to be present in his home on the date the Notice of Intention of Proceedings became effective (8 August 2002), it would almost certainly have still been a matter of weeks before a proof was called in court.

### **Postscript**

40. The Council have informed me that they have now added the following to their application for 50% council tax discount:

‘If you are a Tenant, the conditions of your Tenancy Agreement may exclude you from leaving your house unoccupied for a prolonged period of time. It is important that you seek advice and/or approval from your landlord to ensure that you do not breach the terms of your Tenancy Agreement. East Ayrshire Council tenants can obtain advice from their local Housing Office’.

41. Further, under the Housing (Scotland) Act 2001, the Council's Scottish Secure Tenancy Agreement for new tenants from September 2002 now states:

‘2.1 You must take entry to the house, occupy and furnish it and use it solely as your only or principal home. You are entitled to have members of your family occupying the house with you, as long as this does not lead to overcrowding. If we ask, you must tell us who is living in the house. You must tell us soon if there is a change in those who are living in your house.’

## Findings

42. I am satisfied that Mr X's problems have largely emanated from his failure to comply with his tenancy agreement. He did not seek and was not given prior permission to be absent for an extended period in order to pursue employment opportunities in Jersey. His contact with the Finance Department was retrospective and did not amount to the required permission.

43. The Council were alerted to Mr X's absence when out of genuine concern for his downstairs neighbour his mother reported that the communal path needed repair. Officer B, in response to the repair request, raised legitimate questions, had doubts as to the answers she received and learned from Mrs L that her son was in Jersey and had been for some time. Officer B discovered he did not have landlord's permission for his absence, which by then (13 June 2002) had already extended for eight months. I have been advised that the Council has no formal guidelines in relation to extended absences.

44. The Council no doubt consider they acted in proper exercise of their discretion. While I am satisfied that in the main they did, I consider that they are open to criticism in some respects. My main criticism is that where the Council assert that prior approval for extended periods of absence is required, they should have a clear and explicit policy with specific detailed sanctions for non-compliance.

45. Taking each of the six heads of complaint in turn, I consider:

- (a) The Council were not obliged to accept Mr X's explanation. They took formal action after hearing his version of events at the meeting on 26 June 2002.
- (b) Mr X did not require to return from Jersey on 20 June to attend the meeting on 26 June 2002 in person. He could have instructed agents (his parents or a solicitor) to make his points on his behalf.
- (c) The Council did not require to issue the Notice of Intention on 27 June 2002 but in exercise of their discretion chose to do so. The

issue of that notice was not in itself of major consequence. It was, however, a necessary step for the Council to take if ultimately they required to recover possession of the tenancy. Had they not issued it and had Mr X not returned by the end of September 2002 as he had indicated, then necessary action would effectively have been delayed by three months.

- (d) An explanation has been issued as to why the Notice refers to both a spouse and to rent arrears and I can find no injustice flowing from maladministration in that regard.
- (e) While Mr X did not need to return from Jersey temporarily to attend the meeting on 26 June, I am convinced that had he not left Jersey and resumed 'normal occupation' of his tenancy by the date the Notice of Intention took effect, then court action would have ensued. To argue that Mr X could have seen out the term of the contract and returned later (because almost certainly court action would not have been immediate) was, in my view, clearly advice which should have come more appropriately from Mr X's legal adviser, not from the Director. I have to regard the communication of that advice as maladministration. Mr X for his part did not follow that advice and conformed with the Notice.
- (f) For the six month period from 6 August 2002, Mr X was effectively on probation. While Mr X might consider there was intrusion into his privacy, the Council were entitled to take reasonable steps to establish that occupation of the flat by Mr X had resumed.

46. While Mr X feels aggrieved, in light of my initial remarks, his grievance flows from the consequences of his failure to note the wording of his conditions of tenancy rather than from shortcoming or maladministration by the Council. In these circumstances it is proper that his file should note that a Notice of Intention was served on him on 27 June 2002 but other than delay his application to purchase, the Notice itself did not lead to consequent court action, has now expired, and I understand had no bearing on Mr X's application to purchase his home.

### Conclusions

47. I have set out my Findings in paragraphs 42-46. I am pleased to note that the Finance Department have now altered their form and that the wording of the new Scottish Secure Tenancy Agreement is more explicit.

48. Finally, I trust that the Council will now give their attention to the development of policy and procedural guidelines to tenants on requests for extended periods of absence. I also consider that the Director should apologise to Mr X for the inappropriateness of his advice.

Professor Alice Brown  
Scottish Public Services Ombudsman

4 March 2004