

Case 200905049: South Lanarkshire Council

Summary of Investigation

Category

Local government: Social Work; handling of complaint by Complaints Review Committee

Overview

The complainant, a firm of solicitors (Firm C), complained on behalf of their clients about how its complaint had been dealt with at a Social Work Complaints Review Committee (CRC) held by South Lanarkshire Council (the Council).

Specific complaint and conclusion

The complaint which has been investigated is that the CRC who considered the complaint did not properly explain their decision by reference to the merits of the case (*upheld*).

Redress and recommendation

The Ombudsman recommends that the Council:

- (i) consults with the Chair and other members of the CRC with a view to the CRC producing an adequate and reasoned explanation for their decision based on the merits of Firm C's case.

Completion date

22 March 2011

Main Investigation Report

Introduction

1. The complainants (Firm C) were instructed by the son-in-law and daughter (Mr and Mrs A) of the late Mrs B. Mrs B and her husband (Mr B) formerly owned their home in South Lanarkshire, which was purchased in 1990 at a discount from her public sector landlord under the Right to Buy legislation. The original purchase price was £7429.03 and Mr A advanced the balance to Mr and Mrs B. Mr and Mrs B, thereafter, lived in the house rent-free. Mr and Mrs B executed wills providing that their entire estate should pass to each other, failing which pass on the surviving partner's death to Mr and Mrs A. Mr B died in March 2001. Mrs B's health deteriorated in 2008 and she required to enter a care home on 29 May 2008. Mrs B subsequently moved care homes and remained in the second care home until her death on 18 June 2009. After Mrs B's death, South Lanarkshire Council (the Council) sought to recover from the late Mrs B's estate the £8738.16 costs that they had incurred in funding Mrs B's residence in the two care homes. As executors to the late Mrs B's estate, Mr and Mrs A instructed Firm C and they pursued a complaint in terms of the Council's Social Work Complaints procedures that no part of the value of the late Mrs B's home should be taken into account in the Council's financial assessment. The Council maintained that it should. A complaint was pursued by Firm C on Mr and Mrs A's behalf, which was heard by the Social Work Complaints Review Sub-Committee (CRC) on 8 September 2009.

2. In advance of the CRC, a detailed written submission was made by Firm C. At the hearing of the CRC, a representative of Firm C and a Queen's Counsel (the Advocate) were both heard. A detailed case was made that an implied trust had been set up by the late Mr and Mrs B, although there had been no trust deed. Affidavits from relevant parties, including Mrs A's siblings, were copied to the CRC and they were heard as witnesses.

3. The complaint from Firm C which I have investigated is that the CRC who considered the complaint did not properly explain their decision by reference to the merits of the case.

Investigation

4. The investigation is based on the consideration of information provided by Firm C and as a result of enquiry to the Council. I have not included in this report every detail investigated but I am satisfied that no matter of significance

has been overlooked. Firm C and the Council were given an opportunity to comment on a draft of this report.

Complaint: The CRC who considered the complaint did not properly explain their decision by reference to the merits of the case

5. After Mrs B entered the care home on 29 May 2008, the Council's enquiries disclosed that her home had been purchased at discount from a public sector landlord. On 23 October 2008, a Council solicitor wrote to Mr A stating that, in consideration of the evidence, they viewed Mrs B to be the beneficial owner of the property that had been valued by a Council surveyor at £108,500. Mr and Mrs A were not happy with the decision of the Council and consulted Firm C. Firm C wrote to the Council on the matter on 29 October 2008, indicating that Mrs B's house had been purchased by Mr A. Mrs B had always referred to the house as belonging to Mr A and he had paid for maintenance and insurance. Firm C considered that the Council were acting unreasonably and sought to appeal the decision.

6. In acknowledging receipt, on 7 November 2008, the Council solicitor advised that the matter would be reviewed by a solicitor and social work manager not previously involved but asked Firm C to note that the Council had registered a charging order over the property as security for sums due to the Council in respect of care charges.

7. The matter was reviewed by the Council's Legal Services Adviser and their Social Work Older Peoples' Services Manager. They considered that Mrs B's home required to be taken into account in the financial assessment of Mrs B's means for the purpose of payment for care home fees. A search of the Land Register disclosed that she was heritable proprietor of the house and that she had not conveyed or disposed of her interest. The Council accepted that Mr A had funded the purchase. They stated that no evidence had been provided to the Council by Mr A, such as a trust document or a written arrangement whereby it would have been agreed that Mr A should be deemed beneficial owner. All deductible sums Mr A had advanced to Mrs B had been taken into account.

8. Firm C informed the Council by letter of 16 January 2009 that they wished the matter referred to a CRC. They stated that no proper consideration had been given by the Council to the way the property was purchased in 1990; that a contract had been entered into between Mrs B and Mr and Mrs A; and that the

Council had not requested verification of the circumstances from witnesses such as Mrs B and her other two daughters. Firm C were provided with details of how the request for a CRC could be progressed. A request was then made. On 8 May 2009, Firm C informed the Council that the Advocate would be providing an opinion and then, on 26 May 2009, of his availability over the summer. The CRC was not held before Mrs B's death on 18 June 2009.

9. Subsequently, in August 2009, a final account was prepared and the Council intimated that they would seek to recover from Mrs B's estate costs of £8738.16 incurred in funding Mrs B's residence in the two care homes up to the time of her death. A date for the CRC was arranged for 8 September 2009 and on 20 August 2009 Firm C informed the Council that the Advocate would be representing Mr and Mrs A at that CRC.

10. In advance of the CRC, the Executive Director (Social Work Resources) prepared a report for the CRC, dated 4 August 2009, setting out the history of Mrs B entering into care. The report stated that, in assessing Mrs B's contribution to her care costs in 2008, they had searched the Land Register and found Mrs B to be the owner of her house; that there was no evidence of her having conveyed or disposed of her interest; but there was evidence that Mr A had funded the original purchase price. They had considered Mrs B to be the beneficial owner of the property and that the value of the property should be taken into account in the financial assessment. The report set out the general position with regard to the Council's funding and support of over 1000 people in care homes and the need to apply the relevant Charging for Residential Accommodation (CRAG) guidance (see Annex 3) with consistency, fairness and equity in allocating public funds. It explained thereafter why it was considered that Mrs B was deemed to owe £6546.81 for her residence in the first care home between 29 May 2008 and 5 April 2009 and £2191.35 in respect of her residence in the second home from 6 April 2009 to 18 June 2009; that is, a total of £8738.16.

11. In their preparation for the CRC, Firm C collected affidavits from Mr A, Mrs A and Mrs A's two sisters; provided copy wills for Mr B and Mrs B and a copy death certificate for Mrs B; a copy of the CRAG guidance effective from 7 April 2008; an excerpt from sections 9 to 13 of Volume 24 of the Stair Memorial Encyclopaedia on trusts; documents relating to the repair of Mr and Mrs B's home in 1994, paid for by Mr A; and the insurance of the property by Mr A from 20 December 2006 to 3 January 2008.

12. In a memorandum sent to the clerk of the CRC with these documents on 20 August 2009, Firm C stated in support of Mr and Mrs A's case that the house was bought by Mr and Mrs B in 1990 with an advance for the balance after discount of £7500 but the house was now worth approximately £100,000. The will of Mrs B, following her husband's death in 2001, provided that Mr and Mrs A would inherit. Mr and Mrs A disputed in terms of paragraph 7.014A of CRAG that the house was a resource of the late Mrs B. While there was no trust deed available, in this instance Firm C sought, on Mr and Mrs A's behalf, to infer from the circumstances that one had been set up. In their submission they stated:

'... [Mr and Mrs A] are trusters. The trust has been set up by them. The trust has been constituted by way of passing the sum of approximately £7500 for the purchase of the property. The money was passed to their agents and the property was purchased using that money. [Mr and Mrs B] were the trustees. [Mr and Mrs A] were the beneficiaries. [Mr and Mrs B] were obliged by the terms of the trust to spend the trust funds on the purchase of the house. That house would then be held in trust for [Mr and Mrs A] in the name of [Mr and Mrs B] until the second of them had passed away. Until that event the trust provided that [Mr and Mrs B] would live in the house rent free. The trust also provided that [Mr and Mrs B] would make wills leaving the house to [Mr and Mrs A] after the second death. The beneficiaries of the trust were [Mr B and Mrs B], as well as [Mr and Mrs A].

In terms of the law of Scotland, it is unnecessary for a trust to be set up in writing ... the chapter on trusts in the Stair Memorial Encyclopaedia ... supports the proposition that a trust is capable of being set up in the circumstances described above and that writing is not required for the constitution of the trust.

[Mr and Mrs A]'s submission is that a trust has been set up in the way detailed and that in conclusion, the whole of the house should be left out of the current assessment of [Mrs B]'s resources since [Mrs B] was not the beneficial owner of the house and the charging order should be revoked.'

13. At the CRC convened on 8 September 2009 to consider the complaint, Mr and Mrs A were represented by the Advocate instructed by Firm C. At the hearing, further written submissions were tabled. The case for Mr and Mrs A was put and the Advocate and a Council officer questioned Mr A, Mrs A and

Mrs A's sisters. The case for Social Work Resources was then presented by the Council's Head of Older People's Services and he was questioned by the Advocate acting on behalf of Mr and Mrs A. Social Work Resources maintained that there had been no legally binding agreement indicating any intent to transfer the property and no mention of a trust having been set up had been made until Mr and Mrs A received Social Work Resources' response to Mr and Mrs A's request to review its decision on the financial assessment undertaken on Mrs B. Social Work Resources' case was that no evidence had been provided to demonstrate that a trust had been set up and, therefore, the Council's view was that a trust had not been set up.

14. The Advocate's submission was summarised in paragraph 8.1 of the minute as:

'... Social Work Resources had accepted that the money was not given as a gift and that a trust could be formed in the way described.

It was not necessary to be aware at the time that you had formed a trust.

To form a trust required a truster, trustee and beneficiary and all three did not need to be different people.

The agreement was made and the wills were only there to make sure Mr and Mrs A would receive the house.

The agreement was made to form a trust and that Mr and Mrs B could not sell the house because money had been given to them to purchase the house in return for living rent free until the time they no longer required the house. The house would then transfer to Mr and Mrs A.'

15. Section 9 of the minutes sets out the CRC's conclusions and states:

'... On the basis of the documents presented to us, the evidence we heard and the submissions both written and oral put before us, we

- a. were not persuaded as a matter of fact and/or law that a Trust had been created;
- b. concluded that Social Work Resources had acted properly and reasonably in considering [Mrs B] to be the beneficial owner (of her home); and
- c. were of the opinion that the value of the property should be taken into account in the financial assessment of [Mrs B] 's eligibility for public care funding.'

16. The CRC recommended that the complaint be not upheld and that the Social Work Resources Committee (the Committee) agree to these conclusions.

17. A copy of a draft minute was sent to Firm C on 6 October 2009. After consulting Mr and Mrs A they wrote to the Council's Corporate Resources on 19 October 2009, pointing out that no reasons were given for the recommendation made; there were no findings of fact in relation to the evidence; there was no conclusion as to what the CRC made of the evidence; and that the CRC only stated the conclusions but not the way in which they had reached those conclusions. They believed that, as a minimum to progress matters, the CRC should expand on their decision by explaining in detail what facts they founded upon, which they find to be established; the facts that they do not accept; confirm what they made of the legal contentions on behalf of Mr and Mrs A, as regards the characteristics of the trust and the way in which the regulations and CRAG guidance operated; and an expanded explanation and reasoned argument as to why the CRC arrived at their conclusions.

18. Firm C's letter and the minute were presented to the Committee on 25 November 2009, with a report from the Executive Director (Corporate Services) dated 2 November 2009 recommending that the conclusion and recommendations of the CRC be endorsed. The Committee decided that the minutes of the meeting of the CRC on 8 September 2009 be approved and that the conclusions and recommendation of the CRC be endorsed. The minute of the 25 November 2009 Committee meeting does not record discussion of the letter of 19 October 2009 nor was it replied to. The decision of the Committee was conveyed to Firm C on 27 November 2009, together with the Scottish Public Services Ombudsman (SPSO)'s contact details.

19. In Firm C's complaint to the SPSO on 16 April 2010, on behalf of Mr and Mrs A, Firm C stated that the Council had not explained or justified its decision by reference to the merits of the case.

20. In making enquiries of the Council, my complaints reviewer referred to relevant guidance, in the form of Scottish Office Social Work Services Group Circular 5/ March 1996 and a further letter of 15 April 1997 (see Annex 2). The letter pointed out that failure to provide a written record of the reasons for CRC decisions may be regarded as grounds for findings of maladministration by the Ombudsman. My complaints reviewer asked the Council to comment on their general procedures in minuting and reporting CRC decisions, with particular regard to how they explained or justified their decisions, and whether this case raised exceptional issues causing it to differ from the norm.

21. The Council's Head of Administration Services (the Officer) responded that the Council's practice in minuting and reporting decisions of the CRC was essentially inherited from the former Strathclyde Regional Council prior to 1 April 1996, but that there had been some adjustments over the years to those procedures. The complaint was not unusual, in that it related to a financial assessment by the Council in relation to care home fees, but was unusual in that Mr and Mrs A were represented by an Advocate and also with regard to their contention that a trust had been formed. He confirmed that it was a matter for the complainants to decide as to whether to have a representative present their case or present it themselves.

22. The Officer maintained that the CRC is not a judicial or quasi-judicial body and should not, therefore, be expected to act as one. The role of the CRC, which consists of lay persons, is to examine, objectively and independently, the facts presented by the complainer and by the local authority and then to make a representation to the appropriate local authority committee. With regard to Firm C's letter of 19 October 2009 (see paragraph 17), the Officer stated that the minute of the CRC set out in detail the evidence and the arguments presented. It recorded that the findings had been made on the basis of all the evidence, written and oral, and the CRC had not been persuaded that a trust had been created. The rest of the conclusions flowed from the fact that no trust had been created. Those conclusions were the basis of the CRC's recommendation that the complaint not be upheld. There were no findings in fact in relation to the evidence since the CRC was not a judicial body. The members were lay persons, albeit with a legal adviser in attendance. The Officer stated that there was no conclusion as to what the CRC made of the evidence. It was, in his view, sufficient for them to say that they were not persuaded by the evidence from Mr and Mrs A and the Advocate that a trust had been created, and the CRC's conclusions flowed from that.

23. In response to a request for further clarification, the Officer stated that the background to deprivation of capital cases being referred to the CRC came from a judicial review in the Court of Session (*Yule vs South Lanarkshire Council*). Having sought counsel's advice on the appropriateness of such cases being heard by the CRC, the Council was advised that deprivation of capital cases fell within the remit of the CRC on the basis that, in terms of social work complaints, the complainant had not exhausted the Council's social work complaints process.

Conclusion

24. In terms of subsection 7 (1) of the Scottish Public Services Ombudsman Act 2002, the Ombudsman is not entitled to question the merits of a decision taken without maladministration by, or on behalf of, a listed authority in the exercise of a discretion vested in that authority. Section 7(8)(c) of the 2002 Act states that the Ombudsman must not investigate any matter in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law, unless the Ombudsman is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to resort or have resorted to the remedy.

25. Firm C, in their complaint to the CRC, certainly questioned the merits of Social Work Resources' decision to take the value of the late Mrs B's house into account in the assessment of her financial circumstances. No complaint of maladministration was made to me, however, about the officers' interpretation of CRAG or the merits of the CRC's decision. The complaint I have investigated relates solely to the CRC's decision not being properly explained and justified in respect of the circumstances of the merits of the case.

26. The current advice to councils regarding CRCs, dating from March 1996, was augmented by a letter of 15 April 2007 from the then Scottish Office, which was informed by a publication of an advice note issued by a predecessor Ombudsman to the SPSO in conjunction with the Convention of Scottish Local Authorities. Despite the years that have passed, the message of providing an adequate explanation to complainants, when their complaints are not considered justified, remains no less cogent today (see Annex 2).

27. I am satisfied that the procedure of the hearing appears to have been fair and to have been conducted in accordance with natural justice save in one important respect, namely, the dearth of detail provided explaining the CRC's decision. The stated conclusion, that the CRC was 'not persuaded' on the basis of evidence provided was, in my view, not sufficient. While I consider that the matter is finely balanced, I uphold the complaint because I consider that Firm C should have received a reasoned explanation at the time of the decision not to uphold their complaint. I make the recommendation that that omission now be rectified.

28. Additionally, in placing this and other reports before the Scottish Parliament, I will emphasise the need to ensure consistency in initial decision making by council social services departments based on the CRAG national guidance, on financial eligibility for public funding and in the review of those initial decisions by CRCs.

Recommendation

29. I recommend that the Council:	<i>Completion date</i>
(i) consults with the Chair and other members of the CRC with a view to the CRC producing an adequate and reasoned explanation for their decision based on the merits of Firm C's case.	22 March 2011

30. The Ombudsman asks that the Council notify him when the recommendation has been implemented.

Explanation of abbreviations used

Firm C	The complainant, a firm of solicitors
Mr and Mrs A	The son-in-law and daughter, respectively, of the late Mrs B, executors of her estate and beneficiaries of her heritable property
Mr and Mrs B	The parents of Mrs A and parents-in-law of Mr A
The Council	South Lanarkshire Council
CRC	The Council's Social Work Complaints Review Sub-Committee
The Advocate	A Queens Counsel, instructed by Firm C to present Mr and Mrs B's case at the CRC
CRAG	The Charging for Residential Accommodation Guidance
The Committee	The Council's Social Work Resources Committee which considered the CRC findings and recommendation
The Officer	The Council's Head of Administration Services

Social Work Complaints Procedures

A statutory social work complaints procedure in Scotland was provided by Section 52 of the National Health Service and Community Care Act 1990 which inserted section 5B into the Social Work (Scotland) Act 1968. Relevant updated guidance was issued by the Scottish Office Social Work Services Group in Circular 5/1996 of March 1996 which was issued on the eve of local government reorganisation on 1 April 1996. The role and status of Complaints Review Committees is set out in paragraphs 38-41 of Annex B to the Circular.

Paragraph 38 states that the role of CRC is to examine objectively and independently the facts as presented by the complainant and by the local authority, then to make a recommendation to the appropriate local authority committee. In doing this the CRC should be aware of local authority policies, priorities and resources and should recognise where professional judgement has been exercised. The CRC may express disagreement with any of these in a case under review.

The guidance in paragraph 39 is that CRCs must be conducted formally and have regard to generally accepted procedures which accord with natural justice but should not develop a degree of formality or inflexibility that may inhibit the objective of facilitating a resolution.

A year later, on 15 April 1997, the Social Work Services Group sent a letter to local authority chief executives and senior social work officers repeating the objectives of CRCs and drawing attention to a Good Practice Guide issued in 1993 by the Commissioner for Local Administration in Scotland in conjunction with the Convention of Scottish Local Authorities entitled *Setting Up A Complaints System*. That document identified one of two key factors in measuring the effectiveness of a complaint procedure as being to provide an adequate explanation to complainants when their complaints are not considered justified. The letter pointed out that failure to provide a written record of the reasons for CRC decisions may be regarded as grounds for findings of maladministration by the Ombudsman.

Charging for Residential Accommodation Guidance (CRAG)

The CRAG guidance referred to at the CRC was the version effective from 7 April 2008. Section 7.015 of CRAG states:

'Where a property is held in Trust and the resident is both a joint trustee and joint beneficiary, he legally owns the property as a trustee of the Trust, but purely on a "fiduciary" basis ie he is legally obliged to administer the Trust- as a whole, and not for his own particular purposes. His real interest is that of a beneficial owner, and falls to be valued accordingly (paragraphs 7.012 to 7.014).'

Section 10 of CRAG deals with Trust Funds, defines what is a trust (10.001), how it might be identified (10.005), the treatment of trusts (10.006 and 10.007) and the issues of absolute entitlement to capital (10.010 to 10.014) and absolute entitlement to income (10.015 to 10.017) and also discretionary trusts and compensation for personal injury.