

Case 200904647: Scottish Borders Council

Summary of Investigation

Category

Local government: Social work; policy; administration

Overview

The complainant (the Solicitors) brought a complaint to the Ombudsman on behalf of their clients (Mr and Mrs C). Mr and Mrs C disputed Scottish Borders Council (the Council)'s decision to take into account the value of Mr C's mother (Mrs A)'s former home when calculating her liability for residential costs when she was admitted to a care home. The Solicitors also complained about the Council's complaints handling.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Council's decision to include the value of the Property in their calculation of Mrs A's financial assessment was administratively flawed (*upheld*); and
- (b) the Council's complaints handling was poor (*upheld*).

Redress and recommendations

	<i>Completion date</i>
The Ombudsman recommends that the Council	
(i) obtain independent legal advice on Mrs A's case;	30 June 2011
(ii) convene another CRC hearing to reconsider Mrs A's case with reference to independent legal advice;	30 June 2011
(iii) provide evidence of the steps that they have taken to record, track and respond timeously to correspondence from members of the public and their representatives; and	30 June 2011
(iv) review their handling of the Solicitors' initial correspondence and formal complaint. In particular they should review their staff absence procedures and introduce measures to ensure that	30 June 2011

future staff absences do not unduly impact upon the delivery of service standards set out in the Council's complaints handling procedure.

The Council have accepted the recommendations and will act upon them accordingly.

Main Investigation Report

Introduction

1. Mrs A rented a property (the Property) from Scottish Borders Council (the Council) for a number of years. In 1989, she purchased the Property. As a sitting tenant, Mrs A had accrued a discount entitlement of 60 percent of the purchase price under the Right to Buy scheme. Her son and daughter in law (Mr and Mrs C) provided the outstanding 40 percent of funds. Mrs A entered into a legal agreement with Mr and Mrs C which meant that, whilst she was the legal owner of the property and resided there, she was required to pay no rent or maintenance costs. In return, all proceeds from the future sale of the property would go to Mr and Mrs C.

2. Mrs A entered residential care accommodation in June 2007. When calculating the amount of money that she would be required to contribute to her care costs, the Council considered Mrs C to have assets in the form of a 60 percent share of the Property's value. Taking this asset into account meant that Mrs C was liable to pay a significant portion of her care costs. Mr and Mrs C, who helped Mrs A manage her finances, raised a complaint with the Council via their Solicitors (the Solicitors). They contended that Mrs A had no financial benefit from the Property, as its purchase had been entirely funded by them and they had received all of the funds when the property had been sold in December 2007. The Council advised that they considered Mrs A to have deliberately deprived herself of the asset to avoid residential care costs, meaning that she could, therefore, still be considered as having the asset for the purposes of her financial assessment.

3. Mr and Mrs C disagreed with the Council's financial assessment and considered that Mrs A's liability for care costs had been calculated incorrectly. Their complaint escalated through the Council's complaints procedure and was considered by the Social Work Complaints Review Committee (the CRC). The Solicitors subsequently brought the complaint to the Ombudsman in March 2010, raising additional concerns about the Council's complaints handling and delays to the matter being considered by the CRC.

4. The complaints from the Solicitors which I have investigated are that:
(a) the Council's decision to include the value of the Property in their calculation of Mrs A's financial assessment was administratively flawed;
and

(b) the Council's complaints handling was poor.

Investigation

5. In order to investigate this complaint my complaints reviewer reviewed the complaint correspondence between the Solicitors and the Council, all documentation related to the CRC and additional evidence of the Council's consideration of Mrs A's financial position. My complaints reviewer also reviewed relevant case law, previous Ombudsman reports, legislation and national guidance.

6. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. The Solicitors and the Council were given an opportunity to comment on a draft of this report.

7. The complaint raised by the Solicitors, on behalf of Mr and Mrs C, concerns the decision reached by the Council to include the value of the Property in their calculation of Mrs A's financial assessment. Section 7(1) of the Scottish Public Services Ombudsman Act 2002 states:

'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.'

8. The conclusions reached by the Council following any individual's financial assessment are a matter for their professional judgement. Therefore, when investigating this complaint, I sought only to establish whether there was any evidence of maladministration in the Council's consideration of Mrs A's case leading up to the decision reached.

(a) The Council's decision to include the value of the Property in their calculation of Mrs A's financial assessment was administratively flawed

9. Mrs A lived in the Property for a number of years as a tenant of the Council. Under the Right to Buy scheme, she accrued a discount entitlement of 60 percent of the value of the property. She purchased the Property in 1989. At that time, she was 76 years old. In order to facilitate the purchase of the Property, Mrs A entered into a legal agreement with Mr and Mrs C. This agreement acknowledged that Mrs A was entitled to a discount on part of the Property's value and stated that she would take out an interest-only mortgage to cover the outstanding balance in full. Through the legal agreement, Mr and Mrs C undertook to make all of the monthly payments for the mortgage. Mrs A

undertook to bequeath the Property to Mr and Mrs C in the event of her death. Should she sell the property prior to her death, all proceeds of the sale would be passed to Mr and Mrs C. The property was purchased in Mrs A's name and she was to pay no rent or maintenance costs.

10. On 26 June 2007, Mrs A entered permanent residential care accommodation. Mr and Mrs C sold the Property in December 2007 and retained all of the proceeds, as per the terms of their legal agreement with Mrs A.

11. The Council carried out a full assessment of Mrs A's finances in June 2007 to establish what level of contribution she should make to the cost of her residential care. In the assessment form, Mrs A was asked to state her residential status prior to entering residential care. She stated that she resided in a property owned by her family. On 26 June 2007, the Council wrote to Mrs A, care of Mrs C, asking for clarification as to whether Mrs A ever owned the Property. The Council asked that transfer documentation and the Solicitors' details be provided, if ownership of the Property had been transferred to Mr and Mrs C. The Council received no response to this letter and instructed their Legal Services department to conduct a legal search on the Property's title. This search established that Mrs A was the legal owner of the property at the time she completed her financial assessment form.

12. On 21 February 2008, the Council again wrote to Mrs A, care of Mrs C. In their letter, they advised that Mrs A would be liable for £300.00 of the £435.00 weekly cost of her residential care. The letter noted that the National Assistance (Assessment of Resources) Regulations 1992 (the 1992 Regulations) set out how local authorities should assess the ability of adults in residential care to pay their care costs. The Council highlighted that, where a local authority believes that a resident has deprived themselves of a capital asset in order to avoid or reduce accommodation charges, the 1992 Regulations allow them to treat the resident as still possessing that asset when assessing their ability to pay their residential care costs. This is known as 'notional capital'. The Council concluded that Mrs A had deliberately deprived herself of the Property and that she should be considered as possessing the 60 percent share of the property value that her Right to Buy discount gave her. Assets to the value of 60 percent of the Property's sale price were, therefore, taken into account when assessing her ability to pay her residential care costs.

13. The Solicitors replied to the Council on Mr and Mrs C's behalf on 26 March 2008. They disagreed with the Council's view that the 60 percent discount that Mrs A had received on the purchase of the Property could be considered to be notional capital. They highlighted the legal agreement that Mrs A had entered into with Mr and Mrs C, noting that some 18 years had passed since Mrs A granted a standard security in Mr and Mrs C's favour to secure her obligation under the agreement. The Solicitors noted that Mrs A was bound by the legal agreement, which removed any entitlement she may have had to the 60 percent portion of Property. They questioned the Council's decision to take into account matters that were covered by a legal agreement which was put in place so many years previously, and asked for an explanation as to how the Council had concluded that a deliberate deprivation of capital had taken place.

14. My complaints reviewer was provided with a copy of an email from the Council's Senior Solicitor (Officer 1) to their Care Resource Team's Senior Administration and Finance Officer (Officer 2), dated 7 April 2010. In the email, Officer 1 noted that she had reviewed the Solicitors' letter of 26 March 2008 and was in agreement with Officer 2 that 'it could be argued that Deprivation of Capital has taken place'. Officer 1 referred to case law which she said demonstrated local authorities' entitlement to draw inferences from the facts known to them when carrying out financial assessments for residential care. The case referred to by the Solicitor was *Yule vs South Lanarkshire Council*, which states:

'Held ... (1) that in considering whether there is notional capital, the local authority must look to the information before them to determine whether a purpose of decreasing the amount payable for accommodation could be deduced, but this is not a matter of onus of proof. Rather, the local authority must have material before it from which it can reasonably be inferred that deprivation took place deliberately and with a purpose of the nature specified. The local authority cannot look into the mind of the persons involved in the disposal, but can only look at the nature of the disposal within the context of the time and circumstances in which it took place ... (3) that it is open to a local authority to reach a view as to the purpose of a disposal transaction without any specific findings as to the exact state of knowledge or intention of the applicant, so long as the primary facts are such as reasonably to lead to the inference that the purpose was at least in part that of decreasing the amount the applicant might liable to pay for accommodation ...'

15. In her email of 7 April 2010, Officer 1 commented on the issues raised in the Solicitors' letter and these comments were used by the Council when responding to the Solicitors on 30 May 2008. They noted that, in 1989, Mrs A was '... not a young woman who it might be accepted was not thinking about her future care. She was 76 years old. It is not unreasonable to assume that she and/or her family would already be thinking about the future'. The Council acknowledged that 18 years had passed since Mrs A entered into the legal agreement with Mr and Mrs C, however, highlighted that there is no statutory time limit governing how far back local authorities can consider potential deprivation of capital to have taken place. The Council considered that the terms of the legal agreement could have been achieved through her will just as effectively as through the legal agreement, questioning the need for this arrangement. They noted that Mr and Mrs C had entered into the legal agreement as a financial investment and concluded:

'It can be noted that the Minute of Agreement is also worded so that if [Mrs A] sells the property, her relatives don't just get back the money that they loaned plus reasonable interest. They receive the entire market value of the property. This means that [Mrs A] although still technically the recorded owner of the property and the one who received the discount receives no capital at all.

Given the above, I would suggest that it is not unreasonable for the Local Authority to draw the inference from the facts that [Mrs A] and/or her family were reducing any capital she may have for the purposes of any assessment that might be carried out should she require residential care.'

16. The Council also referred to Section 21 of the Health and Social Services and Social Security Adjudications Act 1983 (the HE Act), which they considered provided them with the authority to treat Mrs A as still possessing the Property for the purposes of her financial assessment, if they were satisfied that she had disposed of it to deliberately avoid residential care costs. They also noted that the HE Act allowed for Mr and Mrs C to be held liable for the amount of benefit accruing to them from assets being transferred to them. The sections of the HE Act referred to by the Council state can be found at Annex 3.

17. On 25 June 2008, The Solicitors wrote to the Council, reiterating their view that the 60 percent discount should not have been taken into account in Mrs A's financial assessment. They referred the Council to the Scottish Government's

circular, CCD4/2007: Revised Guidance on Charging for Residential Accommodation (the Guidance), highlighting section 6.061, which states:

‘Purpose of disposing of an asset

There may be more than one purpose for disposing of a capital asset only one of which is to avoid a charge for accommodation. Avoiding the charge need not be the resident’s main motive but it must be a significant one’.

18. The Solicitors stressed that Mrs A entered into the legal agreement with Mr and Mrs C due to the fact that they were taking on the responsibility for repaying her mortgage; the legal agreement protected their investment.

19. The Solicitors also noted the Council’s comments regarding Mrs A’s age at the time of purchasing the Property and highlighted section 6.063 of the Guidance, which concerns the timing of capital disposals and states:

‘Timing of the disposal

The timing of the disposal should be taken into account when considering the purpose of the disposal. It would be unreasonable to decide that a resident had disposed of an asset in order to reduce his charge for accommodation when the disposal took place at a time when he was fit and healthy and could not have foreseen the need for a move to residential accommodation. The local authority should bear in mind, however, that deprivation can be considered for resources disposed of at any time ...’

20. Section 6.059 of the Guidance states:

‘Has deprivation occurred?

It is up to the resident to prove that he no longer has a resource. Failure to do so will result in the local authority treating the resident as if he still possesses the actual capital ...’

21. The Solicitors noted that, although Mrs A was 76 years old at the time of purchasing the Property, she was in good health and continued to work in the family business. They said that she had no cause to consider future care costs at that time, nor for the following 18 years.

22. The Solicitors further disagreed that the provisions of the legal agreement could be achieved through Mrs A’s will. They said that the arrangement, whereby the full proceeds of the sale of the Property went to Mr and Mrs C,

should Mrs A sell the Property prior to her death, was an essential part of the agreement and could not be achieved through a will.

23. With regard to the HE Act, the Solicitors acknowledged that Section 21 gave the Council the power to hold a person that has received an asset liable for the amount that they have received, however, they noted that this was only the case where the transfer has taken place within 6 months of the resident entering residential care. They argued that this did not apply in Mrs A's case.

24. The Solicitors drew the Council's attention to two previous reports published by my predecessors. In both cases (Case references: 200503530 and 200603087), local authorities had included notional capital in assessments for residential care costs, despite ownership of the properties having been transferred to other family members a number of years prior to the resident entering care. The Solicitors noted similarities with those cases and Mr and Mrs C's complaint and highlighted the Ombudsman's decisions. The Ombudsman had upheld both complaints and commented that it was incorrect of local authorities to assume that care fees must be a consideration for individuals in their 70s or 80s.

25. The Council responded to the Solicitors on 3 November 2008. They stated that their decision to include 60 percent of the Property's sale price was not based solely on Mrs A's age. This was only one of a number of factors considered when assessing her ability to pay residential care costs. The Council explained that they remained of the view that the terms of the legal agreement could have been achieved via Mrs A's will. They acknowledged the importance of the section of the legal agreement giving Mr and Mrs C the full proceeds should the Property be sold prior to Mrs A's death. However, the Council felt that this indicated an assumption that Mrs A may, at some point in the future, relocate to a different property. They felt that the logical progression of this assumption was that her move would be to residential care. The Council stated that this assumption, allied with the legal agreement's arrangement that Mrs A would receive no capital from the proceeds of the sale of the Property, was a 'significant consideration' when reaching their conclusions.

26. The Solicitors reiterated their concerns in a formal complaint to the Council dated 8 January 2009. The matter subsequently escalated for review by the CRC. My complaints reviewer was provided with a copy of the minutes of the CRC meeting, which was held on 19 January 2010. The minutes record

that the Solicitors explained the background to Mrs A's property purchase and legal agreement with Mr and Mrs C in full, noting that the same security for Mr and Mrs C could not be achieved via a will, as Mrs A would have been able to amend the terms of her will at any time. The Solicitors also highlighted section 7.009 of the Guidance, which refers to legal and beneficial ownership and states:

'Legal and beneficial owners

7.009 The treatment of property will depend on whether the resident is a legal or a beneficial owner. A legal owner is a person in whose name the property is held. A beneficial owner is one who is entitled to receive the profits or proceeds of property. In most cases the legal and beneficial owners will be the same person but, where this is not the case, the value of the property will be valued according to the following paragraphs.

Legal ownership

7.010 For the purposes of assessing the resident's ability to pay a charge no account should be taken of the value of a property where the resident is a legal owner but has no beneficial interest in the property i.e. the resident is holding the property on trust for the beneficial owners and had no right to the proceeds or profits should the property be sold.

Beneficial ownership

7.011 Where the resident is the sole beneficial owner of a property the capital value should be taken into account in full ...'

27. The Solicitors stressed that Mrs A was not the beneficial owner of the Property. My complaints reviewer found no recorded evidence of the Council having considered the question of legal/beneficial ownership or of this issue being responded to by the Council at the CRC meeting. The Council subsequently explained to my complaints reviewer that all financial assessments are carried out with reference to the Guidance, however, in Mrs A's case, they did not consider the issue of legal/beneficial ownership to be relevant, as they took the view that Mrs A had deliberately deprived herself of the Property in order to reduce future residential accommodation charges.

28. The minutes of the CRC meeting record that the Council considered Mrs A's circumstances to be different to those of the individuals in the cases highlighted by the Solicitors as having previously been dealt with by my predecessors. In the cases highlighted by the Solicitors, the residents had

transferred ownership of their properties to family members several years prior to entering into residential care. In Mrs A's case, the Property remained in her name and she remained the legal owner, despite the legal agreement removing any rights that she had to receiving any proceeds from the sale of the Property.

29. The CRC made recommendations to the Council's Executive Committee (the Executive Committee), including one that Mrs A's financial assessment be reviewed, removing the inclusion of any proceeds from the sale of the Property as an asset. The Council's Legal and Licensing Services Manager advised the Executive Committee that two of the three CRC committee members had gone against legal advice that she submitted to the CRC and, in her opinion, the decision taken was not legally sustainable. The Executive Committee considered the matter and found that the CRC had not given due regard to the legal advice given to them on this matter. The Executive Committee concluded that this recommendation could not be accepted. As a result, the Council's position on Mrs A's financial assessment remained unchanged following the CRC.

30. The Solicitors complained to the Ombudsman on 10 March 2010, reiterating their position as per their submission to the CRC.

31. When investigating this complaint, my complaints reviewer was provided with the internal documentation relevant to the Council's investigation of Mr and Mrs C's complaint. The documentation included a report compiled by the Council's Social Work Finance Manager (Officer 3), who had been appointed to investigate the formal complaint submitted by the Solicitors on 14 January 2009. Officer 3's report indicated that she had reviewed the background to the Council's decision to include the 60 percent discount in Mrs A' financial assessment. She also conducted interviews with Officer 1, a Senior Social Worker at Mrs A's residential home, Mr and Mrs C and the Solicitors and Officer 2.

32. Her summary of the meeting that she had with Mr and Mrs C and the Solicitors records that Mr and Mrs C were adamant that the legal agreement was not entered into with the intention of depriving Mrs A of capital for the purposes of reducing any subsequent care home costs. Officer 3 further recorded that the majority of the meeting involved a discussion regarding interpretation of the Guidance. It was noted that the Solicitors disagreed with the Council's interpretation of the Guidance.

33. Officer 3's summary of her meeting with Officer 1 records that Officer 1 reviewed the evidence gathered to date and found nothing that would change her view of the case as detailed in her email to Officer 2 on 7 April 2008.

34. Officer 3 concluded that all procedures had been documented and applied correctly when conducting Mrs A's financial assessment. She also found that the Council's approach had been in line with the Guidance. In reaching this finding, Officer 3 acknowledged that interpretation of the Guidance is subjective, however, noted that the Care Resource Team had sought legal advice prior to reaching their decision on Mrs A's case.

35. My complaints reviewer was provided with a copy of a table produced by the Council, detailing the specific issues raised by the Solicitors and the Council's responses. This table has been transcribed at Annex 3.

(a) Conclusion

36. As I explained in the introduction to this report, my consideration of this complaint was limited to establishing whether the Council took into account relevant facts and evidence when reaching their decision to include Mrs A's 60 percent contribution to the purchase of the Property when assessing her finances.

37. The Solicitors noted that my predecessors had previously upheld similar complaints, finding that the local authorities involved failed to properly consider relevant information when assessing residents' finances. As the Council noted at the CRC meeting, Mrs A's circumstances are different to those of the individuals in the previous Ombudsman reports. Mrs A did not transfer ownership of the Property to Mr and Mrs C and was the legal owner of the Property at the time of moving into residential accommodation. In those cases, the Ombudsman was critical of the fact that the local authorities had reached their conclusions by placing a disproportionate emphasis on one particular piece of information.

38. The Solicitors argued that Mrs A's age at the time of entering into the legal agreement should not be taken as evidence of her considering future residential accommodation costs. They also highlighted the length of time that passed between creation of the legal agreement and Mrs A's move to residential accommodation. In the other Ombudsman reports referred to by the Solicitors,

the Ombudsman found that the local authorities involved had placed inappropriate emphasis on these factors when reaching their decision. The table of legal considerations provided by the Council shows that, whilst Mrs A's age at the time of entering into the legal agreement was considered significant, the Council gave due consideration to a number of other relevant factors when reaching their decision. In this case, I am satisfied that the Council have been able to demonstrate that their decision was reached with reference to a number of relevant factors, rather than placing undue emphasis on one particular piece of evidence.

39. The Guidance states that the value of property should not be taken into account when assessing a resident's finances if they are the legal owner and not the beneficial owner. At the CRC meeting, the Solicitors contended that Mrs A could not be considered the beneficial owner of the Property. The legal agreement was worded in such a way as to ensure that all monies obtained through the sale of the Property went to Mr and Mrs C. The Council kept no formal record of their consideration of this issue and provided no evidence of having responded to the Solicitors' point during the CRC meeting. I would expect this issue to have been key in determining an individual's financial liabilities. Section 7.010 of the Guidance clearly accepts that there are legitimate circumstances whereby a resident may be the legal and not the beneficial owner of a property, and allows for this to be taken into account during financial assessment. To reach the view that Mrs A should be considered as still having her 60 percent share of the property as an asset, the Council would have to satisfy themselves that she deliberately put herself in the position of being legal owner and that deprivation of capital was a significant consideration in this decision. It is clear that the Council reached this view.

40. The Guidance states that '... avoiding the charge need not be the resident's main motive but it must be a significant one'. And Section 6.059 states 'It is up to the resident to prove that he no longer has a resource'. As was noted in the Yule vs South Lanarkshire Council case, local authorities cannot look into the minds of Mrs A and her family at the time of entering into the legal agreement. It is not for the Council to prove categorically that the legal agreement was worded specifically with deprivation of capital in mind. Rather, the Council must reach a reasonable conclusion, based on all of the evidence available to them.

41. The Guidance puts the onus on Mrs A and her family to prove that deprivation of capital was not a consideration when the legal agreement was established. I consider there to be a corresponding duty on the Council to give full, objective, consideration to any arguments put forward by the resident in that regard. I am critical that the Council failed to demonstrate that they considered the specific issue of legal and beneficial ownership. And where there is evidence of the Council's consideration of arguments put forward by the Solicitors, I have concerns about the Council's approach.

42. I am satisfied that the Council have demonstrated that their conclusion that Mrs A had deliberately deprived herself of the Property as an asset was reached with reference to a number of relevant factors. In some cases, however, I felt that the Council made assumptions that were not entirely based on the evidence provided. For example, they noted that the legal agreement made allowances for Mrs A moving out of the Property at some point prior to her death, and concluded that the logical progression would be that she moved into a care home. Whilst this is certainly one possible outcome, it is not the only one and not necessarily the most logical progression. Similarly, I felt that the Solicitors' explanation as to why Mr and Mrs C's investment was protected by the legal agreement rather than Mrs A's will was dismissed without any explanation other than that the Council took a different view.

43. Rather than acknowledging and evaluating the various alternative conclusions that could be reached on the evidence available to them, the Council's table of legal considerations reads as a list of counter-arguments in response to the points raised by the Solicitors. The conclusions reached after objective consideration of each point may ultimately be the same, however, the evidence provided by the Council suggests that they may have sought arguments in response to the Solicitors' points to justify their preferred position.

44. I was further concerned by the circumstances surrounding the CRC hearing. The Council's internal legal advice was presented to the CRC who recommended that the Social Work Department be instructed to review Mrs A's financial assessment without her being considered as retaining the property as an asset. Subsequently, the Council's Legal and Licensing Services Manager offered advice to the Executive Committee, which resulted in their decision to reject the CRC's recommendation. The Council's own legal staff advised both the CRC and the Executive Committee and were able to influence the outcome of the CRC process, negating the input of the CRC itself. The emphasis put on

the Council's internal legal advice and the subsequent influence of their legal advisers calls into question the fairness of the hearing process and, as such, I consider the Council's position to be legally unsustainable.

45. With all of the above in mind, I uphold this complaint.

(a) Recommendations

46. I recommend that the Council:	<i>Completion date</i>
(i) obtain independent legal advice on Mrs A's case; and	30 June 2011
(ii) convene another CRC hearing to reconsider Mrs A's case with reference to independent legal advice.	30 June 2011

(b) The Council's complaints handling was poor

47. In their complaint to the Ombudsman, the Solicitors noted that they had experienced lengthy delays when pursuing their formal complaint with the Council. Concerns about the delays to responses and confirming a date for the CRC were also raised by the Solicitors in their complaints correspondence with the Council. In their letter to the Council of 8 January 2009, asking that their concerns be addressed as a formal complaint, the Solicitors also complained that specific points that they had raised in correspondence with the Council had not been addressed.

48. The documentation submitted to my complaints reviewer indicates that the Solicitors' letter to the Council dated 26 March 2008 marked the Solicitors' first involvement in Mrs A's case. The Council responded to that letter on 30 May 2008, some nine weeks later. The Solicitors wrote a further letter to the Council on 25 June 2008. The Council sent an acknowledgement of this letter on 17 July 2008 and responded on 3 November 2008, following a chaser letter from the Solicitors on 17 September 2008. Internal email correspondence within the Council indicates that staff shortages and other workload commitments within the Legal Services department contributed to the delayed response.

49. The Solicitors submitted their formal complaint to the Council on 8 January 2009. The Council acknowledged the complaint on 14 January 2009 and wrote a further letter on 21 January 2009, advising that Officer 3 had been appointed to look into the points that had been raised. The Council sent interim

letters to the Solicitors on 19 February, 12 March, 10 April, 5 June, 15 June, 17 July and 3 August 2009, explaining that they were awaiting Officer 3's report. On 17 July 2009, the Council sent a separate letter to Mr and Mrs C, explaining that Officer 3 had been absent from work due to illness and had only recently returned.

50. The Solicitors wrote three chaser letters to the Council between 9 April and 29 July 2009. On 7 May 2009 they wrote separately to the Council questioning the impartiality of the investigation process following their meeting with Mr and Mrs C and Officer 3. The Council responded to this letter explaining their position on 8 May 2009.

51. The Council responded to the Solicitor's formal complaint on 11 August 2009, some seven months after the initial complaint was received. On 3 September 2009, the Solicitors wrote to the Council advising that Mr and Mrs C had indicated that they would be seeking to progress their complaint for consideration by the CRC.

52. The Council acknowledged the Solicitors' CRC request on 9 September 2009 and wrote to them on 25 November 2009, advising that the CRC would take place on 1 December 2009, and enclosing the productions that the Council would refer to during the meeting. The Solicitors asked that the CRC be delayed due to the short notice that Mr and Mrs C were given of the meeting date and the subsequent lack of preparation time.

53. Between 26 November and 14 December 2009, numerous emails were sent from, and to, the Council's Committee and Elections Officer to the CRC panel members attempting to reschedule the CRC for a date when all members would be available. A number of dates were proposed and the Council were able to offer two dates in late December for the rescheduled meeting. However, Mr and Mrs C asked that the meeting be held in January 2010, given the close proximity to Christmas. All parties eventually agreed to hold the meeting on 19 January 2010.

54. Mr and Mrs C's complaint about the Council's complaints handling was considered at the CRC meeting. At the meeting, the Solicitors noted that the Council's Comments and Complaints leaflet advised that complaints would be acknowledged within five working days and that a full response would be provided within 28 working days. The Council acknowledged that the Solicitors'

complaint had been delayed and apologised to Mr and Mrs C for the distress that these delays had caused. It was again noted that the delays were due to staffing issues within the Council. The CRC panel recommended that 'Members of the Committee receive, in due course, an update from the Director of Social Work on the outcome of the pilot study on mail recording within Social Work, referred to in [Mr and Mrs C's] submission.' My complaints reviewer was not provided with a copy of this particular submission.

55. In her report on Mr and Mrs C's complaint, Officer 3 found that the Council had reached a view on all points raised by the Solicitors and that their position in respect of each point was recorded in the Council's Summary of Legal Issues/Responses table (See Annex 4). She acknowledged, however, that responses provided by the Council did not respond to each point individually.

(b) Conclusion

56. Whilst it clearly took some time for a date to be confirmed for the CRC, I acknowledge that the Council proposed dates in December on two occasions and that these were declined by Mr and Mrs C. I found it entirely reasonable for Mr and Mrs C to ask that these dates be rescheduled given the initial short notice given and the fact that the subsequent dates were so close to Christmas. However, the email evidence provided by the Council shows that proactive attempts were made to arrange the meeting and that those delays that were encountered were due to various CRC panel members' lack of availability on each proposed date.

57. Whilst I am satisfied that the CRC arrangements were progressed relatively efficiently, I was concerned by the time taken for the Council to respond to the initial correspondence from the Solicitors and then to their formal complaint. Responses to the earliest letters from the Solicitors in February and March 2008 were delayed, however, I am particularly concerned that from start to finish, the formal complaints process took over a year. This is largely due to the delay between the Solicitors' complaint letter of 8 January 2009 and the Council's response on 11 August 2009, however, there was also a delay of almost five months in the Council responding to the Solicitor's letter of 25 June 2008 (paragraph 44 refers). Internal emails and evidence from the Council indicate that these delays were caused by staff absence and lack of staff availability due to their being required for other work. I accept that staff absences are unpredictable and unavoidable and that workloads and timescales can be affected as a result of staff being unavailable at short notice.

However, it is not acceptable that the absence of a single member of staff halts the progress of a complaint, or any other service, by several months. Plans should be in place to review the workloads of any staff member after a period of absence so that steps can be taken to ensure service standards are maintained at least to a basic level. My complaints reviewer found no evidence of such contingencies being in place. Whilst it is recognised that the Council maintained contact with the Solicitors via regular interim letters, all activity on their complaint halted until Officer 3's return from absence.

58. I acknowledge that the Council have already identified and accepted their shortcomings with regard to Mr and Mrs C's complaint. I also note the reference to a pilot study being conducted on mail recording within Social Work. I was pleased to note that the Council have actively sought to improve their performance in this regard, however, given the length of delay when investigating the issues raised by the Solicitors, I uphold this complaint.

(b) Recommendations

	<i>Completion date</i>
59. I recommend that the Council:	
(i) provide evidence of the steps that they have taken to record, track and respond timeously to correspondence from members of the public and their representatives; and	30 June 2011
(ii) review their handling of the Solicitors' initial correspondence and formal complaint. In particular they should review their staff absence procedures and introduce measures to ensure that future staff absences do not unduly impact upon the delivery of service standards set out in the Council's complaints handling procedure.	30 June 2011

60. The Council have accepted the recommendations and will act upon them accordingly. The Ombudsman asks that the Council notify him when the recommendations have been implemented.

Explanation of abbreviations used

Mrs A	Mr C's mother
The Property	Mrs A's home prior to moving into residential care
The Council	Scottish Borders Council
Mr and Mrs C	The complainants
The Solicitors	Solicitors acting on behalf of Mr and Mrs C
The CRC	The Council's Social Work Complaints Review Committee
The 1992 Regulations	The National Assistance (Assessment of Resources) Regulations 1992
Officer 1	The Council's Senior Solicitor
Officer 2	The Council's Care Resource Team's Senior Admin and Finance Officer
The HE Act	Health and Social Services and Social Security Adjudications Act 1983
The Guidance	Scottish Government circular CCD 4/2007: Revised Guidance on Charging for Residential Accommodation
The Executive Committee	The Council's Executive Committee
Officer 3	The Council's Social Work Finance Manager

List of legislation and policies considered

The National Assistance (Assessment of Resources) Regulations 1992

The Health and Social Services and Social Security Adjudications Act 1983

Scottish Government circular CCD 4/2007: Revised Guidance on Charging for Residential Accommodation

Section 21 of the Health and Social Services and Social Security Adjudications Act 1983

21. Recovery of sums due to local authority where persons in residential accommodation have disposed of assets

- (1) Subject to the following provisions of this section where –
- (a) a person avails himself of Part III accommodation: and
 - (b) that person knowingly and with the intention of avoiding charges for the accommodation –
 - (i) has transferred any asset to which this section applies to some other person or persons not more than six months before the date on which he begins to reside in such accommodation; or
 - (ii) transfers any such asset to some other person or persons while residing in the accommodation; and
 - (c) either –
 - (i) the consideration for the transfer is less than the value of the asset; or
 - (ii) there is no consideration for the transfer,

the person or persons to whom the asset is transferred by the person availing himself of the accommodation shall be liable to pay to the local authority providing the accommodation or arranging for its provision the difference between the amount assessed as due to be paid for the accommodation by the person availing himself of it and the amount which the local authority received from him for it ...

(6) Subject to subsection (7) below, the value of any asset to which this section applies, other than cash, which has been transferred shall be taken to be the amount of the consideration which would have been realised for it if it had been sold on the open market by a willing seller at the time of the transfer.

(7) For the purpose of calculating the value of an asset under subsection (6) above there shall be deducted from the amount of the consideration –

- (a) the amount of any incumbrance on the asset; and
- (b) a reasonable amount in respect of the expenses of the sale ...'

The Council's table of legal considerations

Issues Raised by [the Solicitors]
Written agreement whereby [Mrs A] secured rent free accommodation in exchange for the bequeathing of the property to [Mr and Mrs C], or if the property was sold, the whole proceeds would go to [Mr and Mrs C]

[the Council] Response
The agreement indicates that [Mrs A] wishes to bequeath her son the property. This could have been done by way of terms of a formal will, and so did not require a Minute of Agreement.

Was 18 years ago so [the Council] could not presume this could reasonably be treated as deliberate deprivation of capital

In 1989 [Mrs A] was not a young woman who it might be accepted was not thinking about her future care. She was already 76 years old. It is not unreasonable to assume that she and/or her family would already be thinking about the future. There is no statutory limit to when to (sic) can cease to consider deprivation having taken place

Stated that such arrangements are common and [Mr and Mrs C] received good return on their investment

Such agreements are not endorsed by local authorities and the intention of the Right to Buy legislation was not so that owners families could 'invest'.

Also noted that the Agreement is worded so that if [Mrs A] sells the property, her relatives don't just get back the money they loaned plus reasonable interest, but they received the entire market value. This means that the legal owner and the person who received the discount received no capital at all

Asked how [the Council] reached their view

If, as in this case, a local authority believes that a resident has deprived themselves of a capital asset in order to avoid or reduce accommodation charges then it may treat the resident as still possessing that asset when assessing ability to pay

Cited Beeson v Dorset County

This is not a case in point as the property has been transferred to families prior to client going into care. [Mrs A] was the legal owner of the property when she went into care

Cannot assume just because of [Mrs A]'s age that care costs were a consideration for her. She was in good health when the agreement was entered into

There is no assertion in our prior correspondence that our decision was taken 'simply due to [Mrs A]'s age. This was only one factor that was taken into account when reaching our conclusion that deprivation had taken place

Scottish Executive guidance states that:

The timing of the disposal should be taken into account when considering the purpose of the disposal

Also states that the local authority should bear in mind that deprivation can be considered for resources disposed of at any time

It would be unreasonable to decide that a resident had disposed of an asset in order to reduce his charge ... when the disposal took place at a time when he was fit and healthy and not [could] have foreseen the need for a move to residential accommodation

The provision that the whole proceeds of the sale of the property ('an essential part of the agreement') gives rise to the presumption that at some point, [Mrs A] may desire or have some reason to leave the property for accommodation elsewhere, and the local (sic) progression from this would be an assumption that she would enter

One of the factors for the local

authority to consider is the purpose of disposing of an asset. It states that avoiding a charge for care fees need not be a resident's main motive, but it must be a significant one. The reason for entering into the Agreement was that [Mr and Mrs C] were paying the mortgage and the agreement was entered into as security for these payments.

Do not agree that the same effect (ie whole sale proceeds to go to [Mr and Mrs C] could be achieved by a bequest in a will. This is an essential part of the agreement

Cited Ombudsman decisions re East Dunbartonshire Council and East Lothian Council

residential care. This together with the fact that the Agreement is worded in such a way that were [Mrs A] to transfer the property during her lifetime then the capital from the proceeds of sale would fall not to her but to her son and daughter in law was a significant consideration for [the Council] in reaching their conclusive on deprivation having taken place.

Our view remains the same – the ends sought to be achieved from the Agreement could have been met by way of a bequest in a will

These are not cases in point as the property had been transferred to families prior to client going into care. [Mrs A] was the legal owner of the property when she went into care