

Case 200903096: The City of Edinburgh Council

Summary of Investigation

Category

Local government: Building Control; Statutory Notices

Overview

The complainant (Mr C), the owner of a tenement flat, raised concerns about the handling of statutory notices issued by The City of Edinburgh Council (the Council) under the City of Edinburgh District Council Order Confirmation Act 1991 and about financial advice and assistance he received.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the Council failed to give Mr C correct and sufficient advice regarding obtaining finance for his share of the costs of works instructed under statutory notices (*not upheld*); and
- (b) the actions of the Council and their agents (the Agents), with regard to the apportionment of costs, were inconsistent (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- | | <i>Completion date</i> |
|---|------------------------|
| (i) revisit, and take steps to seek to prevent, the situation where the Agents sent out invoices in April 2008 on the basis of an erroneous list of owners; | 22 December 2010 |
| (ii) reimburse Mr C for any additional costs he incurred in consequence of the Agents' initial erroneous invoice; and | 22 December 2010 |
| (iii) consider formally whether it is appropriate for them to seek recovery of the costs of works on the basis of title and, if they are mindful to do so, inform Mr C accordingly in order that he can seek appropriate legal advice on his own options. | 22 December 2010 |

The council have accepted the recommendations and will act on them accordingly.

Main Investigation Report

Introduction

1. The complainant (Mr C) has learning difficulties. He has been the owner occupier of a first floor tenement flat in a block of ten flats at 3 X Street for over 20 years. The City of Edinburgh Council (the Council) own three of the flats in the block. The adjoining tenement flat at 7 X Street has seven flats. On the ground floor of 3 X Street is a restaurant (the Restaurant), formed some years ago from premises at 4, 5, and 5A X Street.

2. The statutory notices involved in the complaint derive from roof defects at 3 X Street, in respect of which earlier notices were served in 1995 and 1999. A report was put to a Joint Building Control and Repairs Sub-Committee on 2 June 1999 but the matter was not pursued then by the Council when the owners agreed to have the works carried out privately. The Council were not informed of the completion of the works and the notice, therefore, remained outstanding. A further complaint of water ingress through the roof was made to the Council in 2003 and the Council gave the owners the opportunity to contact their private contractor before the Council became formally involved. On 7 May 2004 and 15 June 2004, the Council served statutory notices (Statutory Notice 1 and Statutory Notice 2) respectively under section 24 (1) of the City of Edinburgh District Council Confirmation Order Act 1991 (the 1991 Act). The first notice was served on the 13 owners at 3, 4, 5 and 5A X Street to execute repairs; the second notice was served on the same 13 owners and the seven owners at 7 X Street). The Council said that the list of owners served was based on information received from Registers of Scotland at the time, which showed 4, 5 and 5A X Street as separate properties. When the owners did not agree to instruct the works, authority was given to Council officers to do so by the Council's Regulatory Committee on 25 August 2004.

3. The correspondence supplied by Mr C indicated that he expressed concern about his liability before the work began, through an approach to his then councillor, Councillor 1. Councillor 1 wrote to the Council's Head of Corporate Property and Emergency Planning (Officer 1) on 20 January 2005. In his response of 7 February 2005, Officer 1 stated that the Restaurant was regarded as a single property for the purpose of the notices. He advised that, while Mr C was correct in his observation that in the past there had been three separate properties, each attracting a portion of the cost, the three premises

were now used as one entire property and consequently attracted only one share.

4. Mr C met with Councillor 1 again in June 2006, following intimation of the commencement of the project by the Council's contract administrators (the Agents). After making a further enquiry, Councillor 1 confirmed to Mr C that invoices for the works, when completed, would be sent out on the basis of equal shares. He stated, however, that that did not impact upon the legal situation where title deeds might describe a different method of allocating costs.

5. When the works were complete, the Agents wrote to all the owners on 7 April 2008, advising them of the final account figure and their individual cost liability. The costs in the accounts of 7 April 2008 were based on 13 and 20 shares. Mr C's shares in terms of Statutory Notice 1 and Statutory Notice 2 were £11,832.25 and £294.22 respectively.

6. Council officers subsequently found this apportionment to be in error and the issue of liability was revisited. The Agents wrote to the owners on 6 August 2008, informing them that the liability and costs set out in the earlier letter of 7 April 2008 had been revised and that the number of liable owners for each notice was now 11 and 18 respectively. This in turn increased each flat owner's individual cost liability for each notice. Mr C was advised that his shares were now £13,983.57 and £326.91. (In total, £2,184.01 more than in the invoices of April 2008.)

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

- (a) the Council failed to give Mr C correct and sufficient advice regarding obtaining finance for his share of the costs of works instructed under statutory notices; and
- (b) the actions of the Council and the Agents, with regard to the apportionment of costs, were inconsistent.

Investigation

8. My complaints reviewer met twice with Mr C, considered documents supplied by him, made enquiries of the Council, inspected their file and met with Council officers. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C and the Council were given an opportunity to comment on a draft of this report.

(a) The Council failed to give Mr C correct and sufficient advice regarding obtaining finance for his share of the costs of works instructed under statutory notices

9. Around the time Statutory Notice 1 and Statutory Notice 2 were served, on 7 May and 15 June 2004, Mr C applied to the Council for rehousing. Following an assessment by the Council's Assessment and Advice Service of his housing needs, a housing support officer (Officer 2) was allocated to assist him but in the subsequent two years he was unsuccessful in bids to be rehoused.

10. In May 2006, Mr C contacted Homeworks, the section in the Council's Services for Communities responsible for assisting private owners with regard to meeting the costs of statutory notices under the Council's Scheme of Assistance. On 31 May 2006 a Homeworks Case Worker (Officer 3) attended a meeting at Mr C's home with Officer 2. Officer 3 helped Mr C complete a questionnaire, with a view to him being considered for a loan arranged by one of two not-for-profit organisations partnering the Council. On 4 October 2006, Officer 3 accompanied Mr C to a meeting with a loans officer from that organisation, to discuss various options available to assist Mr C. Mr C stated that he would prefer an interest only loan, as the Department of Works and Pensions (DWP) might help him repay this. His case was referred, therefore, to the other of the two Scheme of Assistance partners (the Partners), who were able to introduce Mr C to a building society providing an interest only loan.

11. On 18 April 2007, Mr C attended a meeting at the Council's offices attended by Officer 2, Officer 3, and two colleagues. Mr C was advised that a Scheme of Assistance loan would not be available to him if he was thinking of moving house, since financial penalties would apply if the loan was repaid within a year. When Mr C responded that he was no longer seeking to be rehoused, he was advised that he would lose his priority status and his housing support, since the support was being provided specifically to assist him with his rehousing. Cancellation of Mr C's priority for rehousing was confirmed by letter of 20 April 2007. Three days later, Officer 3 wrote to Mr C confirming that the Council were happy to proceed with Mr C's Scheme of Assistance loan application for the full amount of the bill. Officer 3 informed Mr C, however, that if he wished to dispute his proportion of the costs of the statutory notice works, Mr C would need to seek legal advice.

12. The statutory repair works were ostensibly completed in 2007. On 18 January 2008, an officer of the Partners wrote to Mr C's solicitors asking her for a note of her fees and for her to arrange a draw down of the loan from a specified building society as soon as possible.

13. The invoices issued by the Agents on 7 April 2008 were based on the Agents apportioning the total cost of £153,819.22 of Statutory Notice 1 in 13 equal shares of £11,832.25. The total cost of £5,884.44 in Statutory Notice 2 was divided into 20 equal shares of £294.22. Mr C obtained a loan for the combined amount.

14. After it was realised that the basis of apportionment was in error, the Agents wrote again to the owners on 6 August 2008 informing them that the liability and costs set out four months earlier had been revised and that the cost of Statutory Notice 1 required to be shared 11 ways and Statutory Notice 2, 18 ways. The resulting costs for Mr C were £13,983.57 and £326.91 respectively. This meant a total increase in Mr C's share of £2,184.01.

15. On receiving notification of his revised share, Mr C approached Officer 3. Officer 3 contacted Mr C's building society on 26 September 2008, explained the situation and asked them whether they would extend Mr C's loan to enable the balance of the bill to be paid. Officer 3 informed Mr C that going back to the Partners would probably lead to an additional fee of around £500, which was not cost effective. The building society wrote to Mr C asking him to call in to discuss his mortgage. When Mr C did not respond to Officer 3, Officer 3 wrote again to Mr C on 27 November 2008 asking if he had contacted the building society and pointed out that arranging for an addition to the loan authorised by the Partners could be an expensive way of dealing with the outstanding amount. With regard to Mr C's continued concern regarding the apportionment of shares, Officer 3 suggested that Mr C contact a free legal advice surgery 'to find out how to take your neighbours, or at least the shop, to the Small Claims Court'.

16. On 15 December 2008, Officer 3 wrote to Mr C enclosing a calculation showing that £13,152.44 had been paid to his statutory notice account but that a balance of £1,158.03 was outstanding and that Mr C would need to deal with that. Officer 3 advised Mr C that, if he had not already visited the building society, he should now do so and explain the situation to them. Officer 3 repeated that advice in a letter of 8 January 2009, when he learned from the building society that Mr C had not contacted them. Mr C contacted another

councillor, who also made an enquiry of Officer 3. Officer 3 informed Mr C by letter of 28 January 2009 that he could get assistance with filling out building society forms from the Citizens Advice Office.

17. Mr C contacted an independent Advice and Information Resource group and they wrote on his behalf to Customer Care on 17 June 2009, complaining that Mr C had not previously been directed to seek housing support assistance. They said that Mr C had recently been directed to them and he hoped that they would now assist him with a claim to the DWP for interest payments on the loan which he had taken out to finance his share of the works. A further letter was sent to the Council on 29 June 2009.

18. In replying to that letter on 3 July 2009, the Operational Manager - Homeworks (Officer 4) stated that Mr C had had a Council housing support Worker (Officer 2), who accompanied him to his first meeting with Officer 3 in 2006 (see paragraph 10) to discuss a Scheme of Assistance loan. Officer 4 stated that when Mr C re-engaged with Officer 3, Mr C had not specifically mentioned that he was no longer receiving housing support. Officer 4 apologised for her service having wrongly assumed that, because Mr C had received previous housing support assistance, he was still either receiving that support or knew how to contact them for any required additional support.

19. Mr C submitted a complaint to the Chief Executive on 30 July 2009. He indicated that he had raised the necessary finance for his share of the work by re-mortgaging his flat, only to learn that the basis of allocation had been in error and the revised individual cost apportionment required him to find additional funds. He had then to apply for an increase in his mortgage, incurring additional costs and fees. Mr C did not consider that Officer 4's apology of 3 July 2009 compensated for the additional costs incurred or stress caused by the Council's actions. In the Chief Executive's absence, the Council's Director of Corporate Services responded on 1 September 2009, clarifying the Council's involvement and the respective roles of City Development and Services for Communities. He concluded by stating that he did not consider the Council was liable to compensate Mr C.

20. Mr C complained to the Ombudsman on 30 October 2009 and mentioned his learning disability. He stated that he had not received correct or sufficient support regarding obtaining financial assistance for statutory notice repairs (after a need to seek additional funding had arisen). He claimed that he had

incurred additional fees to obtain further finance. The additional mortgage was not recognised by DWP, resulting in Mr C having to pay mortgage interest from his means tested benefits. Mr C said he had suffered unnecessary stress affecting his health and well-being. He felt he should be recompensed for the additional fees incurred and also that his share of the costs should reflect the original statutory notices.

(a) Conclusion

21. Seeking finance for what was a substantial amount of money would not have been easy for Mr C. He relied on the Council for advice and assistance. Unfortunately, his application to a building society through the Council's Scheme of Assistance was based on an erroneous original apportionment of the costs. The advice and assistance provided to Mr C by Homeworks appears to me to have been reasonable. They referred him to the not-for-profit organisation which had Mr C's preferred loan product available and, when the share of Mr C's costs increased, advised him to contact the building society direct with a view to reducing charges. The error in the apportionment by the Agents, which I address in my findings on complaint (b), was not of their making. I do not uphold this complaint.

(b) The actions of the Council and the Agents, with regard to the apportionment of costs, were inconsistent

22. The Council's files on the administration of the works implemented under Statutory Notice 1 and Statutory Notice 2 also contained reference to earlier notices and a later notice. The first notice served on 3 to 5 X Street on 3 August 1990, under section 87(1) of the Civic Government (Scotland) Act 1982, with accounts issued on 5 December 1991, was based on 13 shares. The invoices rendered in respect of a second notice served on 17 February 1995 under section 24 (1) of the 1991 Act listed only 4 and 5 (but not 5A) X Street and was shared 12 ways. Two further notices served in 1999, were served on 13 proprietors at 3, 4, 5 and 5A X Street. On 7 May 2004 and 15 June 2004, the Council served Statutory Notice 1 and Statutory Notice 2 under section 24 (1) of the 1991 Act. The first was served on the 13 owners at 3, 4, 5 and 5A X Street to execute repairs; the second notice was served on 20 owners (3, 4, 5, 5A and 7 X Street). The Council said that the list of owners on whom Statutory Notice 1 and Statutory Notice 2 were served was based on information received from Registers of Scotland at the time, which showed 4, 5 and 5A X Street as separate properties. A further notice in respect of a

choked drain, in August 2006, was served on 12 owners, with 4 X Street not listed.

23. It is clear, however, from the response of Officer 1 to Councillor 1 of 7 February 2005, that notwithstanding those notified, the Restaurant on the ground floor was regarded by the Council as one entire property and, in consequence, would attract only one share of the costs (see paragraph 3). This view was not communicated to the Agents who, on 7 April 2008, sent out 13 and 20 invoices respectively.

24. Scrutiny of the Council's files shed no light on who was responsible for drawing to the Council's attention that, in terms of the Council's practice, the Restaurant, as one property, should only be liable for one share rather than three shares of the cost of the two notices. An email recorded that, on 2 July 2008, a senior officer in Property Conservation identified a need to undertake an additional liability check and the following day the Agents were instructed to issue revised accounts. The Agents wrote again to the owners on 6 August 2008, informing them that the liability and costs set out in the earlier letter of 7 April 2008 had been revised and the number of liable owners for each notice was now 11 and 18 respectively.

25. This had consequences for the flat owners affected at 3 X Street, since the amount of an equal share rose by £2184.01. On receiving the revised invoice, Mr C sought clarification from Property Conservation. After advice from the city solicitor and a physical check on 25 September 2008 by an officer from the Council's Corporate Address Gazetteer Team (which led to the Council's property gazetteer being amended to omit 5A X Street), a conservation surveyor wrote to Mr C on 8 October 2008. He stated that the Council, backed by relevant favourable case law (*Purves v The City of Edinburgh District Council 1987*), apportioned liabilities based on an equal share of the affected properties at the time invoices are issued. Title deeds were not taken into consideration when apportioning amounts, as these were only binding among the building owners and not on a third party such as the Council. Mr C was reminded that as an owner, he still had the right to pursue any share in accordance with the conditions of his deeds but this would be a private matter and would require consultation with a solicitor.

26. Mr C pursued the matter further in a telephone call on 25 February 2009. In responding on 27 February 2009, another conservation surveyor provided

historical details of statutory notices at 3 to 5 X Street and answered various queries. He stated that all accounts issued by the Council since 1 April 1989 had been issued on an equal share basis and none under rateable value; and that if the works were to be carried out privately, it would be entirely up to the owners to determine how costs are apportioned. He also stated that accounts issued on an equal share basis do not prevent any owner/occupier from recovering costs privately under their conditions of title. Owners at date of issue of accounts (and not at date of issue of a statutory notice) were responsible for payment; if a property is altered between issue of the statutory notice and the issue of the account it was the owner of the property who was responsible, ie, if one flat is divided into two, two accounts would be issued.

27. My complaints reviewer sought clarification of the Council's position where in this case they owned three of the flats and the revised apportionment resulted in a bill £6552.03 higher. He was initially informed that the Council were not 'in the habit of seeking recovery on the basis of title'. He asked them on 11 December 2009 to confirm their general practice in cases of statutory notice invoices, where the use of equal shares was disadvantageous to them as an owner and what procedures they employed for recovering underpayment from owners who appear to have paid less than their legal burden. The Council did not answer those questions directly but stated that residential properties and commercial properties in their ownership are managed by Services for Communities and City Development respectively. In response to the decision to investigate, the Council stated that the issue of the Council being the owner of commercial or residential properties had no bearing on the way costs were apportioned. The Council, like all other owners, paid monies to the Director of Finance to cover their share of the costs. All parties were treated the same, as required by the 1991 Act.

28. My complaints reviewer discussed the issue with a senior Council solicitor (Officer 5) on 5 July 2010. Officer 5 explained that recovery by Legal Services on the basis of title would require an instruction from the client department, in this case Services for Communities. He had no personal knowledge of such an instruction having previously been given. If an instruction were to be given, Legal Services would not be professionally indemnified to act on behalf of Mr C or other 'disadvantaged' owners, although that would not preclude the Council from informing Mr C or his fellow owners that they were taking action of recovery.

(b) Conclusion

29. While I recognise that Mr C had forewarning in 2005 and in 2006 of how the apportionment would be made on completion of the works (see paragraph 3), I consider that the error by the Agents had financial consequences for Mr C in added mortgage fees, which he would not have sustained if the correct figure had been given in the first invoice. I, therefore, uphold Mr C's complaint. I consider that the Council should request Mr C to supply details of how he was disadvantaged financially as a result of the error in the apportionment initially made by the Agents on 7 April 2008 and, thereafter, consider redressing those costs.

30. I consider, however, that the Council have failed to act consistently in a more general sense. I do not challenge the Council's ability to invoice on the basis of equal shares. The limited case law precedent supports the Council's position. Clearly, however, the title burdens may make the owners of commercial ground floor properties liable for a sum greater than an equal share. The Council's published guidance states that any owner can take legal action to sue in terms of title. Occasionally, given their ownership of tenement flats in the city, this will include the Council. As a public body, the Council need to be accountable for their actions and transparent and even-handed in their decision making. In this case the relevant Council Department, Services for Communities, as a disadvantaged property owner, have not confirmed why as a matter of considered policy or otherwise they have not themselves sought recovery of costs on the basis of title. To address this, I make the additional recommendation below.

(b) Recommendations

	<i>Completion date</i>
31. I recommend that the Council:	
(i) revisit, and take steps to seek to prevent, the situation where the Agents sent out invoices in April 2008 on the basis of an erroneous list of owners;	22 December 2010
(ii) reimburse Mr C for any additional costs he incurred in consequence of their Agent's initial erroneous invoice; and	22 December 2010

- (iii) consider formally whether it is appropriate for them to seek recovery of the costs of works on the basis of title and, if they are mindful to do so, inform Mr C accordingly in order that he can seek appropriate legal advice on his own options.

22 December 2010

32. The council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council inform him when the recommendations have been implemented.

Explanation of abbreviations used

Mr C	The complainant
The Council	The City of Edinburgh Council
3 X Street	The tenement block of ten flats where Mr C resides
The Restaurant	The business currently occupying the ground floor and incorporating 4, 5 and 5A X Street
The 1991 Act	The City of Edinburgh District Council Confirmation Order Act 1991
Statutory Notice 1	A notice served on owners of 3, 4, 5 and 5A X Street on 7 May 2004
Statutory Notice 2	A notice served on the owners of 3, 4, 5 and 5A X street and the seven owners of 7 X Street on 15 June 2004
Councillor 1	Mr C's then councillor
Officer 1	The Council's Head of Corporate Property and Emergency planning
The Agents	A firm of surveyors appointed by the Council to administer the contract for works required in Statutory Notice 1 and Statutory Notice 2
Officer 2	A Council housing support officer
Officer 3	A Council housing case officer
DWP	Department of Works and Pensions

The Partners	A firm supporting the Council's Scheme of Assistance
Officer 4	The Council's Operational Manager – Homeworks
Officer 5	A Council senior solicitor