

CASE SUMMARY

Complaint against the Buildings Department for maladministration in regard to the issue of a removal order

The Complaint

The complainant complained against the Buildings Department (BD) for -

- (a) delay in taking action against the previous owner in respect of an unauthorised building work (UBW), as a result of which enforcement action was taken against him after he bought the property;
- (b) delay in issuing the removal order to him, leaving him with little time to lodge an appeal; and
- (c) failure to identify the true owner of the UBW at an appropriate time.

Findings and Conclusion

2. The BD received a complaint in March 1996 that a canopy was being erected over a car parking space (CP1) by its owner. The inspection report on the UBW was completed on 22 April 1996 and a recommendation was made to issue a removal order. However, the recommendation was only endorsed on 12 November 1996. In the meantime, the complainant bought the property and CP1 in November 1996. A removal order was prepared on 22 January 1997 but was signed only on 13 June 1997. The order was posted on site on 27 June 1997 and a copy of the order was dispatched by post on 7 July 1997.

3. According to the complainant, the UBW was erected by the previous owner of CP1 and $\frac{2}{3}$ of it was over CP1 and $\frac{1}{3}$ over the adjoining parking space (CP2). He claimed that he is the owner of the ground of CP1 but not the owner of the space adjoining and over CP2. He said even if the BD considered that he owns the space above CP1, they should have issued a removal order to the owner of CP2 as well. He also felt aggrieved that the delay by the BD in sending the order to him by post had left him with little time to lodge an appeal if he had wished to do so.

4. The BD explained that the owner of an UBW can normally be identified by reference to its physical connection with the adjoining premises and/or its exclusive use by certain persons; to information obtained from the owners corporation, management company, neighbours, etc; and, where necessary, to the approved building plans, Deed of Mutual Covenant, etc. In case of doubt, they would seek advice from the Department of Justice. In the present case, the UBW was, according to information given by the caretaker and as evidenced by the physical circumstances, erected for a cover over CP1 for the benefit of its owner. Therefore the removal order was served on the owner of CP1.

5. The BD stated that the responsibilities and liabilities relating to a property are acquired along with its ownership. The owner of a premises should be responsible for the removal of any UBW erected on the premises irrespective of whether a removal order has been served or not. In the present case, even if a removal order had been issued to the former owner, a superseding order would have been issued to the complainant. However, the BD regretted the delay in issuing the order which was due to heavy workload and other urgent commitments.

6. This Office noted that the BD had taken more than one year to issue the removal order. The delay is unacceptable notwithstanding the mitigating circumstances. Furthermore, had an order been served on the previous owner and a copy sent to the Land Registry, the complainant could have been made aware of the existence of the UBW before he purchased the property. The Ombudsman therefore considered that complaint point (a) is substantiated.

7. According to the BD's manual, a copy of the removal order should be dispatched by registered post within two working days of the date of posting the order on site. As the order was posted on site on 27 June 1997, the copy should be

dispatched by post not later than 4 July 1997. However, this was actually done on 7 July 1997. Therefore complaint point (b) is substantiated.

8. Since about $\frac{2}{3}$ of the UBW was over CP1 and $\frac{1}{3}$ over CP2, the BD should have exercised more care to identify the real owner of the UBW before issuing the removal order. Complaint point (c) is therefore also substantiated.

Recommendations

9. The Ombudsman recommended the Director of Buildings (DB) to consider to -

- (a) make an apology to the complainant;
- (b) remind his staff to exercise more care in identifying the owners of UBW which are erected in common areas; and
- (c) recompense the complainant with part of the cost for the demolition of the UBW.

Response from the DB

10. The DB disagreed with the above findings, conclusion and recommendations and made the following comments-

- (a) The responsibility for demolishing the UBW was transferred together with the ownership. The registration of a removal order with the Land Registry is only to enable interested parties to be aware of such an incumbrance to a property. A property not issued or registered with a removal order does not mean that it has no UBW.
- (b) Previously the 21-day limit to lodge an appeal against a removal order started to count from the date the order was posted on site. However, the Department of Justice advised in

August 1997 that the time limit should start to count from the date a copy of the order is sent by registered mail. In the present case, the time limit should start to count from 7 July 1997.

- (c) The BD staff had considered the location of the UBW and its use and had obtained information as to who erected it. Whether the means to establish the owner are correct or not is a matter of law but not maladministration.
- (d) The UBW was primarily over CP1 and believed to be erected by its owner. There should not have been two owners although it extended over part of CP2. Such extension over CP2 might be regarded as trespass and should not render the owner of CP2 responsible for demolishing the UBW. Even if the complainant should be responsible only for that part of the UBW over CP1, the remaining part over CP2 could at most be the responsibility of the owner of CP2 and not the BD.

Final Remarks

11. On complaint point (a), the BD admitted that there was a delay in issuing a removal order, but did not agree that this resulted in enforcement action being taken against the complainant. However, if the order had been served on the previous owner of the UBW and a copy sent to the Land Registry, the complainant could have been made aware of the existence of the UBW before he purchased the property. The purpose of registering a removal order with the Land Registry is, as confirmed by the BD, to enable interested parties to be aware of such an incumbrance to the property. Therefore, the BD's delay in action had deprived the complainant of the additional protection offered by registration of a removal order with the Land Registry.

12. Regarding complaint point (b), the BD admitted that there was a delay in dispatching the removal order by post, but did not agree that this shortened the time available to the complainant to lodge an appeal. However, the then

prevailing practice was that the appeal period was counted from the date the order was posted on site. The latest legal advice highlights the importance of delivering the order by registered mail. Since the BD had delayed in sending out the order by post, undeniably the time available to the complainant to lodge an appeal had been reduced.

13. As to complaint point (c), this Office had not queried the validity or adequacy of the BD' s practice and instructions to establish the owner of UBW, but considered that since the UBW in question was partly over CP1 and partly over CP2, more vigorous effort should have been made to ascertain its ownership before a removal order was issued.

14. Having carefully considered the matter, The Ombudsman is of the view that the conclusion of the investigation should remain unchanged.

15. The BD informed this Office that all the three recommendations had been implemented, as follows -

- (a) a letter of apology had been sent to the complainant;
- (b) staff with responsibilities for removing UBW had been and will be reminded from time to time of the need to exercise due care in identifying ownership of UBW erected in common areas; and
- (c) the BD had asked the complainant for information on the cost for the demolition of the UBW, but the complainant replied that all he wanted was to have his grievance properly acknowledged which had been done and he did not require to be compensated out of public funds.