

## TYNWALD COMMISSIONER FOR ADMINISTRATION

### REPORT ON CASE TCA 1909

## Complaint

1. Mr L and his partner A complained that the Department for the Environment, Food and Agriculture (DEFA), had failed to investigate their concerns that their neighbour had damaged their property and trespassed on it in the course of converting his loft for which planning permission had been granted.
2. DEFA has since told me that it does not have the legal authority to investigate these particular concerns. Although I had understood that the complaint had been considered and rejected by DEFA, the Department has now told me that the complaint was considered under the Enforcement Policy. Although this was not Mr L's understanding (nor that of the MHK from whom Mr L and A had also sought assistance) it had been made clear to him in the acknowledgement letter following his request to investigate and in the final letters of the 26<sup>th</sup> and 27 September 2019. The Department did not point this out to me in the correspondence I had with them dating back to November 2019. They accept, however that it is not inappropriate for me to report: had they objected earlier, I would have lodged this as a section 14 statement.

## Background

3. Mr L is employed by the Department of Infrastructure whilst A cares full time for her mother. She was, at one time, a bank employee and has a better understanding of financial matters than her partner. Throughout the investigation, she appears to have taken the lead.
4. In 2007, Mr L purchased a 3 bedrooled, terraced property in Douglas. His intention was to find tenants and for this purpose, he obtained a "buy to let" mortgage. The property required considerable work before it could be let and Mr L did much of this himself. Whilst he was working on his house, the next door property was sold and, in 2011, the new owner applied for planning permission to carry out a loft conversion. Mr L did not think that the work would impact on his property and did not oppose the application. Planning consent was granted and his neighbour began work. Mr L could not see what his neighbour was doing from the front of his property, nor from his backyard. He could have done so had he walked along the Back Lane but he did not do so. He concentrated on renovating his own property so he could let it to tenants.

5. Eventually in 2014, the property was ready and Mr L had his first tenant. This was not a success and resulted in proceedings in the small claims court because the tenant caused considerable damage to the property. The second tenancy was more successful occupying the property from April 2014 until September 2018. In late 2017, the tenant complained of damp. Mr L asked a roofer to investigate. The roofer found no cause of the damp, reporting that the roof was fine and there was nothing to worry about but the dampness in the walls got worse. They were wet and Mr L had to replace carpets and the cooker. Eventually, Environmental Health told the tenants that they should move out because the walls were too wet and were damaging the children's health.
6. Mr L then engaged another roofer who carried out a more thorough examination of the roof. He reported that the dormer extension had not been constructed in accordance with the published plan where the dormer window was to be built up to the shared chimney. Instead, it had been built around the chimney stack and up to the gable. Mr L could not carry out any necessary work on the chimney stack because of the way in which the extension had been constructed which denies him shared access to the chimney.
7. The roofer also reported that his neighbour had trespassed onto his roof and had removed roofing and ridge tiles. These had been replaced but were newly cemented and Mr L was unsure whether the flashings between the two properties had been left undisturbed. Mr L had spoken to his neighbour who was proving unhelpful maintaining that he had no damp problem as he had "tanked" his inner walls.
8. Mr L therefore contacted the Department regarding the possible breach of planning. Officers made a site visit and agreed that the dormer had been constructed differently from the approved plan in that it butted up to and partially enveloped the chimney. Mr L expected the Department to take enforcement action. However, there is a time limit for such action of 4 years.<sup>1</sup> The Department were, therefore, unable to take any action. The reasoning behind the Department's decision that it was not possible to take any further action was clearly explained to him in a letter dated 27 September 2019 in which it was also suggested that he seek advice about legal action from an advocate. Mr L considered the Department's response to be unhelpful.
9. In coming to this conclusion, the Department determined that the dormer was completed in 2013. Since Mr L's neighbour had not obtained either a habitation or completion certificate, a precise date could not be given but it appears that the property was re-rated in 2014 which indicated that the extension was completed then. The Planning Enforcement Officer suggested that Mr L should obtain advice about possible court proceedings.
10. I should say that, in addition to the correspondence, a meeting was held at the Department which was attended by Mr L, his MHK, the Director of Planning and Building Control, the

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<sup>1</sup> Paragraph 3, Schedule 4 of the Town and Country Planning Act 1999.

Head of Building Control and Standards, and Douglas Borough Council's Head of Building Control<sup>2</sup>. The meeting failed to resolve the problem and led to a further complaint. A had wanted the meeting to be "minuted" as had happened at bank meetings. The Department produced a note of the meeting which A insists is not what was requested. The notes of the meeting were, in any event, only sent to Mr L after his MHK requested them.

11. The Department's note of meeting records that there was a discussion about the different remits of Planning and Building Control and what constituted compliance under the Building Regulations. The Head of Building Control from Douglas Borough Council explained that the works were not required to reflect the Building Control approved plans although the drawings were examined in the course of the meeting with reference to the size and position of the dormer window. Environmental Health were investigating the problems with damp and the Borough Council would take any action needed once their Report was completed. Clearly, one of the matters puzzling the Building Control Heads was that damp/water ingress as a result of building works would normally be detected within 6 months but the works had been completed 7 years previously. It was difficult to be certain that the damp was as a result of the building works.
12. I have also been provided with a second document entitled "Notes of a meeting regarding works at [X] Avenue, Douglas." These are said to be notes omitted from the minutes of the meeting. They make the point that the notetaker is not identified and that "the minutes were not signed off when the meeting ended". I thought that this document had been prepared by A but, as she was not at the meeting, it was presumably prepared by Mr L after the meeting. These notes disclose that there was a discussion between Mr L and the Douglas Borough Council Head of Building Control about the plans. There were apparently two sets of plans. The plans submitted to Building Control were not public documents and could not be inspected but the Douglas Head of Building Control believed that they were the same as those submitted for planning approval. He was more concerned with breaches of the Building Regulations, which would be investigated if brought to his attention within time but he could not investigate because the complaint, because it was out of time. The Head of Building Control confirmed a completion certificate had not been requested nor issued in respect of the neighbouring property. I understand that such a request has now been made and a certificate issued.
13. According to this set of notes, there was a discussion about site visits to check that the plans were being followed. The Director of Planning and Building Control explained that they were not carried out and that the Department relied on the general public to make complaints. It also records a number of occasions when no-one commented on Mr L's observations.
14. As explained in paragraph 8 (above) following this meeting, the Department continued its investigation and on 27 September, the Principal Planner responsible for enforcement wrote

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<sup>2</sup> In Douglas, the Borough Council has responsibility for enforcing Building Regulations rather than the Department.

to Mr L explaining that Paragraph 3 of Schedule 4 of the Town and Country Planning Act 1999 provided for time limits for the issues of an enforcement notice. In respect of building works carried out without planning permission or not in accordance with approved drawings, it was 4 years. Since that time had elapsed, it would not be possible to issue an enforcement notice and no action could be taken.

## Investigation

15. Mr L had already contacted me and following the rejection of his “complaint” in relation to the planning approval/enforcement matter, he and A came to see me. I was shown photographs of the next door extension and could see how the dormer window and side wall trespassed onto Mr L’s roof denying him access to inspect his chimney to see if the water ingress arose from the chimney or roof. Mr L was annoyed by a comment made by the Director of Planning that the problem might have a different source. A was the main speaker during this meeting and regarded the attitude of the Planning Directorate as unprofessional. A also said that advice was being obtained from Advocates. She repeated several times that “someone is going to have to pay for this” explaining that the damage was not covered by the house insurance.
16. I subsequently obtained a report from the Department, confirming the limits on investigating a late complaint about breaches of Planning or Building Regulations. This referred to enforcement being reactive (as set out in the politically approved policy). I wanted to ensure I understood this because it seemed to suggest that a person could deviate from original plans and, provided no-one complained, no action would be taken. In the reply, the Department expanded on this statement. It was not possible to check that every planning approval was carried out in accordance with approved plans. Most potential breaches were brought to the Department’s attention by vigilant neighbours or other residents, by local authorities or by double checking plans with Building Control. There were occasions when planning officers, in the ordinary course of their site visits, noticed planning breaches. The Department believed that in the vast majority of cases, people built in accordance with their approval. If they did not and enforcement action could be taken, the costs of remedying unlawful work could be considerable and this acted as a deterrent.
17. The Department also identified the “political approval” referred to in their original response. I was told that the Operational Policy for Enforcement was approved in 2018 by the Policy and Strategy Committee, the composition of which included the Minister and Political Members of the Department. This raised two issues. The work was being undertaken in 2012/13 and so pre-dates the political approval. I then asked whether the Committee was ratifying an existing “policy” which had not been approved and, if not, what was the policy in 2012/13. I also asked for details of the Committee and how its decisions were promulgated because it seems to me that the policy should be in the public domain so that everyone is aware of their civic responsibility to report apparent planning breaches immediately. In

providing the clarification I sought, the Department explained that the Minutes of the Policy and Strategy Committee were not routinely published, although on occasions extracts were released and I was provided with two extracts of the minutes of meetings where the revised policy was discussed. The Planning Enforcement policy was not the subject of any press release but was published on the Government website. I was provided with a copy of the policy as published in 2013, approved by the Political Member of the Department of Infrastructure who had responsibility for planning at that time and was also sent a copy of the submission from the then Director of Planning and Building Control. I note, in passing, that the Member signed and dated the document but did not record whether the submission was "Approved/Rejected/Referred Back".

18. The Department have not retained a copy of the earlier Enforcement Policy but I am told that the 2013 version did not deviate greatly from it. I, therefore, rely on extracts from the later version. It states that:

"The Government recognises the importance of establishing effective control over unauthorised development so as not to undermine its objectives. Thus it is an offence to carry out development without the necessary permissions. However, the proper enforcement is to ensure development complies with policy and does not result in material harm. The objective of the enforcement is compliance and not punishment."

19. The policy sets out how someone can complain but stresses that:

"A request to investigate should only be made when someone feels that the development is unlawful, and harmful or unacceptable. Complaints made because someone thinks permission should have been sought take up valuable officer time and prevents officers concentrating on harmful breaches."

Whilst it is understandable that the Department should seek to discourage frivolous or vexatious complaints, this paragraph might well act as a deterrent for vigilant individuals on whom the Department largely depends for its information about breaches of planning provisions. The Policy also points out that when they do investigate alleged breaches that:

"In many cases it is appropriate to allow for the submission of an application for a Certificate of Lawfulness or a retrospective application and allow time for a subsequent appeal before issuing an enforcement notice."

Finally, the Policy explains that the "Enforcement Service" cannot deal with "neighbour disputes". The 4 year time limit is dealt with on pages 4 and 5 of the Operational Policy, which was published in August 2018.

## Conclusion

20. One cannot but feel sympathy for Mr L and A's plight. They were having to service a mortgage on a property which had become uninhabitable. The neighbour who may be responsible for the problem was not co-operative and Mr L was not able to gain access to parts of his roof and chimney stack to investigate the water ingress. The Department have rightly pointed out the chimney may not be the cause of the problem, particularly in view of the time which elapsed between completion of work on the chimney and the first indications of damp, but Mr L was deprived of the opportunity to exclude this possibility. His builder/roofer considers it should be investigated but he could not do this.
21. Mr L is not a nosey neighbour. He was busy working on his own house and was insufficiently curious to walk along the Back Lane to observe the next-door extension as it progressed. Had he done so, he could not have failed to notice how the dormer window encroached on his property. The Department were not pro-active, and Building Control fell to Douglas Borough Council. At the time of Mr L's complaint, I did not have jurisdiction over local authorities, so I have not investigated the role played by the Building Control Officers.
22. Mr. L told me that he was eventually able to dispose of the property, but at a loss, having continued to pay a buy-to-let mortgage on an empty property and having incurred substantial legal fees. He remains angry that as a result of what he continues to regard as unfair treatment.
23. The Department rely on the time limit set out in Paragraph 3, Schedule 4 of the Town and Country Planning Act 1999. While that might prevent the Department from taking enforcement action, it would not have prevented me from finding that there had been maladministration in 2013, when the construction work was being undertaken. I have found no evidence to support such a finding. I would however ask that the Department looks again at its website page so that a person concerned about enforcement understands that they must look at both the Enforcement Policy information and the Operational Policy to obtain all necessary information. It should also consider whether, given the Department's reliance on the public to report alleged breaches, the wording could be amended so as not to discourage complaints.
24. I am also perturbed by the suggestion that those responsible for Building Control may use plans which differ from the plans approved under the planning application. This does not prevent enforcement action being taken in appropriate cases, but those plans should also be available for inspection, in the interests of transparency in planning and building control matters.

Angela Main Thompson  
Tynwald Commissioner for Administration  
26 February 2021