

Summary of Investigation Reports

Complaints against Buildings Department for Defective Follow-up Actions on Removal Orders

Foreword

Unauthorised building works (“UBW”) may pose structural or fire safety risks, as well as environmental nuisance. They may also hinder maintenance works of buildings.

2. The Buildings Department (“BD”) is empowered by the Buildings Ordinance (“the Ordinance”) to take enforcement action against UBW.

3. The following categories are “actionable” UWB items and accorded priority enforcement by BD:

- (1) items constituting obvious hazard or imminent danger to life and property;
- (2) items newly constructed;
- (3) items constituting a serious health nuisance; and
- (4) items constituting a serious environmental nuisance.

4. Since April 2011, BD has strengthened its enforcement against UBW by including UBW items on rooftops/flat roofs/open yards as “actionable”. Given the large number of UBW item involved, BD has to prioritise its enforcement actions against such items.

5. In taking enforcement action, BD will issue a statutory order to the owner concerned, requiring removal of the UBW item. BD will also register the order (commonly known as “imposing an encumbrance”) at the Land Registry (“LR”). The encumbrance will be removed upon the owner’s compliance with the removal order.

6. The Ordinance stipulates that any person who, without reasonable excuse, fails to comply with a statutory order commits an offence and is liable to a fine and imprisonment.

7. If an owner, after having been convicted of non-compliance with a removal order, still fails to comply with the order, BD will prosecute the owner again. Meanwhile, BD will consider engaging a contractor to remove the UBW item and recover the removal costs from the owner.

8. Registration of a statutory order at LR imposes an encumbrance on the property, thereby reducing the value of the property. By conducting a search at LR, a prospective buyer of the property and the mortgage institution concerned can find out whether any statutory order has been issued against a property and registered at LR. Hence, registration of orders at LR serves to urge owners to remove UBW items voluntarily as well as protecting the interests of prospective buyers and mortgage institutions.

9. Two complaint cases recently investigated by this Office reveal that BD had failed to take decisive enforcement action against a UBW item within a reasonable time, causing distress to the Owners' Corporation ("OC") of the building affected; and had not registered at LR a removal order against a certain property, thus prejudicing the interests of the prospective buyer of the property.

CASE 1: Delay in Enforcement against a UBW Item, thereby Hindering OC's Compliance with a Building Inspection Notice ("BIN")

The Complaint

10. The OC of the building complained to us that BD had on the one hand issued a BIN to the OC, and on the other hand procrastinated in taking enforcement action against a UBW item on the flat roof of the building ("UBW/FR"), which hindered the OC's compliance with the BIN.

Our Findings

BD's Enforcement Actions

11. In May **2011**, BD discovered the UBW/FR. While not posing obvious danger, the concerned UBW item was an "actionable" item.

12. In June **2012**, BD issued an order ("the Order") to the owner ("Mr A"), demanding removal of the item within 60 days.

13. In February **2013**, BD issued a warning letter to Mr A, reminding him to comply with the Order, lest he would be prosecuted.

14. In March, Mr A wrote to BD, stating that the five tenants living in the UBW/FR had financial difficulties (they were either living on social welfare or recovering from illness) and were unable to move out within a short time. Mr A asked for the removal deadline to be extended.

15. In April, BD issued a statutory notice (i.e. the BIN) under the Mandatory Building Inspection Scheme, asking the OC to complete a building inspection and necessary repairs to the common parts of the building by certain dates.

16. In September, Mr A telephoned BD, reiterating the tenants' hardships and requesting social worker service. BD, therefore, referred the case to a social worker that the Department engaged, to assist the tenants to move out from the UBW/FR.

17. In March **2015**, the tenants still refused to move out. The social worker closed the case. BD subsequently issued a warning letter to Mr A, demanding him to comply with the Order, lest he would be prosecuted. In May, BD started prosecution against Mr A.

18. In February **2016**, Mr A pleaded guilty and was fined by the court.

19. In April, as Mr A still had not removed the UBW/FR, BD instituted prosecution against him again.

20. In July, BD's inspection confirmed that the UBW/FR had been removed. Mr A pleaded guilty and was fined by the court in the same month.

Our Comments

21. As can be seen from the above, BD issued the Order in June 2012, which should have been complied with within 60 days as specified. However, BD did not issue a warning letter to Mr A until February 2013, which was more than **six months** after the deadline for compliance of the Order.

22. After issuing the warning letter, BD referred the case to the social worker and again suspended its enforcement action. The Department argued that:

The social worker recalled that in addition to liaising with Mr A, he had also visited the tenants in the UBW/FR to understand their hardships and offer assistance. However, the tenants were hostile and even threatened to report to the Police that they had been harassed by the social worker. Besides, while the social worker was following up on the case, BD reviewed case progress with him from time to time, and handled the case pragmatically.

23. However, in fact, according to the social worker's case progress reports, between November 2013 and March 2015, all he had done was contacting Mr A five times to advise him to remove the UBW/FR and reminding him of the consequences of non-compliance with the Order. And every time, the owner just claimed that the tenants had difficulties in moving out and that he would continue to persuade them. The progress reports did not mention, as claimed by BD, that the social worker had paid any visit to the tenants or that he had encountered hostility from the tenants.

24. Surely, the objective of BD referring the case to the social worker was to help the tenants move out from the UBW/FR. The progress reports, however, showed that the social worker had only contacted Mr A time and again. BD should have known

well that what the social worker was doing had deviated from the original objective and that his efforts were a sheer waste of time. Even if what the social worker claimed were true (i.e. he had visited the tenants but they were hostile), given that the tenants had refused many times his offer to help, BD should not let the social worker continue talking to Mr A. It was unrealistic to expect that such talking would result in Mr A convincing the tenants to move out. Those efforts were destined to fail.

25. The protracted dialogue between the social worker and Mr A had caused the case to drag on for a further **16 months**.

26. In the course of investigation, we were unable to ascertain the extent of delay that the UBW/FR had caused to the OC's compliance with BD's BIN. Nevertheless, we consider that since BD had already issued the Order against the UBW/FR, it was reasonable of the OC to expect that BD would take enforcement action vigorously so that the UBW/FR would be removed as soon as possible to facilitate the OC's compliance with the BIN and the necessary repair works.

27. The Ombudsman considers that BD had procrastinated its enforcement action against the UBW/FR and the delay was rather serious. That had caused great distress to the OC as it was worried that the continued existence of the UBW/FR would hinder its compliance with the BIN.

CASE 2: Delay in Registering an Order at LR, to the Detriment of New Owner

The Complaint

28. Ms B complained to this Office that BD had failed to register at LR a removal order issued in 2009 ("the 2009 Order") against a UBW item at a residential flat ("Flat X"). As a result, she purchased Flat X without knowing the existence of the UBW item. The responsibility for removing the UBW item was in the end shifted to her.

Our Findings

The Events

29. It was in August 2015 that Ms B purchased Flat X. The transaction was completed in late September 2015. Between the date of signing the sale and purchase agreement and the date of completing the transaction, the solicitors engaged by Ms B had searched LR's land registers twice. The 2009 Order issued by BD against Flat X was not shown there.

30. In November 2015, BD issued another order ("the 2015 Order"), requiring the owner of Flat X to remove the UBW item. The 2015 Order mentioned that BD had issued the 2009 Order to the former owner ("Mr C"), requiring him to remove the UBW item.

31. The responsibility for removing the UBW item was thus shifted to the new owner Ms B.

BD's Explanation for Not Registering the 2009 Order at LR

32. BD's explanation was as follows.

33. BD always register removal orders at LR, so that prospective buyers and mortgage institutions will become aware of the UBW when they conduct a land search.

34. However, prior to 2011, an internal document of BD known as "Existing Buildings Division Manual" ("the Old Guidelines") stipulated that removal orders issued under the so-called "Blitz UBW Clearance" operations were not required to be immediately registered at LR, the reason being that from BD's experience, most owners would comply with removal orders before the deadline. In order to minimise any inconvenience to the owners and to save registration costs, BD would not register removal orders at LR until after several months of non-compliance.

35. Moreover, BD explained that under section 44 of the Ordinance, a person aggrieved by any decision made by the Building Authority (i.e. the Director of BD) may appeal against the decision. Unless the Building Authority is of the opinion that an emergency exists, with effect from the day a notice of appeal is given, the Building Authority shall neither enforce nor permit the enforcement of such decision until the appeal is disposed of or unless it is withdrawn or abandoned.

36. In this case, BD issued an order in March 2009 (i.e. the 2009 Order), requiring Mr C to remove the UBW item. In April 2009, Mr C appealed against the 2009 Order. Under section 44 of the Ordinance, BD should not enforce the 2009 Order when the appeal of Mr C was under way.

37. On the grounds stated in paragraphs 34 to 36 above, BD had not registered the 2009 Order at LR.

38. As for the 2015 Order, since the ownership of Flat X had changed, BD issued the 2015 Order to the new owner to supersede the 2009 Order.

39. Since 1 April 2011, BD has adopted a new policy to promptly register at LR any orders issued under "Blitz UBW Clearance" operations. Hence, BD sent the 2015 Order to LR in June 2016 for registration.

40. BD is of the view that owners should be responsible for any UBW items found in their property. That no removal order has been issued against a particular property does not mean that the property is free from UBW. Therefore, prospective buyers should take precautionary measures (such as inspecting the property and seeking professional advice) to ascertain whether there are any UBW items in the property that

they intend to purchase. Owners or prospective buyers may also enquire of BD about any outstanding order in respect of a property, or whether there is any order pending issue. BD will provide the information.

41. There is a message on BD's website (in the Frequently Asked Questions section) reminding the public to conduct a search of the land records kept by LR or write to BD to enquire if they want to know whether there is any outstanding order issued against a certain property.

Our Comments

42. We consider that the Old Guidelines of BD basically defeated the original purpose of registering a removal order at LR, i.e. to impose an encumbrance on the property concerned, thereby urging the owner to demolish the UBW item voluntarily, and to protect the interests of prospective buyers and mortgage institutions by enabling them to know the existence of the removal order (and hence the UBW item) when they conduct a land search.

43. Deferring registration of removal orders at LR will prejudice the right to information of prospective buyers and mortgage institutions. Although the registration of orders at LR may cause some inconvenience to the property owners and BD will incur registration costs in the process, protecting the right to information (and the actual interests) of prospective buyers and mortgage institutions is of greater importance. We find it inconceivable that BD should sacrifice the interests of prospective buyers for the sake of administrative convenience, and indirectly favour the owners of properties containing UBW items. After all, any "inconvenience" to the property owners will disappear once they have complied with the removal orders.

44. Moreover, most people would not know that BD may follow the Old Guidelines and defer the registration of some statutory orders. In this case, more than six years after its issuance, BD still did not send the 2009 Order to LR for registration. As a result, the solicitors engaged by Ms B were unaware of the 2009 Order even after conducting searches at LR twice. We do not dispute that prospective buyers themselves have a responsibility to ascertain whether there is any UBW item in the property they intend to purchase, but that does not absolve BD from its responsibility to promptly send removal orders to LR for registration.

45. BD also mentioned that the reminder on its website has already alerted the public that they should do a search of the records kept by LR **or** write to BD to enquire. Nevertheless, that reminder does not tell the public that the Department may defer for several years its action of sending a removal order to LR for registration. Nor would the public know that doing a land search is actually not sufficient to safeguard the interests of prospective buyers; they **must** also make an enquiry of BD.

46. BD's practice has undermined the confidence of prospective buyers in LR as a source for verifying the status of a property before completing a transaction.

47. Furthermore, section 44 of the Ordinance only stipulates that BD shall not enforce an order until an appeal is disposed of. In fact, registering the order is fundamentally different from taking enforcement action. Our view is that BD has erred in involving section 44 of the Ordinance as a reason for not registering the 2009 Order at LR.

48. Although the 2009 Order was under appeal by Mr C, the Order in fact remained valid until the appeal was successful. BD should have registered the order at LR. If Mr C eventually succeeded in his appeal, BD could then simply register at LR its cancellation of the Order.

49. The Ombudsman considers it extremely improper of BD not to have the 2009 Order registered at LR.

50. In response to our comments, BD has undertaken to adopt the following improvement and remedial measures:

- (1) to amend its website information to remind the public that:

Some of the orders issued by BD have not been registered at LR. Even when no order has been issued against any UBW item in a particular property, that does not mean that the property is free from UBW. Moreover, the new owner will be held liable for any UBW item found in his/her property. Prospective buyers have a duty to inspect the property and check the approved building plans at BD's Building Information Centre or Building Records Access and Viewing On-line System, so as to ensure that there is no UBW item in the property. Where necessary, they should seek professional advice;

- (2) to register any outstanding removal orders at LR when the Department follow up on cases of non-compliance with the orders; and
- (3) to complete the upgrade of its information system by January 2017 to show the registration dates of all newly issued removal orders so as to facilitate the Department's monitoring.

Recommendations

51. Based on our findings in Case 1 and Case 2 above, The Ombudsman has recommended that BD:

- (1) take firm enforcement action as soon as possible against any person who refuses to comply with its removal order;
- (2) review the way social workers follow up on UBW cases, so as to avert offenders' delay tactics;
- (3) amend its website information as described in paragraph 50(1) above, as soon as possible, to remind the public that some of the orders issued by BD have not been registered at LR and that even when no order has been issued against any UBW item in a particular property, that does not mean that the property is free from UBW. BD should also notify the Law Society of Hong Kong, the Estate Agents Authority and other institutions engaging in property transactions of the amendment; and
- (4) diligently implement the remedial measure as stated in paragraph 50(2) above, i.e. registering any outstanding orders at LR when the Department follow up on cases of non-compliance with the orders.

**Office of The Ombudsman
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