

Scottish Parliament Region: South of Scotland

Case 200500176: East Lothian Council

Summary of Investigation

Category

Local government: Building Control

Overview

The complainant (Ms C) believes she was incorrectly advised of the application of administration charges by East Lothian Council (the Council) in connection with a common repair scheme, and that subsequent Council contact and documents did not contradict this belief.

Specific complaint and conclusion

The complaint which I have investigated is that Ms C was provided with inaccurate and misleading information about administration charges that the Council would make (*upheld*).

Redress and recommendations

The Ombudsman recommends that the Council:

- (i) make a courtesy payment of £100 to Ms C;
- (ii) apologise to Ms C for the misunderstanding and lack of clarity in their documents; and
- (iii) advise owners of methods of payment, reasons for charges and methods of calculation in writing at the beginning of the common repairs process.

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

Main Investigation Report

Introduction

1. On 19 April 2005 the Ombudsman received a complaint from Ms C that the Council had not charged her, as she had been advised they would, in connection with common repairs to her home.
2. The complaint from Ms C which I have investigated is that Ms C was provided with inaccurate and misleading information about administration charges that the Council would make.
3. Though Ms C's building is privately owned, the Council can give grants to help with meeting the costs of repair works and offer advice to owners on how to organize works. In the case of Ms C's building the Council held evening meetings with the owners, allowing them to ask questions in relation to the proposed works.

Investigation

4. The investigation of this complaint involved obtaining and reading all the relevant documentation, including communication between Ms C and the Council, illustrative documents prepared by the Council for common repair schemes and internal correspondence of the Council. I also met the Senior Projects Officer who had responsibility for the common repair scheme Ms C was involved with and the Head of Community Housing and Property Management. I have not included in this report every detail investigated, but I am satisfied that no matter of significance has been overlooked. Ms C and the Council have been given an opportunity to comment on a draft of this report.

Complaint: Ms C was provided with inaccurate and misleading information about administration charges that the Council would make

5. In October 2002 Ms C returned to her home, a privately owned flat on the top floor of a block, to find roof damage. She arranged for an emergency repair to be done, contacted the other residents and the Council for advice and possible financial assistance.
6. The Council arranged a meeting for the residents to discuss the actions to be taken regarding the roof damage on 18 November 2002. At this meeting, the Council's Senior Projects Manager outlined the process of common repairs. The possibility of financial help from the Council through a repair grant was

discussed, payment methods for this were outlined and their various risks discussed.

7. Following this meeting, the owners agreed upon and engaged a surveyor to give a report on the building, to give indicative costs and to proceed with the preparation of a Tender Document for builders to price, thereafter to supervise and report on the works through to completion and the owners told the Council of their decision. On 4 July 2003 the Council wrote to the owners following the Tender process, providing an updated cost estimate breakdown for the various payment methods. The Council asked for confirmation of which payment method each owner wished to use and gave each an grant application form to complete. The grant would cover a portion of the cost of the repairs. On 7 July 2003 the Council served a Statutory Repair Notice on each owner. The serving of a Statutory Repair Notice guarantees that the work will be carried out and paid for, as the terms of the Notice allow charging orders to be placed on the title deeds of the property if necessary. In line with the Council's policy on Grant Assistance, it was only following the serving of the Statutory Repair Notice that the Council made the grant available to eligible owners.

8. On 24 July 2003 Ms C told the Council she intended to pay her share 'in full to [the Council]', as indicated on the cost estimate breakdown, and she enclosed her grant application form. This application was approved on 27 August 2003. Ms C's intention to pay her share of the cost 'in full to [the Council]' was confirmed by the Council on 5 September 2003 and payment for the amount estimated on 4 July 2003 was requested. Ms C paid the requested amount. As some of the owners had indicated that they were unable to pay their share, the Council guaranteed the payment of these shares to the Contractor and the work was carried out 'in default'. Work on the property was completed in August 2004.

9. Following the completion of the work, the Council wrote to Ms C on 23 September 2004 telling her the final costs. Although the costs for the common work came in below the estimate, Ms C also had the windows replaced in her flat as part of the grant-aided scheme. The costs of the common works and the windows were reported in the cost breakdown as was an 'Administration Fee 12.5%', which is clearly noted as being 'restricted'. The final total was now higher than the costs estimated at the start of the project. The letter advised that an invoice for the additional costs would be sent under separate cover.

10. Ms C was confused by this, as she believed the Senior Projects Officer had advised her that if she paid in advance no administration fee would be charged. Her belief was confirmed by her understanding of the estimates and information provided to her throughout the common repairs process.

11. Ms C contacted the Council soon after receiving the final bill for the common repair. On 18 October 2004 the Senior Projects Officer left a message for her, explaining how and why the 'administration fee' was charged. Ms C found this message contradictory. A second call from the Senior Projects Officer explained how the fee was worked out but Ms C felt it did not provide a satisfactory explanation for why it was levied.

12. On 15 November 2004, Ms C complained to the Council by telephone. She received an acknowledgement of this on 16 November 2004. On 17 November 2004 the Senior Projects Officer telephoned and left a message on her answering machine. In this message he suggested Ms C meet with him for a full explanation. Ms C responded to this by letter on 18 November 2004 stating that she might take up the offer of a meeting in the future but wanted a written response in the first instance. A written response from the Senior Projects Officer was sent on 19 November 2004. This response said that, at early meetings with the residents, the Senior Projects Officer explained the payment options and noted:

'when an owner goes into default the Council pays the contractor on behalf of the owner [and] the Council reclaims the VAT, but Customs and Excise insist that the Council charges a fee for this. This means that an owner does not benefit from allowing the Council to pay for them. In East Lothian this was set at 12.5% + VAT. This is capped at £1250 + VAT (£1,468.75) and had you gone into default this is what you would have been charged.

In the case where you wanted to pay your share in full and immediately the administration fee is calculated at the same level as VAT that would have been payable had the money lodged gone into a Residents Account, which owners operate themselves. In your case this is £878.10. This means you saved £590 by paying in full at the start.'

This response also reiterated the Senior Projects Officer's availability to meet with Ms C at her convenience.

13. Though Ms C was dissatisfied with this explanation she did settle the outstanding amount of her liability to the Council. She corresponded with the Council over the next 6 weeks, seeking further clarification and receiving replies. These verbal and written replies consistently confirmed the amount due including the 'administration fee' and repeated the offer of a meeting at Ms C's convenience, but Ms C reiterated her request for a written response. However, her last letter of correspondence, dated 6 January 2005, remained unanswered. When the Council had not responded by 2 March 2005, Ms C wrote to the Chief Executive of the Council enclosing a copy of her unanswered letter and requesting a reply.

14. On 15 March 2005 the Chief Executive replied to Ms C. This reply enclosed documents relating to Ms C's enquiries, these included a document headed 'Points to Note from letter by [Ms C]'. This explains that the surveyors' fees are charged by the surveyors to design, specify and supervise the whole buildings project and the Council administration charge is charged so owners do not gain benefit from doing nothing and saving money if the Council do the work and reclaim VAT. It goes on to state:

'she has not been charged twice for administration. One fee is surveyors fee...and the other is [the Council] administration fee...The [Council] fee is modified to keep cost the same as if she had lodged in a Residents Account and for which VAT would be payable.

I did say no administration fee – but at 12.5%. I did say that [the Council] would modify it as above. I made it clear [the Council] does have to make a charge to meet Customs & Excise rules.'

15. Ms C responded to this letter and enclosures on 21 March 2005. She said some of her questions had still not been answered and asked if the 'administration fee' could be reduced because she did not feel she was correctly informed of the charges. She also felt that the Council's role in administering the work was minimal.

16. The Chief Executive responded to Ms C on 5 April 2005, dealing with her queries and indicating that the Council only had discretion to reduce the 'administration fee' to a level that equated to what an owner would have paid had they lodged money in a Residents Account. In Ms C's case, this had already been done. Ms C remained dissatisfied and complained to the Ombudsman on 17 April 2005.

17. Ms C told me that she had taken steps to clarify her belief that she would not be charged an administration fee if she paid in advance through the Council. She believed she had received assurances that she would not. When she had subsequently been charged an 'administration fee' she had queried this with the Council and felt that they had not adequately explained the reasons for this charge.

18. During my investigation into Ms C's complaint, it became clear that Ms C believed the Senior Projects Officer gave her verbal assurances that no administration fee would be charged. This belief was supported by Ms C's understanding of the cost allocation breakdowns sent to her during the course of the common repair. The Senior Projects Officer, however, believes that he explained clearly to Ms C that if she paid 'up front' she would be charged the lower 'administration fee', calculated at the same level as VAT.

19. Examining the information Ms C was sent by the Council, it was not at all clear to me what the 'administration fee' had been charged for. When I investigated further I found that, when works are required to properties that are managed by a Council and one or more of the individual owners is in default for payment, the work as a whole is considered to have been carried out 'in default'. This means that the Council can claim back the VAT on the work and thus cannot legitimately charge VAT to the owners. However, Customs and Excise still demand that owners in default do not benefit from this. In order to achieve this the Council must charge a fee. In the case of East Lothian Council, this was referred to as an 'administration fee' and was calculated at the level of VAT. This meant that owners who were willing to pay 'up front' would not be disinclined from doing so as they were not being disadvantaged and the works could go ahead as quickly as possible.

20. It is the Council's contention that the Senior Projects Officer sought to distinguish between the higher 'administration fee' charged to owners in default and the lower 'administration fee' charged to owners who pay 'up front' for their share of a common repair in which some owners have gone into default. However, clearly this distinction is complex and open to misinterpretation. As no minutes were kept of these meetings, it has proved impossible to clarify with certainty what was said. While the document "Payment Methods Open To Owners" dated 3 July 2003 indicated that savings would be made by an owner who did not go into default, it is clear that the information provided to Ms C on

15 March 2005, headed 'Points to Note from letter by [Ms C]' states 'I did say no administration fee – but at 12.5% (see paragraph 15).

21. The Council have advised me that, understandably, they prefer that owners take as much responsibility as possible for common repairs by opening and administering their own Residents Account from which to pay the final costs. They realise, however, that ultimate responsibility lies with them and that residents are often unwilling to take the risks involved in administering such an account. The Council, therefore, offer the alternative of allowing payment 'up front' so that owners are not forced to pay a higher cost due to the actions of others. In circumstances where the works are carried out 'in default', owners who have paid 'up front' are charged a fee capped at the level of the VAT that would have been charged had the works not been carried out 'in default'. This means owners who opt to pay 'up front' are charged the same final amount as those who open and administer a Residents Account. This was the situation which the Council had tried to communicate to Ms C.

22. In the case of the common repair of Ms C's property, cost allocation breakdowns were drawn up in November 2002 (as an example for demonstration purposes), February 2003, May 2003, July 2003 and September 2003. The first three of these were available at meetings between the Council and the owners, the final two being sent to all owners by post. Ms C said that, though she was present at the November 2002 meeting, she did not get a copy of the document there. However, all these documents follow the same format and it was these that acted as further re-assurance to Ms C that she would not be charged an 'administration fee'.

23. The cost allocation documents dated November 2002, February 2003, May 2003 and July 2003 begin with a paragraph outlining the total cost of the works as estimated to that date, the amount these would be when split into the appropriate number of equal shares and the total of each share once VAT is added. This is followed by an itemised breakdown headed 'Paying in to Residents Account or Paying in full to [the Council]'. This section lists the total cost for one share including VAT as noted in the first paragraph, the amount of the grant available, the balance that would remain to be paid and the amount charged for recording fees. Finally a total amount to pay is noted. Below this there is an itemised breakdown headed 'Owner in default'. This section lists the total cost for one share excluding VAT as noted in the first paragraph, the amount of the grant available, the balance that would remain to be paid, the

administration fee of 12.5%, the VAT payable on the fee and the amount charged for recording fees. Finally a total amount to pay is noted.

24. The cost allocation document dated September 2003, which also acted as an invoice, is set out differently. In this document the costs excluding VAT are listed first, followed by the VAT payable on these costs, the total of these amounts, the amount of the grant available, the balance that would remain to be paid, the title search fee (noted as nil), the administration fee (noted as 'nil Paying in Advance'), the VAT (noted as nil) and the recording fee for grants. Finally, the total amount to pay is noted.

25. The final costs document presented to Ms C in September 2004 is similarly set out. However, in this document the initial VAT on the total costs is noted as nil and a restricted administration fee including VAT is noted as £878.10.

26. Among the enclosures sent to Ms C with the Chief Executive's letter of 15 March 2005 was a document headed 'Comparative Cost Options'. This document laid out, in tabulated form, an itemised breakdown of costs for those paying 'to a Residents Account', 'by Default (Over Time)' and 'Up Front to ELC'. It clearly indicates the cost of work excluding VAT and then indicates that those paying 'to a Residents Account' will be liable to pay VAT and no 'Council Admin Charge', those paying 'by Default (Over Time)' will not be liable for VAT but will pay a 'Council Admin Charge' calculated as '12.5% capped @ £1250 + VAT) and that those paying 'Up Front to ELC' will not be liable for VAT but will pay a 'Council Admin Charge' calculated as 'Capped at 8.75% to equal VAT'. It also clearly demonstrates that those paying 'to a Residents Account' and those paying 'Up Front to ELC' will pay the same final amount for the works.

Conclusion

27. It has not been possible for me to reach a finding on Ms C's contention that she was assured verbally that no administration fee would be charged. This is because Ms C's belief and the Council's belief differ and there is no objective record of the relevant conversations. However, it is clear that the payment options provided by the Council are complex and that the risk of misinterpretation is high. Ms C's understanding was that no 'administration fee' would be charged if paying 'up front'. The cost allocation documents supplied to Ms C in February, May, July and September 2003 did not contradict this view.

Indeed, the September 2003 cost allocation document explicitly states that the admin fee would be 'nil Paying in Advance'.

28. The Council did offer several times to meet with Ms C to address her queries, however, Ms C wanted to receive the Council's responses and explanations in writing. A meeting may have helped Ms C to understand the charges but she wanted, and had a right to receive, a written explanation. It is my finding that the written responses and explanations Ms C did receive were inadequate. The document headed 'Points to Note from letter by [Ms C]', which Ms C received in March 2005, states 'I did say no administration fee – but at 12.5%'. This document was written by the Senior Projects Officer and clearly demonstrates that there would be potential for misinterpretation. Finally, the use of the term 'administration fee' is in itself misleading as the Council did not undertake any 'administration' for those owners who paid 'up front'. I appreciate that the Council's view is that they explained the process and charges and offered to meet with Ms C in order to clarify them. I also appreciate that Ms C, having been confused by the information that had been supplied to her, wanted to receive a written response so that she could see an explanation of the position. This explanation would have been useful to discuss with others or to use as a starting point for discussion at a meeting. The Council should have recognised that what they believed were clear statements were not clear to Ms C, and I also found the information supplied by the Council difficult to understand. In view of how easily confusion about the process and the charges could reasonably occur and was sustained, I uphold the complaint.

Recommendation

29. I am satisfied that Ms C was charged the correct sum in respect of the repairs to her building. However, due to the unnecessary and avoidable time and trouble Ms C has gone to in pursuing this matter, the Ombudsman recommends that the Council make a courtesy payment of £100 to Ms C, along with an apology for the misunderstanding and lack of clarity in their documents. I note that the Council are committed to continuous review and update of the cost allocation documents and that in the case of owners who pay 'up front' to the Council the term 'administration fee' has been altered to 'default fee'. The Ombudsman commends the Council for the action they have taken in ensuring owners have a clear picture of the amounts of money to be paid together with the reasons for the charges. In order to prevent any recurrence of the misunderstanding suffered by Ms C, the Ombudsman recommends that at the point when choices are being made regarding methods of payment, it would be

helpful to provide owners with distinct breakdowns of differing costs for paying into a Residents Account, paying 'up front' and paying in default, in the tabulated form used in the comparative cost options document supplied to Ms C on 15 March 2005. The circumstances when an 'administration fee' or a 'default fee' would be charged and the method of calculation of the amount should also be provided to owners, in writing, at the beginning of discussions into communal repairs and communicated to all owners, by post, as soon as agreement has been reached to carry out the repairs.

30. The Council have accepted the recommendations and will act on them accordingly. The Ombudsman asks that the Council notify her when the recommendations have been implemented.

20 June 2007

Explanation of abbreviations used

Ms C

The complainant

The Council

East Lothian Council