

Case 200401429: Scottish Prison Service

Summary of investigation

Category

Scottish Executive and Devolved Administration/Policy/Administration

Overview

A member of the Scottish Parliament (Mr C) complained on behalf of a village residents' association (the Association) in his constituency. Until 1999, the village had been the location of a prison, owned and run by the Scottish Prison Service (the SPS). The prison itself was sold in 2003. The SPS also owned a number of residential properties in the village, occupied by prison employees. These properties were serviced by private roads and lighting systems. Mr C complained that, prior to selling these properties to private individuals, the SPS failed to make appropriate provision for the future upkeep of the roads and lighting. He also complained that the SPS withdrew, without notice, from a funding agreement they had entered into that he claimed would enable works to be done to the roads and lighting to allow the local authority to take over responsibility for them.

Specific complaints and conclusions

The complaints which have been investigated are that:

- (a) the SPS failed to make appropriate provision for the future upkeep of the private roads and lighting systems before selling them (*not upheld*); and
- (b) the SPS withdrew, without notice, from a funding agreement to pay for a share of the costs of upgrading the private roads and lighting to a standard that would be satisfactory for the relevant local authority to adopt (*no upheld*).

Redress and recommendations

The Ombudsman has no recommendations to make.

Main Investigation Report

Introduction

1. On 27 October 2004 the Ombudsman received a complaint from a member of the Scottish Parliament (Mr C) on behalf of the residents' association of a village within his constituency. For the purposes of this report, the village and the residents' association will be referred to as Village C and the Association respectively. A reminder of these and other abbreviations is at Annex 1.

2. Until 1999, there had been a prison located in Village C, owned and run by the SPS. The complaint was originally assessed as being ineligible for investigation by this office, but after further information was provided, the complaint was deemed to be within jurisdiction.

Investigation

3. In investigating the complaint, I examined documents provided by the Association and documents and information provided by the SPS and the Council. I also discussed the background to and history of the complaints with Mr C, and the Association's former Secretary (the Secretary).

4. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mr C, the Association and the SPS were given the opportunity to comment on a draft of this report.

(a) The SPS failed to make appropriate provision for the future upkeep of the private roads and lighting systems before selling them

5. This complaint has a long history originating in the early 1980s and the fact that events which are important to the complaint happened so long ago has hampered our investigation. However, it is necessary, to understand the complaint and my conclusions, for me to set out the background here.

6. The position in 1980 was that the Scottish Office (SO), as it then was, owned 73 residential properties in Village C which were occupied by staff working in the local prison. Under the Tenants' Rights (Scotland) Act 1980, the SO offered the properties for sale to the staff living in them, but before doing so, they wrote to the relevant local authority at the time (the Council) to ask if the Council would

consider adopting the roads that served the houses. They advised the Council that the properties would become private dwellings and 'We would not wish to transfer the responsibility for road maintenance to the owners'. They also said that 'The roads are in excellent condition but [we] would be prepared to consider such improvements as [the Council] might think necessary to bring them up to an acceptable standard'.

7. In April 1982, the SO, writing in the capacity of being responsible for the SPS, wrote to the Governor of the prison located in Village C to explain the delay in progressing the application to buy properties which had been submitted by some employees and stated:

'In most cases where there has been a delay it is due to the fact that roads and drains are owned by the Secretary of State for Scotland who is responsible for repairs, maintenance etc. Thus if the houses are sold that responsibility, or part of it, will have to be accepted by the purchasers. For this reason the Department has been seeking to have the roads and drains in the area of the quarters adjacent to the Institution adopted by the local authority, in which event the local authority will assume responsibility for repairs and maintenance. But the local authority will adopt only if the roads and drains meet their standards and accordingly on-site meetings are being arranged with the local authorities to discuss their requirements. If these can be met without major expenditure the necessary work will be put in hand, but if not, responsibility will have to be passed on to the purchaser'.

8. In 1986, properties in Village C which had not been bought by prison employees were put on the open market and sold to private owners. Legal documents show that all purchasers accepted, through their Deeds, a 1/80 'pro indiviso' share of the maintenance and liability for the overall site's roads and lighting. In relation to the ownership of property, prov-indiviso means held in common as in an undivided manner. A person with a pro-indiviso interest in property has no absolute right to any particular portion of the property merely an interest, shared with the other pro-indiviso proprietors in the whole property.

9. In February 1989, the SO wrote in a letter to the Secretary:

'The Department intends to upgrade the roads and surrounding paths around your properties to the standard required by [the Council] prior to [the Council]

adopting these road into their care. There is at present no fixed timetable for the work to be carried out and accordingly no estimate of the costs to be made.

The cost to individual home owners in the area will be 1/80 of the total cost as set out in the disposition of sale'.

10. There is a further letter dated 27 April 1989 from the Council to a local Councillor that stated:

'I confirm that for some time now (over a number of years) discussions have taken place between the Prison Authority and ourselves regarding the work required to bring the roads and lighting in the streets adjacent to the prison up to adoptable standards.

11. As far as I am aware the discussion in regard to roads and footpaths has progressed satisfactorily and recently we sent them the final design for lighting. In this respect there was some delay since December 1988 because of our other design commitments.

12. I now await from them acceptance of our work requirements in regard to both roads and lighting and provided works are carried out to our satisfaction the roads including lighting would normally be adopted after a twelve month maintenance period'.

13. In August 1989, the SO wrote to the Secretary, confirming that the negotiations concerning the adoption of the roads and lighting between the SO and the Council had reached agreement on the extent of the work and specifications required prior to the Council adopting them. The letter stated it was the Department's intention to upgrade the roads to the Council's requirements once the finances were available.

14. The Secretary wrote to the SPS in November 1990 asking the SPS to confirm their intention to have the roads and lighting adopted by the Council. The SPS replied on 6 December 1990 that:

'At the time we wrote we were still the majority occupier and it was our intention to upgrade the roads to local authority standards as and when

finance became available. However, it was never suggested that the Department would bear the whole costs of these works. We would have paid the bill initially and recovered the cost from the owner/occupier, each of whom would be responsible for 1/80 of the cost'.

15. In January 1991, the Secretary wrote to the Council chasing up an earlier letter he had written to them, and stated:

'These roads have been sold to each of us here in 1/80th shares, so we now commence discussions with you, picking up from where the Scottish Office left off. I would, therefore, also ask if grants are available to us since it is our opinion that the best method of upkeeping the roads and lighting here would be for [the Council] to do it since you have the technical skills and know how required for the task, and we pay [community charge] anyway'.

16. In February 1991, the Council wrote to the Secretary to say they could not act as consultants to the Association in the matter, but offered to meet with them to advise them of the legalities and technicalities involved in the adoption of the roads and lighting. They also advised that the last estimate for the required works was £180,000, that no grants were available and the required works must be at the owners' expense.

17. A meeting was held between the Association and the SPS in May 1992. Following that meeting the SPS wrote to the Secretary and confirmed what was agreed at the meeting. The letter stated:

'The background is that all former quarters at [Village C] were sold by the Department with burdens clearly defined. The prices realised were substantially lower than would otherwise would have been the case due to the existence of these burdens. The legal position is, therefore, that all owners, and the SPS in respect to the property it continues to own, are jointly responsible for meeting the cost of maintaining the roads, drainage and lighting systems.

18. In the case of major upgrading the SPS would be prepared, in principle, to coordinate the work, but there would require to be an undertaking in advance that each owner would meet their share of the cost. Discussions took place some time ago with the local authority on the extent of upgrading necessary to bring the road

and lighting systems up to adoptable standards. It was never intended that the work would take place unless agreement was reached with all owners that each would be responsible for their share of the total cost. The estimated cost of bringing the systems to adoptable standard is some £200,000, approximately £2,500 per owner.

19. At the meeting you undertook to determine the position of the residents in relation to meeting these costs; or if this was unacceptable to establish the scale of maintenance they require and advise me accordingly. We will then seek to provide an estimate of the costs. Thereafter, provided that the majority of owners sign agreements guaranteeing their share of the costs in time to allow the contractor to be paid as the work progresses we will arrange for the works to be carried out'.

20. On 7 December 1992 the local MP at the time wrote to the SO, on behalf of the Secretary, and stated that the residents were not prepared to meet the cost necessary to bring the roads and lighting up to an adoptable standard. He asked the SO to undertake work to bring the roads up to the standard he claimed they should have been at the time of sale. The Secretary's view now is that it was his opinion at that time that the residents may not be willing to pay, but he could not speak for them as it was an individual matter.

21. The SO replied to the MP in January 1993 and explained that all house sales were made on the basis that a pro-indiviso share of the private roads and lighting were transferred with each property, and that the price reflected the inclusion of the burdens conveyed to new owners. They stated it would be 'improper use of public funds' for the SPS to undertake maintenance works unless all owners guaranteed in advance to meet their share of the costs involved.

22. I asked the SPS to clarify when it was decided to transfer a share of the responsibility for the maintenance of the private roads and lighting to the purchasers of the properties being sold by the SPS, and the reasons for this decision. The SPS replied:

'... It appears that the discussions with [the Council], referred to in [writing in October 1981] continued and a specification for the cost of work to bring the roads up to an adoptable standard was provided. The procedure, with previous quarters for sale in other areas, was that the Prison Department as it

then was would meet the cost of these upgrades in the knowledge that the money from the house sales would cover the earlier outlay. Once complete, the relevant Council would then assume the responsibility for the roads and lighting thus relieving the purchasers of any future maintenance burdens. When, however, the properties at [Village C] were first offered to the staff occupying them in late 1981, there was only one application to buy. Given this very poor response the application was put on hold whilst the cost implication of carrying out the upgrade to Council standard with little or no chance of any return, or repairing and retaining the private roads was considered. A decision by Ministers regarding the disposal of further properties in the area and the views of the Scottish Prison Officers' Association about who should be eligible to purchase these properties were also factors taken into consideration.

23. When the sale of the first [property in Village C] did complete in January 1984 the position with regard the release of further properties for sale had still not been clarified. As such, the expenditure required to bring the roads up to Council standard to allow them to be adopted could not be justified and the property was, therefore, conveyed with a pro indiviso share and maintenance liability for the roads, street lighting and sewage system. Although the matter of upgrading the roads to an adoptable standard remained a possibility, to protect the position of the Department, instructions were put in place to ensure that any further sales of properties at [Village C] were made subject to the same conditions and burdens.'

24. I also asked the SPS to state by how much the properties they sold in Village C were reduced to reflect the burdens included in the sale, and how that reduction in price had been determined. In response the SPS stated:

'The sales price of the properties was set by the District Valuer. As with all property valuations the price set would have reflected the condition of the properties, their location, the availability of amenities as well as any burdens associated with the property. Potential purchasers would also have been required to have carried out a survey to obtain a mortgage and this survey should have highlighted the value of the property and how this had been calculated. Those properties sold to staff under the Sale of Prison Service Quarters Disposal Scheme (24 properties out of a total of 73), which reflected

the Tenants' Rights Act 1980, also benefited from a further discount based on their previous length of tenancy in prison quarters'.

25. The copy of the property schedule I have examined in respect of four of the properties offered for sale on the open market shows houses with three bedrooms and two public rooms priced at offers over £18,000 in 1997.

(a) Conclusion

26. My investigation has established that there was no requirement for the SPS to ensure that the Council adopted the private roads and lighting that served the properties they sold.

27. It is clear that when the SO planned to sell off the staff quarters in Village C, they were aware of the potential difficulties that would result if they passed responsibility for maintaining the private roads and lighting to the purchasers of the properties they served, and sought to avoid doing so. With this in mind, records show that the SPS made enquiries of the Council in October 1981 about the possibility of the Council adopting them as public roads before they sold any of the properties, with the intention of paying the full cost of upgrading them to the Council's standards.

28. The SPS have explained why they decided not to pay for the required upgrading themselves, that is, that because the position regarding release of further properties for sale had not been clarified, the SPS could not justify the expenditure to bring the roads up to a standard the Council would consider adopting for just one purchaser.

29. The SPS remained the majority occupier of the relevant properties until 1989, and up until this time I am satisfied they continued to negotiate with the Council about the work that would be required to be carried out, in order for the Council to agree to adopt the roads and lighting.

30. The SPS made it clear in their letter to the Secretary in February 1989 that they would not pay the whole cost of the upgrade, but that each of the individual home owners in the area would pay 1/80 share, as set out in the missives and disposition of sale. The SPS intended to do the work required, and then recover

the cost from the other property owners. The Secretary did not raise any objection to this at the time.

31. I have not been provided with any evidence that the Secretary, or any other property owner, complained to the SPS about their decision to cease taking responsibility for doing the required work on the roads and the lighting at this time. Instead, evidence shows that the Secretary approached the Council in 1991, to pick up negotiations where the SO had left off.

32. When no progress had been made by May 1992, the SPS agreed they would arrange for the required works to be done, but on the condition that all the property owners first signed a binding agreement to guarantee they would pay their share of the costs, which was estimated at £2,500 each. The property owners refused to agree to contribute as required. As a result of this, the work was not done and the Council did not adopt the roads and lighting.

33. I have considered whether, if the SPS had carried out the work required by the Council to bring the roads and lighting up to the standard required in 1989, the owners would have been in a different position. My view is they would not. The SPS would have required the property owners to pay 1/80 of the costs that had been incurred. It is unlikely that the amount would have been substantially less in 1989 than in 1992.

34. The price of the properties offered for sale reflected the fact that the owner would take on a burden for maintaining the roads and lighting in the area. It was for prospective purchasers and their legal representatives to satisfy themselves about all aspects of the properties including the full extent of the burdens, and the likely costs involved. It would have been for the prospective purchasers to determine, in light of the burdens attached to the property, whether the sale price was reasonable.

35. I do not uphold this complaint.

(b) The SPS withdrew, without notice, from a funding agreement to pay for a share of the costs of upgrading the private roads and lighting to a standard that would be satisfactory for the relevant local authority to adopt

36. Mr C, in referring the complaint to the Ombudsman, wrote that 'Although the SPS deliberately prolonged the negotiations and procrastinated at every opportunity in relation to the roads and lighting upgrades, at no time did the SPS indicate that the sale of the [prison] would lead to their withdrawing from their funding agreement. The other partners negotiated in good faith and on the clear understanding that the SPS had earmarked the necessary funds for investment in [Village C]. The SPS thus acted in bad faith.'

37. Until the prison located in Village C closed the SPS had maintained the relevant lighting, and had also undertaken repairs in 1994 to some of the roads.

38. A number of meetings took place between the Council and the Association in 2001 with a view to finding an acceptable scheme that would allow the Council to adopt the roads and lighting in Village C under the Roads (Scotland) Act 1984 (the Act). The relevant extracts of the Act are set out at Annex 2.

39. The Chief Executive of the Council wrote to the SPS in December 2001 and said:

'I understand that there were conditions contained in the deeds whereby residents would bear 1/80 of the cost of maintaining the private roads. This maintenance apportionment is not disputed. However, the Council considers that this apportionment does not represent an equitable distribution of costs for upgrading the roads to an adoptable standard. The Roads (Scotland) Act 1984 gives discretion to the local authority as to the apportionment of costs for upgrading roads to an acceptable standard and I remain of the view that your share of the upgrading costs comprising 34.9% is fair and equitable. This apportionment is based on the length of the frontage and gives a reasonable apportionment of potential highway loading.

40. You will be aware that the residents have previously referred this matter to the Scottish Executive Petitions Committee. The residents have advised my staff that whilst they recognise the conditions in the deeds, the extent of the maintenance burden in financial terms was not appreciated. Following the

foregoing Committee Meeting, the Council has agreed to undertake the design and supervision by way of an 'in kind' contribution. The Council is also investigating grant aid on behalf of the residents'.

41. In May 2002, the Council wrote to the SPS and stated that the estimated cost of the upgrading works was £320,000, of which the costs of the upgrade work for the lighting were estimated at £40,000. The Council required the SPS to pay 34.9% of the total costs. The SPS advised the Council in August 2002 that they agreed in principle to the roads and lighting being brought up to adoptable standard, and that they would be willing to pay their 34.9% share.

42. Owners indicated that they could not afford to pay their share, estimated to be around £2,700 per household. As a result, the Council proposed reductions and revisions to the works specification which reduced the total estimated costs by over £40,000.

43. The Council asked the SPS whether they would commit to the original figure proposed under the original specification, despite the fact the cost of the revised specification was substantially lower. In March 2003, the SPS responded by stating they could not accede to this request and could only commit to meeting a 34.9% share of the total, revised, costs in line with their statutory obligations. They made clear this commitment was subject to the SPS still retaining an interest in the site.

44. The SPS reaffirmed its position again in August 2003. They would be willing to meet with the Council and residents with a view to progressing details of a scheme agreeable to all parties, and they remained committed to meeting a 34.9% share of the total costs of upgrading the roads and lighting system as long as they remained responsible for the former prison and associated land.

45. On 2 October 2003, the SPS wrote to the Council and stated:
'... following receipt of an acceptable offer and successful negotiations, the sale of the property has now been concluded. I confirm that the responsibility for the property has passed to the new owner ... with effect from 17:00 on 2 October 2003

Please note that all the burdens associated with this property, with the exception of the sewage treatment system, have also transferred over to the new owner and I would, therefore, be grateful if you could direct any further enquiries regarding the proposed upgrade to the roads and lighting to [him]'.

46. I asked the SPS to confirm when they first advised the Council and the Association that they were in negotiations with a prospective purchaser for the prison site. The SPS referred me to a note of a meeting held with representatives from the Council and the Association on 24 September 2002, which stated 'Potential Purchaser for former [prison] – can he be asked to fund part of this'. They also referred to a written question raised in 2001 in the Scottish Parliament asking the Scottish Executive what steps had been taken regarding any possible sale of the former prison. In response to that written question, the SPS said that, as a result of a sales campaign, an offer had been accepted and negotiations were ongoing to conclude the sale as quickly as possible.

(b) Conclusion

47. The Act provides for a roads authority to undertake necessary works to bring a road up to an adoptable standard if the majority of the frontagers agree, and then recover the costs incurred from the frontagers. In this case, it is clear the Council were negotiating with the relevant owners and the SPS with a view to reaching a funding agreement that would be acceptable to all parties.

48. It is also clear that the SPS agreed, in principle, to pay 34.9% of the total costs of upgrading the roads and lighting under the terms of the Act, and in line with its statutory obligation. Evidence shows they also confirmed this agreement would be honoured as long as they retained an interest in the former prison and associated land.

49. I consider that the reason a funding agreement had not been reached by the time of the sale was not due to any delay or prevarication on the part of the SPS, but because the private property owners refused to pay their share of the apportioned costs of the upgrade. I have not seen any evidence that SPS deliberately prolonged the negotiations or procrastinated at every opportunity, or that they acted in bad faith, as Mr C alleges.

50. It is clear that the SPS decided that to pay any greater contribution than their legal obligation would not be a reasonable and prudent use of public funds. I see no grounds for questioning that decision.

51. When the SPS sold the former prison, they no longer had any statutory obligation to pay a percentage of the upgrade costs, that obligation transferring to the new owner and records show that information concerning the SPS's intention to sell the former prison as quickly as possible was in the public domain in 2001.

52. The actual completion date of the sale may have taken the Council and the other property owners by surprise, but I find that they were aware the property was for sale, and the SPS had made it clear that their funding of any upgrade to the roads and the lighting was dependant on them retaining an interest. Consequently I do not uphold this aspect of the complaint.

27 February 2007

Annex 1

Explanation of abbreviations used

Mr C	The complainant
The Association	The residents' Association of Village C
The SPS	The Scottish Prison Service
Village C	The village in which the prison and properties owned by the SPS were located
The Secretary	The residents' association's former secretary
The Council	The local authority which had jurisdiction over Village C
SO	Scottish Office, the predecessor of the Scottish Executive
Pro-indiviso	In relation to ownership of property pro-indiviso means held in common as in an undivided manner. A person with a pro-indiviso interest in property has no absolute right to any particular proportion of the property, merely an interest, shared with the other pro-indiviso proprietors in the whole property.
The Act	The Roads (Scotland) Act 1984
Frontager	Someone who owns or occupies property along a road, river, shore etc.

Extracts from the Roads (Scotland) Act 1984

s 13 Making up and maintenance of private roads.

(1) The local roads authority may by notice to the frontagers of a private road require them to make the road up to, and maintain it at, such reasonable standard as may be specified in the notice.

(2) Without prejudice to the generality of subsection (1) above there may be required by notice under that subsection work as regards levelling, paving, lighting or drainage.

(3) A notice under subsection (1) above shall, without prejudice to the generality of section 136 of this Act, specify -

(a) the local roads authority's estimate of the cost of the work required by the notice;

(b) a scheme whereby the cost is to be apportioned among the frontagers (being a scheme which is equitable in the opinion of the authority and which describes for each frontager the proportion of cost to be paid by him); and

(c) the dates by which the work shall be commenced and completed;

Provided that the authority may subsequently by notice allow a postponement of commencement or completion (or both).

(4) Without prejudice to subsection (5) below, a requirement imposed on frontagers by a notice under subsection (1) above may, if the requisite number of the frontagers so agree, be fulfilled on behalf of the frontagers by the local roads authority.

(5) Where the date specified in a notice under subsection (1) above for the commencement or, as the case may be, completion of the work specified in the notice expires without the work having been commenced or, as the case may be, completed, the local roads authority may carry out or complete the work.

(6) Without prejudice to section 14 of this Act, the expenses incurred by a local roads authority under subsection (4) or (5) above shall be recoverable from the frontagers in accordance with the scheme referred to in the notice mentioned in those subsections.

(7) A person upon whom a notice has been served under subsection (1) above may within 28 days of such service appeal by summary application to the sheriff; and the sheriff's decision on the matter shall be final.

(8) In subsection (4) above, 'the requisite number' has the same meaning in relation to the private road and the land fronting or abutting the road as it has in section 1(7) of this Act in relation to the road and land mentioned in that section.

s 14 --Power to contribute to, or carry out, work on private roads.

(1) A local roads authority may, if they think fit, pay the whole or any part of any expenditure incurred by a person in making up or maintaining a private road; and may, without prejudice to section 15 of this Act, at their own expense carry out any repair which they consider necessary in relation to a private road after giving such notice as is reasonable in the circumstances.

(2) For the avoidance of doubt –

(a) a local roads authority do not incur responsibility for making up or maintenance of the private road by reason only of their acting under subsection (1) above;

(b) the carrying out of work by a local roads authority under subsection (1) above does not create any implication that the private road, on completion of the work, is of a standard satisfactory to the authority for the purposes of section 16(1)(b) of this Act.

[...]

s 16 Application for private road to become public road.

(1) If a private road –

(a) is of such standard as has last been required by relevant notice under section 13(1) of this Act; or

(b) where no such standard has been so required, is of a standard satisfactory to the local roads authority,

then, if application is made to them under this subsection by the requisite number of frontagers for such addition, the authority shall, subject to subsection (4) below, within 12 months of the application add the road to their list of public roads:

Provided that where the requirement mentioned in paragraph (a) above has been fulfilled by the authority under subsection (4) of the said section 13 or the work specified in the notice has been carried out or completed by them under subsection (5) thereof no such application shall be required and the authority shall add the road to the said list forthwith.

(2) If, on completion of a private road constructed in accordance with a construction consent granted under section 21(3) of this Act, the person granted

such consent applies, as respects the road, under this subsection to the local roads authority they shall within 12 months of the application add the road to their list of public roads.

(3) Any dispute in relation to –

(a) subsection (1) above, between the local roads authority and any frontager; or

(b) subsection (2) above, between that authority and a person applying (or purporting to apply) under that subsection,

shall be determined by arbitration by a single arbiter appointed in default of agreement by the sheriff on the application of either party.

(4) Without prejudice to any addition made under subsection (1) or (2) above, the said subsection (1) or as the case may be (2) does not impose a duty as respects a road which within the period there allowed for such addition deteriorates to a standard below that mentioned in the said subsection (1).

(5) In the foregoing provisions of this section –

'road' does not include a footpath; and

'the requisite number' has the same meaning in relation to that road and the land fronting or abutting the road as it has in section 1(7) of this Act in relation to the road and land mentioned in that section.