

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

**Neutral Citation Number: [2018] UKUT 140 (LC)
Case No: LRX/47/2017**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Service Charges – disclosure – tenant wished to challenge service charge on unspecified grounds – landlord ordered to provide evidence to substantiate all costs – landlord provided detailed summary identifying each area of charge and amount claimed together with properly pleaded claim – tenant asserted that disclosure inadequate and failed to identify any area of challenge respond to landlord’s Scott Schedule or file a Statement of Case within time specified by the order or at any time. Ft-T ruled (on 2 occasions) that disclosure adequate and debarred tenant from defending – held disclosure was sufficient to enable the tenant to file a statement of case and to identify areas of dispute. – tenant plainly in breach of directions. Debarring order within the discretion of F-tT with which the Tribunal would not interfere. Appeal dismissed.

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE
FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)**

BETWEEN:

MS ALLISON CHARLES

Appellant

- and -

**THE MAYOR AND BURGESSES OF THE
LONDON BOROUGH OF TOWER HAMLETS**

Respondent

**Re: 1 Fraserburgh House,
2 Vernon Road,
London. E3 5HF**

His Honour John Behrens

Royal Courts of Justice, Strand, London WC2A 2LL

on

17 April 2018

The Appellant appeared in person

Mr Jeff Hardman instructed by Tower Hamlet Homes appeared for the Respondent

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No cases are referred to in this Decision

DECISION

Introduction

1. This is an appeal by Ms Charles against the decision of the First-Tier Tribunal (“the F-tT”) made on 23 January 2017. By its order the F-tT debarred Ms Charles from taking further part in the dispute relating to the service charges payable for the 2013/4 and 2014/2015 in respect of Flat 1 Fraserbugh House, Vernon Road, London E3. It went on to determine that the whole of the service charges claimed by The London Borough of Tower Hamlets (“the Council”) in respect of Flat 1 was payable.

2. The Council is the owner of Flat 1. Ms Charles is the tenant of Flat 1 pursuant to a lease of 125 years from 4 July 1983. The lease contains provisions enabling the Council to recover a service charge.

3. On 14 April 2016 the Council issued County Court proceedings to recover £2,008.93 in respect of the Service Charge, Ground Rent and Building Insurance for the years 2013/4 and 2014/2015. In addition, there was a claim for interest in the sum of £211.53.

4. On 25 May 2016 Ms Charles filed a detailed defence challenging the service charge. One of her contentions was that the Council had failed to provide access to the supporting accounts in accordance with the Lease and s.22 of the Landlord & Tenant Act 1985 (“the 1985 Act”). On 14 July 2016 DDJ Perry transferred the claim to the F-tT.

5. On 22 September 2016 the claim was considered by Judge Carr at a Case Management Hearing. At that hearing the Council was represented by a Solicitor, Mr Schooling. Ms Charles represented herself. Judge Carr identified the issues between the parties and gave detailed directions including a direction that the final hearing of the dispute would take place on 12 December 2016.

6. It will be necessary to refer to the directions and the subsequent chronology in more detail below. For present purposes it is sufficient to note that Judge Carr required the Council to provide Ms Charles with evidence to substantiate all costs for the years in dispute.

7. The Council purported to comply with its disclosure obligations by providing Ms Charles with the annual service charge certificates and breakdowns and inviting her to inspect the service charge files and documents. It was Ms Charles’s case that this did not comply with the order of Judge Carr. This resulted in correspondence between Ms Charles, the Council and an application by Ms Charles for a stay. A judge of the F-tT refused the stay. Ms Charles

applied for permission to appeal. This was refused by the F-tT. The judge dealing with the application gave as one of her reasons that the Council had complied with its disclosure obligation. A further application to this Tribunal for permission to appeal against the refusal of the stay was dismissed by the Deputy President albeit after the 12 December 2016.

8. Meanwhile Ms Charles did not file her statement of case or respond to the Council's case as required by Judge Carr's order. In the result the Council made an application for an order debaring her from taking further part in the application. The F-tT decided to deal with the application as a preliminary issue on 12 December 2016. The claim duly came before the F-tT on 12 December 2016.

9. As already noted the application succeeded and the F-tT determined all issues in the Council's favour. Ms Charles sought permission to appeal. On 27 July 2017 the Deputy President granted Ms Charles permission to appeal.

Previous proceedings

10. This is not the first dispute between these parties. In 2014 the Council issued County Court proceedings in respect of the service charges for the 4 years between 2009 and 2013. The matter was transferred to the F-tT and there was a hearing lasting 3 days in November 2014. In a ruling dated 19 December 2014 the Council succeeded on practically every point. An application by Ms Charles for permission to appeal was refused by the Deputy President on 31 July 2015. On 20 November 2015 Ms Charles submitted an application for Judicial Review. This was refused by Cheema-Grubb J on 8 Jan 2016 and finally by Gross LJ in the Court of Appeal on 15 Apr 2016. The application to the Court of Appeal was described by Gross LJ as "totally without merit".

11. The matter reverted to the County Court. Judgment was entered against Ms Charles in the sum of £5,793.60 on 6 May 2016. Permission to appeal from this judgment was refused on paper by the Court of Appeal on 20 October 2016 and again following oral submissions in March 2017.

The Lease

12. The lease is dated 15 January 1990. It was for a term of 125 years from 4 July 1983. The original tenant was entitled to a discount of 70% and paid a premium of only £14,700. The annual rent was £10 payable on 1 April each year.

13. Under cl 4(4) the tenant covenanted to pay "the interim charge and the Service Charge at the time and in the manner provided in the Fifth Schedule"

14. The Fifth Schedule contains detailed provisions regarding the Service Charge. It is not necessary to refer to all of the provisions. However:

1. Under para 1(2) the Service Charge is defined as “such reasonable proportion of the Total Expenditure (as defined) as is attributable to the Demised Premises”.
2. Under para 1(3) the Interim Charge is defined as “such sum to be paid on account of the Service Charge ... as [the Council] or their Managing Agents shall specify at their discretion to be a fair and reasonable interim payment”.
3. Under para 6 after the expiry of each accounting period the Council or their Agents are required to serve on the tenant a certificate containing the amount of the Total Expenditure, the Amount of the Interim Charge paid by the Tenants of the Building and the Amount of the Service Charge.
4. Under para 7 the tenant has a right of inspection in the following terms:

The Lessee shall be entitled at his own expense and on prior payment of any costs to be incurred by the Lessors or their Agents at any time within one month after service of such certificate to inspect the receipts and vouchers relating to the payment of the Total Expenditure.

15. There is in fact a further right of inspection under s.22 of the 1985 Act where a tenant has received a summary of costs from the landlord. Under such circumstances the tenant may require the landlord to afford him reasonable facilities for inspecting the accounts, receipts and other documents supporting the summary and for taking copies or extracts from them. Under s.22(5) the landlord must make inspection facilities available free of charge. However, if the tenant wishes to take copies or extracts the landlord is entitled to payment of “such reasonable charge as he may determine.”

The hearing before Judge Carr

16. At the outset of the hearing Ms Charles applied for the action to be stayed pending criminal proceedings against the Council. That application was refused on a number of grounds. Judge Carr went on to give detailed directions including 9, 10 and 11.

9. By 30 September 2016 the landlord is to provide to the tenant the evidence to substantiate all costs incurred for the years in dispute. At the directions hearing there was some dispute as to whether the standard evidence that the Applicant provides is sufficient to demonstrate that the charges are payable and reasonable. The Tribunal made it clear that any argument about the quality of the evidence provided by the Applicant is a matter to be resolved at the hearing.

[Direction 10 provided for the Council to provide by 14 October 2016 a Scott Schedule in a specified form and the Statement of Case It is not necessary to set it out in detail]

11. By 4 November 2016 the tenant shall send to the landlord:
- the landlord's schedule, having completed the column for the tenant's comments with her responses to the landlord's claim.
 - a full statement in response setting out the specific reasons why she considers the demands are not reasonable and payable."

17. The Directions then provided for a brief reply by the Council, exchange of witness statements, the possibility of experts, a bundle of documents, a hearing date and a time estimate of 1 day.

18. The order contained in bold type at the front an Important Notice which warned the parties that failure to comply could result in serious detriment to the defaulting party. It gave as an example that the tribunal might refuse to hear all or part of that party's case.

The Council's compliance with Direction 9

19. On 29 September 2016 Mr Schooling, the solicitor instructed by the Council, sent Ms Charles a two page letter with a number of enclosures. He described the enclosures as "the service charge certification for the years 2013/2014 and 2014/2015 together with the backing information and calculations [the Council] intends to rely on". In the letter he repeated the offer to Ms Charles to view the inspection files pointing out that there were four lever arch files for each year. He expressed the view that the documentation disclosed was sufficient to justify the service charge and offered to make copies of any document requested for a fee.

20. The enclosures comprised some 45 pages comprising:

1. the Service Charge certificates for each year. Each certificate identified each item of expenditure, the percentage attributable to Flat 1, the estimated cost and the actual cost the difference being attributable to the service charge.
2. The invoices for rent, building insurance, estimated service charge and service charge.
3. A document summary for each year divided into 10 sections, one for each element of the service charge. Each section described in detail the nature of the work referred to, identified the invoice date, the completion date and gave a breakdown of the cost. It did not however include copies of the invoices nor did it provide the date when the payment was made by the Council.

21. There was some debate before me as to the usefulness of the lever arch files. Mr Hardman took me to correspondence between October 2014 and May 2016 which showed that

Ms Charles had viewed the 2013/2014 files and been invited to view the 2014/2015 files on more than one occasion. However, these files did not show all of the documents that Ms Charles wanted to see to satisfy herself that the items charged for had been properly incurred and paid for by the Council. The matter was made more complicated by the fact that a significant number of the documents in the document summary did not or might not exist. This was because there were Service Level Agreements and Qualifying Long Term Agreements that covered some of the individual items.

22. Ms Charles accepted before me that inspection of the files would not have been sufficient to satisfy her. It would, however have assisted her and enabled her to see whether the apportionments between the individual leaseholders were justified.

Service of Statement of Case and Scott Schedule

23. The Council's Scott Schedule and Statement of Case were served on 12 October 2016. The Statement of Case refers to 8 invoices – 4 for each year – comprising invoices for the estimated service charge, the actual service charge, the ground rent and the building insurance. It identifies the relevant clauses in the lease and asserts that the sums are payable. The Scott Schedule divides the claims up into the sections referred to in the document summary served on 29 September 2016. In respect of the items claimed it asserts they are reasonable and that items calculated in the same way were upheld by the F-tT in the 2014 proceedings.

Other events before 12 December 2016

24. On 30 September 2016 Ms Charles wrote to Mr Schooling requiring him to send her all the documentation necessary to evidence the costs incurred. She pointed out that Judge Carr had pointed out that she would have 8 weeks to prepare her case from the date the documents were sent.

25. Mr Schooling replied on 3 October 2016 asserting that liability would be established on the balance of probabilities on the basis of the documents provided. He referred to the final sentence in direction 9.

26. On 4 October 2016 Ms Charles sent a letter to the case officer at the F-tT dealing with the case. She asserted that the Council had failed to comply with direction 9. She asked that the directions be varied and that the case be stayed pending the outcome of a criminal investigation and also her appeal against the 2014 county court decision (which was pending).

27. Mr Schooling responded to the application by a letter dated 10 October 2016. He opposed the application on a number of grounds. He asserted that the Council had complied

with the directions order; The request that the Council should provide copies of its inspection files relating to its property portfolio amounted to a fishing expedition, would be contrary to the overriding objective and a disproportionate way of dealing with the case. He pointed out that the photocopying costs of all the files would be £638.40 – a third of the money in dispute. He pointed out that there had been 5 offers to enable Ms Charles to inspect if she wanted to. She had not chosen to inspect in respect of the files.

28. On 31 October 2016 the F-tT's case officer wrote to the parties informing them that a tribunal judge had refused the application for a stay. Three reasons were given. First, Ms Charles had had sufficient time to attend and make copies of any document she needed; second, the F-tT's requirements were met. Third, there had been no material change of circumstance since the decision of Judge Carr; second there was no reason why the criminal investigation could not continue in parallel with the claim. The final sentence directed the parties to prepare for the hearing as directed.

29. On 3 November 2016 Ms Charles wrote a long letter to the case officer complaining about the decision.

30. Despite the final sentence of the letter from the case officer Ms Charles took no steps either to file a Statement of Case or to make any observations on any of the items in the Scott Schedule by 4 November 2016 or thereafter. She thus did not comply with direction 11.

31. On 9 November 2016 the Council made an application to debar Ms Charles from further participation under para 9(3) of the 2013 rules. Reliance was placed on paras 9(3)(a), (b) (c), (d) and (e).

32. On 15 November 2016 Ms Charles wrote a short letter to the F-tT opposing the application. She did not address the points made in the application in detail. She asserted that to strike out the case prior to addressing her concerns was contrary to the overriding obligation to ensure and evidence total fairness impartiality and fairness in these proceedings.

33. On 18 November 2016 Ms Charles wrote to the F-tT making it clear that she wished to appeal the decision refusing the stay on the grounds set out in her letter of 3 November 2016.

34. On 22 November 2016 a judge of the F-tT refused permission to appeal. She considered that Ms Charles had had sufficient time to view the receipts and documents in order to prepare a statement of case. She considered that the Council's offer sufficiently complied with direction 9. None of the other matters were within the jurisdiction of the F-tT. No further case management hearing was necessary.

35. On 8 December 2016 Ms Charles submitted an application to this Tribunal to appeal the decision of the refusal of a stay. That application was not considered by this Tribunal until after 12 December 2016. It was thus unresolved at that date. It was considered and refused by the Deputy President on 16 December 2016. He pointed out that if the hearing had gone ahead on 12 December 2016 the appeal was redundant. However, as an additional reason he pointed out that the refusal of a stay was a case management decision. None of the proposed grounds provided a compelling reason for a stay.

36. On 16 January 2017 Ms Charles submitted an application for judicial review of the decisions. On 27 April 2017 the application was refused by Judge Cotter QC.

The hearing on 12 December 2016

37. At the hearing on 12 December 2016 Mr Schooling appeared for the Council; Ms Charles appeared in person. The F-tT was chaired by Judge Dickie who dealt with the application to strike out as a preliminary issue. In a decision dated 23 January 2017 Judge Dickie made a debarring order under paras 9(3)(a), (b) and (e). She rejected the claims under grounds 9(c) and (d). She went on to order Ms Charles to pay the hearing fee of £200 and to determine that all the items of service charge were payable by Ms Charles.

38. The reasons for the decision are set out in paras 16 – 20 of the decision. I shall not set them out in full. In summary:

1. In para 16 Judge Dickie pointed out that Ms Charles did not take the opportunity to inspect because she believed she would not be provided with all the documents she felt were necessary. However, as she did not particularise her case it would have been difficult for the Council to know what documents she wanted beyond those that it would provide for a statutory inspection. Judge Dickie agreed with the decision of 31 October 2016 that the Council had complied with the order. She agreed that Ms Charles had ample opportunity for inspection.
2. Ms Charles did not state clearly what documents she said were missing. Nor did she provide an analysis of the figures to demonstrate that disclosure was incomplete or there was a break in the chain of evidence.
3. Ms Charles's submission that she had not understood the F-tT's procedure was not accepted. Judge Dickie pointed out that the previous tribunal proceedings had involved the service charges for the 4 years from 2009/2010, a three-day hearing and an unsuccessful application for permission to appeal.
4. Para 20 of the decision is central and reads:

Having failed to advance a case, [the F-tT] considers that there is no reasonable chance of [Ms Charles's] success in these proceedings. Her breach of directions has prevented [the F-tT] dealing with this matter justly and fairly. In particular, her position implied an application for an

adjournment of the hearing, but this would be unjust given the additional costs to [the Council] and the burden on limited tribunal resources. The directions of [the F-tT] notified her that failure to comply could result in serious detriment to her – e.g. [the F-tT] may refuse to hear all or part of her case, and this was sufficient notice of a sanction for the purposes of Rule 9(3)(a). The F-tT thus determines that it should debar [Ms Charles] from further participation in the proceedings on the grounds in Rule 9(3)(a), (b) and (e).

The Appeal

39. On 3 March 2017 Ms Charles submitted an application for permission to appeal. This was refused by Judge Dickie on 31 March 2017 on the ground that there was no error of fact or law in the decision. However on 27 July 2017 the Deputy President of this Tribunal granted permission to appeal. In his view it was arguable:

1. That Ms Charles was unable to comply with the F-tT’s direction until the Council had provided her with “the evidence to substantiate all costs incurred in the years in dispute”
2. That the Council was in breach of its disclosure obligation.
3. That the F-tT ought to have revised the timetable when it refused the application for a stay on 31 October 2017.

40. The Council filed a Respondent’s Notice on 30 August 2017. It submitted that this Tribunal should not interfere with a case management decision of the F-tT except on well-established grounds. It submitted that it was not in breach of Direction 9, that if there was a breach it was not material in that an opportunity to inspect was provided and/or that Ms Charles had made clear that the documents in the files would not have satisfied her because they were not sufficient to prove that the Council had incurred the relevant expense.

41. The appeal was heard on 17 April 2018. Mr Hardman appeared for the Council. He produced a detailed skeleton argument for which I am grateful. Ms Charles appeared in person. She presented her submissions in a polite and highly articulate way. She did her best to answer the questions I put to her. I am grateful to her for her assistance.

42. In her oral submissions Ms Charles made a number of points. She pointed out that she was not legally qualified and thus there was no equality of arms. She submitted that the Council was in breach of Direction 9. In her submission the effect of Direction 9 was that the Council was obliged to supply her with copies of all documents which she considered necessary to prove that the items in the service charge had actually been incurred, the work actually carried out and the moneys paid. She accepted that the cost of doing this would be high, probably more than the £638.40 quoted by Mr Schooling. She referred me to the document summary disclosed by the Council. Whilst it listed the items for which a charge had been made it did not prove that the costs had been incurred or that work had been carried out.

43. She accepted that the existence of the Service Level Agreements and Qualifying Long Term Agreements meant that there might not be actual invoices for each of the items in the summary. However, she repeated her submission that the documents actually supplied were insufficient to comply with the order.

44. She pointed out that she had professional commitments; she worked full time and submitted that it would have been impractical for her to have inspected the files during working hours. Furthermore, as I understood her submissions she accepted that the documents in the files would not have been sufficient for her to challenge the Council's case.

45. She sought to rely on all the points made by the Deputy President in granting permission to appeal submitting in effect that the arguments should be decided in her favour. She submitted that the breach of Direction 9 was so serious that it prejudiced her ability to prepare a case.

46. At no time during her submissions did she identify a specific challenge to any of the items in the document summary. As I have indicated the thrust of her case was that the documents disclosed were inadequate.

47. Mr Hardman repeated and enlarged upon the submissions in the Respondent's Notice. He submitted that what the Council did was sufficient to comply with Direction 9. It was a proportionate and adequate response and quite sufficient to enable Ms Charles to complete her part of the Scott Schedule and to provide a Statement of Case so as to comply with Direction 12. He relied on the fact that the F-rT had confirmed on 3 occasions (31 October, 22 November and 23 January) that the Council had so complied. If, contrary to his submissions, there was a breach of Direction 9 it was not material. At para 23 of his skeleton argument he put the matter in this way:

No failure by the Council prevented the Appellant from completing the Scott Schedule and Statement of Case. The crux of the Appellant's case appears to relate to the lack of underlying invoices from contractors to prove that the payments were incurred and therefore payable. The Appellant could have easily completed the Scott Schedule thereby putting the Council to proof on various matters and, thereafter, leaving the matter in the hands of the tribunal. Further and in any event, the failure to physically send all documents/evidence to the Appellant was not a serious failure given that all documents/evidence were either provided to the Appellant or made available by the Council to inspect. Given that the Appellant had access to all the necessary documents, it cannot be said that any prejudice has been suffered.

48. He submitted that Ms Charles was plainly in breach of Direction 11. The reasons for the debarring order appear plainly in para 20 of the decision. This Tribunal should not interfere.

Discussion

Direction 9

49. It is plain that there was always going to be controversy over the interpretation of Direction 9. The final sentence makes it clear that the F-tT were alive to a possible dispute as to the quality of the evidence provided by the Council. It directed it should be determined at the hearing. Judge Carr was plainly anxious to avoid the sort of dispute that subsequently occurred.

50. It is equally clear that Direction 9 is not happily drafted. It refers to the “provision of evidence”; it cannot in my view be interpreted as requiring the Council to provide all the evidence necessary to prove every element of the service charge without knowing the nature of the challenge by Ms Charles. That would be to interpret the order in a wholly disproportionate way. Apart from all other considerations evidence includes witness statements and may include expert evidence. The order made specific provision for those at a later stage.

51. This was a dispute over just less than £2,000. It cannot have been the intention of Judge Carr to require the Council to send (at their expense) Ms Charles copies of every single piece of paper connected with every element of the service charge.

52. Although Ms Charles was a litigant in person, she was highly articulate, intelligent and experienced in this sort of litigation. She had been involved in a 3 day hearing over the earlier service charges in 2014 and had seen the files for one of the two years in dispute. She had engaged in appeals.

53. This is not a case where the Council did not engage with Direction 9 at all. The document summaries provided on 29 September 2016 identified precisely what items were claimed, identified the amount claimed and the percentage applied. I agree with Mr Hardman that Ms Charles could have easily completed the Scott Schedule (as she had in the earlier proceedings) and provided a Statement of Case identifying the areas of challenge. As noted above she still has not identified a single area of challenge.

54. Even if she believed that there was a breach of Direction 9 I do not accept that it entitled her to do nothing and ignore Judge Carr’s order. It is also to be noted that she was reminded to continue to prepare for trial in the letter of 31 October 2016. She chose not to follow that piece of advice.

55. It follows that I do not agree that Ms Charles was unable to comply with Judge Carr’s direction in a meaningful way. In my view the document summaries together with the right to carry out a statutory inspection was in all the circumstances a sufficient compliance.

56. I agree with the Deputy President that the F-tT could have provided a different timetable when it refused a stay on 31 October 2016 especially as that date was only 4 days before the date when Ms Charles was obliged to serve her Statement of Case and Reply to the Scott Schedule. However, Ms Charles did not ask the F-tT to revise the timetable either before or after 4 November nor did she make any attempt to comply with the order even when faced with the application to debar her from defending.

57. Furthermore, I have great difficulty in seeing how I have any jurisdiction to reconsider the order made on 31 October 2016. Ms Charles sought permission to appeal against that order. Permission was refused by the Deputy President and an application for a permission to bring a judicial review in respect of it has been refused. In my view the order of 31 October 2016 cannot be revisited.

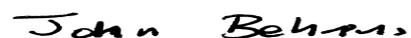
58. It follows that I conclude that the F-tT was entitled to conclude that Ms Charles was in breach of the Directions order. At that stage it had to carry out a balancing exercise between the prejudice to the Council and other litigants by adjourning the case and the prejudice to Ms Charles in making a debarring order.

59. A debarring order is a draconian order. However, in my view the F-tT carried out that balancing exercise particularly in para 20 of the decision. Even though I might have reached a different decision I can see no error of law in its approach. The decision was not perverse.

60. Ms Charles was an experienced litigant with a good understanding of the procedure. She had fought and lost on many similar issues in the earlier proceedings. The sums involved were not large. The additional costs to the Council of an adjournment would be substantial. Ms Charles had failed to engage with the proceedings. She has still failed to identify a single item of challenge.

61. I would dismiss this appeal.

Dated: 15 May 2018



His Honour John Behrens