

Report

on an investigation into
complaint no 10 002 564
against Torbay Council

4 May 2011

Investigation into complaint no 10 002 564 against Torbay Council

Table of Contents	Page
Report summary	1
Introduction	3
Legal and Administrative Background	3
My Jurisdiction	3
Recovery of Council Tax	4
The use of bailiffs	5
Committal hearings	5
Charging orders	5
The bankruptcy process	6
Investigation	6
What happened in this case	6
Conclusions	11

The Local Government Act 1974, section 30(3) generally requires me to report without naming or identifying the complainant or other individuals. The names used in this report are therefore not the real names.

Key to names used

Mr Castle	-	the complainant
Mr Knight	-	bailiff
Mr Ash	-	a process server, employed by the bailiff
Officer A	-	Deputy Head of Customer Contact, at the time of the events complained of
Officer B	-	Senior Exchequer Officer, at the time of the events complained of

Report summary

Local taxation

Mr Castle complains that the Council took bankruptcy proceedings against him in response to a council tax debt of £2,248 without having proper regard to his personal circumstances, in particular his mental health.

The Ombudsman does not consider the Council followed due process in making Mr Castle bankrupt. First, she finds that the Council failed to document its decision-making in respect of the recovery action by way of bankruptcy. Second, she finds that the Council failed to reconsider its decision to pursue bankruptcy when information came to light that Mr Castle might be considered suicidal.

The Ombudsman considers that had such failings not occurred then the Council would not have continued with bankruptcy proceedings against Mr Castle and he would not have incurred the high punitive costs of some £24,000 associated with that action.

Finding

Maladministration causing injustice.

Recommended remedy

In order to put Mr Castle in the position that he would have been in had no maladministration occurred, and taking account of both the financial costs incurred and the distress and time and trouble caused, the Ombudsman recommends that the Council issues Mr Castle with a formal apology and makes him a payment of £25,000.

Introduction

1. Mr Castle complained that the Council took bankruptcy proceedings against him in response to a council tax debt of £2,248 without having proper regard to his personal circumstances, in particular his mental health.

Legal and Administrative Background

My Jurisdiction

2. There are a number of sections of the Local Government Act 1974 (as amended by the Local Government and Public Involvement in Health Act 2007) which fall to be considered in reaching a decision on whether I have jurisdiction to consider Mr Castle's complaint.
3. First, Schedule 5 paragraph 1 of the Act says that a Local Commissioner cannot conduct any investigation into

"the commencement or conduct of civil or criminal proceedings in any court of law".

However, this does not preclude an investigation into administrative actions prior to the issue of court proceedings and, where the Council instructs agents for enforcement of court orders, the actions of those agents (unless they are agents of the Court).

4. Second, Section 26(6) of the Act says that -

"A Local Commissioner shall not conduct an investigation under this Part of this Act in respect of any of the following matters, that is to say,

- (c) any action in respect of which the person affected has or had a remedy by way of proceedings in any court of law:

provided that a Local Commissioner may conduct an investigation notwithstanding the existence of such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect the person affected to resort or have resorted to it."

5. I interpret this to mean that I have no jurisdiction to consider a complaint where court proceedings have been issued by the complainant in respect of the same matter. However, I retain jurisdiction to investigate if such Court proceedings were misconceived; that is where there was no legal basis for bringing the action.

6. Third, S26B of the Act says that a complaint should be made to me within 12 months from the day when the complainant first had notice of the matter. However, S26B(3) provides that I may disapply this requirement.
7. In a previously published report by the Local Government Ombudsman (reference 06B16600) on an investigation into a complaint against Wolverhampton City Council the Ombudsman found that the council made a man bankrupt over non-payment of his council tax, without fully considering all the alternatives. The Ombudsman found that the Council failed to consider the possibility of making a charging order against the man's home. It also gave him inadequate warning of the consequences of bankruptcy before commencing proceedings. The man faced costs of £38,000 for a debt of £1,105. The Ombudsman said: "The Council cannot, it seems to me, turn a blind eye to the consequences to the debtor of any recovery option it pursues. ... The dire and punitive consequences of bankruptcy, involving a multiplication of the original debt many times over and frequently incurring the loss of the debtor's home, must be a factor to be taken into account in deciding that the 'last resort' is indeed appropriate".
8. This decision was applied by the court in *Hunt v Fylde BC* [2008] BPIR 1368. Because of illness, Mr Hunt had withdrawn from the world and adopted an aggressive response to any attempt to assist. The Council had known about the debtor's condition, but District Judge Ashton said this was not the point. He considered that the council's evidence '...conspicuously failed to advise the court of the procedures adopted by the council for making the discretionary decision that bankruptcy proceedings were appropriate. There is no indication that the council had any information about Mr Hunt before the issue of the petition or even sought such information.' He said the onus cannot lie on the debtor to establish lack of either physical or mental capacity, because lack of capacity would itself render the debtor unable to do so.

Recovery of Council Tax

9. The primary legislation governing the administration of council tax is the Local Government Finance Act 1992. The Council Tax (Administration and Enforcement) Regulations 1992 SI 613 govern collection and recovery. Council tax is payable by monthly instalments. If payment is not made on the due date, the Council can start recovery proceedings. The Council must issue at least one reminder but if a payment is not made the full sum for the year becomes due and the Council can commence proceedings to recover that sum plus its reasonable costs in the Magistrate's Court. Once a liability order is made by the court, the council may instruct bailiffs, commence insolvency proceedings, seek a charge over the debtor's property or seek the debtor's commitment to prison. The Courts have held that while recovery action for a council tax debt can be

coercive, it is not unlawful if it becomes punitive because of the debtor's failure to pay.¹

The use of bailiffs

10. Bailiffs can be instructed to collect outstanding debts, if necessary through securing a levy against certain goods that might be owned by the debtor. However, in most circumstances bailiffs cannot take such a levy unless they have gained peaceful entry into a debtor's home or premises. If a debtor has insufficient assets to cover the debt, and cannot or will not agree to repay, other options for recovery would need to be considered.

Committal hearings

11. If the Council has attempted, but failed, to collect a debt through the use of bailiffs then it can request that the debtor appear before the Magistrates Court to consider if they should be committed to prison for wilful refusal or culpable neglect in the non-payment of their council tax. Magistrates must conduct a means enquiry to establish the reason for non-payment. They are given options including committing the debtor to prison, suspending any committal on terms (such as ordering a fresh payment arrangement) or remitting some of the debt (i.e. writing it off).

Charging orders

12. Another method of collection available to a Council is to seek a charging order against a debtor.² This is a way of securing a debt through the County Court against a debtor's property, so that in the event that the property is sold, the creditor must be paid from the proceeds of sale. For a Council to be able to pursue this course of action it must hold a liability order against the debtor and the debtor must owe at least £1,000. The Courts can consider suspending a Charging Order on repayment terms. Where a creditor holds an outright Charging Order or any payment terms are not adhered to, then the creditor can seek an Order for Sale. This too, can be suspended at the Court's discretion; for example on the basis of an order that regular repayments are made. A Charging Order can only be made in respect of the property upon which the council tax debt was owed.³

¹ R v Canneck Justices ex parte Ireland (Court of Appeal) (1995)

² Council Tax (Administration and Enforcement) Regulations 1992, regulations 50 and 51

³ Regulation 50, Council Tax (Administration and Enforcement) Regulations 1992 SI no 613/1992

The bankruptcy process

13. Bankruptcy can be used as a means to try and recover a debt where a creditor is owed at least £750. The aim of bankruptcy is to recover the debts due, ultimately by selling the debtor's property. The Insolvency Rules 1968 govern the process. The creditor must serve a document known as a statutory demand. This should explain the debt the Council is seeking to recover. The Insolvency Rules lay down detailed requirements for a creditor to take exhaustive steps to seek to serve the demand personally. Only if such steps have failed can postal service be used. It is for the court to be satisfied, at the application for a bankruptcy petition, that the statutory demand has been properly served. A council may use its own staff for service of bankruptcy proceedings or contract the process out to a private firm.
14. If a statutory demand is served and the debt remains unpaid after a further 21 days (or no arrangement has been made to the satisfaction of the creditor), then a bankruptcy petition can be served. The petition requests that the County Court (or High Court in London) make an order that the debtor be declared bankrupt. A debtor may oppose the making of a bankruptcy order on the grounds that the debt is not owed, and the Courts have the power to stay proceedings if it appears likely that the debt may be settled in a short period of time.
15. Where a bankruptcy order is made the Official Receiver will be appointed to act as Trustee of the debtor to manage their assets. If there are any assets it is likely that the Receiver will appoint a private insolvency practitioner to act as Trustee to manage the assets. The Trustee's role is to act in the creditor's interest by realising all assets and clearing all debts and costs owed. The Receiver and the Trustee may charge fees for their work. These fees can be substantial but as the Receiver and Trustee are officers of the court complaints about these fees are not within the Ombudsman's jurisdiction. A creditor or the bankrupt can apply to the court to have the bankruptcy annulled. If it is annulled the court will decide whether the Receivers' and Trustees' costs will be paid by the creditor or the debtor.

Investigation

What happened in this case

16. Mr Castle has lived at his present address for more than 40 years. He has lived alone since 1992 and before that with his mother, for whom he was the carer during the last year of her life. At that time he was also in full time employment. Mr Castle was made redundant in 1995. He lived off his savings and a small income from his membership of a musical band for the next 10 years or so. He paid all his bills including council tax until about 2006. From that time he describes himself as having followed 'a gradual descent into chronic

introspection' and 'mental instability'. He reports that he subsisted on less and less money, not replacing worn out household items or clothing and spending two winters largely without heating or hot water. His failure to pay electricity bills resulted in his electricity supplier installing a slot meter. He stopped opening his mail in 2004. He left it on the doormat for months at a time, visible through his glass panelled door. He thought it would give the impression to callers that nobody was home. He used the back door to access the property and stayed out of sight if callers came.

17. In 2006 Mr Castle's council tax account fell into arrears. After the application of a 25% sole occupier discount, Mr Castle's bill for the 2006 / 2007 financial year was £953.08 and the Council issued a bill for this sum on 15 March 2006 with provision to pay by ten monthly instalments. On 4 May 2006 the Council issued a reminder for the overdue April instalment of £98.08, and when it was not paid on 26 May a final notice was issued requesting payment of £953.08 being the total sum due for the year. Mr Castle again made no payment and on 6 June 2006 a Magistrate's Court summons was issued against him. On 30 June 2006 the Council obtained a Liability Order in the Magistrate's Court for £953.08 plus £50 costs.
18. The Council instructed certificated bailiffs to try to recover the debt. Certificated bailiffs are employed by private companies and enforce a variety of debts on behalf of organisations such as local authorities. They can seize and sell goods to cover the amount of the debt owed. They also hold a certificate, which permits them (and no-one else) to levy distress for rent, road traffic debts, council tax and non-domestic rates. Certificated bailiffs are required to gain peaceable entry into property before a levy of goods inside a property can take place. The bailiff's log shows that a first visit was made to Mr Castle's home on 14 August 2006. The bailiff's notes from that visit say 'effects appear poor - as seen via window'. Further visits were made on 24 August 2006, on 4 September 2006 and on 21 September 2006: on the two later visits a bailiff's van was sent but no goods were collected. The first enforcement attendance by bailiffs took place on 11 October 2006 when it was noted there were cobwebs over the front door and a large pile of post behind it. A further 'van visit' was made on 19 October 2006 when the bailiff knocked on the windows at the back of the house but received no reply. On 16 November 2006, a second enforcement visit was made. Again it was noted that mail was piled up behind the door. Further visits were made on 8 and 13 December 2006. The accumulation of mail was noted each time, as were the cobwebs over the front door. The bailiff noted there were no signs of food or cups visible through the window; he also noted there were no flies. A neighbour was spoken to and told the bailiff the resident was 'elderly' (Mr Castle was born in 1949) and said he had not been seen for some time. Further unsuccessful visits were made on 22 February 2007 (when a neighbour confirmed Mr Castle was still resident at the property), on 5 March 2007 and on 5 April 2007. The bailiffs returned the liability order to the Council on 25 April

2007 having been unable to gain access or recover property. The bailiffs had not seen or spoken to Mr Castle at any time.

19. For the 2007 / 2008 financial year Mr Castle's council tax bill after the application of a 25% sole occupier discount was £995.97 and the Council issued a bill for this sum on 12 March 2007. On 4 May 2007 the Council wrote to Mr Castle to say the liability order had been returned by the bailiffs as they had been unable to secure any payment from him and the debt of £1,182.08 remained outstanding. The letter advised Mr Castle that committal proceedings for non-payment could now be commenced, in which case a summons would be issued, or alternatively the Council might instruct an insolvency practitioner to commence bankruptcy proceedings against him. The letter advised that if Mr Castle was declared bankrupt, the Official Receiver (or a Trustee appointed by his creditors) would be able to sell his assets, including his property, to settle the debt.
20. In the meantime the Council continued to follow its usual procedures in respect of the council tax liability for the current billing period. On 8 May 2007 the Council issued a reminder for the overdue April instalment of £95.97, and on 25 May a final notice was issued for the total sum due for the year, £995.97. Mr Castle made no payment and on 5 June 2007 a summons was issued for this sum. On 29 June 2007 the Council obtained a Liability Order for the sum with an additional £70 costs. Bailiff fees of £179.00 were added to Mr Castle's council tax account on 3 December 2007.
21. The Council's written procedure for dealing with cases which have been returned without payment or goods in lieu having been secured by the bailiff required it to consider the possibility of recovering the debt by way of a charging order, committal proceedings or bankruptcy proceedings. The Council decided first to make enquiries with Land Registry to ascertain whether Mr Castle was the owner of the property in which he lived, with a view to registering a charge against the property if he was. Mr Castle was the owner of the property, which had been left to him following his mother's death. But the property was not registered with the Land Registry and so the Land Registry was unable to advise the Council about ownership. The Council did not make any further investigations to seek to establish ownership of the property. The Council next considered committal proceedings but decided that given the difficulties in making contact with Mr Castle he would be unlikely to respond to the court if proceedings were instigated, and such proceedings might become protracted. The Council therefore considered that it would be appropriate to pursue the debt by way of bankruptcy proceedings.
22. Solicitors acting on behalf of the Council issued a pre-action letter to Mr Castle on 9 January 2008 but received no response. A statutory demand was then served personally by a process server, Mr Ash, on 1 February 2008, giving 21 days for compliance. The notes made by Mr Ash stated that he told Mr Castle how to comply with the statutory demand and had suggested he seek legal advice. No

response was received and the Council's Senior Exchequer and Benefits Manager agreed jointly that the solicitor should proceed with action in respect of bankruptcy.

23. A bankruptcy petition was therefore obtained on 12 March 2008. On the following day Mr Ash attended Mr Castle's home in order to personally serve the bankruptcy petition. Mr Castle reports that the only face to face contact he had had with any representative from the Council was with this process server. Mr Castle says that Mr Ash approached quietly to the kitchen window and was invited in. Mr Castle was, in his own words, in an agitated and emotional state. The Council's notes in respect of Mr Ash's visit record that Mr Ash had some doubts about Mr Castle and had not been able to reach a view on whether Mr Castle was being evasive or was in fact suffering illness. He reported that he had not been able to establish much about Mr Castle's personal circumstances, except that he was not currently in employment. Mr Ash telephoned the solicitors to report service of the petition. The solicitor's notes state: "D [debtor] has been personally served with the bankruptcy petition today - D stated that he only had £800 to live on and couldn't afford to pay".
24. My investigator has interviewed Mr Ash and his manager, Mr Knight, the bailiff for whom Mr Ash worked at the time. Mr Ash told my investigator that his recollection was that Mr Castle had been extremely distressed and upset at the second visit. Mr Knight told my investigator that he recalled Mr Ash reporting that Mr Castle was suicidal and that he was very worried about him. Mr Knight also told my investigator that he had reported this to the Council verbally at a regular liaison meeting, at which the Council and bailiffs discussed their position in respect of ongoing debt recovery actions. At interview Officer A and Officer B were both asked about this. Officer A said he had never heard anyone refer to Mr Castle as suicidal, and Officer B said that he could not recall any conversation with Mr Knight in which any reference was made to Mr Castle being suicidal. The Council's minutes from the liaison meeting are very general and make no reference to any individual cases discussed.
25. Mr Knight provided my investigator with a copy of his invoice to the Council's solicitor dated 1 April 2008. That contains the following note: 'Please note the defendant is suicidal and I have raised this with [Officer A] at the Council'. An examination of the solicitor's file revealed the original copy of that invoice together with a record of a telephone call on 2 April 2008 from the Council to the solicitor in which the solicitor noted that the Council had concerns about Mr Castle's mental health. The note said 'Could be suicidal - Council to investigate other enforcement options'.
26. According to the Council's procedure, where bankruptcy proceedings are considered the most appropriate method of recovering a debt, any arrangement should be reviewed and discussed by senior officers, Officer A and Officer B. The Council says that following the concerns raised by Mr Ash, the case was

discussed by Officer A and Officer B on 2 April 2008. There is no record of the discussion. At interview both officers told my investigator that they had not been aware of any reference to Mr Castle potentially being suicidal. Officer A said he would not have pursued bankruptcy if it was stated that the debtor was suicidal. He said that consideration would be given to writing off the debt in such circumstances. Both officers said that they were aware of earlier cases where bankruptcy proceedings had been halted in such circumstances.

27. The Council says that when Mr Ash raised concerns about Mr Castle a telephone call was made to the social services department to check whether Mr Castle was known to them, but that department had no record of him. No record was made of the telephone call. The Council also then contacted the Citizen's Advice Bureau and made an appointment for Mr Castle to attend for specialist debt advice on 18 April 2008. Officers A and B decided that notification of that appointment, together with a council tax benefit application form and a means enquiry form, should be personally delivered to Mr Castle by Mr Ash. At interview Officer B advised my investigator that Mr Ash was given a specific instruction to get Mr Castle to read the letter and confirm he had understood it, and that he reported back afterwards that this had been done. But there is no documentary evidence to support this. Mr Castle reports that the letter delivered by the process server on 7 April 2008 remained unopened. He was not therefore aware of and did not attend the appointment which had been arranged for him at the Citizen's Advice Bureau. He reports feeling that his position was hopeless and that 'there was no point in solving this one particular problem'. In mid-April, a further letter was posted to Mr Castle advising him that it was not too late to make contact with the Council with a view to resolving matters. That letter also remained unopened.

28. On 2 May 2008 a bankruptcy order was made against Mr Castle in the County Court. The debt owed to the Council at this time was £2,336.57, made up as follows:

Council tax charges:	2006/07	£953.08
	2007/08	£995.97
	2008/09	£ 88.52
Liability order costs	30 June 2006	£ 50.00
	29 June 2007	£ 70.00
Bailiff fees	3 December 2007	£179.00

29. The Council was advised by the Insolvency Service on 15 September 2008 that as Mr Castle had not surrendered to the bankruptcy proceedings the Official Receiver would therefore appoint an insolvency practitioner to deal with his assets.

30. In November 2008 Mr Castle approached the Department for Work and Pensions to apply for benefits. He was asked to obtain a medical certificate, which he subsequently did. His doctor diagnosed anxiety and depression.

31. In January 2009 Mr Castle was visited by a solicitor from Bristol who was his Trustee in Bankruptcy. Before this visit Mr Castle had no knowledge of the fact that he had been made bankrupt by the Council in May 2008. With the help of a neighbour and following a meeting arranged with the Trustee, Mr Castle cleared the debt in full by taking a loan against his home. Mr Castle reports that after clearing the debt of £2,248.05 he owed to the Council and £3,940.99 owed to a utility company, the additional costs he incurred as a result of the bankruptcy action amounted to some £24,000.
32. Following contact by Mr Castle's neighbour, a meeting was set up with a representative from the Council's corporate debt team on 11 February 2009. Mr Castle's neighbour advised the Council that Mr Castle had not opened his post for some time and may have mental health issues. The Council agreed to hold further recovery on the sum of £1,028.74 owed in respect of the financial year 2008 / 2009 which had not been covered by the bankruptcy order. Mr Castle then completed a claim form for council tax benefit and a request for backdating of any entitlement to August 2008.

Conclusions


33. I accept that the Council has a duty to all its tax payers to try to recover money owed to it. I recognise that, having obtained liability orders and having tried to collect its debts through the use of bailiffs, the Council was short of options as to how it could collect the money it was due. It is clearly not the case that bankruptcy should never be contemplated, but the consequences bankruptcy can impose upon a debtor are severe and in selecting options for recovery the impact on the individual debtor should be taken into account.
34. The Council satisfied itself that there was no means other than bankruptcy by which the debt could be recovered in a realistic timescale. Because Mr Castle's home was not registered with Land Registry it could not pursue a charging order. But it seems to me that the facts about Mr Castle's ownership of the property could have been elicited through conversation with him if the Council had visited him. A charging order on the property would have been a less punitive option than bankruptcy.
35. In making decisions about debt recovery, I expect that Council officers should make reasonable efforts to contact the debtor in person. It is clear that the Council had difficulties engaging with Mr Castle. But it seems to me that there were warning signs noted by the bailiffs which might reasonably have alerted the Council to the possibility that Mr Castle was unwell: it was known that he did not open his post but left it to accumulate over a long period. None of the Council's own officers visited Mr Castle at home. He was seen only by the process server, who reported that he was unsure whether Mr Castle was unwell or was being evasive.

36. I expect that decisions about debt recovery should be recorded with evidence that the decision-maker is satisfied that the debtor can adequately defend themselves against the Council's actions. Although Mr Castle had in the past settled his debts, that payment history alone was not grounds for the Council to conclude that he was able to do so on this occasion. Once the process server reported that he had doubts about Mr Castle's health, the Council should have conducted a review of the case file in light of that information and that review should have been documented. The failure of the Council to document the action taken to review the case was maladministration.
37. The Council had a further opportunity to review the decision to proceed with bankruptcy action when its solicitor was advised that Mr Castle was considered suicidal. The failure to do so was maladministration, and it had significant consequences.
38. As a consequence of the maladministration identified above I consider Mr Castle has been caused an injustice. I consider that if the Council had properly reviewed the case in light of the information that Mr Castle was possibly suicidal it would not have continued with the bankruptcy action. The Council might have been able to engage with Mr Castle and to discuss and pursue an alternative way of securing payment of the arrears.

Finding

39. As explained above, I find maladministration by the Council. As a consequence of the Council's actions in pursuing bankruptcy Mr Castle incurred costs amounting to some £24,000 after his original debt had been cleared. In addition, he has been caused considerable distress, and has been put to time and trouble in trying to resolve the matter. I now seek to put Mr Castle in the position that he would have been in had no maladministration occurred. Taking account of both the financial cost and the distress and time and trouble, I recommend therefore that the Council issues Mr Castle with a formal apology and makes him a payment of £25,000.

Dr Jane Martin
Local Government Ombudsman
The Oaks No 2
Westwood Way
Westwood Business Park
Coventry
CV4 8JB



4 May 2011