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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AB/LSC/2014/0261**
Property	:	**205 Bath House, 2 Arboretum Place, Barking, Essex, IG11 7GS**
Applicant	:	**Mr & Mrs Rapley & Others**
Representative	:	**Mr S Murphy, solicitor and Lessee of 511 Bath House on 18 December 2014 and Mr Cohen, lessee of 202 &207 Bath House on 20 February 2015.**
Respondent	:	**1. Redrow Regeneration (Barking) Limited ("the landlord")** **2. Barking Central Management Co No2 ("the company")**
Representative	:	**Mr J Cannon of Counsel**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge E Samupfonda** **Mr S Mason BSc FRICS FCIArb** **Mrs R Turner, JP**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**7 March 2015**

DECISION

Decisions of the tribunal

(1) The tribunal determines that all the disputed costs incurred by the Respondents in respect of the service charges for the years 2011/12 and 2012/13 are reasonable and payable by the Applicants.

(2) The tribunal makes the determinations as set out under the various headings in this Decision

(3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985 so that the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of the service charge years 2011/12 and 2012/13.

2. Directions for the future conduct of the case were made at the case management hearing on 21 August 2014. It was agreed by the parties and the tribunal that the issues to be determined were those identified at the case management hearing.

The hearing

3. The hearing of the application first took place on 18 December 2014. Mr Murphy, a solicitor and lessee of flat 511 Bath Road represented the Applicants. A number of tenants; Mr & Mrs Rapley, Mr K Sadler, Ms Moore and Mr Herbet accompanied him. Ms H Assibey, Property Manager with Holdens Property Services, also attended as a witness on behalf of the Applicants. Mr J Cannon, of Counsel represented the Company. Employees of the management company Country Estate Management accompanied him: Ms S Wisdom, Mr D Carrington, Ms H Vantom and Ms R Linnell accompanied him.

4. Mr Cannon made 3 submissions at the commencement of the hearing. The first was in respect of 3 of the Applicants' witnesses; Ms Robyn Hughes, Mr Symonds and Mr Sadler. He invited the tribunal to disallow the witness statement made by Ms Hughes on the grounds that it covers her employment period that postdates the service charge years in dispute. Therefore it was not relevant and it should not be considered. Mr Murphy accepted that Ms Hughes' statement covered a period that post dated the issues in dispute, however he considered that aspects of it were relevant as e.g. paragraph 12 sets out her experience

of working for the Company. The tribunal agreed with Mr Cannon that this statement was not relevant as it covered a period outside the issues in dispute. Therefore the tribunal disallowed it.

5. Mr Cannon then invited the tribunal to disallow Mr Symonds' statement on the grounds that the Applicants had failed to comply with the Directions that stipulated that a witness should attend the hearing unless their statement has been agreed. Mr Symonds has not attended the hearing and the Respondents do not accept the contents of his statement, therefore the tribunal should either have no regard to it or attach very little weight to it. Mr Murphy said that Mr Symonds was employed in the relevant period. He was unable to attend the hearing because he's on leave abroad. The tribunal considered that Mr Symonds' statement was relevant and that it should be admitted despite his absence and the tribunal would attach the relevant weight to it in due course.

6. With regards to Mr Sadler's statement, Mr Cannon said that this should also be disallowed because it was served on the Respondents by email very late yesterday. Therefore this should be excluded because it failed to comply with the Directions timetable and further it was unfair and prejudicial as he had not had an opportunity to consider it and seek instructions. Mr Murphy did not accept that any prejudice was caused by the late service of the statement because this statement does not raise any new issues and the issues have been discussed during the frequent meetings between the parties. The tribunal took the view that as the hearing was to be adjourned part heard, the statement would be admitted as it was relevant and would be considered at the resumed hearing.

7. The second issue that Mr Cannon raised was in regards to the issues in dispute. He was concerned that having agreed and identified the issues in dispute at the case management hearing, the number of issues have increased as set out in the Scott Schedule completed by the Applicants for example vermin and pest control in 2013. He submitted that these additional items should not be allowed. Mr Murphy agreed that the issues had increased as a result of service of the Scott Schedule. He explained that the Applicants would not be pursuing the issues regarding vermin and pest control, entry phones and fire alarms. He said that the Applicants would like to include cleaning and CCTV in both years. Mr Cannon did not object to that course.

8. The third issue raised by Mr Cannon was that the one-day allocated to the hearing would be insufficient given the number of witnesses and the issues to be determined. It was suggested that a pragmatic approach would be for the tribunal to hear the parties' dispute under section 20B of the Landlord and Tenant Act 1985 only and then adjourn to another date.

9. The tribunal agreed with the suggested approached. We were concerned that the issues in dispute were not entirely clear. We therefore directed that the Applicants must by 9 January 2015 serve on the Respondents a comprehensive list of the items remaining in dispute for the service charge years 2011/12 and 2012/13. Before proceeding to hear the s20B dispute, the tribunal was informed that the parties had reached a number of agreements with regards to the electricity and water rates.

10. **Electricity 2011/12**

In this period the Respondents claimed £129,347.00, It was agreed that £47,768.50 was reasonable and payable. It was also agreed that to this sum would be added whatever the tribunal deemed reasonable and payable following its determination on the section 20B dispute.

11. **Application under section 20B**

Mr Murphy explained that the Applicants' case was limited to the service charge year- end 31 March 2012 and related to the electricity invoice of £60,898.26. ('the invoice") This was dated 22 February 2012 and it covered the periods of supply from 19 August 2009 to 26 April 2012. It stipulated that payments were due by 7th March 2012. He explained that the invoice was a corrected invoicing sweeping up a number of invoices that had been challenged by the Company. He drew the tribunal's attention to the statements of invoices from the electricity supplier EDF to the Company in which a running total of electricity charges and a number of invoices over this period were shown. He argued that the liability to pay arose when the first invoice was raised and in the running total presented this was August 2009 and no section 20B was served within the 18 months period. He did not accept that the Company challenged the validity of the invoices with EDF as there was no evidence of this challenge, the tenants were not notified and there has been no correspondence produced to support that contention.

Mr Carrington gave evidence on this issue. He explained that the Company challenged the correctness of the invoices with EDF. EDF accepted a number of errors had occurred and therefore cancelled some of the earlier invoices and reissued the invoice with a new corrected amount of £60,898.75.

Mr Cannon argued that the costs were not incurred when the earlier invoices were raised but when the correct amount was charged and liability to pay arose from 22 February 2012.

Section 20B of the Act was designed to protect lessees from service charge demands made in respect of costs incurred more than 18 months before the demand for payment was made. The provision

renders irrecoverable if the landlord does not demand payment, or at least warn the tenant that a payment will be required within the 18 months period. In this case, it is clear from the statement of invoices from EDF that earlier invoices were raised prior to the corrected invoice dated 22 February 2012. The tribunal accepted that the earlier invoices were disputed and EDF on accepting the errors issued a revised global invoice for £60,898.75. In our view, liability to pay did not arise until the presentation of the correct invoice. In this case that invoice was dated 22 February 2012 and it stated that payment was due by 7 March 2012. The Section 20B notices were sent out on 21st August 2013, well within the stipulated 18 months period. It follows therefore that the service charges were recoverable.

10. The hearing resumed on 20th February 2015 before the same tribunal. Mr Cohen lessee of 202 and 207 Bath House represented the Applicants as Mr Murphy had an alternative commitment. In attendance were a number of lessees including Mr and Mrs Rapley. Ms H Assibey and Mr Symonds, a Property Manager with Life Residential gave evidence on behalf of the Applicants. Although Mr and Mrs Rapley also gave evidence, Mrs Rapley simply confirmed her witness statement and responded under cross -examination that "things had improved" since Countrywide took over management. Mr Rapley accepted the accounts were correctly audited and was of the view that the maintenance costs for the water pump were too high. Mr Cannon represented the Company. In attendance were Mr Carrington and Ms Ventom who also gave evidence on behalf of the Respondents.

11. We were presented with an additional unsigned witness statement of Mr Sadler. Mr Cannon objected to its admission on the basis that it had been served on the Respondents on 15 February 2015. Consequentially, they have not had the opportunity to consider it and in any event it would be wholly unfair to admit it because it is an analysis of the dispute regarding electricity supply for the 2012/13 and the parties had agreed and settled that dispute at the earlier hearing of December 2014. Furthermore the tribunal did not give permission for additional witness statements to be submitted. Mr Cohen acknowledged at the outset that he was disadvantaged by his late entry to these proceedings. He said that he had been informed that this electricity issue was still live, that Mr Sadler had spent some time undertaking some research and the need for that had arisen from the information given by Mr Carrington in his evidence on 18 December 2014. Mr Cohen very sensibly conceded that he could not reopen this issue if it was indeed agreed in December 2014.

12. Having considered the submissions and consulted our notes from the previous hearing, the tribunal concluded that the statement should not be admitted as the parties had indicated to the tribunal at the previous hearing that they had agreed that the costs incurred in respect of the electricity supply in 2012/13 was reasonable. The tribunal also observed that, in compliance with the Directions issued at the previous hearing

that the applicants identify the remaining issues, the applicants had produced a Scott Schedule dated 9 January 2015 that identified the issues in dispute in respect of the year 2012/13 and electricity does not feature as an item still in dispute.

13. The parties informed us that they had reached an agreement on the costs incurred in respect of the water rates for 2011/12 and 2012/13. It was agreed that the cost that had been reasonably incurred was £78,000 in each year. The tribunal saw no reason to disturb that agreement and accordingly determined that the said sums were reasonable and payable.

14. Following a short adjournment the parties informed the tribunal that the outstanding issues that require our determination were management fees of £38,022, lift maintenance of £16,101,00 and water pump (heating) of £27,745.00 for 2011/12. With regards to the year 2012/13 the same items were in dispute and the amounts challenged were management fees £39,163, lift maintenance £16,075 and water pump £36,115. There had been a challenge with regards to the cost of the building insurance but this was abandoned following an explanation of the accounting process given by Mr Carrington in evidence.

15. **Year 2011/12**.

Mr Cohen explained that the sum claimed should be reduced to £19,000 on the basis that it was common ground that the winter of 2011/12 was a period when standards of maintenance "fell completely out of bed" in that the lifts were out of service and individual lessees experienced problems with their heating and hot water. He submitted that a reduction in the management fee was justified because the Respondents were very slow to act when complaints were made and when they did respond, the response was inefficient requiring repeat visits. As the lifts were out of service for a period, the Respondents considered that the sum of £9,000 was reasonable. In the same vain he argued that the costs claimed in respect of the water pump (heating) should be reduced to £20,000. He relied on Ms Assibey's evidence that there were issues with the heating system and lifts that took sometime to rectify. The explanations that she was given by the Respondents were that there was a lack of funds. Mr Cannon resisted the application. He submitted that there should be no reduction in the management fees or to the costs incurred in respect of the lifts and water pumps. Turning to the management fees, he submitted that the Respondents had already reduced the management fees from £56,826 to £38,022 because it was acknowledged and recognised that there had been some difficulties. However, he said that the amount charged originally was in fact a reasonable sum because it was in line with the amount quoted by Block Management UK Ltd, the alternative comparable produced by the applicants. Mr Cannon acknowledged that there were certain periods

when services were not provided for example the lifts did not work from December 2011 to January 2012 as attested to by Ms Assibey but there was no charge made for this service. He told the tribunal that the Respondents experienced financial difficulties because they could not collect service charges as a result of an earlier tribunal decision that had decided that service charges were not payable and that position remained until the landlord successfully appealed to the Upper Tribunal (Lands Chamber.) Consequentially, the lifts were turned off for a short period. With regards to the heating costs, Mr Cannon said that there was no evidence to support any need for a reduction. Overall he contended that as the Respondents had reduced the management fee this was sufficient and any additional reductions would be unfair. Mr Cannon relied on the evidence given by Mr Carrington and Ms Ventona.

16. The tribunal accepted Ms Assibey's evidence that the lifts broke down between December 2011 and January 2012. However, there was no evidence to indicate that the costs of repairing the lifts increased or that there was an unreasonable delay in carrying out the repairs. The tribunal also accepted Mr Carrington's explanation that there was a base contract for lift maintenance and attendance outside of that attracted additional charges. There was no evidence that the contractor was not reputable or that the contractor attended unnecessarily or repeatedly to rectify the same disrepair thus incurring unreasonable costs. Therefore we decided that the cost incurred in respect of the lifts was reasonable and payable.

17. With regards to the heating, we find that there was no evidence produced to support the contention that the heating broke down. The Applicants originally disputed 3 invoices because Clair Hamilton a former employee of the managing agents had allegedly informed the Applicants that a reasonable charge for heating and water pumps should be £10,000. Without more, the tribunal could not be satisfied that the sum claimed by the respondents was unreasonable. We therefore allowed this cost in full.

18. The tribunal considered that the amount originally charged in respect of the management fee was reasonable based on the comparable evidence submitted by the Applicants. Having heard that the management fee was reduced by some 33% from the invoiced amount to reflect a reduction in service, we decided that this was a fair reduction and any further reductions would be unjustified particularly in the light of the fact that the Respondents experienced financial difficulties as explained by Ms Ventona and Mr Carrington said that there was 40% non payment of service charges following the earlier tribunal decision.

19. **Year end 2012/13**

With regards to the heating, we heard evidence from Mr Symonds who told us that he managed 35 flats in the development and some of his lessees experienced individual heating problems intermittently. The filters, which serve the Heating Interface Units (HIU) were becoming blocked in individual flats and needed to be cleaned but re-blocked because of the sludge in the system that was being pumped around. The system needed to be power flushed out. He commissioned the expert report dated 27 August 2012 from HANA. The report concluded that the system was not regularly maintained and made a number of recommendations. Mr Symonds' evidence was that because the Respondents did not carry out all of the recommendations there were further breakdowns in February 2013. Mr Cannon highlighted the fact that Mr Symonds is not a heating expert but is a property manager from a lettings agency. He said that there was no evidence to prove that the heating broke down because the work recommended by HANA had not been carried out. He added that Ms Assibey accepted under cross-examination that the boilers are complex and not straightforward modern machinery. He referred to a number of invoices dated in 2013 from CH Lindsey indicating that some work was carried out to the boilers. He submitted that the heating broke down for only part of the year and that the failure to provide a service had been properly reflected by the reduction in the amount claimed in respect of the management fees. He concluded that it would be unfair to reduce the service charge further.

20. Both Mr Symonds and Ms Assibey gave evidence to the effect that the heating broke down in February 2013. Ms Assibey said it was for 3 weeks but Mr Symonds was not so sure. Be that as it maybe, there was a paucity of evidence to support the Applicants assertions that the cost incurred was unreasonable and that the heating broke down as a result of the Respondents conduct. The Applicants provided us with a brief report by HANA but produced no expert evidence to assist us. Mr Symonds did the best that he could by giving us his interpretation of the report but he was not technically qualified. An examination of the CH Lindsey invoices indicated to us that the works done appear to arise from defects in the boiler house and were disrepair items that needed to be repaired to ensure that the boilers functioned. There was no evidence to show that such costs were not reasonably incurred or that the works were unnecessary. In our view the costs were legitimately expended and incurred. The fact that the works did not address the recommendations made by HANA does not make these repair costs unreasonable. It appears to us that the HANA report was addressing the Heating Interface Units and not the central boilers. Furthermore, there was no expert evidence to show that because the HANA recommendations were not carried out this led to the heating breakdown. Therefore we concluded that the heating cost was reasonable and payable.

21. There was no evidence advanced by any witness that the lifts broke down in this year despite assertions being made by the Applicants that the lifts broke down frequently and that repairs and maintenance were not carried out in a timely or reasonable. In the absence of such evidence we have no option but to conclude that the cost in respect of the lifts has been reasonably incurred.

22. We were told that the management fee claimed was voluntarily reduced from £53,136 to £39,163 to reflect the reduced services provided. We consider that this is a fair deduction and that it would be unjust to make further deductions. In the light of the evidence, we consider that the original sum claimed was reasonable. However we observe that the failure to address the problems highlighted in the HANA report is evidence of poor management.

23. **Application under section 20C of the Act**

The Applicants made an application under section 20C of the Act that the costs of these proceedings should not be recovered through the service charge. Mr Cohen said that the series of hearings has resulted in significant reductions in the service charge demanded and that there is now finally a stable management team. However, the Applicants were entitled to ask questions and had the simple explanations been given earlier some issues such as the building insurance and water rates. would not have been raised. There was an admission that services had fallen below standard. Mr Cannon opposed the application and submitted that the Respondents are entitled to recover the cost of these proceedings through the service charge by virtue of paragraph 10B of the lease. He said that the tribunal decision of 2011 disallowed the Respondents' costs because of the way the Development had been managed. The tribunal decision of 2014 acknowledged that improvements in the style of management had been made. Since then the Respondents had been trying to resolve the queries raised by the Applicants as evidenced by the concessions made. In his view, this application was precipitous and for that reason alone the order should not be made. He added that the Applicants had also conceded and withdrawn a number of items. He was critical of the Applicants' conduct and attributed inflated Respondents' costs to the fact that the Applicants submitted witness statements late (Mr Sadler's twice) they were unable to pinpoint and articulate the items in dispute at the outset of the first hearing and were unable to take a step back and acknowledge that things were improving thereby raised issues that could've been resolved by round the table discussions. He said that the application should be determined on the basis that costs should follow the event and even if we found for the Applicants it doesn't affect the conclusion that this application should not have been brought at all.

24. Section 20C provides that a tribunal may "make such order on the application as it considers just and equitable in the circumstances." We

are permitted to take into account the conduct of the parties in deciding whether or not to make an order.

25. From our observations of the parties' conduct we consider that it might have been possible to settle this dispute by way of discussions because throughout these proceedings, the parties have, following discussions agreed some items such as the electricity for the year 2011/12 and the water rates. It was right to say that the Applicants were initially unclear about the items that they disputed and that once identified, the items reduced in number. Items such as the cleaning, CCTV, building insurance concierge, vermin and pest control were not pursued. It is possible that the Respondents' costs may have inflated as a result of the Applicants' conduct in that the issues not clearly identified at the outset resulted in late withdrawals and submissions of late witness statements (Mr Sadler) and statement outside the relevant periods (Ms Hughes.) It was not disputed that there is a contractual right to recover under the terms of the lease. Such a right is a property right, which should not be lightly disregarded. Having heard the submissions and taking into account our determinations above, we concluded that it would neither be just nor equitable for us to make an order under s20C thus preventing the Respondents from recovering the cost of these proceedings through the service charge.

Name: Judge E Samupfonda **Date:** 7 March 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.