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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/29UL/LSC/2016/0029

Property : Flat 4, 7 Earls Avenue, Folkestone, Kent
CT20 2HW

Applicant : Mr Rohen Kapur

Representative : Mr Rajesh Kapur

Respondent : Champion & Bushell Limited

Representative : Midland Management Limited

Type of Application : Service charges

Tribunal Member(s) : Judge Tildesley OBE
Mr R Athow FRICS MIRPM

**Date and Venue of
Hearing** : Dover Magistrates Court
12 August 2016

Date of Decision : 19 August 2016

DECISION

The Application

1. The Applicant sought a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by the Applicant for the years ended 24 December 2014, 2015 and 2016.
2. The Applicant disputed specifically the gardening costs and management fees for the years in question, and the contribution to the reserve fund for external decoration and repair.
3. The Applicant subsequently decided not to proceed with his challenge to the gardening charge, which was confirmed at the hearing by his brother who was acting as his representative.
4. The Applicant also sought an order for the limitation of the landlord's costs in the proceedings under Section 20C of the Landlord and Tenant Act 1985.
5. The Applicant's principal grievance with the Respondent concerned the disrepair of the roof, guttering, downpipes and windows which was causing him considerable distress.

The Proceedings

6. The Applicant acknowledged in his application that he was ill and suffering from stress. His brother, Mr Rajesh Kapur, represented him at the case management telephone conference, and at the hearing. His brother prepared the hearing bundle. References to the bundle are in []. The Applicant's father, Dr Birbal Kapur, a retired GP, was also present at the inspection and the hearing.
7. Mr Alan Willett represented the freeholder in the proceedings. Mr Willett was a director of the freeholder which owned a large property portfolio. Mr Willett explained the overwhelming majority of the properties in the portfolio were managed by external managing agents. The freeholder had, however, retained the management of small number of the properties including the subject property and carried out this function under the trading name of Midland Managements.
8. The case management conference was held on 15 June 2016. At which directions were issued for the exchange of evidence. The hearing took place on 12 August 2016 at Dover Magistrates' Court. Immediately prior to the hearing the Tribunal inspected the property in the presence of the Applicant, his father and Mr Willett.
9. The Applicant supplied the Tribunal with a collection of photographs of the building

The Property

10. The subject flat is on the upper levels of a detached building constructed in the late 19th Century along with many other similar styled houses and hotels in the West End of Folkestone, about ½ mile from the town centre. The Leas pedestrian area along the cliff-top is about 100 yards away. Folkestone Central and Folkestone West Railway Stations are about ½ mile away giving High Speed connections to Ashford and London. The M20 motorway is about 1 mile away.
11. The building was originally erected as part of a high quality residential development and was subsequently converted into four self-contained flats. In 2011 the lower ground flat was converted into two units. All flats are held on leases. The two lower ground floor flats and the entrance floor flat have their own entrance doors. The first floor flat and the subject flat are accessed via a covered staircase to the first floor, from which there is a door to a small communal lobby with doors to the first and second floor flats. There is an “in/out” drive where the flats have the right to park cars, and a small communal front garden. There is a larger rear garden which has a pedestrian gate on the rear boundary giving access to Terlingham Gardens which is a communal garden for the use of all properties which surround it.
12. The construction style is typical of the surrounding houses. The building has five levels, lower ground, ground, first, second and third floors. The subject flat occupies the second and third floors. The third floor is in the roof area. The walls are of brick elevations with ornamental stonework detailing, and Dutch gable styled areas at high level both front and rear. The windows are mainly of the sliding sash style.
13. The roof is a complex construction with clay tiles. From an internal inspection the Tribunal noted that it appeared to be the original roof, and had no felt or insulation. This is typical for the age and construction style of the property. There is a flat roofed dormer to the top floor, South elevation. On other elevations there are fanlights and dormer windows which provide lighting to various parts of the upper floor accommodation. There is a detailed porch canopy over the entrance to Flat 2. The Tribunal noted some loose or slipped tiles to the main roof. The chimney stacks are of a substantial design and construction.
14. During the inspection the Applicant showed the Tribunal external areas where gutters were blocked and plants were growing at high levels on the building. Internally the Tribunal was shown two rooms where the chimney breasts were showing signs of damp penetration. The Applicant used a “damp meter” to illustrate the existence of moisture in the walls. Additionally the Tribunal inspected the two bathrooms which also had signs of moisture. One bathroom had a small electric extractor fan, whilst the other had an unpowered fan.

15. The Tribunal were shown the windows of the subject flat and noted that external painting had not been undertaken for several years. Some of the windows were affected by wet rot particularly the cills.

The Lease

16. The Applicant holds a long lease of the property which was made between Champion and Bushell Limited of the one part and Raymond John Halton of the other part and dated 21 October 1993 [110-128]. The lease was for a term of 99 years from 29 September 1993 with a yearly rent of £70 payable 25 December in each year.
17. Under clause 4.5 the tenant agrees to pay the landlord the maintenance charge which was to be applied to the performance of the landlord's maintenance covenants contained in paragraphs (3) (4) (5) (6) (7) of clause 5.
18. Under clause 4(5)(a) the tenant is required to pay the sum of either £500 or one quarter of the actual costs whichever is the greater towards the maintenance charge. Clause 4(5)(b) enabled the landlord to demand payment of the sum of £500 in advance on 25 December and a balancing charge if any within 14 days of issuing a statement of actual costs certified by the landlord or his managing agent.
19. The Respondent's arrangements for the collection of the maintenance charge did not strictly conform with the terms of the present lease. The Respondent demanded in advance from each leaseholder one fifth of the estimated expenditure regardless of whether the sum demanded exceeded the £500 limit payable in two instalments. Any surplus at the end of the year was held in reserves. Mr Willett explained that the leaseholders had requested the facility to pay the charge by two instalments. The Tribunal decided not to pursue the question of the Respondent's collection methods which on the whole worked to the benefit of the leaseholders. The Applicant did not dispute the current arrangements.
20. The landlord's maintenance covenants comprise in essence:
 - (a) Keeping in good repair all the roofs, main walls, foundations, passages, the grounds and boundary walls and fences.
 - (b) Painting the outside parts of the building including the outside of the front door every four years.
 - (c) Keep all passage, landings and staircases properly cleaned and lighted and in reasonable decorative order.
 - (d) Keep the property fully insured.
21. Clause 5(6) authorised the setting up of a reserve fund from the maintenance charge as the landlord may from time to time consider necessary or advisable to cover accruing or anticipated expenditure.

22. Clause 6(5) states that “the structural repair of all windows and window frames belonging to the flat and the internal decoration thereof shall be the tenant’s responsibility the external redecoration only being the landlord’s responsibility”.
23. Clause 7 authorised the landlord to employ and pay out of the maintenance fund such contractors, agents or servants as is necessary for the performance of the landlord’s maintenance covenants.

Consideration

24. The Tribunal has jurisdiction to determine all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when a service charge is payable.
25. By section 19 of the 1985 Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.
26. The relevant legal provisions are set out in the Appendix to this decision.
27. The Applicant raised three issues for determination. The first issue concerned the Respondent’s purported failure to carry out its maintenance responsibilities in connection with the property. The Applicant referred to the extensive problems of water ingress and the length of time it took the Respondent to deal with the problem at the rear of the flat. The Applicant relied on the poor condition of the windows frames and cills which had not been painted for a considerable number of years. At the inspection the Applicant pointed out the vegetation in the gutters which was also seen in the photographs of the building taken by the Applicant.
28. The Applicant did not understand why the Respondent had not progressed with the external works and decoration to the property above the first floor including down pipes and rainwater goods, which apparently had been the subject of discussions between Mr Willett and the leaseholders. The Applicant questioned the Respondent’s commitment to these works in particular the Respondent had not carried out the necessary consultation with leaseholders and not drawn up a specification for the works. The Applicant also said the Respondent had returned the £5,000 collected from the leaseholders in 2016 for the reserves [81] which apparently was to be applied to the costs of the external re-decoration and repairs.
29. Mr Willett acknowledged there had been no external re-decoration of the property above the first floor for about 17 years. Mr Willett, however, denied that the Respondent had neglected its repairing responsibilities in respect of the property.

30. Mr Willett referred to the works carried out to stop the water ingress in the back bedroom in 2013. The cost of those works in the sum of £1,455.83 had been paid from the service charge for year ending 25 December 2013 [77]. Mr Willett also mentioned the Respondent's efforts to stop the water penetration at the rear of the Applicant's flat. These works commenced in 2014 involving repair of broken tiles, replacement of flashings and dealing with open joints in the brickwork. Unfortunately the steps taken did not resolve the problem, with water still penetrating the property. In the end Mr Willett determined that the cause of the water ingress was the porous brick work to which a sealant has been applied, which apparently had worked. Throughout this time scaffolding was erected at the back of the property. Mr Willett estimated that the costs of these works were in the region of several thousand pounds, which he said would not be recovered from the leaseholder.
31. Mr Willett said the Respondent had not painted the window frames because the timber had deteriorated to such an extent that no useful purpose would be served by painting. Mr Willett pointed out the Applicant was responsible for the structural repair of the windows. In this respect Mr Willett said he had provided the Applicant with details of contractors who would carry out this work. The Applicant denied that he had been provided with such information.
32. Mr Willett stated he had discussed with the leaseholders the external re-decoration and works to the property above the first floor. Mr Willett had estimated the cost of these works to be in the region of £18,000, of which about £7,000 would be for the cost of the scaffolding.
33. Mr Willett had decided to issue a credit note for the £5,000 allocated to the reserve in the 2016 budget to comply with the wishes of the leaseholders. Mr Willett referred to the e-mail dated 30 June 2016 [78] from all of the leaseholders who said there was no need to add a further £5,000 to the maintenance fund for external repairs and decorations. The e-mail bore the Applicant's name.
34. Mr Willett said the Respondent was still committed to carrying out the works to the upper floors. Mr Willett stated that he intended to appoint a surveyor to prepare the specification for the repairs and decorations. Mr Willett denied that the Respondent's proposed sale of the freehold would affect the works. Mr Willett was upset with the Applicant's allegations of financial impropriety on the Respondent's part which had prevented the sale of the freehold at the recent auction. Mr Willett pointed out the Respondent required an auction sale in order to give the leaseholders the option of first refusal.
35. At the hearing the Tribunal explained to the Applicant and his representative that it did not have jurisdiction to determine the

Respondent's alleged breach of repairing covenant, and that if they wished to pursue it an application would have to be made to the court.

36. The Tribunal urged caution about launching into a court action without exploring first whether the parties could reach a resolution of their differences.
37. The Tribunal's assessment of the position is that the Applicant wished to have a guarantee that the works to the upper part of the property would proceed, and for the Respondent to initiate without delay the consultation process and the specification for the works. The Respondent, on the other hand, wanted the Applicant to withdraw his allegation of financial impropriety to enable the freehold to be placed for auction which would trigger the right of first refusal.
38. The Tribunal observes that the windows are a potential stumbling block to a resolution. It maybe the surveyor carrying out the specification could give an expert opinion on whether the frames require redecoration or replacement. The Respondent is responsible for the former, whilst the Applicant has to bear the costs of the latter. Finally if the parties are able to agree a way forward, the Applicant would require an assurance that any sale of the freehold would not impede implementation of the necessary repairs.
39. Turning now to the two areas which fall within the Tribunal's jurisdiction: management charges and the allocation of £5,000 to external decoration and repairs in the 2014/15 budget.
40. The management fee was in the sum of £500 for each of the three years in question. The Applicant's objections were twofold. First, the sum of £500 represented a significant increase on the management fee of £300 which was charged in 2013/14. Second, the Respondent's managing arm had not provided the required level of service to justify a fee of £500. In this respect the Applicant relied on the Respondent's alleged failures to respond to his concerns about disrepair and water ingress, and the time taken by the Respondent from 2013 to the end of 2015 to carry out the repairs necessary to fix the water penetration in his flat.
41. Mr Willett explained that the increase of £300 to £500 was due to the creation of an additional lower ground flat following the conversion in 2011 of the original flat into two units.
42. Mr Willett said the fee of £500 represented an annual charge of £100 per flat which in Mr Willett's experience was a modest charge. According to Mr Willett, external managing agents in Kent would be likely to set a charge in excess of £200 per flat.
43. Mr Willett stated the duties covered by the fee of £500 included responding to leaseholder's enquiries, organising maintenance and repairs, preparing sets of accounts, sending out demands, and

arranging property insurance. Mr Willett also said that he had been spending an increasing amount of time at the property dealing with the disagreement between the Applicant and another leaseholder.

44. Mr Willett denied the Respondent had neglected its responsibilities for repair and maintenance. Mr Willett contended the age, size and type of construction and the fact that it was a conversion rather than purpose built posed significant challenges for the upkeep of the building. Mr Willett pointed out that it was not possible to access the upper parts of the building with a standard cherry picker because of the position of the trees. Mr Willett said it was notoriously difficult to isolate the causes of the water ingress which could only be done by a systematic process of elimination by carrying a repair and then waiting to assess the outcome. This was why it took so long to remedy the defect at the rear of the property.
45. The Tribunal is satisfied that clause 7 of the lease gives the Respondent authority to recover the Applicant's share of management fees through the service charge. In this case the Respondent had used employees¹ which included the services of a director to carry out the management function.
46. The Tribunal finds that a management fee of £100 per residential unit is indeed modest particularly for the range of duties performed for the fee and for a conversion which, in the Tribunal's expert opinion, is more challenging than a purpose built block of flats.
47. The Tribunal is limited to examining the level of service offered in the years in question for a management fee of £500. As a rule the standard management fee would only cover arranging routine repairs and maintenance. The costs of managing major works would normally attract an additional fee to the standard charge. The Respondent has not charged for the major works to the rear of the property which took until 2015 to complete and has in fact taken on the whole costs of those works with no recharge to the leaseholders.
48. The Tribunal in its assessment of the level of service provided is looking at the quality of the routine day-to-day management rather than the Respondent's compliance with its repairing covenant in the lease. Given that perspective the Tribunal finds the Respondent performed the routine day-to-day management of the property in a satisfactory manner.
49. The Tribunal, therefore, determines that the management fees of £500 each for the years ended 24 December 2014 and 2015 have been reasonably incurred, and that the estimated fee of £500 for the year ended 24 December 2016 is reasonable. The Applicant's share of the management fee is £100 for each year in question.

¹ The lease uses the word servant which equates to employees.

50. The final matter for determination is the charge in the sum of £5,000 for external decorations and repair for the year ended 24 December 2015. The Applicant also disputed the same charge in the budget for the year ended 24 December 2016 but this is no longer an issue in view of the Respondent's decision to refund the charge to the leaseholders.
51. The amount of £5,000 was levied in the budget for 2014/15 [52] and transferred to the reserves at the end of the accounting year appearing in the net assets of the balance sheet as at 24 December 2015 [47].
52. Mr Willett said that towards the end of 2014 and early 2015 discussions took place with leaseholders about external repairs and decoration to the property. Mr Willett believed the estimated costs for the works would be in the region of £17,000 to £18,000. According to Mr Willett, the Respondent considered it prudent to collect the leaseholders' contributions for these works in stages over the next two years. Mr Willett opined that the two annual payments of £5,000 together with existing reserves would be sufficient to cover the estimated costs for the external repairs and decoration.
53. Mr Willett indicated that the Applicant was the only one of the five leaseholders who had not paid his contribution of £1,000 to the charge for external decoration and repairs.
54. The Applicant contended the charge was unreasonable because no consultation had taken place in respect of its imposition. The Applicant pointed out that he had paid the rest of the maintenance charge for that year. The Applicant also questioned whether such a charge was lawful having regard to the level of disrepair to the building.
55. The Tribunal considers the Applicant by conflating consultation with reserves has misunderstood the circumstances upon which a contribution to reserves can be demanded.
56. The legal requirements for consultation are found in section 20 of the 1985 Act and the corresponding Regulations. In essence they require the landlord to consult with the leaseholders in respect of any building works where the costs of those works exceed an appropriate amount (£1,250 in the case of the subject property). If the landlord fails to consult, he can only recover a maximum contribution of £250 from each leaseholder towards the costs.
57. A reserve fund is a pool of money created through the payment of service charges which are not immediately needed for repairs but which are collected and retained to build up sums which can be used to pay for large items of infrequent expenditure such as the replacement of a roof.
58. The provisions of the lease will determine whether service charges collected from the leaseholders can be applied to a reserve. There is no requirement to consult with leaseholders about putting monies into

reserves. The requirement to consult applies to carrying out of works or the provision of services.

59. In this case clause 5(6) of the lease places an obligation upon the Respondent to create a reserve fund as the Respondent may from time to time consider necessary or advisable to cover accruing or anticipated expenditure. Under clause 4(5) of the lease the Respondent can use the maintenance charge collected from the leaseholders for the reserve fund.
60. The Tribunal is satisfied the 2014/15 budget and accounts issued to the Applicant clearly indicated the purpose for which the £5,000 was being levied and that the monies had been allocated to the reserve. Further the Tribunal considers the amount of £5,000 was reasonable having regard to the estimated expenditure of around £18,000 for the proposed external repairs and redecoration.
61. The Tribunal determines that the £5,000 for external decoration and repairs in the year ended 24 December 2015, and held in the reserve fund is reasonable and payable. The Applicant's contribution is £1,000.
62. At the end of the hearing Mr Willett indicated that the Respondent would not be seeking to recover its costs in connection with these proceedings through the service charge. The Tribunal, therefore, made an order under Section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Decisions of the Tribunal

63. The management fees of £500 each for the years ended 24 December 2014 and 2015 have been reasonably incurred, and that the estimated fee of £500 for the year ended 24 December 2016 is reasonable. The Applicant's share of the management fee is £100 for each year in question.
64. The £5,000 for external decoration and repairs in the year ended 24 December 2015, and held in the reserve fund is reasonable and payable. The Applicant's contribution is £1,000.
65. The sums of £590 and £1,590 are payable by the Applicant in respect of the service charges for the years ended 24 December 2014 and 24 December 2015 respectively.
66. The sum of £590 is payable in advance as an interim payment for the service charge for the years ended 24 December 2016.
67. An order under Section 20C of the Landlord and Tenant Act 1985 is made by consent.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

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 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.