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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BE/LSC/2017/0367** **LON/00BE/LSC/2018/0004** **/LON/00BE/LSC/2018/0092**
Property	:	**Flats 12, 15, 19 & 21 Limes Walk, Linden Grove, London SE15 3LJ**
Applicant	:	**London Borough of Southwark**
Representative	:	**Andrew Skelly of Counsel**
Respondents	:	**(1) Patricia Wheeler, Flat 21** **(2) John Lowor & Stella Mensah, Flat 12** **(3) Carole Sterling, Flat 19** **(4) Daniel Wayne Kerkel, Flat 15**
Representative	:	**In person**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Evis Samupfonda** **Mr Chris Gowman** **Mrs Lucy West**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**13 June 2018**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £46, 563.54 is payable by each of the tenants by way of service charge in respect of the estimated cost for the major roof works carried out in 2016/17. At the conclusion of the hearing, Mr Skelly indicated o behalf of the landlord that it would seek to recover a reduced amount in light of the adjustments made in the final accounts. However, the applications in this case challenged the reasonableness of the estimated costs.

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

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(4) Since the tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the county court.

The application

1. The first application was received from Ms Wheeler. Ms Wheeler (Flat 21) seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether the amount demanded by way of service charges in respect of the estimated service charges for major works for the years 2016/17 was reasonable. A Case Management Conference was conducted on 24 October 2017 and directions were issued.

2. In the second application, the landlord seeks and, following a transfer from the county court the tribunal, is required to make a determination under s27A of the Act as to whether the amount demanded by way of service charges in respect of the estimated service charges for major works for the years 2016/17 was reasonable in respect of Flat 12 (Mr Lowor and Ms Mensah).

3. As both applications concerned the reasonableness of the estimated costs of major roof works, the landlord applied to the tribunal to hear the two applications together. The tribunal agreed to this request and directions were accordingly made following a Case Management Conference on 20 February 2018.

4. Following the issue of the tribunal's directions dated 20 February 2018, a third application was transferred to the tribunal from the county court, the landlord having issued proceedings for a determination of the

reasonableness of the estimated cost of the service charges for the major roof works in respect of Flat 19 (Ms Sterling).

5. Mr Kerkel (flat 15) and Mr Gilderson (flat 22) applied to the tribunal to be added as applicants to Ms Wheeler's application. Directions joining the applications were made on 3 April 2018.

6. Upon receipt of the directions, the landlord objected to the order joining Mr Gilderson as an applicant because in county court proceedings D7QZ10DR, a judgement had been entered against him for the same service charges that he sought to challenge before the tribunal (and his mortgage lender had apparently paid the full amount of the judgement debt to the landlord). Pursuant to s27A(4)(c), the tribunal is deprived of jurisdiction to determine the claim as the matter "has been the subject of determination by a court." Mr Gilderson was notified accordingly by the tribunal's order dated 3 May 2018 removing him as an applicant.

7. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

8. The hearing was conducted on 21 May 2018 and the tribunal only convened on 22 May 2018 in order to make its decision. Mr Skelly of Counsel represented the landlord. Ms S Shadbolt, the Landlord's Project Manager, Mr C Hingston, Chartered Building Surveyor and Mr J Hutton, Quantity Surveyor of Calfordseaden LLP gave evidence on behalf of the landlord. All the tenants, with the exception of Ms Mensah, attended the hearing and were given an opportunity to make submissions in their own right.

The background

9. Limes Walk was built in the early 1950's, externally the walls to the ground floor are brick, with hanging tiles external to the first floor facades. The main roof is flat with some lean to style roofs of various styles at lower levels. Windows are upvc double glazed units with a mixture of solid timber and timber panelled doors. Gutters and downpipes are upvc. The tribunal did not inspect and the parties did not request an inspection of the Building. The tribunal did not consider that one was necessary, nor would it have been proportionate given the nature of the issues in dispute.

10. Each tenant holds a long lease in respect their flat, which requires the landlord who is the freeholder to provide services and the tenant to contribute towards their costs by way of a variable service charge. The

specific provisions of the lease and will be referred to below, where appropriate.

The issues

11. At the commencement of the hearing on 21 May 2018, Mr Skelly handed in written submissions on behalf of the landlord. This identified all the issues in dispute as outlined by each of the tenants in their respective statements of case. The tenants confirmed that they had read the submissions and concurred with the issues identified.

12. The landlord served a Schedule 3 Notice of Intention informing the tenants of the proposed works to renew the roof and other associated works on 7 January 2016.

13. In essence the tenants are all concerned with the same issue, namely they challenge the reasonableness of the estimated costs of the major works. The landlord seeks to recover the estimated charges of £46,563.53 or thereabouts from each tenant. The tenants did not fully comply with the directions specifically asking them to serve witness statements, copies of the relevant documents they seek to rely on and any legal submissions. They did, however, serve their statements of case. From the statements of case, the landlord identified the issues that each tenant specifically raised and from that, compiled a composite statement of case responding to each of the issues raised.

14 The tribunal has had regard to the parties' statements of case and issues raised. Given the number of issues and their sporadic nature, the tribunal, for ease of reference, has grouped the issues and considered them in the same composite manner under the sub headings as set out below. In addition, the tribunal has focussed on the salient points and therefore has not rehearsed all the submissions made as the parties set out their positions comprehensively in their statements of case.

15 Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The Landlord's failure to comply with the statutory consultation procedures

16 Essentially, Ms Wheeler contended that the landlord had failed to comply with the consultation procedures. She accepts that she received the Notice of Intention describing the proposed works dated 7 January 2016. Ms Wheeler explained that she submitted her observations within the 30-day period provided for in the Notice. However, on returning

from a 3-week holiday in early April, she found the form had not been delivered by the Post office but instead had been returned to her, as the postage was deemed insufficient. On 6 April 2016, Ms Wheeler resubmitted her observations. Ms Wheeler raised a number of queries including failure by the council to call for competitive tenders for the major works and historical neglect. Ms Sterling argued that the landlord has also failed to comply because it should have served the Notice on the Tenants and Residents Association.

17. Mr Skelly submitted that the landlord complied with the required consultation procedures that he briefly set out. He said observations were received from Ms Wheeler and Mr Kerkel. He said that the although Ms Wheeler's response was made outside of the time limits, the landlord considered the observations received and compiled a composite response to the queries raised by tenants and sent the response dated 17 June 2016. Mr Skelly said that there is no recognised TRA in place as the requirements of s29 of the LTA 1985 have not been complied with.

The tribunal's decision and reasons

18. The tribunal determines that the landlord complied with the consultation requirements set out in section 20 of the landlord and Tenant Act 1985. The landlord served a Schedule 3 Notice of Intention for the proposed works in January 2016. The Notice complied with Schedule 3 of the Service Charges (Consultation Requirements)(England) Regulations 2003. The tribunal was referred to the landlord's Housing Major Works Partnering contracts, Tender Process that resulted in appointing A & E Elkins Ltd as the landlord's long term Partnering contractor for the major works. Therefore the landlord was not required to carry out a completive tender process in circumstances where there is a Qualifying Long term Agreement.

The tribunal is satisfied that Ms Wheeler's observations were received outside of the time limits specified in the Notice; however, her observations, together with those made by others were taken into consideration as evidenced by the very comprehensive document sent to the residents by the landlord collating all the queries raised and setting out the landlord's responses. As Ms Wheeler's observations were made out of time, the landlord was not under any duty to take them into consideration. The tribunal heard that there was a TRA in place. However the landlord is only obliged to serve Notices on TRA that fall within the provisions set out in s29 of the Act and there was no evidence to demonstrate that this was a recognised TRA falling within those provisions.

The Roof Works were not necessary

19. The tenants challenged the roof works on the grounds that they were not necessary. They also argued that the roof could have been repaired rather than replaced and that the work done amounted to improvements. They did not have any expert evidence to support their contentions but said for example that the roof works were not necessary on the basis that some of them had not experienced any problems such as water ingress. They also considered that the feasibility study undertaken by A & E Elkins lacked rigour and they questioned the independence of A & E Elkins on the basis that A & E Elkins were also the chosen suppliers instructed to carry out any works identified.

20. The tribunal heard evidence from Ms Shadbolt, Mr Hutton and Mr Hingston. They took the tribunal through the processes undertaken by the landlord in conducting the major works.

The tribunal's decision and reasons

21. The tribunal determined that the roof works were necessary. In coming to this decision the tribunal relied on the experts' reports provided by the landlord. The landlord instructed A & E Elkins Limited who conducted a feasibility study of the landlord's housing stock including Limes Walk as part of the landlord's obligation to meet the Warm Dry Safe standards. The tribunal was taken to the inspections and findings in the A & E Elkins' report dated August 2014. They concluded, "The roof covering was fast approaching if not at, the end of its serviceable life." They go on to explain why. There was no evidence from which the tribunal could be satisfied that A & E Elkins did not act independently or that they had an interest in identifying as many properties as possible requiring work. Ms Shadbolt told the tribunal that A & E Elkins also identified properties that they said did not require any works.

22. The landlord engaged Calfordseaden (CS) LLP to assess whether the descriptions and recommendations within A & E Elkins' report constituted an accurate reflection of the condition of the roof at Limes Walk and CS also reviewed the pricing of the contract. The tribunal considered the report by CS dated September 2014. Their conclusions were "The roof currently resembles a patch work with various sections of the roof being repaired or overlaid. Closer inspection of some of these repairs suggests that the work has not been completed to a high standard as joints are lifting and sections of the felt are bubbling." They concluded, "Due to the poor condition of existing flat roof, overlaying the whole roof is the only option to ensure the roof is maintenance free for a minimum of 5 years." The tenants queried whether CS could effectively conduct a 'desk top' review and the tribunal acknowledged that CS reported from the photographs provided by A & E Elkins as access to the roof was limited. However, there is no evidence put before the tribunal to undermine the report and its findings; assertions are not sufficient. There is no evidence to suggest that the photographs

provided to CS were not of a sufficiently good quality to prevent them from undertaking a review and forming their own independent professional judgment.

23. The landlord instructed Pluvitec to visit the Building and carry out an inspection of the roof for the purposes of preparing a specification of work for the upgrading of the existing water proofing system. Core samples were taken. Pluvitec set out in comprehensive detail their findings. In conclusion it was found that "the roof to these blocks is past its useful working life and the problems present will only increase over time."

24. The landlord produced the "responsive repairs summary" that documented a schedule of the complaints the landlord had received from residents regarding water ingress into their dwellings.

25. The tribunal relied on the conclusions reached by the landlord's experts in regards to the condition of the roof. In the absence of any contra evidence, the tribunal determined that the major works to the roof were necessary. The expert evidence also indicated that repair was not the most effective or efficient way to remedy the defects identified. The landlord's Notice of Intention informed the tenants that an overlay of the existing roof was generally the preferred option with a 30 year guarantee for the materials and workmanship. However, given the collapsed areas of insulation and likely trapped moisture, overlay was not an option, as the guarantee would not be provided. Therefore complete replacement was the preferred option, as the guarantee would be secured. In the circumstances, the tribunal determined that the landlord acted reasonably in adopting the method set out by the experts. Although the tenants argued that the works amounted to improvements, this argument was not advanced further at the hearing. In any event, the tribunal was of the view that the roof works fell within the landlord's repairing covenant because the replacement roof did not, in the tribunal's view, result in a wholly different building of a different character and the works undertaken were necessary in order to repair the defects in the roof. Additionally the expert evidence given demonstrated that there was no realistic short-term repair option due to the poor condition of the roof.

The cost of the work was excessive

26. The total breakdown of the cost was £1,698,470.22. The estimated cost that the landlord seeks to recover from each tenant is currently £46,563.54. The tribunal determines that the amount payable by each tenant in respect of the major roof works is £46,563.54.

27. The landlord used a "Bed-Weighting Method" in order to ascertain each tenant's contribution to the cost of work. The tribunal was told that the decision to charge in this manner was agreed with the Home Owners'

Council, which is the formal consultation body for homeowners within the Landlord's organisation.

28. The tenants argued that the cost was excessive and not reasonable. However, there was no comparable or independent evidence provided to substantiate or support that contention. Mr Kerkel was particularly concerned by the method adopted by the landlord and the fact that the initial costs were so high. The tenants queried why the landlord had now reduced the sums that it is likely to seek to recover once the final cost has been ascertained.

29. The final account is not yet agreed as the scheme is within the 12 months Defects Liability period. Therefore the application is limited to considering the estimated costs. In this regard the landlord's contractor CS were involved in checking the pricing of the contract schedules and specifications, monitoring spend, assessing and certifying the payments to the contractors and they will be involved in preparing the final accounts. The tribunal heard evidence from Mr Hutton who explained the role of CS. The tribunal was provided with the specification item Re-chargeable/Non re-chargeable work. The tribunal is satisfied that at the relevant time, the landlord made an assessment of what it considered was a reasonable cost to carry out the work based upon its evaluation of expert advice. However, until the work actually commenced, the landlord was not able to assess the exact cost or the exact extent of the disrepair. Mr Hutton provided an explanation of how the costs were quantified and arrived at and adjustments made during the process in his statement. The tribunal considered CS' TOP Review Report in which CS reviewed A & E Elkins' draft TOP schedule of work descriptions and quantities dated 28 October 2015. This concluded that following an extensive review process and as a result of correspondence and meetings between A&E Elkins, CS, the landlord, leaseholders and freeholders of Lime Walk, a number of items were changed within the TOP and supporting information was provided in a number of rates used. The total figure of the revised TOP submitted for final issue to the landlord was then quantified at £1,698,470.22 in place of the original TOP value of £1,954,955.26.

30. Clause 6(2) to the Third Schedule of the lease provides that the landlord may adopt any reasonable method of ascertaining the said proportion and may adopt different methods in relation to different items of costs and expenses.

31. The tribunal was satisfied that the explanation given for the reduction was reasonable and plausible. The landlord provided evidence from which the tribunal can be satisfied that the costs were properly calculated using an objective and transparent process. It therefore determined that the estimated cost of the work was not excessive in the absence of any contra evidence to support the tenants' contention.

The Assured Shorthold Tenancy

32. Mrs Wheeler explained that she granted an assured shorthold tenancy commencing 27 January 2015. She referred to the terms of the agreement and in particular clause 4. This refers to the landlord's" obligation to keep in repair the structure and exterior of the property. From this, she submitted that, as she was the 'landlord' under the AST agreement, it was her responsibility to maintain the roof at her own expense and not that of the landlord (Southwark).

The tribunal's decision and reasons

33. The tribunal determined that this ground is wholly misconceived. Ms Wheeler misunderstood the effect of granting a sub tenancy and seemed to be confusing the different references to 'landlord' in the different leases. The landlord (Southwark) retained what is referred to as the 'Head lease' (between Southwark and Ms Wheeler) and there is no evidence that the terms of the Head lease between Ms Wheeler and the landlord were varied. Therefore, the repairing obligations remained with the landlord under the terms of the Head lease. Ms Wheeler was only responsible to her tenants for repairs inasmuch as they would be taken care of by the Head lease landlord, not herself.

Other Matters raised

34. Ms Sterling and Mr Kerkel argued that the landlord had failed to maintain a sinking fund in accordance with the Lease.

35. The landlord's position was that a reserve fund is thought to be incompatible with the landlord's accounting obligations under Local Government and Housing Act 19689 section 74(1). An explanation is fully set out in the landlord's statement of case.

36. The Lease provides at paragraph 9(2) of Part 2 to the 3rd Schedule that the "The Council may require the Lessee to pay a reasonable contribution towards such major expenditure in each year and shall notify the Lessee of the amount thereof..." Given the terms of the Lease and in the circumstances, the tribunal determined that the landlord had acted in accordance with the terms of the Lease.

37. The tenants argued that the landlord could have adopted a different method of apportionment such as square footage. This may have resulted in significant reduced costs for each resident. The landlord's explanation was that the method adopted was that which had been agreed by the Home Owners' Council.

38. There was no evidence before the tribunal from which it could assess the tenants' assertions. In any case, the landlord is entitled under the terms of the lease to require the tenants to make reasonable contributions towards major works under paragraph 9(2) as set out above. The landlord consulted and arrived at an agreement with the home Owners' Council as to the method that should be adopted. In the circumstances, the tribunal concluded that the landlord had acted reasonably.

39. Ms Sterling challenged the validity of the consultation process on the basis that the landlord did not serve a NOI on the Tenants' Resident Association. (TRA)

40. The landlord's position is that, while there may a formal TRA, it is not a recognised TRA as it has not met the requirements set out under s29 of the 1985 Act.

41. The tribunal considered S29 of the 1985 Act. This provides that a recognised TRA "is an association of [qualifying tenants (whether with or without other tenants)] which is recognised for the purposes of this Act relating to service charges either:

(a) by notice in writing given by the landlord to the secretary of the association or

(b) by a certificate of a member of the First tier Tribunal.

There was no evidence put before the tribunal to demonstrate how the TRA complied with section 29. However, there is evidence in the form of a letter dated 18 June 2015 from the Landlord to the TRA in respect of the proposed major works.

Application under s.20C and refund of fees

42. Although the landlord indicated at the end of the hearing that no costs would be passed through the service charge, for the avoidance of doubt, the tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Landlord may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: Judge Evis Samupfonda **Date:** 13 June 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), 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 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.