FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AS/LSC/2019/0306**
Property	**:**	**Flat 8 Cardinal Building, Station Approach, Hayes, Middlesex UB3 4FD**
Applicant	**:**	**Mr Ladeek Kumar**
Respondent	**:**	**Ballymore (Hayes) Limited**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Judge P Korn** **Mr H Geddes**
Date of Decision	**:**	**28 October 2019**

DECISION

Decisions of the Tribunal

(1) No credit is due to the Applicant or to the Property in respect of any overpayment of service charges between 2011 and the date on which the Applicant became leaseholder of the Property.

(2) We make no cost orders.

Introduction

1. The Applicant is the leaseholder of the Property and he seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 in connection with past overpayment of service charge.

2. The Applicant states that there was an overpayment of service charge between 2011 and 2018 as a result of the Respondent's managing agent using incorrect measurements when calculating the proportion of the service charge payable by the leaseholder of the Property.

3. The relevant statutory provisions are set out in the Appendix. The Applicant's lease ("**the Lease**") is dated 20th September 2012 and was originally made between the Respondent (1) and Vishal Manji (2).

4. In its application the Applicant stated that it would be content with a paper determination, and in its directions the Tribunal stated that the case would be decided on the papers alone (i.e. without a hearing) unless either party requested a hearing. No such request has been received and the case is therefore being dealt with on the papers alone without a hearing.

Applicant's case

5. The Lease was assigned to the Applicant in July 2018. He then received a service charge demand in January 2019 which he queried, and it was later accepted by the Respondent that the proportion of the total service charge payable in respect of the Property had been incorrectly calculated due to the wrong square footage having been used. Specifically, it was agreed that the measurement used (495.14 square feet) was wrong and that the correct measurement was 430.56 square feet. Following correction of the square footage, the 2019 service charge demand was reduced by £389.49 to £2,604.16.

6. The Applicant now seeks a credit for overpaid service charges for the period 2011 to 2018, but the Respondent has refused to provide this on the ground that the Lease was only assigned to the Applicant in July 2018.

7. The Applicant argues that despite the fact that he was not the leaseholder prior to July 2018 he remains fully liable for all past, present and future liabilities and that any credits from previous periods need to be credited to the Property to offset any future liabilities.

8. In seeking the abovementioned credits the Applicant relies on paragraph 12(b) of the Fourth Schedule to the Lease, although he does not quote it in full. Paragraph 12(b) reads as follows: *"In the event that following receipt of a copy of the certification provided for in the Sixth*

Schedule hereto the sums that the Landlord collected on account of the Services from the Tenant exceed the amount that the Tenant was liable for then such excess shall be held by the Landlord on account of future service charges due from the Tenant".

9. The Applicant also submits that the Respondent has acted negligently by refusing to apply credit for the overpaid charges and states that the Respondent has made no attempt to contact the previous leaseholder.

Respondent's case

10. The Respondent states that the Applicant entered into communication with the Respondent in January 2019 querying the 2019 service charges. Following investigations, the Respondent identified that a service charge credit of £389.49 was due to the Applicant for the 2019 service charge year. A further credit will be applied in due course in respect of the period from the date on which the Applicant became the leaseholder of the Property (27th July 2018) to 31st December 2018.

11. The Respondent accepts that the square footage was wrongly calculated, and there is now no dispute between the parties as to the correct square footage to apply.

12. However, the Respondent does not accept that the Applicant is entitled to a service charge credit in respect of the period prior to his leasehold ownership of the Property.

13. In support of its position the Respondent has referred the Tribunal to the decision of the Upper Tribunal in *Gateway Holdings (NWB) Limited v Lynda McKenzie, Mr Simon Greenfield (2018) UKUT 371 (LC).* The Respondent also states that the Applicant did not pay any service charges prior to the date of his acquisition of the Property and that any overpayment would be due to the previous leaseholder, not to the Applicant. In addition, the Respondent has seen no evidence of any agreement or arrangement between the previous leaseholder and the Applicant with regard to overpayment for previous years.

14. The Respondent asks the Tribunal to strike out the Applicant's application on the basis that it is misconceived and an abuse of process.

Tribunal's analysis and determination

15. As noted above, paragraph 12(b) of the Fourth Schedule to the Lease reads as follows: *"In the event that following receipt of a copy of the certification provided for in the Sixth Schedule hereto the sums that the Landlord collected on account of the Services from the Tenant exceed the amount that the Tenant was liable for then such excess shall*

be held by the Landlord on account of future service charges due from the Tenant".

16. The 'certification' being referred to in paragraph 12(b) is the annual certification of the total actual service charge and the amount (if any) payable by the tenant after taking into account payments made on account. The process envisaged by paragraph 12(b) is simply there to address a situation in which the payments made 'on account' by the tenant exceed the actual service charge for that year as established through the certification process. If in that year the sum or sums paid on account exceed the actual service charge as certified then instead of the balance being refunded to the tenant it is simply rolled forward and credited against the tenant's account so that the amount payable in respect of the next payment period will be reduced by the amount of that credit.

17. In our view there is nothing in the Lease which provides for the landlord to credit to the current tenant an amount erroneously charged to a previous tenant. Nor has the Applicant offered any proper legal authority for the proposition that the landlord should credit the current tenant's service charge account in these circumstances for any other reason. The Applicant has referred to the Respondent's alleged negligence, to a failure on the Respondent's part to contact the previous leaseholder and to the assumption on the Applicant's part of past and future liabilities, but we are not persuaded by any of these arguments. In addition, as noted by the Respondent, we have no information from the Applicant as to how any service charge surpluses overpayments or underpayments were addressed in the contract between the previous leaseholder and the Applicant.

18. As noted above, the Respondent has referred the Tribunal to the decision of the Upper Tribunal in *Gateway Holdings (NWB) Limited v Lynda McKenzie, Mr Simon Greenfield (2018) UKUT 371 (LC)*. That case concerned the question of whether a residential leaseholder may apply to the First-tier Tribunal for a determination in respect of service charges paid by her predecessor in title. In his decision, Mr Martin Rodger QC stated (amongst other things) as follows: *"The lease requires that 'the landlord shall give credit for overpayment' which presumably means the sum overpaid must be credited to the account of the tenant who paid it. In respect of the sum found by the FTT to have been overpaid, that tenant was not Mrs McKenzie and I do not see how she could now claim to be entitled to receive the overpayment".*

19. Applying the Upper Tribunal's reasoning in *Gateway Holdings* to our case, the Applicant cannot claim to be entitled to receive any overpayment prior to the date on which he became the leaseholder. If his point is then simply that he is not claiming payment but is merely asking for a credit, this seems to be in reliance on the wording of

paragraph 12(b) of the Fourth Schedule to the Lease, and for the reasons already given above we consider his analysis of that provision to be misconceived.

20. Therefore, in conclusion, we are not persuaded that the Applicant is entitled to a credit for overpayments which may have been made by the previous leaseholder, and consequently the application must fail.

21. As regards the Respondent's specific request that we strike out the application, we do not accept that the application constitutes an abuse of process and in any event we do not consider that any useful purpose would be served in striking out the application at this stage.

Cost Applications

22. The Applicant has made two cost applications. He has applied for reimbursement of the application fee under paragraph 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**Rule 13(2)**"). He has also applied under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**Paragraph 5A**") for an order reducing or extinguishing his liability to pay any litigation costs which are contractually payable under the Lease in connection with these proceedings.

23. The Applicant has been unsuccessful in his main application and we consider his application to have been misconceived. Accordingly, and in exercise of the discretion afforded to us in interpreting these provisions, we do not consider it appropriate to order the Respondent to reimburse the application pursuant to Rule 13(2) and nor do we consider it appropriate to make an order under Paragraph 5A. We therefore decline to make either cost order against the Respondent.

24. The Respondent has also made a cost application. It has not specified the primary or secondary legislation on which it is relying, but we shall assume that its application is under paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**Rule 13(1)(b)**"), the relevant part of which states as follows: *"The Tribunal may make an order in respect of costs … if a person has acted unreasonably in bringing … or conducting proceedings in … a leasehold case"*.

25. In *Ridehalgh v Horsfield* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct permits of a reasonable explanation. This formulation was adopted by the Upper Tribunal in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007* and in *Willow Court Management (1985) Ltd v Alexander (2016) UKUT 0290 (LC)*. One principle which emerges from

these cases is that costs are not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings.

26. Sir Thomas Bingham also said that unreasonable conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case, but that conduct could not be described as unreasonable simply because it led to an unsuccessful result. The Upper Tribunal in *Willow Court* added that for a lay person to be unfamiliar with the substantive law or with tribunal procedure or to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case should not be treated as unreasonable. Tribunals should also not be over-zealous in detecting unreasonable conduct after the event.

27. Whilst we have found in favour of the Respondent in this case and whilst we consider the application to be misconceived, we do not accept that the Applicant's conduct in bringing or conducting the application was so poor or vexatious (for example) as to qualify as unreasonable within the test set out in *Ridehalgh v Horsfield* and applied in the Upper Tribunal decisions referred to above. We therefore decline to make a costs order against the Applicant under Rule 13(1)(b).

Name: Judge P Korn **Date:** 28th October 2019

RIGHTS OF APPEAL

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

B. 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.

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

D. 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

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.