FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AU/LSC/2019/0223**
Property	**:**	**Flats A and B, 62 Aubert Park, London N5 1TS**
Applicants	**:**	**Ms Eva Farace** **Mr Antonin Guillebaud and Ms Pauline Bureau**
Represented by		**Ms Farace and Mr Guillebaud appeared as litigants in person**
Respondent	**:**	**Mr Aderemi Bola** **62 Aubert Park Management Company Limited**
Represented by		**Ms Lewis-Counsel**
Type of application	**:**	**Service charges - Preliminary Hearing on the matter of Jurisdiction**
Tribunal	**:**	**Judge Daley** **Ms Coughlin**
Date and venue of hearing	**:**	**11 September 2019 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**03 October 2019**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that it has no jurisdiction in relation to this matter.

The Background

1. On 11 September 2019, the Tribunal held a preliminary hearing to decide whether the Tribunal had jurisdiction to determine this matter. The Tribunal held an oral hearing which was attended by Ms Eva Farace and Mr Guillebaud on behalf of the Applicants, and Mr Aderemi Bola the Respondent, who was represented by Ms Lewis Counsel. Although the Management Company was a party to the Application, for reasons that will become clear the company is effectively defunct and was not represented at the hearing.

The Background to this matter is set out as follows-:

2. On 21 June 2019 the Applicants issued an application for the determination of the reasonableness and payability of service charges in respect of the year 2019. On 16 July 2019, a Case Management Conference took place in which the Tribunal ordered that this matter be set down for a preliminary hearing listed for 1.30pm on 11 September 2019 in order to consider-: (i) Mr Bola's standing to serve service charge demands and (ii) the issue of payability of any service charges which Mr Bola claims to be entitled to demand from the applicants (including in respect of work to the roof terrace of Flat C) under the terms of the lease and/or to give further directions.

The Hearing

3. The hearing was attended by the parties listed above.

4. The facts of which gave rise to the application are ably set out in paragraphs (5) to (8) of the Directions dated 16 July 2019 which stated as follows-: *"… (5) The applicants stated that the lessees of each of the three flats at 62 Aubert Park own a third of the freehold. The freehold interest is held by 62 Aubert Park Management Company Limited and it is the Tribunal's understanding that no person other than the lessees of the three flats has any interest in 62 Aubert Park Management Company Limited. (6) The Tribunal was informed that the second respondent, Mr Bola, has sought to demand service charges from the applicants. (7) The applicants consider that Mr Bola has no right to act on behalf of the landlord company; that service charges have been demanded by Mr Bola which are not payable under the terms of the applicants' lease; that no section 20 consultation has been carried out … and that Mr Bola's service charge demands are not in the correct form. (8) Accordingly, the applicants' case is that no service charges are currently payable by the applicants in respect of the service charge year 2019 and they seek a determination to that effect…"*

5. The Tribunal sought to clarify the position by asking additional questions of each of the parties, although Mr Bola was represented, the

hearing was informal, Mr Bola at times provided information directly to the Tribunal. The Tribunal was informed that although each of the leaseholders had a share of the freehold and that 'they were all directors of the company' none of them acted as a director, and the register at Companies House contained the details of shareholders who had vacated the premises and transferred their share of the freehold, and that in the case of Mrs Gracie Bola, who was also shown as a person with an interest in the company, she was unfortunately deceased.

6. The Tribunal was informed that in the past when work had been undertaken at the property, any one of the lessees would arrange for a contractor to carry out the work and would then be reimbursed by the others. Ms Farace stated that both of the applicants had arranged for work to be carried out. They had followed the procedure of obtaining two estimates and had then informed the other leaseholders who had subsequently agreed that the work could go ahead. Ms Farace accepted that this procedure had not been followed in relation to works undertaken to the flat roof in 2012.

7. Mr Bola did not accept that this was the normal procedure he stated that in an emergency the work was undertaken and then the other leaseholders were informed. He also stated that he arranged the insurance, and although there was a degree of discussion between the leaseholders as to whether they had the best rate for insurance the cost of the insurance was normally paid. Mr Bola had purchased his flat shortly after the building had been converted; as such he had owned his interest in the premises for the longest period and was the original lessee for flat C.

8. Ms Farace accepted that she had paid for the roof repairs in 2012 without querying whether the sums were payable by her. She stated that she was new and did not want any hassle and she accepted that she had not properly consulted the terms of the lease.

9. Neither, Ms Farace, or Mr Guillebaud agreed with Mr Bola's statement that work was undertaken without following the procedure of obtaining estimates. They both stated that apart from 2012, work was undertaken after following the procedure of obtaining two invoices, and consulting with the other leaseholders. They claimed that only Mr Bola had arranged for work to be undertaken without consultation. Ms Farace and Mr Guillebaud claimed that they had always followed the procedure set out in the lease.

10. It was clear to the Tribunal that the company 62 Aubert Park Management Company Limited existed in name only and that all of the functions of the landlord that were necessary in the small three flat building were carried out by the leaseholders informally exercising the responsibility as the freeholder.

11. The Tribunal referred to the relevant lease provisions, the leases of all three flats did not have mirror provisions and this was in part, at the heart of the difficulty in this case. Mr Bola was the leaseholder of flat C, which has the benefit of a flat roof terrace, which may be used as an outdoor space. His lease between Michael O'Driscoll and Aderemi Bola and Gracie Ebadan is dated 5 May 1989. His demised premises are described in the First Schedule of the lease as follows-: "… All That self-contained flat situate on the top floor of the Building and known as Flat C which premises are shown edged red on the said Plan…"

12. The Tribunal was shown a copy of the plan and noted that there was green, edging, and that this marked out the area of the roof terrace, were the disputed work was carried out. Clause 7 of the lease for flat C(Mr Bola's lease) provided as follows-: "*The exclusive right for the Lessee to have access to and the use of the roof terrace at second floor level shown coloured in green on the said plan subject to the proviso to clause 5(i) hereof and subject also to the Lessee being responsible for the repair maintenance and upkeep of the surface covering of such roof terrace the parapet walls and any railings thereof surrounding it to the extent that the want of repair maintenance and upkeep is caused by the Lessee and/or those person or the misuse thereof specified in clause 5(i) hereof and also the Lessee accepting legal responsibility for any claims damage liability whatsoever in the event of the same arising from the breach of the terms of the lease…"*

13. The Applicants' lease did not have a corresponding clause 7, which mirrored this provision. Clause 7 in Ms Farace and Mr Guillebaud lease conferred the right to keep a dustbin in the refuse area.

14. In addition clause 5 (i) of the Flat C's Lease covenants provided that the Leaseholder should-: *Keep the Premises including the surface coverings of the roof terrace and parapet walls and any railings… in good and substantial repair and condition …and in particular (but without prejudice to the generality of the foregoing) so as to give support shelter and protection to the remaining parts of the Building Provided That the lessees shall not be responsible for any works of repair to the said surface coverings of the roof terrace the parapet walls and any railings erected thereon if the want of repair is not caused by either the Lessee or the Lessees family servants agents contractors employees or invitees or by reason of the misuse thereof by any person aforesaid…"*

15. The other two leases (Ms Farace) and (Mr Guillebaud), made no mention of the roof terrace, Clause 5(1) imparted an obligation to Keep the Premises (other than the parts…referred to in paragraph (ii) and (iii) of clause 6 hereof) and all internal wall… in good and substantial repair and condition. Paragraphs (ii) (a) of clause 6 referred to the main structure and in particular the roof chimney stacks gutters and

rainwater pipes and iii) of clause 6 referred to the landlord's obligation to redecorate the building.

16. Given the problems with the leases in particular the lack of mirroring provisions, it was not surprising to the Tribunal that clause 6(ii) a of Mr Bola's lease provided that "*the Lessor will as and when necessary maintain repair and renew and keep in good and substantial repair and condition (a) the main structure including the roof of the said roof terrace parapet walls and any railings erected thereon*.

17. There was also additional wording in clause 5(ix) of the Respondent Mr Bola's lease the clause in general requires the leaseholders to "Indemnify the Lessor against all liability claims damage" arising from the Lessee's failure to perform the obligations as to "repair and as to making good" Whereas Mr Bola's lease at 5 (ix) stated subject to paragraph 7 of the second schedule which is referred to above.

18. Ms Farace in her submission relied upon the wording in clause 5(i) of the second schedule, she stated that Mr Bola was required to maintain the roof terrace covering, in her view there should have been an independent surveyor, and although she paid for the roof covering 7 years ago, she now considers that she should not have paid without seeing a report and having sight of estimates. She stated that she could not be satisfied that the condition of the roof had not been caused by misuse of the roof terrace.

19. Ms Farace stated that she was aware that there was a sofa on the terrace, an outdoor heater and pots. She stated that she had been informed that the roof terrace should have nothing heavy on it. Without an inspection of the roof prior to the work having been carried out the applicants could not be satisfied that the roof's condition had not been caused by the respondent's tenants.

20. Ms Lewis-counsel, stated that in accordance with the terms of the lease, Mr Bola did not have to maintain the roof terrace, he was only responsible for the surface, she further argued that if the roof needed replacing, the Respondent was not responsible for the cost of the surface he was only responsible for maintaining it. Ms Lewis stated that the Applicants were responsible for contributing to the cost of repairs to the roof structure, and in that regard she referred to clause 6(ii) a in the Applicants' lease. She further submitted that if a repair was necessary he was not required to solely pay for the costs of the surface covering.

21. Ms Lewis also argued that this matter was outside the jurisdiction of the Tribunal as clause 9 provided a mechanism for dealing with disputes.

22. Mr Bola in his statement dated 20 August 2019, and at the hearing stated that he was a shareholder of the Respondent Company, 62 Aubert Park Management Company Limited. He stated that in the past he had been required to act in urgent situations without obtaining estimates, he referred to when the premises of the first applicant was burgled and that he had paid for emergency glass and contacted the police. He asserted that he was only responsible for damage caused to the roof terrace and otherwise the landlord was responsible. He stated that he had acted in good faith because the matter was urgent.

23. In respect of the contractor who had carried out the work, Mr Bola had used Bridge Roofing who had carried out work to the roof in 2012. He stated in his statement that the Second Applicant, Mr Guillebaud, knew that the work was going to be carried out by Bridge Roofing and that he did not raise any issues concerning this, or ask for an estimate in advance of the work being undertaken.

24. The Tribunal was provided with a copy of the invoice from Bridge. The invoice which was described as a 'Pro Forma' invoice. It was stated on the invoice "…The roof structure is not designed to carry heavy furniture as well as people, in the event off (sic) overload the guarantee being null and void." The cost of the work was£12,138.00.

25. The Tribunal was also referred to an estimate which was attached to the Respondent's witness statement. The Tribunal noted that it provided a 10 year guarantee, the previous invoice for the 2012 roof work also carried out by Bridge Roofing, The Tribunal wanted to know whether this invoice also carried a 10 year guarantee and if so, why the work was not carried out under the terms of the guarantee. Mr Bola was not able to provide a copy of the previous invoice for the 2012 roof works. In answer to the Tribunal's query, he stated that the roof was in need of renewal which did not deal with the issue of the guarantee.

26. In the joint statement of Ms. Farace, Mr. Guillebaud and Mrs. Bureau. The Applicants stated that they wished the Tribunal to answer the following questions-: "…a. Is the roof terrace part of Flat C's demise premises? b. If so, who should pay the maintenance cost of the roof terrace? Should it be the Landlord (62 Aubert Park Management Company Limited) or Flat C? c. Have the rules for engagement of works been respected?" In their statement, the Applicants noted that they did not have access to the Respondent's lease. In respect of question C, they referred to the Respondent's non-compliance with section 20 of the Landlord and Tenant Act 1985.

The Decision of the Tribunal and the reason for the decision

27. In Section 30 of the Landlord and Tenant Act 1985 states, that the Landlord is given an extended meaning; it is defined as any person with the right to enforce payment of a service charge, this section could

include a tenant who is required to pay for a specific service and claim reimbursement.

28. It is clear that the wording of the section is wide enough to include Mr Bola if the lease provided for him to pay for work and to seek reimbursement, then it would be permissible for him to seek reimbursement from the other leaseholders, and the provisions of section 27A of the Landlord and Tenant Act 1985 would bring this into the Jurisdiction of the Tribunal.

29. The Lease defines the Lessor as Michael O'Driscoll, this would also apply to his successor in title, which in this case is 62 Aubert Park Management Company Limited. From the information provided to the Tribunal it is clear that this company is in existence in name only, one of the Directors died, others who had obtained a share of the freehold were not named as a director. There did not appear to be any election of Directors, given this Mr Bola cannot claim to be acting as a de facto Director. If the Tribunal understands Mr Bola's claim, he did not claim that the service charges had been served on the other leaseholders in his capacity as a director, rather he claimed that all of the leaseholders were directors and as such any of them could claim reimbursement for work carried out.

30. If the Tribunal is wrong about this, it is clear that Mr Bola is not acting on behalf of the company as a director, as he has not followed any of the processes set out in the lease to incur service charges on behalf of the company. The lease provides in the sixth schedule states… this is to be assessed by reference to the rateable value of the premises, there is no evidence before the Tribunal on the rateable values of the premises, or why Mr Bola assessed his contribution as less than the other leaseholders.

31. Although the Tribunal has no reason to doubt that Mr Bola acted in good faith, he has not carried out the commissioning of this work in accordance with the lease. In particular the Tribunal refer to clause 1 of the Fifth Schedule and clause 2. The Tribunal also noted that there was no attempt to settle this matter under clause 9.

32. As Mr Bola was not acting as the Landlord he has no standing to incur service charges on behalf of the Management Company neither can he claim that he was a leaseholder who incurred the costs as a result of an obligation under the lease.

33. The Tribunal is a creature of statute which means its jurisdiction is limited to that set out in relevant Acts of Parliament. Under section 27A of the Landlord and Tenant Act 1985 the Tribunal has the power to determine whether a "service charge" is payable. Under section 18(1), a "service charge" means an amount payable by a tenant.

34. As this sum was not incurred as a service charge the Tribunal has no jurisdiction to determine the payability of this sum. In any event the Respondent has not made a compliant demand neither has he followed any of the procedures required under the act.

35. Accordingly, as the Tribunal finds that Mr Bola does not have standing to serve the service charge demands, and further no demands were served that complied with the Service Charge regulations. Accordingly, the Tribunal lacks Jurisdiction in this matter. No further directions will be given.

Name: Judge Daley **Date:03.10.2019**

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).