LON/00AY/LAM/2003/0005

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE, ON APPLICATIONS UNDER SECTION 24(1)OF THE LANDLORD AND TENANT ACT 1987, AS AMENDED

APPLICANTS:	Mr Christopher & Mrs Sylvia Trude
REPRESENTED BY:	Miss A Parathalingam, (Student Advisor, College of Law) Mr D Fowler, (Student Advisor, College of Law) Mr G Milne, Carnegie Consultants
RESPONDENTS:	Dungarvan Investment Ltd.
REPRESENTED BY:	Mr P Kilcoyne of Counsel Mr S Killen, Messers David Wineman, Solicitors Mr S Brent, Messers, Stanley Brent & Co Miss J Brent Messers, Stanley Brent & Co
ADDRESS:	132 Brixton Hill, London SW2 1RS.
APPLICATION DATE:	17 November 2003
HEARING DATE:	07 & 08 April 2004 and 4 May 2004
TRIBUNAL MEMBERS:	Mr G F Bowden TD MA FRICS Mr P M J Casey MRICS Mrs T Gordon

Ref: LON/OOAY/LAM/2003/0005

THE TRIBUNAL REASONS

132 BRIXTON HILL, LONDON SW2 1RS

1. Introduction

1.1 This is an application by Mr Christopher and Mrs Sylvia Trude, to appoint a new manager under section 24 of the Landlord and Tenant Act 1987 (the Act), to manage 132 Brixton Hill (the subject property). The Applicants are long-lessees of the upper-ground floor flat in the subject property.

1.2 The Tribunal inspected the subject property on Wednesday 7 April 2004 and found it to be a substantial, five-storey detached building, built circa 1850, set back from the public footpath and the busy main (A23) road. Originally designed as a residential building, extensions have been built-out at the front creating shop premises, one either side of central steps leading up to the original front door. There is an open forecourt between the footpath and the shop premises. The shop on the north side of the steps deals in electrical appliances, and that on the south side position is a café. These commercial premises extend through to the semi basement area of the main structure of the building.

1.3 Access to the residential units in the upper part of the subject property is by the central front steps leading up to an open walkway running along the front of the building above and behind the ground-floor shop extension. The Applicants' flat (132E) on the upper-ground floor, has its front door and windows opening on to this walk-way. Access to the floors above is by way of the original front door at the top of the central steps. This front door gives access to the residential units above; the first floor flat (132C) is held on a long-lease by Mr Fullalove, and on the second and attic floors there are two flats, (132A and 132B), retained by the freeholder and let on short-term assured shorthold tenancies.

1.4 The Applicants' flat occupies the whole of the upper-ground floor above the semi-basement area of both the café and electrical appliance premises. At the rear there is a large garden with a fence dividing it in two. The southerly part of which was demised to the Applicants, who have access to it by a stairway from a veranda running along the rear of the building. It was stated, in evidence, that the northerly section went with the electrical appliance premises. In effect these premises have no direct access to it and, in practice, the Applicants tend and maintain the two parts of the garden. The café premises have a window, beneath the veranda opening on to the Applicants' rear garden. It was a matter of dispute between the parties as to whether the café premises have access, in an emergency, to the Applicants' demised garden area.

1.5 The freehold interest in the subject property is held by Dungarvan Investments Limited (the Respondents), which is a holding company owned by Mr Stanley Brent, whose family have been freeholders of the property for many years. The management of the property has been carried out by Stanley Brent & Co, a company run by the freeholder for the purpose of managing this and other properties. Mr Stanley Brent, is by profession a solicitor and has, over the years, personally handled the legal work in connection with the management of the subject property. Although technically separate legal entities, the situation is, in effect, one of management by the landlord.

2. Evidence

2.1 A hearing was convened at 14.00 hours on Wednesday 7 April at which Mr D Fowler and Ms A Parathalingan, of the College of Law represented the Applicants. Mr P Kilcoyne of Counsel represented the Respondent.

2.2 The Tribunal heard oral evidence from the Applicant, Mr Christopher Trude, and Mr Graeme Milne, the proposed new manager, on the afternoon of Wednesday 7, and on the morning and afternoon of Thursday 8 April.

2.3 The Hearing was resumed on Tuesday 4, May when the Respondent, Mr Stanley Brent gave his evidence.

2.4 In closing the proceedings, the Chairman asked the parties to submit their closing submissions in written form.

2.5 On consideration of these submissions the Tribunal requested that the Respondents provide a copy of the lease relating to the communal premises. This was received by the Tribunal on 1 June 2004.

2.6 The parties' submissions which summarised the points at issue and the curriculum vitae of Mr Graeme Milne, of Carnegie Consultants, are attached to this decision document as Appendices.

Appendix A.	Applicants' Submission
Appendix B	Respondent's Reply to Applicants' Submissions
Appendix C	Witness Statement of Graeme Milne

3. The Issues

3.1 The basis of the Applicants' case is set out in the issues itemised in para 3 (a, b, c and d) page 1 of the submission dated 17 May 2004, (Appendix A). The Respondent acknowledged these issues in the nine points in para 16 of its Reply dated 12 May 2004, (Appendix B). These submissions summarise the cases presented fully by the parties at the oral hearing. The Tribunal decided to deal with them in their decision under the four broad issues set out in the Applicants' submissions

3.2 Breach of obligation owed to tenants by allowing and actively supporting a campaign of harassment and intimidation by the café tenants against the Applicant.

3.3 Unreasonable service charges made, by refusing to provide detailed information regarding the invoice and works carried out on the water supply pipes by Subterra Ltd and by failing to ensure adequate management of the works carried out;

3.4 Failure to provide a copy of insurance policy and details, which in addition amounts to a further instance of unreasonable service charges made.

3.5 Failure to comply with RICS Residential Management Code, under the above heads and several others detailed below.

4. Decision

4.1 During the course of the proceedings the Applicants alleged and the Respondent accepted that the situation is, in practice, management by the landlord himself. In these circumstances the Tribunal noted the view of the parties and have, in their deliberations and decision accepted, that to all intents and purposes, the landlord, Mr Brent, and the managing agent, Stanley Brent and Co, should be treated as one and the same. Hereafter both are referred to as the "Respondent".

4.2 In their decision the Tribunal have followed the sequence set out in the Applicants' submission as noted above:-

a. Breach of obligations owed to tenants by supporting harassment.
b. Unreasonable service charges and failure to provide information.
c. Failure to provide insurance details.
d. Failure to comply with RICS management code.

4.3 <u>Breach of obligation owed to tenants by allowing and actively supporting a campaign of harassment and intimidation by café tenants against Applicants</u> The Tribunal accepted that there had been anti-social and aggressive behaviour on the part of the café tenant and/or some of the clients of the café. The Respondent could have intervened, with a more hands-on approach, to try and resolve this issue. On the evidence before them, however, both written, oral and in cross

examination, the Tribunal found that the Applicants had not proved their case, that the Respondent had encouraged, aided or abetted any such behaviour on the part of the tenant Miss Cambell, or the clients of the café. On the basis of the evidence before them, the Tribunal felt that there had been no breach by the Respondent in supporting a campaign of harassment.

4.4 Unreasonable Service Charges - by refusing to provide detailed information regarding the invoice and works carried out to water supply pipes. It is not within the remit of the Tribunal in this Application to adjudicate on the reasonableness of costs for works carried out to the water supply pipes. The reasonableness or otherwise of the cost of these works was not pleaded at the Hearing. The Tribunal did nevertheless take a view on the information provided to tenants in respect of these works. On the documentary evidence before them the Tribunal felt that, while the Respondent had taken some steps to keep the Applicants and the other Lessee informed, fuller details of the works, and the apportionment of costs between all occupants of the building, should have been provided.

4.5 Failure to provide a copy of Insurance Policy It did appear that the Respondent had not provided the Applicants and the other lessee, Mr Fullalove with full details of the insurance cover. However, it was apparent from the evidence that the Respondent had been receptive to the Applicants' proposal that cover should be provided by an alternative insurer, China Insurance Co. (UK) Ltd - who in fact subsequently provided the insurance cover. It was also apparent from the evidence that the share of the premium, demanded from the lessees, was in accordance with the terms of the lease.

4.6 Failure to comply with RICS Residential Management Code and other issues including: provision of a security door; condition of the building; failure to reply to every letter; failure to correspond with lessees on relevant matters; failure to answer questions satisfactorily.

4.7 Condition of building On inspection the Tribunal thought that the general condition of the building indicated satisfactory maintenance, and indicated, in general, satisfactory management arrangements. There were one or two minor matters such as an uneven paving slab and a leaking water pipe which could be readily rectified.

4.8 Failure to communicate The allegation that the Respondent did not reply to every letter or regularly correspond with leaseholders on relevant matters, or indeed answer all question in a manner to satisfy the Applicants was considered by the Tribunal. They noted that periodically there had been a heavy flow of correspondence from the Applicants, often reiterating points, from earlier letters. These had frequently remained unacknowledged or unanswered in written form. In response the Respondent had contended that he felt there had been a letter-writing campaign to build up a case against him. However he accepted, in cross examination, that in the past he could have been more forthcoming in his response and would, in the future, adopt a more hands-on approach. In order to obviate disputes arising between landlord and tenant, and between tenants themselves, he would put in place a procedure for dispute resolution.

4.9 Security Door The Applicants and the other lessee had, over a period of time, been in discussion with the Respondent about installing a security door, between the ground floor commercial premises, at the bottom of the steps leading up to the residential accommodation above. This proposal from the Applicants and the other lessee, Mr Fullalove, had been strongly resisted by the Respondent without any reasonable explanation being given. Eventually reasons for the Respondent's opposition were set out in a letter to Mr Fullalove.

The Tribunal found the Respondents reasons for opposing the proposal unconvincing. The easy access from the street to the balcony at the top of the steps could, no doubt, attract undesirables to this secluded area. This situation did justifiably engender in the occupants a sense of anxiety and insecurity. The Tribunal felt that there was a failure of good management in not discussing the matter more fully with the lessees and other tenants, and giving serious consideration to the benefits of such a door both in protecting the subject property and enhancing the occupants sense of security.

4.10 Appointment of Manager The Tribunal gave careful consideration to the management of the subject building, with its mixed commercial and residential occupation, and also the special technical expertise needed in looking after a listed building. The Tribunal read with interest Mr Milne's witness statement, and recognised in the oral evidence he gave his enthusiasm and his ability to bring a conciliatory and common-sense approach to management problems. However it was apparent he had neither the professional training nor experience in property management, to equip him for the complex task of managing a building such as 132 Brixton Hill. He currently holds no appropriate professional indemnity insurance, which must be an essential requirement for such an appointment. For a Tribunal to make an order under section 24 it would be necessary for the proposed manager to demonstrate that he or she has not only the personal, but also the appropriate professional skills, to fulfil the appointment.

4.11 In the light of the above consideration the Tribunal determined that it would not be just or convenient to appoint Mr G Milne of Carnegie Consultants to be manager of the subject premises.

4.12 It was apparent to the Tribunal that there had, over the years, been a break down in trust between the parties, and that there had been a number of breaches of good management practice. The Tribunal felt, however, that it was a finely balanced decision as to whether a new manager should be appointed. The Tribunal took note of Mr Brent's evidence as manager (rather than freeholder), in which he acknowledged that, in the past, he could have handled things differently,

and that in the future he would take steps to improve the relationship between himself and the lessees by taking into account their concerns. In this context the Tribunal recognised that the question of the security door, which Mr Brent had dismissed out of hand, was an issue which gave cause for the Applicants and the other long leaseholder to fear for their security. It was noted that Miss Brent, stated in her evidence, that such a door could enhance security. The provision of a security door, such as had been suggested, should be given serious consideration.

4.13 On the present Application the Tribunal were making no order as to the appointment of a new manager. They, nevertheless, did not rule out the possibility of a further Application succeeding before another Tribunal in the future, if management matters did not significantly improved in meantime.

4.14 Costs: With regard to the Section 20C Landlord and Tenant Act 1985 Application, (limitation of service charges: costs of proceedings) the Tribunal makes no order as to costs or refund of fees.

CHAIRMAN ..... Clarence Bowden .....

DATE ..... 30 July 2004 .....

APPENDIX A

IN THE LEASEHOLD VALUATION TRIBUNAL LON/OOAY/LAM/2003/0005

BETWEEN:

(1) CHRISTOPHER TRUDE

(2) SYLVIA TRUDE

Applicants

-and-

DUNGARVAN INVESTMENTS LIMITED

Respondent

APPLICANT'S SUBMISSIONS

References to page numbers in the hearing bundle appear in square brackets.

Introduction

1. This is an application for an order under section 24, Landlord and Tenant Act 1987, to be made by the Tribunal to appoint a new manager in respect of 132 Brixton Hill ("the property").

Background facts

2. The registered freeholder of 132 Brixton Hill ("the building") is Dungarvan Investments Limited, of which the Director is Mr Stanley Brent. The managing agent is Stanley Brent & Co, of which the Director is also Mr Stanley Brent. The building is on four floors, of which the ground floor is used by the shops; the upper ground floor is let on a 99-year lease granted on 02.10.87 to A; the first floor is let on a long lease to Messrs Fullalove; and the second and third floors are let on short leases. The shops are Basement Jo, a café; and Arlington Electrics.

3. The grounds on which A asks the Tribunal to make an order are:

   a) Breach of obligations owed to tenants by allowing and actively supporting a campaign of harassment and intimidation by the café tenants against A;

   b) Unreasonable service charges made, by refusing to provide detailed information regarding the invoice and works carried out on the water

supply pipes by Subterra Ltd, and by failing to ensure adequate management of the works carried out;

c) Failure to provide a copy of insurance policy and details, which in addition amounts to a further instance of unreasonable service charges made; and

d) Failure to comply with RICS residential management code, under the above heads and several others detailed below.

4. The above grounds are intended to be not exhaustive, but illustrative. The history of management failures by R's managing agent goes back many years. From 1987, when A bought the lease of 132e Brixton Hill, R's managing agent took an approach of inactivity towards managing the building, save when activity was in R's own interests. It is apparent from the evidence heard by the Tribunal that this approach extends back long before A acquired the lease to 132e Brixton Hill. The building has been owned by Stanley Brent's family for over 100 years, and the freehold has been owned by R since 1964. R allowed the building to decay so far that masonry fell from it, injuring Mr Trude, and the London Borough of Lambeth issued a dangerous structure notice.

5. R's closing submissions (at paras. 6-8) refer in some detail to a judgment in 1996 following litigation over the major works to the building following that notice. This judgment was not submitted in evidence to the tribunal, although when raised in cross examination of Mr Trude he gave evidence that the litigation was made necessary by the bank to which A went for a loan to pay their share of the costs of the works, and by the bank's disquiet at a number of terms of the lease, which the Court subsequently amended.

6. However, it is not disputed that "an acute state of ill feeling and mistrust existed between the parties" (R's closing submissions, para. 6). It is submitted that these terms are not one-sided, as suggested by R. It is part of A's case that trust and confidence between landlord and tenant had completely and justifiably broken down by 1996, so that, although in the period dealt with by A in their application (restricted to the last two years, to make the application manageable) A raised their concerns in "a spirit of respectful enquiry" [20-2], the managing agent either failed to respond or was dismissive of the issues they raised. It therefore proved impossible to resurrect any trust or confidence; and this is evidence that the situation is irretrievable.

7. It is A's position that many of the problems stem from the fact that R and its managing agent, Stanley Brent & Co., are in fact one person, namely Stanley Brent. His interest in the building is not simply that of a freeholder, because two of the four flats are let on assured shorthold tenancies and both of the shops on short leases. Stanley Brent and Co. manages with a view to maximising R's income, and minimising R's costs, in terms of both cash and work; so that,

although the tenants pay him for his services, the managing agent provides those services exclusively to the landlord, and is incapable of acting impartially.

Breach of obligations to tenants

8. Clause 4(2) of A's lease [1-11] states:

> (2) The Lessee paying the rents hereby reserved and performing and observing the covenants on the part of the Lessee herein contained shall peaceably hold and enjoy the demised premises for the term hereby granted without any interruption by the Lessor or any person lawfully claiming through under or in trust for it.

9. Clause 5(2) of A's lease [1-13] states:

> (2) In the event of any dispute between the Lessee and the lessee or lessees or occupiers of any other part or parts of the remainder of the building... then in every such case the dispute or difference shall be determined by the Lessor...

10. In addition, the RICS Residential Management Code states that good practice calls for:

a) policies and procedures for responding to incidents of harassment (Code 4.8);

b) policies and procedures for handling leaseholder/tenant disputes and complaints about nuisance between neighbours (Code 4.29 and 20.1); and

c) investigation of written complaints against other leaseholders/ tenants in the building and if appropriate enforcement of the conditions of occupancy (Code 4.28 and 20.4).

11. R testified that no such policies or procedures exist. It is A's case that Stanley Brent & Co. failed consistently to investigate or take any action whatever on A's complaints of activities by the café tenants, save for one isolated incident of noise nuisance, and failed to enforce the café tenants' conditions of occupancy. The issue in this application is not whether these complaints were justified (although they were so), but Stanley Brent & Co.'s failure to take any interest in those complaints; to respond to correspondence on the matter; and to investigate whether the café tenants had breached the conditions of their lease.

12. R notes in his closing submissions (para. 23) that the managing agent also took no action against A on the basis of allegations (presumably by the tenants of Basement Jo's). This does not support R's case, but is further evidence of the failure to manage. In addition, and in stark contrast to these failures, the managing agent was quick to take action over A's alleged breach of the lease conditions with regard to the café's rear window. It is submitted that this is evidence that the managing agent will only act when to do so is in R's interests.

13. A wrote to R [20-1] in a courteous manner to raise serious concerns about the café's alcohol licence, use of the forecourt and noise nuisance at night and weekends; but was ignored by R. Further letters [23 and 24] were also ignored. As A's complaints became even more serious, two telephone requests were met with refusals to take any action and a further letter was ignored [25]. The next

letter [31-1] finally received a reply [34], but the matter of the café was ignored; another letter [35-1] was ignored. The next [37] received a reply [38], that—

> ...there is nothing wrong with the restaurant forecourt. It does not invalidate the building insurance, breach any lease provisions, or jeopardise the safety of the residents. We must decline to enter into any further correspondence on this issue but, of course, if you continue dissatisfied it is always open to you to refer the matter to and have same resolved by the Court.

14. It is submitted that this was wrong because:

    a) the fence around the forecourt does not have planning permission [33];

    b) the café lease's clause 2(9) is drafted in very similar terms to clause 2(6) in A's lease, which R relied on in taking action against A over the plastic netting A erected on the boundary of their garden; and

    c) the café lease's clause 2(4) requires the lessee "not to cause or permit or suffer to be on the forecourt in front of the demised premises any vehicle or other article or thing and at all times to keep the said forecourt swept and clear and free from obstruction and in a safe and clean condition".

15. A further letter [40] received no reply. Another [53-1] received a reply [54-1] which failed to mention the café. The next [57-1] informed R of an incident in which a drunken reveller entered A's flat via the rear door, having been encouraged by the café tenants to trespass on A's garden via the rear window of the café. R accepted in cross examination that this was a serious matter, which if true would amount to a breach of the café tenants' lease which he should have investigated and acted upon. Mr Trude gave evidence that his wife telephoned the managing agent, who told her to sort the matter out herself as he could not be bothered, and then hung up on her [115].

16. The managing agent's reply [58] to the letter detailing this incident made no mention of it, merely responding to A's complaints in general—for the first time since the first letter cited above, 19 months earlier—by saying it had investigated A's complaint of noise nuisance on one particular occasion, arising out of a party at the café, and had found that both sides had conflicting accounts and each had witnesses; it declined to act as judge and jury and suggested that A seek redress through the Courts.

17. R states that there is no independent documentary evidence that other occupants of the building had problems with the café tenants (closing submissions, para. 17). This is not the case. Mr Trude gave evidence that Mr Ginn, the tenant of the

electrical goods shop, had also had problems with the café tenants, and this is supported by a letter from PC Andrew Burton [47], who visited the two shops and talked to Ms Campbell and Mr Ginn, as a result of which they "agreed in theory to refrain from speaking to each other". In addition, the other long leaseholder, Michael Fullalove, has made a witness statement, submitted to the Tribunal, supporting A's application.

18. R states that it took a neutral line (closing submissions, para. 23). It is submitted that ignoring or dismissing requests for action does not amount to taking a neutral line. In addition however, it is A's case that R was far from neutral when its own interests became involved, and its managing agent acted enthusiastically on R's behalf, at the same time supporting the café tenants by its litigation against the Applicants with regard to the basement rear window of the building.

19. The Fire Safety service has visited the premises and assessed that the rear of the café is suitable only for storage and not for staff [22]. The tribunal heard evidence that the window had been blocked up until the end of the 1980s, and a planning application to open it up was made and subsequently withdrawn in 2001 [21]. There is therefore no fire exit to the rear of the café, and no right of entry into A's garden.

20. Mr Brent admitted, in response to the Tribunal's questions, that if the cafe had an alcohol licence the property's value to him would increase. In an alcohol licensing appeal on 2.8.02, the Inner London Crown Court refused a licence to the café because of the impossibility of providing a safe rear fire escape. R has subsequently pursued a campaign of litigation to attempt to secure a fire exit.

21. When A put a sheet of flexible plastic netting along the boundary of their land near the café window to keep foxes out, the managing agent wrote [30] claiming that the fence contravened paragraphs 1 and 2(6) of the lease, and at the same time—just in case they did not—imposing a new regulation, purportedly under the right reserved in the fourth schedule to the lease, requiring them to keep their boundary to the alleged emergency escape free from obstruction of any kind at all times. The window does not constitute a fire exit, was opened in the late 1980s and passage through it is not an easement, quasi-easement, right or privilege as alleged by the managing agent. In addition, the Tribunal saw that the neighbouring electrical goods shop has its own garden but has no access to it, the rear windows being blocked up in the same way as the café's had been. A therefore submits that R did not act reasonably in imposing this regulation.

22. A's reply [31-1], as far as it concerned the rear window, did receive a response from the managing agent, on [34], restating its position and threatening litigation. A's reply to this [35-2], proposing a meeting of surveyors to avoid litigation, was ignored. R instituted County Court proceedings, alleging A had blocked the exit from the rear of the café. At court on 16.12.02, R stated the obstruction had been removed, and its application was dismissed with no order

as to costs. Following the lodging of the present application with the Tribunal, R issued new County Court proceedings against A on the same issue, which on 26.4.04 R was given permission to discontinue, with costs awarded to A. The HHJ Winstanley was satisfied that A was not blocking any exit; that there was no exit; and that the lease contained no covenant preventing A from putting the plastic netting along the boundary of their land.

23. The Tribunal heard that R has issued a series of s.146 notices against A (and against the other leaseholder, Mr Fullalove). These began with a notice for carrying out repairs without seeking permission, and another for erecting trellises to protect A's front windows. R has been quick to threaten litigation, for example in its managing agent's letter [42], just eight days after its insurance renewal notice. R has been just as quick to carry out these threats, for example issuing proceedings for £22.36 owed in error from an insurance payment of £649.69; and, though the balance and interest were paid in full, obtaining judgment for the court fees, which A had not paid due to a misunderstanding.

24. It is therefore submitted that R and its managing agent have shown no interest in providing a service to their tenants, or helping them to resolve their problems, unless those problems touch on R's own financial interests; and approach relations with their tenants by means of threats of litigation, and litigation itself.

Unreasonable service charges: works on water pipes

25. Amended Clause 3(5)(a) of the lease [2-2] states that the Lessee covenants to pay and contribute on demand to the Lessor one-fourth part of the cost of:

> (a) the repairs and decorations referred to in Clause 3 (4) hereinbefore contained Provided that the Lessee shall not be liable to make any contribution towards the cost of repairs and decoration to the shops forming part of the Building And provided that the repairs and decorations have been reasonably undertaken and paid for by the Lessor

26. Service charges include the costs of repairs: s.19(2A)-(3), Landlord and Tenant Act 1985. Relevant costs are to be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred — s.19(1), Landlord and Tenant Act 1985.

27. The RICS Residential Management Code states that good practice calls for:

a) prompt and suitable responses to reasonable requests from leaseholders/tenants for information and observations relevant to management of the property (Code 4.3);

b) reasonable steps to ensure contractors carry out their duties promptly and to a reasonable standard (Code 13.5, 14.13); and

c) a procedure to deal with complaints by tenants alleging shoddy work (Code 13.6).

28. Work was necessitated by a leak on the service pipe supplying the café, discovered by Thames Water some time in 2002 [41-1]. Thames Water asked R at that time to repair it, and then wrote to R [45] under its statutory powers requiring it to do so within 14 days. Informed of this by a neighbour, A raised the matter in a letter [48], which R ignored.

29. The managing agent later wrote [55] stating that A had failed to respond to estimates for the renewal of five lead pipes. If sent, these were not received by A; R's reply to the present application indicates it provided detailed invoices to Mr Fullalove. It is submitted that it is good practice for the managing agent to write to all leaseholders; and bad practice to write to one on the assumption that they will pass on the information, and to make money demands without previous correspondence. In any event, Mr Fullalove had replied to the invoices, but received no response to his concerns [63-2].

30. Further, five water pipes were renewed; there being four flats, A assumes the fifth connects with the café and shop, and therefore invoicing each leaseholder for a quarter of the cost is unreasonable. In cross examination, it was evident Mr Brent had no idea which part of the building the fifth pipe served. It is submitted the managing agent should have found out, and acted unreasonably in charging the whole cost of the works to the flats without doing so. It is also submitted the managing agent failed to give a satisfactory explanation for the change from a leak initially identified by Thames Water [45] as attributable solely to the café.

31. In addition, the contractor, Subterra, was employed not only to cure the leak, but to backfill the excavation and reinstate the pavement over the pipes [94]. This has not been properly done, and the managing agent failed to supervise this work to ensure that it was. The pavement outside the entrance to the building remains severely sunken. Mr Trude told the Tribunal that his son had very recently injured his ankle by tripping on it.

32. A raised their concerns over the work and the invoice [61-2], but the managing agent's reply [62] ignored the question of which properties the pipes served, and stated simply that the work was completed satisfactorily. A's next letter [64] was ignored. Mr Fullalove wrote to the managing agent, raising several concerns about the works, and stating that "the administration of this matter has been dilatory and poor" [63-1].

33. It is therefore submitted that R's charges to the leaseholders are an unreasonable element of the service charge, because:

a) the managing agent's chaotic handling of the matter, and failure to respond to the leaseholders' concerns, rendered consultation useless and makes it impossible to know which properties are served by the renewed pipes, and therefore to know whether, or in what proportion, they should pay; and

b) the managing agent's failure to ensure that Subterra reinstated the pavement to a safe condition meant the leaseholders were being asked to pay for services not carried out with reasonable care and skill (s.13, Supply of Goods and Services Act 1982).

Unreasonable service charges: insurance policy

34. Service charges include insurance costs — s.19(2A)-(3), Landlord and Tenant Act 1985, and relevant costs are to be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred — s.19(1), Landlord and Tenant Act 1985. It is submitted that, without copies of the building's insurance policy and details, it is impossible to determine whether this cost is reasonably incurred.

35. Failure to comply with the statutory duty to provide, in response to a written request, a written summary of the insurance cover, including the risks covered and the sum for which the property is insured, is an offence under s.30A and Schedule, Landlord and Tenant Act 1985, and a breach of RICS Residential Management Code 16.9.

36. After the present insurance policy began in early 2000, A repeatedly requested a copy, with details of the risks covered, as did Mr Fullalove. R notes (closing submissions, para. 33) that it changed to the present insurers on A's request; however, Mr Trude gave evidence that the quote initially obtained by Mrs Trude was half the premium finally arranged by the managing agent. R and its managing agent provided, without explanation, a booklet on shops, restaurants and take-aways, and referred A to the insurers for further information. The insurers will disclose information to the policy holder; that is, to R.

37. The Tribunal heard from R that section 8 of the booklet [supplementary bundle, 14] showed that the policy covered the residential flats too. However, it begins by noting: "Only operative if indicated in the schedule." The schedule was shown to A for the first time at the Tribunal, and had never been copied to A.

38. R requires A to pay £740.07 for the year from to 7.2.04, a quarter of the total premium. The lack of information made it impossible to know whether the policy covered only the residential flats or the whole building, including the shops. It appeared from the policy renewal notice of 10 January 2003 that the policy covers the shops too, and that therefore the leaseholders were required to insure the shops, while not being responsible in the lease for repairs to the shops. A required information to challenge this, and the managing agent has been singularly unforthcoming with that information. A letter from China Insurance Co. Ltd. to R on 24.3.00 [R's "Barclays bundle", p. 8], explaining that the policy covered both shops and flats, was not copied to A.

39. It is therefore submitted that the reticence of R and its managing agent as to the details of the insurance put A in the position of not knowing what was covered, and therefore being unable to know if the building was under-insured or if they were being over-charged; and so whether the service charge was reasonable. It is submitted that a service charge that cannot be judged as reasonable or not is by definition unreasonable.

Failure to comply with RICS residential management code

40. In addition to the failures detailed above, R and its managing agent have failed to comply with other parts of the RICS Residential Management Code, in particular as follows:

Failure to consult leaseholders/tenants before a programme of works is set down (Code 14.12 and, for works over £1,000 in accordance with statutory duty, Code 14.8 and 19.2), inviting and considering comments and justifying its decisions (Code 14.21).

41. Access to the flats in 132 Brixton Hill is via an open concrete staircase to a landing approximately 2.13m above street level. Access is unrestricted and any person on the landing cannot be observed from the street. A building surveyor, D. Blackburn, commissioned by the leaseholders, notes that A was "in effect living in a siege situation" [79-2].

42. A and the other leaseholder and residents were concerned that a security door should be installed to prevent unauthorised access to the landing, and ideally this should be done before the exterior decoration of the building, especially since it called for scaffolding to be erected from the landing. A repeatedly wrote to R, putting their case for installing a security door before the external painting is carried out, and requesting a meeting to discuss it.

43. A understood R to have agreed orally to install such a door, in 1998, and to have shaken hands on the matter [57-2]. The managing agent denied that Mr Brent had at any time agreed to this [58]. A's letters about this [the latest of which are

at 29, 44, 48, 51 and 53-2] raised concerns about graffiti, prostitution, vomit and blood-filled syringes.

44. R and its managing agent completely ignored these requests until finally [54-1] it stated: "We deny emphatically that we have at any time agreed to the installation of a gate or door at the front steps to the building. On the contrary, we have repeatedly informed you that we were not prepared to agree same." It closed with the remark: "We have dealt at length with your letters and are not prepared to enter into further correspondence thereon." While R submitted to the Tribunal that the security door was a matter for R and not the managing agent, it is clear that they are the same, and that this letter in the managing agent's name spoke for R.

45. R pressed ahead with the external decoration works, despite A and Mr Fullalove's concerns, to the extent of Janice Brent, a representative of the managing agent, turning up unannounced at A's home on the morning of 23.8.03 with a builder, asking for access to A's back garden to quote for the work. Mrs Trude, who answered, was ill and suggested an appointment on Tuesday, 26.8.03. Mr Trude took that day off work to be present; only to find the builder trespassing on A's garden through the café rear window.

46. Mr Fullalove wrote to the managing agent [56] requesting that it explain its objections to the installation of a security door, and noting its baffling intransigence. In a further letter [57-2] A reiterated the importance of the security door, noting that all three front windows of their flat had had to be boarded up for the past 15 years, and their children had had to grow up in darkness; they again called for agreement on the matter. The managing agents' reply [58] stated simply: "We repeat yet again that we are not prepared to agree to a door installation and we have written to Mr Fullalove at some length on the subject."

47. A raised the security door matter again[61-1], and noted they had received an estimate for £3,640 [59], on which they invited the managing agent's comments. They reiterated the arguments for installing the door before the external painting, saying they could not understand why the agent was pushing for the decoration works before the door installation. They protested that the agent had sent estimates for the decoration works and then written six days later [58] declaring it would go ahead since A had failed to respond; they protested the short consultation time and asked for a serious discussion on the timetabling. The managing agent replied [62], stating simply: "We have repeatedly set out our position in previous correspondence and are not prepared to keep going over the same ground."

48. A wrote to the managing agent [64] repeating their concerns, and stating that in view of the unsatisfactory management they enclosed a notice under section 22, Landlord and Tenant Act 1987. On Saturday, 18.10.03, Ms Brent telephoned A

to say the exterior decoration works would start that Monday. A wrote to the managing agent on [71], protesting that it had brushed their concerns aside without consultation or fair warning, although access would be required to A's property. They noted that Miss Brent had finally suggested a meeting about the door, and they asked for a short note outlining the issues to be discussed; they proposed inviting an independent witness. Mr Brent gave evidence in his witness statement [107] that A refused to attend a meeting unless a door was agreed beforehand. The final paragraph of Mr Trude's letter [72] makes clear that this is not so.

49. R set out its objections to the security door for the first time in its reply to the s.22 notice [104-5]: it had no such legal obligation and did not agree to a door; it was unsuitable to the architectural design of the building; it would cause more problems than it solved, and would itself be a target for vandalism. It is submitted that these reasons are wholly spurious. While R indicates it expressed them to the other leaseholders, it made no such communication to A. The surveyor's report [79-3] notes that the proposed door is in keeping with the existing building (which is more than can be said for the shop fronts on either side); it was expected that the local authority would look on the proposal sympathetically in view of the security needs of the residents, and it was "highly recommended that the proposal to fit a door to the bottom of the stairs be taken forward as quickly as possible". It is submitted that R's alternative proposals for security, set out for the first time in its reply, are wholly inadequate. The existing CCTV camera referred to is not operated by the police, but for Transport for London and LB Lambeth, and is aimed not at the doorway but at the A23 red route road.

50. It is therefore submitted that R's managing agent failed to allow proper consultation with leaseholders over the decoration works and the security door; acted throughout solely in the interests of R in avoiding paying two-thirds of the cost of installing a door; failed to listen to leaseholders' concerns; failed to consult with both leaseholders, corresponding only with Mr Fullalove; and arranged a trespass to A's land.

<u>Deduction of arrears or other payments allegedly due from an insurance claim settlement, in contravention of Code 16.7</u>

51. Following a water leakage from the first floor flat, 132c, into their own flat, A received approval from the loss adjusters, Ellis May, of an estimate for repair works. In order to progress the works, they wrote to the managing agent [78] to request that it write to the insurers, China Insurance, authorising payment direct to A. The managing agent refused to authorise release of insurance claim monies to them unless and until they made payment of all monies due to R [83].

52. It is therefore submitted that R's managing agent has breached the RICS Code repeatedly in all of these matters.

Additional matters in response to R's closing submissions

53. R alleges that A's only significant concern before 18.10.02 was the café tenants. This is untrue. A's application concentrates on the past two years for the sake of practicability; the problems go back to 1987, when they acquired the lease to their flat, and while some papers are now lost in various solicitors' offices, what remain who fill many lever arch files. Almost all of the concerns raised in this application predate 18.10.02, however.

54. It is glib to suggest that the introduction of the new regulation on 18.10.02 triggered an increasing number of complaints. First, A are supported in their complaints by the other leaseholder, Mr Fullalove. Second, A are private individuals in full-time employment, and their correspondence is likely to fluctuate, let alone given the serious illnesses in the family mentioned in correspondence with R.

55. R states that since there is no complaint about the condition of the building between 1992 and 2002, it is unfair to go back to before the service of the dangerous structure notice in 1992 as evidence of wider mismanagement. First, this application originally went no further back than two years for evidence; the trip back in time was prompted by R's own statement. Second, it may be said to show R's general attitude to management that it had owned the building since 1964, allowing it to fall into such disrepair over three decades. Third, given that over £100,000 was spent on the building after the notice was served, it should be expected that the building would be in good condition for some years thereafter. Fourth, the leakage of kitchen waste water from the upper floors down the flank wall of the building has persisted for 15 years [88-6].

56. It is alleged that A sent so many letters that R gave up, and did not properly reply to every letter; and that this was A's intent. First, R did not properly reply to any letter, as is seen from the foregoing. Second, R has attempted to have its cake and eat it by trying to make some mileage out of the lack of letters over some periods to prove that A had no complaints. Third, R could have avoided receiving so many letters if its managing agent had dealt with the issues when first raised. R appears to suggest that the proper course for A to take was to make their complaint and then give up when they received no reply.

57. R suggests that Mr Fullalove only supports this application to the extent that he wants a security door to be installed. The Tribunal's attention is directed again to Mr Fullalove's witness statement, which supports this application in full; to his letters [56 and 63], speaking of baffling intransigence, dilatory and poor administration and unanswered correspondence; and to Mr Brent's admission in cross examination that he had issued at least one s.146 notice against Mr Fullalove.

58. R refers to over £6,000 which A owes. A is fully prepared to pay any money owed which is justified.

Conclusion

59. This application is not directly about the café tenants, the work to renew the water pipes, the insurance policy, the security door, or the withholding of insurance money. Nor is it directly an application against an unreasonable service charge.

60. It is not A's case that the managing agent could certainly have resolved matters between A and the café tenants, but that it could have tried—and perhaps might have succeeded if it had done so soon enough, if it had enforced the terms of the café lease, and if it had not encouraged the café tenants by supporting their attempts to gain a fire exit to the rear. Early action could have avoided much distress.

61. It is A's case that R's management style, illustrated in part by the water pipes episode, is of a sort guaranteed to cause an irretrievable breakdown of trust, when repeated over and over again. Trust is not possible when the landlord consistently operates unfairly; and the insurance policy illustrates this: R maintains it is correct and in accordance with the lease (which R drafted), and if A want something else they should apply to vary the lease. It is A's case that they could not get the information they needed to do so without bringing R to this tribunal.

62. It is not A's case that a managing agent can force the installation of a security door if the landlord does not want one. It is A's case that the managing agent failed throughout to listen to the leaseholders' concerns, or to discuss them, or adequately to explain R's opposition to it, or to enter into consultation with regard to the door and the external decorations.

63. Furthermore, it is A's case that the reason for these shortcomings is that the managing agent is the landlord. Instead of providing a service to all of those who pay his wages, the managing agent serves only the landlord: himself. It is submitted that R is clearly only interested in making money from the building, and not interested in spending it, or in providing a customer service.

64. A appreciates that replacing a managing agent is not a light matter; especially when the agent is also the freeholder. But R does not live at 132 Brixton Hill, and does not have to live with his own mismanagement. In over 16 years there has been no improvement in R's management, and no improvement from the breakdown in trust that happened long ago, despite A's conciliatory efforts.

65. It is therefore submitted that:

a) there has been a breach of an obligation owed to the tenant, in that the agent has failed to deal fairly as between landlord and lessee, and between lessees;

b) there has been an unreasonable service charge, in that repair works invoiced cannot be verified, and were not carried out with reasonable care and skill; and in that insurance information was not made available that would have confirmed the unfairness of the division of payments;

c) there have been a breaches of the RICS Code, in the above matters, and in the failure to consult over works and the withholding of insurance monies; and

d) it is just and convenient to appoint a new manager, in that this is the only way to introduce an impartial layer between landlord and tenants, end the management by litigation and give A the chance to enjoy their home in peace.

The proposed order

66. A acknowledges that the introduction of a new proposed managing agent after the previous nominee pulled out on the day before the hearing is far from ideal. But it is respectfully submitted that if the Tribunal is minded to make the order, it should not hold back because A has been unable to propose a satisfactory agent. It is submitted that Mr Milne's witness statement and action plan, and his evidence to the Tribunal, show him to be satisfactory. If the Tribunal finds Mr Milne to be unsatisfactory, however, A requests an adjournment to find an alternative.

Costs

67. If this application is successful, A will apply for an order for R to reimburse their £150 Tribunal fee.

68. In any event, A will apply for an order to exclude R's costs from future service charges, as being precluded by statute (para. 10(4) of Sched. 12, Commonhold and Leasehold Reform Act 2002), in accordance with the decision in Stoker v Urbanpoint Property Management Ltd (LVT 3.3.04, LON/00AE/LSI/2003/0025, at para. 24); or in the alternative under s.20C, Landlord and Tenant Act 1985, in that this application was the almost inevitable consequence of R's unacceptable conduct.

The College of Law Legal Advice Centre

17 May 2004

APPENDIX B

IN THE LEASEHOLD VALUATION TRIBUNAL

LON/OOAY/LAM/2003/0005

BETWEEN

(1) CHRISTOPHER TRUDE
(2) SYLVIA TRUDE

Applicants ('As')

- and -

DUNGARVAN INVESTMENTS LIMITED

Respondents ('R')

RESPONDENT'S REPLY TO
APPLICANT'S SUBMISSIONS dated 17 May 2004

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1. References to page numbers in the hearing bundle appear in square brackets.

2. R proposes to reply to points raised in the numbered paragraphs of As' submissions. When referred to specifically, these paragraphs are in bold and italics (eg. ***paragraph 2***).

3. ***Paragraph 4 (and also paragraphs 53-58):*** The As seek to run a 'tip of the iceberg' argument (ie. things were bad after 2002, and they were exactly the `same before 2002 - see eg. the dangerous structure notice).

   However, pre-2002 issues were not part of As' case. There was no documentation relating to pre-2002 matters. R did not prepare its case on the pre-2002 position. And, there was no real evidence about the rights and wrongs of what went on prior to the major works in 1993. Indeed, it might be asked: how much of the pre-1993 disrepair, under the terms of A's lease [at 1-1] was the liability of **As**, rather than R? Therefore, as already submitted '*it would not be fair to go back to the service of the Dangerous Structure Notice in 1992 (*or anything else*) as evidence of wider mismanagement* (see paragraph 37 of R's submissions)'. R respectfully invites the Tribunal to decide the case on the post-2002 issues considered in detail at the hearing.

4. ***Paragraph 5***: The judgment in the 1996 litigation is a matter of public record. It is submitted that, therefore, it is admissible evidence.

5. ***Paragraph 6***: It seems clear that As no longer trust Mr Brent (although Mr Brent denied holding strongly negative feelings towards As). The fundamental issue is whether the Tribunal thinks that this lack of trust is accompanied by substantial fault on R's part.

R's case on this is that the As fell out with R a long time ago (see eg. the judgment). And, there is no evidence to suggest that this was caused by real fault on R's part. Therefore, to suggest that what took place post-2002 caused a falling out is almost putting the cart before the horse. The reality is that, in some measure, what happened post-2002 is a result of the existing ill-feeling.

6. ***Paragraph 7***: There is nothing wrong with R, as landlord, seeking to maximise the income generating potential of the building. Inevitably, therefore, there will be situations of potential conflict between R and one of the leaseholders. However, such conflict is natural and the mere possibility of such conflict does not require the appointment of a manager. It is only when the conflict gives rise to real interference with the leaseholder's rights, or poor management practice, that the question of appointment of a manager arises.

   The question inevitably is one of degree. Put another way, is appointment of a manager a proportionate response to the situation? R believes that such an appointment would be totally disproportionate.

7. ***Paragraphs 8-24***: With respect, nothing in these paragraphs represents a breach of the obligations of the lease.

   (i) The covenant for quiet enjoyment in clause 4(2) of the Lease is only broken by interruption by the tenant of adjacent premises held under a common landlord if the landlord has, in the lease or otherwise, authorised that tenant to do the act which causes the interruption. The landlord is not liable merely because he knows the other tenant is causing a nuisance and takes no steps to prevent it: there must be consent or active participation on the landlord's part to make him liable for breach of covenant in such a case (see *Woodfall on Landlord and Tenant*, para 11.275). There is absolutely no suggestion that R (or Mr Brent) authorised the café tenants to do what they did.

   Further, threats to evict a tenant by legal proceedings and an interference with privacy which does not amount to a nuisance do not amount to a breach of this covenant (see *Woodfall on Landlord and Tenant*, para 11.275). So, as far as the other matters referred to in this section are concerned: the failure to answer letters; and, the introduction of the new regulation and action under it, it is submitted that these matters could not amount to a breach of the covenant for quiet enjoyment.

   (ii) Clause 5(2) of the Lease should be construed in the light of its <u>full</u> wording. First, the clause is not in the form of a covenant (ie. promise) given by the landlord - by contrast with other parts of the lease. Secondly, it clearly provides that the landlord may refuse to adjudicate. Accordingly, there is no 'obligation' here which can be broken.

(iii) Of course, the failures to respond to every letter, or deal with the disputes between tenants, were breaches of the RICS Code. The Tribunal already have R's submissions on this. The only points to add are:

* ***paragraph 11***: In short, R did investigate the complaints and concluded well before 2002 that the complaints were exaggerated. In the light of he way Mr Trude gave evidence to the Tribunal, it is submitted that this was an understandable and reasonable approach to take. Not everyone might have taken that approach, but notably the police took a similar line in their letter of 8 May 2003 [47] (of course, in his evidence, Mr Trude then criticised the police for not dealing with the case properly). It is a well known fact that certain tenants cause unnecessary work for managing agents by making unreasonable complaints. After a certain amount of such complaints, it is reasonable for managing agents to draw a line on their investigations. By 2002/2003, matters had gone well past that line.

* ***paragraph 17***: There is no evidence that Mr Fullalove had problems with the café tenants. Seeking to deploy his statement in aid of this point speaks for itself (Indeed, it is very unclear how far Mr Fullalove's statement goes on matters on any of the particular points in issue on the application). But, it is accepted there was some minor friction between Ms Campbell and Mr Ginn at the time of PC Burton's letter [47].

* In considering the above points, as well as the other points raised in this application, R is submitting that Mr Trude exaggerates things when it suits him.

  For example, how likely is it that:
  * As Mr Trude said, his son had a <u>serious</u> ankle injury from falling on the collapsed area of the pavement (***paragraph 31***)?
  * The Trudes or their neighbours had to wash down the common parts on <u>a daily basis</u> in 2001 because of vomit, excrement etc.? (In the 2002 correspondence, this matter is not mentioned once)
  * Mr Trude put down netting to 'keep foxes out'? (***paragraph 21***)

* ***paragraph 23***: As with the Dangerous Structure Notice, the As seek to raise the section 146 notices with a view to the creation of a vague negative impression of R (and Mr Brent). None of these matters were issues before, or properly examined by, the Tribunal and, again, it is submitted that it would be unfair to R to bring these matters in at this stage of the proceedings.

* Additionally, the judgment in default entered on 23 April 2001 is a good example of what R (and Mr Brent) are dealing with. Originally, the criticism of R was that R did not notify the As of any litigation and the As were unaware of the action. It was alleged that they were not

'properly served' and did not know judgment was entered because they would have applied 'to set it aside'[see 105-4]. Yet, Mrs Trude's own letter dated 17 April 2001 refers to the 'court fee' of £80 and Mr Brent's reply of 20 April 2001 refers to the 'court judgment' [see letters in Barclays Bank bundle].

Interestingly, in ***paragraph 23***, the line of criticism changes - the incident being transformed into an example of R's over-zealous recoupment of money owed on this matter. It is said that £22.36 was owed 'in error' and that the As had not paid the court fees due to 'a misunderstanding'. Is even this true? Mr Brent had sent a letter as early as 31.3.01 pointing out that the As had 'ignored the court fee' [see his letter dated 20.4.01 in the Barclays Bank bundle].

(iv) To conclude, the As have not made out a case under the 'breach of obligations' ground.

8. ***Paragraphs 25-33***: R invites the Tribunal <u>not</u> to conduct a microscopic analysis of a minor item of work which came at a time when the As were getting ready to issue the present application. Several points arise:

* These are works which the As themselves could have got done and recouped contributions from other parties. They did not do the work.

* Mr Fullalove was satisfied with the work and paid his service charge.

* Mr Brent was told that all the pipes led to the residential part of the building. Given the costs involved, it was reasonable for him to rest on that assurance.

9. By contrast, and in order to gain perspective, R invites the Tribunal to consider the major works carried out in 1993. Criticism at that time of the standard of the work was found to be unfounded (see the judgment). Moreover, there has been no formal criticism of the standard of the external works carried out in 2003 (Mr Trude criticised the works in cross-examination but, notably, that point has not been pursued). The As actually sought to prevent the recent major works taking place.

10. ***Paragraphs 34-39***: To suggest that the As were unsatisfied with details about the insurance is surprising. The details were provided by R when asked for. The information provided on the annual renewal notices is identical to that on the 'Policy Schedule'. Where are the contemporaneous requests in 2001 and 2002 by the As for details of the insurance? There were none. The first complaint about the insurance was in October 2003.

11. In any event, a service charge is not unreasonable simply because a leaseholder has inadequate knowledge to understand the legitimacy of the charge. Either

the charge is objectively justifiable or it is not. In this case, the charge is fully justifiable (the fact that the As pay for the insurance of the whole building raises a different point). There was no evidence that the insurance company would not provide information to the As in accordance with their normal practice where long leaseholders require such information. The As did not ask R to provide authority even if such authority were needed. Such authority was not in fact required.

12. To conclude, if R cannot justify the service to the complete satisfaction of the tribunal (in connection with the fifth pipe, and the collapsed pavement) then an unreasonable service charge may have been demanded. What, then, is the extent of that unreasonable element? It is submitted that it is minimal.

13. ***Paragraphs 40-50***: It is acknowledged here, again, that there have been some breaches of the RICS Code. However, it is submitted that none of the matters mentioned in ***paragraphs 40-50*** amount to further breaches of the RICS Code. The two items discussed: the external repairs; and, the door, are completely separate matters.

14. *The external repairs*: The allegation in ***paragraphs 40 and 50*** that R failed to consult in connection with the external works of decoration in 2003 is completely new. It does not appear in the As' application or supporting statements. Mr Brent patiently and courteously prompted the As and Mr Fullalove over two years in respect of these works [see 12, 28, 38, 43]. Eventually, after the As regular promises to get estimates and much prevarication by the As, Mr Brent obtained 2 estimates on 17 September 2003 and forwarded these to the As [55]. In response, the As continued to try and hold up the works [57-1]. Mr Brent then proposed going with the cheapest estimate. Works started on 20 October 2003 [60]. No further representations were received from the As except the letter of 18.10.03 [71] which then sought to criticise the decision to do the works as follows:

'.....you have ...rushed headlong into commissioning the exterior decoration, at the onset of the winter season of wind and rain. This is extremely poor judgment.....
..I will have to take Monday off work to oversee the disruptive chaos that ensues when scaffolders are working .....[this was one of a number of days that Mr Trude claimed to have taken off work - for another see ***paragraph 45***]
Professional management would have ensured that these and the many other issues ...would have been aired etc.....
I just do not have the time to waste in dealing with incompetent management....'

In the circumstances, it is submitted that this was not a reasonable response. R, and Mr Brent had complied with the statutory consultation procedure.

15. *The door*: R repeats its submission that there is nothing in the Code that covers the issue of the door. Paragraph 14 of the Code (see ***paragraph 40***) is concerned with repairs only.

16. ***Paragraph 41***: Yes, Mr Blackburn described the absence of a door as 'in effect living in a siege situation'. But was that actually so? The first time Mr Trude mentions this matter in his numerous letters is 7.9.03 [53-1]. However, it is accepted that Mrs Trude mentioned the need for a door in her letter of 7.10.02 [29] where her complaints relate to 'disturbances and graffiti'.

17. ***Paragraph 43***: Did Mr Brent orally agree to install a door in 1998? The As must, in 2002, have understood Mr Brent's position that R would not put in a door or gates [see Mr Brent's letter of 22.3.00 - Barclays Bank bundle]. If Mr Brent really made this agreement, why is the first mention of it in a letter dated 7 September 2003 [53-2]. Why is there no reference to this in Mrs Trude's correspondence [eg. 29]? or Mr Fullalove's letter of 21.7.03 [see Barclays Bank bundle]?

18. ***Paragraph 51***: After advice, R authorised direct payment of the insurance monies. It is understandable why R took the position it did, but if it was a technical breach, it had a very minor effect and was shortlived.

19. ***Paragraph 55***: The As refer to the leaking kitchen waste pipe which is said to have been a problem for 15 years. When between January 2002 and the hearing of the application did the As first refer to it? Mr Trude's letter of 7 September 2003 [53-2]. There he said: it had been like that for 10 years (cf. 15 years? in ***paragraph 55***); and that both leaseholders had complained about it 'for many years'. But, when asked was there any written complaint about the building either in 2001 or 2002, Mr Trude (after overnight consideration) could not provide one. R accepts that there has been an intermittent problem which it has attempted to deal with intermittently.

20. ***Paragraph 62***: How can it be said that As could not get the information it needed until it came to the Tribunal? The As had all the relevant insurance information at all times. Why did they pay their insurance? Did they ever object to paying the insurance sums due?

21. ***Paragraph 66:*** The suggestion of an adjournment to seek a quotation from another proposed managing agent underlines the obvious difficulties that would be faced by the appointment of a different agent. R has already stated that such an appointment would tend to complicate matters and cause more expense.

22. ***Paragraph 68***: In view of R's concession that this application has shown that there is room for improvement on the standard of communication, R will not seek to recoup the costs of these proceedings through the service charge. But, R respectfully asks the Tribunal not to interpret this as a concession about the

degree of any shortfall in management standards. R points out that this conciliatory attitude is in marked contrast to that of the As who have made no attempt to discharge their liability to pay their due contributions to the cost of the repairs, painting and insurance which amount to in excess of £6,000.

23. This application can be beneficial to both sides without the need for an order appointing a manager. R has acknowledged shortcomings and has undertaken to improve certain matters. It is submitted that such acknowledgement and undertaking meets the sting of this application. There is no need for the Tribunal to go further.

Desmond Kilcoyne, 21.5.04

Filed and served by:
David Wineman
Respondent's Solicitors
Craven House
121 Kingsway
London WC2B 6NX

APPENDIX C

For: Applicant
By: G. Milne (1st)
Exhibits: None
Dated: 7 April 2004

IN LEASEHOLD VALUATION TRIBUNAL LON/OOAY/LAM/2003/0005

BETWEEN:

(1) CHRISTOPHER TRUDE
(2) SYLVIA TRUDE

Applicants

- and -

DUNGARVAN INVESTMENTS LIMITED

Respondent

WITNESS STATEMENT OF GRAEME MILNE

I, GRAEME MILNE, of 69 Athlone Road, London SW2 2DU, state as follows:

1. I am a partner in Carnegie Consultancy (a firm), which provides accountancy and property management services. I have been involved in property management for three years, and am currently involved in it. The content of this witness statement is within my personal knowledge unless expressly stated to the contrary.

2. I have inspected 132E Brixton Hill, London SW2 1RS, and have inspected the communal areas and exterior of 132 Brixton Hill ('the building'). I am aware of the issues forming the subject matter of this application.

3. If appointed to manage the building, I am aware that I will be responsible to the Tribunal. The first thing I would do is to conduct a full audit of the building management accounts. I would carry out full consultation with the leaseholders, short-term tenants and freeholder with a view to resolving the long-running problems, including security, disrepair and conflicts between occupiers.

4. I would obtain full professional indemnity insurance and carry out the management of the building in accordance with the Royal Institute of Chartered Surveyors' residential management code. I would draw up a policy and procedure for dealing with complaints between occupiers of the building, in consultation with the occupiers, including the freeholder. I would review the present insurance policy cover for the building, to ensure that it is adequate and that the parties contributing to the premiums are paying the correct shares.

5. It is my policy, and my practice, to deal with all office correspondence within two days. I believe strongly in hands-on management and a common-sense approach of dealing with issues that arise as they arise, and before they can become more serious problems.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

Full name: Graeme Milne

Signed.....Date 8/04/2004