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RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Schedule 11 Commonhold & Leasehold Reform Act 2002
S.20C Landlord & Tenant Act 1985

Residential Property
TRIBUNAL SERVICE

DECISION & ORDER

Case Number:	LON/00BK/LAC/2006/0007
Property:	Flats 1 & 2, Hinde House, 18 Thayer Street London W1U 3JY
Applicant:	Mr John Pickering (1) Mrs Gillian Pickering (2)
Respondent:	Starclass Properties Limited
Application:	26 July 2006
Hearing:	18 & 25 October 2006
Appearances:	For the Applicants: Mrs Pickering in person Mr Pickering For the Respondents: Mr Di Mambro of Counsel
Date of Decision:	6 February 2007
Tribunal Members:	Ms J A Talbot MA Mr F L Coffey FRICS Mr E Goss

Summary of Decision
The Applicants are not liable to make payments of administration charges to the Respondent.

Application

1. This was an application made by John and Gillian Pickering on 26 July 2006 pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for a determination in respect of administration charges at Flats 1 & 2, 18 Thayer Street, Hinde House, London W1U 3JY.

Background

2. Following an oral Pre Trial Review Directions were issued on 1 August 2006, the administration costs in dispute were identified as a total of £3,874.59 in respect of an alleged breach of covenant in the lease. The parties were directed to produce Statements of Case plus supporting documentation upon which they sought to rely. Bundles of documents for use at the hearing were provided by both parties.

3. Other applications concerning service charges at Hinde House were determined by a differently constituted Tribunal in May 2006. These were not directly relevant to this application but were part of the background context against which it was made.

Jurisdiction

4. The Tribunal has the power to determine whether an administration charge is payable in accordance with Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") which provides as follows:

"Schedule 11

Reasonableness of Administration Charges

Meaning of Administration Charge

1(1) In this Part of this Schedule "administration charge" means an amount
payable by a tenant of a dwelling as part of or in addition to the rent
which is payable, directly or indirectly –
...
(d) in connection with a breach (or alleged breach) of a covenant or
condition in his lease.

Reasonableness of administration charges

2 A variable administration charge is payable only to the extent that the
amount of the charge is reasonable.
...

5(1) An application may be made to a leasehold valuation tribunal for a
determination whether an administration 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."

Lease

5. The Tribunal had a copy of the lease of Flat 1, 18 Thayer Street. The lease is dated 16 March 1998 and is for a term of 125 years from 24 June 1991 at a ground rent of £50 per annum for the first 33 years and rising thereafter.

6. Insofar as is relevant to the application, at paragraph 4 of the 5th Schedule, the tenant covenants to pay to the landlord *"all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be reasonably incurred by the landlord incidental to the preparation and service of a Notice under Sections 146 and 147 of the Law of Property Act 1925".*

7. The service charge is defined in the 8th Schedule. It includes, at paragraph 9, *"the cost of employing Managing Agents or Surveyors to manage the property and to collect the rents and maintenance charges in respect of the flats therein and to carry out such other duties as may from time to time be assigned to them by the landlord".*

8. Paragraph 11 of the 8th Schedule provides that the service charge includes *"all legal and other proper costs incurred by the landlord:- (a) in the running and management of the property and in the enforcement of the covenants on the part of the tenants and the conditions and regulations contained in the leases granted of the flats in the property insofar as the costs of enforcement are not recoverable from the tenant in breach"*.

Hearing

9. The hearing took place in London over 2 days on 18 and 25 October 2006. It was attended by Mr and Mrs Pickering in person, accompanied by Ms L Leost and Ms S le Coomber. The Respondents were represented by Mr D Di Mambro of Counsel and Mr W Christopher of solicitors Reid Minty. Attending as witnesses for the Respondent were Mr A I Spencer and Mr K Townsend of managing agents Anthony Green & Spencer ("AGS"); Mr N Penso and Mrs P Mackmurdie, former employees of AGS; and Mr G Marr of the Metropolitan Police.

10. In addition to the oral evidence the Tribunal also had access to substantial documentation from both parties including witness statements from residents of Hinde House and from the landlord's solicitors.

Issues in Dispute

11. The Tribunal first identified the administration charges in dispute in more detail. The total cost was £3,874.59, comprising £1,201.46 landlord's solicitors costs and £2,673.13 managing agents costs. These sums were originally demanded by email and then referred to in a letter dated 28 April 2006 from Mr J D Thornton of Hurford Salvi Carr ("HSC"), the current managing agents, to Mrs Pickering, enclosing invoices from AGS and the Respondent's then solicitors, Philppsohn Crawfords Berwald ("PCB").

12. The sums demanded related to legal and management costs incurred by the landlord in investigating an alleged breach of covenant by the Pickerings. The central issue for the Tribunal was whether the Pickerings were liable to pay all or any of these costs under the terms of their lease, and if so whether the costs were reasonable in amount.

13. At the hearing the Tribunal indicated that the scope of the application was whether the sums in question were payable as administration charges. It was not required to determine whether they were payable as service charges, or whether there had been a breach of the lease; there were no applications pursuant to Section 27A of the Landlord and Tenant Act 1985 or Section 168(4) of the 2002 Act.

Facts

14. From the oral and written evidence before it the Tribunal found the following facts.

15. Hinde House was a substantial block of flats situated on the corner of Hinde Street and Thayer Street to the east of Manchester Square in the West End of London. From descriptions and a scale model produced by AGS it was evident that the subject flats were on the first and second floors, accessed by a separate entrance on Thayer Street serving only these flats and one other, Flat 3. On the ground floor were 2 retails outlets, a male clothes shop and a barber shop.

16. In 2002 the Pickerings purchased 2 flats at Hinde House, numbers 1 & 2, 18 Thayer Street, as part of a portfolio of 6 buy-to-let properties. They sub-let both the flats. A one-year fixed term written assured shorthold tenancy of Flat 1 dated 17 November 2004 was granted to Gabrielle Szerencses and Diana Schaffer, and an identical tenancy agreement of Flat 2 dated 18 November 2004 was granted to Laura Riz. Both tenancy agreements contained comprehensive terms and conditions including the following tenant's obligation: *"the property is not to be used for any business, illegal, immoral or dangerous purpose or to hold social gatherings or parties or undertake any activity which creates a nuisance to neighbours"*. Before granting the tenancies Mrs Pickering did not obtain references but she interviewed the prospective tenants, obtained copies of their passports and letters confirming payment for English language classes.

17. In early December 2004 Mrs Pickering became aware from a neighbour that their tenants were running some kind of business from the flat. It was not clear exactly when she suspected that they were prostitutes. At first she thought they might be involved in drugs. Following meetings with her tenants at which they denied breaking the terms of the tenancy agreements, she wrote to them on 5 December 2004 warning that any business activity must cease, and on 13 December 2004 giving notice to terminate the tenancies.

18. The tenants did not leave. Mrs Pickering took legal advice. After a Christmas break she wrote again on 17 January 2005 in more formal terms setting out breaches of the tenancy agreement and requiring them to leave by 18 February. By this time she knew about the nature of the business. All 3 tenants had left by 11 February 2005 without the necessity for legal proceedings, although her solicitor had on 26 January 2005 served Notices under Sections 8 and 21 of the Housing Act 1988.

19. Meanwhile, on 23 November 2004, AGS also became aware that Mrs Pickering's sub tenants were operating as prostitutes from the flats. This was not via complaints from other residents of Hinde House, but by information from a member of the public. Mr Spencer sought legal advice and was advised that if true this would amount to a breach of covenant by the Pickerings which could lead to the serving of a Notice under Section 146 of the Law of Property Act 1925. However, serving a Notice was not recommended as it could be regarded as an aggressive act (he was apparently not advised that such a step could not be taken unless a LVT

were to determine under Section 168(4) of the 2002 that a breach had occurred).

20. Mr Spencer was also advised against telling Mrs Pickering straight away of the nature of the allegations in case this could be construed as harassment. It is not clear why AGS's solicitors gave this advice, but it was against the background of an unfortunate degree of tension and mistrust surrounding an ongoing service charge dispute with the Residents Association at Hinde House, of which Mrs Pickering was the Secretary.

21. On 24 November 2004 Mr Spencer telephoned a number on a card found in a telephone box near Hinde House. A transcript of that conversation showed that Mr Spencer verified the address and that sexual services were being offered at Flat 2. He telephoned Mrs Pickering twice but was unable to speak with her. He then wrote to Mrs Pickering on 25 and 29 November 2004 asking her to meet him. He was not explicit and did not state what the problem was. The first letter stated: *"I require to meet with you ... to discuss a matter unrelated to the freehold or service charge. I cannot stress enough the importance that we meet to discuss this matter and would implore you to act upon this letter and arrange a suitable time to meet."* The letter went on: *"when we meet you will fully understand and appreciate the importance of this meeting and why I cannot discuss its contents over the telephone ... I am sure you will agree, when we have spoken, why I have chosen to deal with this matter in this sensitive manner".*

22. Mrs Pickering did not reply to the telephone calls or letter and was not prepared to meet Mr Spencer because he would not tell her the subject of the meeting. She felt intimidated, even though she had not met him or spoken to him before. This was in the context of ongoing correspondence over the service charge dispute. She referred the letter to her solicitor at Lee & Pembertons, who wrote to Mr Spencer on 26 November 2004: *"you have stated that the matter about which you wish to speak is unrelated to the current disputes relating to the property. Our client has stated that she has no other business with you and does not wish to meet you to discuss any personal issue. If you wish to pursue the matter you must set this out in writing to us as her solicitors. Given the importance that you have repeatedly stressed we expect you will do this without delay. Continued telephone calls in this respect will be regarded as harassment".* There was no further direct contact between Mr Spencer and Mrs Pickering as the matter was in the hands of their solicitors, who corresponded during December 2004 and January 2005.

23. AGS reported the matter to the police. A file note shows that on 26 November 2004 a secretary spoke to a police officer called "Gus" who stated that a full investigation into immoral earnings involving *"say 8 flats"* could take some months but if it was only *"one person offering services from one flat"* the police would not get involved. The file note goes on: *"he confirmed that we can contact owner and quote lease terms in connection*

with immoral earnings but we could also make an official complaint to the local police ... where they would send a uniformed officer round to say ... please leave. That is quicker although person may refuse to leave and not much police can do about that and we would have to refer back to the lease".

24. Mr Spencer did not contact the local police, but on 30 November 2004 spoke with and wrote to Mr Graham Marr of the Metropolitan Police Vice Unit. Mr Marr investigated the reports. He asked Mr Spencer not to tell Mrs Pickering of the prostitution pending his enquiries. The chronology is unclear as Mr Marr did not keep detailed records, but during December 2004 and January 2005, he carried out financial investigations into the Pickerings, visited the offices of ASG, spoke to the occupants of the flats and also to Mrs Pickering. On 18 January 2005 he confirmed in writing that the investigation was concluded.

25. On 21 January 2005 ASG's solicitors wrote to the Pickerings enclosing a copy of Mr Marr's letter and stating, for the first time, that there was "*incontrovertible evidence that both the ... flats are occupied by prostitutes ... unless the prostitution ceases within 7 days of the date of this letter our client will have little alternative other than to service a section 146 notice and commence immediate forfeiture proceedings in respect of both Flats 1 and 2 ... this would not be their preferred course of action*". It went on:" *our client has incurred significant expense in dealing with this matter and its rights in relation to those costs are expressly reserved*".

26. In the Tribunal's papers was a draft letter dated 11 December 2004 from PCB to Lee & Pembertons in reply to their letter of 26 November 2004, which for some reason was not sent. This letter denied allegations of harassment, and contained the same wording regarding the prostitution and section 146 notice as the later letter of 21 January 2005. The draft letter also stated that the police "*were currently investigating the matter but have taken the view that it would be preferable if your client were provided the opportunity to take appropriate steps before they do*".

27. In answer to questions from the Tribunal, Mr Spencer re-iterated that he had not told Mrs Pickering in November 2004 that her tenants were prostitutes or given her the opportunity to sort the matter out because he wanted to get proof and did not want to be accused of harassment. He would have behaved differently with any other lessee. He contended that he had acted reasonably in consulting solicitors and acting on their advice, and in following Mr Marr's request to withhold the information pending the police investigation.

28. Mrs Pickering told the Tribunal that even when she started receiving reports from neighbours about her tenants in December 2004, she had not connected this issue with Mr Spencer's letter of 25 November 2004. She was under pressure at that time and it did not occur to her to inform him Mr Spencer about the matter. She contended that she had acted reasonably by dealing robustly with her tenants as soon as she found out

something was going on. Had AGS told her what they knew immediately, she would have acted earlier, and much of the work carried out by AGS would have been unnecessary.

Liability to pay administration charges

29. Mrs Pickering did not accept that she was liable to pay any of the administration charges. She regarded the charges as unreasonable in their entirety. She doubted the accuracy of the invoices, which lacked substantiation, and Mr Spencer's version of events. She did not make any detailed legal submissions as she felt herself to be inexperienced in such matters; however, she did not accept that she had been in breach of her lease, or that the landlord was entitled to recover any of its costs under the lease terms. She felt that the decision to pursue her for these costs so long after the event was connected to her role in the service charge dispute. The demand for payment coincided with the decision of the previous Tribunal in May 2006.

30. Mr Di Mambro, Counsel for the landlord, submitted in both oral and written submissions that Mr and Mrs Pickering were liable for payment of the administration costs under the terms of their lease and that the costs were reasonable. He relied primarily on Paragraph 4 of the 5th Schedule which entitled the landlord to recover from the tenant "*all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be reasonably incurred by the landlord incidental to the preparation and service of a Notice under Sections 146 and 147 of the Law of Property Act*".

31. Although the landlords' managing agents and solicitors had not served and indeed did not intend to serve a S.146 Notice, it was argued that all the work done, being legal advice and management work to investigate the potential breach, was "*incidental to the preparation*" of a potential Notice and thus fell within the wording of the Schedule. It did not matter that a Notice was not actually prepared or served, or that the legal advice given by solicitors to Mr Spencer was in fact that a Notice should not be served in the circumstances of this case. It was always a possibility that a Notice could be served.

32. Mr Di Mambro contended that this construction of the lease was a matter of common sense and business efficacy, and that this must have been the objective intention of the parties to the lease. The use of the word *"and"* was ambiguous, in that while the ordinary meaning of the words was that the charges would only qualify if the work related to both preparation *and* service, it could also mean incidental to preparation *and/or* service.

33. Paragraph 11(i) of the 8th Schedule was referred to whereby the landlord was entitled to charge by way of service charges *"all legal and proper costs incurred ... in the enforcement of the covenants on the part of the tenants insofar as they are not recoverable from the tenant in breach"*. Interpreting the lease as a whole, Mr Di Mambro argued that it would be

absurd and commercially unrealistic if the landlord did not first have the chance to recover such costs from the tenant in breach rather than from all the tenants via the service charge.

34. Mr Di Mambro presented two further alternative legal arguments: first, that if the Tribunal was against him on the interpretation of the express terms of the lease, then there was as a matter of contract law an implied term that the landlord must be able to recover all its reasonable costs; and secondly, that there was a statutory entitlement under Section 146(3) of the Law of Property Act 1925 to recover *"all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer or otherwise* " in relation to any breach of covenant.

Reasonableness of the charges

35. Mrs Pickering's case was essentially that she had acted reasonably throughout and that the landlord – specifically Mr Spencer and AGS – had not. She had acted as soon as she received reports about her sub-tenants from her neighbours, and had acted decisively and robustly, with the result that they left voluntarily after just 7 weeks. She had sought legal advice, met with the tenants and written to them in clear terms. She did not accept that they had caused any significant problems to her neighbours, or that any other residents had complained directly to AGS. Had Mr Spencer contacted her in late November, as soon as he had information about the prostitution, and told her clearly about it, she would have been able to confront the tenants sooner, and the landlord's subsequent costs could have been avoided.

36. Mrs Pickering accepted that it was not unreasonable for Mr Spencer to seek legal advice and to write to her putting her on notice of the potential breach of covenant. It would have been reasonable for the draft letter of 11 December 2004 to be sent, either to her or her solicitors, and she could not understand why this had not been done. She felt that Mr Spencer was targeting her and wanted to compile a case against her because of the wider context of her role in the ongoing service charge dispute. She was suspicious of Mr Spencer's motives in seeking to charge these costs to her so long after the event; she felt that this was because she was seeking to sell one of the flats and that the costs were being used as a pretext for refusing to grant license to assign.

37. On the level of the costs, Mrs Pickering doubted the accuracy of the invoices which purported to support the charges, which she had been obliged to request from Mr Thornton, and which were not self-explanatory or supported by time sheets. She contended that the work charged for may well not have related to the matter in hand and that the costs were in any event excessive. She thought there had been a duplication of solicitors' costs relating to the service charge dispute: a sum of £246.76 which also appeared on an invoice from PCB relating to service charges.

38. Mr Di Mambro contended that Mrs Pickering had acted unreasonably: she had not vetted her tenants properly; she had refused to meet with or talk to Mr Spencer; she wrongly believed that she was being persecuted by him and was irrationally suspicious of him and AGS. Against this background, the costs incurred by Mr Spencer in investigating the situation in the way that he did, and instructing solicitors throughout, were not only reasonable but a proportionate response to a difficult and sensitive matter.

39. On the quantum of costs, written and oral evidence was given by Mr Spencer, and Mr K Townsend and Mrs P Mackmurdie, former employees of AGS; and written statements by Mr W T Christopher of Reid Minty and Mr S N Philippsohn of PCB. The legal costs totalled £1,201.46 (inclusive of VAT) and included £85 for Counsel's Fees. There were 3 invoices referring to costs as at 20/01/05, 24/02/05, and 21/06/05, addressed to Starclass Properties Limited, together with separate narrative descriptions of the work, which included: drafting and re-drafting correspondence; considering and advising on letters from Mrs Pickering and Mr Spencer's response; advising on breach of covenant and any waiver; instructing Counsel and dealing with Mrs Pickering's solicitors. Mr Philippsohn confirmed that the invoices and narratives were accurate and that all the costs (including the £246.76 referred to above) related to advice given on this matter.

40. The management costs of AGS were evidenced by an invoice sent to the Pickerings dated 24/03/06 for work for the period "*November 2004 to May 2005*" for *"professional fees for acting on behalf of our client Starclass Properties Ltd"*. The total was £2,673.13 (inclusive of VAT). At the hearing, 2 versions of a schedule of costs were produced, listing dates and time, brief details, and finally, total time spent. The 2nd version also showed, in red, time spent on the matter that had not been charged for.

41. In support of these costs, Mr Spencer stated that he was a qualified surveyor and property manager of some 25 years experience. He was a director of both AGS and Starclass Ltd. Starclass had appointed AGS as managing agents for the block. Other staff dealt with day to day management issues. His own hourly charging rate for the costs in issue was £250. Despite his experience, he considered himself justified in taking legal advice, including on correspondence and day to day handling of the matter, because he did not want to be faced with allegations of harassment and needed to protect his position.

42. There was a management agreement then in place between Starclass and AGS. AGS and Starclass had the same directors, Mr Spencer and Mr A M Green. AGS was appointed to manage the building because when it was purchased the service charge accounts were in disarray and had to be sorted out. The management agreement (dated 30 July 2001) was their standard commercial contract, not a residential one. Appendix (i) contained a "summary of management proposals" which did not set out a clear menu of items covered by the management charge. This was

calculated on a percentage basis. Mr Spencer was uncertain what the percentage was; the agreement stated 15%. Documents were subsequently sent confirming that the rate had been reduced to 10%.

43. In reply to questioning from the Tribunal, Mr Spencer said that he was not familiar with the contents of the RICS Code of Management, specifically the recommendations that residential management charges should be at a flat rate rather than a percentage basis. Nor was he familiar with the Code's suggested menu of items to be included in the basic charge and items which could be charged in addition. He was unable satisfactorily to explain in detail what work was included in his firm's basic charge. He relied on item 2 of appendix (iii) of the agreement which listed work *"outside normal scope of management fee"*. It reads: *"attending court hearings and giving evidence if required in relation to recovery of rent or other charges from tenants, or ensuring compliance with lease covenants"*.

44. On the detail of the schedule of costs, it emerged from evidence given by Mr Townsend that no contemporaneous time recording was kept by AGS as evidence of the work done (despite the fact that the management agreement at appendix (i) states that there is a *"fully computerised records system"*). Mr Townsend, who was not employed by AGS at the time, had been given the task of going through the files to estimate the time taken based on the documents available. The schedule gave times of day when certain tasks were said to have been carried out, but Mr Townsend did not in fact have that information; he had made an educated guess, in units of 15 minutes. Mr Spencer had also examined the files and said that substantial amounts of time spent had not been included in the schedule. Mr Townsend, who was familiar with the RICS Code, had dealt with the handover of management to Mr Thornton of HSC; the fee arrangement between Starclass and HSC was placed on a flat rate basis and not a percentage.

Decision

45. The Tribunal considered the substantial written and oral evidence and submissions, and dealt with liability to pay as the first issue, and then the reasonableness of the charges.

Liability to pay administration charges

46. The Tribunal found that the express terms of the lease did not entitle the landlord to recover the legal and management costs claimed. It was necessary to consider carefully the precise wording of the lease terms in order to ascertain the extent of the tenant's liability. Paragraph 4 of the 5th Schedule, in the Tribunal's view, was clear, unambiguous and narrowly drawn. Reading the clause as one whole sentence, the natural meaning of *"costs incidental to the preparation and service of a Notice"* was that it only applied where a Section 146 notice had actually been both prepared

and served, which was not the case here. There was not even a fixed intention to serve such a notice; the legal advice was indeed not to do so.

47. It is not uncommon for a lease term relating to Section 146 notices to contain the words *"in contemplation of the preparation and service of a notice"*. In such a case, a landlord may be able to recover costs of the type claimed here. However, this lease does not contain the words *"in contemplation of"* or anything similar to them. The Tribunal did not accept that the use of the word *"and"* in Paragraph 4 of the 5th Schedule was ambiguous, or that it was necessary in the alternative to imply *"and/or"*. In any event this would not alter the Tribunal's interpretation that a Section 146 notice must have been prepared and served for the landlord to recover its costs.

48. The Tribunal agreed with Mr Di Mambro that it was necessary to construe the lease as a whole and in context; however, it disagreed with his interpretation of Paragraph 8 of the 11th Schedule. In the Tribunal's view, this clause provides for the situation where the landlord is not able to recover his legal and management costs of investigating a possible breach of covenant from the tenant in breach. In these circumstances, the landlord is entitled to recover those costs - to the extent that they are reasonably incurred – through the service charge. This complements Paragraph 4 of the 5th Schedule in that the landlord could choose to demand such costs as service charges where he has not prepared and served a Section 146 notice.

49. The Tribunal did not accept that it was possible to imply a term into the lease obliging the tenant to pay the landlord's legal and management costs. Whilst it is of course true that a lease is a contract between and landlord and a tenant, a lease is a complete written document containing express terms freely entered into by both parties. At common law there exist a very limited number of well established implied terms, such as the landlord's covenants of quiet enjoyment and not to derogate from grant, and the tenant's covenant to behave in a tenant-like manner.

50. It is settled law that a tenant is only liable for a landlord's legal or management costs if there is an express term to this effect. Where a service charge clause, or by extension an administration charge clause, is unclear or ambiguous, the courts will interpret it narrowly and determine any uncertainties in the tenant's favour, or *contra proferentem* against the landlord. Nor is it necessary to imply such a term to give business efficacy to a lease. There is no general presumption, when construing a lease, that it will have been intended for a landlord to recoup all his expenditure.

51. When faced with a possible breach of covenant, the landlord can choose its course of action, but he can only recover all or part of his costs if the lease so allows. If a Section 146 notice is served (subject to the requirements of Section 168 of the 2002 Act) then under the terms of this lease, it can recover his reasonable costs of preparing and serving the notice from the tenant in default. If the landlord chooses not to serve a

notice, it may be able to recover its costs through the service charge, again subject to the statutory requirement that such costs must be reasonably incurred. This latter course may be perceived as unfair by other tenants who are not in breach, but that is one of the risks of being a leaseholder; it is neither irrational nor absurd.

52. The Tribunal did not agree that the landlord had a statutory right under Section 146(3) of the 1925 Act to recover its costs. Section 146(3) applies only when a notice has been served, and only where the landlord has waived the breach or the tenant has otherwise obtained relief from forfeiture, which was not the case here.

53. The Tribunal, within the scope of this application, is not required to determine whether the administration charges at issue would otherwise be recoverable as service charges. That would be a question for another Tribunal, depending on whether the landlord were to pursue that course of action, and if a separate application under Section 27A of the 1985 Act were to be made by either the landlord or one of the tenants.

Reasonableness of the costs

54. Having found that the landlord was not entitled to recover the administration costs at issue under the terms of the lease, the Tribunal was not required to determine the reasonableness of those costs. However, having heard lengthy evidence on the point, in order hopefully to assist the parties, the Tribunal went on to evaluate the evidence and consider the question.

55. Both parties, it seemed to the Tribunal, had taken an entrenched and somewhat extreme view about the actions and attitudes of the other. Mrs Pickering felt persecuted and intimidated even though she had hardly spoken to Mr Spencer; he was equally adamant that he had tried to deal with her in a carefully measured and sensitive way. Unfortunately, for reasons probably connected with the wider context of the service charge dispute (which judging from the correspondence had become somewhat protracted and acrimonious), it appeared to the Tribunal that there had been an unfortunate and serious breakdown of trust and communication between the parties.

56. Mr Di Mambro went to considerable lengths, both in adducing evidence, cross examination and written submissions, to demonstrate that Mrs Pickering had behaved unreasonably, and that therefore it was reasonable of Mr Spencer to deal with the matter in the way that he did. Mrs Pickering's oral and written submissions robustly defended her own actions. The Tribunal took the view that they had both made errors of judgment.

57. The Tribunal considered that the onus was on the AGS to manage the property and deal with the situation professionally and appropriately. If Mr Spencer felt that he could not discuss the prostitution problem openly on

the telephone, then he should have put the information that he had in writing, in a clear and straightforward way, as soon as he knew what was going on. This would have alerted Mrs Pickering to the problem earlier and given her the opportunity to respond. If the situation had been handled in this way, no question of harassment could arise, and even if such an allegation had been made, it could have been easily refuted. As it was, his letter was far from self-explanatory and it is perhaps not surprising that Mrs Pickering was unwilling to attend a meeting if she did not know what it was about.

58. The Tribunal did not accept that Mr Spencer needed to have definite proof that Mrs Pickering's tenants were prostitutes before contacting her. He was not obliged to follow Mr Marr's later advice to withhold the information, or to co-operate with the police investigation into the Pickerings' finances; these matters were not connected to managing the property. In any event, before contacting Mr Marr, Mr Spencer had obtained his own evidence by making telephone calls. He had also received initial advice from the police that one option was to inform Mrs Pickering and ask the local police to send a uniformed officer round to the property to warn the tenants so that they would leave. This, in the Tribunal's view, would have been a sensible way to proceed.

59. The Tribunal concluded that although she acted firmly and took reasonable steps to remove her tenants, Mrs Pickering could and should have contacted AGS, either in person or through her solicitor, when she first suspected that her tenants were running any kind of business. In doing so, she would have protected her position against allegations of breach of covenant. In the Tribunal's view it was perhaps somewhat disingenuous of her not to realise this. Even though she was a lay person, she was also an experienced landlord, and she had access to specialist legal advice. Better communication would have prevented the accrual of further costs. As it was, both parties were taking steps about the same matter without informing the other.

60. It was clear that PCB had advised AGS not to serve a Section 146 notice as it could be regarded as an aggressive step. Instead, PCB advised that a letter should be sent to Mrs Pickering warning her of the possible breach of covenant and urging her to take speedy action. The Tribunal considered that the contents of the draft letter dated 11 December 2004 were eminently reasonable, and that if it had been sent, the situation could well have been resolved, and further investigations by AGS and correspondence between solicitors could have been avoided.

61. The Tribunal agreed with Mrs Pickering to the extent that it was reasonable of Mr Spencer to assess the situation, take initial legal advice, and instruct his solicitors to send the draft letter. The Tribunal considered that the legal costs up until that date were reasonable. These amounted to £954.70, the first 2 invoices from PCB. This is not a determination of the reasonableness of those charges but an observation intended to assist

the parties. The Tribunal has already found that the legal costs are not payable as administration charges under the terms of the lease.

62. The Tribunal took the view that the work done by AGS should fall within the scope of the basic management charge. A competent experienced managing agent should be able to deal expeditiously with incidents of this type, without excessive reliance on solicitors to approve every action. The Tribunal was not satisfied that the work fell outside that scope because of Appendix (iii) of the management agreement. That provision was not clearly worded, but appeared to relate to giving evidence in court in relation to breaches of covenant, rather than day to day work dealing with problems arising at the property. Nowhere in the agreement was there any mention of an hourly rate of £250, which the Tribunal considered to be excessively high.

63. The Tribunal considered that the percentage charging basis in the management agreement was unsatisfactory and inconsistent with the RICS Code, which recommends a flat rate and a clear and transparent menu of charges, so that tenants can easily ascertain what costs they might be liable for above and beyond basic management. It noted that the current arrangement with HSC was on just such a flat rate; when AGS was instructed by Starclass, with which it was closely connected, a high percentage rate was charged, but when Starclass chose to employ an independent managing agent, it negotiated a cheaper flat rate fee.

64. The Schedule of costs on which AGS relied was fatally flawed. The Tribunal was surprised that there was no proper contemporaneous time recording system. The times allocated to pieces of work were, at best, an estimate, and at worst, unreliable and speculative. Mr Townsend had done his best, but had been given an unenviable and difficult task. As a result, the narrative on the Schedule was too general, the 15 minute units were too broad, and some of the time claimed to have been spent was too long, or simply not chargeable to a client, such as charging for time taken handing over the file to new staff, internal meetings and conversations, reviewing correspondence and emails.

65. Finally, the Tribunal was not convinced that any satisfactory explanation had been given as to why these charges were not demanded from the Pickerings until 28 April 2006, so long after the events in November 2004 to February 2005. The Tribunal noted Mrs Pickering's suspicion that it was raised purely as an obstacle to granting her license to assign the flat when she was trying to sell it, but makes no findings in this regard other than to observe that if it were the case, it would be regrettable.

66. In relation to costs, Mrs Pickering applied under Section 20C that the landlord's costs incurred in connection with the proceedings before the Tribunal should be excluded from the service charge. Mr Di Mambro opposed that application. The Tribunal has an absolute discretion in this matter. It found in favour of the Mrs Pickering on the substantive issue of liability to pay. Although there is a point of principle at stake for the

landlord, in that all the leases are on the same terms, the Tribunal considered that the costs incurred by the landlord in defending the application were disproportionate to the value of the claim. The Section 20C application was allowed.

Determination

67. The Tribunal determines for each and every reason set out above that the Applicants are not liable to pay the administration charge claimed by the Respondents.

68. The Tribunal makes no determination as to whether the amount of the administration charge is reasonable.

Section 20C

69. The Tribunal orders pursuant to Section 20C of the 1985 Act that the costs incurred by the Respondent in connection with the proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

Dated 6 February 2007

Ms J A Talbot
Chairman