SOUTHERN RENT ASSESSMENT PANEL

Certificate pursuant to regulation 18(7) of The Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (SI 2004/3098)

Re: **24 Waldon Court**
St Luke's Road South
Torquay
Devon TQ2 5PB

Case No: **CHI/00HH/LSC/2005/0016**

I certify pursuant to the above-mentioned regulation that there is an error in the Notice of the Leasehold Valuation Tribunal's decision in this matter dated 18 November 2005.

The wording of paragraph 8 is incorrectly stated and should read:-

8. The Applicant had made a Section 20C Application but the Respondent's Counsel accepted that there was no provision in the Lease providing for the recovery of costs and the matter did not therefore need to be pursued.

Dated 6th December 2005

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D SPROULL (Chairman)

RESIDENTIAL PROPERTY TRIBUNAL SERVICE

SOUTHERN RENT ASSESSMENT PANEL/
LEASEHOLD VALUATION TRIBUNAL

Case Number: CH1/00HH/LSC/2005/0016

Decision on an Application made under Section 27A of the Landlord and Tenant Act (1985) as amended ("the Act")

Applicant:	Glyn Glanville ("the Applicant")
Respondent:	John David Cullen Sampson ("the Respondent")
Re:	24 Waldon Court St Luke's Road South, Torquay ("the Property")
Date of Application:	1st November 2004
Date of Hearing:	29th September 2005
Venue:	The Livermead Cliff Hotel Torquay
Representation:	The Applicant in person
	Nathaniel Duckworth Counsel (Falcon Chambers) for the Respondent
Tribunal Members:	Mr D Sproull LLB
	Mr T Shobrook BSc FRICS
	Ms C Rai LLB
Date of Decision:	18th November 2005

The Application

1. The Tribunal is asked to exercise its jurisdiction under s.27A of the Act to determine the liability of the Applicant to pay service charges in respect of the Property for the following years:-
   - 1997 the sum of £275-33 relating to the repair of the garage to cure entry of water and degradation of structure and
   - 2003 the sum of £381.12 relating to the repair of flank walls
2. Prior to the Hearing the Tribunal members inspected the Property accompanied by the Applicant and Paul Tynedale on behalf of the Respondent
3. At the Hearing the Applicant represented himself. The Respondent was represented by Nathaniel Duckworth ("Counsel") Paul Tyndale ("Mr Tyndale") of APA Management was in attendance on behalf of the Respondent and Kevin Isaacs FRICS ("Mr Isaacs") a Partner with O'Brien Chartered Building Surveyors gave evidence as an expert on behalf of the Respondent
4. The Chairman sought initially to agree a common bundle of documents to which all parties could refer
5. It was established that the Further Directions dated 28th April 2005 made by Robert Long had largely been ignored by the Respondent. Counsel for the Respondent apologised to the Tribunal for this omission.
6. In response to questioning from the Tribunal the following points were agreed by both parties:-
   - Neither party could produce a copy of the Lease of the garage but both accepted that the Lease of the garage would have been in the same form as the typical Lease which had been produced by the Respondent
   - No issue arose as to the amount of the service charge for the two years in question
   - No issue arose as to the reasonableness of the amount charged for both years
   - There was no issue as to any necessary prior consultation having been carried out
   - No meeting of experts had taken place

7. At the hearing Counsel for the Respondent produced a copy of the Respondent's expert's report dated 28th September 2005 from Kevin Isaacs which had not been disclosed to either the Tribunal or the Applicant until then

8. The Applicant had made a Section 20(c) Application but his Counsel accepted that there was no provision in the Lease providing for the recovery of costs and the matter did not therefore need to be pursued

9. In response to questions from the Tribunal both parties agreed that the only item at issue was whether the work that had been done in respect of which the service charge was made came within the covenant in section 2(iii) of the Lease requiring the Applicant, to pay and contribute to "the cost of maintaining repairing redecorating and renewing…".

10. In agreeing to this the Applicant stated that he did wish to pursue a point with regard to the need for and reasonableness of the work which was required to the flank wall. Counsel for the Respondent objected to the Applicant pursuing his point on the grounds that the application had been made on the basis of the works being necessary due to an inherent defect and did not raise any issue as to reasonableness.

11. The Tribunal found that it could not consider amending the application to allow consideration of this although it had some sympathy for the Applicant because of the Respondent's non compliance with the Further Directions It would be open to the Applicant to make a further application at a later date

12. The Applicant had submitted a written Proof of Evidence with a considerable bundle of attachments and had also submitted a Paragraph 4 Report. He stated that he acted as his own expert witness. Later he gave evidence to the Tribunal as to his qualifications. He had no paper qualifications but had been a surveyor for 43 years. He worked as a Project Manager and Quantity Surveyor for Gleeds. He gave details of several significant developments in which he had been involved sometimes with a team of 20 qualified surveyors beneath him. He had bought the property in 1988. Neither party knew precisely when the flats were built but assumed it was in the 1960's. He said that the garage roof had not been constructed with an adequate damp-proof membrane which should have been provided by the use of asphalt tanking

13. He suggested that the repair which had been subsequently carried out by the Respondent was an improvement and therefore did not come within the covenant to maintain repair redecorate and renew.

14. The Applicant referred to and relied upon the report of Norman H. Berry ARIBA Chartered Architect dated 20th October 1988 as evidence that the damp problems had existed since construction and therefore was an inherent defect

15. He also said that the report of Brian Godfrey Associates dated November 1996 was evidence that damp problems had existed since the garages were built and there was therefore an inherent defect. He suggested that the report was inaccurate in that it implied that asphalt had been used in the original construction as waterproofing. He contended that had it been used it could have been repaired although this would not have cured the water ingression as an inherent defect

16. He further relied on the content of a letter from K. M. Courtier Limited dated 6th July 1998 (written in response to an enquiry made by him) in which Mr Courtier wrote "As far as I recall the concrete roof had just a coating Tac coat under the Bitmac" as evidence

17. In addition he referred the Tribunal to sundry extracts from various British Standard documents and from Mitchell's Elementary Building Construction and other technical documents.

18. He maintained that the absence of tanking constituted an inherent defect.

19. The Applicant then went on to address the issue of the flank walls. He stated that the O'Brien' report (which would appear to be undated but was based upon an inspection which took place on the 23rd August 2001) related solely to investigation following the removal of one panel to a wall at Lytton House (the adjoining property). As a result of that investigation Mr Issacs had found:-

- Hessian based bitumen felt at the bottom of the cavity indicating failure of the damp proof course
- A problem relating to "cold bridging" where condensation occurs.

20. In his report Mr Issacs suggested several options for remedial work, two of which related to the provision of cladding or the application of a polymer based render (referred to by the Applicant as an insulated membrane)

21. The Applicant said that if the correct type of heavy hessian bitumen felt had been used in the installation of the original damp-proof course this should have lasted for the lifetime of the building. He alleged that that it would seem that the incorrect materials had been used and that this constituted an inherent defect.

22. The Applicant stated that no investigation had been made in relation to Waldon Court and enquired what had been achieved by the works carried out. He said that these works had not cured the problem and the work carried out was not a repair and had not been carried out in response to a request from the residents at Waldon Court. The residents had not wanted the same works to be undertaken on their building as those that were carried out at Lytton House. In fact the work carried out to Waldon Court was different. Only a coating had been provided and no vents had been installed, The flank walls at Waldon Court had been coated before and under guarantee but it was implied that the guarantee could not have been relied upon.

23. The Applicant also suggested that had the wall at Waldon Court been constructed in accordance with the relevant by-laws applying at the time of construction and in compliance with British Standards the material would not have failed. He provided samples of various different types of felt, not all of which would be suitable for use in damp proof courses, to indicate to the Tribunal the wide variety of materials available.

24. The Applicant concluded his evidence by stating that there was no adequate damp proof course in the original building and therefore overcoming this problem is an improvement and in any event the works carried out did not overcome the inherent problem of cold bridging.

25. In response to cross examination by Counsel for the Respondent, the Applicant confirmed that he had advised the Respondent upon the suggested methods of remedy to cure the water ingression to the garages. His suggestion that the Respondent use a particular system had been approved. In response to a suggestion put forward by Counsel he agreed that short term repairs could result in greater cost in the long term and would not be as financially beneficial as a more comprehensive solution. However the Applicant maintained that had the garage and flats been built in accordance with the by-laws prevalent at the time they would have been highly unlikely to fail.

However he was unable to produce the actual by-laws referred to nor to say precisely when the property had been built. He said that the standards which now applied had not significantly changed (from those relevant at the time construction)

26. Counsel queried the Applicant's conclusion that the damp proof course had failed on account of its inadequate construction. He suggested that the Applicant had indicated that the relevant by-laws had been breached but could not produce those by-laws; neither could he confirm the date of the construction and therefore could not state which by-laws would have applied.

27. Although the Applicant responded that it was an inescapable conclusion that no system that had been applied at the time of construction should have failed it was clear that:-

(a) No-one is able precisely to date the construction

(b) The only inspection of the flank wall that was actually carried out was in relation to Lytton Court

(c) No evidence has been produced as to the quality (or otherwise) of any materials originally used in the damp proof course

28. Counsel asked the Applicant when the leaks or problems with the garage roof were first identified. He said that the Berry Report (dated October 1988) was the first report. It was agreed that this may have been prepared some 20 years after the construction. If that were the case there had been no prior evidence of problems with either the garages or the flank walls. The Applicant confirmed that when he purchased his property there was evidence of spalling which was still the case on inspection by the Tribunal. This had not caused the Applicant undue concern at that time. Although he alluded to correspondence between unnamed residents and the management company no evidence was produced as to the failure of the damp proof course or the dampness in the garages prior to his purchase of the Property. Nothing had put him off purchasing the Property.

29. As a result of cross examination by Counsel the Applicant suggested that the works to Waldon Court were unnecessary and therefore the service charges were unreasonable. After argument from both parties the Tribunal decided that they could not consider the reasonableness of the service charge in the application before it.

30. Counsel in presenting the Respondent's case called Kevin Isaacs BSC MRICS of O'Brien Chartered Building Surveyors. He had been a Maintenance Surveyor since 1989 and a Chartered Building Surveyor since 1996. He stated that he has many years experience in dealing with buildings of this type.

31. Dealing first with the issue of the garage roofs, he commented on the case put forward by the Applicant as to the variety of methods that might be used to make underground garages waterproof. Whist tanking was an acceptable method it was not the only method. For instance one might rely upon the use of high density concrete of suitable thickness. He went on to say that it was difficult for him to comment one way or another on the Godfrey report and to produce evidence to support or contradict it. He suggested that the problems were more likely to be the result of failure of the detailing at the perimeter and the channels rather than a fundamental design failure. He produced photographs of a recently built car park which showed damage to asphalt surfacing.

32. Mr Isaacs then addressed the issue of the flank walls. All of his evidence in relation to the possible reasons for the defects was inconclusive. He stated that the by-laws during the late 50's and early 60's were relatively simple. Historically it was not unusual for defects to appear in buildings of that age and type. He seemed to accept that problems with dampness might have more than one cause. Therefore the problems could have arisen from a combination of defects. In response to questioning from the Tribunal he admitted that he might have expected to find weep holes but has experience of buildings constructed without weep holes, which was not uncommon even to the present day. He also indicated that any original weep holes may have been blocked up

33. In his summing up the Applicant stated that modern buildings should be built to a satisfactory standard. He maintains that the defects in this building are exceptional and not apparent, and that, therefore, they must be inherent. It is his belief that it is not incumbent upon the tenant to bear the cost and expense of improving the building. The tenant is liable to maintain and repair the Property and therefore any works of improvement cannot be the financial responsibility of the tenant

34. Counsel summed up the case on behalf of the Respondent. He said that:-

(a) There is no dispute as to whether the works fall within the repairing covenant. The only question at issue is as to recoverability of the service charge.

(b) It is a question of fact whether the works were necessitated by a defect in design, or in workmanship

(c) The onus of proof lies with the Applicant It is for the Applicant to provide evidence as to the source of the problem.

There are clearly differences in opinion as to various modes of best practice. In considering "obvious" and "latent" defects he will refer to case law and in particular he will refer to the Ravenseft and Elmscroft cases (copies of which were produced to the parties)

35. Garage Roof - He said that in relation to the garage roof the Applicant claimed there was no waterproof membrane and there ought to have been. The Godfrey report is in stark contrast to the Applicant's view and, indeed, evidence. There is no suggestion the original construction was fundamentally defective. The report identifies cracking. The report identifies a solution. The report does not suggest that the design was defective. The only evidence from the Applicant that the surface was different is that contained in the contractor's letter. The contractor has not appeared as a witness. He was not cross examined. It is suggested that therefore this is not real evidence. It is suggested that the letter that the Applicant wrote prompted the reply that the contractor gave, and in any event it was weak in evidential terms since it had been requested approximately one year following the work having been carried out

36. Flank walls - the applicant believes that the damp proof course should have lasted for the life of the building. He relies on evidence in an email from Steve D'Arcy, Technical Services Manager of Ruberoid Building Products Limited. Again this evidence could not be tested. There are no witnesses and it referred to current standards as opposed to the standards prevalent at the time the building was constructed. There is therefore no comparison of "like for like". Whether the Applicant's view is correct or not, has he proved his case on a balance of probabilities? In the absence of evidence we can only speculate upon the specific type of component used. It could be one of many

kinds of damp proof course. The Applicant relies upon the by-laws and regulations but Counsel claims it is incumbent upon the Applicant to evidence what they were. In his opinion the apparent failure of the damp proof course after forty years does not evidence an inherent defect.

37. Counsel then addressed poor workmanship. The 1988 report identifies some water ingress problems. Paragraph 2.2 in the Godfrey report refers to general problems. It does not support the case that there had been damp problems ever since construction. Mr Isaacs most recent letter does not accept evidence that this was the case. Counsel therefore suggests that the evidence is flimsy. It is incumbent upon the Applicant to prove the case upon the balance of probabilities. This concluded Counsel's submission on the "question of fact".

38. On the question of recoverability he will show that the doctrine of inherent defect is no longer "good law" He refers to Dowding and Reynolds (Dilapidations - the Modern Law and Practice) and to the case of Ravenseft Properties Limited v. Davstone (Holdings) Limited [1980] QB 12 in which Forbes J. said that he was unable to accept that the doctrine "had any place in the law of landlord and tenant. Instead the correct test was that ".....it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the Landlord a wholly different thing from that which he demised." Counsel claims that poor workmanship does not fall within the doctrine of inherent defect.

39. Counsel then referred to case law which dealt with the failure or absence of damp proofing systems. In particular he considered the case of Quick v. Taff-Ely Borough Council [1986] QB 809 where excessive dampness had existed but had not caused consequential damage.

40. He said that it is necessary to apply the "fact and degree test" to establish whether the Landlord may be liable to put in something which was not originally there. The Landlord cannot avoid his responsibility to repair by relying upon the cause of the disrepair being an inherent defect. In this case both of the defects have resulted in physical damage. Mr Isaacs' evidence implied that there was physical damage to the flank walls but there is no evidence in relation to Waldon Court. However if damage existed what should the Landlord have done? Applying the fact and degree test, can he

recover the cost of something which improves the property and which may not have been originally there? Counsel referred to the case of Elmcroft Developments Limited v. Tankersley-Sawyer [1984] 1 EGLR 47 as supporting this. He also considered the age of the Property. He suggested that on his own evidence the Applicant thought that he had been buying a well constructed property. Therefore this is what he expected to get and indeed once the works were completed would perhaps get. He suggested that if the Applicant's share of the cost of the works was a small proportion of the value of the Applicant's interest in the Property it would support the fact and degree test; here the leasehold interest owned by the Applicant was substantial. The relevant cases quoted and contrasted were Eyre v. McCracken [200] 80 P&CR 220 and the Elmcroft case (previously referred to)

41. Counsel concluded by saying that even if it was accepted by the Tribunal that both of the issues related to an inherent defect it was for the Tribunal to decide by applying the "fact and degree" test that the Applicant and not the Respondent should bear the cost, the Respondent's case being that even if the defects are inherent, and that is not necessarily the case, they should fall within the landlord's repairing obligations within the lease and, therefore, the Applicant is obliged to pay his share.

42. **Findings of Fact**

- No factual evidence has been presented by either party as to when the buildings were erected or which by-laws or Building Regulations would have applied at the time of construction
- No conclusive evidence was produced as to the precise nature of the construction of the garages and in particular in relation to prevention of ingress of water.
- With regard to the flank walls of Waldon Court, all evidence produced related to the adjoining property Lytton Court and assumptions had been made on the basis of that evidence.

43. **Decision**

Service Charge for 1997 (repair of garages)

The application is rejected.

Although the Tribunal accepted that the water ingression problem with the garages might have resulted from an inherent defect in their construction it was not shown by the Applicant, on the balance of probabilities that this was the case.

Furthermore it was not accepted that the remedial work that was carried out constituted an improvement, and therefore the Applicant is liable to pay his share of the costs in accordance with the provisions of the lease.

Even if it is accepted, as put forward by the Applicant, that there was an inherent defect in the construction of the garages, about which there is some doubt, the Tribunal was persuaded by the arguments put forward by the Respondent's Counsel and in particular by his reference to the Ravenseft case and the words of Forbes J. who held in that case that on a proper application of the fact and degree approach the relevant work was repair.

In this case the Tribunal finds that, as a matter of fact and degree, the work that was carried out to cure the defect could fairly be called repair within the meaning of the covenant in the Lease

Service Charge for 2003 (flank walls)

The application is rejected.

Insufficient evidence was produced to identify the nature of the defect to the flank walls of Waldon Court. All the factual evidence produced by either party was in relation to the adjoining property Lytton House

Due to the lack of evidence the Tribunal is unable to form a view as to whether or not the works were carried out as the result of an inherent defect.

The following cases were cited in argument:-

Lister –v- Lane & Nesham – CA 1893

Ravenseft Properties Ltd –v- Davstone (Holdings) Ltd – 1980 QB 12 (1975 – 3300)

Smedley –v- Chumley and Hawke Ltd Warrell (the third party) – CA 1981

Quick –v- Taff Ely Borough Council – CA - 1985

Eyre –v- McCracken – CA March 10 2000

Reference was also made to Dowding and Reynolds Dilapidations The Modern Law and Practice Third Edition 11-04

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Dugald Sproull
Chairman

18th November 2005