Neutral Citation Number: [2015] EWCA Civ 1252

Case No: B2/2013/3349

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HER HONOUR JUDGE MAY
1WL00306

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2015

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE BRIGGS
and
LADY JUSTICE KING

- -

Between :

MANSING MOORJANI	**Appellant**
- and -	
DURBAN ESTATES LIMITED	**Respondent**

- -
- -

SIMON WILLIAMS (DIRECT ACCESS) for the **Appellant**
ELODIE GIBBONS (instructed by **CHARLES RUSSELL SPEECHLY LLP**) for the **Respondent**

Hearing dates : Wednesday 11th November 2015

- -

Approved Judgment

Lord Justice Briggs :

Introduction

1. This appeal from the order of HHJ May QC made in the Central London County Court on 22nd December 2013 poses the question whether the lessee under a long lease of a residential flat can claim to have suffered loss arising from a period of disrepair affecting both the flat and the common parts in the building attributable to the lessor's breach of its obligations to the lessee if, during that period, and for reasons unconnected with the disrepair, the lessee chooses to live elsewhere, leaving the flat vacant.

2. The underlying issue of principle is whether the loss caused by such a breach (which, being temporary, causes no damage to the capital value of the lessee's interest) lies in the impairment of the amenity value of the lessee's proprietary interest in the flat, for which he has paid rent or a premium, or in the experience of discomfort, inconvenience and distress which the lessee actually suffers because of the disrepair.

3. This is a case in which, on the Judge's findings of fact, the disrepair, although serious, was not sufficient to render the flat uninhabitable and where, as I have explained, the lessee's decision to live elsewhere was not taken by way of intended mitigation of the loss of amenity or inconvenience which he would have suffered had he continued to live there. In most cases, this difficulty does not arise. Either the lessee remains in the flat, so that his personal loss of amenity and inconvenience is equivalent (at least in value) to the impaired amenity of the flat. Or the lessee vacates because of the disrepair, so that his non-use of the flat can properly be said to have been caused by the breach. In neither of those typical cases is it necessary to address the underlying question of principle, and the combination of the industry of counsel and my own research has not revealed any reported case in which that question has been answered in decisive terms.

The Facts

4. On 24th June 1977 the Respondent Durban Estates Limited granted to the Appellant Mr. Mansing Moorjani a 150-year lease, from 29th September 1976, of Flat 67 on the third floor of the central London mansion block known as Ivor Court, Gloucester Place, London NW1. The Lease provided for the payment of a premium of £19,000, an annual ground rent of £55 per annum for the first fifty years of the term (rising thereafter) and a payment of a service charge which, when aggregated with similar payments by the other flat owners in the building, was to fund the lessor's expenditure upon the performance of its covenants under clause 5 of the Lease. This included the maintenance and repair of the common parts of the building, and the following insurance and reinstatement obligation, in clause 5(7):

> "To keep the Building including the flats therein (but not the decorations or contents of the flats) and all lifts and boilers and all plant machinery and equipment therein insured against loss

> or damage by the insured risks in such sum as shall be considered by the Lessor's Surveyor to be the full replacement value thereof (including provision for architect's and quantity surveyor's fees and demolition and debris clearance) and to cause all moneys received in respect of any such insurance to be laid out with all convenient speed in rebuilding repairing or otherwise reinstating the Building or the part thereof so destroyed or damaged And whenever reasonably required to produce to the Lessee or his agent the policy of such insurance (or a certified copy thereof) together with the receipt for the last premium (or a certified copy thereof) and to permit the interest of the Lessee and his mortgagee to be noted on such policy"

It is well known, and common ground in this case, that a covenant of that kind places an implied obligation on the lessor to pursue its rights under such a policy, so as to generate payment by the insurers for whatever works of rebuilding, repair and reinstatement are necessary because of the occurrence of an insured risk: see generally *Vural Limited v Security Archives Limited* (1989) 60 P&CR 258.

5. Mr. Moorjani had almost completed works of refurbishment at Flat 67 when, in April 2005, there was a serious leak in the flat above his which caused serious damage both to his own flat and to the flats below his, all the way down to the basement of the building. In order to distinguish it from a less serious but more persistent leak which occurred later, I will call it "the 2005 flood". The Judge found that, shortly after the 2005 flood, a Mr. Gilbert of Gross Fine, the Lessor's agents, had said to him "leave it to us, we'll deal with the repairs." She interpreted this as meaning that Gross Fine would, on behalf of the Lessor, liaise with the insurers and put in train proper procedures for identifying and dealing with defects caused by the flood and covered by the insurance policy: (Judgment para 18).

6. The result was that contractors engaged by Gross Fine undertook repair works later in 2005, against whose invoices the insurers made payment in April 2006. Mr. Moorjani complained, and the Judge found, that the contractor's works were seriously inadequate, both because of the poor quality of the works done, and because of omissions to do all that was required. Nonetheless the Judge found that these deficiencies were essentially decorative, and did not render the flat uninhabitable. A period of inconclusive correspondence between Mr. Moorjani and Gross Fine was interrupted, before any further remedial works had been done, by the second less serious but persistent leak from the flat above, which had to be pursued by way of claim against different insurers but which led to no relevant claims in these proceedings. The effect of the 2006 leak was however to muddy the waters as to the extent to which disrepair later identified by the parties' experts had been the result of the 2005 flood, the 2006 leak or a combination of the two.

7. In 2007 Mr. Moorjani engaged his own contractors to make good the continuing defects in the decorative state of the flat. Save for three contested items, his expenditure in doing so was in due course dealt with as part of a settlement of proceedings against him by Durban Estates for arrears of services charges in the Land Valuation Tribunal in 2009.

8. Mr. Moorjani had not been living in the flat at the time of the 2005 flood. He was living with his sister, and continued to do so until 2008, when he returned to live in Flat 67. During the same period (that is from 2005 until early 2008) the Judge found that the common parts (serving Flat 67 and others) were also in a state of disrepair, due to Durban Estates' failure to perform its repairing obligation in relation to them. That state of disrepair continued until Durban Estates sold the reversion in 2011, whereupon its responsibility ceased. The Judge described the effect of Durban Estates' breach as such as to leave the common parts dilapidated, shabby and dingy, to an extent sufficient to found a claim for loss of amenity, at least during the three years after January 2008 when Mr. Moorjani was living in the flat, and therefore using the common parts as his means of access and egress.

9. In proceedings issued in April 2011, Mr. Moorjani sought damages from Durban Estates under the following heads:

   i) Loss of rental income from the flat;

   ii) Special damages consisting of his cost in repairing three outstanding items caused by the 2005 flood;

   iii) General damages for breach of the Lessor's obligations in relation to insurance and reinstatement;

   iv) General damages for breach of the Lessor's obligation to repair the common parts, from 2001 until 2011.

10. The Judge dismissed the loss of rent claim. Permission to appeal in that respect was refused by Patten LJ, so that I need say no more about it.

11. The Judge also dismissed the special damages claim on factual grounds, to which I shall shortly return. Mr. Moorjani obtained permission to appeal under this heading.

12. Mr. Moorjani limited his claim under head (iii) to the period following Durban Estates' receipt of the insurance monies in April 2006. The Judge dismissed it in its entirety because Mr. Moorjani was not living in the flat for any part of the period between the 2005 flood and his completion of the outstanding works of repair and redecoration, in February 2007. She said (at paragraph 23):

> "Despite its being habitable, Mr. Moorjani at the time lived elsewhere, on the basis that he did not wish to live in his flat. In the event, therefore, he did not suffer loss by reason of living in less comfortable circumstances, as he was not there, having gone to live with his sister. That being so, I do not think he can show that he has suffered a loss of amenity or inconvenience by reason of living in the flat."

The Judge dismissed a claim that Mr. Moorjani had in any event suffered the inconvenience of having to write letters, make calls, attend at the flat and pursue Gross Fine, on the basis that these items did not extend beyond the "ordinary vicissitudes of life as a householder of a flat in a mansion block".

13. As to the common parts claim, she dismissed it in relation to the period before 2005 on the basis that there was insufficient evidence of disrepair during that period. Permission to appeal that decision has been refused. She dismissed it for the period between 2005 and Mr. Moorjani's return to the flat in 2008, upon the same ground as in relation to claim (iii), namely because he could have suffered no loss of amenity in relation to the common parts while he was not living in the flat. Finally, in relation to the period from January 2008 until March 2011, after Mr. Moorjani's return, she assessed general damages for the loss of amenity attributable to the shabby common parts at £1,500. Mr. Moorjani appeals in relation to the period from 2005 until 2011, with permission. As to the last of those periods, he says that the Judge's assessment was too low.

Analysis

14. It is convenient first to deal with those parts of Mr. Moorjani's appeal which raise no point of general principle. I shall begin with his claim (ii), in relation to the three outstanding items. They were:

    i) Warped doors, due to flood damage;

    ii) Repairs to the master bedroom to put right flood damage;

    iii) Electrical repairs in relation to damage caused by water penetration.

15. The Judge concluded that all those three items of disrepair had been caused by the 2005 flood, and that the cost of repairing them fell within the confines of the insurance policy. She also found that it had been the duty of Durban Estates, through Gross Fine, to identify these items and pursue them with the insurance company, either because of the implied term identified in the *Vural* case or because of the conversation which had taken place between Mr. Moorjani and Gross Fine shortly after the 2005 flood. She identified correspondence between the loss adjustors, Gross Fine and Mr. Moorjani (described at paragraph 20) by which the loss adjustors had asked Gross Fine to identify any further defects liable to be repaired under the policy. Gross Fine had passed the enquiry to Mr. Moorjani, and Mr. Moorjani had replied, in April 2006, identifying at least the warped doors and the defects in the master bedroom. This he did before a deadline which had been imposed by the loss adjustors. The Judge continued:

> "There, however, the trail goes cold. There is reference in a later letter to there having been a subsequent meeting at the flat attended by the assessors, Gross Fine and Mr. Moorjani. Presumably the matters which Mr. Moorjani now complains of were discussed at that meeting. There is no evidence as to what happened after that, nothing to show (a) that insurers would have paid or (b) that the fact they did not was due to some default on the part of Gross Fine."

Then, at paragraph 21:

> "In these circumstances, I have concluded that I simply cannot find the necessary evidential threads joining up so as to render Durban Estates liable to pay for the three items of damage as damages to breach of duty on the part of Gross Fine. It is for the claimant to prove his claim and I find that he has not done so."

She went on to conclude that, had breach been proved, she would have valued the doors at £1,650 and the bedroom repairs at £1,800, but found no sufficient evidence of any kind to place a value on the electrical repairs.

16. In my judgment, on the facts found by the Judge, Mr. Moorjani did prove his case in relation to the doors and the bedroom repairs. He had demonstrated that they had been caused by the 2005 flood, that they therefore fell within the confines of the insurance policy, and that Durban Estates had, through Gross Fine, taken it upon itself to identify and pursue a claim in relation to all aspects of the disrepair to his flat which could be made the subject of a claim. Further, Mr. Moorjani had demonstrated that he had raised at least the doors and the bedroom works with Gross Fine in April 2006, in good time for a claim to be pursued with the insurers by Gross Fine in relation to them. There was no evidence that Gross Fine had pursued a claim in respect of those items with the insurers. The ball was in the Lessor's court, through its agents, and it was for Durban Estates to prove, if it could, that the fault lay with the insurers rather than with them. The evidence, including the Judge's findings, persuades me that these items became in practice irrecoverable once the insurers' deadline had passed, and the 2006 leak had muddied the waters. It was, before that date, the failure of Gross Fine to pursue a claim in relation to those items, for which Durban Estates is liable, that led to Mr. Moorjani having to deal with them at his own expense. I would accordingly reverse the Judge's finding in relation to the first two of the outstanding items, but not the third, for which Mr. Moorjani could provide no evidence so as to identify his expenditure.

17. I turn to the appeal against the Judge's quantification of general damages for Durban Estates' failure to repair the common parts during the period when he was living at the flat. At paragraph 30, the Judge sensibly asked herself: "how does one put a value on three years of living in an apartment block where the common parts are shabby?"

She referred to three cases to which she was taken by way of comparables: *Earle v Charalambous* [2007] HLR 8, *Lewin v Brent London Borough Council* (1995) CLY 1574, and *Sella House Limited v Mears* [1989] 1 EGLR 65, in which awards had been made (adjusted for inflation to 2013) in the range of £450-513, two of which specifically related to common parts disrepair. She then tested her provisional conclusion that she should award £1,500 for the period of just over three years when Mr. Moorjani was living at the flat, against her own assessment of rental value of the flat of £550 per week in 2008 (rising at 5% per annum) and a notional rentalisation of the loss of amenity at 1to 2%, which confirmed her provisional view.

18. Mr. Williams, for Mr. Moorjani (who did not appear below) criticised this assessment as plainly too low. He did not challenge the Judge's mathematics, but said that a 1 to 2% rentalisation of the loss of amenity caused by the unrepaired common parts was manifestly inadequate.

19. The assessment of general damages for loss of amenity attributable to failure to repair common parts does not lend itself to scientific analysis. It is pre-eminently a matter for an experienced judge sitting (like this Judge) regularly in the local county court for the district which includes the property in question. In *Wallace v Manchester City Council* (1998) 30 HLR 1111, Morritt LJ said this, in relation to the assessment of general damages for a landlord's failure, at page 1121:

> "Thus the question to be answered is what sum is required to compensate the tenant for the distress and inconvenience experienced because of the landlord's failure to perform his obligation to repair. Such sum may be ascertained in a number of different ways, including but not limited to a notional reduction in the rent. Some judges may prefer to use that method alone (*McCoy v. Clark*), some may prefer a global award for discomfort and inconvenience (*Calabar Properties Ltd v. Stitcher* and *Chiodi v. De Marney*) and others may prefer a mixture of the two (*Sturolson v. Mauroux* and *Brent L.B.C. v. Carmel Murphy*). But, in my judgment, they are not bound to assess damages separately under heads of both diminution in value and discomfort because in cases within the third proposition those heads are alternative ways of expressing the same concept."

Later he continued:

> "The question is the monetary value of the discomfort and inconvenience suffered by the tenants. That is a matter for the judge. As Kennedy LJ observed in the course of argument there is no market in out-of-repair council houses on which expert evidence could be either admissible or helpful. Secondly, a judge who seeks to assess the monetary compensation to be awarded for discomfort and inconvenience on a global basis would be well advised to cross-check his prospective award by reference to the rent payable for the period equivalent to the duration of the landlord's breach of covenant. By this means the judge may avoid over- or under-assessments through failure to give proper consideration to the period of the landlord's breach of obligation or the nature of the property."

These observations were cited without criticism by Carnwath LJ in *Earle v Charalambous*, at paragraphs 18-20.

20. The Judge first identified £1,500 as a provisionally appropriate global award of general damages, and then cross-checked it by reference to a notional reduction of rent. There is in my view no basis for suggesting that, in doing so, she was wrong in principle. The most that can be said is that her cross-check revealed a very low percentage notional reduction, one which, had I been conducting the matter afresh, might have suggested to me that the provisional figure was too low. But the Judge had the benefit, which I lack, of having heard the evidence, and of her considerable experience in cases of this type in Central London. I do not consider that it would be right to disturb her assessment merely upon the ground that I might regard it as too

low, in the absence of any identifiable error of principle, unless it was so low as to have been plainly wrong. I would therefore dismiss the appeal upon this ground.

The question of principle

21. The remaining grounds of appeal are entirely bound up with the question of principle identified at the beginning of this judgment, it being impossible to conclude that the Judge was wrong to find as a fact that Mr. Moorjani's absence from the flat between 2005 and 2008 was caused in any relevant sense by its state of disrepair during that period. That was a finding made after hearing Mr. Moorjani give evidence with which it is simply impossible for this Court to interfere, in the absence of compelling evidence to the contrary, and there is none.

22. Before looking at such guidance as there is to be obtained from authority, it is worth reflecting in a little detail upon the consequences which ought to flow from accepting one or the other of the two ways of identifying the loss caused by breaches of this kind, namely (i) impairment of the lessee's property right, and (ii) personal inconvenience, discomfort and distress. If (i) is correct then, in principle, it should be irrelevant what the lessee does with his property while it is impaired. It should not matter whether he uses it continuously, or for weekends, or for holidays, whether he sub-lets it, allows a friend or family member to use it rent free, or simply leaves it vacant. This reflects a long-standing principle of the law of damages, which is that what the claimant chooses to do with property damaged by the defendant's breach, otherwise than by way of mitigation, is *res inter alios acta*. Furthermore, it is fully applicable, in the context of leases, to the quantification of damages for a tenant's breach of repairing obligations, where it is irrelevant to the measure of the landlord's loss that he has, before delivery-up, already re-let the premises at a rent which takes no account of the disrepair: see *Joyner v Weeks* [1891] 2QB 31 and *Haviland v Long* [1952] 2QB 80. By contrast, if the loss for which the lessee seeks damages is his own personal inconvenience, discomfort and distress, then what he does with the leasehold property during the period of disrepair is, as the Judge found, crucial. Non-use during the period of disrepair will be fatal to any claim. Use only for weekends or holidays may diminish the amount of the claim *pro rata*. Allowing use by a friend or family member would, on the face of it, mean that the lessee with the benefit of the covenant suffers no loss and that the person suffering the discomfort, inconvenience and distress, being a stranger to the lease, has no claim. Furthermore, it has been held that a corporate lessee is incapable of suffering distress or discomfort: see *Lewis v Daily Telegraph Limited* [1964] AC 234, at 262 and, in the landlord and tenant context, *Electricity Supply Nominees v National Magazine Co.* [1999] 1 EGLR 130.

The authorities

23. The leading cases on damages for breach of landlords' repairing covenants are generally regarded as the following: *Hewitt v Rowlands* (1924) 93 LJKB 1080, *Calabar Properties v Stitcher* [1984] 1 WLR 287, *Wallace v Manchester City Council* (1998) 30 HLR 1111, and *Earle v Charalambous* [2007] HLR 8. All of them are decisions of this court. None of them directly address the question of principle arising

in this case. The language of many of the judgments in them tend to suggest unspoken assumptions about the present question, but because they relate to facts upon which this question did not arise, it would be imprudent to assume that the language used was intended to be dispositive of it. Furthermore, the judgments in question are by no means entirely consistent.

24. In *Hewitt v Rowlands*, the statutory tenant of a cottage without a damp-course sued his landlord for breach of his covenant to keep the cottage dry. Since giving up occupation would have terminated his tenancy, the tenant remained in occupation throughout, enduring the pervasive dampness as best he could.

25. The case had a disastrous procedural history in which the assessment of damages had to be carried out three times after successful intermediate appeals. It is best remembered for the concise statement of the fundamental principle for quantification of damages, stated by Bankes LJ in the following terms, at page 1082:

> "*Prima facie* the measure of damage for breach of obligation to repair is the difference in value to the tenant during that period between the house in the condition in which it now is and the house in the condition in which it would be if the landlord on receipt of the notice had fulfilled his obligation to repair."

26. In *Calabar Properties v Stitcher*, a top-floor flat held on long lease by the plaintiff had been damaged by water penetration due to the landlord's breach of its covenant to keep the exterior of the building in repair. That damage caused disappointment, discomfort and loss of enjoyment to the plaintiff and bouts of ill-health to her husband, following which, in despair, they left the flat for good, and sued the landlord, who had (wrongly as it turned out) been maintaining that their problems were merely due to condensation. The plaintiff recovered in full for the cost of repairs and redecoration (subject to betterment) and a global sum for the disappointment, discomfort, loss of enjoyment and for her husband's ill-health. She appealed the refusal of the judge to award her damages for loss of amenity, on a rental basis, while still in occupation, and for the cost of alternative accommodation. The Court of Appeal (Stephenson, Griffiths and May LJJ) dismissed her appeal. As to the cost of alternative accommodation, it had not been pleaded, but Griffiths LJ was at pains to point out that if breach of a landlord's repairing covenant forces a tenant to find alternative accommodation because the leasehold premises had become uninhabitable, then a properly pleaded claim for that cost may in principle be recoverable. At page 297 F-G he said:

> "The object of awarding damages against a landlord for breach of his covenant to repair is not to punish the landlord but, so far as money can, to restore the tenant to the position he would have been in had there been no breach. This object will not be achieved by applying one set of rules to all cases regardless of the particular circumstances of the case. The facts of each case must be looked at carefully to see what damage the tenant has suffered, and how he may fairly be compensated by a monetary award."

At page 299 C-E, he said:

> "Whatever Bankes LJ meant by "the difference in value to the tenant", the one thing he cannot have meant in the circumstances of that case was the diminution in the market value of the tenancy, for it was a statutory tenancy which the tenant could not sell, and thus it had no market value. In my view the difference in value to the tenant must vary according to the circumstances of the case. If the tenant is in occupation during the period of breach he is entitled to be compensated for the discomfort and inconvenience occasioned by the breach and I suspect that that is what Bankes LJ had in mind when he used the phrase "the difference in value to the tenant" in *Hewitt v Rowlands*… for which the judge in this case awarded £3000. If the tenant has rented the property to let it and the landlord is aware of this then "the difference in value to the tenant" may be measured by his loss of rent if he cannot let it because of the landlord's breach. If the tenant is driven out of occupation by the breach and forced to sell the property then "the difference in value to the tenant" may be measured by the difference between the selling price and the price he would have obtained if the landlord had observed his repairing covenant. But each case depends upon its own circumstances and *Hewitt v Rowlands* should not be regarded as an authority for the proposition that it is in every case necessary to obtain valuation evidence."

27. At page 295, Stephenson LJ took the same view as Griffiths LJ about the meaning and effect of *Hewitt v Rowlands*. He sought to identify the applicable principles as follows, at 295 G – 296 B:

> "In measuring and assessing any tenant's damages for breach of a landlord's repairing covenant the court must, I think, always start with the fundamental principle that they are
>
> > "So far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach in contract." "

After reference to *Dodd Properties (Kent) v Canterbury City Council* [1980] 1 WLR 433, from which he derived that quotation, and *Perry v Sydney Phillips & Son* [1982] 1 WLR 1297, he continued:

> "So the true measure of damages for persons owning or occupying land, whether in tort or contract, depends on the position of the plaintiffs and all the circumstances in which they have suffered loss and damage in the light of the fundamental principle to which I have referred."

28. In *Calabar v Stitcher*, the lessee continued to occupy the property until driven out by the state of its disrepair. In *Wallace v Manchester City Council*, the plaintiff and her two children remained steadfastly in occupation of a council house held on a secure

tenancy notwithstanding a lengthy period of appalling disrepair for which her landlord was responsible. It is therefore hardly surprising that the decision of this court provides no decisive assistance with the present question of principle, but Morritt LJ did seek to provide general guidance for the benefit of District and County Court Judges generally. He did so in the form of the following propositions, at pages 1120-21:

> "First, the question in all cases of damages for breach of an obligation to repair is what sum will, so far as money can, place the tenant in the position he would have been in had the obligation to repair had been duly performed by the landlord. Secondly, the answer to that question inevitably involves a comparison of the property as it was when the landlord was in breach of his obligation with what it would have been if the obligation had been performed. Thirdly, for periods when the tenant remained in occupation of the property notwithstanding the breach of the obligation to repair, the loss to him requiring compensation is the loss of comfort and convenience which results from living in a property which is not in the state of repair it ought to have been if the landlord had performed his obligation… Fourthly, if the tenant does not remain in occupation but, being entitled to do so, is forced by the landlord's failure to repair, to sell or sublet the property, he may recover for the diminution of the price or recoverable rent occasioned by the landlord's failure to perform his covenant to repair.
>
> Obviously the tenant cannot claim damages in accordance with the third proposition for periods occurring after the sale or sub-lease referred to in the fourth. To that extent, as shown in *Calabar Properties v Stitcher*, those two heads are mutually exclusive. This case is concerned with the proper application of the third proposition, not the fourth. Thus the question to be answered is what sum is required to compensate the tenant for the distress and inconvenience experienced because of the landlord's failure to perform his obligation to repair. Such sum may be ascertained in a number of different ways, including but not limited to a notional reduction in the rent. Some judges may prefer to use that method alone…, some may prefer a global award for discomfort and inconvenience… and others may prefer a mixture of the two… . But in my judgment, they are not bound to assess damages separately under heads of both diminution in value and discomfort because in cases within the third proposition those heads are alternative ways of expressing the same concept."

29. Finally, in *Earle v Charalambous*, the claimant was, as in *Calabar v Stitcher*, the long lessee of a top-floor flat who, after enduring progressive deterioration due to a leaking roof (for which the lessor was responsible), was eventually forced out of the flat and lived with his parents until it was belatedly repaired, after which he returned to the

flat. Both the Judge and the Court of Appeal divided the claim into two periods: (i) while the lessee remained in occupation and (ii) while, after being forced out, he lived with his parents. The Court of Appeal reduced the Judge's global assessment for period (i), but upheld it for period (ii).

30. What matters in the *Earle* case are the statements of principle by Carnwath LJ, with whom both Moses LJ and Morritt C simply agreed. At paragraph 15, Carnwath LJ adopted counsel's description of the "central issue" as follows:

> "Central to this appeal lies the issue whether in assessing the normal measure of damages for breach of a repairing covenant in respect of residential premises, the distress, discomfort and inconvenience for which the tenant is being compensated under the head 'difference in value' should be assessed according to past awards for such non-pecuniary loss or is actually dependent upon the market rent of the premises. If the former, the maximum level of damages is indicated to be no more than about £3300 per annum. If the latter, the damages are governed by whatever may be the market rent for the property."

He then referred to the leading cases which I have described. In relation to *Wallace v Manchester City Council*, he noted, at paragraph 21, that Morritt LJ's analysis had to be understood in the context of a case about a secure weekly tenancy, where the actual rent may be an imperfect guide to the true value of the tenancy to its occupant. As for *Calabar v Stitcher*, he relied upon criticism of its apparent disapprobation of rental value as a basis for determining the measure of damages by HHJ Hicks QC in *Electricity Supply Nominees Limited v National Magazine* [1999] 1 EGLR 130, treating the *Calabar* case as no binding authority derogating from the generality of the principle (quoted above) relevant to all such cases, as enunciated by Bankes LJ in *Hewitt v Reynolds*. He continued, at paragraph 31:

> "31. Diminution in market value is a familiar basis for assessing damages for wrongs affecting property. That carries no implication that there is to be an actual sale. An assumed sale in the open market is used as a method of arriving at an objective test of value. The assumed sale is of course "fictional". But that element of fiction has never been regarded as open to objection, let alone "absurd", either in principle, or because it may lead into a "complicated underworld" which expert valuers are supposed to inhabit. Where the loss of value is temporary, then rental rather than capital value is an appropriate yardstick (see, for example, in relation to compensation for temporary inconvenience caused by public works: *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1, 16G-H). The decision in *Calabar*, as I have explained, causes no difficulty on its own facts. But insofar as Stephenson LJ was commenting more generally on the use of valuation evidence, his observations were not necessary for the decision, and were, in my respectful view, contrary to well-established principle. I would, however, accept that (in the words of Griffiths LJ):
>
> > "… each case depends upon its own circumstances and *Hewitt v Rowlands* should not be regarded as an authority for the

> proposition that it is in every case necessary to obtain valuation evidence." (p.299F)
>
> 32. Although that is sufficient to deal with the "central issue", I would go further. I do not think that a direct analogy can be drawn with awards in relation to protected periodic tenancies, still less with the "modest" awards thought appropriate in other areas of the law (see e.g. *Watts v Morrow* [1991] 1 WLR 1421, 1439G). A long-lease of a residential property is not only a home, but is also a valuable property asset. Distress and inconvenience caused by disrepair are not free-standing heads of claim, but are symptomatic of interference with the lessee's enjoyment of that asset. If the lessor's breach of covenant has the effect of depriving the lessee of that enjoyment, wholly or partially, for a significant period, a notional judgment of the resulting reduction in rental value is likely to be the most appropriate starting point for assessment of damages. Generally, this reduction will not be capable of precise estimation; as Morritt LJ said in *Wallace*, it will be a matter for the judgment for the court, rather than for expert valuation evidence."

31. In my judgment, the critical part of that analysis for present purposes is Carnwath LJ's conclusion that "distress and inconvenience caused by disrepair are not free-standing heads of claim, but are symptomatic of interference with the lessee's enjoyment of that asset". I would not, for my part, limit that observation to long leases, so as to exclude periodic, secure or even statutory tenancies. In each case, the lessee or tenant enjoys a recognisable species of property right, in return for payment, either in the form of a premium, a rack rent or a fair rent. If in any of those cases the amenity or value of that bundle of rights to the lessee or tenant is impaired by the lessor's or landlord's breach of covenant, then that is a loss of which discomfort, inconvenience or distress (or the breakdown in health of a loved one) are all symptoms.

32. Finally, I derive a little further assistance from two more cases. The first is *Shine v English Churches Housing Group* [2004] HLR 42, in which the Court of Appeal allowed the landlord's appeal from the quantification of damages for its breach of covenant, mainly on the grounds that nothing had been demonstrated to permit an award for distress and inconvenience in an amount exceeding the rental payable by the tenant during the relevant period. Ironically, it was a case in which the tenant had not merely doggedly remained in occupation of the premises during the period of disrepair, but in the view of the Court of Appeal unreasonably failed to mitigate his loss by accepting alternative accommodation while the repairs were carried out. At paragraphs 104-5 in the judgment of the Court, there appears this useful guidance:

> "104 Whilst we accept that the guidelines helpfully set out by Morritt LJ in *Wallace v Manchester City Council* are not to be applied in a mechanistic or dogmatic way, and whilst we equally accept that there will be cases in which the level of distress or inconvenience experienced by a tenant may require an award in excess of the level of rental payable, we take the view that the plain inference of Morritt LJ's judgment, and the figures identified in the case itself,

> demonstrate that if an award of damages for stress and inconvenience arising from a landlord's breach of the implied covenant to repair is to exceed the level of the rental payable, clear reasons need to be given by the court for taking that course, and the facts of the case - notably the conduct of the landlord - must warrant such an award.
>
> 105 It must, we think, always be remembered that an award of damages under LTA 1985 section 11 is an award for a breach of contract by the landlord, not for a tort committed by the landlord. It is, accordingly in our judgment logical that the calculation of the award of damages for stress and inconvenience should be related to the fact that the tenant is not getting proper value for the rent, which is being paid for defective premises. Moreover, the reason for the awards being modest is, it seems to us, related to the fact that the tenant in a secure weekly tenancy has the benefit of occupying premises at a rent, which is well below that which the same premises would be likely to command in the open market."

The most helpful part of that guidance lies, in my view, in the observation that, approaching such a claim as contractual in nature, the award of damages for stress and inconvenience is related to the fact that the tenant is not getting proper value for the rent which is being paid for the defective premises.

33. There are two respects in which this observation has to be treated with caution before being applied mechanically to a long lease at a premium, where the lessor's repairing obligations are funded by service charge payments. The first is that the concept of "proper value for the rent" must be extrapolated as including proper value for the premium paid on the grant of a long lease, where the rent is, as here, only an almost nominal ground rent. The second is that a consequence of the landlord's failure to repair under a lease such as the present is that the lessees are, collectively, relieved from that part of the service charge which they would have been obliged to pay, if the lessor had complied promptly with its obligations. In the present case, the second qualification applies only to the failure to keep the common parts in repair, since prompt repair of Flat 67 following the 2005 flood would have been at the expense of the insurers. But even in relation to the common parts, the repairs were eventually done, and charged to the lessees under the service charge provisions. Whether doing them so late relieved or aggravated the burden of the service charge is a matter for speculation. More generally, neither of these qualifications seems to me to go to the heart of the underlying principle, which is that, as disclosed by the analysis in both the *Shine* and *Earle* cases, the breach of the lessor's obligations causes an impairment (even if only temporary) in the value of the property rights for which the lessee has paid.

34. The second case is the much earlier decision of this court in *McCoy v Clark* (1982) 13 HLR 87. The trial judge had awarded a very low level of damages for disrepair caused by the landlord's breach because he found that the tenant, an unemployed man, had not valued his flat as a home, nor decorated, furnished or tidied it, but just used it as a place to "put his head down". Allowing the appeal and awarding a higher sum, but without referring to authority or principle, Sir David Cairns said, at 94:

> "On that basis, was the compensation that was awarded to the defendant for it adequate? In my view, it was not. It is all very well to say that the defendant was not spending a great deal of the day in the flat and that he was using it mainly as a sleeping place. If he had the flat as a sleeping place and was willing to pay £9 a week for the flat for that purpose, then he is entitled to a flat which is comfortable for that purpose, and if it is substantially reduced in the degree of comfort, then I think what he ought to recover is something proportional to that reduction."

Again, that passage appears to recognise that the relevant loss is the impaired amenity of the property for which the tenant has paid, rather than just discomfort, inconvenience and distress.

Conclusions

35. Taking those authorities together, I have reached the following tentative conclusions. First, although the language of the *Calabar* and *Wallace* cases speak of discomfort, inconvenience and distress as if they were the very losses caused to the lessee by the lessor's breach, the better view is that the loss consists in the impairment to the rights of amenity afforded to the lessee by the lease of which discomfort, inconvenience and distress (and even the deterioration of the health of a loved one) are only symptoms. The lessee pays a premium for the assignable right to the enjoyment of occupation of a specific property for a period usually longer than his own lifetime, the quality of which is underpinned the lessor's repairing and reinstatement obligations. It is nothing to the point that the lessor incurs no cost in their performance (since that is met either from insurance or service charge). The quality of enjoyment is underpinned by the lessor's promise to carry out those obligations diligently and in due time, rather than to neglect or delay in their performance.

36. Secondly, it is therefore not a fatal obstacle to a claim for damages for that impairment in the lessee's rights that the lessee may have chosen not to make full use, or even any use, of them during part of even all of the relevant period, for reasons unconnected with the disrepair itself. The use which the lessee chooses to make, or not to make, of those rights is, at least in principle, *res inter alios acta*, in just the same way as the profitable re-letting of premises prior to the quitting of possession by an earlier tenant in breach of his repairing obligations.

37. But third, it by no means follows that the use, or non-use, of the lessee's property rights during the period of disrepair is irrelevant for all purposes. It may for example be relevant as mitigation of loss. Thus in the *Earle* case, the lessee mitigated the consequence of having his premises rendered uninhabitable by lessor's default by living for part of the relevant period with his parents. *Prima facie*, the loss of his rights of use and amenity at his flat was total, and should have entitled to him to a 100% notional rent by way of damages. But the Court of Appeal was content to limit his damages to 50% of a notional rent. At paragraph 41, Carnwath LJ said this:

> "With regard to period (ii), I begin from the position that the lessee was deprived of the entire enjoinment of his property throughout this period. Whether one treats rental value as a measure of that loss, or one looks to the cost of renting equivalent accommodation, that would suggest a potential award of the order of £21,000. The lessee was able to mitigate his loss by living with his parents for this period, but that does not mean that the compensatable loss is confined to his transport problems. That would leave him with nothing for the loss of enjoyment of his property for almost two years."

38. Where, by contrast, a lessee has to rent alternative premises, then that cost may be the best measure of the lessee's loss, as is I think implicit in the conclusion of the Court of Appeal in the *Calabar* case that, had it been pleaded, that loss would have been recoverable in full.

39. Fourth, it would be strange if mitigation were the only principle by reference to which the limited use or non-use of leasehold premises during the period of disrepair was relevant. In the present case, Mr. Moorjani had vacated Flat 67 to live with his sister rent-free sometime before the 2005 flood for reasons which were, necessarily, unconnected with any breach of covenant by Durban Estates, and the Judge concluded that he continued to live with his sister (rent-free) after the 2005 flood for reasons unconnected with that breach. Suppose that the disrepair had (contrary to the Judge's findings) rendered Flat 67 uninhabitable. It would be strange indeed if, in those circumstances, Mr. Moorjani was entitled to recover 100% of the rental value of the flat during the period of disrepair, whereas Mr. Earle (who vacated by way of mitigation) was entitled to a mere 50%, for an equivalent impairment of his rights as lessee. It may be that non-use for reasons unconnected with the disrepair should be regarded as a form of mitigation of loss, even if there is no intention to mitigate, but it will not wholly cancel out the loss constituted by the impairment of amenity, for which the tenant has paid rent, and the lessee a premium, even if he lives elsewhere rent-free.

40. Fifth, and finally, the court is entitled and, I would say, obliged to temper the rigour of those rules which seek to implement the compensatory principle which lies at the heart of the law of damages, where particular circumstances make it just to do so, see generally *County Personnel (Employment Agency) Limited v Alan Pulver & Co* [1987] 1 WLR 916. In particular circumstances, as was acknowledged in the *Shine* case, this may admit quantification of damages in excess of the current rental value. In *Calabar v Stitcher* the lessee recovered compensation on account of the damage to her husband's health occasioned by the disrepair. In other cases, it seems to me perfectly legitimate to treat the particular circumstances of the claimant lessee as tending to reduce rather than aggravate his damages, and not merely where the relevant conduct consists of what may conventionally be described as mitigation.

41. I make no apology for having delved rather deeper into this question of principle than was attempted in counsel's submissions, although they did refer us to some of the main authorities. Mr Williams for Mr Moorjani treated loss of amenity as the basis of his submissions, while Miss Gibbons for Durban Estates treated it as so obvious that the loss consisted of personal inconvenience, discomfort and distress that she found it

difficult even to understand, let alone deal with, the court's difficulty with the Judge's approach.

Outcome

42. The outcome of the above analysis of the principles and the authorities is that, in my view, the Judge was wrong to treat Mr. Moorjani's non-occupation of his flat during most of the period of disrepair as fatal to his claim for his compensation for loss of amenity. In my judgment he suffered precisely the same loss as would have been suffered by a lessee who, in comparable circumstances, had remained in the flat throughout, namely a serious although temporary impairment of the rights in relation to that flat conferred upon him by the Lease, for which he had paid a full premium. The starting point for the valuation of that impairment ought to be by reference to the rental value of the flat during the relevant period, with a very substantial percentage discount to reflect the Judge's conclusion that the disrepair in the flat was cosmetic and did not render it uninhabitable, and that the disrepair in the common parts was not, by reference to other cases with which she was familiar, of a particularly severe kind.

43. The damages should then be further substantially reduced by reference to the fact that, unusually, Mr. Moorjani chose to not occupy the flat for most of the relevant period, so that the effect upon him of the impairment of his rights was very much less than it would have been upon a lessee who, as is usual in such cases, remains in occupation throughout. The appeal in relation to those two elements of Mr. Moorjani's claim must therefore be allowed, and the Judge's nil award in relation to both of them set aside.

44. Mr. Williams urged the court, for understandable reasons of economy, and because there is no substantial dispute of primary fact, to substitute the Judge's nil award with an amount of its own determination. Miss Gibbons for Durban Estates remained neutral on this question, but it seems to me that it would be an unpardonable waste of time and costs to remit it to the County Court for a further determination, probably before a different judge.

45. Since I have concluded that the Judge's quantification of Mr. Moorjani's damages during the period after he had resumed occupation in 2008, although in my view low, ought not to be disturbed, it is possible to address his claims for the remaining period as claims for impairment when he was, from start to finish, out of occupation. Nonetheless the period falls into three parts. The first, from 2005 until the end of March 2006, was one in respect of which his only claim was in relation to the common parts. This is because he made no claim in respect of the 2005 flood for a period earlier than the lessor's receipt of the insurance monies in late March 2006. Despite Mr. Williams' valiant attempts to do so, I consider that it would be quite wrong to permit on appeal the introduction of an earlier claim in relation to the 2005 flood than was advanced at trial.

46. Having regard to the modest amount in issue, I intend to apply a broad brush. I start with the Judge's estimated notional rental value of £550 per week in 2008, which I am minded to adjust downwards by 5% a year for 2005/6. I am not constrained by her 1

to 2% apportionment of the notional rent and, had Mr. Moorjani been in occupation, I would have awarded 5%. But since he was not in occupation, I would reduce that amount by half, so that I would award Mr. Moorjani 2.5% of the notional rental value of the flat for the fifteen months consisting of 2005 and the first quarter of 2006.

47. The second period runs from April 2006 until the completion of the repairs to the flat in the first quarter of 2007, when the amenity value of Mr. Moorjani's interest was impaired both by the state of the common parts and by the disrepair of the flat itself. Again, I would use the same notional rental value discounted at 5% back from the 2008 value. The combination of the disrepair to the flat and to the common pairs, both of which the Judge described as essentially decorative, I would quantify at 20% of the notional rent, which I would again reduce by half by reason of Mr. Moorjani's non-occupation. The result is therefore 10% of one year's rental value.

48. The third period runs from the second quarter of 2007 until Mr. Moorjani resumed occupation of the flat in early 2008, which appears to be a period of about ten months. Again, the starting point is the Judge's assessment of notional rental value, which need not be discounted from £550 per week and, again, I would apply a 2.5% apportionment on account of the continuing disrepair to the common parts.

49. My calculations of those formulae, rounded to the nearest pound, are as follows:

    i) Period one: £760.

    ii) Period two: £2,574.

    iii) Period three: £596.

    iv) In aggregate therefore, the amount for which I would, if my Lord and my Lady agree, give judgment to Mr. Moorjani is £7,380, being £3,930 for the three periods of impaired amenity, £1,650 for the warped doors, and £1,800 for the bedroom repairs.

Lady Justice King

50. I agree.

Lord Justice Longmore

51. I also agree.