IN THE SUPREME COURT OF JUDICATURE No CCRTF 97/1165/2
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ORDER OF HIS HONOUR JUDGE HARDY

Royal Courts of Justice
Strand
London WC2

Tuesday, 7th July 1998

B e f o r e:

LORD JUSTICE KENNEDY

LORD JUSTICE MORRITT

JULIE WALLACE and Others

Appellant

- v -

MANCHESTER CITY COUNCIL

Respondent

(Handed down transcript
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Official Shorthand Writers to the Court)

MR JAN LUBA and MR PETER BUCKLEY (Instructed by Clifford Chance & Co of Rusholme, Manchester) appeared on behalf of the Appellant

MR IAN LEEMING QC and MR ROBERT DARBYSHIRE (Instructed by Manchester City Council) appeared on behalf of the Respondent

J U D G M E N T
(As Approved by the Court)

LORD JUSTICE MORRITT:

1. In 1989 the plaintiff, Mrs Wallace, went, with her two small children, to live in property belonging to Manchester City Council at 62 Abergele Road, Fallowfield, Manchester. On 22nd August 1994 she was given a written tenancy agreement. This stated that her rent was £45.26 per week. In July 1995 the weekly rent was increased to £47.40 per week. Thus at all times since 1989 Mrs Wallace has been a secure weekly tenant and, as such, subject to the provisions of Part IV Housing Act 1985.

2. There were two relevant obligations on the part of the City Council implied into such tenancy. The first was an obligation to keep in repair the structure and exterior of the dwelling house and the installations inside the dwelling house as prescribed by and on the terms set out in s.11 Landlord & Tenant Act 1985. The second subjected the City Council to a duty to take such care as is reasonable in all the circumstances to see that all persons who might reasonably be affected by defects in the state of the premises are reasonably safe from personal injury or from damage to their property caused by a relevant defect as defined in s.4 Defective Premises Act 1972.

3. On 8th March 1996 the property was inspected by Hiltons, building surveyors, on the instructions of the solicitors acting on behalf of Mrs Wallace. They reported

> "Discussions with the Tenant revealed the following matters, namely:
>
> - The external wall below the Living Room window has collapsed some 2 to 3 months ago.
>
> - The windows are generally rotten. That to the Living Room is in a particularly poor condition. As a consequence the Living Room is always extremely cold despite the heating being on continuously.
>
> - A remedial Damp Proof Course has been installed on 3 occasions to the Living Room, the last being in August 1995. There is a mould build up behind the Tenants side board to the side party wall.
>
> - Plaster and skirtings are deficient/falling off/loose to the Bedrooms.
>
> - The Tenant has suffered from constant infestation from rats which enter the property from the drains at the rear of the house. The Council have attended on 3 occasions to lay preventative substances. The operative has however stated that the rats are eating the laid substances and that it may be possible for the infestation to re-occur.
>
> - The rainwater pipe to the front elevation leaks badly during periods of heavy rain.
>
> We understand that these deficiencies have existed over a number of years with the Tenant having complained to the Council but gained no effective response."

4. On 27th August 1996 the City Council's building surveyor inspected the property and prepared a schedule of works. In December 1996 repairs were carried out by way of replacing a window and repointing a wall, but, the City Council contend, they were unable to obtain access so as to carry out further works.

5. On 24th January 1997 Mrs Wallace and her two children commenced proceedings in the Manchester County Court claiming that the City Council was in breach of each of the two obligations to which I have referred. They alleged that Mrs Wallace had complained to the City Council about the want of repair on many occasions since 1992. This was a material allegation for the liability of the landlord under both statutory provisions depends on having notice of the want of repair or of the relevant defect as the case may be. They alleged that each of them had suffered distress, anxiety and inconvenience in consequence. They claimed specific performance of the repairing obligations and damages for diminution in the value of Mrs Wallace's rent, for inconvenience in respect of all of them and for the ill-health suffered by the children.

6. On 2nd July 1997 the action came before His Honour Judge Hardy. He heard evidence from Mrs Wallace, her surveyor, Mr Williams and the building surveyor for the City Council, Mr Claringbold. In his judgment, given on the same day, the judge recorded that to a large extent the disrepair had not been disputed and that he was not invited to make detailed findings or orders in that respect. He found that there had been breaches of both the obligations relied on with the consequence that Mrs Wallace and her children were entitled to damages. He assessed the damages to be paid to each child at £2,000 and the special damages, for damage to curtains, carpets and furniture, in the amount claimed, namely £780. The judge continued:

> "That leaves two heads of damages which are pursued. The one is the award of general damages to the plaintiff and it is said to the children for the general inconvenience and diminution in value it is said to the value of the property to them. I am invited to consider dealing with an award partially on the basis of an order for general damages and partially under what can be termed perhaps a subhead of general damages, not exactly special damages but to calculate it on some basis which assess them as the diminution in the value of the tenancy to them in relation to the amount of rent paid.
>
> I am hesitant about doing it that way. I know that other Judges in concurrent jurisdictions have done so and it may be a useful exercise to consider it in that way as part of the way in which one arrives at a figure of general damages. I do not regard it myself as a separate head of damages from general damages but a part of them and if Judges wish to use that method in arriving at their total figure they, of course, so far as I am concerned [are] perfectly at liberty to do so. Personally speaking, I do not find it a useful approach.

> Added to which it presents what, to my mind, is a considerable difficulty. If this lady had been paying the whole of the rent out of her own pocket the argument might have additional force but for the majority of the time she was not paying any of the rent out of her own pocket but it was paid with housing benefit. For a period of about two years she was contributing towards it at £18 per week.
>
> Damages are intended, in so far as money can, to place people in the same position as if the [wrong] had not occurred. It seems to me that it is a breach of that general principle to award to a person a sum calculated by relation to a figure which has been paid to a defendant when it has not been paid by the plaintiff. I can foresee all sorts of problems in doing it this way. It would in effect reward the plaintiff by a figure which she had not suffered as a cash sum. It seems to me far better, rather than use that approach, to award her a sum which would be adequate compensation in my view for the damage she has suffered which is the distress, inconvenience and disruption to her lifestyle and that of her children by the defects complained of. That seems to me a far better way of approaching it."

7. After referring to such assistance as may be obtained from considering awards in other cases the judge awarded damages not only for the discomfort and distress already encountered but also for the further discomfort when the remedial works were being carried out in the total sum of £3,500 for all heads of general damage. Subsequently the repairs set out in a schedule agreed between the parties' respective surveyors were carried out. Mrs Wallace has remained the tenant of the dwelling house.

8. This is an appeal of Mrs Wallace, brought with the leave of the court below, from the order of His Honour Judge Hardy. She does not dispute the awards of £2,000 in favour of each of her children. Nor does she challenge the award of special damages. Her contention is that in the passage from his judgment which I have quoted the judge erred in three distinct respects. First, it is submitted that the judge should have made an award in respect of the diminution in the value of Mrs Wallace's tenancy arising from the disrepair by reference to the rent paid in addition to an award for discomfort and inconvenience. She submits, second, that the fact that the rent was discharged out of the housing benefit to which she was entitled could not disentitle her to damages under such a head. Third, she submits that the award was so low that this court is entitled to intervene and increase it. I will deal with these contentions in turn.

Diminution in Value

9. Counsel for Mrs Wallace focussed on that part of the judgment, which I have quoted, in which the judge indicated that he did not regard diminution in value as a separate head of general damage and did not propose to adopt that approach. Counsel submitted that such a conclusion was

an error of principle. He contended that there were two parallel limbs, strands, paths or subheads of general damage namely (1) diminution in value and (2) discomfort and inconvenience. He submitted that the judge was bound to make findings under both of them. He did not contend that his approach was clearly required by previous authority, but he did suggest that it was consistent with the decided cases and the practice of the courts.

10. I shall, in due course, consider the cases to which Counsel for Mrs Wallace referred us in this connection. But the agreed starting point is the basic principle that the purpose of an award of damages is, so far as possible by an award of money, to place the innocent party in the position he would have been in if he had not suffered the wrong, whether breach of contract or tort, of which he complains. We were referred to passages to this effect in Johnson v Agnew [1979] 2 WLR 487, 499 in the context of damages in lieu of or in addition to a decree of specific performance and Dodd Properties (Kent) Ltd v Canterbury City Council [1980] 1 AER 928 in relation to repairs to property necessitated by the commission of a tort. Thus in the context of the breach of an obligation to repair property let to another the purpose of the award of damages is, so far as an award of money can do so, to place the tenant in the position he or she would have been in if the obligation to repair had been properly performed.

11. Counsel for Mrs Wallace relied on six decisions of this court. They were McCoy v Clark [1982] 13 HLR 87; Calabar Properties Ltd v Stitcher [1984] 1 WLR 287; Sturolson v Mauroux [1988] 20 HLR 332; Chiodi v De Marney [1988] 21 HLR 6; Ezekiel v McDade [1995] 2 EGLR 107 and Brent LBC v Carmel Murphy [1995] 28 HLR 203. I will refer to them in that order.

12. In McCoy v Clark [1982] 13 HLR 87 the plaintiff landlord sued for arrears of rent and the defendant tenant counterclaimed for damages in respect of disrepair to the roof over his flat. The judge accepted the submission that the disrepair to the roof meant that the flat was worth substantially less to the tenant than it would have been if the roof had been in order. He assessed the damages on the basis of a proportion of the rent payable under the tenancy, namely 10% for the first 113 weeks and 20% for the succeeding 68 weeks. The tenant appealed on the grounds that such an award was too low. The Court of Appeal accepted that submission. Sir David Cairns, with whom Stephenson LJ agreed, considered that the figure found by the judge was too low. At page 94 he said

> "I am satisfied, not only that the judge did find, but that it is the right finding, that the main cause of this dampness and the main cause of the flat being worth less to the defendant than it otherwise would have been was the plaintiff's breach in relation to the roof.

> 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."

Counsel for Mrs Wallace accepted that the case shows no more than that the assessment of damages by reference to a proportion of the rent was a method acceptable to the court. In particular there was no separate claim or award for discomfort and inconvenience. For my part I do not think that the case is authority which supports either side; the point with which we are concerned was not in issue. But insofar as it favours either of them it supports the City Council because Sir David Cairns evidently considered that a proportion of the rent might be used as a measure of the degree of comfort foregone. To that extent comfort and convenience and reduction in value of the flat were regarded as opposite sides of the same coin.

13. In Calabar Properties Ltd v Stitcher [1984] 1 WLR 287 the plaintiff landlord sued for arrears of rent. The tenant, the assignee of the residue of a term of 99 years at a rent of £100 per annum, counterclaimed for damages for breach by the landlord of his covenant to keep the block of which the tenant's flat was part in good and substantial repair. The Official Referee decided that the dampness in the flat of which the tenant complained was caused by water penetration attributable to the landlord's persistent failure to comply with his covenant. He also concluded that the tenant was justified in moving to alternative accommodation while the repairs were being carried out. The judge awarded damages of £4,606 for the cost of redecoration of the flat, which he used as a measure of diminution in value, and £3,000 for discomfort and loss of enjoyment. He refused to award any damages to cover the running costs of the flat when unoccupied nor for any consequential loss of use based on either the capital value of the flat or its rack rental value. The tenant appealed contending that the judge should have awarded damages under those heads also.

14. Counsel for Mrs Wallace relied on this case as showing that a tenant might obtain an award of general damages for both the cost of redecoration, as representing the diminution in value of the lease, and for discomfort and inconvenience to the tenant occasioned by the landlord's failure to repair. This is true; but, first, there was no appeal against the awards of damages the judge had made only against those he had refused and, second, Stephenson LJ (at page 290H), with whom May LJ agreed, regarded the award of damages for the cost of redecoration as an award of special, not general, damages.

15. The issues the court was required to decide do not arise in this case. Nevertheless two members of the court made observations in relation to the question of the recoverability of damages for consequential loss of use which are germane. The tenant had contended that she was entitled to a further award for such damages based on the diminution in the capital or rack rental value of the flat occasioned by the landlord's failure to repair in accordance with his covenant. The contention was based on a statement of Bankes LJ in Hewitt v Rowlands (1924) 93 LJKB 1080, 1082 that

> "...the measure of damages is the difference in value to the tenant of the premises, from the date of the notice to repair down to the date of the assessment of damages, between the premises in their present condition and their value, if the landlord on receipt of the tenant's notice had fulfilled the obligations of the covenant."

16. In rejecting the submission for the tenant Stephenson LJ, at page 293 said

> "The second objection is that to submit that what the defendant has lost by the plaintiffs' breach of covenant is the consequent diminution in the value of the flat as a marketable asset is to ask the court to take a wholly unreal view of the facts. The reality of the defendant's loss is the temporary loss of the home where she would have lived with her husband permanently if the plaintiffs had performed their covenant. She cannot increase her loss by deciding not to return after the covenant has been performed, and she does not seek to do so. But she can claim, as it seems to me, to be put in as good a position as she would have been if the plaintiffs had performed their covenant, as least as early as they had notice that the main structure was out of repair instead of years later. If she had bought the lease as a speculation intending to assign it, to the knowledge of the plaintiffs, the alleged diminution of rental (or capital) value might be the true measure of her damage. But she did not; she bought it for a home, not a saleable asset, and it would be deplorable if the court were bound to leave the real world for the complicated underworld of expert evidence on comparable properties and value, on the fictitious assumption that what the flat would have fetched had anything to do with its value to her or her husband. I do not think we are bound by the authority of *Hewitt v Rowlands,* 93 L.J.K.B. 1080, or any other decision to do something so absurd."

Later, at page 295, he added in relation to the decision in Hewett v Rowlands

> "What is plain is that, in laying down the measure of damage, the court cannot have had the capital or rental value of the cottage as a marketable asset in mind, because a statutory tenancy is not marketable, and the court was considering the position of a statutory tenant who was still living in the cottage and would lose his interest in the cottage if he ceased to live there. What the difference in value to the plaintiff of the statutory tenancy of the cottage repaired and unrepaired may have been was not an easy matter for the registrar to assess, but I suspect he would not have gone far wrong if he had equated it with what the plaintiff might have to spend on performing the landlord's covenant (assuming the landlord would not perform it himself) and substantial general damages for inconvenience and discomfort for the period from notice to the landlord till assessment or performance of the covenant by the plaintiff. In my judgment, there is nothing in that case which supports Mr. Ralls' claim to any such additional sum as he claims for diminution in value to the tenant or

which would disable the judge from measuring that diminution and the defendant's damage by the amounts he has awarded as general and special damages - and by the reasonably incurred costs of alternative accommodation, an item which was never in issue in *Hewitt v Rowlands*, 93 L.J.K.B. 1080, because the tenant never left the cottage he occupied.

17. At page 297 Griffiths LJ stated

"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 be fairly compensated by a monetary award.

In this case on the findings of the judge the plaintiff landlords, after notice of the defect, neglected their obligation to repair for such a length of time that the flat eventually became uninhabitable. It was also clear that unless ordered to do so by an order of the court, the plaintiffs had no intention of carrying out the repairs. In these circumstances the defendant had two options that were reasonably open to her: either of selling the flat and moving elsewhere, or alternatively of moving into temporary accommodation and bringing an action against the plaintiffs to force them to carry out the repairs, and then returning to the flat after the repairs were done. If the defendant had chosen the first option then the measure of damages would indeed have been the difference in the price she received for the flat in its damaged condition and that which it would have fetched in the open market if the plaintiffs had observed their repairing covenant. If however the defendant did not wish to sell the flat but to continue to live in it after the plaintiffs had carried out the necessary structural repairs it was wholly artificial to award her damages on the basis of loss in market value, because once the plaintiffs had carried out the repairs and any consequential redecoration of the interior was completed there would be no loss in market value. The defendant should be awarded the cost to which she was put in taking alternative accommodation, the cost of redecorating, and some award for all the unpleasantness of living in the flat as it deteriorated until it became uninhabitable. These three heads of damage will, so far as money can, compensate the defendant for the plaintiffs' breach.

Later, at page 299, of the statement of Bankes LJ which I have quoted, he commented

"Whatever Bankes L.J. 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 L. J. had in mind when he used the phrase "the difference in value to the tenant" *Hewitt v Rowlands,* 93 L.J.K.B. 1080, 1082, for which the judge in this case awarded £3,000. 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.

> In my view there was no need for any valuation evidence in this case. I repeat that damages in a case such as this should include the cost of the redecoration, a sum to compensate for the discomfort, loss of enjoyment and health involved in living in the damp and deteriorating flat and any reasonable sum spent on providing alternative accommodation after the flat became uninhabitable."

May LJ agreed with both judgments.

18. In my view, whilst not constituting any binding authority on the point we have to decide, the dicta which I have quoted do not support the contention of Mrs Wallace. As in McCoy v Clark so in Calabar Properties Ltd v Stitcher it was recognised that where the tenant wishes to remain in occupation of the property the diminution in value occasioned by the landlord's failure to repair for which he is entitled to be compensated is the personal discomfort and inconvenience he has experienced as a result of the want of repair. It is evident that the court considered, and I agree, that the assessment of the amount of money necessary to compensate the tenant was a matter for the judge and not for expert evidence.

19. In Sturolson & Co v Mauroux [1988] 20 HLR 332 the landlord sought to recover arrears of rent. The defendant, a statutory tenant, counterclaimed for damages for breach by the landlord of his covenant to repair and to provide certain services. By the time of the hearing the necessary repairs had been carried out. The judge awarded damages under two heads, namely £1,345 for diminution in value calculated as a percentage of the rent payable and the balance for discomfort, inconvenience and injury to health. The landlord appealed contending that the rent officer had taken the want of repair into account when assessing the fair rent so that the award of damages gave rise to double recovery. He also contended that the tenant had failed to mitigate his loss. Both points were rejected. Counsel for Mrs Wallace relies on this case as indicating the approval of this court to awards of damages on both the bases for which he contends. It is true that the court did not disapprove of those two awards, no party suggested that it should. But I do not accept that the decision is any support for the proposition that a judge must award damages under both those heads.

20. In Chiodi v De Marney [1988] 21 HLR 6 a statutory tenant occupying a flat at a registered fair rent of £8 per week withheld the rent and was sued for possession. He counterclaimed for damages for breach of the implied covenant on the part of the landlord to repair. The judge awarded him damages under three heads of which only one is relevant for present purposes. That head was for inconvenience and distress calculated on the basis of £30 per week for three and a half years. The landlord appealed contending that, as the rent was only £8 per week, the award was too

high. The appeal was rejected. The case shows that a weekly sum, even in excess of the rent payable for the premises, is a permissible way to calculate the monetary compensation to be awarded for distress and inconvenience. It is no support at all for the proposition that a court is bound to assess damages under the heads of both inconvenience and diminution in value.

21. In Ezekiel v McDade [1995] 2 EGLR 107 the court awarded damages for a negligent valuation on the basis of diminution in value and discomfort and distress. It was suggested that it was in some way supportive of the submissions made on behalf of Mrs Wallace. I can only say that I disagree.

22. Finally counsel for Mrs Wallace relied on Brent LBC v Carmel Murphy [1995] 28 HLR 203. In that case the defendant, a secure tenant, when sued for arrears of rent counterclaimed for damages for breach of the landlord's obligation to repair. The judge awarded her general damages for diminution of the value of the tenancy calculated by reference to a reduction in the rent payable and general damages by reference to an annual sum. Counsel for Mrs Wallace relies on the circumstance that there was there an award on both the bases for which he contends and leave to appeal was refused. One of the grounds of appeal was that the awards of damages were excessive. Roch LJ said that there was no indication that the awards were wrong in principle or excessive in amount. Plainly this case also indicates that damages may be awarded on both bases. Likewise, in my view, it is no support for the proposition that the court is bound to do so.

23. I have dealt at length with the cases relied on by counsel for Mrs Wallace because of the importance of the point raised on this appeal to District and County Court Judges throughout England and Wales. I can express my conclusions more shortly in the form of a series of propositions. 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 if the obligation to repair had been duly performed by the landlord. Second, the answer to that question inevitably involves a comparison of the property as it was for the period when the landlord was in breach of his obligation with what it would have been if the obligation had been performed. Third, 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 was not in the state of repair it ought to have been if the landlord had performed his obligation. (McCoy v Clark; Calabar Properties Ltd v Stitcher and Chiodi v De Marney) Fourth, 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. (Calabar Properties Ltd v Stitcher)

24. 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 Ltd 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 (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 LBC 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.

25. It follows that in my judgment Judge Hardy was right when he said that diminution in the value of the property in relation to the amount of rent paid is not a separate head of damage. In the light of the submissions made to us I would make some general observations on the problems of assessing damages in this field. First, I would agree with the observations of Stephenson and Griffiths LJJ in Calabar Properties Ltd v Stitcher that expert valuation evidence is not of assistance when assessing the damages in accordance with my third proposition. The question is the monetary value of the discomfort and inconvenience suffered by the tenant. 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. Second, 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.

Housing Benefit

26. Counsel for Mrs Wallace accepted that if he did not succeed on his first point the question

whether the judge was right to regard the source of the payment of rent as a relevant consideration did not arise. It is not necessary to reach any concluded view on the point because, as counsel for the City Council submitted, the award of damages did not depend on it. For my part I would only observe that the problem the judge saw appears to have arisen from his view that the diminution in rent basis, which he refused to adopt, looked to a diminution in the value of the money the tenant paid by way of rent. In that event it would, as he thought, be wrong to reward the tenant by a figure she had not paid. In my view that is not what is meant by "diminution in value". As the authorities show, that phrase comes originally from the judgment of Bankes LJ in Hewitt v Rowlands (1924) 93 LJKB 1080, the meaning of which was explained by Stephenson and Griffiths LJJ in Calabar Properties Ltd v Stitcher as a reference to discomfort and inconvenience. On that basis the source of the money with which to pay the rent is irrelevant to the extent of the discomfort and inconvenience suffered by the tenant and what would be proper monetary compensation for it.

Amount of damages

27. Counsel for Mrs Wallace submitted that the award of £3,500 was so low as to indicate that the judge must have erred in principle, thereby entitling and, indeed requiring, this court to intervene, Pickett v British Rail Engineering Ltd [1980] AC 136, 151. His argument proceeded along the following lines. A detailed examination of the facts of Calabar Properties Ltd v Stitcher [1984] 1 WLR 287; Sturolson v Mauroux [1988] 20 HLR 332; Chiodi v De Marney [1988] 21 HLR 6; Davis v Peterson [1989] 21 HLR 63 and Brent LBC v Carmel Murphy [1995] 28 HLR 203 and a revaluation of the amounts awarded so as to arrive at current values indicate an unofficial tariff of damages for discomfort and inconvenience of £2,750 per annum at the top to £1,000 per annum at the bottom. He relied on the fact that Mrs Wallace had pleaded and given evidence to support her allegation that she had frequently complained about the want of repair to the City Council since 1992. If the judge had awarded £3,500 for five years discomfort then, counsel submitted, the annual award of £700 could be seen to be well below the scale.

28. Counsel for the City Council disputes this approach. He points out that the judge did not in terms accept Mrs Wallace's allegation that she had been complaining, with the result that the City Council had notice of the want of repair, since 1992. He relied on the fact that the notice of appeal accepted that the judge appeared to have awarded £3,500 for inconvenience for a period in excess of three years. The notice of appeal did not suggest that the judge should have awarded damages in respect of the full period of five years. He pointed out that an award of £3,500 for three years represented £1,166 per year, a sum within the unofficial tariff relied on by counsel for Mrs

Wallace.

29. It seems to me that this dispute depends on the proper period for which to award damages. It is unfortunate that the judge made no finding in this respect. Given the sums involved it could not be right for us to remit the case to the judge to make such a finding. In my view we must do the best we can on the materials available.

30. The allegation in the particulars of claim was that Mrs Wallace gave notice of disrepair to the City Council in 1992. She gave oral evidence to that effect, particularly in cross-examination. On the other hand the first documentary reference to a complaint being made is a note dated 25th October 1994 made by the housing officer to whom Mrs Wallace had specifically referred in her statement. This recorded a complaint of rising damp. Moreover the passage from the report of Mrs Wallace's surveyor which I have already quoted (para.3 above) indicates that not all the defects had existed for the full five year period. The collapse of the external wall occurred in early 1996 and work to the damp proofing and rat preventive substances had been carried out on three occasions before the report was prepared in March 1996.

31. In these circumstances it appears to me that counsel for Mrs Wallace was right when drafting the notice of appeal to infer that the period of breach of the repairing obligation properly proved was three years. In my view it has not been demonstrated by counsel for Mrs Wallace that the judge did or should have found a breach of obligation for any longer period. On the basis that the City Council was in breach of its obligation for the period October 1994 to July 1997 the damages awarded by the judge works out at approximately £1000 per annum. Assuming, but without deciding, that there is an unofficial tariff, such as counsel for Mrs Wallace suggests, in my view it has not been shown that the award made by Judge Hardy fell outside it. It follows that the amount of the award is not such as to indicate any error in principle so as to entitle this court to interfere with the award the judge made.

32. For all these reasons I would dismiss this appeal.

LORD JUSTICE KENNEDY: I agree.

Order: Appeal dismissed with costs. Legal aid taxation. Leave to appeal refused [Not part of approved judgment]