

Chapter 8 Nicola's Windows Problem

There follows below an example of a Practical Legal Research Report considering Nicola's windows problem. We have looked at this in chapter 9. The basic facts of the case are:

Excerpt from initial interview

Nicola: "I've got a problem with my landlord. I live in this really nice area of the city and the rent's very cheap. To be honest I'm really worried about him evicting me. He's been really abusive. The next door neighbor is like something out of a soap opera, a real drunk, and she's leaving such mess about that rats are in the yard and I've even seen one in my kitchen. I've asked her to tidy up but she just starts swearing at me and tells me her boyfriend is "into martial arts". Also, one of my windows is rotten and the flat's damp and draughty in winter, my sofa's wrecked by mould. I went round to the landlord but he was really nasty and told me I could leave. I do not want to have to go and live in the West end where the rent's cheaper but there's a lot of crime. I've got no written tenancy agreement but I've been living there and paying rent monthly since April 1996. He can't just throw me out can he?"

Practical Legal Research Report

The Client's Problem

Nicola has rented a flat since April 1996. She has no written tenancy agreement and pays rent monthly. One of the windows in the flat is rotten and possibly causing damp which has also damaged her sofa and made the flat cold. Her neighbour is an alcoholic who has left rubbish around which is possibly causing a rat infestation in Nicola's flat. Her neighbour refuses to clear up and is abusive. Nicola has complained about some or all of these issues to her landlord but he appears to be threatening to evict her.

[Note that in the research report which follows, as in chapter 9, we have concentrated on one aspect of the client's problem – her window problem and not on research into her neighbour or the landlord's threats to evict her. In a real case, these would have to be researched too].

Identification of problem/areas for research

- What appears to be the broad category of law? Property? Housing? Landlord and Tenant?
- What sort of tenancy, if any, does Nicola have? Does it make a difference that it is not in writing and she pays rent monthly? Would this affect her agreement with her landlord and her rights in relation to the windows?
- Who has the duty to keep the flat in repair, the tenant or the landlord?
- If the tenant has a duty to repair where would that originate from? Contract law? What form would the contract take? A tenancy agreement?
- If the landlord has a duty to repair the windows where would that duty originate? Again, in contract law through the tenancy agreement? Is it possible that the state may have regulated this area and that there may be legislation governing landlord and tenant obligations?
- If the landlord has a duty to repair the window what are the available remedies?
- If damages are available how do the courts assess these? Are there fixed tariffs or is there any case law that might be relevant? What is the procedure for making such a claim?
- If a remedy to compel the landlord to repair the window is available, how do you procedurally enforce such a claim through the courts?

- Is it possible that another agency – the local council or some other state body, might have powers and responsibilities in relation to domestic tenancies?

Keywords/Phrases

Tenancy agreement

Types/classification

Oral

Written

Effect on rights to repair

Landlord's obligations/ tenant's obligations

Repair

Duty/ landlord/ tenant

Tenant's rights/ obligations

Landlord's rights/ obligations

Damages for non repair/ disrepair

Court proceedings/ enforcement

Procedure

Remedies

Disrepair

Repair/ mend/ fix/ restore

Housing

Tenancies/ types of tenancy/

Oral agreements/ repairs/ obligations

statutory nuisance/ Housing Health and Safety Rating System/ HHSRS Operating Guidance

Research Report

If the premises were let furnished (not sure here) there's a duty that it's fit for human habitation at the time it was let.¹ But examples of fitness for habitation seem to go beyond our situation.

s.8 Landlord and Tenant Act 1985 implies duties for lettings at low rents but our rent is above the limit.

Statutory Nuisance

In order to be a statutory nuisance we need to show that the situation is 'prejudicial to health' or some other specific statutory nuisance under s.79 Environmental Protection Act 1990. It does not seem to be a specific statutory nuisance.

The court would look for conditions that were bad enough to cause a well person to become ill.² The test is objective – will the problem be an actual or potential detriment to health. Interference with comfort is not enough.³

Here there is no report to suggest Nicola's health will be affected. Instructions indicate it causes discomfort but is not prejudicial to health.

Statutory liability under s.11 LTA

¹ *Hart v Windsor* (1844) 12 M + W 68 cited in J Luba et al, *Repairs: Tenants' Right* (Legal Action Group, London 1999) 59.

² *Ibid.* 122

³ *Salford CC v McNally* (1975) 3 WLR 87

In the absence of an agreement (none here) or statute there is no duty to repair. However, in the lease of a dwelling house (which this is **[note research would have also been necessary into whether Nicola had a tenancy in law]**)⁴ granted after 1961 which is for less than 7 years there is an implied covenant on the landlord to keep in repair the structure and exterior of the demised premises (s.11 Landlord and Tenant Act 1985). Unless this is caused by failure of the tenant to use in a tenantlike manner or the damage is caused by fire, flood or tempest or some other unavoidable accident.⁵ Which is not the case here.

The duty only extends to disrepair of which the landlord has knowledge. It does include windows.⁶

This does not extend to remedying a design defect⁷. Here we do seem to have deterioration rather than design defect.

Repair does not extend to minor defects. It means deterioration which as a matter of fact and degree is unacceptable after taking into account and making allowances for age, character, area, type of tenants likely to take it.⁸ But here we have water penetrating through the windows so should easily satisfy this.

The standard of repair: regard has to be had to age, character, projected life of dwelling and the locality locality (s.11(3) LTA 1985). Question will be whether replacement is necessary or patch repair.

⁴ See note 1 to *Halsburys Laws Volume 27(1) Landlord and Tenant* para 413
<<http://www.lexisnexis.com/uk/legal/search/flap.do?flapID=home&random=0.38475285563945993>>
Accessed at 8.3.2011

⁵ Ibid.

⁶ *Irvine v Moran* [1991] 1 EGLR 261 confirmed also in commentary in *Repairs: Tenants' Rights*, op cit.

⁷ *Quick v Taff Ely Borough Council* [1986] QB 809

⁸ *Plough Investments Ltd v Manchester City Council* (1989) 13 HLR 107 and see also *Repairs: Tenants' Rights*, op cit 53.

Remedies available:⁹

Given the above it would appear that our remedy is direct against the landlord:

1. Action for damages
2. Specific Performance
3. Deduct cost of repairs actually done from rent

Damages

The landlord is not liable for damages until has actual notice ¹⁰. Damages are designed to put a tenant into the position she would have been in but for the lack of repair. It appears that this will amount to the discomfort involved rather than any diminution in value (see *Calabar Properties Ltd*¹¹) unless she acquired it as an investment (not the case here).

It includes damages for inconvenience, disappointment, ill health, mental distress, loss of enjoyment. This can do by reference to rent. Say lose one third of property then deduct one third of rent from time of notice to date.

Specials for cleaning etc are recoverable (none here?).

⁹ *Halsburys Laws Volume 27(1) Landlord and Tenant* para 463
<<http://www.lexisnexis.com/uk/legal/search/flap.do?flapID=home&random=0.38475285563945993>>
Accessed at 8.3.2011

¹⁰ *Ibid.*

¹¹ *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759, [1984] 1 WLR 287 CA

She can recover damage to property.¹²

She has a duty to mitigate loss. i.e. not just let the water flood everywhere. She seems to have done her best here.

Limitation is 6 years from date of notice to landlord¹³.

Deducting rent

Confirmed as legitimate¹⁴ in order to effect repairs. Steps to be taken:

- Inform landlord going to do it and if he refuses to do repairs
- Allow reasonable period to go by
- Obtain 3 estimates for repair and give final warning with them
- Engage lowest tender
- Submit invoice and request re-imburement
- Recover by deducting from rent¹⁵

She cannot deduct rent for damages. It doesn't seem to be a good idea to simply withhold the rent without doing the work because this may lead to action for possession.

¹² Ibid.

¹³ See *Repairs: Tenants' Rights*, op cit.

¹⁴ *Lee-Parker v Izzett* (1971) 1 WLR 688

¹⁵ *Repairs: Tenants' Rights*, op cit. 84.

Specific Performance

It is possible to obtain a court order that the landlord remedy the problem and repair the windows. The remedy is specified in s.17 LTA 1985 **[note to reduce the length of this report we have omitted this from the report]**

Housing Health and Rating System (HHSRS)

This is an alternative remedy to the problem using the local authority.

The fitness standard included in s605 of Housing Act 1985 no longer exists and has been replaced by a new Housing Health and Safety Rating System (HHSRS) which came into force on 6th April 2006 as a result of the Housing Act 2004¹⁶. (The EPA 1990 is not affected). The new system moves away from a list of standards that have to be met towards identifying hazards and assessing the level of risk they pose. The new system theoretically can take in a much wider range of problems where they pose a hazard.

A hazard is any risk of harm to the health or safety of an actual or potential occupier of a dwelling arising from any deficiency in the dwelling or in any building or land in the vicinity. (whether as a result of the construction, absence of maintenance or repair or otherwise).¹⁷

A hazard is of a prescribed description where the risk of harm is associated with the occurrence of any of the matters listed in the regulations under HHSRS (England) Regulations 2005, SI 2005/3208. The relevant ones for the windows being:

¹⁶*Halsburys Laws Volume 22 Housing* para 359
<<http://www.lexisnexis.com/uk/legal/search/flap.do?flapID=home&random=0.38475285563945993>>
Accessed at 8.3.2011

¹⁷ Ibid. para 361

(1) damp and mould growth: exposure to house dust mites, damp, mould or fungal growths (Sch 1 [para 1](#)); (2) excess cold: exposure to low temperatures (Sch 1 [para 2](#)); (29) structural collapse and falling elements: the collapse of the whole or part of the dwelling or HMO (Sch 1 [para 29](#)).

Harm means any class of harm within Classes I to IV as set out in the HHSRS (England) Regulations 2005, SI 2005/3208 Schedule 2. The relevant ones in this case being:

The Windows:

The occurrence of the matters listed above, resulting from the poor condition of the windows (eg. damp and mould growth) might lead to the following harms in my view:

Class II: non malignant respiratory disease; loss of consciousness for days

Class IV occasional mild pneumonia, broken finger, slight concussion, moderate cuts to face or body, severe bruising to body, regular serious coughs or colds

Whether a hazard is a category 1 or category 2 hazard will depend upon the calculation of the risk of it occurring and severity of the harm as set out above. There are prescribed bands and a prescribed calculation.¹⁸

¹⁸ Ibid. para 361

I have not researched exactly how the calculation is worked out but an example of how this works is given in the HHSRS Operating Guidance given under s.9 Housing Act 2004 by the Office of the Deputy Prime Minister, which gives lots of useful guidance.¹⁹

Is the state of the windows covered by these provisions?

It is clear from the Guidance²⁰ that the Act is concerned with matters that are the responsibility of the landlord and not those of the occupiers. "It is concerned only with those deficiencies that can be attributable solely or partly to the design, construction and/or maintenance of the dwelling"²¹.

The windows are the responsibility of the landlord as set out above.

The system is enforced by the Environmental Health Department of the local authority²². The Act itself does not give much detail. It explains that the EHD have to inspect properties²³ and if they are found to have a category 1 hazard then the Local Authority must take action²⁴ against the landlord to deal with the problem. If the problem is classed as category 2 they have a discretion as to whether they take action²⁵.

²⁰*HHSRS Operating Guidance*, (Office of the Deputy Prime Minister, 2006) paras 2.33-2.36

<<http://www.communities.gov.uk/documents/housing/pdf/142631.pdf>>

Accessed at 8.3.11

²¹ *Ibid.* para 2.33

²² *Halsburys Laws Volume 22 Housing* para 363

<<http://www.lexisnexis.com/uk/legal/search/flap.do?flapID=home&random=0.38475285563945993>>

Accessed at 8.3.2011

²³ *Ibid.* para 364

²⁴ *Ibid.* para 364

²⁵ *Ibid.* para 369

What is the system?

The Environmental Health Officer inspects the property and prepares a report on state and condition. If he finds one or more hazards which feature on the list he must assess the seriousness of the hazard²⁶.

Remedies:

If a category 1 or 2 hazard is identified Local Authority can serve an improvement notice, a hazard awareness notice, a prohibition notice or a demolition notice (they also have emergency powers)²⁷.

In our scenario this is very unlikely to be a cat 1 hazard. If it is a cat 2 hazard they have a discretion to serve an improvement notice. The EHO may even consider it not to be a category 2 hazard if he considers that the occurrence of the level of damp is not likely to lead to a severe class of harm.²⁸

Additional Information Required

Does the landlord know about the window problem?

How did the landlord come to know of the problem? In writing? Orally?

What proof do we have that he has been informed?

When was the landlord informed?

²⁶ Ibid. para 362

²⁷ Ibid. para364

²⁸ Ibid. para 369 for the discretion to serve an improvement notice.

What was the landlord's reaction to the problem? Did he refuse to take any action? If he did refuse to take action did he give reasons for that?

Have the Local Authority been informed?

What evidence do we have that the windows are in need of repair? Further information is needed from Nicola's friend and pictures and other proof.

We need evidence of the cost of the sofa and damage to it

Seek further evidence as to the damp and mould growth being caused by the window problem

We need more information from Nicola about the length and duration of discomfort she has suffered

Summary

It appears that Nicola has a right to:

1. Repair the windows herself
2. Repair of the windows by her landlord
3. Possible enforcement action by the local authority to force the landlord to repair the windows
4. Damages in respect of the failure to repair from her landlord.

1. Repairing the windows herself

Nicola could have the work done and deduct the cost from the rent. I would advise against this as you have to be very careful not to give the landlord an excuse to gain possession of the flat on the ground of non-payment of rent.

Nicola could have the work done and start a court action to claim the money paid.

2. Repair of the windows by her landlord

Nicola could start a court action to get an order that Mr Riley do the work by way of specific performance.

Before we take any action beyond asking Mr Riley to repair the windows we should consider whether the local authority will force him to take action (see immediately below).

3. Possible enforcement action by the local authority to force the landlord to repair the windows

There is a possibility that the local authority could decide that the state of the windows represents a hazard under the Housing Health and Rating System. If they decide that the windows represent a hazard to Nicola's health they may, and in some cases must, take action to force Mr Riley to repair or replace them. I suggest that as a first step we ask the local authority to assess the windows.

If the local authority take action then this will save Nicola the trouble of court action and be a faster way to get the repairs performed.

4. Compensation for the conditions of the windows

Nicola should also be entitled to damages for her sofa and the inconvenience caused by the draught and damp. If Mr Riley refuses to pay a reasonable amount then she could consider bringing a court action for the money (the local authority have no power to order him to

compensate her). It is difficult to be precise about how much Nicola may receive at court. If we can show that the sofa is damaged beyond repair we will be able to get the replacement value of it.

In relation to the damage for discomfort and inconvenience, further research is needed into likely court awards **[note you would have done this as part of your research but we have omitted it here]**.

Primary Sources

ss. 8, 11, 17 Landlord and Tenant Act 1985

s.79 Environmental Protection Act 1990

s.9 Housing Act 2004

HHSRS (England) Regulations 2005, SI 2005/3208

Hart v Windsor (1844) 12 M + W 68 cited in J Luba et al, *Repairs: Tenants' Right* (Legal Action Group, London 1999)

Salford CC v McNally (1975) 3 WLR 87

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Quick v Taff Ely Borough Council [1986] QB 809

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Calabar Properties Ltd v Sticher [1983] 3 All ER 759, [1984] 1 WLR 287 CA

Lee-Parker v Izzett (1971) 1 WLR 688

HHSRS Operating Guidance, (Office of the Deputy Prime Minister, 2006) paras 2.33-2.36

<<http://www.communities.gov.uk/documents/housing/pdf/142631.pdf>>

Accessed at 8.3.11

Secondary Sources

Halsburys Laws Volume 27(1) Landlord and Tenant para 331, 413, 463,
<<http://www.lexisnexis.com/uk/legal/search/flap.do?flapID=home&random=0.38475285563945993>>

Accessed at 8.3.2011

Halsburys Laws Volume 22 Housing para 359, 361, 362, 363, 364, 369
<<http://www.lexisnexis.com/uk/legal/search/flap.do?flapID=home&random=0.38475285563945993>>

Accessed at 8.3.2011

Updating (ensuring the report is up to date)

Legislation cited is cited in the internet version of Halsburys Laws and no updates as to amendment/revocation of the legislation are mentioned.

References to Halsburys Laws are via the internet and the updating sections of Halsburys has been checked.

The case law referred to has been checked via case search on lexis library (save for *Irvine v Moran* which was searched via Westlaw). There is no record of the cases being overruled or given negative treatment.

Plough Investments Ltd is not available as a search on either Lexis Library or Westlaw so I was unable to check that further.