Neutral Citation No: [2016] NICA 18 | *Ref:* **GIL9914**

Judgment: approved by the Court for handing down | *Delivered:* **5/4/2016**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

PAULINE ARGUE

Plaintiff/Appellant;

and

NORTHERN IRELAND HOUSING EXECUTIVE

Defendant/Respondent.

Before: GILLEN LJ, WEIR LJ and Deeny J

GILLEN LJ (giving the judgment of the court)

[1] This is an appeal against the decision of Maguire J who dismissed a claim for personal injuries brought by the plaintiff/appellant ("the appellant") against the defendant/respondent ("the respondent") arising out of an accident which occurred on 7 February 2010. The injury was sustained when the appellant fell due to a defect in the staircase of her home where she was a tenant of the respondent.

[2] Of relevance to this appeal is the finding of the learned trial Judge that the respondent had not been in breach of Sections 1 or 2 of the Defective Premises (Landlord's Liability) Act (Northern Ireland) 2001. He also found that there had been no breach of Article 3 of the Defective Premises (Northern Ireland) Order 1975. The latter finding is not a subject of the appeal.

Background

[3] The appellant and her husband were tenants of the respondent at 19 Avonlea Gardens, Rathcoole. The house was constructed in 1954 and refurbished in 1989. The appellant's tenancy commenced in 1997 and since that time no work has been done to the staircase in the house.

[4] On 7 February 2010 the plaintiff was injured when she fell due to a defect in the staircase of the house. A defect was subsequently identified on the third stair but

neither the appellant nor her husband had been aware of any defect prior to the accident. After the defect was identified and reported, the respondent carried out the necessary repair.

[5] A number of factual findings were made by the court which are not the subject of dispute in this appeal namely:

- It is likely that the defect had been the product of steady deterioration over time rather than instantaneous failure.
- The appellant had not established that the defect in question was the result of a repair at some stage in the history of the stair.
- It was unlikely that the defect, prior to the accident, would have been picked up by inspection, placed as it was under the carpet.
- It would not have been reasonable to have expected the respondent to have carried out periodic inspections of the staircase involving removal of the carpet.
- It was not unreasonable for the respondent to rely on reporting of any problems by tenants, who used the staircase every day.

[6] The respondent's responsibilities under the Tenancy Agreement can be summarised as follows:

- The respondent had, and has, a duty to maintain and repair the staircase.
- The appellant had a duty to permit access to the dwelling for the purpose of viewing its condition and carrying out any works. The respondent therefore had a right and an obligation to enter the premises to carry out repairs to the defect in question.
- The respondent was not under a contractual duty to carry out a repair until a reasonable time had elapsed after the District Manager had been given written and specific notice by or on behalf of the tenant of the need for such works.

The Defective Premises (Landlord's Liability) Act (Northern Ireland) 2001 ("the 2001 Act")

[7] Where relevant the provisions of the 2001 Act are:

> "1.-(1) Sub-sections (2) and (3) apply where –
>
> (a) premises are let under a tenancy to which this Act applies; and
>
> (b) the tenancy puts on the landlord an obligation to the tenant for the maintenance or repair of the premises.

(2) The landlord owes to all persons who might reasonably be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

(3) That duty is owed if –

(a) the landlord knows of the relevant defect (whether as a result of being notified by the tenant or otherwise); or

(b) he ought in all the circumstances to have known of that defect.

(4) The duty imposed by this section is in addition to any duty a person may owe apart from this section.

Application of this Act where a landlord has a right of entry to carry out repairs.

2.-(1) Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, the landlord shall be treated for the purposes of this Act (but for no other purposes) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises.

(2) Sub-section (1) applies –

(a) as from the time when the landlord first is, or by notice or otherwise can put himself, in a position to exercise the right mentioned in that sub-section; and

(b) so long as he is or can put himself in that position.

(3) The landlord shall not owe the tenant any duty of care by virtue of this section in respect of any defect in the state of the premises arising from or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.

…….

4(6) ----In this Act "relevant defect" means a defect in the state of the premises –

(a) existing at or after the material time; and

(b) arising from, or continuing because of, an act or omission by the landlord which constitutes (or would, if he had had notice of the defect, have constituted) a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises."

[8] Although couched in somewhat different format, the 2001 Act broadly reflects the terms of the Defective Premises Act 1972 which operates in England and Wales ("the 1972 Act").

The Decision of Maguire J

[9] In a closely argued 18 page judgment Maguire J rejected the case now made by the appellant, essentially for three reasons:

- There was no express provision in the legislative scheme indicating that Section 1(3) does not apply in cases under Section 2 of the 2001 legislation.
- Section 4(4) of the 1972 legislation (similar to Section 2 (1) of the 2001 Act) is linked to Section 4(1) and (2)(similar to Sections 1(1),(2) and (3)of the 2001 Act). In Northern Ireland Section 2(1) contains the words that "the landlord shall be treated for the purposes of this Act (but for no other purposes) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises.
- The court found no reference in the Law Commission's Report that what was to become Section 4(4) in England and Wales had the effect of setting aside the requirements in respect of knowledge or means of knowledge.

The Submissions of the Appellant

[10] Mr Liam McCollum QC, who appeared on behalf of the appellant with Mr Ciaran McCollum, contended as follows:

(i) Where a landlord has a right to enter premises to repair a defect he is under a duty in respect of that defect notwithstanding that he neither knew about nor reasonably could have known about it pursuant to the provisions of Section 2 of the 2001 Act.

(ii) Such a landlord is treated for the purposes of Section 1(1) and (3) as if he was under the duty imposed in respect of a defect he knew or should have known about. In short, knowledge of the defect is *imputed* against the landlord.

(iii) The duty imposed by Section 1 arises only where there is actual or constructive knowledge of the defect. Section 2 imputes that knowledge to the landlord and triggers a duty to repair. If the landlord is imputed to have knowledge of a defect on the stairway, in the instant case the defect constitutes a clear breach of duty. Whilst eschewing any claim for complete strict liability, nonetheless the plaintiff/appellant was largely relieved of the need to prove fault in the normal sense of the word.

(iv) The definition of "relevant defect" envisages liability without knowledge.

[11] Counsel invoked in aid of his argument:

(i) An article headed "Liability for Defective Premises" authored by Andrew Roy and Emily Walker of 12 Kings Bench Walk, Temple, wherein it was argued that in relation to the corresponding English legislation, Sections 4(1)-(4) of the 1972 Act, the precise argument now put forward by Mr McCollum was correct.

(ii) *Obiter dicta* by Laws LJ in which Alker v Collingwood Housing Association [2007] WLR 2230 Mr McCollum asserts Laws LJ determined the point he is now making.

(iii) The report of the Law Commission in England and Wales entitled "Civil Liability of Vendors and Lessors for Defective Premises" (Law Comm No 40 1970)("the Law Commission Report")which encouraged the change adumbrated by Mr McCollum. Counsel contended that the thrust of the report was to provide a remedy for innocent victims injured on defective premises and to provide for liability upon landlords in similar circumstances to the current liability in nuisance in favour of third parties where there is a right to enter for the purposes of repair. The right to enter and inspect for defects requiring repair repairs created such an obligation on the landlord. In short, counsel contended that the whole point of sub-section (4) is to preclude landlords from asserting Nelsonian ignorance of defects.

The Submissions of the Respondent

[12] Mr Ringland QC who appeared on behalf of the respondent with Mr Boyle advanced the following arguments:

(i) The Law Commission Report merely exhorted a modest extension of the law to equate the position of the landlord with an obligation to repair with that of

the landlord who has a right to enter to repair. It is not a far ranging change in the law.

(ii) The appellant's argument would in effect create a position of strict liability on the landlord with the right to enter and repair. There is no hint of such a radical change in the law in either the Law Commission Report or the explanatory notes attaching to the legislation.

(iii) It is now 44 years since the legislation was introduced in England and 15 years since the legislation in Northern Ireland. If Mr McCollum's argument was correct, it is extraordinary that such a consequence has not been set out in any leading textbook or authority save, arguably, for the *obiter dicta* remarks of Laws LJ.

(iv) Counsel cited a decision of the County Court in Cardiff in Paula Pritchard v Caerphilly CBC [2013] WL and the judgment of Jay J in Lafferty v Newark & Sherwood District Council [2016] EWHC 320 (QB) where the argument now postulated by Mr McCollum was rejected directly in the *ratio decidendi* of each judgment.

Conclusion

[13] We have come to the conclusion that the argument advanced by Mr McCollum cannot withstand scrutiny and this appeal should be dismissed for the following reasons.

[14] First, adopting a purposive approach to the legislation, it is difficult to comprehend why Parliament would wish to place a heavier burden on a landlord who has a right to enter in order to repair than the landlord who has an obligation to repair. The law has a bias towards the rational. Why should a tenant find himself in a better position under Section 2 than he is under Section 1? Since most tenancies will have express or implied entry rights, Section 1 would be largely irrelevant because tenants would always have better rights under Section 2. Certainly a court should look for a clear and unequivocal indication that that was to be the case. We have searched in vain to capture the words in Section 2 of the 2001 Act that would impute actual or constructive knowledge to the former category of landlord. It would, in our view, introduce a want of coherence and self-consistency which the court should not attribute to any statutory provision unless driven to do so.

[15] On the contrary, a more obvious reading of the 2001 legislation is to borrow the wording of Section 2, which indicates that the landlord who has the right of entry to carry out repairs "shall be treated for the purposes of the Act as if he were under an obligation to the tenant for that description of maintenance or repair of the premises.". Courts should not underestimate the resonance of simple language. This is precisely the language of obligation to the tenant evinced in Section 1 and, absent

some express assertion of imputation, it is difficult to see why the wording means other than simply equating the duties of two types of landlord.

[16] Thirdly, the Law Commission Report is an important source in exploring the genesis of the comparable English legislation of 1972. We have again searched in vain for any express or implied reference to imputation in the case of a landlord under Section 4(4). If such a clear, and arguably harsh, distinction was to be drawn between the two categories of landlord, one would have confidently expected to have found such an express reference in the course of that lengthy document. We find no such reference.

[17] Paragraphs 7 and 8 of the report set the scene for what we consider to be the concept of equating the approach to be adopted to the two types of landlord. The mischief addressed in paragraph 7 is that "the law is capable of causing injustice to innocent persons who suffer injury and damage and it has been subjected to criticism by judges and by textbook writers." Paragraph 8 refers to the four recommendations made to improve the rights of purchasers, tenants or third parties who sustain injuries or suffer loss as a result of the defective state of premises. Once again no attempt is made to distinguish between the duties laid on different landlords with different rights or obligations.

[18] Paragraph 61 of the report records again the mischief sought to be addressed in these terms:

> "Over the last 40 years a series of cases has extended the landlord's liability in nuisance to circumstances in which, although he is under no obligation to repair, he has an express or implied right to enter and do repairs".

[19] We consider that this concept of modest extension is the limit of what the Act purports to do.

[20] This theme is picked up once more in paragraph 68 where the report records:

> "We have already suggested that in discharging a repairing obligation a landlord should be under the general duty of care in respect of matters falling within the scope of that obligation so far as visitors to a premises are concerned. Two further steps are required to cover the whole area of potential liability. The first is to extend the category of protected persons to cover all those who should have been in the landlord's contemplation; the second is to extend the liability to cases in which the landlord has only a right to repair. We think that these steps should be taken. There is, however, one necessary restriction on the generality of such a provision. It may

> happen that under the terms of the lease the landlord's right to repair arises only when the tenant has made a default in carrying out an obligation which is primarily placed on him. In such a case the landlord should not become liable to the tenant himself for the consequences of a defect arising substantially from his own default."

[21] Paragraph 69 goes on to recommend that the law should be "amended to provide that where the landlord has an obligation or right to repair the demised premises, he should in the discharge or exercise of that obligation or right be under a general duty of care to see that injury or damage is not suffered by those who are likely to be affected by any failure to discharge that obligation or exercise that right with reasonable diligence."

[22] In the summary of recommendations at paragraph 70(4) once again the landlord under the repairing obligation and the landlord with the right to repair the premises are equated under the general duty of care without any attempt to distinguish the obligations placed upon them

[23] It is significant that the explanatory notes to the Defective Premises Bill drafted by the authors of the report not only omit any reference to the radical change now contended for by Mr McCollum but, on the contrary, declare at General Note 4(c):

> "None of these changes is as far reaching as at first sight appears. For in the first place a landlord may be liable in nuisance to persons such as the passer-by on the highway and the neighbour in his garden who are affected by the defective state of the premises he has let. In the second place his liability in nuisance is not confined to liability for defects of which he actually knew but extends also in respect of defects of which, as a landlord, he ought to have known. And in the third place a landlord who has a mere right to enter and do repairs on the demised premises can be liable in nuisance under the existing law in respect of dangers arising or continuing because of his failure so to exercise his right as to prevent the premises from constituting a nuisance."

[24] In short, the whole thrust of the Law Commission Report is to the effect that the extended duty under Clause 4(4) is in substance to be the same duty of care as that owed elsewhere in Clause 4. It is the ink with which this part of the report is written.

[25] The Law Commission prepared a draft Bill in similar form to that which eventually became Section 4 of the 1972 legislation. Parliament only added wording

to Section 4(4) to the effect that the deemed obligation would arise only from the moment the right to enter could be practicably exercised.

[26] Fourthly, in the quest to ascertain the purpose and meaning of Section 4 of the 1972 legislation and Sections 1 and 2 of the 2001 legislation, it is pertinent to observe the comments of the relevant Northern Ireland Minister during the second stage of the Bill (found at archive.niassembly.gov.uk/record/reports/001016.htm) where the modest nature of the extension of the duty under Section 2 surfaced when he said:

> "I now turn to the main features of the Bill. I have shown how Section 4 of the Defective Premises Act 1972 extended a landlord's liability to include those who might reasonably be expected to be affected by defects in the premises. The Committee was content with this wording and recommended it in its report. The draft Bill therefore contains a similar provision in Clause 1(2). This provision will replace the limited statutory claim available under the Occupiers' Liability (Northern Ireland) Act 1957 and will, in effect, extend the ambit of the landlords' liability. … This new duty of care owed by the landlord will apply if he or she knows of the defect or if he or she ought to have known of it in all the circumstances. In some ways, it is devised to ensure that rogue landlords take precautions to keep their properties in good repair. The duty is extended further by removal of the requirement of an obligation to repair by providing that the landlord is under a duty, either where he has undertaken to do repairs or where he has a right, express or implied, to carry out maintenance and repairs".

[27] It is also revealing to note a not dissimilar cursory explanation given during the second reading of the 1972 Bill in the House of Commons when the Bill's sponsor, Mr Ivor Richard MP, stated:

> "Clause 4 rationalises and slightly extends the liability of a landlord who has an obligation or a right to repair premises which he has let to another. It removes certain doubts and anomalies which have grown up in the common law and establishes clearly that, so far as a landlord has an obligation or right to repair the premises, he is under a duty of care to those who are likely to suffer injury or damage if the premises are not maintained properly. The Law Commission thought that it would be a valuable provision."

[28] It would be curious,perhaps even remiss, if the radical change adumbrated by Mr McCollum had not featured in the ministerial or sponsoring person's statements.

[29] Fifthly, whilst care must be exercised in ascertaining the meaning of a statute by the manner in which it is read by others, nonetheless it is significant that none of the leading textbooks which address the 1972 legislation make the argument now propounded by Mr McCollum. Thus, for example, in *Charlesworth and Percy on Negligence* 13th Edition, at para 8-142 the author, considering the effect of Section 4(4) of the 1972 legislation, states:

> "The effect of this provision is that for the purposes of SS4(1) to (3) only, a landlord's powers of entry to carry out maintenance or repair of the premises are the equivalent of an obligation to do so."

[30] Exactly the same approach is adopted in *Clerk and Lindsell on Torts*, 21st Edition, at paragraph 12-85, *Woodfall on Landlord and Tenant*, 2014, at 15.031 and *Winfield and Jolowicz*, 16th Edition, at paragraph 9.37.

[31] Finally, in the course of their endeavours counsel have been able to unearth only two cases where the argument raised by Mr McCollum has surfaced as part of the *ratio decidendi* of the judgment and in each case that argument has been rejected.

[32] First, in Pritchard v Caerphilly CBC [2013] WL in the County Court at Cardiff. This case arose out of a claim where the plaintiff fell down stairs at her home, which she rented from the defendant local authority, because of a defective handrail. On the facts the court found that even had the landlord exercised his right of re-entry to repair and inspected the premises between the date of handover and the date of accident he would have found nothing amiss. He would have found no defect with the handrail because it was a latent defect.

[33] At paragraph [23] His Honour Judge Llewellyn said:

> "When the legislation under sub-section (4) states that the landlord should be treated for the purposes of sub-section (1) to (3) above as if he were under an obligation to the tenant for that description of maintenance or repair of the premises, it seems to me that this is in part the product of the purpose of the Act to render a landlord liable where he has a right to repair and does not exercise it, thus transforming the terms of the agreement into an obligation upon him to repair and from that a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe and that sub-sections (1) to (3) interrelate and are to be read together just as they are together with sub-section (4)."

[34] We respectfully agree with that assessment and it applies in precisely the same way in the instant case substituting, of course,Sections 1 and 2 of the 2001 Act for the references to Section 4 iofthe 1972 Act.

[35] Even more authoritative is the case of Lafferty v Newark & Sherwood District Council [2016] EWHC 320 (QB) where Jay J, again construing Section 4(4) of the 1972 Act, came to a similar conclusion and rejected the proposition that Section 4(4) created a form of strict liability.

[36] In our view the judgment of Jay J at paragraphs 33, 34 and 35 illuminatingly captures precisely the reasons why the appellant's argument must be rejected. For our own part we could not improve upon the reasoning therein set out and accordingly we go no further than to respectfully set out the wording of those three paragraphs:

> "(33) I agree … that the purpose of Section 4(4) is not to create a strict liability but to extend the application of Section 4(1) to relevant defects which are outwith its scope … and therefore to bring them within the scope of the section as a whole. The purpose of Section 4(4) is not to confer an additional or alternative route to recovery where the claim under Section 4(1) fails on its facts because Section 4(2) is unsatisfied.
>
> (34)…….the sub-section is a deeming provision which treats the landlord as being under a section 4(1) obligation in circumstances where the lease and statute does not confer such an obligation. Crucially, in my judgment, this deemed obligation is exactly the same in terms of its nature and content as the obligation that would have been owed under Section 4(1) had that sub-section been applicable. This conclusion flows from the language of the sub-section – `he shall be treated for the purposes of sub-sections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant' – because the reference to `obligation' there must be a reference to the (same) obligation under sub-section (1) Treatment "for the purposes of sub-section (1)" has precisely that purport and effect. Of course, the sub-section (1) obligation is one to exercise reasonable care in all the circumstances; it is not a strict obligation. Yet the effect of Mr Colville's submissions is to treat the sub-section (4) obligation as something different in nature and kind from the obligation under sub-section (1). Not merely does his approach decouple the sub-sections in

> circumstances where they are, in truth, chained together, it serves to create two different types of obligation within the same section of the DPA 1972.
>
> (35) Mr Colville's submissions also seek to neutralise or circumvent sub-section (2), but I do not agree with him that this sub-section is redundant in a sub-section (4) case. When sub-section (4) applies, so does sub-section (1); and for the purposes of sub-section (1), in establishing the content of the duty, regard must be had to whether the landlord "ought in all the circumstances to have known of the relevant defect." To my mind, this mandates an inquiry by the court into information which the landlord obtained, or ought to have obtained, during the course of carrying out any inspections, and information which he would have obtained had he carried out such inspections as he ought to have performed properly. In my judgment, liability may be established in a sub-section (4) case either in circumstances where a landlord's inspection(s) are negligently performed, or where the landlord fails to carry out proper inspections because he abstains from implementing a reasonable system for performing them. I am not intending to set out exhaustive categories, but these must be the paradigm instances."

[37] In Alker v Collingwood Housing Association [2007] 1 WLR 2230 the Court of Appeal determined a case where the issue was whether Section 4(3) of the 1972 legislation covered defects which were not the subject of disrepair but were unsafe for other reasons namely because strengthened glass was not used in a door. The Court of Appeal held that Section 4(3) could not be given an extended definition so as to fix the landlord with liability for design or construction defects in such circumstances. At paragraph [16] of his judgment Laws LJ said:

> "It can be seen that the duty under Section 4(1) arises if and only if the following conditions are fulfilled (Sections 4(1) and 4(2) are then set out). However those requirements are qualified by Section 4(4): the landlord is treated as under a Section 4(1) duty if he can exercise a right enjoyed by him to enter the premises in order to carry out works of maintenance or repair. The duty itself, however, is only to take reasonable care to protect potentially affected persons from injury or damage caused by relevant defect … Here it is common ground that the conditions are met. The appellant owed an obligation for maintenance or repair. Section 4(2) was not

> fulfilled because the appellant had no notice of the putative defect, but that omission is repaired by the application of Section 4(4) which, as I have said qualifies the conditions. The appellant had a right of entry for the purpose of repair or maintenance.... Accordingly the only question in the appeal is whether the state of the glass panel constituted "a relevant defect".

[38] Like Jay J in Lafferty's case, we recognise that the *obiter dicta* comments of Laws LJ in Alker's case are of a highly persuasive nature emanating from that distinguished source. We share the approach adopted by Jay J when he indicated that it is not clear whether the reasoning that he adopted about Section 4(4) is inconsistent with the comments of Laws LJ. Laws LJ's judgment makes express reference to the content of the duty to take reasonable care. In Alker's case it was common ground that it did not matter that sub-section (2) was not fulfilled. On the facts of that case the issue was not whether the landlord knew or ought to have known whether the door contained safety glass but whether that was the sort of matter which the 1972 legislation embraced at all. It was an inherent defect case rather than one involving the concept of repair and thus it was somewhat artificial to focus on sub-section (2). However, if that is an incorrect interpretation of what Laws LJ was stating, and in fact he was supporting the argument now advanced by Mr McCollum, the fact remains that his comments were *obiter dicta* without full argument of the nature that has been before us and we cannot adopt that reasoning.

[39] Similarly, the article by Roy and Walker, in so far as it deals with Section 4(4), is bereft of the wide array of authorities and sources which have been produced in this case and we venture to suggest that, armed with such wider authorities, the authors may reconsider their conclusion.

[40] In all the circumstances, therefore, we dismiss the appeal and affirm the decision of Maguire J.