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Judgment: approved by the Court for handing down

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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

ANN GRIFFIN

Plaintiff:

-v-

DUNNES STORES BANGOR LIMITED, BTW SHIELS, NEWRY & MOURNE DISTRICT COUNCIL and TREVELYAN HALL LIMITED t/a LITTERBOSS

Defendants:

STEPHENS J

[1] The plaintiff, Ann Griffin, now 68, then 62, date of birth 1 August 1947, sustained a serious injury to her right shoulder at 4.00 pm on Monday 17 August 2009 when she fell at the entrance to a branch of Dunnes Stores at Monaghan Street, Newry ("the Store"). The plaintiff alleges that she was caused to fall when she either slipped on, or her feet became entangled in, a discarded plastic carrier bag which was lying on the ground. She brings this action against:

(a) Dunnes Stores Bangor Limited, who are the lessees and the occupiers of the Store,

(b) BTW Shiels who are the managing agents of the landlords of the Store. Rather than suing the landlords in relation to their potential liabilities in respect of their ownership and occupation of the common areas around the Store and other stores some of which are leased to other tenants, the plaintiff chose to sue the managing agents. It is accepted by this defendant that it has the same obligations as the landlord and that in effect I should approach their liability as the liability of the landlord.

(c) Newry and Mourne District Council, the local authority, which is sued on a basis of its responsibilities under the Litter (Northern Ireland) Order 1994. The plaintiff, by her counsel, accepts that this Order imposes no civil liability on the local authority and therefore the

plaintiff did not proceed with any case against this defendant. I entered judgment for this defendant against the plaintiff.

(d) Trevelyan Hall Limited, trading as LitterBoss, who are the exterior cleaning and estate maintenance contractors engaged by the landlords to clean the common parts, including the area where the plaintiff fell.

[2] Mr Bentley QC and Mr Brian McCartney appeared on behalf of the plaintiff. Mr Ringland QC and Mr Dornan appeared on behalf of the first defendant, Dunnes Stores Bangor Limited. Mr Spence appeared on behalf of the remaining defendants.

Factual background

[3] Some of the factual background was not contested. I set out in this part of the judgment a summary of the factual issues which were not in dispute together with my conclusions in relation to the various factual disputes which have arisen.

[4] The Store is a part of the Newry Retail Park which is at Monaghan Street/Conn Street, Newry, County Down. The majority of the stores at the retail park have been let to the first defendant so that they are responsible for some 70% of the service charges. The areas demised to the first defendant do not include the exterior of the Store. The exterior parts are termed common parts and remain under the control of and in the occupation of, the landlord. The tenants, including the first defendant, have an obligation to pay a service charge and part of the service charge is for the cleaning of the common parts. The other tenant of the landlord at the retail part is Pound Stretcher.

[5] As is common with retail parks there are access roads, pavements for pedestrians, car parks, trolley bays and plants in various bedding areas together with a service yard. The front entrance to the Store is off an access road. There are paviours between the access road and the front door of the Store. To the left outside the front door is a trolley bay so that shoppers visiting the store can obtain a trolley before entering the store. Over the trolley bay and over the front door there is a canopy, so that individuals are to an extent protected from the elements when under canopy.

[6] The landlord owns and occupies the front of the Store, the paviour area, including the trolley bay and the access roadway.

[7] On the far side of the access roadway and facing the entrance to the store are premises occupied by Curley's Wine Cellar. Those premises are not owned by the landlord. The boundary line between the landlord's premises and whoever is responsible for the premises occupied by Curley's is at the junction of the pavement immediately outside Curley's and the edge of the access road.

[8] The plaintiff regularly shopped at the Store. On Monday 17 August 2009 she arrived by taxi which stopped on the access road outside the front door of the Store. The plaintiff walked across the paviour area to the trolley bay. As she did so she did not see any litter or any plastic bag on the ground. She obtained a trolley and in order to do so she had to insert a £1 coin. She then entered the Store with her trolley and having selected her purchases paid in the ordinary way at the checkout. At the time the first defendant provided, free of charge, to its customers plastic shopping bags. These were white with, I find, black lettering. The plaintiff's purchases having been placed in plastic bags in her trolley, the plaintiff then proceeded to the telephone which was beside the main exit. She telephoned for a taxi. The taxi company, known as Taxi Line, aware that fares regularly are collected from the Store, have drivers waiting in the vicinity, so the plaintiff's taxi, driven by Mr Larkin, arrived quickly and parked on the access road at the front of the store. The plaintiff had either already walked across the paviour area to the access road or did so whenever she saw the taxi arriving. As she walked across the paviour area she did not see any litter or any plastic bag. The passenger side of the taxi was closest to the paviour area. The taxi driver, Mr Larkin, got out of the driver's side of the taxi and walked around to the boot of his vehicle. He helped the plaintiff by lifting all her shopping bags out of the trolley and placing them in the boot of his vehicle. He then returned to the driver's side of the vehicle getting into his taxi whilst the plaintiff went with the trolley, the short distance across the paviour area to the trolley bay, so that she could leave the trolley in the trolley bay and retrieve her £1 coin. Mr Larkin did not see any plastic bag on the ground up to this point.

[9] The plaintiff as she went with her trolley to the trolley bay did not see any plastic bag on the ground. The plaintiff, having returned her trolley, turned to go back to the taxi. As she went back to the taxi she fell to the ground.

[10] There was a difference of evidence as to where exactly she fell. She was uncertain where she had fallen stating that she had taken a few steps. I consider that at all times the plaintiff was doing her best to give her evidence accurately. She is a pleasant individual coping with many difficulties in life. She is entirely honest, but the accuracy of her evidence is to be seen in the context that she is not articulate, she is vague and I consider she had obvious difficulties remembering events. If the plaintiff had been asked the day after the accident exactly where it had occurred, I consider that given her characteristics, given the upset of the accident and the limitations that, even then, she was under in relation to her ability to observe and recall, I consider that she would have had very considerable difficulties in identifying the exact location.

[11] In relation to the issue as to where the plaintiff fell I prefer the evidence of Mr Kelly, the security guard, whose place of work was just inside the front door of the Store. He stated that the plaintiff fell at a location under the canopy beside the trolley bay and beside where the two ladies in red coats are shown in photograph number 1.

[12] I also find that the point at which the plaintiff fell was in the joint occupation of the first and second defendants.

[13] I also make it clear that if the plaintiff fell a further distance away from the trolley bay and closer to the access road I would also have found that that area was in the joint occupation of the first and second defendants. I would have done so on the basis of a finding that the area occupied by the first defendant extended from the front entrance of the store down to the junction of the paviour area and the access road.

[14] At the time that she fell the plaintiff did not know what caused her to fall. After she had fallen she did not see any plastic bag.

[15] Mr Larkin, the taxi driver, did not see the plaintiff as she turned from leaving her trolley in the trolley bay. He did see her as she was in the process of falling. He saw that her feet or one of her feet was caught up in a plastic shopping bag. Mr Kelly also gave evidence that he came out of the store just after the accident occurred and saw that there was a white plastic bag around the plaintiff's feet.

[16] I find that the plaintiff was caused to, and did fall, as the result of slipping on or becoming entangled with a plastic shopping bag which was on the ground under the canopy in close proximity to the trolley bay.

[17] There was a factual dispute as to the amount of litter including discarded shopping bags that occurred at the front entrance of the store. The plaintiff had been a regular shopper at the store over some nine years. She accepted that there had been "no previous problem" with a plastic bag over the nine year period. If that evidence stood on its own I would not have considered it to be important, given that "a problem" could be a problem with slipping or tripping as opposed to there being a plastic bag in the area. If an individual who is more assertive had been giving evidence it might have been crucial if they had not replied by asserting that over the nine year period there were plastic bags and litter in the area at the front of the store to be seen, although they had not slipped or tripped on them before.

[18] Mr Larkin, who had been at the location over a number of years both as a taxi driver and as a shopper, stated that it was a regular occurrence for plastic shopping bags to be left in trollies and to blow out onto the ground or for bags which had burst to be discarded onto the ground. However he stated that most days he would not see a bag and it could be a rare thing to see a bag.

[19] The plaintiff's daughter Michelle Griffin stated that after the accident she visited the location and took a photograph of debris at the front of the store. However, she was not able to produce the photograph which she had kept on her mobile phone stating that it was no longer possible to retrieve it. She also stated that she could not remember seeing a plastic bag in the area before.

[20] Mr Kelly who was called as a witness by the first defendant and who was then a security guard at the store stated that on occasions plastic bags blew through the door of the store.

[21] Mr Mitchell the first defendant's manager at the store stated that this was not an area which gathered a lot of litter. That there was no issue with plastic bags in the area, though he had seen a plastic bag in that area. That there had been no accidents over his nine years at the store either before or after this particular accident in this area and that there was never any complaint from him to the cleaning contractor as to the standard in which the area was kept. He considered it to be a very well kept area. He was not familiar with bags coming in through the front door of the Store.

[22] Mr McLaughlin of LitterBoss gave evidence of regular inspections of the area and that there was no problem in relation to this area.

[23] Finally Mr Murray, the Property Manager of the second defendant, gave evidence as to his regular inspection of the area and the lack of any problem with litter or a tripping hazard.

[24] I accept the evidence of Mr Mitchell, Mr McLaughlin and Mr Murray. I find that there was no problem with litter or with plastic bags in the area at the front of the store except for irregular unpredictable and minor occurrences. By minor I mean discarding of what were small items of litter the vast majority of which, if not nearly all of which, would not present a slipping or tripping hazard given the nature of the surface of the paviours. I do not accept that plastic bags blew through the front door of the Store. I consider that it would extremely rare for a plastic bag to be discarded in this area or to blow into this area. Again the time at which a plastic bag would be in the area would be unpredictable except that it would have been somewhat more likely on a windy day. There was no evidence that 17 August 2009 was windy. Even on a windy day I have given consideration as to the location from which a plastic bag may have been blown. I am not satisfied, on the balance of probabilities, that the plaintiff has established any nearby location which would have created a foreseeable risk of being the source of plastic bags being blown into this area. Also I do not consider that bags were particularly prone on windy days of being blown out of trollies in the trolley bays given that all these trollies are stored in such a way that the trolley in front protects objects from being blown out of the trolley behind. Furthermore there is no evidence that the front of the store was particularly exposed to swirling wind.

[25] So in conclusion I find that none of the defendants were aware of nor ought they to have been aware of, nor should they have foreseen any problem with plastic bags in this area except on an extremely rare occasion, the timing of the occurrence of which could not be predicted. Except to that most limited extent none of the defendants knew that plastic shopping bags would be on the ground at the entrance

to the store though all of them knew or ought to have known that if there was a plastic bag on the ground that it would present a hazard to pedestrians.

[26] I turn to consider the system for dealing with dangers which might exist from time to time from the presence of plastic bags and from the presence of litter that could cause a pedestrian to slip or trip and fall at the front of the store.

[27] LitterBoss a competent contractor which is quality ensured to ISO 9001 and ISO 1401 provide cleaning services for, amongst other areas, the front of the Store. They have done so since 1993. The hours that they spend at the retail park were cut back in March 2009 from 27.5 hours to 15.5 hours, but I find that the saving in time was made in other areas of the retail park and not in the area at the front of Store. Before the cut back the cleaner worked 8.00 am to 11.00 am in the morning. After the cutback it was 8.00 am to 10.00 am in the morning. It was in the morning that he undertook work at the front of the store. There was one less hour in the morning but I consider that all of the cutback was in relation to cleaning other areas apart from this area.

[28] I find that the regular cleaner did the work competently and diligently. I find that during week commencing 17 August 2009 another cleaner was on duty who had been sufficiently trained and also was competent and diligent. It was suggested that perhaps he did not carry out his work to the high and exacting standards of the regular cleaner. I reject that evidence. There were no complaints about him. I am satisfied that he would not have left a plastic bag on the ground. I consider that the difference between him and the regular cleaner, if there was any, was only of the order that he would not search out every single small item on the ground in quite the same way as the regular cleaner. I am not satisfied that he did leave at 9.30 am as opposed to 10.00 am, but in any event I am satisfied that the area was in good condition at the time that he left. I consider that if there had been any dropping of standards that the store manager would immediately have complained. He did not do so.

[29] I accept the evidence that the first defendant had a pick and go policy so that every member of staff had an obligation on going through the front area to pick up and place in the adjacent litter bin, any object on the ground. There is no written record of such a system but I accept the evidence that it was in operation and that these duties were performed by members of staff. I also accept the evidence that there would have been a significant number of members of staff through this area during the day given the different shift patterns and breaks that occur during the course of the working day. I also accept that there would have been a significant number of members of staff in this area in the hour before the plaintiff fell.

[30] There have been no accidents and no complaints. These factors do not establish but are factors supporting the proposition that the system was reasonably effective. I consider that taken with the evidence as to this system they confirm my view that the system was in fact reasonably effective. I hold that there was a

reasonably effective system for dealing with the dangers that may arise from time to time in that the area was cleaned every morning and thereafter there was a pick and go system in operation. I make it clear that in deciding that this system was in fact reasonably effective I have considered the various improvements to the system suggested on behalf of the plaintiff. I do consider that a different system could have been operated which would have achieved standards in excess of what would be reasonably required. At one extreme for instance, though this was not suggested by the plaintiff, one could employ a cleaner full time to be responsible for amongst areas this particular area at the front of the store. On a somewhat more practical level one could record the training of staff in writing, one could have a system of regular inspection with the inspections being recorded, one could have supervision of those who carry out the inspections. All these features would improve the present system, but that does not alter my finding that the system that was in operation was in fact reasonably effective.

[31] The issue as to the adequacy of the system operated by the defendant for ensuring that this area was kept in a proper condition is resolved in favour of the defendants. I consider that the system that they operate was sufficient to discharge the defendants' duty to take reasonable care for the safety of the plaintiff.

[32] There is another issue in this action and that is for how long the plastic bag had been on the ground. There is no direct evidence but given the system in operation and the number of staff moving through the area I consider that it would only have been on the ground for a short period of time.

[33] On the basis of these factual findings I do not consider that the plaintiff has established any negligence or any breach of statutory duty on the part of any of the defendants. I dismiss the plaintiff's claim.

[34] I make it clear that if I had found in favour of the plaintiff I would not have made any reduction for contributory negligence. There is a contrast between members of staff looking out for plastic bags and other hazards and members of the public intent on returning to a taxi or for instance putting a retrieved £1 coin back into a purse.

[35] Again I make it clear that if I found in favour of the plaintiff I would have awarded £60,000 in relation to general damages.

[36] The only outstanding issue that I have not addressed is the issue as to the amount of special damages. I had directed the parties to provide schedules in relation to special damages and if the plaintiff wishes to appeal my decision in relation to liability then I will give a further ruling in relation to special damages on a date convenient to the parties.