Neutral Citation Number: [2024] EW Misc 23 (CC)

Case no: J30YJ394

IN THE COUNTY COURT SITTING AT LEEDS

Date:

Before :

HHJ MALEK

- -

Between :

MISS AMY ELISA MANN **Claimant**

- and -

SARAH MARTIN **Defendant**

- -

Mr. Colin Baran (instructed by **]**) for the **Claimant**
Mr. James Hurd (instructed by **]**) for the **Defendant**

Hearing dates: 23-24 May 2024

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APPROVED JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

HHJ Malek :

Introduction

1. On 4 April 2013, the Claimant's mother, Dianne Susse, entered into a tenancy agreement (the "Tenancy Agreement") with the Defendant in respect of 19 Riviera Garden, Chapel, Atheron, Leeds LS7 3DW (the "Property").

2. The Claimant lived with her mother at the Property and was involved in an accident on 19 May 2013, when part of the back garden boundary wall located on the Property (the "Wall") is alleged to have fallen onto her leg, causing her to sustain a fracture. The Claimant was 7 years old at the date of the accident, having been born on 27 December 2005, and is now 18 years old.

3. It is common ground that the Property was a dwelling house at all material times and that the Defendant retained a right of entry to effect repairs pursuant to clause 4.3.10.1 of the Tenancy Agreement.

Relevant findings of fact

4. On, or around 4 April 2013, the Claimant moved into the Property along with her mother, Mrs Susse.

5. On around the same day a pre-tenancy inspection was carried out on behalf of the Defendant. This was carried out by JER Property Consultants, who were instructed by the Defendant's estate agents, Hendry's.

6. Shortly after the Claimant moved into the Property, but prior to her accident on 19 May 2013, a fence panel adjacent to the Wall was replaced. That panel was, on the balance of probabilities, replaced by an agent, and on the instruction, of

Mrs. Scullion, who was the owner / occupier of the property next door to the Property and had, therefore, joint responsibility (with the Defendant) for the Wall (it being, essentially, a party wall). I come to this conclusion because I prefer the Defendant's evidence on this issue. Whilst Mrs. Susse's recollection is that it was the Defendant's agent, Mr. Pound, who replaced the fence post adjacent to the Wall she only sets this out in her witness statement dated 31 July 2023, made some 10 years after the accident. In contrast the Defendant made a statement dated 18 March 2014, only around 8 months after the accident, in which she says that it was not Mr. Pound who carried out this work. The Defendant was further clear, and remained unshaken in her testimony, that she had not paid Mr. Pound to replace the fence post and panels adjacent to the Wall. It is, therefore, likely that Mrs. Susse has simply misremembered who carried out the work, as a result of the passage of time.

7. Between moving in and the date of the accident Mrs. Susse saw the Wall when she came out in the garden. She leaned upon it around the relevant section on numerous occasions to talk to Mrs. Scullion. During this time she did not observe any visible defects in the Wall and did not notice it to be loose or unstable.

8. On 19 May 2013 part of the Wall collapsed on the Claimant as she was leaning against it talking to Mrs. Scullion. An ambulance was called and the Claimant was taken to Leeds General Infirmary for treatment. She sustained a compound fracture of the lower third right tibia and required plastic surgery.

The law

1. Section 4 of the Defective Premises Act 1972 provides as follows:

Landlord's duty of care in virtue of obligation or right to repair premises demised.

(1)Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to 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.

(2)The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.

(3)In this section "relevant defect" means a defect in the state of the premises existing at or after the material time and 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; and for the purposes of the foregoing provision "the material time" means—

(a)where the tenancy commenced before this Act, the commencement of this Act; and

(b)in all other cases, the earliest of the following times, that is to say—

(i)the time when the tenancy commences;

(ii)the time when the tenancy agreement is entered into;

(iii)the time when possession is taken of the premises in contemplation of the letting.

(4)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, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection 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.

The issues in this case

9. Although the parties envisaged a number of preliminary issues I was not, on the day of the hearing, troubled with them. In addition, following discussion between counsel, it became clear that the substantive issues had narrowed such that only the following issues required (or where likely to require) adjudication:

   i) Did the Defendant, prime facie, owe the Claimant a duty of care under s.4(4) of the DPA, and if so, what was the scope of that duty?

   ii) If so, did the Wall suffer from a relevant defect?

   iii) If so, did the Defendant know or ought she to have, in the circumstances, known about the defect?

   iv) If so, did this defect cause the Claimant injury?

   v) If so, did the Defendant, fail to take such care as is reasonable in all the circumstances to see that the Claimant was reasonably safe?

   vi) If so, did the Defendant's failure cause the Claimant's injuries?

Discussion

10. A landlord is placed under a s.4 duty if he has the obligation or right to repair the premises (or part thereof) in question. In this case the Defendant had a right (but probably not an obligation) to repair the Wall.

11. For present purposes the duty under s.4 can be summarised as follows. Under s.4 the landlord owes a duty, to all persons (not just tenants) who might reasonably be expected to be affected by defects in the state of the premises, to

take such care as is reasonable in all the circumstances to see that the said person is reasonably safe from personal injury caused by a relevant defect, provided always that the landlord knew or ought to have known of the relevant defect. A relevant defect, for present purposes, can be defined as a defect in the state of the premises occasioned by a failure by the landlord to maintain or repair the premises.

Did the Defendant, prime facie, owe the Claimant a duty of care under s.4(4) of the DPA, and if so, what was the scope of that duty?

12. It was common ground, before me, that the Defendant owed the Claimant a duty of care in relation to the relevant defect. The issue between the parties appeared (I say appeared because, in the end, it is not evident to me that there was actually much between the parties on this point) to be whether the duty under s. 4(4) extended the duty under s. 4(1) to a "duty to make safe", such that a duty might be owed in relation to a latent, inherent or construction defect. As I say, I am not sure that this is what the Claimant actually argues for, but if it is then it seems to me to be plainly wrong.

13. The most helpful decision on the point is *Lafferty v Newark & Sherwood District Council [2016] EWHC 320*:

    i) A s. 4(4) duty might apply in two situations. "*The first is where the relevant defect falls outside the ambit of sub-section (1) altogether, either in the absence of an express repairing covenant or because the implied covenant under section 11 of the Landlord and Tenant Act 1985 is inapplicable to the defect in question. The second is where the relevant defect does fall within the ambit of sub- section (1) but sub-section (2)*

cannot be satisfied on the facts" ([32]). The present case falls under the first category.

ii) The purpose of s. 4(4) DPA "*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*." ([33]).

iii) S.4(4) DPA "*is a deeming provision which treats the landlord as being under section 4(1) obligations in circumstances where the lease and statute does not confer such an obligation. ...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*". ([34]).

14. The point being made in ***Lafferty***, with which I agree, is that the s. 4(4) is a deeming provision. It does nothing to change the nature of the obligation under s.4(1). It merely brings into the scope of s.4(1) a description of maintenance and repair not otherwise caught by s.4(1), but in relation to which description of maintenance and repair the landlord has retained a right (expressly or impliedly) to enter the premises and carry out the said maintenance or repair.

15. It follows then that s.4(4) does not extend the landlord's obligation under s 4(1) to anything other than to repair or maintain. This is because the extension under s.4(4) seeks to cover other descriptions of maintenance and repair which are not covered by s. 4(1), but does not change the fact that we are still talking about

repairs and maintenance. If, therefore, the defect complained off comes about not as a result of a failure to maintain or repair (and is for example an inherent defect) then it is not, in my view, covered by s.4(1) and nothing in s.4(4) saves or makes it so.

16. The answer to the question posed, then, is that the Defendant does owe the Claimant a duty of care under s.4(4), but this does not extend to a duty to "make safe".

Did the Wall suffer from a relevant defect?

17. In the present case the Claimant argues that the relevant defect is the Wall which was unstable, presumably because it was in a state of disrepair.

18. The Claimant's argument is, essentially, that the Wall must have been in a state of disrepair. Walls do not fall down by themselves if they are in good repair. However, a wall in otherwise good repair may fall down if either (a) excessive force is placed against it, (b) it is damaged, or (c) the wall suffered from a design or inherent defect.

19. As I have already found, I do not find it likely that the Claimant was climbing on the wall when it collapsed. Whilst I accept that part of the hospital records tend to indicate that the Wall collapsed as the Claimant "*came down of the wall*" other parts of those records indicating that the Claimant was merely "*leaning on*" the Wall. In short, the hospital records are inconsistent. By contrast both the Claimant and her mother are adamant that the Claimant was not climbing on the Wall when it collapsed. Notwithstanding the passage of time, I accept their evidence on this point and conclude that the Claimant was not climbing on the

Wall at the relevant time. In all likelihood she was leaning against it as she spoke to her neighbour, Mrs. Scullion. I say leaning against as opposed to on top because, given the available evidence of both the height of the wall and the Claimant at the relevant time, it seems to me to be likely that the top of the wall, at the point and time in question, stood somewhat higher than the Claimant's shoulders, but lower than her eyes. That said, I do not think it can be said that in leaning against the Wall the Claimant applied excessive force to it so as to cause it to collapse. Whilst I accept that the Wall is likely to have been of considerable weight it is the stability of the wall that is determinative.

20. During the course of his evidence Mr. Parascandolo appeared to express the view that the Wall was badly designed and/or constructed. That is to say that it suffered from some inherent defect. I reject such evidence. Mr. Parascandolo was not called as an expert witness and, therefore, his opinion on how the wall came to collapse or whether or not it was in a state of disrepair are irrelevant. Whilst I agree, as a matter of common sense, that a single leaf brick is likely to be less stable than a double leaf brick wall of a similar height I cannot see how such an argument assists the Claimant. As can be seen from the photographs, whilst the Wall is single leaf it seems to be the width of a standard breeze block – i.e. the same width as a double leaf brick wall.

21. As I have already found, it is likely that Mrs. Scullion hired a contractor to replace the fencepost adjacent to the Wall. It is likely that the Wall, as originally constructed, was built plumb with the original fencepost. As the photos demonstrate that was no longer likely true by the time the new fencepost was put in place. It stands to reason that the removal of the old fencepost is likely

not only have contributed to or caused fractures in the Wall, but also rendered the Wall more unstable because the new fencepost no longer acted as support for the Wall.

22. It follows then that I conclude that the likely cause of the collapse of the Wall was neither some sort of inherent defect nor the application of excessive force to it by the Claimant on the day that she was injured, but the damage done to it by the contractor hired by Mrs. Scullion. I am fortified in this conclusion by reason of the evidence provided by Mrs Susse. It will be recalled that she said that she had leaned on the Wall a number of times before the accident and had not noted that the upper tier of the Wall had fractured or was unstable. It is not entirely clear whether Mrs. Susse was talking about before or after the work carried out to the adjacent fencepost. However, the fact that Mrs. Susse was able to lean on the Wall, without mishap, in the way that she described would tend to suggest that an inherent defect was unlikely to be the cause of its collapse. Having also discounted the application of excessive force by the Claimant I am left, as I have already indicated, with the damage and removal of support occasioned by the work to the fencepost as the most likely cause.

Did the Defendant know or ought she to have, in the circumstances, known about the defect?

23. There was some argument before me as to whether or not the Defendant was required to have "notice" of the relevant defect. Although this might be shorthand for whether the Defendant "knew" about the defect I should prefer to use the statutory language. The question then is whether (a) the Defendant knew

that the Wall was in disrepair or, in the alternative, (b) whether she ought, in all circumstances, to have known.

24. It was the Defendant's clear evidence that she did not know, at the material time, that the Wall was in a state of disrepair. There is nothing to gainsay this. I, further, accept her evidence when she says that she would have carried out repairs had she been aware of any disrepair to the Wall, there being no evidence to the contrary. I conclude, therefore, that the Defendant did not, at all material times, know that the Wall had a defect or was in a state of repair.

25. I agree that where the landlord, as in the present case, did not have actual knowledge then the question of whether s/he ought to have known of the defect will usually depend upon what steps s/he ought reasonably to have taken to inspect the premises; and where, as in this case, an inspection was carried out the issues are whether reasonable care was taken in carrying out the inspections and whether the defect was, or should have been, discovered as a result of the inspection ([26] & [37] *Rogerson v Bolsover District Council [2019] EWCA Civ 226 CA*).

26. I, further agree, that the Defendant was under no duty to carry out a structural survey or examination of the Wall and what was required was a reasonable visible examination for obvious defects.

27. As I have found elsewhere in this judgment, a pre-tenancy inspection was carried out on the Defendant's behalf on 4 April 2013. That inspection does not note any defects in, or disrepair to, the Wall.

28. The Claimant argues that the inspection was inadequate and that a reasonable inspection would have revealed that the Wall was in disrepair and / or defective. She relies on the fact that there is nothing in the pre-tenancy inspection report dated 4 April 2013 (the "Report") [251] to suggest that the Wall was properly inspected, let alone in good repair.

29. At page 13 of the Report under "outside" and under the sub-heading "rear" the Report notes that the "*pebble with wooden edge steps leading down into the lawn area*" are "*well maintained*", but that that "*breeze block out house*" was "*extremely weathered with broken side windows and front door*". Whilst the Defendant accepts that there is no mention of the Wall in the report she argues that it is clear, given the vicinity of the wooden edge steps to the Wall, that the person carrying out the inspection would not only have seen, but also commented on any defects in the Wall (had they been present). She further argues that where the inspector had mentioned a "*missing fence to next door*" in close proximity to the Wall it is implausible to suggest that a visually defective wall was somehow overlooked. Whilst the point has some force, the difficulty with this argument, for the Defendant, is that the Report makes no mention of the Wall at all, in circumstances where the steps are mentioned in a positive light: making it difficult to argue, for example, that the Wall was not mentioned <u>because</u> it was not defective and was "*well maintained*".

30. The more compelling argument is that when moving in Mrs. Susse did not notice the Wall to be defective or in a state of disrepair. Certainly, she did not report it in circumstances were she was happy to complain about the missing fence. Further, Mrs. Susse, by her own admission, found no defect in the Wall

(and certainly did not report any) whilst leaning upon it on numerous occasions subsequent to moving in, but prior to the accident.

31. Given the fact that Mrs. Susse lived at the premises and the number of opportunities that she had to examine the Wall at close quarters and yet found no obvious visible defects; in all likelihood, even if the inspector failed to take reasonable care during his inspection, the defect would not have been discoverable on a reasonable visible inspection on the date in question.

32. Given my findings on the cause of the defect to the Wall I should, for the sake of completeness, also set out my views on whether the Defendant ought to have known that a defect in the Wall arose as a result of work carried out to the adjacent fence post. There is, simply, nothing in the evidence that would lead me to fix the Defendant with such knowledge: the work was not performed by her agent and I do not think that the Defendant can be said to be under an obligation to carry out a specific (as opposed to a routine periodic) inspection of the work, once completed.

Remainder of the issues

33. As, I hope, will be clear from the way I have framed the issues it is not necessary, given my conclusions on the first three issues, for me to go on to consider the remainder of the issues.

34. However, for the sake of completeness I should add that the Defendant did not fail to take such care as is reasonable in all the circumstances to see that the Claimant was reasonably safe. She had no knowledge of the defect in the Wall and, in the circumstances, it cannot be shown that she ought to have known.

Accordingly, it cannot be said that she failed to take reasonable care to ensure that the Claimant was reasonably safe.

Conclusion

35. For the reasons given I dismiss the Claimant's claim. No doubt this will come as a disappointment to her, but I hope she will understand that nothing that I have said in this judgment can or should be taken to negate or undermine, in any way, the very real pain and suffering that she has experienced as a result of her unfortunate accident. I hope that she will now be able to put this sad incident behind her and move on with her life. I wish her the very best.

36. The parties are invited to agree any orders consequent upon this judgment and to file a draft in advance of this judgment being handed down. In the event that a draft order is agreed the parties and their representatives are excused from any further attendance. Alternatively, if agreement is not possible I shall hear submissions on any consequential orders following the formal handing down of judgment.

37. It remains only for me to, publicly, thank counsel for their invaluable assistance. In particular, I am indebted to them for the production of very helpful written skeleton arguments which have greatly assisted in the formulation of this judgment.