Case No: B2/2013/3178

Neutral Citation Number: [2015] EWCA Civ 20

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BOW COUNTY COURT
Her Honour Judge May QC
21R71402

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2015

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LEWISON
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

	SAMUEL EDWARDS	**Appellant**
	- and -	
	BALADAS KUMARASAMY	**Respondent**

- -
- -

MR ANTHONY O'TOOLE (instructed by **Oliver & Co**) for the **Appellant**
MR JOSHUA SWIRSKY (instructed by **MacLeod James & Goonting**) for the **Respondent**

Hearing date : 20 January 2015

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Judgment **Lord Justice Lewison:**

1. One summer evening in 2010 Mr Edwards was taking rubbish out from a second floor flat which he and his partner rented from Mr Kumarasamy. He tripped over an uneven paving stone in the pathway between the front door of the block and the communal bins in the car park, as a result of which he injured his knee. The pathway is 10 to 12 feet long and is the essential means of access to the block. The tenancy under which Mr Edwards rented the flat was an assured shorthold tenancy to which the implied repairing obligations in section 11 of the Landlord and Tenant Act 1985 applied. The issue on this appeal is whether Mr Kumarasamy is liable for Mr Edwards' injuries.

2. Mr Kumarasamy is not the owner of the block of flats. He has a long lease of flat 10 which is

on the second floor of the block. He has a number of rights granted to him under that lease. They include the right to use on foot the entrance hall, lift and staircases giving access to the flat; the right to use an access road and parking space and the right to use the Bin Store (which is part of the Communal Areas as defined) and other facilities provided by the landlord. Regulations forming part of the lease in fact require all domestic rubbish to be placed in the Bin Store. The owners of the block also covenanted to keep the Communal Areas in good and substantial repair, and to keep passageways and footpaths forming part of the building in good order and condition; but a clause in the head lease restricts their liability to cases in which the tenant has given notice of the defect and the lessor has had a reasonable opportunity to remedy the defect. It is common ground that Mr Edwards gave no notice of any defect to Mr Kumarasamy before the accident; and Mr Kumarasamy gave no notice to his own landlord.

3. DDJ Gilman held that the paved area between the front door of the block and the car park was part of the structure or exterior of flat 10; and awarded Mr Edwards £3,750 in damages. On appeal HH Judge May QC reversed his decision on that issue and there is no appeal against that part of her decision. However, a new point was taken before the judge; namely that Mr Kumarasamy was liable under the extended covenant implied into the tenancy by section 11 (1A) of the Landlord and Tenant Act 1985. The judge held that he was not, because it was a precondition to liability that notice of the defect had to be given. For the reasons that follow I respectfully disagree with the judge and would allow the appeal.

4. Section 11 of the Landlord and Tenant Act 1985 provides, so far as relevant:

> "(1) In a lease to which this section applies …there is implied a covenant by the lessor—
>
> (a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes)…
>
> (1A) If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then, subject to subsection (1B), the covenant implied by subsection (1) shall have effect as if—
>
> (a) the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest…
>
> …
>
> (1B) Nothing in subsection (1A) shall be construed as requiring the lessor to carry out any works or repairs unless the disrepair (or failure to maintain in working order) is such as to affect the lessee's enjoyment of the dwelling-house or of any common

> parts, as defined in section 60(1) of the Landlord and Tenant Act 1987, which the lessee, as such, is entitled to use.
>
> (3A) In any case where—
>
> (a) the lessor's repairing covenant has effect as mentioned in subsection (1A), and
>
> (b) in order to comply with the covenant the lessor needs to carry out works or repairs otherwise than in, or to an installation in, the dwelling-house, and
>
> (c) the lessor does not have a sufficient right in the part of the building or the installation concerned to enable him to carry out the required works or repairs,
>
> then, in any proceedings relating to a failure to comply with the lessor's repairing covenant, so far as it requires the lessor to carry out the works or repairs in question, it shall be a defence for the lessor to prove that he used all reasonable endeavours to obtain, but was unable to obtain, such rights as would be adequate to enable him to carry out the works or repairs"

5. Thus, if read in the modified way that section 11 (1A) requires, the covenant contained in the tenancy provides that there is a covenant by the lessor to keep in repair the structure and exterior of the dwelling-house and the structure and exterior of any part of the building in which the lessor has an estate or interest (including drains, gutters and external pipes). It is important to note that section 11 works by implying a covenant into a tenancy agreement. In other words the tenancy contains a compulsory contractual term.

6. Mr Kumarasamy's right to use the front hall, the car parking space and Bin Store and other facilities provided by the landlord take effect as legal easements. He therefore has an estate or interest in the paved area where Mr Edwards sustained his accident. Is that enough to bring the extended covenant into play? Mr Swirsky, appearing for Mr Kumarasamy, says no. He argues that the extended covenant only applies to a part of the building in which Mr Kumarasamy has an estate or interest. The word "building" in section 11 (1A) (a) is not defined, and should be given its ordinary dictionary meaning of "structure with a roof and walls". The paved area in which Mr Edwards sustained his accident does not fall within this definition. I agree that, viewed on its own, the paved area where Mr Edwards tripped is not itself a building. But that is not the statutory question. The statutory question is whether the paved area is part of *the structure or exterior* of part of the building in which Mr Kumarasamy has an estate or interest: *Niazi Services Ltd v van der Loo* [2004] EWCA Civ 53, [2004] 1 WLR 1254 at [21]. In my judgment Mr Kumarasamy's legal easement over the front hall means that the front hall is a part of a building in which he has an estate or interest. Can the paved area which leads from the front door to the car park be described as part of the exterior of the front

hall? In *Brown v Liverpool Corporation* (1983) 13 HLR 1 this court held that steps leading to the front door of a dwelling were part of the exterior of the dwelling. Dankwerts LJ said:

> "They are attached in that manner to the house for the purpose of access to this dwelling house, and they are part of the dwelling house which is necessary for the purpose of anybody who wishes to live in the dwelling house enjoying that privilege. If they have not means of access of some sort they could not get there, and these are simply the means of access. They are outside structures, steps that are built, and therefore it seems to me they are plainly part of the building, and therefore the covenant implied by [s 11] of the Act fits and applies to the obligations of the landlords in this case."

7. Salmon and Sachs LJJ would have gone further and held that the steps were part of the building itself. But in my judgment the conclusion that the steps were part of the exterior of the building is sufficient. *Brown* was a case in which the whole building was subject to the tenancy (and consequently the whole building was the dwelling-house); so it cannot be directly transposed to our case, especially since the judge held that the paved area was not part of the exterior of flat 10. However, on the basis of the Deputy District Judge's findings of fact, the paved area was both short and also part of the essential means of access to the front hall in which Mr Kumarasamy did have an estate or interest. I consider, therefore, that it can properly be described as the exterior of the front hall. I hold therefore that, in principle, the extended covenant applies. This point was not argued before the judge; and as Mr O'Toole submitted she tacitly assumed that the covenant applied. In that respect, she was right.

8. The next issue on this appeal is whether, as the judge held, Mr Kumarasamy's liability is conditional on notice having been given or whether, as Mr Edwards contends, liability arises as soon as the disrepair exists.

9. I propose first to consider the common law. The general rule is that a covenant to keep premises in repair obliges the covenantor to keep them in repair at all times, so that there is a breach of the obligation immediately a defect occurs. There is an exception where the obligation is the landlord's and the defect occurs in the demised premises themselves, in which case he is in breach of his obligation only when he has information about the existence of the defect such as would put a reasonable landlord on inquiry as to whether works of repair are needed and he has failed to carry out the necessary works with reasonable expedition thereafter: *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69, 78-9. Where, therefore, a defect appears in the external cladding of a building that is not demised to the tenant (as in *Sun Life*) or in a sea wall, possession of which is retained by the landlord (as in *Murphy v Hurly* [1922] 1 AC 369), the landlord is liable even though he has no notice of the disrepair. The latter case

conveniently collects the authorities which provide the original rationale for the rule. The principal reason for it was that the courts took the view that it would be unreasonable to interpret a landlord's covenant as absolute when the landlord "had no means of ascertaining the condition" of what was demised: *Makin v Watkinson* (1870) LR 6 Ex 25 (Bramwell B); *Tredway v Machin* (1904) 91 LT 310 (Collins MR). The assumption in the older cases is that the landlord had no right of entry in order to inspect the demised property. This is clear from the judgment of Bramwell B in *Makin*, and succinctly expressed by Collins MR in *Tredway*:

> "That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair."

10. In almost all modern leases the landlord will reserve a right to enter the demised property on notice in order to inspect it; and section 11 (6) of the Landlord and Tenant Act 1985 (like its statutory predecessor) confers a similar right on the landlord. It has never been suggested, however, that the existence of a right of entry makes any difference to the interpretation of a landlord's repairing covenant. The critical distinction, for the purposes of the common law, is between that which is demised and that which is not.

11. There is one further point to make about the common law. Where, as here, there has been an express grant of an easement the grant will carry with it an ancillary right on the part of the dominant owner to carry out repairs on the servient owner's land in order to make the easement effective. Thus in the case of the grant of a right of way the dominant owner is entitled to repair the way: Gale on Easements (19th ed) para 1-91; *Newcomen v Coulson* (1877) 5 Ch D 133. The judge took the view that Mr Kumarasamy had no right to "take up or mend the path," but unfortunately no one drew this common law principle to her attention.

12. Whether the landlord must have notice of the disrepair before his liability arises was the issue in *O'Brien v Robinson* [1973] AC 912, a case which concerned the statutory predecessor of section 11 of the Landlord and Tenant Act 1985. Mr and Mrs O'Brien were injured when the bedroom ceiling of their flat fell on them, and they brought an action against their landlord for damages for breach of his implied covenant. Lord Diplock gave the leading speech with which Lords Reid, Simon and Cross agreed. Lord Diplock began by looking at the history of covenants which statutes inserted into leases. The first such covenant was imported by an Act of 1909. Lord Diplock said:

> "But although created by statute the legal nature of this obligation was contractual. Its characteristics were the same as those of an obligation created by a repairing covenant in a lease. What the

> statute was providing was that any contract for the letting of premises to which it applied should be read and given effect to as if it contained an express covenant by the landlord to keep the premises in such a state of repair as would make them reasonably fit for human habitation."

13. He then referred to subsequent legislation and two cases that had considered it, saying:

> "At this stage it is sufficient to say that as I read [the two] cases their *ratio decidendi* was based upon (a) the contractual nature of the landlord's obligation resulting from the statutory requirement that it should be implied as a term in the contract of letting and (b) the legal characteristics of a repairing covenant by a landlord in a lease or tenancy agreement."

14. Lastly he came to the statutory predecessor of section 11 of which he said:

> "…it has the same essential characteristics: (a) that the landlord's obligation results from a statutory requirement that it should be implied as a term in the contract of letting and (b) that the term to be implied has the legal characteristic of a repairing covenant by a landlord in a lease."

15. Lord Diplock then turned to consider the common law and concluded that:

> "… by 1926 the result of half a century of judicial decision was that it was well established that, at any rate where the state of disrepair was known to the tenant, the landlord's obligation to start carrying out any works of repair did not arise until he had information about the existence of a defect *in the premises* such as would put a reasonable man upon inquiry as to whether works of repair were needed." (Emphasis added)

16. He then turned to the question whether this applied to cases where the defect was latent, in the sense that the tenant did not know of it, and held that it did. Two points can be made about Lord Diplock's speech. First, the case before the House was one in which the disrepair was within the demise. Second, Lord Diplock regarded the interpretation of the statutory covenant as being governed by the same considerations as the interpretation of an equivalent covenant at common law. This is how Nourse LJ explained the case in *Sun Life*, when engaged in the reverse process of applying "the rule in *O'Brien v Robinson*" to the landlord's repairing covenant in a commercial lease. He also described "the rule in *O'Brien v Robinson*" as:

> "… where a defect occurs *in the demised premises themselves*, a

> landlord is in breach of his obligation to keep them in repair only when he has information about the existence of the defect such as would put a reasonable landlord on inquiry as to whether works of repair to it are needed and he has failed to carry out the necessary works with reasonable expedition thereafter" (emphasis added)

17. This court considered the scope of the rule in the context of the statutory covenant in *Passley v Wandsworth LBC* (1998) 30 HLR 165. Mr Passley was the tenant of a top floor flat under a secure tenancy granted by Wandsworth. In the course of a cold snap pipework on the roof of the block ruptured; and Mr Passley's flat and some of his possessions were damaged by water. This court held that because the pipes were outside the demise Wandsworth were liable under the covenant irrespective of notice.

18. The scope of a landlord's covenant to repair is, at common law, defined by the lease itself. However, the application of the statutory covenant depends on the facts. Whether something is part of the structure and exterior of a dwelling house does not depend on the extent of the demise, but on the facts. That point was decided by this court in *Campden Hill Towers Ltd v Gardner* [1977] QB 823. The issue in the case was whether a covenant to pay a service charge was invalidated by the statute; and that in turn involved considering what was the structure and exterior of a flat in a block. The landlords argued that the covenant could not apply to anything that was not demised. Megaw LJ said:

> "We do not accept the lessors' contention in so far as it would limit "the structure and exterior of the dwelling house" to that which, in the conveyancing meaning, is included in the particular terms of the demise in the lease. Anything which, in the ordinary use of words, would be regarded as a part of the structure, or of the exterior, of the particular "dwelling house," regarded as a separate part of the building, would be within the scope of paragraph (a). Thus, the exclusion by the words of clause 2 of the underlease of "any part of the outside walls" would not have the effect of taking outside the operation of paragraph (a) that which, in the ordinary use of language, would be regarded as the exterior wall of the flat - an essential integral part of the flat, as a dwelling house; that part of the outside wall of the block of flats which constitutes a wall of the flat. The paragraph applies to the outside wall or walls of the flat; the outside of inner party walls of the flat; the outer sides of horizontal divisions between Flat 20 and flats above and below; the structural framework and beams directly supporting floors, ceilings and walls of the flat."

19. Although this case was decided some four years after *O'Brien v Robinson*, that case was

neither referred to nor cited. That is not surprising, because the question of notice was not in issue. But the very experienced specialist counsel who appeared in that case (Mr JS Colyer QC, Mr Robert Pryor and Mr Derek Wood) would obviously have cited it had it borne on the point at issue. It seems to me that we can therefore take it that the court's decision that the covenant extended beyond the demise did not disturb the general principle of interpretation that the landlord's liability on his covenant to repair requires notice only where the defect is within the demised property itself. That would be no different from a case in which there was an express landlord's covenant encompassing structures some of which are within the demise and others of which are not. This was the position in *Sun Life* itself. The precise chain of title is not entirely clear from the report of the case in the Court of Appeal but does emerge clearly from the judgment of Aldous J at first instance: [1994] 2 EGLR 66. In that case the intermediate landlord had covenanted with its sub-tenant to comply with the covenants contained in its own headlease of the building. The headlease contained a covenant to keep the whole building in repair. It therefore covered both what was demised to the sub-tenant and what was not. Had the defect arisen in the property comprised in the sub-lease itself it seems probable that notice would have been required. But because of the location of the defect outside the sub-demise it was not. In my judgment the same approach should be applied to the statutory covenant. Moreover, one must not forget that the qualification about notice is not expressed in the statutory covenant. It is only there because it is a necessary implication. So we are, in effect, in the territory of implied terms; and in implying terms a minimalist approach is the correct one. Both section 11 (1B) and section 11 (3A) are designed to limit a landlord's liability under section 11 (1A); but it is striking that Parliament did not include any requirement of notice.

20. Mr Swirsky submitted that liability under the extended covenant only applies where the disrepair affects the tenant's enjoyment of the dwelling-house or common parts; and it was ultimately common ground that this test was to be objectively applied. In practice the tenant is likely to be the first person to become aware of the existence of defects falling within the landlord's obligation. Accordingly it would be right to interpret the covenant as requiring the giving of notice before the landlord's liability arose. Although this might be a pragmatic way of limiting the landlord's liability I cannot find it in the words of the statute. An argument of this nature would have been equally applicable to the landlord's covenant considered in *Sun Life*, and indeed a similar argument was advanced on the landlord's behalf. But in *Sun Life*, as we have seen, the critical division was between what was demised and what was not. Moreover, as I have said we are in the territory of implied terms, and necessity rather than mere reasonableness is the touchstone.

21. The judge was comforted in her conclusion by the terms of section 11 (3A) which, she said, was predicated on the basis that the landlord would have received notice of the defect before liability arose. Mr Swirsky also relied on this provision. He submitted that it would be all but useless if the landlord was already liable for a breach before he had had the opportunity to use all reasonable endeavours to obtain the necessary rights to carry out the work. I acknowledge that a conclusion that liability arises without notice

does mean that section 11 (3A) has a lesser effect than it might otherwise have had. But it is by no means useless. It is a commonplace that a liability to repair is frequently a continuing liability and many tenants make claims for loss and discomfort sustained over lengthy periods. In the *Niazi* case, for instance the complaint lasted for the best part of three years. In such a case section 11 (3A) would enable the landlord to stop liability from continuing to accrue.

22. Finally on this point, as I noted in giving permission to appeal the judge's decision is supported by the leading textbook on dilapidations, Dowding & Reynolds (5th ed para 20-37), although neither the judge nor we were referred to it. The learned authors give two reasons for their opinion that notice is required even in the case of the extended covenant:

    i) Liability under the extended covenant only applies where the disrepair affects the tenant's enjoyment of the dwelling-house or common parts and in practice the tenant is likely to be the first person to become aware of the existence of defects falling within the landlord's obligation;

    ii) There is nothing in *O'Brien v Robinson* to indicate that the House of Lords thought it was doing anything other than laying down a general rule of general application to section 11.

23. I have already dealt with the first of these reasons. So far as the second reason is concerned, the rule in *O'Brien v Robinson* as explained in *Sun Life* and subsequently applied in *Passley* concerns only defects within the demised property. Conscious as I am of the depth of scholarship and thought in Dowding & Reynolds, I respectfully disagree with the authors' conclusion.

24. Lastly, Mr Swirsky sought to argue that the paving stones were merely uneven, rather than being in a state of disrepair. This was not a point pleaded in the Defence. Nor was it taken before the Deputy District Judge or the Circuit Judge. It was assumed before both judges that the paving stones were in a condition that, in principle, engaged section 11. In my judgment it is too late to take the point for the first time on a second appeal.

25. I would allow the appeal.

Lord Justice Christopher Clarke:

26. I agree.

The Chancellor of the High Court (Sir Terence Etherton):

27. I also agree.