



Neutral Citation Number: [2019] EWCA Civ 226

Case No: B3/2018/0928

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NOTTINGHAM COUNTY COURT
HIS HONOUR JUDGE OWEN QC
C96YM746

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2019

Before:

LADY JUSTICE NICOLA DAVIES DBE
LORD JUSTICE MALES
and
MR JUSTICE MOOR

Between:

ELIZABETH ROGERSON
- and -
BOLSOVER DISTRICT COUNCIL

Appellant

Respondent

Tom Russell and Ben Chapman (instructed by **Hopkins Solicitors LLP**) for the **Appellant**
Angela Rainey and Michael Standing (instructed by **BLM Law LLP**) for the **Respondent**

Hearing date: 6 February 2019

Approved Judgment

Lady Justice Nicola Davies DBE:

1. This is a second appeal following the order of HHJ Owen QC sitting in the County Court at Nottingham on 19 February 2018 allowing the respondent's appeal against the decision of DDJ Haskey who had given judgment for the appellant on 21 September 2017. Permission to appeal has been granted on two grounds, namely:
 - i) Whether a landlord can be liable under section 4 of the Defective Premises Act 1972 ("DPA 1972") by reason of a defect which would have been discovered if the landlord had implemented a system of regular inspection. HHJ Owen held that a landlord had no duty to inspect;
 - ii) If there was a duty to inspect was it satisfied by a purely visual inspection or should the landlord had applied a pressure test, as held by the DDJ? HHJ Owen held that there was no duty beyond inspecting patent defects.

Background facts

2. The appellant was a tenant of a council house owned by the respondent at 49 Gladstone Avenue, Blackwell, Alfreton, Derbyshire ("the property") pursuant to a tenancy agreement dated 15 July 2013. On 7 September 2014, for the first time since she took up occupancy of the property, the appellant was mowing the lawn in the front garden of the property when she stepped backwards with her left foot onto an inspection cover which gave way, as a result of which the appellant's left leg and body fell through the cover into the void beneath. The underground chamber was used for the purpose of water sewage. The inspection cover, underlying equipment and structure were the property of Severn Trent Water Limited. The cover is metallic, it should have been supported by a metal frame which should have been supported by mortar or similar material.
3. As a result of the accident the appellant suffered personal injury, loss and damage. The original judgment sum was £15,082.88. A cross-appeal in respect of the level of damages awarded was not allowed by HHJ Owen.

The hearing before the DDJ

4. The witness statements of the appellant, her partner and father were before the court and each gave evidence. A report from the appellant's expert, Mr Andrew Hill, a chartered civil engineer, was before the court. Mr Hill was not called to give evidence. The only witness called on behalf of the respondent was Andrew Clarke, an operational repairs manager, who had been employed in the role by the respondent for two years. Mr Clarke had no personal knowledge of any inspections carried out at the property. He produced documents relating to an inspection of the property on 9 May 2013 and a "survey" of the property on 18 January 2014.
5. The appellant's account of the accident of 7 November 2014 was accepted by the DDJ. No finding of contributory negligence was made. As to the nature and duration of the defect the DDJ stated:

"16. I do not consider from the evidence that I have seen that the danger that was posed to the claimant and which

materialised was one that has come into being very quickly. An examination of one photograph, which shows the inspection cover coned off by the defendant prior to the repair, shows the inspection cover does not fit well into the ground. It shows a gap in the soil near to the void. This is the best evidence that we have.

17. There is also the evidence of Mr Hill, the chartered engineer. He said that the manhole, the void itself and the cover, would be about 40 to 60 years old, that is (sic) would have been in place for this time. It is clear that it is beginning to corrode away and he says that the most logical explanation of what has happened is that support for the inspection cover provided by the framework around it has deteriorated over a period of time and, as a result, the inspection cover was not able to take the claimant's weight. He said that it is likely that corrosion with rain water in this area of the garden has affected the mortar and, therefore, the stability of the inspection cover and that this is a likely cause for it eventually failing.

18. Mr Hill postulates another potential cause; impact damage. This could be responsible also for the instability of the inspection cover. This, if that is the correct cause, must have predated the claimant coming into the tenancy because there was nothing in the claimant's evidence at all to show that the claimant used heavy machinery upon it or was responsible for any mechanical damage. This was not put to her or alleged by the defendant, that in any way she was the author of her own misfortune. In addition the defendant's evidence was that heavy mechanical mowers were not used at the property by the defendant prior to the grant of the tenancy. This was a pure speculation on Mr Hill's part and I discount it. So, on a balance of probability, the overwhelming likelihood is that the inspection cover and the void beneath had become in an unsafe state for a period of time going well back beyond the January 2014 inspection and, indeed, the May 2013 inspection."

6. Pursuant to Schedule 2 of the tenancy agreement, which sets out the "Council's obligations and rights", the landlord was obliged to maintain the structure and exterior of the property. The DDJ noted that there was no first-hand evidence from anyone on behalf of the respondent who could actually speak to what was seen or done upon inspection or who could describe the state of the property at the time it was demised or at the time of either inspection. Mr Clarke had never seen the property nor inspected it. The DDJ took account of the inadequate nature of the respondent's documentation relating to the May 2013 and January 2014 inspections, the detail, or lack of it, I refer to later in this judgment.
7. The DDJ stated that it was "common ground that it is for the defendant to show that they have complied with their duty of care" pursuant to sections 4(1)-(3) of the DPA 1972. As to that duty the DDJ stated:

“19. It is a duty on the defendant, of course, to take reasonable care only, and how would reasonable care manifest itself? By means of a simple pressure test. All the defendant needed to do to ensure that this inspection cover was safe was to carry out a simple pressure test. Mr Clarke, himself, accepted in his evidence that if Ms Rogerson’s account was accepted as truth, he could see that the inspection cover would have been unsafe, he would have expected a competent inspector to have tested it for safety and he would have expected a simple pressure test to be carried out. That is all that had to be done to take reasonable care for this tenant’s safety and the safety of her family. There was no need to call Severn Trent to remove the cover. There was no need for anything that would place an excessive burden upon the defendant but there is no evidence at all before me that this simple test was ever undertaken.”

8. The DDJ concluded that the facts related to a defect that was not actually known to the landlord but which the landlord ought, in all the circumstances, to have known of. There was nothing to show that the duty of care, namely to carry out a reasonable inspection of the premises, had been done in respect of the state of the garden. The DDJ stated that this was important because within the property’s gardens the two inspection covers were:

“...a clear and obvious safety risk. They are large. Their purpose is well-known. ...it is perfectly plain to anyone that underneath would be a large void to allow utilities access to sewage or water supplies, a large void which if inadequately protected would prove a serious danger to any tenant and, in particular, a significant risk to young children.”

9. The DDJ stated that she would have expected any landlord taking reasonable care to ensure that a proper inspection of inspection covers over voids within the gardens of domestic premises was undertaken given the clear and obvious risks. No sufficient evidence was before the court to show that the respondent had complied with its duty to take such care as was reasonable in all the circumstances to see that the premises were reasonably safe to protect people from personal injury caused by a relevant defect.
10. The DDJ distinguished the case of *Lafferty v Newark and Sherwood District Council* [2016] EWHC 320 (QB) on its facts. Applying the balance of probability test the DDJ held that the respondent was in breach of its duty of care pursuant to section 4 of the DPA 1972.

The judgment of HHJ Owen

11. The judge made the following findings:
 - i) The DDJ erred in finding that section 4 implied a duty to inspect, however it was not material as section 4(1) imposes a broad duty to take such care as is reasonable in all circumstances to see that the appellant was reasonably safe. Since the respondent had undertaken their inspections for their letting purposes

the question remained as to whether they ought to have known of the defect as found by the DDJ by reason of those inspections;

- ii) There was no evidence to show that the mere knowledge of the presence of the inspection cover gave rise to knowledge, actual or constructive, of the deteriorated and unstable underground framework “short of removing the cover to examine or test the underground framework or brickwork the defect was and would remain unknown... the cover and chamber was not the property of the defendant and they had no legal right or responsibility to interfere with it. They clearly had the right to walk over the cover and to undertake a non-intrusive inspection for their own purposes”;
 - iii) At [33] the judge stated:

“... there is no evidence ... to show that the inspection carried out, particularly by Les, was other than reasonable. There was no reason to suppose it was not. There is no evidence to show that the simple pressure test (that is, presumably, the inspector standing or walking over the cover) had not been undertaken or that on either occasion the defect would have been revealed.”
 - iv) The judge noted that counsel on behalf of the respondent had submitted that the garden, in particular the inspection cover, was not within paragraphs 1 and 2(a) of Schedule 2. However, he stated:

“Miss Rainey [for the respondent] conceded, if the visual inspection revealed an apparent defect which might place the tenant at risk of injury there would still be a duty to act reasonably, that is, take such care as was reasonably required to see if the tenant was reasonably safe.”
 - v) As to section 4(2) the words “or otherwise” would include knowledge acquired (or which ought reasonably to have been acquired) as a result of the inspections of the premises in May 2013 or January 2014;
 - vi) The DDJ erred in finding that section 4(1) implied a duty on the part of the respondent to inspect to ensure relevant defects did not develop, however such a misdirection was not material because “it was conceded that had such inspection revealed a patent defect or risk of injury to the tenant the duty to take reasonable care would arise notwithstanding the fact that the cover was not their property or that section 4 did not imply a duty to inspect”;
 - vii) Given the apparent state of the cover “there was no reason to suppose that the cover was a source of danger or defective. There was no evidence before the Deputy District Judge to show that the two inspections undertaken by the defendants were probably conducted without reasonable care or indeed to infer any such inspections as the Deputy District Judge found would have revealed the defect.”
12. By reason of these findings the judge concluded that the appellant had failed to establish a breach of section 4(1) of the DPA 1972.

The relevant law

Section 4 of the Defective Premises Act 1972

13.

“4. 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....”

Case law

Sykes v Harry [2001] EWCA Civ 167

14. The first defendant was the landlord of a property, in the lounge of which was a gas fire. Pursuant to the tenancy agreement the first defendant was responsible for repairs to the building and the gas fire. The claimant/tenant became unconscious in front of the lit gas fire. Inspection revealed defects in the fire and a blockage in the chimney flue which resulted in carbon monoxide being emitted into the room and causing injury. Proceedings were brought alleging breach of the landlord’s duty pursuant to section 4 of the DPA 1972.
15. At [19] to [21] Potter LJ identified the duty of the landlord pursuant to section 4 as follows:

“19. In that respect Mr Brown submits that the judge was in error. He submits that the duty under s.4 of the 1972 Act is a duty of reasonable care in all the circumstances, tied in, and analogous, to the common duty of care and the ordinary law of negligence; it is not to be regarded as dependent upon identical constraints and liabilities to those imposed in the field of contractual liability between landlord and tenant and, in particular, the question whether the landlord has been 'put upon inquiry' of the existence of a defect. He goes on to submit that, judged by the appropriate test, the findings of the judge were sufficient to place the landlord in breach of his duty under s.4(1) to take such care as is reasonable in all the circumstances to see that the claimant (as a person who might reasonably be expected to be affected by a defect in the fire) was reasonably safe from injury caused by such defect.

S.4 OF THE DEFECTIVE PREMISES ACT 1972

20. So far as the ambit and standard of the landlord's duty of care is concerned, I consider that the claimant is correct. I have already referred to the statutory purposes underlying s.4 of the 1972 Act (see paragraph 16 above). The purpose of the 1972 Act was to break away from the historic limitations placed by the common law upon the duty/liability of a landlord to persons injured as a result of defects in the condition of premises owned by him and, in particular, the practical fetter imposed upon the move towards a common duty of care under s.4 of the 1957 Act

which was imposed by a provision in sub-section (4), that the landlord was not deemed to be in default of his duty unless the relevant defect would be actionable at the suit of the tenant. Yet that is the very fetter which the judge's interpretation of s.4 of the 1972 Act would (at least in part) perpetuate.

21. In this connection, sub-section 4(3) of the 1972 Act, when defining a 'relevant defect' for the purposes of sub-section (1), is designed to make clear that a landlord's broad duty of care under sub-section (1) is responsible only for such defects as fall within the scope of those repairing obligations as expressed or implied in the lease. However, because the relevant defect is also defined in terms of the landlord's failure to carry out such obligations, and thus argument might otherwise arise as to whether or not he had notice of the relevant defect, the relevant defect is defined in terms which preclude such argument i.e. as 'an act or omission by the landlord which constitutes or would if he had notice of the defect have constituted a failure by him to carry out his obligation'. Thus, the reference to the obligation between the landlord and tenant is inserted to show that the person to whom the duty is owed under sub-section (1) is not to be regarded as in the same position as a tenant vis-à-vis his landlord suing under the lease. Such a tenant would be obliged under *O'Brien -v- Robinson* to show that the landlord had notice of the defect (i.e. actual notice or notice of facts which put him on enquiry as to the defect), whereas a person suing under the duty owed by the landlord under sub-section (1) is relieved of that obligation. Such a claimant merely has to show a failure on the part of the landlord 'to take such care as is reasonable in all the circumstances' to see that the claimant is reasonably safe from personal injury. Further, that duty is owed if the landlord 'ought in all the circumstances' to have known of the relevant defect, a test which is general in its terms and is emphatically not expressed to be limited by concepts of contractual notice; rather is it expressed in the familiar terms of common law negligence. Finally, (and this is common ground between the parties) there is no express or implied exclusion of the tenant himself from the category of 'persons who might reasonably be expected to be affected', and the obligation to take reasonable care in all the circumstances cannot be excluded or restricted by contract: see s.6(3)."

Clarke v Taff-Ely Borough Council (1983) 10 HLR 44

16. A claim was made pursuant to section 4 DPA 1972 in respect of a 1920s house which was found to have defective flooring which resulted in an accident involving the plaintiff. The expert evidence was to the effect that with the knowledge of: (i) the age of the house; (ii) the type of construction of the floorboards; and (iii) the presence of damp; it was foreseeable that rot in the floorboards was likely to occur. In that event, the floors would be likely to give way without notice. As a result, in reasonably using

the floors a person could suffer personal injury. An inspection of the flooring could be visual or by testing the floor for “give”. Any “give” would indicate at once that something was wrong with the floor, which could be further investigated.

17. The judge found as a fact that there were three occasions or situations in which a proper inspection of the house would take place:
- i) As part of a planned maintenance programme;
 - ii) Where there was a change of tenancy; and
 - iii) Where any complaints were received.

The judge was satisfied that the local authority did know of the type of floor construction in the pre-war houses in their area and of the potential problems. He concluded that the authority would have been aware of its duty under section 4(1) of the DPA 1972. It was simple and reasonable for arrangements to have been made for those in power to inspect the defects and to have done so in any of the identified situations. In failing to make arrangements for such an inspection the local authority failed to take such care as was reasonable in the circumstances. If thought had been given to the problem of the flooring and its foreseeable dangers it would have been possible and reasonable to have arranged a simple scheme whereby each of the houses with this floor construction was inspected.

18. I do not read this authority as supporting the submission that of itself, section 4(1) requires a regular inspection of a property. On the particular facts, the local authority was on notice of the potential problem of the flooring and by reason of that knowledge it was found to have a duty to inspect.

Lafferty v Newark and Sherwood District Council [2016] EWHC 320 (QB)

19. The issue before the court was whether section 4(4) of DPA 1972 created a form of strict liability. Jay J reviewed the relevant authorities and at [21] he referred to the judgment of Laws LJ in *Alker v Collingwood Housing Association* [2007] 1 WLR 2230:

“21. At paragraph 6 of his judgment in *Alker*, Laws LJ said this:

‘It can be seen that the duty under section 4(1) arises if and only if the following conditions are fulfilled:

1. The landlord owes an obligation to the tenant under the tenancy for the maintenance or repair of the premises – section 4(1).
2. The landlord knew or ought to have known of whatever is the "relevant defect" – section 4(2).

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 a "relevant defect". That is defined by section 4(3). I repeat the definition for convenience:

"... a defect in the state of the premises ... 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 - that is a failure by him to carry out his obligation for maintenance or repair"."

20. Jay J found 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 out with its scope and therefore to bring them within the scope of the section as a whole. He found that 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. In that case liability could not arise under subsection (4) because there was no actual or constructive knowledge of the defect to bring it within subsection (2). The trial judge had based this conclusion on his finding that the defect was completely and utterly latent. Jay J arrived at the same conclusion but in so doing considered that what was required was to bring under scrutiny the respondent's system for inspecting the property and whether even an entirely reasonable system would have discovered the presence of this defect.

The submissions of the appellant and the respondent

21. The two grounds of appeal were directed to the statutory effect and interpretation of section 4 of the DPA 1972. The primary issue being: what does section 4(1) require a landlord to do? It is the appellant's case that on the facts of this case the section required a system of inspection by the landlord. The appellant also contended that once her account of the accident had been accepted, an adverse inference could be drawn against the respondent in determining whether or not it had discharged its duty of care pursuant to section 4. The respondent's case was that the relevant case law does not support the appellant's primary submission, however, in this case inspections were carried out. They were reasonable and such defect as existed could not have been reasonably discovered during the course of either inspection. Notwithstanding the focus of the grounds of appeal the respondent sought to dispute factual findings made by the DDJ. It is of note that HHJ Owen did not seek to overturn the DDJ's finding as to the nature or duration of the relevant defect. There being no cross-appeal it is not open to the respondent to attempt to challenge the factual findings.

Discussion

22. The question raised by section 4(1) is: did the landlord take such care as is reasonable in all the circumstances to ensure that all persons who might reasonably be affected by defects in the state of the premises are reasonably safe from personal injury or damage which could be caused by a relevant defect? This is a fact specific question which has to be answered in the context of the circumstances of the individual case.

23. It was accepted by both parties before the DDJ that on the facts of this case section 4(1) of DPA 1972 was engaged. But before the judge and before this court the respondent sought to rely upon the provisions of Schedule 2 of the tenancy agreement to submit that the garden and in particular the inspection cover did not fall within the parameters of the schedule. However, as was noted by HHJ Owen, Ms Rainey had conceded that if the visual inspection revealed an apparent defect which might place the tenant at risk of injury there would still be a duty to act reasonably, that is, to take such care as was reasonably required to see if the tenant was reasonably safe.
24. Schedule 2, 1.2, of the tenancy agreement requires the council to replace and renew as appropriate the structure and exterior of the property. Reflecting this obligation, the inspections carried out on behalf of the respondent in May 2013 and January 2014 included the garden as an identified area which required inspection. Within the front garden was the inspection cover, it is not suggested that it would not have been visible to a person carrying out an inspection. I do not regard the fact that the cover, the void and structure beneath it belonged to the Severn Trent Water Limited as obviating the need for an inspection of the cover by those acting on behalf of the respondent during the course of an inspection of the garden.
25. Does section 4 of the DPA 1972 require a landlord to implement a system of inspection? I do not read any of the authorities cited by the parties as requiring a landlord, without more, as being under a duty to implement a system of regular inspection in order to satisfy the provisions of section 4. In each case it is a question of fact, one aspect of that being the knowledge of the landlord as to any likely or known risks or problems in the property. In this case there had been inspections: one triggered by the commencement of a new tenancy; another by a ten-year stock review. These were occasions when it was reasonable to implement inspections. However, given the facts as they are known to the court, in my view, there is insufficient evidence to provide a sound basis for stating that section 4 required this landlord, without more, to institute a system of regular inspection of the property.
26. As a matter of fact, inspections were carried out. The issues are therefore whether reasonable care was taken in carrying out the inspections and whether the defect which resulted in the appellant's accident was, or should have been, discovered as a result of either inspection.
27. Prior to the commencement of the appellant's tenancy an inspection was carried out in May 2013. In January 2014 a ten-yearly inspection for stocktaking purposes which included a health and safety inspection was performed. The fact of each inspection was before the DDJ. What was not clear from the limited evidence which the respondent elected to call was the nature and extent of either inspection and the level of care which was brought to each. No first-hand evidence from a person or persons who performed either inspection was provided. "Les", who performed the first inspection and signed the inspection document provided in evidence, had retired from his employment with the respondent but was alive at the date of trial. No explanation was given as to why he was not called as a witness to give evidence of his inspection. Such evidence as existed was contained in a pro forma document headed "Property details form" which included a section entitled "Pre-vacation inspection" and within that a section "Clearance required". The garden, outbuilding, house and loft were all ticked as requiring clearance. Further ticks were inserted to indicate that the property had not been left in an acceptable condition, it was unclean and had not been cleared

of belongings. A screenshot of a works order which was said to relate to the property included a work order number, the words “clear garden” and “completed”, no further details were provided.

28. As to the survey/inspection carried out in January 2014 by Michael Dyson Associates on behalf of the respondent, there is an extract from a data sheet. The only relevant entry is “External H&S issues to investigate = none”. In my view this evidence raised more questions than it answered, a fact which did not go unnoticed by the DDJ. Given the paucity of the evidence provided by the respondent it is unsurprising and was reasonable for the DDJ to have made the findings which she did at [12] and [13], namely:

“12. ... There is no first hand defendant evidence before me from anyone who could actually speak to what was seen or done upon inspection, who could describe the state of the property at the time it was demised, at the time of the inspection in May 2013 or in January 2014 or, indeed, at all. Mr Clarke has never seen the property, has never inspected the property and no one who is alleged to have inspected the property has been proffered as a witness, either in writing or in an oral hearing.

13. In a nutshell, there is no sufficient evidence before me to show that the defendant has complied with its duty of care, to take such care as is reasonable in all the circumstances to see that the premises are reasonably safe, to protect people from personal injury caused by a relevant defect, a defect in the premises existing at or after the material time, that being the time of the tenancy, and arising from or continuing because of any acts or omissions by the landlord which constitute or would have constituted a failure by the landlord to carry out their obligations to the tenant for the maintenance or repair of the premises.”

At [15] the DDJ found, and was entitled to find, that there was nothing to show that the duty of care to carry out a reasonable inspection of these premises had been carried out as regards the state of the garden and further identified the fact that the inspection covers represented a clear and obvious safety risk, in particular to young children. This was a house in which the appellant lived with her two young children. In my judgment there was no sound evidential basis to enable HHJ Owen to conclude that each inspection had been carried out with reasonable care as there was no evidence as to how either inspection had in fact been carried out nor what had been inspected within the garden.

29. As to the defect which caused the appellant’s accident, the respondent called no first-hand evidence nor expert evidence to refute the findings of the appellant’s expert, Mr Hill, as to the nature and longstanding presence of the defect around and below the inspection cover. Following the appellant’s accident she notified the respondent of what had occurred but, even then, no inspection was carried out. There was no first-hand evidence, pre or post the accident, to challenge the appellant’s evidence as to the

condition of the cover and the frame nor Mr Hill's opinion as to the nature, extent and duration of the defect.

30. The DDJ having accepted the appellant's evidence as to how the accident occurred, it was then for the court to examine the respondent's evidence as to the steps it had taken to ensure compliance with section 4 of the DPA 1972. This could properly be described as shifting the evidential burden to the respondent. The appellant's submission that the fact of the accident of itself creates an adverse inference which is for the respondent to rebut puts the case too high, I believe the better approach is to state that in such event the evidential burden shifts to the respondent.
31. The purpose of section 4 is to ensure that the landlord is unable to avoid liability to those to whom the duty is owed, to maintain the premises free from any (relevant) defect. On the facts as found by the DDJ and accepted by HHJ Owen, there was a physical defect. On the facts as found by the DDJ a pressure test would have been sufficient to reveal the defect. The test entailed no more than a measure of lateral pressure on the cover itself. It was not a complicated test, it did not entail lifting the cover. Given the defects around and below the cover and the period of time over which Mr Hill said they would have been present, such a test at the time of either inspection would have identified a problem in the stability of the cover caused by the absence of adequate support. In those circumstances it was a defect of which the respondent knew, or ought to have known, had the inspection been properly carried out.
32. In my judgment HHJ Owen erred in finding that, without more, there was no duty on the part of the respondent to inspect to ensure relevant defects do not develop. Such a finding does not reflect the wording of section 4(1) of the DPA 1972, namely the duty is owed if the landlord "ought in all the circumstances to have known of the relevant defect". It negates the purpose and spirit of section 4 which imposes upon a landlord a duty to take reasonable care to ensure that persons who might reasonably be affected by a defect are reasonably safe. To adopt the description of Mr Russell, on behalf of the appellant, such a limitation is "unworkable".
33. For the reasons stated I would allow the appeal. I set aside the order of HHJ Owen dated 19 February 2018 and restore the order of DDJ Haskey dated 27 September 2017 giving judgment for the appellant in the sum of £15,082.88 together with interest.

Lord Justice Males:

34. I agree that this appeal must be allowed. As we are differing from HHJ Owen QC and because it was suggested that this appeal involves a point of principle about a landlord's duty to inspect for defects, I will add some comments of my own.

A landlord's duty to inspect?

35. The landlord's obligation under subsections (1) to (3) of section 4 of the DPA 1972 depends on the landlord being under an obligation to the tenant for the maintenance or repair of the premises. A first step, therefore, is to ascertain the landlord's duties under the tenancy agreement or by imposition of law. The duty is owed to all persons who might reasonably be expected to be affected by defects for which the landlord

has a maintenance or repairing responsibility. This includes the tenant: *Sykes v Harry* [2001] EWCA Civ 167 at [22].

36. The landlord's duty is to take such care as is reasonable in all the circumstances to see that such persons are reasonably safe from personal injury or property damage caused by a "relevant defect". Such a defect is one which exists at or after the "material time" and which arises from or continues because of an act or omission of the landlord which constitutes a failure of his repairing or maintenance obligation or which would have done if he had notice of the defect in question.
37. The duty to take such reasonable care only arises if the landlord knows of the defect or if he ought in all the circumstances to have known of it: see subsection (2). The words "ought in all the circumstances to have known of the relevant defect" are general words and mean what they say. They are not dependent on any concept of contractual notice: *Sykes v Harry* at [19] to [21]. The statute does not refer to any duty on the landlord to inspect the premises, but in a case where the landlord does not have actual knowledge, the question whether he ought to have known of the defect will usually depend upon what steps he ought reasonably to have taken to inspect the premises and whether an inspection which he ought reasonably to have carried out would have revealed the defect in question.
38. What steps a landlord ought to take by way of inspection will depend on all the circumstances. The question is what a competent landlord exercising reasonable care would do. Sometimes a visual inspection will be all that is required, but in other circumstances something more may be needed. There is no rule of law that a visual inspection is all that is necessary. Nor is there any rule that a visual inspection is not enough. What is needed will depend on the nature of the property. The defendant council in *Clarke v Taff Ely Borough Council* did not need to perform a "give" test on the flooring of all its rented properties but only on substandard pre-war properties where the risk of rot was foreseeable.
39. What is required in any particular case is a judgment for the trial judge to make, taking account of all the circumstances, including the extent to which the defect in question was reasonably apparent or (if not apparent) foreseeable, the nature and severity of the risk which it posed, any applicable safety regulations and what an inspection would involve. An appeal court should not interfere with the trial judge's evaluation unless some clear error has been made.
40. Not surprisingly, the cases include examples falling on each side of the line. *Sykes v Harry*, where the landlord failed to service a gas fire for a period of eight years, is an obvious example of a defective system of inspection where the defect should have been discovered and repaired. So too is *Clarke v Taff Ely Borough Council* where the danger of rotten floorboards in the property was foreseeable and the landlord ought reasonably to have carried out a simple test which would not have been unduly demanding of time or resources and would have revealed the dangerous condition. On the other hand, in *Lafferty v Newark & Sherwood District Council* [2016] EWHC 320 (QB), there were no external signs or warnings of the potential hazard caused by the fracture of an underground pipe and no reasonable inspection could have discovered it (see at [6] and [36]). As Jay J rightly said at [36], it was necessary to consider whether a reasonable system of inspection would have discovered the existence of the defect but, on the facts, it would not. Accordingly it could not be said

that the landlord ought in all the circumstances to have known about it and the landlord was not liable.

41. Thus the question whether a landlord is under a duty to inspect (and if so, with what frequency) does not arise in the abstract, but only as bearing on the question whether he ought in all the circumstances to have known of the defect. Although in practice the two stages will be telescoped, the section envisages two enquiries: first, whether the landlord ought reasonably to have discovered the defect; and second, if so, what reasonable care required him to do about it. Usually of course, once the defect is discovered or if it ought to have been discovered, it will be obvious that a repair is necessary.
42. As already indicated, subsections (1) to (3) do not apply unless the landlord owes an obligation to the tenant for maintenance or repair. Subsection (4), however, extends the landlord's duty to a case where the landlord has a right of entry in order to carry out any description of maintenance or repair of the premises. Once the landlord is in a position to exercise that right, he is treated for the purpose of subsections (1) to (3) as if he were under an obligation to carry out the maintenance or repair in respect of which he has a right of entry. However, the landlord's duty in such a case remains a duty to take reasonable care and arises only if the landlord knows of the defect in question or if he ought in all the circumstances to have known of it. As Stephenson LJ explained in *Smith v Bradford Metropolitan Council* (1982) 4 HLR 86 at 91:

“So if the landlord has a contractual right, express or implied, to enter the premises he has let to carry out maintenance or repair of them, he is treated under subsection (4) as if he were under an obligation to the tenant for maintenance and repair of the premises under subsection (1); and so, just like the landlord who is under an obligation to repair, apart from statute, he comes under the duty of care imposed by subsection (1).”
43. *Lafferty v Newark & Sherwood District Council* confirms that the duty arising under subsection (4) is a duty to take reasonable care. Jay J rightly rejected a submission that the subsection imposed a strict liability going beyond the duty of care described in subsection (1). The question whether the landlord ought in all the circumstances to have known about the defect therefore involves exactly the same considerations when the duty arises under subsection (4) as it does when the duty arises under subsection (1).
44. HHJ Owen QC stated at a number of points in his judgment that there was no duty on the respondent to inspect to ensure that relevant defects did not develop (see [30], [35], [47] and [50]). As I have explained, however, the only relevant question is whether the respondent ought in all the circumstances to have known of the defect. The concept of a duty to inspect to ensure that future defects do not develop is not found in the statute. However, I can envisage circumstances where an inspection revealed (or an inspection which ought to have been carried out would have revealed) the existence of a problem which was likely to develop into a relevant defect. In that event, if the defect developed and caused injury, it could be said that the respondent ought in all the circumstances to have known of it. However, it would be better in my view to stick to the language of the section, rather than to speak in terms of a duty to ensure that defects do not develop.

The facts found by the trial judge

45. Deputy District Judge Haskey (“the DDJ”) made a number of important findings as Nicola Davies LJ has explained. First, she accepted the appellant’s account of how the accident occurred [1] and [6]. This appears to have been the main issue at the trial, where the respondent contended that the appellant’s account was false. Next, she found that the framework supporting the cover which had been in place for over 40 years had deteriorated over time due to rainwater affecting the mortar which had as a result become dislodged and disintegrated. This meant that the cover was unstable and not properly supported which was the most likely explanation for the appellant’s accident [17]. Ms Angela Rainey for the respondent submitted that the DDJ was not entitled to reach this conclusion as it involved illegitimate “cherry picking” from the evidence of the appellant’s expert Mr Hill. As I shall explain, I do not agree. The DDJ also found that the poor condition of the framework was of long-standing and had not come into being suddenly. It pre-dated the appellant’s tenancy which began in July 2013 [18].
46. On the basis of these findings the poor condition of the brickwork was there to be discovered when the property was inspected prior to the grant of the appellant’s tenancy in May 2013 and again in January 2014 [12]. The question was whether it should have been.
47. The DDJ expressly rejected a theory advanced by Mr Hill. This was that the cover had been dislodged laterally by mechanical damage, probably as a result of mowing the lawn with a ride-on mower before the commencement of the appellant’s tenancy. Mr Hill indicated that significant force would be required to cause such lateral dislodgement. The significance of this theory was that the displacement would have been apparent on a careful visual inspection. The DDJ found (as Mr Hill had acknowledged in his report) that this theory was pure speculation and discounted it [18].
48. Ms Rainey complains that the DDJ was not entitled to discount this aspect of Mr Hill’s report while accepting other aspects of his evidence. She points out that his report must be read as a whole, and submits that, fairly read, his theory was that the accident was caused by a combination of deterioration of the mortar in the supporting structure and lateral displacement of the cover itself, and that deterioration of the mortar alone would not have led to the cover giving way when the appellant stepped on it. There is some force in this submission, but it must be remembered that Mr Hill himself described his theory as speculation and that he had never seen either the cover or its supporting framework.
49. In these circumstances I consider that the DDJ was entitled to reject Mr Hill’s theory of lateral displacement of the cover. There was positive evidence from the appellant that no work had been done in the garden during her tenancy before the date of the accident using the kind of heavy machinery which would have been required to cause the impact damage to which Mr Hill referred. There was also evidence from the respondent that, even before the appellant’s tenancy, heavy mechanical mowers had not been used at the property. Accordingly Mr Hill’s theory of mechanical damage was inconsistent with the factual evidence which the DDJ accepted. Nevertheless the accident occurred and the DDJ was entitled to accept the appellant’s account of how it had occurred. There had to be a cause for this and disintegration of the underlying

support structure so that the cover was liable to give way was an explanation which in my judgment the DDJ was entitled to accept. This is not a finding with which an appeal court can interfere.

Application of section 4

50. Before dealing with what is in my judgment the real issue in this appeal, which is whether in all the circumstances the respondent ought to have known of the defective condition of the support framework for the cover on the basis of the facts found by the DDJ, it is first necessary to mention an issue whether section 4 of the DPA 1972 has any application in this case. This was not an issue before the DDJ but was raised on appeal.
51. As Nicola Davies LJ has explained, the tenancy agreement obliged the landlord to repair “the structure and exterior of the Property”. Before the DDJ it was common ground that the inspection cover in the back garden and its associated framework formed part of “the structure and exterior of the Property” which the respondent had an obligation to repair so as to give rise to the duty in section 4(1) of the DPA 1972 [11]. The respondent’s case was that it had fulfilled its duty, not that it was under no such duty.
52. On appeal to HHJ Owen, however, the respondent (now represented by Ms Rainey who had not appeared before the DDJ) took a new point which she pursued also before us. This was that the inspection cover and its associated framework did not form part of the structure and exterior of the premises and was not owned by the respondent council but by Severn Trent. This was said to make a critical difference as it would be Severn Trent and not the respondent which was responsible for carrying out any necessary maintenance or repair. Therefore, it was submitted, the respondent had no obligation to maintain or repair the cover so that the duty to take reasonable care in section 4(1) of the DPA 1972 did not arise.
53. HHJ Owen did not accept this submission. I consider that he was right not to do so. If (as was common ground before the DDJ) the cover formed part of “the structure and exterior of the Property”, the respondent had undertaken an express obligation in the tenancy agreement to maintain and repair it. If it needed to call in Severn Trent to undertake any necessary inspection or to carry out any necessary work, that was no concern of the appellant. On the other hand, if the cover was not part of “the structure and exterior of the Property”, the respondent nevertheless had a right of entry to inspect the condition of the property and to carry out any necessary repairs. As Ralph Gibson LJ put it in *McAuley v Bristol City Council* [1992] 1 QB 134 at 151:

“If there should be a defect in the garden which exposed the tenants and lawful visitors to the premises to significant risk of injury, then I think that, to give business efficacy to the agreement, as Somervell LJ put it in *Mint v Good* [1951] 1 KB 517, a right should be implied in the council to carry out repairs for the removal of that risk of injury.”
54. Here there is no need to imply a term. There was an express contractual right given by clause 8.1 of Schedule 1 of the tenancy agreement. Once again, it can make no difference that in practice the respondent council might require the water company to

carry out the work. As between the parties to the tenancy agreement, the respondent was entitled to carry out repairs to the cover and its support. Thus even if the duty contained in section 4(1) did not apply, the same duty of reasonable care arose by reason of section 4(4).

55. I would add that the submission that ownership of the cover by Severn Trent made a critical difference was detached from reality. It was contrary to the evidence of the respondent's own witness, Mr Clarke, the respondent's Operational Repairs Manager. He accepted that it would be for the respondent to inspect the cover to ensure that it was safe, albeit that there was an issue as to what such an inspection should involve. It was never his evidence that the respondent need have nothing to do with the safety of the cover.
56. Although in the end there is nothing in the respondent's new point that it was under no section 4 duty because of Severn Trent's ownership of the cover, I would not have permitted the respondent to resile from the concession made before the DDJ. When a relatively modest personal injury claim in the fast track is conducted on an agreed basis before the DDJ, there would need to be a good reason for allowing an entirely new case to be advanced on appeal.

Ought the respondent to have known about the defect?

57. On the DDJ's findings of fact, the defective condition of the framework supporting the inspection cover was a "relevant defect" which existed when the tenancy agreement was entered into and at all times thereafter. It was not disputed that this was a defect which, if the respondent had known about it, it ought to have repaired, either by doing the work itself or by requiring Severn Trent to do so.
58. The real issue in the case was whether the defect was one which the respondent "ought in all the circumstances to have known" about. Here too the DDJ made some important findings. First, she found that the cover represented "a clear and obvious safety risk" to any tenant and, in particular, to young children [15]. Next she found that reasonable care required a proper system of inspection by the landlord [15]:

"I would have expected any landlord taking reasonable care to ensure that a proper system of inspection covers over voids within the gardens of domestic premises was undertaken, given the clear and obvious risks."

59. These findings could not be and were not challenged on appeal.
60. Finally the DDJ found that, in order to discover the defective condition of the framework underneath the cover, all that was required was what she described as a "simple pressure test" [19]. Although she did not spell it out, it appears that what she had in mind by "a simple pressure test" was simply the cautious application of moderate lateral force to the cover to ensure that it was not dislodged and did not move when stepped on.
61. This last finding led to some confusion before HHJ Owen because the relevant evidence was inaudible and therefore did not appear on the transcript of the cross examination of Mr Clarke. However, Ms Rainey accepted before us that Mr Clarke's

evidence, in summary, was that he would not have expected an inspection to include lifting of the cover to look underneath, but that he would expect the cover to be tested for safety and this could be done by means of a pressure test. It is apparent that this was the evidence to which the DDJ was referring when she said at [19] that Mr Clarke “would have expected a simple pressure test to be carried out”. There was therefore a valid basis in the evidence for the DDJ’s finding.

62. Although the DDJ said that there was no evidence that such a test had been done, it follows from her findings that such a test had not been done or at any rate not properly done, either in May 2013 or January 2014. While there was no first-hand evidence one way or the other, her findings necessarily mean that no such pressure test was carried out. If the framework was (as she found) already damaged and if a simple test would have revealed that condition (as she also found), the fact that the condition was not discovered must mean that the test was not carried out. In response Ms Rainey could only submit that Mr Clarke had said in evidence that the individuals who had undertaken the inspection were competent, but that point goes nowhere.
63. Accordingly there was evidence before the DDJ which entitled her to make the findings which she made. These findings were sufficient to demonstrate that the respondent ought in all the circumstances to have known of the relevant defect and to establish a breach by the respondent of its duty to take reasonable care under section 4 of the 1972 Act.

HHJ Owen’s approach

64. HHJ Owen reached a different conclusion. His essential reasoning as I read it was that the deterioration in the framework for the cover was not visible without removing the cover [5] and that a competent inspection would not have required anything more than a visual inspection; in particular removal of the cover was unnecessary [18]. Accordingly it could not be said that the respondent ought to have known of the relevant defect [32].
65. HHJ Owen appears to have understood this to have been what Mr Clarke had said in evidence and what the DDJ had found [17] and [18]. He summarised this understanding at [18]:

“18. [Mr Clarke] disagreed with the suggestion that the cover should physically be removed (transcript, page 54). The Deputy District Judge accepted that evidence and found it to be unnecessary for an inspection to include removal of the cover (judgment, paragraph 19). Provided that the cover, on simple visual inspection, appeared to be sound it was not necessary to go further.”
66. This was in my judgment a misunderstanding of the DDJ’s reasoning at [19]. Her reasoning was not that a visual inspection was sufficient. Rather she found that it was unnecessary to remove the cover as a simple pressure test was all that was required to test the safety and stability of the cover.
67. The misunderstanding may have arisen because HHJ Owen thought that there was no reference in the evidence to any need for a pressure test. He said at [20] that this

finding “is not in fact supported or made good by the evidence and transcript”. It is unfortunate that the relevant part of the transcript was inaudible but it is clear that there was evidence to support the DDJ’s conclusion on this point. In fairness to HHJ Owen, he was encouraged in his understanding by Ms Rainey, but on further reflection she now accepts that this was mistaken.

68. HHJ Owen also said that there was no reason to suppose that the inspections actually carried out in May 2013 and January 2014 did not include a pressure test. He described this as being “the difficulty with the Deputy District Judge’s approach” [33] and added that the DDJ had not found that such a test would have revealed the defect [50]. As already explained, however, the fact that the defect was not revealed when (on the DDJ’s findings) it was there to be discovered demonstrates that no such pressure test was carried out.
69. Finally, HHJ Owen said that there was no duty on the respondent to inspect to ensure that relevant defects did not develop (see [30], [35], [47] and [50]). As explained above, however, the only relevant question is whether the respondent ought in all the circumstances to have known of the relevant defect. In this case, the DDJ’s findings meant that there was a clear and obvious danger, that a reasonable landlord would have ensured a system of proper inspection, that this would have involved a pressure test, and that such a test would have revealed the defect which was of long standing. It would not on the facts found have been merely a potential defect which might develop, but an existing defect, namely the deterioration in the support structure for the inspection cover.
70. For these reasons, as well as those set out by Nicola Davies LJ, I conclude that there was no valid basis for HHJ Owen to interfere with the DDJ’s findings of fact or the conclusion from them which she reached. I would therefore allow the appeal and restore the order of the DDJ.

Mr Justice Moor:

71. I agree that the appeal should be allowed for the reasons given in both judgments and have nothing to add.