THE HIGH COURT

[2015 No. 105 C.A.]

BETWEEN

TAMMY HUMPHREY

PLAINTIFF

AND

DUBLIN CITY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 17th day of April, 2018

1. This is an appeal by the Defendant against the order of the Circuit Court (His Honour Judge Comerford) made on the 30th March, 2017. The plaintiff lives at 302 Dolphin House, Rialto in Dublin. The defendant ("the Council") is the owner of this property, a one bedroomed flat which is let to the plaintiff pursuant to the Council's statutory obligations under the Housing Act, 1966.

2. The plaintiff's home is part of a flat complex that dates from the 1950s. She lives there with her young son and daughter. The plaintiff went into occupation of the flat in 2008 on foot of a standard form tenancy agreement with the Council.

3. The plaintiff's claim as pleaded in her civil bill herein is that the premises are unfit for human habitation by virtue of a number of matters identified in the endorsement of claim. It is alleged that one of the two store rooms in the flat have been subject to dampness and mould growth on the ceiling and the walls are damp. She complains that by virtue of the atmosphere in the flat, mould has grown on pillowcases and other items of clothing in the wardrobe. These issues are said to arise primarily from inadequate ventilation and poor insulation in the flat. In the civil bill the plaintiff claims damages and orders compelling the Council to carry out works to render the flat habitable.

4. The defendant's defence is a full traverse of the plaintiff's claim and essentially the defendant alleges that any mould or damp in the storeroom known as store 1 has been remedied by the introduction of a vent to the exterior and in any event, the problem was originally caused or contributed to by the plaintiff having a tumble dryer in the room. There is also a counterclaim for arrears of rent which have now accrued in the amount of €19,679.

5. In her evidence, the plaintiff complained that certain parts of the apartment are subject to dampness and mould growth and she has repeatedly redecorated the affected areas without success. Her evidence was that the clothing stored in the apartment was affected and smells musty as does the bed linen. She said that mould grew on various things in the apartment including her children's toys. She claimed that the condition of the apartment was an embarrassment and consequently she was reluctant to have guests visit. I accept the plaintiff's evidence on these issues.

6. With regard to the question of the tumble dryer, the plaintiff suggested that it was not the cause of the dampness in store 1 because it was broken either when or shortly after she got it and it was used very little.

7. It is fair to say that the plaintiff had a number of other complaints about the apartment which included matters such as smells from the drains and poor drainage from the bath and sinks.

8. The windows in the apartment, of which there are three to the front and two to the rear, appear to have been replaced at some time probably in the late 1980s or early 1990s and the windows that were installed have what are known as trickle vents at the top. This is a form of ventilation which can be opened and closed and about which there was much controversy during the course of the trial.

9. Although the plaintiff as I have said complained about a lot of issues including smells, I am satisfied that these complaints were never made to any of the defendant's staff or experts or indeed the two consulting engineers retained on her behalf, one of whom has since died. There is no complaint in the pleadings about any of these matters and I am therefore of the view that they do not fall for consideration in this appeal.

10. The plaintiff's consulting engineer, Mr. Semple, gave evidence before the Circuit Court and again before me. He visited the premises on two occasions on the 10th February, 2016 and the 30th November, 2016, although his report in respect of the latter visit was not compiled until the 5th March, 2018, after the Circuit Court hearing.

11. On both of his visits, Mr. Semple carried out moisture readings of the relevant surfaces in the flat. He used a device called a Protimeter. It is common case that readings of up to 17% represent a dry surface, between 17% and 20% are "at risk" and 20% and higher represent a "wet" reading, a level at which timber will start to rot. On his first visit, Mr. Semple recorded a reading of 40% in the external wall of store 1 and of 23% in the area around the downpipe in the bathroom ceiling. Both of these readings are thus within the wet category.

12. On his second visit, Mr. Semple took the same external wall in store 1 and found an 80% moisture reading together with a reading of 25% in the rear right hand corner of the right hand wall and 23% at the back wall. The same area of the bathroom which had previously been wet was measured again this time showing 15% suggesting it was dry. Mr. Semple also carried out a reading in the toilet at the ceiling in the top left hand corner where there is evidence of moisture damage and recorded a reading of 45%. All of these readings are above acceptable limits. Of note, Mr. Semple did not carry out any measurement of the relative humidity readings in the flat during his visits.

13. The Council's consulting litigation engineer, Mr. O'Keeffe, visited the property on one occasion only on the 11th October, 2017 at about 10 am for a period of approximately one hour. On that occasion, Mr. O'Keeffe recorded the external ambient temperature as being 15.5 degrees centigrade, suggesting it was a particularly mild October morning. Furthermore, when Mr. O'Keeffe visited, four out of the five windows in the flat were open. It should be noted that Mr. O'Keeffe did not give evidence in the Circuit Court and first saw the property over six months later.

14. Mr. O'Keeffe carried out a broadly similar exercise to Mr. Semple in terms of taking moisture readings but his results were radically

different. In the store 1 external wall, Mr. O'Keeffe measured the moisture level at 13.8% whereas it had been 40% and 80% respectively when measured by Mr. Semple. On Mr. O'Keeffe's measurement therefore, this wall was dry.

15. In the bathroom ceiling around the downpipe where Mr. Semple had found a moisture reading of 23%, Mr. O'Keeffe found it to be 11.3%.

16. Of note in relation to Mr. O'Keeffe's inspection, he did measure the relative humidity in the sitting room of the flat which he found to be over 63%.

17. Mr. Brian Curran, senior executive engineer with the Council, also gave evidence of having received a complaint from the plaintiff in April, 2012 about the matters above described. Her primary complaint was of dampness. He inspected the flat on the 27th April, 2012. He found the moisture level in store 1 to be less than 14% but whether he measured in precisely the same area as Mr. Semple and Mr. O'Keeffe is not entirely clear. Also of relevance, he noted that the humidity level in the flat was measured at 65%. He carried out a second visit on the 12th June, 2013 in response to a complaint from the plaintiff's solicitor. He said that the plaintiff's complaint was confined to store 1 as in June 2013 there was a tumble dryer present in store 1.

18. When asked if the Council had inspected the flat prior to the plaintiff's tenancy commencing, Mr. Curran was unable to say if such inspection had taken place but if it had, there was certainly no record of it. There is accordingly no evidence before the court that any inspection was carried out by the Council of the condition of the flat before it was let to the plaintiff.

19. There was much discussion between the experts about the trickle vents in the flat's windows. Mr. Semple was adamant that they were not in compliance with the building regulations and were inadequate for the purposes of properly ventilating the flat. Mr. O'Keeffe disagreed with this proposition and suggested that Mr. Semple's method of measurement was incorrect. Furthermore he said that the Building Regulations had in fact no application to a property that was constructed in the 1950s as they did not come into effect until the 1990s.

20. Mr. Semple's conclusion was that the flat was not fit for purpose and he identified the purpose as being to enable the plaintiff and her family to live there. He said that in his view, the apartment was not fit for human habitation. Mr. O'Keeffe strongly disagreed with that proposition and said there was nothing evident on his inspection which could support such a conclusion. There was also considerable debate about whether the plaintiff kept the vents open at the relevant times or whether she caused or contributed to the problem by doing so. It was suggested that on one inspection by the defendants, three of the five vents were closed.

21. In relation to the counterclaim, there was no dispute about the amount claimed and the plaintiff suggested that she had stopped paying the rent some time ago by virtue of the condition of the apartment.

22. As I have already indicated, I accept the plaintiff's evidence that there is dampness and excessive moisture in at least some parts of the apartment. This can be seen clearly from the photographs put in evidence not just in store 1 but there is obvious condensation on the internal surfaces of the windows in some of the photographs. Of importance in relation to the humidity level, Mr. O'Keeffe said in evidence that a humidity level of higher than 70% will cause mildew over time. He said that he would expect to find a humidity level of about 50% in a normal modern dwelling.

23. I do not think for the purposes of deciding this case it is necessary for me to reach a definitive conclusion as to the competing opinions of the respective party's experts. Although nobody was able to explain the discrepancies in the moisture readings between Mr. Semple and Mr. O'Keeffe, it has to be borne in mind that those readings were taken under different conditions. I think it is of importance that Mr. O'Keeffe's readings were taken on a very mild autumn day when all the windows bar one in the flat were open. Mr. Semple's readings on the other hand appeared to have been taken at either end of the winter season when it seems likely that the weather was significantly colder.

24. I have therefore come to the conclusion that taken as a whole, the evidence in this case establishes that, by modern standards at any rate, there is inadequate ventilation in this flat. Although it has to some extent been ameliorated in store 1 by the installation of the vent, nonetheless it remains a problem both from the point of view of decoration and also the presence of mould and mildew on clothing and other items in the flat. I think this conclusion is also supported by the fact that both Mr. Curran and Mr. O'Keeffe found humidity levels in the flat which were significantly elevated above the level that might reasonably be expected of a modern residence. The ambient humidity was quite proximate to the mildew level even on the day Mr. O'Keeffe inspected which as I say was very mild and when almost all the windows were open. It is easy to see therefore how the level could exceed 70% on a regular basis at colder times of the year giving rise to the problem experienced by the plaintiff.

25. There is no dispute between the parties as to the applicable law. The leading case is *Siney v. Dublin Corporation* [1980] I.R. 400. In that case, the Supreme Court held that where the Council's predecessor, Dublin Corporation entered into a letting agreement with a tenant pursuant to its powers under the Housing Act, 1966, there was an implied term in such agreement that the flat was fit for human habitation at the date of the letting as a matter of contract. Furthermore, the court held that the Council owed a duty to its tenant to take reasonable care to ensure that the flat was fit for human habitation at the date of the letting. In the later case of *Burke v. Dublin Corporation* [1991] 1 I.R. 341, the Supreme Court held that this duty was one which applied not just at the commencement of the letting but throughout its duration.

26. In his judgment in *Siney*, O'Higgins C.J. explained the background of the 1966 Act (at p. 410):

> "Generally, it may be said that under the Act of 1966 the defendant corporation, as a housing authority, was charged with the task, in respect of its own functional area, of ending overcrowding and of eliminating substandard and unsuitable housing for poor people. The defendants were also empowered, and obliged, to let such housing accommodation as they were able to provide, on a priority basis, to people released from these conditions. In short, the aim of the Act of 1966 was to bring into existence decent housing which, in each functional area, would be introduced by the housing authority and the standards of which would be maintained by that authority… it was a letting made by the defendant corporation of a dwelling provided under its building programme and let by it in accordance with its scheme of priority for, *inter alia*, the ending of overcrowding and the elimination of houses unfit in any respect for human habitation. Under these circumstances, can it be said that such a letting carried no implication that the accommodation thereby provided for a necessitous family would be fit for habitation by them? It seems to me that to not imply such a condition or warranty would be to assume that the defendant corporation was entitled to disregard, and was disregarding, the responsibilities cast upon it by the very Act which authorised the building and letting of the accommodation in question."

27. The court also noted that in considering whether a house was unfit for human habitation pursuant to s.66 of the Act, the

Corporation was required to have regard to the matters set out in the Second Schedule to the Act which lists 12 different items. Two of these, items 4 and 9, relate to resistance to moisture, and air space and ventilation respectively.

28. One of the issues that arose in the *Siney* case was whether damages could be awarded for what was termed 'interference with the ordinary comfort and convenience' of the plaintiff and his family even in the absence of any particular loss or damage having been proved. The same issue arises in this case. In that regard, O'Higgins C.J. said (at p.415):

> "With regard to what was termed 'interference with the ordinary comfort and convenience' of the plaintiff and his family, the Circuit Court judge measured damages at £150. It was objected on behalf of the defendants that this sum in respect of inconvenience was not recoverable and that the damages should be confined to what was described as physical or material damage. I think that this is too sweeping a submission. It is true that damages arising from a breach of contract may not be recovered for annoyance, or loss of temper or vexation or disappointment. However, damages may be recovered for physical inconvenience and discomfort: see *McGregor on Damages*, (14th ed. p. 61). It seems to me that it is this kind of discomfort and inconvenience which the Circuit Court judge had in mind in his findings as to damages at paragraph 5 of the Case Stated."

29. Henchy J. delivering a concurring judgment came to the same conclusion holding that there was a warranty in the tenancy agreement that the flat should be suitable and fit to dwell in.

30. In *Burke* the Supreme Court again approved and applied Siney. On the issue of the continuing obligation of the Council regarding fitness for habitation of the flat, Finlay C.J. said (at p. 355-356):

> "The question obviously arises in this case as to whether in the case of a dwelling having been provided for a tenant under the Act of 1966 without negligence, which is in fact unfit for human habitation, there is a continuing obligation on the housing authority if the fact of unfitness is established to it or it ought to have discovered it, to render it fit.

In my view there is…it is not a single or once off duty imposed upon the authority at the commencement of a letting, but is one which, in my view, must as a matter of law be taken to continue during the course of the letting."

31. There is no precise definition of fitness for human habitation to be found either in the 1966 Act or indeed the decided cases. Although the Second Schedule to the Act enumerates some of the matters which a housing authority must have regard to in considering whether a house is unfit for human habitation, in *Burke* the Supreme Court held that a construction of s.66(2) of the Act which would require evidence of a breach of the implied warranty to come precisely within the twelve matters contained in the second schedule would be two narrow because it would prevent a housing authority from looking at any other matter. What was relevant was not the opinion of the housing authority but the absolute question of whether the house was fit for human habitation.

32. As it happens in the present case, the plaintiff's complaints are in fact four square within the terms of the Second Schedule which explicitly refers to moisture and ventilation. The judgment of Blayney J. in the High Court in *Burke* [1990] 1 I.R. 18, is instructive in that the court expressly considered the definition of fitness for human habitation. Blayney J. noted (at p.26):

> "…what is in issue in the present case is not the opinion of a housing authority as to whether the third plaintiff's house is or is not reasonably fit for human habitation. The court is required to form its own view on this question. Accordingly, the manner in which a housing authority might be required by the Act of 1966 to approach the question is not really relevant. It may be of some assistance as a guide but in my opinion it clearly has no binding force. The court is free to have regard to it or not. For this reason also it seems to me that the matters set out in the second schedule to the Act are not of great assistance.
>
> Neither side referred me to any authority in which the phrase 'unfit for human habitation' was defined and there would not appear to be any."

33. Clearly therefore the court is at large to reach its own conclusion on whether or not a particular dwelling is fit for human habitation. In the present case, counsel for the defendant suggested that this case fell far short of the conditions arising in both the *Siney* and *Burke* cases. That is certainly true. However each case turns on its own facts and also on contemporary standards as of the relevant date. What was acceptable as being fit for human habitation in 1950 when these flats were constructed may well be viewed differently today. Similarly what was fit for human habitation when Mr. Siney went into occupation of his flat in 1973 may not necessarily be the same now in the almost half century that has since intervened.

34. I do not think the question can be judged by reference to whether or not the flat in issue is in a dilapidated condition or not. Indeed Mr. Siney's flat was brand new. One could have a new dwelling rendered unfit for human habitation because the water or electricity is cut off or the front door is missing. These may be relatively trivial matters capable of being easily remedied but nonetheless ones which render the dwelling in question unfit for habitation. This is not to suggest that a housing authority has a duty to provide accommodation that is state of the art.

35. I have come to the conclusion in the present case that the plaintiff's flat has since the time of her occupation suffered from a significant ventilation problem which gives rise to the difficulties explained by the plaintiff and which should not be present in a reasonably comfortable dwelling of the kind that I am satisfied the defendant is obliged to provide in accordance with its statutory and common law duties. That is not necessarily to say that the problems experienced by the plaintiff are severe or could not relatively easily be remedied.

36. Nonetheless it seems to me that to expect a young woman with two small children to reside in a dwelling which is subject to unacceptable levels of dampness and consequent mildew and mould growth is, in the early part of the 21st century, unacceptable. In my view therefore, the defendant is in breach of the implied covenant in the tenancy agreement that the premises be fit for human habitation.

37. Though the Circuit Court made quite an elaborate order with regard to carrying out of works by the defendant, no evidence has been adduced before me which would enable me to reach any conclusion on the issue of what works may or may not be required to eliminate the problems in this flat. Neither expert gave any real evidence about this and accordingly I am not in a position to come to any determination in that regard.

38. I am however satisfied that the plaintiff is entitled to damages for having to endure the conditions described now for a decade. I propose assessing the plaintiff's damages in that regard in the sum of €25,000.

39. The defendant is clearly entitled to succeed on its counterclaim to the extent of the arrears already indicated and in the circumstances of the case, I propose to set those off against the damages to which the plaintiff is entitled so that there will be a net decree in favour of the plaintiff in the amount of €5,321.