

# Practitioner Page

## Residential Disrepair: Where does the Structure Stop?

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☞ Disrepair; Landlords' duties; Repair covenants; Residential tenancies; Walls

### Introduction

The Court of Appeal case of *Quick v Taff Ely BC* [1986] Q.B. 809 established that, for the purposes of s.11 of the Landlord and Tenant Act 1985, “disrepair” is a physical deterioration to the structure or exterior of a dwelling. The issue of whether plasterwork is a part of the structure of a property under s.11 of the 1985 Act had mainly been avoided by the appellate courts and the little case law that had touched upon the subject was contradictory. In *Grand v Gill* [2011] EWCA Civ 554; [2011] 1 W.L.R. 2253, however, the Court of Appeal finally decided, in unequivocal terms, that internal plasterwork is part of the structure of premises:

“... I would hold, as a general proposition, that plaster forming part of or applied to walls and ceilings is part of the structure of the relevant premises.”(per Lloyd L.J., at [34]).

### The statutory obligation

Section 11 of the 1985 Act deals with repairing obligations in residential leases:

- “(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; and
- (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.”

These obligations cover short leases of seven years or less and cannot be excluded by contract. They do not extend to other parts of the building in which the landlord does not have an interest, for example, the long leases of other flats in a block. The obligation to keep the remainder of the building in repair only applies once any disrepair begins affecting the tenant's enjoyment of their own premises or the common parts.

## The structure/plasterwork issue

The question whether plasterwork in premises forms part of the structure had been posed in a number of cases, but had not been resolved. In *Quick*, the landlord council conceded that the plaster was part of the structure, (see [1986] Q.B. 809, at 820B and 822G). Similarly, in *Staves v Leeds City Council* (1991) 23 H.L.R. 107: see, [110], per Ewbank J., and [112], per Lloyd L.J. The question was again touched upon in the Court of Appeal in the case of *Niazi Services Ltd v Van der Loo* [2004] 1 W.L.R. 1254, but was not decided and the following authorities would routinely be relied on by landlords contending that plasterwork was *not* covered by s.11: *Southwark LBC v McIntosh* [2002] 1 E.G.L.R. 25 (ChD) and *Irvine v Moran* [1991] 1 E.G.L.R. 261 (QBD).

The significance of the *Quick* decision was that it defined disrepair in residential properties with the Court of Appeal holding that "disrepair" is a physical deterioration to the structure or exterior of a property. That definition excludes defects in the original build. So, an ill-fitting window frame would not be in disrepair if it had originally been installed in that condition, but would be in disrepair if the frame had shrunk and warped over time. On the facts, the Court also found that there was no expectation on the landlord to take responsibility for disrepair caused by condensation, save where an express clause was included in the tenancy agreement to that effect.

The case of *Irvine*, however, went further in finding that plaster was not part of the structure and, hence, that the landlord would not be responsible for disrepair connected to plaster damage regardless of cause. The case was concerned with s.32 of the Housing Act 1961 which, for present purposes, is identical to the provisions contained in s.11 of the 1985 Act. Mr Recorder Thayne Forbes QC first dealt with what was the structure of the property:

"I have come to the view that the structure of the dwelling-house consists of those elements of the overall dwelling house which give it its essential appearance, stability and shape. The expression does not extend to the many and various ways in which the dwelling-house will be fitted out, equipped, decorated and generally made to be habitable. I am not persuaded by Mr Brock [counsel for the landlord] that one should limit the expression 'the structure of the dwelling-house' to those aspects of the dwelling-house which are load bearing in the sense that that sort of expression is used by professional consulting engineers and the like; *but what I do feel is, as regards the words 'structure of the dwelling-house', that in order to be part of the structure of the dwelling-house a particular element must be a material or significant element in the overall construction.* To some extent, in every case there will be a degree of fact to be gone into to decide whether or not something is or is not part of the structure of the dwelling-house. It is not easy to think of an overall explanation of the meaning of those words which will be applicable in every case and I deliberately decline to attempt such a definition. *I am content for the purposes of this case to say that I accept Mr Brock's submission that 'structure of the dwelling-house' has a more limited meaning than the overall building itself and that it is addressed to those essential elements of the dwelling-house which are material to its overall construction.*" [Emphasis added].

Applying this definition, the Recorder went on to find that internal plasterwork did not form an essential and material element making up the structure of the dwelling:

“As I have said, section 32(1)(a) and the words ‘structure of the dwelling-house’ mean something less than the dwelling-house overall and limited to the essential material elements that go to make up the structure of the dwelling-house. It seems to me that internal wall plaster is more in the nature of a decorative finish and is not part of the essential material elements which go to make up the structure of the dwelling-house. I, therefore, hold that internal wall plaster and, for the same reasons, the door furniture do not form part of the structure of the dwelling-house, bearing in mind I have held that those words mean something less than the overall construction.”

The definition of “structure” was approved in *Marlborough Park Services Ltd v Rowe* [2006] EWCA Civ 436; [2006] H.L.R. 30, but not whether that definition excluded plasterwork. In 2002, the court in *McIntosh*, confirmed this interpretation finding that the landlord would not be ordinarily liable for disrepair caused by damp unless it could be shown that the cause of damp was some physical damage to the structure and the exterior of the property or that the damp was, in itself, the cause of damage to the structure or the exterior of the property. The case of *McIntosh* concerned a flat which had suffered from constant damp for over five years with no remedial action taken by the landlord. The defendant’s surveyor found that the damp had been caused by condensation. The trial judge found in the tenant’s favour awarding damages, distinguishing *Quick* and noting that:

“... the real vice of the situation in this case is that for five years or so the local authority, despite vociferous complaints on the part of the claimant, made no real attempt to find the cause of or to remedy the dampness which, without any doubt whatsoever, afflicted the premises in which she lived.”

However, on appeal, the damages award was overturned since there was no causal connection pleaded between the serious dampness and any disrepair to the structure or exterior of the house. Consequently, the tenant had failed to establish that the landlord was responsible for the damp inside the property. The restrictive application of the structure of a dwelling-house advanced in *Irvine* was holding sway.

At about the same time that *Irvine* was decided, a more sensible interpretation had been taken by Mr Assistant Recorder Stephen Sedley QC (as he then was) in the County Court decision of *Hussein v Mehlman* (1992) 2 E.G.L.R. 87. He found that plasterwork did form part of the structure of the property. The tenant had been granted a three-year assured shorthold tenancy of a property that suffered from a number of defects in relation to heating, leaks and damaged plaster to the ceiling in one of the bedrooms and a common area, unusable outdoor toilet, ill-fitting doors and windows and burst pipes. The tenant terminated the contract and argued a repudiatory breach by the landlord by failing to comply with the implied condition of keeping the property in repair. The Assistant Recorder, when considering the “status” of the internal plasterwork said (at [34]–[35]):

“It remains the defendant’s contention, however, that the ceiling of the bedroom was not part of the structure within the meaning of section 11(1)(a) [of the 1985 Act]. Mr Russen [counsel for the Defendant] has, wisely, taken his stand on this proposition without seeking actively to defend it. In my judgment it is untenable.

The object of section 11(1)(a) is to place upon the lessor the obligation to maintain the fabric of the building in a safe and habitable condition. A house - at least a 1930s London suburban semi-detached house - without plaster on its ceiling is not a complete house and is certainly not safe or habitable. In *Staves v Leeds City Council*, Ewbank J recorded: 'It has been conceded in this case, as in earlier cases, that the internal plasterwork is part of the structure of the house.'

The Assistant Recorder also considered the earlier House of Lords' case of *O'Brien v Robinson* [1973] A.C. 912 noting that, while the case was primarily concerned with the issue of notice to the landlord, in relation to a bedroom ceiling collapse — "there appears to have been no dispute at any stage, and no point taken by their Lordships, as to the ceiling's being part of the structure of the house and so within the covenant", thereby supporting his own findings that plaster was part of the structure and thus within the realm of the landlord's repairing obligations. The decision of *Hussein* and, more importantly, the Assistant Recorder's interpretation of the earlier cases does not seem to have been advanced in *Grand v Gill*. Fortunately, the Court of Appeal still reached the right decision.

## Grand v Gill

The tenant, Ms Grand, appealed against an award of £5,600 general damages. She was the assured shorthold tenant of the property, a two-bedroom flat, and she lived there with her daughter. A 12-month AST began in November 2004. The rent was £850 per month (£10,200 per annum). The main issue with the flat was damp and mould throughout the flat. The damp became so bad in the second bedroom that the daughter had to move into the living room. There was water ingress through the ceiling from a leaking roof above the flat and from defective guttering. However, the roof was outside the demise and the responsibility for the repair of the roof and gutter was found to lie with the head landlord. In addition to inadequate heating, an expert had found defective plaster in two areas, to the external wall of the living room and the kitchen ceiling, both caused by the water penetration. At trial, Ms Grand was awarded £350 damages for breach of quiet enjoyment. The trial judge found that the damp and mould was principally an issue of condensation, which was a consequence of a design fault and for which, following *Quick*, Mr Gill was not liable. The condensation could be wiped off with a cloth and it did not cause the plasterwork underneath to be damp or mouldy. However, the trial judge also held the heating problems had contributed to the damp and mould by increasing the incidence of cold surfaces leading to condensation. Full liability for the damp and mould would have resulted in £2000pa (20 per cent rental discount), but was assessed as a 10 per cent exacerbation caused by the lack of heating and air-tight windows, so £600 was awarded for the three years of the claim. The expert indicated that there were areas of defective plaster that needed to be replaced but no specific performance was ordered—the judgment was silent on liability and damages for this defective plaster.

Ms Grand appealed contending, amongst other things, that the decision in *Irvine* was wrong and that, whilst Mr Recorder Thayne Forbes's conclusion that internal plasterwork did not give the house stability was not entirely wrong, it was nonetheless artificial to regard internal plasterwork as purely decorative. Ms Grand argued that Mr Gill was liable for the defective plasterwork requiring replacement and that, although these had been caused by the roof leaks, for which Mr Gill was not liable, the defective plaster itself was a lack of repair under s.11 of the

1985 Act. The discount of 90 per cent ignored Mr Gill's 100 per cent liability for the defective plaster. This would require plaster to form part of the "structure" under s.11 of the 1985 Act. Rimer L.J. put the matter in this way (at [17]–[18]):

"*Quick's* case shows, as the judge recognised, that liability under repairing covenants such as Mr Gill's for conditions caused by condensation resulting from a design defect does not arise unless they result in physical damage covered by the landlord's covenant, when the repairing obligation will apply. In this case, however, the judge found (or ought to have found) that there was physical damage, resulting in disrepair, to what is said to have been part of the structure of the property, namely the plasterwork in the living room (front wall and ceiling) and in the kitchen (ceiling).

In my judgment, assuming that the plasterwork damage identified by Mr Lovatt is correctly characterised as damage to the 'structure' of the flat, it was damage for which Mr Gill was responsible under his repairing obligations under both the tenancy agreement and the provisions in section 11(1) of the Landlord and Tenant Act 1985 (see, *Quick v. Taff Ely BC* [1986] Q.B. 809, per Dillon L.J., at 818E). A key question, however, which Mr de Waal very properly raised with us, is whether such plasterwork did form part of the 'structure' of the flat. Only if it did was Mr Gill liable to repair it."

In the result, his Lordship concluded that plasterwork was not purely decorative and thus formed part of the structure in these terms:

"For myself, whilst I would accept and adopt Mr Recorder Thayne Forbes's observations as to the meaning of 'the structure ... of the dwelling-house' as providing for present purposes, as Neuberger LJ put it, a good working definition, I am respectfully unconvinced by his holding that the plaster finish to an internal wall or ceiling is to be regarded as in the nature of a decorative finish rather than as forming part of the 'structure'. In the days when lath and plaster ceiling and internal partition walls were more common than now, the plaster was, I should have thought, an essential part of the creation and shaping of the ceiling or partition wall, which serve to give a dwelling-house its essential appearance and shape. I would also regard plasterwork generally, including that applied to external walls, as being ordinarily in the nature of a smooth constructional finish to walls and ceilings, to which the decoration can then be applied, rather than a decorative finish in itself. I would, therefore, hold that it is part of the 'structure'. I would accordingly accept that the wall and ceiling plaster in Ms Grand's flat formed part of the 'structure' of the flat for the repair of which Mr Gill was responsible."

It follows that plaster is part of the appearance and shape of premises. Consequently, Mr Gill was liable for the defective plasterwork and the trial judge should have addressed this in damages. Full compensation for the two areas of defective plaster were, "with a broad brush", assessed at being £750 of the judge's notional £6000. In place of the £600 awarded by the trial judge, £1275 was awarded, increasing overall damages from £5600 to £6275.

## Commentary

This is an eminently sensible decision. Unlike a commercial lessee, no residential tenant would ever expect premises to be let out without internal plasterwork. A prospective tenant would be bound to conclude that the property is not ready to be let if the plastering has not been completed. *Grand v Gill* clarifies a landlord's repairing obligations under s.11 of the 1985 Act, expanding the extent of the implied repairing obligation to include internal plasterwork.

So far so good. However, it must be remembered that, even after *Grand v Gill*, the fact that there is serious and extensive damp in a dwelling property will not, of itself, be enough found a disrepair action. The damp has to be in the plasterwork and has to be serious enough to mean that there has been a physical deterioration in the plasterwork. What caused any dampness in the plasterwork will also be crucial, since set-off will be used by landlords where the dampness has been caused by condensation due to tenant use of the property. For example, where a tenant dries wet clothes on the radiators, this may be the original cause of the disrepair. Where disrepair to the plasterwork is caused by a neighbouring tenant, from the landlord's common parts or by an unknown third party, a tenant can now claim against their landlord. Although a landlord, in a standard "washing machine flood case", may have a Pt 20 claim to pursue, they are now liable to repair the ceilings of the property.

*Grand v Gill* also opens up claims where there is a defect in construction or inadequate ventilation which has caused condensation that leads to water penetration in the plasterwork and thus disrepair. Until now, there was no remedy for this consequence of defective construction. This is a common situation in 20th century purpose-built blocks. Following *Quick*, the landlord cannot be compelled to remedy the defective construction, but can now be compelled to address some of its consequences. It is unclear whether landlords will be able to try and prevent this type of disrepair by requiring tenants to wipe down condensation in the premises or whether any such tenancy condition would breach the Contract Consumer Regulations 1999. Likewise, any condition requiring tenants to excessively ventilate their property might breach the Regulations. Whatever further judicial clarification may be forthcoming, *Grand v Gill* has now ended the days when landlords could avoid maintaining plasterwork in their properties.

*The law is stated as at October 7, 2011.*