

The structure of plaster

Cecily Crampin of Tanfield Chambers considers the significance of Grand v Gill [2011] All ER (D) 187; [2011] EWCA Civ 554

Disrepair claims arising out of short residential tenancies in which the tenant complains of damp and the growth of mould, are far from rare. Following the Court of Appeal's recent decision in *Grand v Gill* [2011] All ER (D) 187; [2011] EWCA Civ 554, such cases are likely to be even more common. The prevailing view, that the presence of damp and mould is not enough to found a claim, has been considerably diluted. Plaster can be part of the structure of a property within the meaning of the Landlord and Tenant Act 1985, s 11 and hence that plaster can suffer disrepair certainly for properties held on leases of fewer than seven years, to which that section applies.

Ms Grand claimed that her landlord, Mr Gill, was in breach of his covenant under s11, that he had failed to keep in repair the structure or exterior of her flat. The evidence was that the flat suffered from damp, which had caused damage to the plasterwork and mould on the walls. However, the problems that Ms Grand complained of were in great part found to be caused primarily by the design and structure of her flat. As is not unusual in cases of this kind, the flat suffered from penetrating damp and inadequate ventilation. It is straightforward, however, that there is no breach where there is just bad design (*Quick v Taff Ely Borough Council* [1986] QB 809; [1985] 3 WLR 981; [1985] 3 ALL ER 321). The tenant, where s 11 applies, must show physical damage or disrepair to something falling within "the structure or exterior". Thus Ms Grand had to show that the plaster on the interior walls of the flat was part of the structure of the property.

It is perhaps surprising that there is so little previous authority on this point. It has certainly arisen in previous cases heard by the Court of Appeal. In a number of cases, it has simply been conceded by the landlord that the plaster is part of the structure, and in one case, *Niazi Services Ltd v Van der Loo* [2004] EWCA Civ 53; [2004] 1 WLR 1254, Jacob LJ noted the difficulty of the

question but did not need to decide it. It has also been thought straightforward that plaster on a ceiling is part of the structure of a flat. In *Hussein v Mehlman* [1992] 2 EGLR 27, Mr Stephen Sedley QC, sitting as an assistant recorder, said:

"a house ... without plaster on its ceiling is not a complete house ..."

Nevertheless, in *Irvine's Estate v Moran* (1992) 24 HLR 1; [1991] 1 EGLR 261 (QBD), Mr Recorder Thayne Forbes QC decided that internal wall plaster was not part of the structure, stating 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" (p 5) but the "internal wall plaster is more in the nature of a decorative finish" (p 6). It is this decision that has informed the common view; it is thought correct in *Dowding & Reynolds on Dilapidations* fourth edition, for example.

The Court of Appeal in *Grand v Gill*, expressly disapproved *Irvine v Moran* (although not the definition of "structure"), and hence found Mr Gill liable. However, Rimer LJ at least seems to have found the question far from easy to decide, especially in the absence of expert evidence as to the particular plasterwork in Ms Grand's flat or to the nature of plasterwork generally. His decision suggests that it may be a question of fact whether plasterwork is part of the structure.

"I would also regard plasterwork generally ... as being ordinarily in the nature of a smooth constructional finish ... to which the decoration can then be applied, rather than a decorative finish in itself" (para 25).

Although Lloyd LJ and Thomas LJ's decisions give less room for an exception, it appears from Rimer LJ's reasoning that plaster could be purely decorative, and s11 would not apply.

In *Grand v Gill* there was damage to the plasterwork itself, and the expert's

suggestion was that it should be stripped back and the walls re-plastered. If the problem is just mould on the walls, there may be an argument that there is no disrepair but just a need for redecoration. For example, in *Ratcliffe v Sandwell* [2002] EWCA Civ 6; [2002] 1 WLR 1488 there was mould growth on the wall but the argument focused on whether the local authority landlord was under a human rights' obligation to ensure that the housing was fit for human habitation. As set out by the first instance judge, the solution for the mould was treatment with fungicide and redecoration. This, he said, was not a repair. *Grand v Gill* may have established that plaster is part of the structure, but the tenant must also show disrepair.

What impact is *Grand v Gill* likely to have? Ms Grand succeeded in having her damages for breach of covenant increased (although not by much). In her case, by the time of trial, the landlord had undertaken the necessary work to the flat. However, for many tenants, the most pressing problem is likely to be finding a remedy for the cause of the damp, and it does not follow from the decision in *Grand v Gill* that a court would require a landlord to solve an inherent defect.

In the right circumstances, however, the effect of *Grand v Gill* might reach that far. Works which resolve a defect may be ordered by a court when it is futile to remedy disrepair without eliminating the cause of it (*Elmcroft Developments Ltd v Tankersley-Sawyer* (1984) 15 HLR 63; (1984) 270 EG 140), provided that those works do not produce a property of a wholly different character (*McDougall v Easington DC* (1989) 21 HLR 310; [1989] 25 EG 104).

Hence it is possible that the decision in *Grand v Gill* has pushed opened a door to the improvement of housing stock, if only a little way.

