

Case No: B2/2000/3589
B2/2001/2209

Neutral Citation Number [2002] EWCA Civ 06
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LEEDS COUNTY COURT
(His Honour Judge Milford QC)

Royal Courts of Justice
Strand, London, WC2A 2LL
21/01/02

Before :

LORD JUSTICE CHADWICK
LORD JUSTICE TUCKEY
and
SIR MURRAY STUART-SMITH

Between :

LEE	<u>Appellant</u>
- and -	
LEEDS CITY COUNCIL	<u>Respondents</u>
RATCLIFFE & ORS	<u>Appellants</u>
- and -	
SANDWELL METROPOLITAN BOROUGH COUNCIL	<u>Respondents</u>

(Transcript of the Handed Down Judgment of
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Mr Kim Lewison QC & Mr S Knafler (instructed by **Ward Dewhurst, Birmingham**) for the Appellants in Lee and Ratcliffe & ors in the first and second appeals

Mr Andrew Arden QC, Mr C Baker & Mr C Dodd (instructed by **Leeds City Council**) for the Respondents in the first appeal

Mr Andrew Arden QC & Mr C Baker (instructed by **Sandwell Metropolitan Borough Council**) for the Respondents in the second appeal

Judgment
As Approved by the Court

Lord Justice Chadwick :

1. These two appeals raise the familiar issue whether a local authority is under any, and if so what, obligation to a tenant or occupier of a dwelling house let as part of its housing stock in circumstances where the dwelling house is or has become unsuitable for occupation by reason of condensation, damp and mould caused by some defect in design. The appellants invite the Court to revisit that issue in the light of provisions contained in the Human Rights Act 1998.
2. The factual position in each of the present appeals is indistinguishable from that described by the Law Commission in the first paragraph of its report *Landlord and Tenant: Responsibility for State and Condition of Property* (1996) (Law Com No 238):

“An unemployed council house tenant in Pontypridd found that his council house was virtually uninhabitable because of condensation. This was attributable to a defect in the design of the property. The tenant’s furniture, carpets, curtains and decorations were ruined by the damp. Although the landlord was under an implied statutory obligation to repair the structure and exterior of the premises, it was not liable for the tenant’s loss, nor could it be compelled to remedy the defect. This was because the design defect did not constitute in law a “disrepair” for which it was responsible under its implied obligation.”

The footnote to that paragraph identifies the facts described as those in *Quick v Taff Ely Borough Council* [1986] QB 809 – a decision of this Court.

3. The absence of any civil remedy in circumstances such as those described by the Law Commission had arisen through a combination of two factors. First, the statutory obligation to ensure that a house let for human habitation is fit for human habitation had come to have little or no application to local authority tenancies. The reason is that that obligation is tied to rent limits which have remained virtually unchanged since 1957. Second, it was held in the *Quick* case that the statutory obligation of a landlord to keep in repair the structure of a dwelling house did not extend to the rectification of design faults; unless the effect of the design fault was that the structure was out of repair.

Fitness for human habitation

4. A statutory obligation to ensure that premises let for human habitation were fit for that purpose was first imposed, in respect of tenancies at low or modest rents, by section 12 of the Housing for the Working Classes Act 1885. The Act extended to certain

unfurnished lettings a condition which, some eight years earlier, the courts had been ready to imply in relation to furnished lettings - see *Wilson v Finch Hatton* (1877) 2 ExD 336. The obligation, both at common law in relation to furnished lettings and under the statute in relation to unfurnished lettings, was, at first, confined to the condition of the house at the commencement of the letting. Section 12 of the 1885 Act was repealed and replaced by the Housing of the Working Classes Act 1890. The obligation was re-enacted, but with increased rent limits, by section 14 of the Housing, Town Planning &c Act, 1909; and was extended, by section 15(1) of that Act, to include an undertaking that the house should, during the tenancy, be kept by the landlord in all respects reasonably fit for human habitation. Those provisions were successively re-enacted in the Housing Acts of 1925, 1936 and 1957. They are now to be found in section 8(1) of the Landlord and Tenant Act 1985. The subsection is in these terms:

“In a contract to which this section applies for the letting of a house for human habitation there is implied, notwithstanding any stipulation to the contrary –

(a) a condition that the house is fit for human habitation at the commencement of the tenancy, and

(b) an undertaking that the house will be kept by the landlord fit for human habitation during the tenancy.”

5. Section 10 of the 1985 Act sets out the nine matters to which regard is to be had in determining whether, for the purposes of the Act, a house is unfit for human habitation. Those matters include “freedom from damp” and “ventilation”. A house is to be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of the nine matters set out “that it is not reasonably suitable for occupation in that condition”.
6. Between 1909 and 1957 the rent limits by reference to which the statutory obligation to ensure that the house was fit for human habitation was made applicable remained those fixed by the 1909 Act; with some adjustment as between urban and rural lettings before 1925. The upper limit was increased twofold, in the case of lettings after 6 July 1957, by section 6(1)(c) of the 1957 Act. The 1957 limits were retained when the section was re-enacted in the Landlord and Tenant Act 1985. The effect is that the rent limits are now far below the average rents for local authority housing – and even further below the average rents for comparable housing in the private sector – as the table at paragraph 4.12 of the Law Commission report demonstrates. But that must be taken to reflect the legislative intention at the time of the 1985 re-enactment. Some three years after that re-enactment, Lord Justice Dillon observed in *McNerny v London Borough of Lambeth* (1988) 21 HLR 188, at page 194, that:

“the limits [set by the 1957 Act] . . . are far below the normal rents for a council house or flat . . . and Parliament has conspicuously refrained from up-dating the limits in the 1985 Landlord and Tenant Acts.”

In *Issa v Hackney London Borough Council* [1997] 1 WLR 956, at page 964F-G, Lord Justice Brooke described the statutory covenant to ensure that a dwelling house be fit for human habitation (although preserved in section 8(1) of the 1985 Act) - and the consequential value to the tenant's family of section 4(1) of the Defective Premises Act 1972 - as "completely dead letters".

The landlord's obligation to repair

7. The statutory obligation to repair the structure and exterior of a dwelling house held under a lease was first imposed on the landlord by section 32(1) of the Housing Act 1961. It is now found in section 11(1) of the Landlord and Tenant Act 1985. The subsection is in these terms:

"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),

(b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and

(c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water."

8. The scope of the obligation to keep in repair the structure and exterior of the dwelling house, to be implied under paragraph (a) of the subsection, was considered by this Court in *Quick v Taff Ely Borough Council* [1986] QB 809. It is important to keep in mind that, in this Court, the only relevant claim was a claim in respect of condensation – see, in the judgment of Lord Justice Dillon, at page 814F. The house was fitted with central heating by a warm air ducted system. The windows were single-glazed with metal frames set in wooden window surrounds; the lintels above the windows were not faced with insulating material – *ibid*, at page 814H. The condensation came about from the warm air of the environment in the rooms reaching the cold surfaces of the building - *ibid*, at page 815F. It is against that factual background that the Court addressed the question whether the landlord was required to do the work necessary to alleviate the condensation problem – which, on the evidence, required the window frames to be replaced, the lintels to be faced with

insulating material and a new radiator system to be installed in place of the warm air ducted system.

9. Lord Justice Dillon identified the appellant's contention in these terms: "that anything defective or inherently inefficient for living in or ineffective to provide the conditions of ordinary habitation is in disrepair". He described that proposition as having "very far-reaching implications indeed". He said this, at page 817G-818E:

"The covenant implied under section 32 of the Act of 1961 is an ordinary repairing covenant. It does not only apply to local authorities as landlords, and this court has held in *Wainwright v Leeds City Council* (1984) 270 EG 1289 that the fact that a landlord is a local authority, which is discharging a social purpose in providing housing for people who cannot afford it, does not make the burden of the covenant greater on that landlord than it would be on any other landlord. The construction of the covenant must be the same whether it is implied as a local authority's covenant in a tenancy of a council house or is expressly included as a tenant's or a landlord's covenant in a private lease which is outside section 32. A tenant under such a lease, who had entered into such a repairing covenant would, no doubt, realise, if he suffered from problems of condensation in his house, that he could not compel the landlord to do anything about those problems. But I apprehend that the tenant would be startled to be told . . . that the landlord has the right to compel him, the tenant, to put in new windows. . . .

In my judgment, the key factor in the present case is that disrepair is related to the physical condition of whatever has to be repaired, and not to questions of lack of amenity or inefficiency. I find helpful the observation of Atkin LJ in *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, 734 that repair "connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged". Where decorative repair is in question, one must look for damage to the decorations but where, as here, the obligation is merely to keep the structure and exterior of the house in repair, the covenant will only come into operation where there has been damage to the structure and exterior which requires to be made good."

10. The other members of the Court (Lord Justice Lawton and Lord Justice Neill) agreed with Lord Justice Dillon. Lord Justice Lawton said this, at page 823B-C:

"In my judgment, there must be disrepair before any question arises as to whether it would be reasonable to remedy a design fault when doing the repair. In this case, as the trial judge

found, there was no evidence that the single-glazed metal windows were in any different state at the date of the trial from what they had been in when the plaintiff first became a tenant. The same could have been said of the lintels. The judge misdirected himself in finding that these windows required repair.”

There is no doubt that the Court recognised that the effect of the condensation in the *Quick* case was that parts of the house (at the least) were unsuitable for occupation. Lord Justice Dillon described the living conditions of the plaintiff and his family as “appalling” – *ibid*, at page 815B. Lord Justice Lawton referred – at page 821C - to the uncontradicted evidence, accepted by the trial judge, that the sitting room could not be used because of the smell of damp. But it is equally clear that this Court has held, in the *Quick* case, that the exterior and structure is not out of repair by reason only of the fact that as a result of internal condensation – unrelated to water penetration – the dwelling has become unfit for human habitation.

11. The decision in the *Quick* case was applied by this Court in *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055 – see at pages 1063h and 1065d. In *Stent v Monmouth District Council* (1987) 19 HLR 269, at page 285, Sir John Arnold, President, explained the effect of those decisions:

“It is no doubt the case that where there is no repair requiring to be done as in such cases as *Quick v Taff Ely B.C.* [1985] 3 WLR 981 and *Post Office v Aquarius Properties Ltd* (1985) 276 EG 923 . . . the repairing covenant on its true construction does not require any design defect to be made good.”

In *Southwark London Borough Council v Tanner* [2001] 1 AC 1 Lord Hoffmann treated as settled law the proposition that the repairing covenant to be implied under section 11 of the Landlord and Tenant Act 1985 did not require the landlord to ensure that the premises were fit for the purpose for which they had been let. He said this, at page 8B-C:

“It is true that in each tenancy agreement the council agreed to keep the structure in *repair*. Such an obligation would in any case be implied by section 11 of the Landlord and Tenant Act 1985. But the appellants do not rely upon this covenant and cannot do so. Keeping in repair means remedying disrepair. The landlord is obliged only to restore the house to its previous good condition. He does not have to make it a better house than it originally was: see *Quick v Taff Ely Borough Council* [1986] QB 809.”

12. It does not follow that there are no circumstances in which a due performance of the obligation to repair may not require the elimination of a design defect. The position was explained by the President in *Stent v Monmouthshire County Council*, at page 285, in a passage immediately following that which I have already cited:

“It is, in my judgment, undoubtedly the case on the basis of the authorities relating to cases where there was a repair requiring to be done, such as *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12 and *Elmcroft Developments Ltd v Tankesley-Sawyer* (1984) 270 EG 140 that on a true construction of the covenant to repair there is required to be done, not only the making [good] of the immediate occasion of disrepair, but also, if this is what a sensible, practical man would do, the elimination of the cause of that disrepair through the making good of an inherent design defect at least where the making good of that defect does not involve a substantial rebuilding of the whole.”

13. It was the application of that principle which led this Court to hold, in the *Stent* case, that the landlord was required to eliminate the design defect which had caused a wooden exterior door to rot; and to hold, in *Staves & Staves v Leeds City Council* (1990) 23 HLR 107, that the landlord was required to do the works necessary to prevent further damage to internal plaster from condensation and damp. But it is important to keep in mind that, in those cases, there was evidence of damage to the structure (the damaged plaster being treated as part of the structure for that purpose) which gave rise to the need for repair. The cases show that, where there is a need to repair damage to the structure, the due performance of the obligation to repair may require the landlord to remedy the design defect which is the cause of the damage. They do not support the proposition that the obligation to repair will require the landlord to remedy a design defect which has not been the cause of damage to the structure; notwithstanding that the defect may make the premises unsuitable for occupation or unfit for human habitation.

The landlord's liability for defective premises

14. The obligation to repair, imposed by section 32(1) of the Housing Act 1961, was reinforced by the provisions in section 4 of the Defective Premises Act 1972. The section is in these terms (so far as material):

“(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 - . . . (b) . . . the time when the tenancy commences . . .

(4) Where premises are let under a tenancy which expressly or impliedly gives the landlord a 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.

(5) For the purposes of this section obligations imposed or rights given by any enactment in virtue of a tenancy shall be treated as imposed or given by the tenancy.

...”

15. The effect of section 4(1) of the 1972 Act is that the duty to take reasonable care to see that persons are kept reasonably safe from personal injury caused by a relevant defect is owed not only to the tenant but also to “all persons who might be expected to be affected by defects in the state of the premises”. Persons who might be expected to be affected by defects in the state of the premises will include members of the tenant’s family living at the premises. But the duty under section 4(1) arises only where personal injury or damage to property is caused by a “relevant defect”. For that purpose – and subject to the provisions in section 4(4) of the Act - a “relevant defect” means a defect in the state of the premises arising from, or continuing because of, an act or omission by the landlord “which constitutes . . . a failure by him to carry out his

obligation to the tenant for the maintenance or repair of the premises”. It follows – but, again, subject to the provisions in section 4(4) – that where the defect which has caused the personal injury or damage to property is a “design defect” which does not constitute in law a “disrepair” for which the landlord is responsible under his repairing obligations (whether express or implied), there is no liability under section 4(1) of the 1972 Act.

16. Section 4(4) of the 1972 Act extends liability under section 4(1) to certain defects in the state of the premises which do not arise from the landlord’s failure to carry out his repairing obligations. It does so by introducing a statutory hypothesis. A landlord who is not otherwise under an obligation to carry out works of maintenance or repair of a particular description is to be treated – for the purposes of sections 4(1) and (3) but for no other purpose – as if he were under an obligation to carry out works of maintenance and repair of that description if the terms of the tenancy (expressly or impliedly) give him “the right to enter the premises to carry out [that] description of maintenance or repair of the premises”. So, for example, a landlord who is not otherwise under an obligation to carry out works of repair and maintenance to the garden but who has a right to enter for the purpose of carrying out such works if he chooses will be treated – for the purposes of section 4(1) and (3) of the Act – as if he were under an obligation to carry out such works; with the consequence that he owes a duty to take reasonable care to see that the tenant or other person who might reasonably be expected to be affected by defects in the state of the garden is reasonably safe from personal injury caused by such a defect arising from lack of repair or maintenance – see *McAuley v Bristol City Council* [1992] 1 QB 134.

Prejudice to health

17. The obligations which may be imposed on a landlord in relation to property let for occupation are not limited to those arising under the contract of tenancy (whether express or implied) or under the 1972 Act. They include obligations which may be imposed under provisions for the abatement of statutory nuisance formerly contained in the Public Health Act 1936 and now found in the Environmental Protection Act 1990. The provisions have existed, in some form, since 1846 – see 9 & 10 Vict. Cp 96.
18. Section 80 of the Environmental Protection Act 1990 requires a local authority, if satisfied that a statutory nuisance exists within its area, to serve an abatement notice. A statutory nuisance exists where premises are in such a state as to be prejudicial to health – see section 79(1)(a) of that Act. Where the nuisance arises from any defect of a structural character, the abatement notice is to be served on the owner of the premises – see section 80(2)(b). An abatement notice may require the person on whom it is served to abate the nuisance, and to execute such works or take such other steps as may be necessary for that purpose – see section 80(1). Section 80(4) of the Act provides that a person who fails to comply with an abatement notice without reasonable excuse is guilty of an offence. Section 81(3) enables a local authority – whether or not they take proceedings in respect of an offence under section 80(4) – to abate the nuisance and to do whatever may be necessary in execution of the notice.

19. Section 80 of the 1990 Act can have no application in a case where the local authority is the owner of the premises and the statutory nuisance arises from a defect of a structural character. It cannot have been in the contemplation of Parliament that a local authority would serve an abatement notice on itself – see, in an analogous context, *R v Cardiff City Council, ex parte Cross* (1982) 6 HLR 1. But section 82 of the 1990 Act does provide a remedy – see *R v Epping (Waltham Abbey) Justices, ex parte Burlinson* [1948] 1 KB 79, *Birmingham District Council v Kelly* (1985) 17 HLR 572 and *Herbert v Lambeth London Borough Council* (1992) 24 HLR 229 (decisions on the provisions then contained in the Public Health Act 1936) and, more recently, *Davenport v Walsall Metropolitan Borough Council* (1995) 28 HLR 754. The remedy under section 82 of the 1990 Act is enforceable in the magistrates’ court at the suit of a person aggrieved by the existence of a statutory nuisance. The defendant to such proceedings, in the case of a nuisance arising from any defect of a structural character, is the owner of the premises – see section 82(4)(b) of the 1990 Act. Where the magistrates’ court is satisfied that the alleged nuisance exists, it shall make an order requiring the defendant to abate the nuisance and to execute any works necessary for that purpose. Further, the magistrates’ court may order compensation in such a case – see section 35(1) of the Powers of Criminal Courts Act 1973 and the decision of the Divisional Court in the *Davenport* case.
20. Nevertheless, the provisions in Part III of the Public Health Act 1936 – and now in Part III of the Environmental Protection Act 1990 - cannot be invoked to support a cause of action in the civil courts: see *Issa v Hackney Borough Council* [1997] 1 WLR 956. As Lord Justice Brooke observed, at page 965H:

“This case demonstrates that recourse to the Act of 1936 could bring about the abatement of a statutory nuisance eventually, and could ensure a modest award of compensation. Part III of the Environmental Protection Act 1990 now provides the vehicle for these remedies. But it also demonstrates yet again that there continues to exist a class of case in where a serious wrong continues to be without a remedy in the civil courts.”

The position following the Law Commission Report

21. Lord Justice Brooke had referred, in the preceding paragraph of his judgment in the *Issa* case, to a comment of Lord Justice Staughton in *Habinteg Housing Association v James* (1994) 27 HLR 299, at page 306:

“We are told that the Law Commission has been considering such a problem. It is to be hoped that they will recommend a solution. What is more, it is hoped that if they do, Parliament will carry it out. Judges and lawyers are sometimes reproached when the law does not produce the right result. There are occasions when the reproach should be directed elsewhere.”

Lord Justice Brooke went on, at page 965H in the *Issa* case, to say this:

“Parliament has now had the Law Commission’s report for over six months. The resolution of this injustice lies in decisions being taken about the allocation and distribution of public sector finance to the health service and to local government which are for ministers and Parliament and not for judges to take in our constitutional scheme of things.”

22. As noted in that passage, the Law Commission has made its recommendations. It has recommended that (subject to certain exceptions which are not material in the present context) there should be implied into a lease of a dwelling house which is for a term of less than seven years a covenant by the landlord (a) that the dwelling house is fit for human habitation at the commencement of the lease and (b) that the lessor will keep it fit for human habitation during the lease – see paragraph 8.35 of the Report and clause 5 of the draft Bill annexed to the Report as Appendix ‘A’. If carried into effect, the recommendation would remove the rent limits which have led to the position that section 8 of the Landlord and Tenant Act 1985 can have little or no application to local authority tenancies.
23. Parliament has not found time to give effect to that recommendation. At the least, it has not done so directly. Unless, as the appellants contend, the solution to the problem can be found in the provisions of the Human Rights Act 1998, the position remains “that there continues to exist a class of case where a serious wrong continues to be without a remedy in the civil courts”.

The Human Rights Act 1998

24. It is against that background that the appellants seek recourse to the 1998 Act. As I have said, these appeals may be seen as a further attempt to persuade the courts that local authority landlords should be subject to an obligation which Parliament has not yet imposed by legislation specifically directed to the reform of the law of landlord and tenant, or to the needs of those in occupation of local authority housing. If that is what the 1998 Act requires, the courts must say so. But it is, I think, important to keep in mind Lord Hoffmann’s observations in *Southwark London Borough Council v Tanner* [2001] 1 AC 1, at pages 8F and 9H-10A, as to the need “to show a proper sensitivity to the limits of permissible judicial creativity” in the field of social housing responsibilities; a field which is “so very much a matter for the allocation of resources in accordance with democratically determined priorities.”
25. Section 3(1) of the Human Rights Act 1998 requires that:

“In so far as it is possible to do so, primary legislation . . . must be read and given effect in a way which is compatible with the Convention rights.”

The section applies to primary legislation whenever enacted – see section 3(2) of the Act. There is no doubt that it applies to the provisions in section 11(1) of the Landlord and Tenant Act 1985 and section 4(1), (3) and (4) of the Defective Premises Act 1972.

26. Section 6(1) of the 1998 Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. It is not in dispute that a local housing authority is a “public authority” in that context – see section 6(3)(b) of the Act. Convention rights are those set out in Schedule 1 to the Act – see section 1(1) and (3). In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate – see section 8(1). An order made under section 8 of the Act by a court in civil proceedings may include an award of damages.

27. Article 8 in Schedule 1 to the 1998 Act is in these terms:
 - “1. Everyone has the right to respect for his private and family life, his home and his correspondence.

 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

28. There is no dispute that, in an appropriate case, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely – see *Lopez Ostra v Spain* (1994) 20 EHRR 277, at paragraph 51 (page 295), *Guerra v Italy* (1998) 26 EHRR 357, at paragraph 60 (page 383). It is not necessary to show that the pollution seriously endangers health. Nor is there any dispute that section 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with the Convention right enshrined in Article 8 – see *Guerra v Italy* at paragraph 58 (pages 382-3) where it is pointed out that:
 - “. . . although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to

abstain from such interference: in addition to this primary negative undertaking, there may be positive obligations inherent in effective respect for private or family life.”

29. With those provisions in mind, I turn to the two appeals which are before this Court, and the issues which this Court is asked to decide.

Lee v Leeds City Council

30. The appellant in the first appeal, Mrs Ruth Lee, is tenant of property known as 11 Brooklands Close, Leeds. She holds that property under a secure tenancy granted by Leeds City Council in or about October 1994. The property is a two storey semi-detached dwelling house of traditional brick construction. The interior of the property suffers from condensation, mould and damp. Particulars are set out in a report prepared in May 1997 by Mr B J Smart, a chartered civil engineer. His conclusion was that the property was in such a state as to be prejudicial to the health of the occupants. That conclusion was confirmed by Mr G R Spencer, a housing consultant and surveyor, on re-inspection of the property in April 1998. On that basis the condition of the property was such as to constitute a statutory nuisance within section 79(1)(a) of the Environmental Protection Act 1990.
31. The terms of Mrs Lee’s tenancy agreement require the landlord to keep in good repair the structure and exterior of the property (including drains, gutters and external pipes); an obligation which would, if it were not an express term, be implied under section 11(1) of the Landlord and Tenant Act 1985. In May 1998 Mrs Lee commenced proceedings in the Leeds County Court against the City Council. She sought an order requiring the Council to remedy such of the defects described in Mr Smart’s report as remained outstanding. She relied on the terms of her tenancy agreement, on section 11 of the 1985 Act and on section 4 of the Defective Premises Act 1972.
32. The City Council’s response was to deny that it was liable to remedy interior damp, condensation and mould unless caused by the structure and exterior of the property being out of repair. It relied upon the decision of this Court in the *Quick* case. In those circumstances the parties agreed to the trial of a preliminary issue:

“to determine the liability or otherwise of the Defendant in relation to condensation, damp and mould growth in light of the Defendant’s express repairing obligations, in light of section 11 of the Landlord and Tenant Act 1985 and also in light of Article 8 of the European Convention of Human Rights.”

An order for the trial of an issue in those terms was made by the district judge on 3 August 2000.

33. The issue was tried by His Honour Judge Milford QC. It is important to have in mind the basis upon which he approached the matter. He said this:

“The dispute centres on a number of areas in the house where the internal plaster work has become damp and mouldy through condensation.

It is not contended that this results from any want of repair of the exterior of the house. Nor is it contended that it results from rising damp or penetrating damp. Furthermore, it is not contended that the plaster needs to be replaced. The experts are agreed that what is required is treatment with a fungicide and redecoration with a fungi check system.

I am asked to approach the issue, and I do, on the basis that the state of the mould in the house was a risk to health.

I also approach the issue on the basis that the condensation, damp and mould resulted from no unreasonable use of the house by the Claimant. That is to say that the condition flowed from the construction, insulation and heating system of the house.”

34. The judge rejected the submission that there was to be implied into the tenancy agreement an obligation on the landlord to ensure that the dwelling was fit for human habitation. He pointed out that Parliament had not thought fit, when re-enacting, as section 8 of the Landlord and Tenant Act 1985, the provisions first enacted as section 12 of the Housing of the Working Classes Act 1885, to raise the rent limits for the application of those provisions; and had not chosen to give effect to the recommendations of the Law Commission in that respect. He said this:

“In the past decade or more, I am confident, that many tenancies, such as this, have been considered by the courts. The fact remains, that just as the legislature has not given effect to the recommendations of the Law Commission, so no higher court has implied into a tenancy such as this, a term that the Landlords must maintain the premises in a state fit for human habitation. It would be an extremely bold step for this court to take. It would be contrary to the weight of authority and it is not a step that I am prepared to take.”

35. The judge rejected, also, the submission that the City Council’s obligations in respect of the condition of the premises – which were obligations to repair, whether imposed by the terms of the tenancy agreement, by section 11 of the Landlord and Tenant Act 1985 or, for the purposes of section 4(1) of the Defective Premises Act 1972, by the

provisions in section 4(4) of that Act - went beyond the limits identified by this Court in the *Quick* case. In particular, he dismissed the suggestion that the *Quick* case had been decided *per incuriam*, in that the Court of Appeal had not considered, in that case, its earlier decision in *Proudfoot v Hart* (1890) 25 QBD 42. He said this:

“I am satisfied that the correct definition of “repair” is to be found in [the *Quick* case] that damp and mould do not require repair as was agreed by the surveyors in their joint report. What was required was the application of a fungicide to the affected areas and then a special form of redecoration. This does not, in my judgment, amount to repair. This finding also disposes of the claimant’s point under the Defective Premises Act where I hold that the word “repair” has the same meaning.”

36. The judge turned, then, to the submission that the obligation in section 11(1)(a) of the Landlord and Tenant Act 1985 must now – in accordance with section 3 of the Human Rights Act 1998 – be construed so as to give effect to the tenant’s Convention rights. As he put it:

“It is submitted on behalf of the complainant that Section 11 must be construed to give effect to Article 8, which means that ‘keep in good repair’ means prevent damp and mould, which adversely [affects] the quality of the claimant’s home and family life generally, and particularly puts at risk the health of the family.”

He referred to the decision of the European Court of Human Rights in *Lopez Ostra v Spain* (1994) 20 EHRR 277. But he went on to say this:

“I should say that the facts were very different to these: the applicant had suffered fumes, noise and smells from a nearby waste treatment plant. The claimant has not been able to point to any European decision which is on all fours with this case. I would not be minded to find, on what I have seen and heard of the damp and mould at the claimant’s home, that her rights under Article 8 have been infringed. The conditions complained of do not seem to me to be sufficiently serious.”

37. That finding of fact would have been sufficient to dispose of the contention that, in the case with which he was concerned, the local authority had acted in a manner which infringed the claimant’s Convention right. But the judge addressed the question whether, if he were wrong to make that finding of fact, it was necessary to interpret the obligation to repair imposed by section 11 of the 1985 Act so as to place upon the local authority “the onus of dealing with the mould by the installation of insulation or a new heating system?”. He said this:

“The Environmental Protection Act 1990 defines at Section 79 subsection 1(a) as a statutory nuisance “any premises in such a state as to be prejudicial to health”. By Section 82, subsection

1, a Magistrates' Court may act under this section on a complaint made by a person on the ground that he is aggrieved by the existence of a statutory nuisance. It is then for the magistrates, under subsection 2(a) and (b), to make an order requiring the defendant to abate the nuisance and to prohibit the recurrence of the nuisance, and to execute any works necessary to prevent the recurrence. This, says the defendant, is the claimant's remedy in this case. I agree. It is unnecessary for the word "repair" in Section 11 to be reinterpreted in a way contrary to the decided cases, as the claimant has her remedy under the Environmental Protection Act. This provides her with a remedy, if she is living in a home which is in a state which prejudices her health."

38. By an order dated 31 October 2000, the judge declared that the City Council had no liability for condensation, mildew or mould growth. He gave permission to appeal; but confined that permission "to the Human Rights aspect only". In her appellant's notice, filed on 29 November 2000, Mrs Lee seeks to extend that permission to cover all points argued in the court below.

Ratcliffe v Sandwell Metropolitan Borough Council

39. The appellants in this appeal are the three children of Mrs Dawn Ratcliffe. They live with their mother at 67 Fairway Avenue, Tividale, near Warley. Mrs Ratcliffe holds that property as a secure tenant of Sandwell Metropolitan District Council under an agreement made in November 1993. The tenancy agreement does not contain an express term imposing repairing obligations on the landlord; but it is not in dispute that the landlord is subject to the statutory repairing obligation implied by section 11 of the Landlord and Tenant Act 1985. The agreement contains a restriction on the tenant from parting with possession of the premises without the consent of the landlord. It requires the tenant to give immediate notice to the landlord of any defect or damage to the premises; to carry out at the tenant's own expense certain internal repairs, including plaster patching similar to that which could be required as normal interior decorations; and to keep the dwelling in a clean and proper condition and the interior in a reasonable state of decoration. Clause 10 provides that the landlord shall be at liberty, after giving reasonable notice, "to enter and inspect the state of repair, decoration, or cleanliness of the premises . . . and to execute any repairs therein".
40. The property, 67 Fairway Avenue, is a semi-detached house of brick construction under a pitched tiled roof. It suffers from condensation and associated mould growth. There is evidence that each of the appellants suffers from asthma; and that that condition is aggravated by the state of the premises. The claims in the action – which the appellants bring by their mother as next friend – are for damages for personal injury caused by the landlord's breach of duty under section 4 of the 1972 Act.

41. The proceedings came before His Honour Judge Geddes, sitting in the Birmingham County Court, for the trial of a preliminary issue:

“Does the landlord have an obligation in law to rectify design faults in the building which are the cause of the condensation found in the property.”

For the purposes of the preliminary issue, the following were agreed facts:

- “(A) The property has suffered from condensation and associated mould growth. The cause of the condensation in the property was the lack of adequate heating, ventilation, insulation, or any of those three.
- (B) The tenancy contains an express right for the landlord to enter the premises to inspect décor cleanliness and to do repairs. In the light of that express term section 4(4) of the [1972] Act applies and therefore notice/Knowledge is not in issue.
- (C) It is accepted that the condensation and associated mould growth have exacerbated the claimants’ asthma.”

It may, I think, be assumed from those agreed facts that it was not in dispute that the premises were in such a state as to be prejudicial to the health of the claimants; and so were a statutory nuisance within section 79(1)(a) of the Environmental Protection Act 1990.

42. The argument before His Honour Judge Geddes seems to have followed closely that in the earlier proceedings in *Lee v Leeds City Council* – save that there is nothing to suggest that any reliance was placed on the 1990 Act. The judge rejected the submission that there should be implied as a term of the tenancy - either in order to give the tenancy agreement business efficacy or as a necessary correlative to the tenant’s obligations to keep the interior in a clean and proper condition and not to part with possession - an obligation on the landlord to rectify defects in design. He rejected the submission that the *Quick* case had been decided *per incuriam*. He held that he was bound by the decision of this Court, in that case, that the statutory covenant to repair – now contained in section 11 of the Landlord and Tenant Act 1985 – imposed an obligation on the landlord “only when there existed a physical condition which called for repair to the structure or exterior of the dwelling house”. Because “there was no evidence of any physical damage or want of repair to the windows or lintels or any other part of the structure or exterior” the landlord could not be required to carry out work to alleviate the condensation.
43. The judge rejected, also, the submission that section 11 of the 1985 Act must be construed so as to give effect to Article 8 of the Convention. He, too, distinguished the decision in *Lopez Ostra v Spain* (1994) 20 EHRR 277 on the facts. He said this:

“Here there has been no interference with the Claimants’ rights by a public body directly, or by that body failing to act against a third party such as the plant owners in the [*Lopez Ostra*] case . . . The

condensation has arisen not because of the activity of any one (such as might amount to a breach of the Claimants' rights under Article 8), but because of design defects in the building. Accordingly I do not find that there is any need to construe section 11 so as to require the Defendant to rectify those design faults."

44. The judge answered the preliminary issue in the negative. Accordingly, by an order made on 2 November 2000, he dismissed the claims in the action.
45. Application for permission to appeal the order of 2 November 2000 was made to the High Court. That application came before Mr Justice Mackay in June 2001. He adjourned the application generally so that application could be made to the Master of the Rolls for a direction under section 57(1)(a) of the Access to Justice Act 1999. The basis of that application was that the issues to be raised by the appeal were closely connected with the issues raised by the appeal in *Lee v Leeds City Council*, which was then fixed for hearing in this Court. It was said that it would be convenient for the two appeals to be heard together so that authoritative guidance could be given to assist county courts in dealing with condensation cases.
46. The appeal in the *Ratcliffe* case comes before this Court by reason of a direction under section 57(1)(a) of the 1999 Act. The effect of such a direction is that there is no order – comparable to that in the *Lee* case – restricting permission to appeal in the *Ratcliffe* case to “human rights aspects”.

The issues on these appeals

47. The respondents are content – indeed, anxious – that all points raised by the appellants in the skeleton arguments should be argued on these appeals. They take the view that it would not be in the interests of local authorities generally – or in their own interests in particular – for the issues to be confined by the limited permission to appeal already obtained in the *Lee* case; or to the issues raised by the application in the *Ratcliffe* case. In those circumstances the appellants' skeleton arguments may be taken as a convenient statement of the issues which this Court is asked to decide. Those issues may be summarised as follows:
 - (1) Does section 6 of the Human Rights Act 1998 impose on the respondents, as public authorities, “an independent statutory duty . . . to do what is necessary to comply with Article 8?
 - (2)(a) Was *Quick v Taff Ely Borough Council* [1986] QB 809 wrongly decided, in that this Court ought to have treated the statutory covenant to keep the structure and exterior in repair as including an obligation to keep the premises “in good condition so far as is needed to enable the tenant to enjoy the normal amenities of a home”; in the alternative,

- (b) Should section 11 of the Landlord and Tenant Act 1985 now be construed, in accordance with the requirement in section 3 of the Human Rights Act 1998, so as to impose on the landlord an obligation to keep the premises in good condition?
- (3) If the statutory covenant does not have the effect for which the appellants contend, is it necessary, nevertheless, to imply a term into a tenancy agreement under which a public authority provides social housing to the effect that (a) the landlord keep the dwelling in good condition or (b) that the landlord keep the dwelling in a condition which enables the tenant to perform her obligations under the tenancy?
- (4) If neither the statutory covenant in section 11 of the 1985 Act, nor any term to be implied independently of that covenant, impose on the landlord an obligation to remedy a design defect which is the cause of condensation, damp and mould, does the landlord have a right to enter the premises for the purpose of carrying out works for that purpose; so as to give rise to a duty under section 4 of the Defective Premises Act 1972?

Issue (1): An independent duty under section 6 of the Human Rights Act 1998?

48. I have already indicated (i) that section 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, (ii) that a local housing authority is a “public authority” in that context, and (iii) that there may be positive obligations inherent in effective respect for private or family life. The answer, therefore, to the question “does section 6 of the Human Rights Act 1998 impose on a local authority landlord an obligation to take steps to ensure that the condition of a dwelling house which it has let for social housing is such that the tenant’s Convention right under Article 8 is not infringed” must be in the affirmative. But that begs the question whether, in the particular case, the condition of the dwelling house is such that the tenant’s Convention right is infringed. And, in addressing that latter question, “. . . regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, . . .” – see *Lopez Ostra v Italy* at paragraph 51, and *Hatton and others v United Kingdom (Application 36022/97)* (unreported, 2 October 2001) at paragraph 96. As it was put in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 470, at paragraph 67 (page 497), in relation to the “positive obligations inherent in ‘respect’ for family life” which may arise under Article 8:

“However, especially as far as those positive obligations are concerned, the notion of ‘respect’ is not clear cut: . . . the notion’s requirements will vary considerably from case to case”.

49. The steps which a public authority will be required to take in order to ensure compliance with Article 8 – that is, to ensure ‘respect’ for private and family life – must be determined, in each case, by having due regard to the needs and resources of the community and of individuals. And, in striking the balance between the resources

of a local housing authority (and the need to meet other claims upon those resources) and the needs of the individual tenant, regard must be had to the observation of Lord Hoffmann in *Southwark London Borough Council v Tanner* [2001] 1 AC 1, at pages 9H-10A (to which I have already referred). The allocation of resources to meet the needs of social housing is very much a matter for democratically determined priorities. That observation is as pertinent in the present context as it was in the context to which it was addressed - the implication of a contractual term at common law. I find no support in the Strasbourg jurisprudence – or in the jurisprudence which has been developing in these courts since the advent of the 1998 Act – for the proposition that section 6, in conjunction with Article 8, imposes some general and unqualified obligation on local authorities in relation to the condition of their housing stock.

50. That is not to say that there will never be cases in which a local authority, as the landlord of a dwelling house let for the purposes of social housing which is unfit for human habitation or in a state prejudicial to health, will be in breach of the positive duty inherent in respect for private and family life which is imposed by section 6 of the 1998 Act and Article 8 in Schedule 1 to that Act. But it has not been shown that there has been any breach of that duty in the cases which are the subject of these appeals.
51. The failure to establish a breach of that duty in these cases is, in part at least, a consequence of the course which the proceedings have taken. The parties have been concerned to establish points of principle. By inviting the courts to determine those points as preliminary issues they have sought to avoid the need (essential in cases under Article 8) for the court to determine the facts. The desire to establish points of principle is understandable; but, in my view, it has led to a position in which an affirmative answer to the first of the questions posed for decision in this Court is of no assistance to the appellants in their appeals. It is significant, in this context, that nowhere in the grounds of appeal in *Lee v Leeds City Council* is there a challenge to the judge's observation that:

“I would not be minded to find, on what I have seen and heard of the extent of the damp and mould at the claimant's home, that her rights under Article 8 have been infringed. The conditions complained of do not seem to me to be sufficiently serious.”

- Issue (2)(a) Was the Quick case wrongly decided?
in the alternative,*
- (b) Does section 3 of the Human Rights Act 1998 now require a different interpretation of the covenant to be implied under section 11(1)(a) of the Landlord and Tenant Act 1985?*

52. Mr Lewison, QC, counsel for the appellants, accepts that the only basis upon which this Court can be invited to hold that the *Quick* case was wrongly decided is that advanced in the courts below; that is to say, that the decision in that case was *per*

incuriam, in that the attention of the Court of Appeal in that case was not drawn to the earlier decision of this Court in *Proudfoot v Hart* (1890) 25 QBD 42. He relies, in particular, on the meaning which both Lord Esher, Master of the Rolls, (at page 52) and Lord Justice Lopes (at page 55) gave in that earlier case to the expression “good tenable repair”. As Lord Justice Lopes put it:

“That expression seems to me to mean such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it.”

That definition was approved by Lord Atkin in *Summers v Salford Corporation* [1943] AC 283, at page 289. He went on to say that:

“I find it difficult to draw a distinction between an obligation to put premises into habitable repair and so deliver them up, and to keep premises “in all respects reasonably fit for human habitation.”

53. It is true that there is no reference to *Proudfoot v Hart* in the judgments of this Court in the *Quick* case; and that it does not appear in the list of cases cited to the Court in argument. But the decision in *Proudfoot v Hart* had been considered, in some detail, by this Court in *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, (in which it was distinguished); and was referred to in *Ravenseft Properties Limited v Davstone (Holdings) Ltd* [1980] QB 12 (where it was described by the judge as “very well known”). Each of those later cases was considered by this Court in the *Quick* case. It seems to me very unlikely that this Court decided the *Quick* case in ignorance of the decision in *Proudfoot v Hart*; and very much more likely that it found no place in the judgments in the *Quick* case, or in the list of cases cited in argument, because neither the Court, nor the experienced counsel in that case, thought it was of any assistance. In my view, the submission that the *Quick* case was decided *per incuriam* must be rejected.
54. I should add that, even I were persuaded that the *Quick* case had been decided in ignorance of the decision in *Proudfoot v Hart* (which I am not), I would take the view that it was not now open to this Court to refuse to follow the decision in the *Quick* case on that ground. Both cases were before this Court in *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055. It is clear that the Court did not regard the two cases as inconsistent – *ibid*, at page 1063j-1064c and at page 1065g-j. In the *Aquarius* case the tenant’s covenants included an obligation “to keep in good and substantial repair . . . the demised premises and every part thereof”. In the second of the passages to which I have referred (at page 1065g-j) Lord Justice Slade said this:

“In these circumstances, there would in my opinion have been no grounds on which the judge could properly have held that the words of the repairing covenant quoted above imposed any present obligation on the tenants to do work to the premises. Counsel for the landlords suggested that any such decision would conflict with the principle established by *Proudfoot v*

Hart (1890) 25 QBD 42, [1886-90] All ER Rep 782 that a tenant's covenant to keep premises in good repair obliges the tenant, if the premises are not in good repair when the tenancy begins, to put them into that state. However, as he accepted in the course of argument, the relevant statements of the law in that case were only directed to the case where the condition of the premises has deteriorated from an earlier better condition. They were not directed, and in my judgment have no application, to a case such as the present where the structural defect complained of by the landlords has existed from the time when the premises were originally built. Though counsel for the landlords sought to draw a distinction in this context between structural defects due to errors in design and those due to faulty workmanship, I can see no grounds on principle or authority for drawing any such distinction."

55. I turn, therefore, to the alternative submission: that, notwithstanding the decision in the *Quick* case, this Court must now re-interpret the covenant which section 11(1)(a) of the Landlord and Tenant Act 1985 requires to be implied in those leases to which that section applies. It is said that that is what section 3(1) of the Human Rights Act 1998 requires.
56. Section 3(1) requires that, so far as it is possible to do so, legislation must be read and given effect in a way which is compatible with the Convention rights. For my part, I would not regard it as impossible (if the section stood alone) to read section 11(1)(a) of the 1985 Act as if the obligation "to keep in repair the structure" of the dwelling house meant "to put and keep [the structure] in good habitable repair"; and, if the section were read in that way, to give that obligation the effect which Lord Atkin, in *Summers v Salford Corporation* [1943] AC 283, thought it should have. I find it much more difficult to read the section in that way in the circumstances that section 8 of the same Act imposes an express obligation (in limited circumstances) to keep a dwelling house fit for human habitation. But, to my mind, re-interpretation of section 11(1)(a) of the 1985 Act is not open to the Court in this case.
57. The starting point, as it seems to me, is to ask whether, if the expression "to keep in repair the structure" is given the meaning which the courts have held, consistently since the decision in the *Quick* case, that it should bear in the context of section 11(1)(a) of the 1985 Act, the obligation which that section imposes is compatible with the Convention rights. It is only if that question is answered in the negative that it is necessary (or permissible) for the court to look for some other meaning. If the answer to that question is that the obligation which section 11(1)(a) of the 1985 Act has hitherto been held to impose is compatible with the Convention rights, then there is nothing in section 3(1) of the Human Rights Act 1998 which requires (or permits) this Court to re-interpret that obligation. In particular, it is not for this Court to re-interpret that obligation so as to confer greater rights on the tenant than those which Parliament has been held to have intended. As the courts have emphasised repeatedly, if landlords of unfurnished accommodation (and, in particular, local authority landlords charged

with the function of providing social housing) are to be under an obligation to ensure that the premises are fit for human habitation, then it is for Parliament to say so. Parliament has defined, in section 8 of the 1985 Act, the circumstances in which that obligation should be imposed.

58. I find it impossible to hold that, if the expression “to keep in repair the structure” is given the meaning which this Court held, in the *Quick* case, it should bear in the context of section 11(1)(a) of the 1985 Act, the obligation which that section imposes is not compatible with the Convention rights. It is not to the point that another interpretation of the section would also be compatible with the Convention rights; or that another interpretation would give rights which (as the appellants submit) it is the intention of the Convention that a tenant should have, but which the interpretation of section 11(1)(a) hitherto adopted does not give.
59. I have already indicated my view that, in a case where it is established that a local authority landlord is acting in a manner which is incompatible with Article 8, there will be a breach of section 6 of the 1998 Act; and that, if such a breach is established, the courts have power to give a remedy. There are, also, the powers under the Environmental Protection Act 1990 to which I have referred. In an appropriate case a remedy can be found. There is no basis for the court to resort to the powers to re-interpret existing legislation which are conferred by section 3 of the 1998 Act.

Issue (3): Should a term be implied at common law?

60. A term will not be implied at common law unless it satisfies the requirement of certainty – see *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, at page 574 (where Viscount Simonds referred to “the general principle that an implication must be precise and obvious) and *Shell UK Ltd v Lostock Garage Limited* [1976] 1 WLR 1187, 1197B, 1201A. The submission in the present case is that the term to be implied is a term that the landlord keep the dwelling in good condition; alternatively, a term that the landlord keep the dwelling in a condition which enables the tenant to perform her obligations under the tenancy.
61. In *Welsh v Greenwich London Borough Council* [2000] 3 EGLR 41, this Court held that an express covenant to “maintain the dwelling in good condition and repair” did impose on the landlord an obligation to remedy the underlying cause of excessive condensation which had resulted in mould. The Court found, in that context, that the words “good condition” were “intended to mark a separate concept and to make a significant addition to what is conveyed by the word ‘repair’” – see, in the judgment of Lord Justice Robert Walker, at page 43M, and, also, in the judgment of Lord Justice Latham, at page 44D.

62. It must follow that to imply an obligation to keep the dwelling in good condition in a tenancy agreement which contains only an express term to keep the structure in repair (as in the *Lee* appeal) or which contains no express repairing obligation on the landlord, so that the repairing obligations are those implied under section 11(1) of the 1985 Act (as in the *Ratcliffe* appeal) is to invite the criticism that the court is seeking to make for the parties a bargain which they have not themselves made. The term would impose on the landlord obligations which, on a proper understanding of the law as explained by this Court in the *Quick* case, the landlord could not have intended to undertake. Nor, viewed objectively, could the tenant have thought that the landlord did intend to undertake those obligations – see the observations of Lord Hoffmann in *Southwark London Borough Council v Tanner* [2001] 1 AC 1, at page 12D:

“In the grant of a tenancy it is fundamental to the common understanding of the parties, objectively determined, that the landlord gives no implied warranty as to the condition or fitness of the premises.”

Lord Millett explained the position in the following passage, at pages 17G-18A:

“It [the principle that a tenant takes the property as he finds it] is simply a consequence of the general rule of English law which accords autonomy to contracting parties. In the absence of statutory intervention, the parties are free to let and take a lease of poorly constructed premises and to allocate the cost of putting them in order as they see fit. The principle applies whether the complaint relates to the state and condition of the demised premises themselves or, as in the cases cited, of other parts of the building in which the demised premises are located. Of course, the tenants of local authority housing do not negotiate the terms of their tenancy agreements. They take what they are offered on terms set by the local authority. But the meaning and effect of contractual arrangements cannot be made to depend on the parties’ relative bargaining power. If it is thought right to redress any imbalance by importing terms in favour of the weaker party, this is a matter for Parliament.”

63. In my view for the courts to imply into local authority tenancies in respect of property let to meet the need for social housing a term that the landlord is to keep the property “in good condition” – with the consequence that, as shown by the decision in the *Welsh* case, the landlord is obliged to remedy the underlying cause of condensation and mould – is to go beyond the limits of “permissible judicial creativity”. As Lord Millett put it in the *Tanner* case, at page 26H:

“These cases raise issues of priority in the allocation of resources. Such issues must be resolved by the democratic process, national and local. The judges are not equipped to resolve them.”

64. The appellants contend, in the alternative, for the implication of a term that the landlord keep the dwelling in a condition which enables the tenant to perform her obligations under the tenancy. Reliance is placed upon the decision of this Court in *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348. It was held in that case, following an observation of Lord Justice Slade in *Duke of Westminster v Guild* [1985] QB 688, at page 697, that there are circumstances in which it will be appropriate to impose on a landlord, on whom the obligation is not in terms imposed by the lease, an obligation to repair in order to match a correlative obligation expressly imposed on the tenant. The principle is not, I think, in doubt. But, as Lord Justice Kerr pointed out in the *Barrett* case, the question whether the terms and circumstances of the particular lease require or enable such an implication to be made may not be easy. It must be kept in mind, as Lord Justice Stuart-Smith observed in *Demetriou v Robert Andrews (Estate Agencies) Limited* (1990) 62 P&CR 536, at page 545, that there may be circumstances in which there is no repairing obligation imposed either expressly or impliedly on anyone in relation to a lease.
65. The tenant's obligations upon which Mrs Lee relies to support the implication of a correlative obligation in the landlord are (i) the obligation to use the premises as her only or main home and (ii) the obligation to keep the inside of her home, including fixtures and fittings, clean and in a reasonable state of decoration. Mrs Ratcliffe's lease includes obligations not to part with possession of the premises, not to use them for trade or business purposes, to arrange at her own expense for certain defined repairs (including plaster patching), and to keep the dwelling "in a clean and proper condition, and the interior of the dwelling in a reasonable state of decoration". In those circumstances the question is whether there is to be implied some contractual obligation upon the landlord, beyond those which are expressed in the tenancy agreements or imposed by statute, which requires the landlord to keep the dwelling in a condition which enables the tenant to perform her obligations.
66. In my view the answer to that question is that there is no further contractual obligation to be implied, beyond that to keep the exterior and structure of the premises in repair (which, in so far as it is not an express term, is implied by reason of section 11(1)(a) of the 1985 Act). It must be kept in mind that, in the *Barrett* case, there was no exterior repairing covenant. In the present appeals, the tenants' obligations are to be performed in the context that the landlord is responsible for exterior repair.
67. For the reasons that I have already given, I do not think it is open to the courts to regard an obligation to remedy defects which make the premises unfit for human habitation as a necessary correlative to the obligation on the tenant to reside there. A term to that effect is already implied, in the only circumstances in which Parliament must be taken to have thought that it is required, by section 8 of the 1985 Act. Parliament cannot have overlooked the possibility that there will or may be cases where premises which are not fit for human habitation are let by a local authority for use by the tenant as his or her home. It must, I think, be assumed that Parliament has accepted that, in such cases, it is not necessary to impose on the landlord an obligation to ensure that the defects which lead to that condition are remedied. The courts must proceed on the basis that Parliament was content that the problem could and should be

dealt with under public health legislation now contained in the Environmental Protection Act 1990.

68. Nor do I think that an obligation to remedy design defects which lead to excessive condensation and mould can be regarded as a necessary correlative to the tenant's qualified obligations in respect of internal decorative repair. The tenant's obligations must be conditioned by the nature of the premises. If the premises suffer from condensation and mould by reason of some inherent design defect, then the tenant cannot be required to do more by way of decoration than is reasonable in those circumstances. To hold that the landlord is obliged to put the premises into a state in which they are free from condensation so that the tenant can decorate them would be to impose on the landlord an obligation which goes far beyond anything that can properly be regarded as correlative to the tenant's obligations.

Issue (4): Is there a deemed obligation by reason of section 4(4) of the Defective Premises Act 1972?

69. It follows from what has gone before that I approach this question on the basis that, but for the provisions in section 4(4) of the 1972 Act, there would be no "relevant defect" for the purposes of section 4(1) of that Act. That is because, as I have held, the defects about which the appellants complain are not (but for the provisions of section 4(4)) defects "arising from, or continuing because of, an act or omission by the landlord which constitutes . . . a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises" – see section 4(3) of the Act.
70. Section 4(4) of the Act requires the landlord to be treated, for the purposes of subsections (1) and (3), as if he were under an obligation to the tenant for maintenance or repair of the premises where the tenancy "expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises". In those circumstances the scope and extent of the deemed obligation is commensurate with the scope and extent of the right to enter. The questions in the present appeals, therefore, are (i) whether the works that would be required in order to remedy the inherent defects in design – which are the cause of the excessive condensation and mould – are within the expression "any description of maintenance or repair of the premises" and if so, (ii) whether the tenancy agreements (or either of them) give the landlord the right to enter the premises in order to carry out such works.
71. His Honour Judge Milford held, in the *Lee* case, that the works required were not works of repair; so answering the first of those questions in the negative. His Honour Judge Geddes dealt with the point, in the *Ratcliffe* case, by reference to the second question. He held that the landlord's right to enter was limited to entry for the purposes of rectifying defects which the tenant was under an obligation to report; that the tenant was not under an obligation to report design defects; so that the landlord had no right to enter in order to remedy such defects. In effect, therefore, he answered the second question in the negative.

72. The relevant covenant in Mrs Lee's tenancy agreement required her "to allow the Council's authorised officers or contractors to enter your home at reasonable times of the day to carry out repairs or inspect the premises." In a later version of the City Council's standard tenancy agreement, to which she may have become subject, that obligation had become: "You must allow the Council's representatives or agents access to the Premises at reasonable times of the day to inspect its condition and carry out necessary repairs." Mrs Ratcliffe's tenancy agreement required her to give immediate notice to the Director of Housing "of any defect or damage to the premises"; and gave the Council the right on reasonable notice, "to enter and inspect the state of repair, decoration, or cleanliness of the premises at all reasonable hours of the day, and to execute any repairs therein".
73. It can be seen, therefore, that the express right to enter (other than for the purposes of inspection) is limited to entry for the purposes of carrying out (or executing) repairs. The local authorities submit that before anything can be repaired it must be damaged; and that, accordingly, the works that would be required to remedy design defects (where no damage has resulted from those defects) are not works of repair. It follows that there is no right to enter the premises in order to carry out those works. Both questions should be answered in the negative.
74. The appellants rely on observations in this Court in *Mint v Good* [1951] 1 KB 517. The issue in that case was whether a landlord who had not reserved expressly the right to enter the demised premises and do repairs was liable in nuisance to a person on the highway who was injured by the collapse of a wall forming part of the premises. The court found that a right to enter must be implied in the circumstances. In the course of his judgment Lord Justice Somervell (with whom Lord Justice Birkett agreed) said this, at pages 521-2:

"The question, therefore, would be whether, in the circumstances as stated, a right to enter on and view the premises and do necessary repairs is to be implied. I would have said that, in the absence of evidence which excluded it, there is no term which could be more easily and necessarily implied by law in a tenancy of this kind than a right in the landlord to enter, or to re-enter, to examine the premises and do necessary repairs."

Pausing there, the position in the present appeals is that there is an express reservation of a right in the landlord to enter in order to inspect the premises and carry out necessary repairs. But Lord Justice Somervell continued:

"It must be in the contemplation of both parties to such a weekly tenancy that the tenant will not be called upon to do repairs. The Rent Restriction Acts have rather altered the position; but in the old days it would have been absurd for either side to contemplate that a man who was only a weekly tenant should be called upon to do repairs. Both sides, I think,

must contemplate as the basis of the contract that the house will be kept in reasonable and habitable condition; that that will be done by the landlord and not by the tenant; and, although he does not bind himself to do so, that he will have the right to enter and look after his own property by doing repairs.”

Lord Justice Denning did not find it necessary to decide whether there was an implied right in the landlord to enter and do repairs. He thought that “even if he has no strict right, but has been given permission to enter whenever he asked, it should make no difference” –*ibid*, at page 527.

75. *Mint v Good* was not a case under the 1972 Act. The court was not concerned with the question which arises on the present appeals; that is to say, whether the reservation of a right to enter and do repairs includes a right to remedy design defects which have not given rise to a want of repair. It is, I think, clear from the report that the wall in that case was out of repair; the trial judge had found that “reasonable examination by a competent person would have detected that it was in such a condition that it was liable to collapse at any moment” – *ibid*, at page 518. Lord Justice Somervell referred to the condition of the wall as due to lack of repair – *ibid* at page 519 (“It was not a latent defect: it was due to lack of repair”). In my view it is not possible to read the passage at page 522 (set out above) as deciding that there is to be implied into a weekly tenancy a right in the landlord to enter to do whatever works are necessary to put the premises into a reasonable and habitable condition. The Court was concerned with the existence of an implied right of entry to do repairs.
76. *Mint v Good* was applied by this Court, in the context of a claim under the 1972 Act, in *McAuley v Bristol City Council* [1992] 1 QB 134. The claim in that case was for injury suffered by reason of a garden step which was in an unstable condition. It was held that there was no obligation in the tenancy agreement or under the provisions then contained in section 32 of the Housing Act 1961 (now section 11 of the Landlord and Tenant Act 1985) to repair the step. Lord Justice Ralph Gibson identified the issue at page 145 D:
- “Thus, in this case, assuming there is no actual obligation, contractual or statutory, to repair the garden step, the plaintiff, to succeed under section 4, must show that the defect in the garden step was a “relevant defect”, i.e. that it was a defect in the state of the premises which constituted a failure by the council to carry out repair of a description for which the council had a right to enter the premises.”
77. Condition 6(c) of the tenancy agreement in the *McAuley* case gave the council the right to enter for “any purpose which may from time to time be required by the council”. Lord Justice Ralph Gibson rejected an interpretation of that condition which would “give the right to the council to enter to carry out works of alteration and improvement without the consent of the tenant, e.g. the replacement of an ill-tended lawn by a neat area of concrete” – *ibid*, at pages 145H-146A. But he held, in reliance on *Mint v Good*, that there was an implied right to repair the step – *ibid*, at page

151C-H – and so that there was a right to enter for that purpose. Lord Justice Neill agreed. He was careful to restrict the implied right to a right to enter to carry out repairs to remedy any defects which might expose visitors to the premises (or the tenant himself) to the risk of injury – *ibid*, at page 154G. It is, I think, clear that both Lord Justice Ralph Gibson and Lord Justice Neill regarded the step as being out of repair. They were not, in terms, addressing a case where the defect arose from a fault which was inherent in the design or construction of the step. But it may well be (as the appellants suggest) that they would have not have regarded the distinction as significant.

78. As Lord Justice Ralph Gibson observed, at page 146C-E, there was an element of unreality in an inquiry whether a right to enter and carry out remedial works should be implied. “If a landlord wished to enter to carry out repairs to parts of the premises outside the ‘exterior of the dwelling house’ it is highly unlikely that any tenant would refuse”. He went on:

“That fact, I think, is not conclusive and is of little weight. The test is not whether the landlord could in probability have obtained permission or whether he has in the past been given permission, but whether, if the tenant were unwilling to permit the work to be done, the landlord could insist and, if need be, obtain an injunction.”

So, in the present case, there is element of unreality in the question whether the tenancy agreements give the landlord the right to enter the premises in order to carry out the works that would be required in order to remedy the inherent defects in design which are the cause of the excessive condensation and mould. There can be no doubt that, if the landlord were willing to carry out those works, the tenants would be eager for the works to be done. But, as Lord Justice Ralph Gibson pointed out, that is not the test. The question is whether the landlord could insist on carrying out remedial works against the wishes of the tenant.

79. In the light of the decision of this Court in the *McAuley* case I would give an affirmative answer to that question; at least to the extent that the remedial works were required to remedy defects which were a danger to health. It seems to me that, having regard to the obligations to abate statutory nuisance, that may be imposed by the magistrates’ court on a landlord by section 82 of the Environmental Protection Act 1990, it is necessary to imply a right in a local authority, where it is the landlord, to enter and do the works which are required for that purpose. It is to be noted that, in a case where a local authority has served an abatement notice under section 80(1) of the 1990 Act, it may do “whatever may be necessary in execution of the notice” – see section 81(3) of the Act. It would be extraordinary if, in a case where the local authority is also the landlord (so that the case falls outside the provisions of sections 80 and 81 of the 1990 Act), there were not to be implied into the tenancy agreement a power to enter in order to abate a statutory nuisance.
80. But an affirmative answer to the question whether there is to be implied a power to enter in order to carry out remedial works required to remedy defects which pose a

danger to health does not lead to the conclusion that failure to carry out such works (if not works of repair) may give rise to liability under section 4(1) of the 1972 Act. As I have said, the first question in this context is whether the works that would be required in order to remedy the inherent defects in design – which are the cause of the excessive condensation and mould – are within the expression “any description of maintenance or repair of the premises”. If they are not, the fact that the landlord may be entitled to enter the premises in order to carry out those works does not give rise to a deemed obligation to the tenant “for that description of maintenance or repair” under section 4(4); so that the defect is not a “relevant defect” for the purposes of section 4(3); and there is no duty under section 4(1) to take care to see that persons are reasonably safe from injury caused by that defect.

81. In my view the respondent local authorities are correct in their submission that the first question should be answered in the negative. The works required to remedy the design defects are not works of repair – giving to “repair” the meaning which it should bear in this context. It is not contended that the works are works of maintenance. It is, I think, significant that Parliament, when enacting section 4 of the 1972 Act in substantially the terms proposed in the draft bill annexed to the Law Commission report *Civil Liability of Vendors and Lessors for Defective Premises* (1970) (Law Com No 40), chose to link the duty of care imposed by section 4(1) to the landlord’s failure to carry out an obligation “for the maintenance or repair” of the premises – *ibid*, section 4(3). That is the framework within which the statutory hypothesis in section 4(4) must operate. Parliament did not, as it might have done, link the duty of care to a failure to remedy defects in any more general sense. The obligation to “repair” has a well recognised meaning in the law of landlord and tenant; and, as the cases show, it does not arise unless the object in respect of which it is imposed is out of repair. If the defect which has caused the injury in respect of which a claim is made under section 4(1) of the 1972 Act is not a defect arising from want of repair, it cannot be a “relevant defect” for the purposes of that section. As Lord Justice Ralph Gibson put it, in the *McAuley* case, at page 145D:

“There is, I think, no warrant for a wide construction of the words of section 4. They apply to all landlords, and not merely to local authorities, and can operate so as to impose a substantial burden upon a landlord in respect of premises under the immediate control of the tenant and in respect of which the landlord has assumed no contractual obligation.”

Conclusion

82. It follows that I would dismiss these appeals. I have considered whether some variation to the orders made in the County Courts is required to reflect the conclusions which we have reached; but, subject to any further submissions which the parties may wish to make on that question, I do not think it necessary to disturb those orders.

Tuckey LJ:

83. I agree.

Sir Murray Stuart-Smith:

84. I also agree.

Order: (Appeals dismissed; claimants to pay Respondents' costs of the appeal; Defendants' costs of the appeal to be determined by a costs judge; Claimants who were in receipt of services funded by the community legal service do pay Defendants an amount of be determined by a costs judge; Claimants' costs to be assessed in accordance with the Community Legal Services (Costs) Regulations 2000; Claimants' application for permission to appeal to the House of Lords refused).

(Order does not form part of the approved judgment).