HOMES (FITNESS FOR HUMAN HABITATION) ACT 2018

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The Problem

1. Prior to this Act, rights for tenants and occupiers were piecemeal and there were noticeable gaps. Significantly, the common law rested on the fundamental principle of *caveat emptor* (let the buyer beware the bargain). Landlords and tenants were assumed to be negotiating on equal terms.

2. Section 11 Landlord & Tenant Act 1985 requires the landlord to *"keep in repair*" various parts of the dwelling-house. It does not require the landlord to "put" the dwelling house into repair, if it was not let in a state of good repair. Its scope is limited to the "structure and exterior" and the installations for the supply of utilities.

3. There is no obligation to make improvements eg to bring the condition of the property up to a modern standard eg by installing central heating or double glazing.

4. If damage is not done to the structure or exterior, the repairing covenant will not have been breached, so an infestation is not a breach of the repairing covenant but only actionable in nuisance. And, notoriously, damp which does not cause damage to the structure is not a breach of the repairing covenant.

5. There are broader obligations in tort, under s.4(4) Defective Premises Act 1972 but these only operate to compensate personal injury and financial loss.

6. The categorisation of "hazards" under Housing Act 2004 creates obligations on local housing authorities in some cases to take action against landlords, but not where the

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landlord is the same local housing authority[1]. In addition, the local housing authority's duty is a public law duty not enforceable by the tenant or occupier.

7. There is an existing implied term requiring landlords to keep premises fit for human habitation at s.8 Landlord & Tenant Act 1985. It only applies to tenancies where the annual rent is no more than £52 (or £80 in London). Those limits were last updated in 1957.

Legislative history

8. As long ago as 1996, the Law Commission proposed the enactment of a general implied term about fitness (*Landlord & Tenant: Responsibility for State and Condition of Property*, Law Commission, LC238, 1996). No government took up its proposals.

9. In Lee v Leeds City Council[2], the Court of Appeal held that there was no basis for implying into tenancies of social housing let by public authorities an obligation to keep a dwelling in good condition or to remedy defects which made it unfit for human habitation. Instead the Court of Appeal called for legislation.

10. Karen Buck MP answered the call in 2015 with a private members' Bill: Homes (Fitness for Human Habitation) Bill. It was talked out in the House of Commons.

11. She reintroduced the Bill in 2017. Following the Grenfell Tower fire, Parliamentarians were more prepared to support it and it received cross-party support. Royal Assent was given on 20 December 2018 and it came into force on 20 March 2019.

12. The new Act amends Landlord & Tenant Act 1985 by inserting three new sections – s.9A, s9B and s9C – and amending s.10 for England. It does not apply to Wales (where s.91 Renting Homes (Wales) Act 2016 will insert a similar implied term when it comes into force).

Commencement and scope

13. The new implied term at s.9A Landlord & Tenant Act 1985 applies to:
    a. All new tenancies granted on or after 20 March 2019 (s.9B(3));
    b. All periodic tenancies that are in existence on 20 March 2019 after a period of twelve months so on 20 March 2020 (s.9B(4));
    c. All tenancies that come into existence as periodic tenancies after 20 March 2019 on the expiry of a fixed term tenancy granted before 20 March 2019 (s.9B(5));
    d. All replacement or renewed fixed term tenancies granted after 20 March 2019 on the expiry of a fixed term granted before 20 March 2019 (s.9B(6)).

[1] R v Cardiff City Council ex parte Cross (1983) 6 HLR 1, CA

[2] [2002] EWCA Civ 6, [2002] 1 WLR 1488, CA

14. It applies to those tenancies which are covered by s.11 Landlord & Tenant Act 1985 ie all fixed term tenancies of less than seven years and all periodic tenancies (s.13 Landlord & Tenant Act 1985). Note that lettings for less than seven years may fall outside scope if the tenant can renew for a further term making more than seven years in total (s.13(2) Landlord & Tenant Act 1985).

15. As set out above, it only applies to tenancies in England.

16. As with the s.11 repairing obligation, the provision does not apply to certain properties let to local authorities, other public bodies, the Crown or government departments (s.14 Landlord & Tenant Act 19850.

The extent of the implied term

17. The implied term is that the landlord covenants that the dwelling *"(a) is fit for human habitation at the time the least is granted or otherwise created or, if later, at the beginning of the term of the lease, and (b) will remain fit for human habitation during the term of the lease*" (s.9A(1)).

18. The covenant extend to the common parts of the building (s.9A(6)).

19. The Act does not specify what might be unfit. Instead, it prescribes exceptions at s.9A(2) and (3):

    a. Not works or repairs which have arisen by virtue of the tenant's failure to use the premises in a tenant-like manner (whether in an express covenant or implied);
    b. Not to rebuild or reinstate the dwelling in the case of destruction or damage by fire, storm, flood or other inevitable accident;
    c. Not in relation to anything which the tenant is entitled to remove from the building;
    d. Not works or repairs which require the consent of a superior landlord or other third party in circumstances where consent has not been obtained following reasonable endeavours to obtain it;
    e. Not where the unfitness is wholly or mainly attributable to the tenant's own breach of covenant or because of an exclusion under s.12 Landlord & Tenant Act 1985 (power of the court to authorise exclusions or modifications in leases in respect of s.11 repairing obligations).

20. In determining whether a property is fit for human habitation, regard must be had to the factors set out at s.10(1) Landlord & Tenant Act 1985: "*repair, stability, freedom from damp, internal arrangement, natural lighting, ventilation, water supply, drainage and sanitary conveniences,*

facilities for preparation and cooking of food and for the disposal of waste water in relation to a dwelling in England, any prescribed hazard".

21. 29 hazards are prescribed in the Housing (Health and Safety Rating System) (England) regulations 2005, Schedule 1. For something to be a hazard there must be a risk of harm to the health or safety of an actual occupier of a dwelling which arises from a deficiency in the dwelling (s.2 Housing Act 2004).

22. In short, the existence of a hazard is not the only means by which a property might be unfit. But if it does exist, it is strong evidence of unfitness.

Types of unfitness

23. The case-law on unfitness is old. A *"rule of thumb*" was said to be: "*if the state of repair of a house is such that by ordinary use damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation*" (Atkins LJ Morgan v Liverpool Corporation[3]). Another, in relation to the Defective Premises Act 1972, s.1, is that the dwelling must be capable of occupation for a reasonable time without risk to the health or safety of the occupants, where a dwelling is or is part of a newly constructed building what is a reasonable time will be a question of fact, and it must also be capable of occupation for a reasonable time without undue inconvenience or discomfort to the occupants (Rendelesham Estates plc v Barr Ltd[4]. See also Bole v Huntsbuild Ltd[5] where Dyson LJ said the question should be approached by asking "where the dwelling as a whole was unfit for human habitation".

24. There is some case-law to the effect that the s.8 implied term only applied where the damage could be made good by the landlord at reasonable expense: Buswell v Goodwin[6]. This was a concession made in argument, not a ratio and, if raised, is ripe for review.

25. Some examples from the old case-law of unfitness are:

    a. A small house in which the sole window in a main room could not be safely opened: Summers v Salford Corporation[7];
    b. Premises where plaster had fallen from the ceiling: Walker v Hobbs & Co[8];

[3] [1927] 2 KB 131, CA

[4] [2014] EWCH 3968 (TCC), [2015] 1 WLR 3663, TCC

[5] [2009] EWCA Civ 1146, CA

[6] [1971] 1 WLR 92, CA

[7] [1943] AC 283, HL

[8] (1889) 23 QBD 458

c. The complete collapse of a ceiling: Fisher v Walters[9];
d. Accommodation in which a sanitary convenience was defective and serious dampness had accrued from defective guttering: Horrex v Pidwell[10];
e. The risk of collapse of a further part of a garden retaining wall adjacent to the house: Baillie v Savage[11];
f. Condensation dampness: Johnson v Sheffield City Council[12].

Enforcement

26. Since the obligation is in the form of a term implied into the tenancy, the tenant will bring a claim for breach of covenant and can claim an order for specific performance (to remedy the unfitness s.9A(5)) and damages. For the landlord to be liable, he or she must have been put on notice and have had a reasonable time to remedy the unfitness (unless the unfitness is to the common parts, where notice is not required).

27. The Protocol for Housing Disrepair Cases will apply as will the availability of legal aid under LASPO. The usual rules for allocation to small claims, fast track and multi-track will apply.

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[9] [1926] 2 KB 315, KBD

[10] [1958] CLY 1461

[11] [2018] EWHC 3035 (Ch).

[12] (1994) Legal Action August p16, Sheffield County Court

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