AnthonyGold

Homes (Fitness for Human Habitation) Act – practical issues

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What is the implied term?

AnthonyGold

The Act amends Landlord and Tenant Act 1985 to add implied terms of tenancy agreements.

A new section 9A adds an implied term for England

(Wales is not included. Because reasons).

The implied term is that the landlord contractually promises that the let property ("the dwelling'):

(a) is fit for human habitation at the time the lease 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.

What is the implied term?

AnthonyGold

This extends to all parts of the building of which the ‘dwelling’ forms part, in which the landlord has ‘sufficient estate or interest’.

So, for a block, to the structure of the building and all common parts.

What is the implied term?

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Can you exclude the implied term from your tenancy agreement?

No. Just like section 11 LTA 1985 – the repairing clause – you cannot exclude the term, nor can you impose any penalty or disadvantage on the tenant if they use the clause.

Yes, but what does 'fit for human habitation' mean?

AnthonyGold

The test for a breach and whether a tenant has a potential claim is at section 10 Landlord and Tenant Act 1985 (as amended).

the house or dwelling shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.

We'll come back to 'not reasonably suitable'…

What are 'those matters'?

Those matters

AnthonyGold

There is a list at section 10:

- *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;*

Those matters

AnthonyGold

'Prescribed hazard' means anything prescribed by the Secretary of State under section 2 Housing Act 2004 – for the present, that means the HHSRS list of hazards (or any version in the future). This includes

- Damp and mould growth
- Carbon monoxide and fuel combustion products
- Electrical hazards
- Excess cold
- Excess heat
- Lighting (including natural)
- Noise
- Domestic hygiene, pests and refuse
- Fire risk/hazards (including fire escape routes)

Those matters

AnthonyGold

‘Hazard’ is defined in the same way as Housing Act 2004, but, crucially, with ‘potential occupiers’ taken out, so it reads:

“hazard” means any risk of harm to the health or safety of an actual occupier of a dwelling or HMO which arises from a deficiency in the dwelling or HMO or in any building or land in the vicinity (whether the deficiency arises as a result of the construction of any building, an absence of maintenance or repair, or otherwise).”

HHSRS

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Does this mean there has to be an HHSRS assessment?

No. (though if one is done and a category 1 hazard is found – so long as it applies for the current occupiers, that would very likely be 'unfit')

The hazard types are factors for the court to consider – is the property so deficient in relation to one or more of those factors as to be not reasonably suitable for habitation.

Unfit for human habitation.

AnthonyGold

The question of whether a dwelling is ‘not reasonably suitable’ for human habitation will be for the courts.

Old (but still valid) case law (1926) said:

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

NB “may”, not ”has been”

Unfit for habitation.

AnthonyGold

Meanwhile, in a 2014 section 1 Defective Premises Act 1972 case (test of 'unfit for habitation'), the High Court found that to be 'fit' a residential property must:

(a) 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 (it may or may not be as long as the design life of the building); and

(b) be capable of occupation for a reasonable time without undue inconvenience or discomfort to the occupants.

Rendlesham Estates Plc & Ors v Barr Ltd [2014] EWHC 3968 (TCC) at 68.

('reasonable time' is not relevant to the new implied term)

Unfit for habitation.

AnthonyGold

So, we will have to see exactly what the courts make of it, but it is clear that it would have to be something that either:

Was a significant risk to the occupiers' health and safety, or

Was a cause of significant ('undue') inconvenience or discomfort to the occupiers.

So not negligible or minor.

Unfit for habitation.

AnthonyGold

Examples:

Damp and mould (including condensation)
Frequently broken down lifts (subject to degree of inconvenience)
Fire safety hazards (in dwelling or common parts)
Unsafe means of access
Excessive cold (broken or inadequate heating)
Inadequate or no ventilation
Excessive heat
Excessive noise
Etc..

But what about…?

AnthonyGold

Landlords are not liable for *any* unfitness, nor do they always have to do works. There are exclusions:

If the works are the responsibility of the tenant, under their obligation to behave in a tenant-like manner.

If the works are to anything the tenant is entitled to remove from the dwelling (the tenant's property/belongings)

Rebuilding or re-instating the dwelling after fire, flood, storm or inevitable accident

Contd….

But what about…?

AnthonyGold

Exclusions contd…

The landlord is not required to do works:

Where the unfitness is wholly or largely due to the tenant's own breach of covenant

Where the works or repairs would be in breach of any enactment. Eg works to remedy a defect would breach planning permission, or listed building requirements, or conservation area requirements (but only extends to the specific works that would be a breach.)

Where the works require the consent of third party (superior landlord, neighbour, council etc.) and reasonable endeavours have been made to obtain that consent, but it hasn't been given. ('Reasonable endeavours' is very unlikely to extent to bringing legal proceedings)

But what about…?

AnthonyGold

So in most situations where the landlord can't do the works for reasons out of their control, or where the unfitness is due to the tenant behaving in an untenant-like manner, or in breach of tenancy, there is no obligation and no liability.

Notice? Access?

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The same common law rules on notice as with repairs will apply:

Defects inside the let property (or to a house) – no liability until landlord has been notified of the problem and had a reasonable period to rectify it.

Defects to a building (eg block of flats) – where the landlord has 'sufficient estate or interest' in the common parts, taken to have immediate notice when the defect arises.

Access – provided for in the Act – right to access to inspect or do works at reasonable times of day on 24 hours written notice.

When does this apply?

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Was in force 20 March 2019 – for all new tenancies of less than 7 years term beginning on or after that date.

For any ‘renewal’ tenancy granted on or after 20 March 2019

For any tenancy that becomes a statutory periodic tenancy on or after 20 March 2019, following a fixed term starting before 20 March 2019.

For any periodic tenancies in existence on 20 March 2019, applies after 12 months – 20 March 2020.

Enforcement?

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Tenant can bring a claim in the county court for works and damages.

Can be a counterclaim to a rent arrears claim.

Likely to be the same ‘pre action protocol’ as disrepair – letter of claim, expert inspection and so on. So at least two, likely three months before a claim is issued at court.

Practical steps

AnthonyGold

Repairs have always been reactive.

Fitness needs more proactive approach – implied covenant at commencement of tenancy and thereafter

So, consider properties at/before grant of new tenancy. Any history of complaints about, eg, damp and mould that would give rise to questions about why the property suffers that way?

Include consideration of fitness issues on void checklist (eg heating working? Heating adequate for the space? Windows opening and closing properly)

Don't rely on the old disrepair liability points. That will not work where there is a fitness issue, regardless of whether there is disrepair or not.

Practical steps

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Review stock now, inspection and records check.

Respond to tenant concerns promptly. Keep detailed records.

Do not rely on the old responses to, eg, mould issues. These won't work.

Consider reasonable ways to remedy any defects/issues.

Notify a superior landlord if the problem is with structure or common parts.

Just getting rid of the immediate effects (eg, wiping down mould growth) won't work as the liability is for the underlying cause of the problems.

Homes fit to live in...