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Homes (Fitness for Human Habitation) Act 2018

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PART 1

An Overview of the Act

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Introduction to the Act

- The implied covenant that homes would be fit for human habitation originated in the Housing of the Working Classes Acts in the 1880s.
- It was subsequently re-cast in ss.8-10 of the Landlord and Tenant Act 1985 ('LTA 1985').
- Unrealistic rent limits rendered ss.8-10 LTA 1985 otiose.
- The 2018 Act came into force on 20 March 2019 replacing s.8 LTA 1985 and introducing new sections 9A, 9B and 9C into the LTA 1985.

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To which tenancies does the new law apply?

- s.9B LTA 1985
- From **20 March 2019**:

1. All new tenancies (including replacement tenancies) of a term of 'less than 7 years' (including new periodic tenancies) granted on or after 20 March 2019;
2. All tenancies that began as a fixed term prior to 20 March 2019 but become a periodic tenancy after 20 March 2019

- 'Less than 7 years' is further defined in s.9B(8) LTA 1985

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To which tenancies does the new law apply? Cont.

- From **20 March 2020**:

1. All periodic or secure tenancies already in existence on 20 March 2019

- Accordingly, only non-secure fixed term tenancies granted before 20 March 2019, which are not renewed, avoid the Act up to their expiry date (s.9B(3) LTA 1985).
- It does not apply to licenses to occupy.

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To which tenancies does the new law apply? Cont.

- The dwelling let under the lease must be let 'wholly or mainly for human habitation' (s.9B(1) LTA 1985)
- S.9B(7) provides that it is immaterial whether the dwelling is to be occupied under the lease or under an inferior lease derived out of it or that the lease also demises other property

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What are the implied terms?

- See s.9A LTA 1985
- The implied covenant by the lessor is that the dwelling:
  - **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**
  - **will remain fit for human habitation during the term of the lease**
- Contracting out not permitted, s.9A(4) LTA 1985

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The meaning of 'fit for human habitation'

- s.10 LTA 1985 (as amended by the 2018 Act) – A property will be regarded as unfit if 'it is so far defective in one or more of those matters (set out below) that it is **not reasonably suitable for occupation** in that condition.
- The list of factors:

  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

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The meaning of 'fit for human habitation' (Cont.)

- The prescribed hazards referred to in s.10 LTA 1985 are the 29 types of prescribed hazard set out in Schedule 1 of the Housing Health and Safety Rating System (England) Regulations 2005/3208 (both Category 1 and Category 2 hazards)

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The meaning of 'fit for human habitation' (Cont.)

- The definition of 'hazard' for the purposes of s.10 LTA 1985 is as per s.2(1) Housing Act 2004:
  - *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).*

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Reach of the implied term

- S.9A(6) LTA 1985:
  - *Where a lease to which this section applies of a dwelling in England forms part only of a building, the implied covenant has effect as if the reference to the dwelling in subsection (1) included a reference to any common parts of the building in which the lessor has an estate or interest.*
- I.e. Where the dwelling forms part of a block, the obligation extends to all parts of the building which are owned by the landlord

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Reach of the implied term (Cont.)

- Pursuant to s.9A(2)-(3) LTA 1985, a landlord is not responsible for:
  - Unfitness which has been caused by the tenant failing to behave in a tenant like manner or that results from the tenant's breach of the agreement;
  - Carrying out works or repairs for which the tenant is liable;
  - Rebuilding/reinstating the dwelling in the case of destruction or damage by fire, storm, flood or other inevitable accident;
  - Keeping in repair or maintaining anything which the lessee is entitled to remove from the dwelling;
  - Carrying out works or repairs which, if carried out, would put the lessor in breach of any obligation imposed by any enactment (whenever passed or made); and,
  - Carrying out works or repairs requiring the consent of a superior landlord or other third party in circumstances where consent has not been obtained

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Reach of the implied term (Cont.)

- s9A(3): S.9A(1) is also not to be taken as imposing on the lessor any liability in respect of the dwelling being unfit for human habitation if the unfitness is wholly or mainly attributable to—
- (a) the lessee's own breach of covenant, or
- (b) disrepair which the lessor is not obliged to make good because of an exclusion or modification under section 12

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What will be a breach of the terms?

- In considering whether the dwelling is unfit, the correct approach is to consider whether the defects, **taken in the round**, mean that the premises are not reasonably suitable for occupation (*Wyse v Secretary of State for the Environment* [1984] JPL 256).
- This will be a question of fact for the Court.
- N.B. The only issue is whether the property is not reasonably suitable for occupation – a category 1 or 2 hazard does not need to be proved.

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Examples of breach under the old law

- Dwellings have been found to be unfit for habitation where:
  - One of the two sash cords in the only window in one of the bedrooms in a 4 room dwelling broke and the window jammed; thereby giving rise to the risk of injury to any person opening or closing the window because of the risk that the other cord would break (*Summers v Salford Corp.* [1943] AC 283);
  - A pane of glass in a door was in poor condition; so that if pushed or leaned against it was likely to break and cause injury (*Todd v Clapperton* [2009] CSOH 112 (Scottish)); and,
  - A defective lavatory and guttering (*Horrex v Pidwell* [1958] CLY 1461).

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Examples of breach under the old law (Cont.)

- Dwellings have been found to remain fit for habitation where:
  - Defective hot water system; where the tenant could heat water in kettles (*Daly v Elstree DC* [1948] 2 All ER 13); and,
  - Occasional invasion of rats from outside (*Stanton v Southwick* [1920] 2KB 642).

- NOTE ALSO: Historically, the obligation in s.8 was confined in *Buswell v Goodwin* [1971] 1 WLR 92 to premises which could be made fit by the landlord at reasonable expense

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Guidance from s.1 Defective Premises Act 1972?

- Under s.1 DFA 1972, a person taking on work for or in connection with the provision of a dwelling owes a duty to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed
- The tests are worded slightly differently but caselaw under s.1 may be relevant to the interpretation of the new law

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Guidance from s.1 Defective Premises Act 1972? (Cont.)

- The meaning of 'fit for habitation' was considered in Rendlesham Estates Plc & Ors v Barr Ltd [2014] EWHC 3968 (TCC):
  - It is a **matter of fact** in each case.
  - It extends to 'defects of quality' rendering the dwelling unsuitable for its purpose as well as to 'dangerous defects'.
  - It relates to defects rendering the dwelling **dangerous or unsuitable** for its purpose and **not to minor defects**.
  - Such defects in one part of the dwelling may render the dwelling unfit for habitation as a dwelling house even if the defect does not apply to other parts of the dwelling.
  - Must consider the effect of the defects **as a whole**

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Requirement of notice

- The landlord is unlikely to be liable under the section until he/she has notice of the relevant defect. While ss.9A and 9B do not expressly provide for this; this is the established position in the cases for both s.8 (as it was) and s.11.

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New access provisions

- By virtue of s.9A(7)-(8) LTA 1985, there is also an implied covenant by the lessee that the lessor (or a person authorised by the lessor in writing) may enter the dwelling to view its condition and state of repair:
  - Only at reasonable times of the day; and
  - Only if at least 24 hours' notice in writing has been given

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PART 2

An Assessment of the Significance of the New Law

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When is the Act likely to be different to s.11 cases? (1) Contracting out

- S.11(2)(a)(b)(c) are the same as s.9A(2)(a)(b)(c)
- s.12(1) is the same as s.9A(4); but,
- s.12(2): The county court may, with the consent of both parties, authorise a term or agreement which excludes or limits s.11 if it appears that it is reasonable to do so, having regard to all the circumstances of the case, including the other terms and conditions of the lease.

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Applying to the Court to exclude s.11

- S.9A(3)(b): If a landlord's s.11 obligation has been excluded or limited by the county court under s.12, there is no liability for s.9A(1) unfitness which is 'wholly or mainly attributable' to disrepair which would have fallen under s.11 but for the exclusion/limitation

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The impact of the terms of the tenancy

- S.9A(3)(a): s9A(1) does not impose on the lessor any liability in respect of the dwelling being unfit for human habitation if the unfitness is 'wholly or mainly attributable' to: (a) the lessee's own breach of covenant…..
- Drafting implications?

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When is the Act likely to be different to s.11 cases? (2) Breach

- **(A) Condensation dampness/ mould**:
- S.11: The fundamental need to show physical disrepair, cf. *Quick v Taff Ely BC* [1986] QB 809
- S.9A(1)
- Limits? s.9A(2)(e) (no right to do the works), (6) (no interest)

s9A(3)(a) (breach of tenant covenant)

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- **(B) Fire**:

s.11?

S.9A91) now covers fire safety in relation to: installations within the dwelling; the fabric of the dwelling/between dwellings; common parts (eg. fire doors); and, external cladding

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- **(C) Excess cold**:
- S11: CH system not in proper working order
- S.9A: Inadequate (or non-existent) heating system

(query whether the system must be affordable for the tenant)

(D) Noise:

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When is the Act likely to be different to s.11 cases? (3) Intermediate landlords

- S.9B(7)
- it is immaterial ‘whether the dwelling is to be occupied under the lease or under an inferior lease derived out of it’
- it is immaterial ‘that the lease also demises other property (which may consist of or include one or more other dwellings)’

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The simple case: L and T

- L is freeholder of house or flat
- T is the tenant of that house or flat
- S.11, LTA 1985 binds L; for the benefit of T
- S.9A(1) binds L; for the benefit of T

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Lease of a building with a number of habitable units

- Here, there is L, the head landlord of the building
- T takes a lease of the whole building
- T (thereby becoming an intermediate landlord) lets out the individual flats to S1, S2, S3 etc.
- Where do s.11 and s.9A(1) apply in this chain? Between T and each subtenant (S1 etc.), as in the simple case, both s.11 and 9A(1) apply

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Does s11 apply between L and T?

- S.11 applies to a ‘lease of a dwelling-house’ (s.13(1), LTA 1985)
- This means a lease ‘by which a building or part of a building is let wholly or mainly as a private residence and “dwelling-house” means that building or part of a building’ (s.16(b), LTA 1985)
- ‘A’ dwelling-house/ ‘a’ private residence

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Does s.9A(1) apply between L and T?

- S9A(1) applies to a lease under which ‘a dwelling is let wholly or mainly for human habitation’ but see s.9B(7) above
- Examples in practice
- Can S sue L?

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When is the Act likely to be different to s.11 cases? (4) Damages?

- Usual civil law remedies will be available for breach of the implied covenant: i.e. interim injunction, damages and specific performance.

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When is the Act likely to be different to s.11 cases? (5) Common parts?

- S.11(1)(a): (exterior)
- S.11(1A): (parts of the building in which the landlord has an interest)
- S.9A (6) Where a lease to which this section applies of a dwelling in England forms part only of a building, the implied covenant has effect as if the reference to the dwelling in subsection (1) included a reference to **any common parts of the building in which the lessor has an estate or interest**.

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- 9A(1) as re-interpreted: In a lease to which this section applies …etc., there is implied a covenant by the lessor that **the common parts of the building in which the lessor has an estate or interest**: (a) are 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.
- Example: fire safety in common parts
- But note eg. s.9A(2)(e)

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How much difference is it making in practice today?

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The end – any questions?