**Practical implications / application of the Homes (Fitness for Human Habitation) Act 2018**

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**Legislation cited**

[Homes (Fitness for Human Habitation) Act 2018 (c.34)](http://uk.westlaw.com/Document/I6D7B387004E311E98F1CA3D9780F419B/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search))

**Introduction**

In a recent article in the Construction Law Journal[1](#co_footnote_1_1) Clare Anslow introduced the subject of [Homes (Fitness for Human Habitation) Act 2018](http://uk.westlaw.com/Document/I6D7B387004E311E98F1CA3D9780F419B/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) and concluded that the Act

”has given tenants a new way to force their landlords to improve conditions in their homes and, if appropriate, to be compensated for the loss. I am intrigued to see how this new piece of legislation is going to work alongside the existing disrepair arguments, and I am sure that over the next 12 months there will be a swathe of County Court judgments addressing the use and scope of the [HFHHA 2018](http://uk.westlaw.com/Document/I6D7B387004E311E98F1CA3D9780F419B/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) …”.

The introduction to the Act specifies that this is an Act to amend the [Landlord and Tenant Act 1985](http://uk.westlaw.com/Document/I601777F0E42311DAA7CF8F68F6EE57AB/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) to require that residential rented accommodation is provided and maintained in a state of fitness for human habitation; and for connected purposes.[2](#co_footnote_2_1)

Despite the fact that the new Act refers solely to leases and more specifically to those of seven years or less, Anslow confirms that it applies to

”all tenancies of properties in England that have commenced on, or since the 20th March 2019 which are residential tenancies granted for a term of less than seven years and to certain longer-term tenancies in the social housing sector. This means that it applies to all tenancy agreements that began as a fixed term before the commencement date but become a periodic tenancy after the commencement date”.

Pursuant to [s.9B(4)](http://uk.westlaw.com/Document/I4422B630290D11E9AC05B1B74744BD28/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) from 20 March 2020 it also covers periodic tenancies and secure tenancies that were in existence on 20 March 2019.

This article seeks to look at the Act from a surveyor’s perspective. The sections of the Act that would require their involvement can be found at: ***\*J.H.L. 54***

1. **9A(1)(a):** in determining whether a dwelling is or was 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
2. **9A(1)(b):** in advising whether a dwelling has or will remain fit for human habitation during the term of the lease.

  For those Chartered Building Surveyors, who will be required to provide expert opinion on the question of fitness for habitation, this legislation creates a plethora of issues not least the lack of definition of minimum standards relating to the criteria stated as being assessed for fitness for human habitation which the Act lists as follows:

1. repair;
2. stability;
3. freedom from damp;
4. internal arrangement;
5. natural lighting;
6. ventilation;
7. water supply;
8. drainage and sanitary conveniences;
9. facilities for preparation and cooking of food and for the disposal of waste water;
10. in relation to a dwelling in England, any prescribed hazard;
11. and 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.

  The lack of minimum standards will require surveyors to provide subjective opinions which, whilst based upon their own experience, may not coincide with the interpretation that a court may make on the same evidence.

In this paper the authors will be focussing on two of the criteria commencing with freedom from damp and natural lighting with examples drawn from personal experience in these fields.

**Freedom from damp**

Since the legislation provides no definitions it is necessary to firstly consider the types of dampness that occur in a property and then the causes and sources of such dampness before considering measures that may be applied and how fitness for habitation might be considered.

Dampness within a buildings structure will generally fall into one of two categories, firstly penetrating dampness from such things as broken rainwater goods, structural failure or lack of maintenance of the structure such as missing pointing. The other significant source of dampness in the structure is generally referred to as rising dampness resulting from the damp proof course being either broken or bridged. Dampness within the structure may also be a symptom of a plumbing failure internally.

There is little doubt that where a landlord fails to maintain any part of the structure, with the result that damp penetration occurs, then the situation is capable of deterioration to the point where a property may become unfit for habitation but the question remains as to the point at which unfitness will occur. ***\*J.H.L. 55***

When one considers rented accommodation then the most common source of dampness forming the subject of complaint is, in fact, that of condensation and this results from a number of factors not all of which would be considered the landlords responsibility but the manifestations include mould growth on walls and within the dwelling on clothing and flooring for example as well as within the surface of walls.

Fundamentally there are three factors in preventing condensation: insulation, heating and ventilation. Many older properties have had new sealed windows installed and central heating, but the external walls are uninsulated. In their original state the windows would have provided ventilation and internal temperatures would not be greatly different to those externally. Now the internal temperature is somewhat greater and so the “dew point” i.e. the point at which condensation forms is closer to the internal surface of the walls. When one adds the effect of human occupation then condensation can become severe. For example, it is not uncommon for occupants to cook meals involving boiling water and to take showers before retiring for the evening. Central Heating systems are set on twice daily and will go off at the time of retiring allowing the dwelling to cool down. Moisture contained in the warm air environment during the day will condense on any cold surface such as windows and uninsulated walls.

Thus, the questions to be considered are, what is the responsibility of the landlord and what is the responsibility of the inhabitants, and at what point does a small area of mould growth become too much?

Prior to the Housing Health and Safety Rating System (HHSRS) introduced by the [Housing Act 2004](http://uk.westlaw.com/Document/I5F9353D0E42311DAA7CF8F68F6EE57AB/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)), there were numerous cases demonstrating that a landlord is not liable for condensation unless that condensation is caused by some structural defect falling under the landlord’s obligation to repair. For example, in [*McNerny*](http://uk.westlaw.com/Document/I76F97DC0E43611DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) [3](#co_footnote_3_1) the case concerned the effects of condensation causing the plaintiff to suffer from colds and other ailments. The claim failed as although the single pane windows and solid walls were the cause of the condensation, they could not be said to be in disrepair (liability under the [Defective Premises Act 1972](http://uk.westlaw.com/Document/I605B10A0E42311DAA7CF8F68F6EE57AB/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) goes no wider than the repairing covenant).

Under the HHSRS, greater powers are given to local authorities to deal with condensation (under the heading “Damp and Mould Growth”). However, if the tenant is causing the condensation, it will not be a landlord’s duty even under HHSRS.

One way to understand the application of HHSRS would be to consider the case where a tenant has no form of heating and, under common-law, there is no duty for a landlord to make a property better than when the tenant took on the tenancy. However, if there was condensation and the installation of fixed heating would alleviate the problem, the local authority could require fixed heating to be installed. The new Act, however, would require confirmation of fitness for habitation prior to occupancy.

If a tenant has gas central heating, double glazing, good insulation etc. and there is condensation, not caused by any structural defect, then the HHSRS would not be able to intervene but could this change under the new Act?

Surveyors are not unaccustomed to inspecting and advising clients on the causes and solutions for dampness in properties and, where there is a defect in the structure or services to the property and subject to the terms of the lease, the responsibility will be easily defined. There is, though, the question of magnitude. For example, in heavy rainfall a gutter may overflow. This could be due to leaves and other debris in the gutter or to exceptional weather conditions. A judgement will have to be made as to whether any of these is sufficient to render the dwelling unfit for ***\*J.H.L. 56*** habitation i.e. at what point does it go from being a short-term nuisance to an issue that requires the implementation of the Act?

Surveyors looking to the Building Research Establishment (BRE) or British Standards for assistance in the quantification of any damp injury will be disappointed. A wealth of good technical publications are in existence however these are currently not structured in the field of dampness for the purpose of helping to define a minimum occupational fitness level. These documents over time might evolve but in the immediate future of the anticipated rush of early litigation, both expert and judicial decisions are going to be subjective on the quantum that defines the bar of the problem.

Condensation is a much harder question. Many landlords have installed central heating in their tenants’ properties and replaced old wooden or metal framed windows with new PVCu double glazed windows. They have even installed humidistat-controlled extract fans in kitchens and bathrooms in some instances and yet still have complaints about condensation affecting health and ruining clothes. A surveyor inspecting these premises will identify two issues, firstly the lack of insulation of the external walls resulting in a dew point close to the internal surface of the walls and secondly the occupancy where it often found that windows are taped shut, trickle ventilators in windows sealed, extract fans switched off, clothes being dried indoors etc. etc.

Often, inspection of neighbouring similar dwellings will find no such issues relating to the occupancy and will conclude that but for the way in which this dwelling was being occupied the dwelling would be fit for habitation. However, the issue of poorly insulated external walls remains and where, for example, they are lower than current building regulations does this make the dwelling unfit?

The classic black mould associated with condensation is of particular concern, as this area is ripe for rogue practitioner abuse. The fear factor concept of “toxic mould” and the lack of statutory protection for both the landlord and tenant that inspection report must be provided by Chartered Professionals such as Chartered Building Surveyors or Chartered Environmental Health Practitioners needs the qualifications and experience of “Damp Experts” to be challenged. Opportunity websites are appearing seeking to take a technical problem of mould and then build on to layperson fear such that the unfit for human habitation label within the legislation may be seen as a gift to those seeking to prey on the unfortunate. The desire for supporting robust technical standards to define minimum both protects landlords and tenants from these rogues.

**Natural lighting**

Just as with the definition of dampness, the Act does not specify what should be considered “adequate” or “minimum” and so it is necessary to firstly consider how daylight is diminished and how the minimum acceptable level may be defined.

This is, by far, one of the most contentious issues when dealing with rented accommodation as historically a right to light could only be asserted where there was an interest in the land and such cases were commonly considered under the [Prescription Act 1832](http://uk.westlaw.com/Document/I612F2980E42311DAA7CF8F68F6EE57AB/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)). Statutory tenants have no interest in the land and therefore could not pursue an action against an adjoining owner to protect the access to daylight although they might have a case against their own landlord for loss of quiet enjoyment where their landlord causes the obstruction or perhaps acquiesces in the obstruction but that is not the same as being able to protect the access to light.

The two common situations that arise whereby daylight is reduced to a tenants property are firstly where the social landlord undertakes what is commonly termed “estate regeneration” which involves developing unused plots within and around an estate and secondly where another developer wishes to erect a new structure adjacent to the tenants property and the landlord ***\*J.H.L. 57*** agrees a settlement for the obstruction of light to the freehold even though it affects the daylight to the tenants property.

The measure applied to such cases to determine whether a property is or is not adequately daylit relates back to the case of [*Colls*](http://uk.westlaw.com/Document/I89C69001E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) [4](#co_footnote_4_1) and subsequent cases such as [*Ough*](http://uk.westlaw.com/Document/I14D24400E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) [5](#co_footnote_5_1) and [*Regan*](http://uk.westlaw.com/Document/I86EECDC0243711DBA048C911C25D4312/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)).[6](#co_footnote_6_1) The common approach to date has been to assess whether a room can receive daylight from 0.2 per cent of the sky to more than half of the room area at working plane height. If this is the case, then the room would be considered adequately daylit.

Leases may contain clauses that remove the right to light to a tenant but where they do not then the rule in [*Wheeldon*](http://uk.westlaw.com/Document/IF8BFB8F0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) [7](#co_footnote_7_1) or [s.62 of the Law of Property Act 1925](http://uk.westlaw.com/Document/I38E0B640E44811DA8D70A0E70A78ED65/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) will apply to imply a right. The question that this raises is that where a lease specifically excludes a right to light for the tenant can the new Act override this if the property would be deemed unfit for habitation as a result?

When one considers dwellings from a planning perspective, the issue of daylight is much less clear. There are examples where planning permission was granted in which some rooms had no access to daylight but, where the local planning authority have adopted guidance then this usually references BR209—Site Layout Planning for Daylight and Sunlight[8](#co_footnote_8_1) and seek for applicants to meet this guidance wherever possible. If a property has planning approval where the BRE guidance is not met then the tenant might have a prima facie case for stating that their dwelling was inadequately daylit from the outset but to place this in context, BR209 and CIBSE LG10[9](#co_footnote_9_1) were read in conjunction with the former British Standard BS 8206-2[10](#co_footnote_10_1) as guidance only and thus not necessarily considered as minimum standards. However, the recent launch of BS EN 17037[11](#co_footnote_11_1) directly impacts on the recommendations of these other technical documents due to the withdrawal of BS8206-2. The new standard BS EN 17037 can no longer be interpreted as guidance and cannot be incorporated into BR209 whilst BR209 continues to reference a standard that no longer exists.

The potential application of BS EN 17037 under the new right of redress against landlords under the [Homes (Fitness for Human Habitation) Act 2018](http://uk.westlaw.com/Document/I6D7B387004E311E98F1CA3D9780F419B/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) is a cause for concern as it sets target values for daylight based upon idealistic levels for new developments and fails to establish the minimum levels that would be considered necessary before a dwelling becomes unfit for habitation.

There is a risk therefore that a tenant may take action for lack of daylight based upon the levels described in BS EN 17037 whereas the level considered to be adequate by the courts in rights of light cases is still available to the tenant. This might have the effect of rendering entire properties unfit, not just the dwelling being considered, and whilst defending unfortunate tenants from unfit habitation standards due to poor natural light is morally desirable, the social goal of providing basic, entry-level accommodation within our system must equally be balanced.

In cases brought under the new Act surveyors will be required to assess available daylight based upon available standards. One surveyor may well apply the standard employed in rights ***\*J.H.L. 58*** of light cases which most commentators have agreed to be insufficient by current standards[12](#co_footnote_12_1) whilst another might reference the levels described in BS EN 17037 which is being criticised for being aspirational and far higher than a minimum standard.

BS EN 17037 as the earlier BS8206-2:2008 demonstrates uses the word minimum at the identical level as suggested for design award credit for environmental good practice. It is an uncomfortable design reality that the level of good practice is higher than the threshold of minimum for habitation fitness.

**Conclusion**

The question of technical minimum is key to a housing rental market as this provides the entry run to accommodation. In this article we have considered the minimum for dampness and light. A similar response can be taken to other elements to the Act.

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| **Footnotes** | |
| [1](#co_fnRef_1_1) | Clare Anslow, “The Homes (Fitness for Human Habitation) Act 2018 (Legislative Comment)” (2019) 35 Const. L.J. 461–463. |
| [2](#co_fnRef_2_1) | See also A. Dymond, “A Bill Fit for Purpose? (2018) 21 J.H.L. 43. |
| [3](#co_fnRef_3_1) | [*McNerny v Lambeth BC(1989) 21 H.L.R. 188*](http://uk.westlaw.com/Document/I76F97DC0E43611DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)) |
| [4](#co_fnRef_4_1) | [*Colls v Home & Colonial Stores [1904] A.C. 179; 73 L.J. Ch. 484; [1904] UKHL 1*](http://uk.westlaw.com/Document/I89C69001E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)). |
| [5](#co_fnRef_5_1) | [*Ough v King [1967] 1 W.L.R. 1547; [1967] 3 All E.R. 859; (1968) 19 P. & C.R. 40*](http://uk.westlaw.com/Document/I14D24400E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)). |
| [6](#co_fnRef_6_1) | [*Regan v Paul Properties Ltd [2006] EWHC 1941 (Ch)*](http://uk.westlaw.com/Document/I86EECDC0243711DBA048C911C25D4312/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)). |
| [7](#co_fnRef_7_1) | [*Wheeldon v Burrows (1879) LR 12 Ch D 31*](http://uk.westlaw.com/Document/IF8BFB8F0E42811DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&vr=3.0&rs=PLUK1.0&contextData=(sc.Search)). |
| [8](#co_fnRef_8_1) | *BR209 Site Layout Planning for Daylight and Sunlight—a Guide to Good Practice* [https://www.bregroup.com/services/testing/indoor-environment-testing/natural-light/](https://www.bregroup.com/services/testing/indoor-environment-testing/natural-light) [Accessed 30 March 2020]. |
| [9](#co_fnRef_9_1) | *LG10/14 Lighting Guide 10: Daylighting—a Guide for Designers—LG10* <https://www.cibse.org/knowledge/knowledge-items/detail?id=a0q20000008I7kK> [Accessed 30 March 2020]. |
| [10](#co_fnRef_10_1) | *British Standard BS 8206-2, Lighting for buildings. Code of practice for daylighting*, <https://shop.bsigroup.com/ProductDetail/?pid=000000000030157088> [Accessed 30 March 2020]. |
| [11](#co_fnRef_11_1) | *BS EN 17037, Daylight in buildings*, <https://shop.bsigroup.com/ProductDetail?pid=000000000030342286> [Accessed 30 March 2020]. |
| [12](#co_fnRef_12_1) | See the debate in: P. Chynoweth, “Progressing the rights to light debate Part 1: a review of current practice” (2004) 22 Structural Survey 131–137; P. Chynoweth, “Progressing the rights to light debate: Part 2: the grumble point revisited” (2005) 23 Structural Survey 251–264; P.S. Defoe and I Frame, “Was Waldram Wrong?” (2007) 25 Structural Survey 98–116; P.S. Defoe, “Light, How Much is Right” (2008) 10/08 Building Services Journal 54–55; P.S. Defoe, “Waldram Was Wrong!” (2009) 27 Structural Survey 186–199; P.S. Defoe, “Seeing the Light” (2011) The Land Journal 14–15, RICS; PS. Defoe and I. Frame, “Waldram’s Conundrum” (2012) 30 Structural Survey 65–68. |