

AnthonyGold



*Using Fitness –  
issues and tactics*

Giles Peaker  
November 2019

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*Application* AnthonyGold

For all new tenancies of less than seven years term (and longer fixed term secure) beginning on or after 20 March 2019 (including 'replacement' tenancies)

For all tenancies that become periodic on or after 20 March 2019, after a fixed term starting before 20 March 2019 – on the day the periodic tenancy begins.

For all periodic tenancies existing on 20 March 2019, on 20 March 2020.

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*Application* AnthonyGold

NB, that is ALL such tenancies (with a few limited exceptions – the same as with Section 11).

This includes 'non-secure' tenancies for Local Authority temporary accommodation!

(It does not, alas, include licences, whether for Part VII temporary accommodation, or property guardians – assuming the latter is actually a licence.)

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*What does 'fitness for human habitation' mean? A reminder.* AnthonyGold

Test is:

'Not reasonably suitable for occupation in that condition' (with regard to the listed matters, including the 29 HHSRS categories)

Up to the courts to establish if 'unfit for human habitation'.

No defined threshold (deliberately)

May need to stress does NOT mean 'cannot be occupied'.

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*Key differences to disrepair/Section 11* AnthonyGold

A continuous obligation, from the very start of the tenancy.

Potentially includes virtually all risks to health and well being. (But remember section 11 can also cover disrepair that is not a risk to health.)

Less concern with identifying specific defects, so long as issue is a) not caused by tenant, and b) a risk? (Though issue on remedy here.)

Can/should force improvements as remedy.

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*Using Fitness* AnthonyGold

Think big! (Or indeed think big about the very small)

Eg – problems with the structure or common parts of an entire building only needs one tenant to challenge (so long as the defects present a risk to their households health and safety).

Or, eg – bring linked claims by a number of tenants (can work very well, but needs careful organising. This is a whole other thing, but maybe more important for some Fitness claims.)

Or, eg – think outside the box about boxes (tiny 'permitted development' dwellings in former office blocks. Size and layout relevant for fitness, as is ventilation and natural light)

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*Using Fitness* AnthonyGold

Issues to bear in mind:

Limitation: Will only run from 20 March 2019/20 March 2020 depending on when it applies.

But can couple with disrepair claim – up to 6 years on the disrepair, while using Fitness for the other (non disrepair) works. So still potential damages, with broader works.

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*Using Fitness* AnthonyGold

Is it too early?

Where Fitness doesn't apply till 20 March 2020, no reason not to flag up in pre-action correspondence now.

- "You will be in breach for X on 20 March 2020. Here are the reasons why. If proceedings issued before then/counterclaim ongoing, we will seek to amend to include this. You have been given advance warning and reasoning, so no costs against C likely."

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*Expecting Defences* AnthonyGold

'Tenant-like conduct' – particularly on mould cases.

Get proper (and reliable) evidence from the client on their actions. Be aware that these will be difficult cases unless there is expert evidence on causes of condensation (and even then, if landlord had evidence of tenant actions).

Be aware of – and have expert evidence to counter – the 'third party consent' defence.

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*Experts and evidence* AnthonyGold

Do you need an independent EHO? – No

But, experts are going to need training. Consider instruction letters carefully. If possible, discuss the meaning and requirements of instructions with expert beforehand. What are they going to have to address and give an opinion on? Do they need clarification on s.10 'factors'?

Expert must be asked to address question of whether, in their opinion, property is unfit for human habitation, with regard to the Section 10 factors

Expect disputed instructions to SJE. Expect disputes on relevant expertise.

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*Experts and evidence* AnthonyGold

Consider assisting client with report to LA Environmental Health.

LA EHO finding of Category 1 (or even 2) hazards will be effective evidence in civil claim/counterclaim.

Can claim run in parallel with LA enforcement

Improvement Notice from LA for private sector tenants removes immediate risk of retaliatory eviction.

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*Procedure and claims* AnthonyGold

No specific pre-action protocol as yet.

Disrepair protocol currently being amended, so following the protocol recommended.

Claim will often include section 11 anyway – disrepair may not be sufficient as to be unfit, but still fall under section 11. And historic damages for disrepair, pre application of H(FFH)A.

Consider interim injunction – extended range of issues that may give rise to serious risk.

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*Procedure and claims* AnthonyGold

Track –

CPR 26.6 applies, so that the small claims/fast track limits are as per disrepair

Where works outstanding **either** the works or the damages must be worth more than £1,000.

Where purely damages claim, value of claim must be more than £10,000

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*Claim/counterclaim both s.9A and s.11* AnthonyGold

Fitness covers issues not covered by s.11 disrepair.

S.11 disrepair covers issues not covered by fitness (more minor disrepair).

No reason not to plead both. Disrepair will initially cover longer period up to 6 years limitation for damages, but fitness will get broader defects remedied.

Equally for counterclaims – initially damages will be primarily disrepair, but remedy can/should include fitness.

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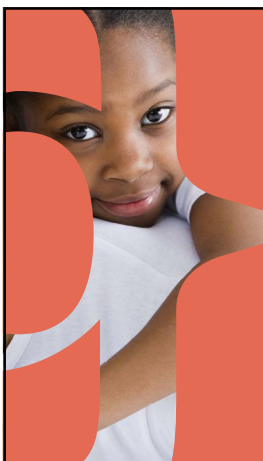
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*There will be fun to be had...*

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