

Fitness for Human Habitation, s9A Update

When should a court determine that a property is (un)fit for human habitation?

This update looks at the decision in *Harvey v Heaver* [2026] EWHC 1671 (KB) handed down on 3 July 2026.

The High Court was asked to address the fitness for habitation of a property based on the uncontested evidence of a single joint expert. The High Court was not invited to consider historic fitness, liability under s.11 of the Landlord and Tenant Act 1985 or any other head of claim, nor damages. The decision is therefore extremely useful on a narrow point: how to determine whether a property is unfit for human habitation.

s.9A Landlord and Tenant Act 1985

Section 9A of the Landlord and Tenant Act 1985 applies to tenancies granted after the commencement of the Homes (Fitness for Human Habitation) Act 2018 on 20 March 2019, and to all tenancies regardless as to when they were entered into after 20 March 2020.

The s.9A provision is familiar to most practitioners, but in summary provides an implied term into tenancies that the dwelling is fit for human habitation at the time the tenancy was granted, and will be kept fit for human habitation during the term of the tenancy. There are some exceptions; it does not require the landlord to:

- a) carry out works or repairs for which the tenant is liable because of:
 - i. the duty of the tenant to use the dwelling in a tenant-like manner, or
 - ii. because there is an express covenant in the lease which requires the tenant to use the dwelling in a tenant-like manner.
- b) rebuild or reinstate the dwelling where it has been destroyed or damaged by fire, storm, flood or other natural occurrence;
- c) keep in repair or maintain anything which the tenant is entitled to remove from the dwelling;
- d) carry out any works or repairs to the property which would result in the landlord breaching any of their statutory obligations under other provisions;
- e) carry out works or repairs to the property which would require the consent of a superior landlord or other third party, provided that such consent was requested but not obtained.

Section 9A(3) provides that, in addition, the implied covenant does not impose on the landlord any liability where the property is unfit for human habitation where the unfitness is wholly or mainly because of:

- a) the tenant's own breach of the implied covenant, or
- b) disrepair which the landlord is not required to make good because of an order made by the county court.

Guidance in *Harvey v Heaver* [2026] EWHC 1671 (KB)

The High Court decision is extremely helpful to understand how the court should approach the question of whether a property is, or is not, unfit. The following can be gleaned;

1. The question of whether the condition(s) of the property are such as to individually or collectively make a property unfit are matters that the court should make its own determination on. At paragraph 12: “I treat his [the expert’s] factual observations, professional conclusions and photographs as the evidence in the case, while remaining the judge of the ultimate questions of fitness for human habitation and relief”.
2. As to how the court dealt with facts, this was a property with excessive damp and mould in every room. The court then had to consider causation for that excessive damp and mould. The investigative process involved the following steps;
 - a. The judgment recorded the damp readings taken with a Protimeter MMS2 and, having admitted the manual for that instrument into evidence, fully understood what was being measured and what the measurements showed.
 - b. The first step was for the court to consider the cause of damp and mould. The factual findings were “the damp and mould is wholly or mainly attributable to a combination of the limited thermal performance of the construction and active moisture ingress through the chimneys, external walls and roof due to defects or disrepair” (para 21).
 - c. The court considered statutory guidance on whether these causes would fall into the unfitness category. This involved consideration of Chapter 11 of the guidance issued by the Secretary of State for Communities and Local Government under s.9 of the Housing Act 2004 entitled “Housing Health and Safety Rating System (HHSRS): Operating Guidance Part 2: A technical guide for assessors (June 2026). This is guidance that local authorities must have regard to by s.9(2) of the HA 2004. The court held that;

18. ... Chapter 11 treats penetrating and rising damp, water ingress through defective rainwater goods, and dampness tracking through solid walls that lack an effective damp-proof course as core to the damp and mould hazard, and as matters of the condition of the structure. That is the mechanism the single joint expert describes and which I find: moisture entering through the defective chimneys, external walls and roof of this mid-nineteenth-century, solid-walled dwelling, the readings reaching the ‘wet’ or saturated band in every habitable room and both roof spaces. According to the Guidance a dwelling should be watertight, weathertight and free of persistent

dampness (Appendix 1, baseline indicator 17.1). This Property is none of those things.”

- d. The court considered other factors which might attribute the cause of the damp and mould to the tenant. These included the fact that the expert had found trickle vents in one room closed (whilst in others they were open), and unchanged air filters in the roof space. There was also an unevidenced contention by the landlord that the tenant was not utilising the central heating and was drying clothes inside, which the court was not impressed with. The main reason for this is that according to the HHSRS Guidance, a building must be able to deal with moisture from ordinary living without needing to run dehumidifiers or open windows (Ch 11 page 79). These may have partly contributed to damp and mould, but were not the main or only cause.
 - e. The court then went on to consider the harm alleged to have been caused by the conditions to the occupiers of the property.
3. As to the legal test; the meaning of the test for fitness for habitation was given a full consideration and a number of factors are relevant.

The legal test

First, do the living conditions present a risk to the health and safety of the occupiers, or do the living conditions have a sufficiently negative effect on the occupier’s comfort and convenience – even if there is no risk to health and safety?

This test is founded in *Summers v Salford Corporation* [1943] AC 283, which provided that:

(a) A house is not ‘reasonably fit for human habitation’ if the state of repair of a house is such that by ordinary user either (i) ‘damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health’; or (ii) the premises ‘cannot be used and dwelt in ... with reasonable comfort’: per Lord Atkin, p. 289.

(b) Unfit is not the same as uninhabitable. A single defect can render a dwelling unfit. ‘A burst or leaking pipe, a displaced slate or tile, a stopped drain, a rotten stair tread, may each of them until repair make a house unfit to live in’: Lord Atkin, p. 288. Here, an unusable window due to a broken sash-cord in a small house meant the dwelling was not in all respects reasonably fit for human habitation.

The test is also founded in *Rendlesham Estates plc v Barr Ltd* [2015] 1 WLR 3663. The Court adopted a materially identical test to that applied by Lord Atkin in *Summers*, namely that the property is not fit if it is ‘not capable of occupation for a reasonable period without risk to the health or safety’ or ‘without undue inconvenience or discomfort’ to the occupants [68]. In the context of damp and mould, both parties emphasised this passage at [79]:

I have no doubt that the presence of mould and damp in living rooms or bedrooms, if persistent and more than minor, renders an apartment unfit for habitation. Damp living conditions are well known to pose a risk to health, and there is evidence from some witnesses of actual risks to health or concern about the potential risk, either to themselves or children.

Second, the addition of ‘any prescribed hazard’ in section 10(1) extends the matters that are relevant to the issue of fitness. They are not a different list, but address later concerns that the list was incomplete.

Third, if any of the 21 “matters and circumstances” exist and present “any risk of harm” within s.2(1) of the Housing Act 2004, including temporary harm and harm to mental health, they are both a ‘prescribed hazard’ (s.10(1) LTA 1985) and a ‘hazard’ (s.2(1) of the HA 2004). This is relevant to the assessment by the court of whether the property is “so far defective in one or more of those matters that it is not reasonable suitable for occupation in that condition” and therefore unfit for human habitation under s.10(1).

Fourth, there is no dependence on a finding of a Category 1 or a Category 2 Hazard. Both the cases of *Summers v Salford Corporation* [1943] AC 283 and *Rendlesham Estates plc v Barr Ltd* [2015] 1 WLR 3663 make clear that a finding of unfitness can be made even if there is no risk of harm (that is, a ‘hazard’) if by reason of one of the relevant matters (that is, ‘freedom from damp’) the dwelling is ‘not capable of occupation within a reasonable period...without undue inconvenience or discomfort’ to the occupiers.

Fifth, to consider the exemptions from liability under s.9A. These include;

- (a) What works are the responsibility of the tenant (s.9A(2)). The duty is to act in a tenant-like manner. Per Denning LJ in *Warren v Keen* [1954] 1 QB 15, it is described as a duty to “take proper care of the place”. He need not do more than “the little jobs about the place which a reasonable tenant would do”.
- (b) Unfitness that is wholly or mainly attributable to the tenant’s breach of covenant (s.9A(3)). The court determined that “the threshold is a high one, however: tenant default that is a real but secondary cause of unfitness does not meet it. So, for example, condensation mould wholly or mainly the result of the tenant’s own failure to ventilate or heat the dwelling will defeat the claim; but the same mould, if mainly attributable to a defect that is the landlord’s responsibility, such as inadequate insulation or the absence of effective ventilation, will not, even if the tenant’s use of the dwelling has played some part in it.” (para 60).

Sixth, to consider an order for specific performance.

Concluding thoughts

Interestingly, the issue of whether a tenant needed to give notice to a landlord of the unfitness is a legal question still to be decided. The High Court declined to consider this question in this particular decision.

This is a helpful case for the clarity given to parties dealing with unfitness claims. Landlords will be disappointed with the determination that the threshold for attributing unfitness to a tenant's breach of covenant "is a high one", but such a determination is likely to have been inevitable given the policy considerations which underly the legislation.

This article was written by Elizabeth England of Five Paper barristers on 15 July 2026. It does not provide legal advice. For advice on a particular case please seek the assistance of a professionally qualified person.