

## Issue 128 February 2019

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### Housing matters

*Housing matters* is produced by Shelter for the NHAS and aims to provide a source of up-to-date housing and homelessness news, focus on important case law, cover key legal issues, and produce information for public use.

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*Housing matters* welcomes contributions from NHAS members. If you would like to provide an article or update for *Housing matters* please email [JackieL@shelter.org.uk](mailto:JackieL@shelter.org.uk)

### National Homelessness Advice Service

The National Homelessness Advice Service (NHAS) is funded by the Ministry for Housing, Communities and Local Government.

The service aims to prevent homelessness and remedy other housing problems through increasing public access to high-quality housing advice in England, including online information on the NHAS website at [www.nhas.org.uk](http://www.nhas.org.uk)

**The NHAS provides the following to local authorities, local citizens advice and around 100 other advice agencies in England:**

- **a national telephone housing advice consultancy service.** Call **0300 330 0517** from 9am–6pm, Monday to Friday, or send in an enquiry using the online enquiry form available on the members' areas of [www.nhas.org.uk](http://www.nhas.org.uk)
- **housing debt advice:** within our consultancy team we have specialist housing debt and welfare benefits advisers who can advise where clients are struggling to pay their housing costs. We can support you to work through your client's housing debt case.
- **free basic housing advice training courses** to develop housing advice skills, covering the main housing advice presenting issues and how to advise households effectively on homelessness prevention options
- **written briefings**, articles in *Housing matters* and *Adviser*, information on housing issues and other written materials
- **support** in the implementation of new homeless prevention initiatives.

### Contact details

For more information about NHAS training, please email [JoanneK@shelter.org.uk](mailto:JoanneK@shelter.org.uk) or call **0344 515 1676**.

For general enquiries about the NHAS service, please email [nhas@shelter.org.uk](mailto:nhas@shelter.org.uk) or call **0344 515 2268**.

Alternatively, please use the 'contact us' page at [www.nhas.org.uk](http://www.nhas.org.uk)



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# What's new?

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## **Fitness for human habitation**

From 20 March 2019, the Homes (Fitness for Human Habitation) Act 2018 inserts new sections 9A, 9B and 9C into the Landlord and Tenant Act 1985. Under the new provisions, a tenancy of less than seven years must be 'fit for human habitation' both at the start and throughout the tenancy.

The fitness of a property is determined in relation to factors listed in section 10 of the Act, which include:

- freedom from damp
- ventilation
- natural light
- the presence of 'prescribed hazards'.

There are 29 prescribed hazards as set out in Schedule 1 to the Housing Health and Safety Rating System (England) Regulations 2005 SI 2005/3208 (HHSRS). They include:

- damp and mould
- excess cold, heat or noise
- overcrowding
- pests
- electrical or fire hazards.

A property will be unfit for human habitation if (and only if) '*it is so far defective...that it is not reasonably suitable for occupation in that condition*'. A tenant asserting that their property is unfit can apply for compensation and/or an order requiring the landlord to carry out works to make the property fit for habitation in the county court (or the High Court where the level of compensation is higher). Legal aid may be available where the unfitness constitutes a serious risk of harm to the health and safety of the tenant and their family.

Initially, the Act applies only to new tenancies (including a renewal of an existing tenancy and a fixed term tenancy that becomes statutory periodic on or after 20 March 2019). It will apply to all periodic tenancies from 20 March 2020.

## **Support for mortgage interest**

With effect from 1 January 2019, the rate of interest charged by the DWP on a support for mortgage interest loan decreased to 1.5 per cent from 1.7 per cent. The rates may change on 1 January and 1 July each year. The current rate can be found on [Gov.uk](https://www.gov.uk).

## **EU Settlement Scheme**

From 30 March 2019, EU nationals living in the UK and their family members must apply for and obtain settled or pre-settled status to continue living in the UK after 30 June 2021 (31 December 2020 in case of 'no deal'). Irish citizens and people with indefinite leave to enter or remain in the UK are exempt from the requirement.

The rules on how to apply to the EU Settlement scheme can be found on [Gov.uk](https://www.gov.uk). The scheme opened nationally (on a trial and voluntary basis) from 21 January 2019 for certain EU nationals holding a biometric passport. EU nationals who need advice about applying for settlement status, should be referred to an immigration adviser regulated by the Office of the Immigration Services Commissioner (OISC). The [Gov.uk](https://www.gov.uk) [Adviser Finder](#) can be used to find an OISC regulated adviser.

The rights of EU nationals to housing and social security assistance, and the rules about proving their right to reside in the UK are not affected in the meantime.

## **Universal credit**

(1) With effect from 16 January 2019, regulation 2 of the Universal Credit (Transitional Provisions) (SDP Gateway) Amendment Regulations 2019 SI 2019/10 introduces a new gateway condition to prevent claimants who are entitled to a severe disability premium in connection with an existing 'legacy benefit' from claiming universal credit.

(2) With effect from 31 December 2018, regulation 4 of the Universal Credit and Jobseeker's Allowance (Miscellaneous Amendments) Regulations 2018 SI 2018/1129 revokes the Universal Credit (Housing Costs Element for claimants aged 18 to 21) Regulations 2017 SI 2017/252 so that 18 to 21-year olds are eligible for the housing costs element of universal credit.

(3) With effect from 1 February 2019, the Universal Credit (Restriction on Amounts for Children and Qualifying Young Persons) (Transitional Provisions) Amendment Regulations 2019 SI 2019/27 removes the restriction on a person responsible for more than two children making a new claim for universal credit. In addition, a child element will continue to be allowed for a third, or subsequent, child born before 6 April 2017.

# Letting agents: servants of two masters?

**In this article Samuel Beswick explores the relationship between letting agents, landlords and tenants.\***

**Samuel Beswick is a Frank Knox Memorial Fellow at Harvard Law School.**

Tenants frequently deal with their landlords indirectly through agents appointed by the landlord. Letting agents may be involved in:<sup>1</sup>

- 'letting agency work' at the beginning of a tenancy, such as advertising for tenants, performing credit checks, gathering references and drawing up tenancy agreements
- 'property management work' during the tenancy, such as collecting rents and arranging services, repairs, maintenance and improvements.

A prospective tenant may also appoint a 'relocation letting agent' to find them a property and to negotiate tenancy terms on their behalf. This article considers the position of the agent in both cases.

## No one can serve two masters

It is a common fallacy that in letting a property an agent acts for both landlord and tenant. In evidence to the Parliamentary committee on the [Tenant Fees Bill](#), the CEO of ARLA Propertymark, the UK's largest representative body of residential letting agents, asserted that 'an agent is effectively the servant of two masters. They are the agent to both, and they have a legal duty of care to both'.<sup>2</sup>

In legal terms, this is 'absolute nonsense'.<sup>3</sup> It is also ironic. The expression comes from a famous Enlightenment-era play where the mischievous lead sets out to 'wait upon' two masters so as to 'earn two men's wages and eat and drink for two': an impossible task when the masters' interests are at odds.<sup>4</sup>

Suggesting that agents act both for the landlord and the tenant is contrary to English law and practice. An agent engaged by a landlord serves only the landlord. Consumer protection legislation, for instance, defines 'letting agent' as a person who does agency work for 'a prospective landlord ... *or* ... a prospective tenant [who is] seeking to find [housing / a dwelling-house] to rent'.<sup>5</sup>

The letting agent acts for one or the other, not both. It is startling that the largest representative body of residential letting agents does not appreciate this principle.

## Landlord's agent

When a landlord engages an agent to let out their property, the agent has legal authority to represent the landlord's interests.

The agent takes on contractual as well as special, 'fiduciary' duties to that individual (who is the agent's 'principal').<sup>6</sup> A fiduciary duty is one based on a relationship of trust between two parties. The most important fiduciary duty imposed on an agent is that they may not act in conflict with their principal's interests. This safeguards against abuse of the relationship.

Landlords and (prospective) tenants have competing interests when it comes to negotiating rent, deposits and tenancy terms. That is why agents cannot serve both. Agents should not purport to do so. A landlord's agent would be seriously in breach of their duties to the landlord (and subject to regulatory sanction) if they took payment from a prospective tenant to convince the landlord to lower the rent or deposit where this was against the landlord's interest.

There is an easy way to discover whether or not someone is a tenant's agent: sack them.<sup>7</sup> If the tenant cannot sack and replace the letting agent (or agency) for a property, they are probably not the tenant's agent.

## Scope of the agent's authority

The extent of an agent's authority to act is informed by the contract between the agent and landlord. This may include the authority to:

- show prospective tenants through the property
- make representations to tenants on behalf of the landlord
- perform reference checks and enter into holding deposit agreements<sup>8</sup> and tenancy agreements
- handle the tenant's money for the landlord and deliver the keys.

Property management functions which an agent might be involved in during the tenancy include:

\* The author acknowledges the contribution of panelists and attendees at a Forum on Tenant Fees and Holding Deposits held at University College London, 30 August 2018, in informing the views expressed in this article.

- arranging for repairs and improvements to be carried out
- dealing with rent and late payments
- checking inventories and facilitating the tenant moving out.

None of these functions are ‘services’ to the tenant. They are services to the landlord—tasks that the landlord would be required to perform had s/he not contracted these responsibilities to her/his agent.<sup>9</sup>

### Who is responsible?

The landlord is responsible for ensuring the property is habitable and properly maintained and that the tenant is given exclusive occupation of it. This stems from the covenant of ‘[quiet enjoyment](#)’ that the law implies into tenancy arrangements. Even though they can delegate tasks to agents, the buck stops with the landlord.

### Multiple agents

Tenants should beware of properties that are promoted by multiple letting agents. This [troublingly common practice](#) runs the risk that agents might take holding deposits from multiple prospective tenants for the same property. This puts tenancy applicants in a vulnerable position and potentially exposes landlords to breach of contract with each.<sup>10</sup> That is because in taking a holding deposit from a prospective tenant, an agent typically agrees (on the landlord’s behalf) to ‘hold’ the property for the applicant while reference and credit checks are carried out. But agents cannot stop marketing a property without the landlord’s express consent. And they are ordinarily duty-bound to put forward all offers made, even after a holding deposit is paid.

### Duties to tenants

Letting agents do have certain duties toward prospective tenants—not to lie, not to mislead, and to be transparent in their dealings. These duties are imposed by law to [protect tenants](#) from underhanded practices.

Agents must, for instance:

*If carrying out letting agency work:*

- display their fees on their premises and website<sup>11</sup>
- state on their premises and website whether they belong to a ‘money protection scheme’, which protects rent and deposits paid via an agent against bankruptcy or fraud.<sup>12</sup>

*If carrying out property management work:*

- give the landlord’s name and address in writing, if requested<sup>13</sup>
- deal with problems to ensure tenants’ ‘quiet enjoyment’ of their property throughout the tenancy.

Agents should also give prospective tenants the Government’s [How to Rent guide](#) and a copy of the draft tenancy agreement before taking a holding deposit.<sup>14</sup>

The letting agent’s duties to prospective tenants are limited to those set out in law. They will be further prescribed once the Tenant Fees Bill comes into force.

### Complaints about letting agents

There is currently no single body that regulates letting agents. However, all agents are required by law to belong to a ‘[redress scheme](#)’.<sup>15</sup> If the tenant has a complaint which is not dealt with satisfactorily by the agent, the tenant can follow it up with the redress scheme. Letting agents can be fined up to £5,000 for not belonging to a redress scheme. In addition, letting agents may belong to other trade bodies and these have their own complaint mechanisms that tenants can use.

### Agent for the tenant

When might a tenant be the agent’s principal? Only when a prospective tenant engages an agent to go out and find them a property and (usually) to negotiate terms with a landlord (or the landlord’s agent) on the prospective tenant’s behalf.<sup>16</sup> A relocation agent will owe contractual and fiduciary duties toward their client: the prospective tenant. It would be a breach of these duties were the agent only to consider properties within a certain portfolio or to pursue a ‘good deal’ for a particular landlord without their client’s consent.

### Conclusion

It is not apparent why letting agents are coy about where their legal duties lie. It may be due to misguided training or impressions within the industry, confusion around the limits of agents’ legal duties, or perceptions of government policy. It may be a façade to dress up dubious tenant fees as payments for ‘services’. One hopes the Government’s proposed overhaul of letting agent regulation will clarify matters.<sup>17</sup> Confusion and disputes with tenants might be avoided if agents were clear from the outset about who their master typically is: the landlord.

### Footnotes

<sup>1</sup> See, for example, s.86 Consumer Rights Act 2015; ss.54 and 55 Housing and Planning Act 2016.

<sup>2</sup> Public Bill Committee, [Official Report](#) (5 June 2018).

<sup>3</sup> As Justin Bates remarked at a [Forum on Tenant Fees and Holding Deposits](#), UCL, 30 August 2018.

<sup>4</sup> [Carlo Goldoni, The Servant of Two Masters \(1743\)](#).

<sup>5</sup> s.54 Housing and Planning Act 2016; s.86(1) Consumer Rights Act 2015. See also, Tenant Fees Bill 2017-19 (HL Bill 129, 57/1), cl. 25.

<sup>6</sup> Woodfall’s Law of Landlord and Tenant (2018), vol. 1, [2.190]–[2.195]; [London Borough of Haringey v Ahmed \[2017\] EWCA Civ 1861, \[27\]–\[28\]](#). See, ‘Fiduciary duties’ in [Out-Law.com](#).

<sup>7</sup> Credit to Justin Bates for articulating this test.

<sup>8</sup> S. Beswick, [Holding Deposit Agreements: Pre-tenancy Obligations and Rights](#) (2015) 19 L. & T. Rev. 143.

<sup>9</sup> S. Beswick, [Tenant Fees Bill: Good Intentions – Weak Protections](#) (2018) 22 L. & T. Rev.

<sup>10</sup> S. Beswick, [Enforcing a Holding Deposit Agreement](#) (2018) 22 L. & T. Rev. 88.

<sup>11</sup> s.83(1) and (2) Consumer Rights Act 2015.

<sup>12</sup> s.83(6) Consumer Rights Act 2015.

<sup>13</sup> s.1(1) Landlord and Tenant Act 1985.

<sup>14</sup> Property Ombudsman, [Code of Practice for Residential Letting Agents](#) (TPOE22-5), [9(e)] and [9(l)].

<sup>15</sup> s.83 and s.84 Enterprise and Regulatory Reform Act 2013; Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014 SI 2014/2359.

<sup>16</sup> See, Tenant Fees Bill 2017-19 (HL Bill 129, 57/1), cl. 2(8).

<sup>17</sup> Wendy Wilson, [The Regulation of Letting and Managing Agents](#) (BP No. 6000, 17 May 2018).

# Hoarding and housing

**In this article Richard Harmer explains how advisers can help clients whose hoarding disorder has led to problems with their housing.**

**Richard Harmer is a senior solicitor at Shelter.**

Hoarding is widely recognised as a condition that can have a serious impact on a client's housing. Hoarding becomes a significant problem where the amount of clutter interferes with everyday living, for example, where a bathroom, bedroom or kitchen can't be accessed. It can also pose a health and safety risk to the client or their neighbours.

A hoarding disorder is defined by the NHS as when someone acquires an excessive amount of items and stores them in a chaotic manner, usually resulting in unmanageable amounts of clutter. The items can be of little or no monetary value.<sup>1</sup> It can be an illness in itself or it can be a symptom of another condition, such as severe depression or dementia.<sup>2</sup>

## Impact of hoarding on housing clients

Hoarding could result in a breach of a tenant's duty to act in a 'tenant-like manner' where it presents a health and safety risk.

A landlord will often take possession proceedings where neighbours have complained about nuisance caused by hoarding, or where the hoarding is preventing access for repairs.

Additionally, a council may seek to prosecute the tenant under the Environmental Protection Act 1990.<sup>3</sup> If the council is made aware that the reason for the problem is a hoarding disorder it may be able to help with clearing up the property if the tenant is willing to remove the items.

A tenant could be found intentionally homeless if they are evicted because of the state of the property.

## Establishing the extent of the problem

The checklist below may help in establishing the background where a housing problem is the result of a hoarding disorder:

- what evidence does the landlord have of hoarding by the tenant?
- what steps has the landlord taken before serving notice or issuing court proceedings? Are the proceedings being taken solely due to the hoarding?

- What policies does the landlord have in respect of possession action against tenants with vulnerabilities/disabilities?
- is there evidence that the tenant is vulnerable or disabled (eg is there a diagnosed mental health problem)? If the landlord is providing the tenant with alternative accommodation this could be evidence that they accept they have a disability
- are social services involved? Has there been a Care Act assessment or a referral to a specialist organisation, for example Hoarding UK?
- are there concerns about the tenant's mental capacity?

## Disability and the Equality Act

Disability is defined in the Equality Act 2010 as where a person suffers from a physical or mental impairment which has a substantial impact on their ability to carry out normal day to day activities.<sup>4</sup>

Specialist evidence may be needed to ascertain whether the tenant has a disability and whether this is causing the behaviour that has led to the housing problem. Legal aid may be available to fund such evidence if the case is proceeding to court. Alternatively, a referral to social services may result in the tenant receiving specialist counselling which could provide evidence.

## Defending possession proceedings

A social landlord may start possession proceedings on the premise that the threat of a possession order may resolve the issues created by hoarding. They may rely on the following grounds:<sup>5</sup>

- breach of tenancy
- behaviour causing a nuisance
- deterioration in the condition of the property.

All of these are 'discretionary grounds' which means that a court will only make a possession order if the ground is made out and it is 'reasonable' to do so.

The key to defending possession proceedings is whether the tenant is willing to address their hoarding behaviour as the court may decide it is not reasonable to evict a tenant who is attempting to clear their clutter.

If the tenant has some insight and is willing to engage then the landlord should be asked to delay taking (or adjourn) possession proceedings to allow for items to be removed on a step-by-step basis.

If the case has reached court, it is typically listed initially for a five-minute hearing. The first step could be to ask the court to direct that a defence is filed, along with directions for a specialist consultant to look at the issue of disability and how it links to the hoarding.

Where a section 21 notice has been served by a private landlord due to concerns about clutter and hoarding, a disability/proportionality argument may form the basis of a defence. This can be a difficult argument to pursue but may buy the tenant time to remove the items as the matter might have to go to a full trial.<sup>6</sup>

### Tenants with little insight

Where a client does not see their behaviour as an issue—for example they may say they hold onto items because of an emotional attachment, or that they dislike our ‘throwaway culture’—it is important to obtain evidence from a suitability qualified expert, such as a GP or psychologist. They can assess whether the problem is a disability and what assistance could help.

The question of the client’s mental capacity may arise. Under the Mental Capacity Act 2005, a person lacks capacity if they are ‘unable to make a decision for themselves in relation to a matter because of an impairment or disturbance in the functioning of mind or brain.’ There is a presumption of capacity, but a doctor or lawyer may need to address this issue.

If a client lacks capacity then specialist legal advice should be sought as an application could be made to the Court of Protection.<sup>7</sup> The Court can authorise action in the person’s best interests, which could include giving permission to contractors or social care staff to enter the client’s home to ensure compliance with tenancy terms and conditions.<sup>8</sup>

If the client refuses to acknowledge that they have a problem and a possession order appears inevitable, then any finding of

hoarding should be linked to disability, thus potentially avoiding a later intentional homelessness decision.

### Getting help

The client could be referred for support to a specialist organisation, such as Hoarding UK, for help to address their hoarding behaviour. Hoarding UK provides a range of assistance including arranging counselling and helping to remove clutter.<sup>9</sup>

If the client agrees, you should refer them for an assessment under the Care Act 2014.<sup>10</sup> Check if this forms part of a social landlord’s policies. Under the Care Act, social services must carry out an assessment to look at what services an adult may need to prevent their care needs from becoming more serious and, if they need care and support, to help them in their day to day life.

Remember that if the tenant has a physical health problem, they may simply need help to remove items from their home.

### Case study

Mary was 82 and had lived in her council house for 25 years. After she fell and broke her ankle ambulance staff could not get in due to her hoarding, so the fire brigade had to be called. Mary had been sleeping in her bathroom because she couldn’t access her bedroom. The hospital referred Mary to social services. Her social worker concluded that Mary couldn’t go home, and the fire brigade said there was a health and safety risk to her neighbours. The council placed Mary in a bed and breakfast five minutes from her home where she received counselling support. She indicated that she would clear the clutter.

Despite boxing items up, Mary didn’t discard anything. The council served a notice seeking possession, citing breach of tenancy and nuisance grounds. Mary was referred to Shelter for legal advice and she made more progress removing boxes. The court agreed to adjourn proceedings on the basis that Mary was receiving counselling and had agreed to remove items step by step. Eventually the case went to trial as the council was not satisfied with the rate of progress. The court agreed to further adjournments as she continued to discard items. A possession order was finally made but the council agreed not to enforce it until it had made her an offer of suitable alternative accommodation.

## Shelter Legal

### [Disability discrimination defences](#)

### Footnotes

<sup>1</sup> [NHS definition](#) of a hoarding disorder

<sup>2</sup> See the [Royal College of Psychiatrists website](#) for more information on hoarding disorders

<sup>3</sup> Under s.80 Environmental Protection Act 1990 a court may order the tenant to dispose of the clutter or impose a fine.

<sup>4</sup> s.6 Equality Act 2010.

<sup>5</sup> Sched 2 Housing Act 1985; Sched 2 Housing Act 1988.

<sup>6</sup> See HOMAT 105 (April 2015) for an article on the disability discrimination defence to possession.

<sup>7</sup> A client without mental capacity cannot instruct a solicitor to apply to the court themselves. The instruction will need to be made by the client’s ‘litigation friend’.

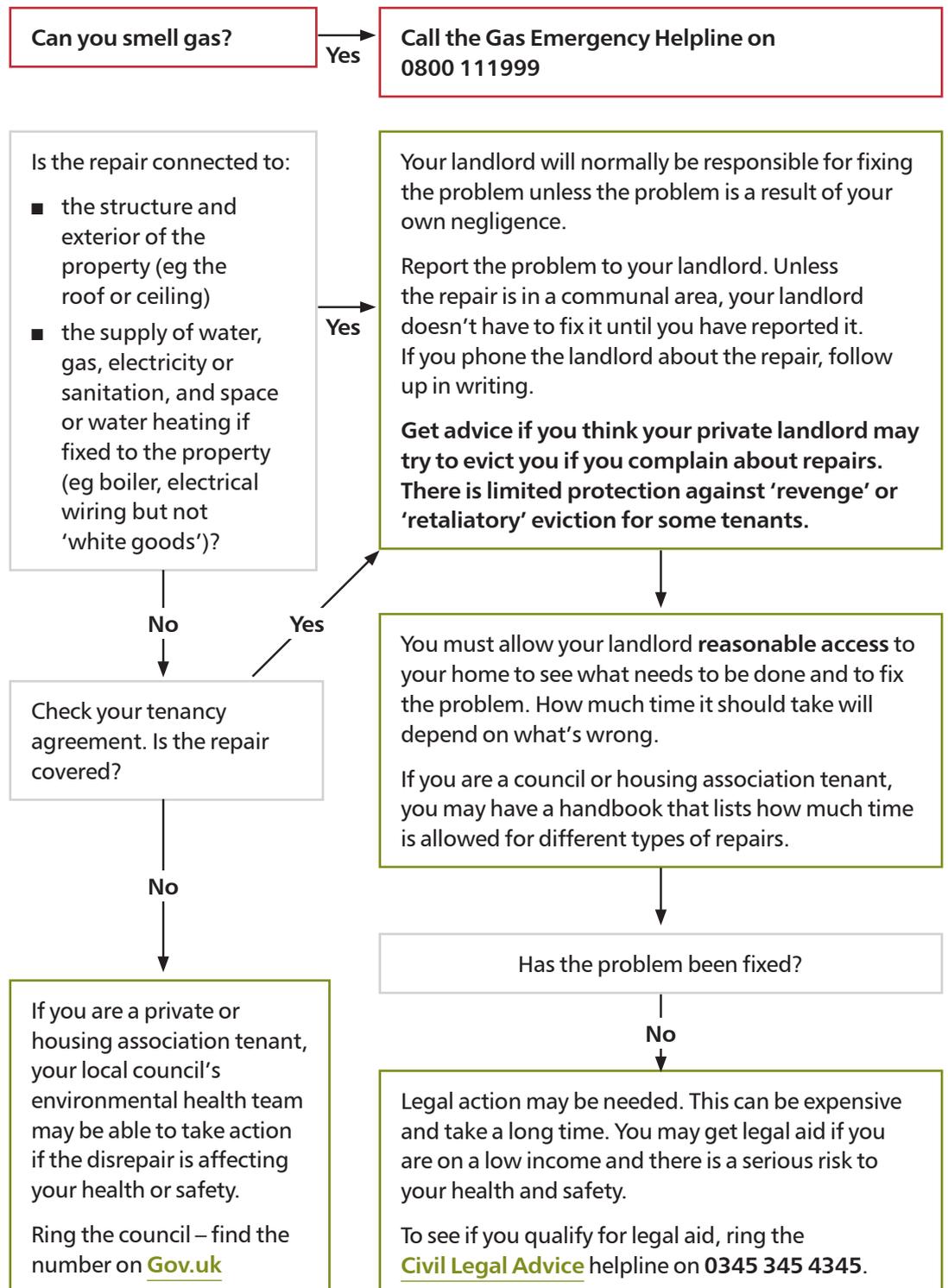
<sup>8</sup> See [Garden Court website](#) ‘Court of Protection powers that help vulnerable tenants who hoard or refuse access to remain in their homes’, Bethan Harris, 2013.

<sup>9</sup> [Hoarding UK](#) website

<sup>10</sup> s.9 Care Act 2014. See also Chapter 14 of the [statutory guidance to the Care Act: Safeguarding](#), in which at 14.17 hoarding is listed as a possible indicator of neglect that could give rise to a safeguarding concern. A safeguarding enquiry may be prompted where the adult is unable to protect themselves by controlling their own behaviour.

# Dealing with disrepair

**This flowchart provides an overview of how to deal with disrepair if you are a tenant.**



**Note**  
Information contained in this factsheet is correct at the time of publication. Please check details before use.

## Further advice

You can get further advice from Shelter's free\* housing advice helpline (0808 800 4444), a local Shelter advice service or local Citizens Advice office, or by visiting [england.shelter.org.uk/housing\\_advice](http://england.shelter.org.uk/housing_advice)

\*Calls are free from UK landlines and main mobile networks.