GARDEN COURT
CHAMBERS

Housing conditions update 2023

Catherine O'Donnell, Garden Court Chambers

9 January 2023

Inquest into the death of Awaab Ishak

- An inquest into the death of two-year-old Awaab Ishak, which concluded on 15 November 2022, held that he died as a result of a severe respiratory condition due to prolonged exposure to mould in his home environment.
- On **16 November 2022** coroner Joanne Kearsley made a report to prevent future deaths under Coroners (Investigations) Regulations 2013.
- She found that the presence of mould had been notified to the landlord Rochdale Boroughwide Housing (RBH) by Awaab's parents in 2017 before he was born, but nothing was done. A complaint was made in 2020 by Awaab's health visitor.
- In June 2020, the family instructed solicitors to make a disrepair claim due to the mould. An inspection carried out by RBH on 14 July 2020 confirmed the presence of mould. The policy at the time was not to progress to repair and treatment until the agreement of the solicitors had been obtained. No action had been taken to treat the mould by the time Awaab died.
- During the course of the inquest, the court heard evidence from the Housing Ombudsman regarding its October 2021 report, *Spotlight on: damp and mould – it's not lifestyle*. Many of the themes it had noted from the increased number of complaints it received were found in Awaab's case.

Inquest into the death of Awaab Ishak

The coroner found it was her duty to report the following matters of concern:

- The June 2006 document *A Decent Home: definition and guidance for implementation* [https://www.gov.uk/government/publications/a-decent-home-definition-and-guidance] does not give any consideration to the issue of damp and mould and nor does it provide any guidance as to the need for a property to be adequately ventilated.
- The housing health and safety rating system data sheet relating to damp and mould used to calculate risks of the incident and the spread of harm is not reflective of the current known risks of damp and mould and harm to health.
- There was no evidence that up-to-date relevant health information pertaining to the risks of damp and mould was easily accessible to the housing sector.
- The evidence highlighted a 'policy' among housing associations in cases where a disrepair claim has been brought of waiting for agreement from the claimant (or their legal representative) before rectifying any recognised disrepair.
- The private landlord sector does not have access to the Housing Ombudsman for their complaints to be investigated.

The Government's response

20 November 2022, Michael Gove, Secretary of State for Levelling Up, Housing and Communities, wrote to council leaders and social housing providers calling for action on housing conditions.

"All social homes must meet the Decent Homes Standard; you must be aware of any that do not and undertake rapid remedial works. However, in light of [the Awaab Ishak] case I expect you to go further than the letter of the Standard and have particular regard to damp and mould [Footnote: Specifically, as well as category 1 damp and mould hazards, to have regard to and take action on high scoring (bands D and E) category 2 damp and mould hazards, as outlined in the relevant guidance]

Damp and mould are not 'lifestyle issues' as the Housing Ombudsman Service underscored last year. Where people complain about damp and mould, you must listen; where you find them, you must take prompt action. To keep tenants safe, you must not hide behind legal process."

The Government's response

On **13 January 2023** the Secretary of State for Levelling Up, Housing and Communities and the Secretary of State for Health and Social Care responded to the matters of concern raised by the coroner's report. 2022-0365 - Response from Secretary of State for Levelling Up, Housing and Communities and Department for Health and Social Care (judiciary.uk)

Action that the government said it would take included:

- An amendment to the Social Housing Regulation Bill relating to hazards in social homes
- The current review of the housing health and safety rating system ("HHSRS") will include updated estimates on the likelihood of harm due to dampness and mould based on current research;
- There will be a rapid review of existing guidance on the health impacts of damp and mould in homes, followed by new consolidated guidance tailored to the housing sector.
- The creation of a new Private Rented Sector Landlord Ombudsman through the upcoming Renters Reform Bill.
- Writing to leading legal bodies requesting their help directing social tenants with concerns about their housing to the Housing Ombudsman (see HLPA's response in I, February 2023)

Private rented sector

In a white paper published in June 2022 entitled *A fairer private rented sector* [https://www.gov.uk/government/publications/a-fairer-private-rented-sector], the Department for Levelling Up, Housing and Communities (DLUHC) set out its plan to offer a 'New Deal' to those living in the private rented sector in England. The proposals include:

- legislating to introduce a legally binding Decent Homes Standard in the private rented sector;
- running pilot schemes with a selection of local councils to trial improvements to the enforcement of existing standards and explore different ways of working with landlords to speed up adoption of the Decent Homes Standard; and
- introducing a single government-approved ombudsman covering all private landlords who rent out property in England. Membership will be mandatory and local councils will be able to take enforcement action against landlords that fail to join the ombudsman.

Private rented sector

This was followed between 2 September 2022 and 14 October 2022, bya consultation on the introduction and enforcement of a Decent Homes Standard in the private rented sector in England (*A Decent Homes Standard in the private rented sector: consultation* [https://www.gov.uk/government/consultations/a-decent-homes-standard-in-the-private-rented-sector-consultation].

The consultation included the government's plans to introduce a legal duty on landlords to ensure their property meets the Decent Homes Standard. If landlords are in breach of this requirement as identified by a local council through an inspection, this would be a criminal offence. The government proposes that failure to comply with this duty also be made a banning order offence and to extend the grounds for rent repayment orders, requiring landlords to repay rent to the tenant(s) in situations where they have not complied with the Decent Homes Standard.

The Housing Ombudsman's response

On **29 November 2022**, the Housing Ombudsman wrote an open letter to social landlords about complaints relating to damp and mould asking them to renew their focus on the recommendations in its spotlight report on the topic published last year Complaints relating to damp and mould (housing-ombudsman.org.uk)

"There has been an exponential rise in casework involving damp and mould reaching our service, with 134% more cases for formal investigation and 42% of our severe maladministration decisions involving damp and mould."

"my report [Spotlight on: Damp and mould] recommended landlords take a zero-tolerance approach to damp and mould. I further recommended landlords consider a dedicated policy to support decision-making and an urgent, proactive approach. I am asking all landlords to actively consider whether such a policy is required, if not done so already. If a dedicated policy is genuinely not considered necessary, I ask you to be really clear why. Secondly, my report highlighted our concerns about the tone of some communications, especially language such as 'lifestyle choices' and 'behaviours' that infer blame on the resident and places the onus for resolving the issue on them, absolving the landlord of responsibility. This underlying attitude can impede an effective diagnosis of the causes and timely actions that should be taken by the landlord. This reflects some of the evidence heard at the inquest. This call to change language has resonated with many landlords who have taken action. However, I am acutely aware that, given this language had become so widespread and accepted, the sector may still have some way to go before it is eradicated from the vernacular of social housing. I consider the use of patronising, stigmatising or potentially discriminatory language as 'heavy handed' and therefore may, under section 52(f) of our Scheme, make a finding of maladministration."

The Ombudsmans' response

On 2 February 2003 the Housing Ombudsman published One year on follow up report: Spotlight on damp and mould – it's notlifestyle (housing-ombudsman.org.uk). It reported:

"The volume of casework and findings have increased significantly. The number of findings we made about the handling of damp, mould and leaks increased from 195 in 2020-21 to 456 in 2021-22, a 134% increase. The rate at which we upheld those findings increased from 37% to 45%. We had 1,993 enquiries and complaints about damp, mould and leaks in 2020-21 – that figure increased last year to 3,530, a 77% increase and as of December 2022, we had already received 3,969 enquiries and complaints for 2022-23."

• Regulator of Social Housing's response

22 November 2022, the Regulator of Social Housing wrote to CEOs of large registered providers (local authorities and housing associations) regarding damp and mould, seeking assurance from all providers that they had ‘a clear understanding and strong grip’ on damp and mould issues in their homes, and that they were addressing risks to tenants’ and residents’ health.

It asked them to provide the following by 19 December 2022:
•their approach to assessing the extent of damp and mould issues affecting their properties, including how they assessed the prevalence of category 1 and 2 damp and mould hazards;
•their most recent assessment of the extent of damp and mould hazards in their homes, including the prevalence of category 1 and 2 damp and mould hazards;
•the action they were taking to remedy any issues and hazards, and to ensure that their homes met the Decent Homes Standard; and
•how they ensured that individual damp and mould cases were identified and dealt with promptly and effectively when raised by tenants and residents.

Regulator of Social Housing

On 2 February 2023 it published Damp and mould-initial findings (publishing.service.gov.uk)

"Our best estimates are that 3-4% [120,000- 160,000] of the four million social housing homes have at least some notable damp and mould, 1-2% have serious [40,000-80,000], HHSRS category 2 damp and mould problems, and less than 0.2% have the most serious [8,000], HHSRS category 1 level, problems which would fail the Decent Homes Standard."

"Most providers' responses demonstrated that they
- *are taking damp and mould seriously*
- *identify and address cases of damp and mould in tenants' homes*
- *have made improvements in how they handle damp and mould cases over the last year"*

"A minority of registered providers supplied poor quality information that lacked the detail needed for us to have confidence about whether they are tackling damp and mould appropriately. A poor-quality response does not necessarily mean the provider has a poor approach but does mean that we will need to look more closely at what they are doing to tackle damp and mould effectively."

"Where providers either reported a high prevalence of serious damp and mould or supplied poor quality information, we will now ask them to provide further, specific assurance that they are identifying and addressing damp and mould cases. If we then identify any providers who have not met our standards, we will take regulatory action in line with our usual processes. This will include publishing regulatory notices or regulatory judgements where appropriate."

Non-decent and damp homes

The DLUHC *English Housing Survey 2021 to 2022: headline report* [https://www.gov.uk/government/statistics/english-housing-survey-2021-to-2022-headline-report]. In 2021, 3.4m occupied dwellings (14 per cent) failed to meet the Decent Homes Standard. The private rented sector had the highest proportion of non-decent homes (23 per cent) while the social rented sector had the lowest (10 per cent). Four per cent of the occupied dwelling stock [136,000 homes] had problems with damp. Problems with damp were most prevalent in the private rented sector, with 11 per cent of dwellings having reported a problem in 2021. Two percent of owner-occupied dwellings and four percent of occupied social rented dwellings had problems with damp.

The DLUHC *English Housing Survey, 2020 to 2021: social rented sector* report [https://www.gov.uk/government/statistics/english-housing-survey-2020-to-2021-social-rented-sector]. It found that satisfaction with repairs and maintenance was lower among social renters (66 per cent) than private renters (75 per cent). The most common reasons for dissatisfaction with repairs and maintenance among social renters were the landlord being slow to complete repairs (29 per cent), the landlord not bothering to do the repairs (26 per cent), and the work being of poor quality (17 per cent).

Good news!

The government has announced that it will be deferring the implementation of the Fixed Recoverable Costs ("FRC") in relation to housing cases until October 2025.

In a letter from Lord Bellamy QC, Parliamentary Under-Seceretary of State for Justice on 3 February 2023, he said the government had decided to expand the delay to the extension of FRC to legally aided housing possession claims to "all relevant housing cases for two years from October 2023, when the FRC reforms are due to be implemented generally."

Renting Homes (Wales) Act 2016

- *The Renting Homes (Wales) Act 2016* (RH(W)A) came into effect on 1 December 2022. It replaces secure tenancies issued by local authorities and assured tenancies issued by housing associations that are registered social landlords (RSLs) with 'secure contracts', and private sector contracts with 'standard contracts' (which can also be used by local authorities and RSLs in some circumstances). Tenants and licensees are 'contract-holders'.
- Housing conditions in Wales are now governed by ss89–100 **[Q7]** of the Act.
- The new provisions include an obligation that landlords keep dwellings fit for human habitation (s91) as well as in repair (s92).
- There are supplementary provisions relating to housing conditions in the *Renting Homes (Supplementary Provisions) (Wales) Regulations 2022*. These include a provision that the contract-holder is not required to pay rent in respect of any day or part day during which the dwelling is unfit for human habitation. However, the contracting parties may agree to exclude supplementary provisions (RH(W)A 2016 s24).

Renting Homes (Wales) Act 2016

- *The Renting Homes (Fitness for Human Habitation) (Wales) Regulations 2022* and the *Renting Homes (Fitness for Human Habitation) (Wales) (Amendment) Regulations 2022* prescribe the matters and circumstances to which regard must be had when determining whether a dwelling is fit for human habitation. These broadly reflect the 29 'matters and circumstances' set out in the *Housing Health and Safety Rating System (Wales) Regulations 2006* **[Q8]**, as prescribed under the Housing Act 2004.
- The regulations also set out requirements in relation to the installation of smoke alarms, carbon monoxide alarms and the provision of electrical condition reports.
- A dwelling will be treated as unfit for human habitation at a time when the landlord is not in compliance with those requirements (reg 11 **[Q9]**).
- Further, landlords cannot give notices for possession in relation to standard contracts where any of the requirements are not met (RH(W)A 2016 ss176 and 196 and Sch 9A paras 5A and 5B).
- Contract-holders are given additional protection from eviction where they have enforced or relied on the landlord's obligations under s91 or s92 and the court is satisfied that the landlord has made the possession claim to avoid complying with those obligations (s217).

Environmental Protection Act 1990

R (Parker) v Magistrates' Court at Teeside and Bashir and Bashir (interested parties) [2022] EWHC (Admin)

Mr Parker brought an action against the freeholder of his property and the joint freeholders of the neighbouring property (the interested parties), under *Environmental Protection Act 1990* s79 for statutory nuisance in relation to a party wall. Liability was admitted and the terms of an abatement order were agreed. The costs to be paid by his freeholder was agreed but not the amount of the remaining costs to be paid by the interested parties. At the hearing before the district judge, one of the interested parties appeared and indicated that he did not have the means to pay costs. The judge assessed both the interested parties' liability for costs at £100. Mr Parker sought judicial review of the decision. Fordham J explained that the magistrates' court must address three questions, all set out in s82(12):

- What 'expenses' were 'properly incurred' by the private prosecutor in the proceedings?
- What amount is 'reasonably sufficient to compensate' the private prosecutor for the properly incurred expenses?
- If there is more than one defendant responsible, what is a 'fair and reasonable proportion' of the expenses – identified by answering questions 1 and 2 above – that any given defendant should be ordered to pay to the private prosecutor?

The district judge had erred in looking at costs through the 'prism' of the interested parties' means rather than considering the statutory questions. The means of a defendant are irrelevant to whether expenses were properly incurred. However, it is possible that a court could find the relative resources of the parties, or some point linked to those resources, to be of assistance in deciding what amount is reasonably sufficient to compensate for those expenses.

Lifts

Anchor Hanover Group v Cox (2023) UKUT 14 (LC)

- Mr Cox was the assured tenant of a flat in a four storey, purpose-built independent living retirement development of 51 flats for those aged 55 and over, owned by Anchor Hanover Group, a non-profit registered provider of social housing. Mr Cox argued that a properly functioning lift serving all floors of the building was an essential facility which many tenants relied on and without which they would be unable to continue living in their flats.
  Mr Cox's tenancy provided that Anchor would provide the services set out in a schedule and that Mr Cox would pay a service charge for them. The schedule of services includes the repair, maintenance and insurance of the lift serving the building.
- Mr Cox argued that by virtue of section 11(4) and (5) a service charge clause in a tenancy agreement has no effect so far as it would require the tenant to contribute to the cost of work carried out by the landlord which falls within the landlord's implied repairing covenants.

- The First Tier Tribunal found that: the lift was a common part or common facility and engaged section 11(1B) through the definition of "common parts" in section 60 Landlord and Tenant Act which covers "any common facilities" in the building, it was also an installation which indirectly served Mr Cox's flat; although it was not mentioned specifically in section 11(1)(b) it fell within that limb of section 11(1) because in the context of this building it was an essential installation.

Lifts

The Upper Tribunal held:

- *"subsection (1B) does not add a new implied repairing obligation, and specifically it does not add the common parts of the building to the subject to the landlord's obligations under subsection (1) and (1A). The subject matter of the covenants remains, first, the structure and exterior of the dwelling-house and the building in so far as it belongs to the landlord, and secondly, the specific types of installation identified in section 11(1)(b) and (c) (whether inside the dwelling-house or in another part of the building) provided they directly or indirectly serve the dwelling-house. Instead, subsection (1B) qualifies the obligation to repair the structure and exterior of the building and the relevant installations so that it arises only if the disrepair affects the lessee's enjoyment of the dwelling-house or the common parts."*
- *"By subsection (1A)(b) the service installations which the landlord is required by subsection (1)(b) and (c) to keep in repair now additionally include any installation of the sort already mentioned if, directly or indirectly, it serves the dwelling-house and is either part of a building in which the landlord has an estate or interest or is owned by or under the control of the landlord."*
- *"The lift is an installation, but it is not an installation for the supply of water, gas, electricity or sanitation, or for space heating or heating water, and so it does not fall within subsection (1)(b) or (c) as extended by subsection (1A)(b)."*
- *"The FTT treated subsection (1A)(b) and (1B) as applying subsection (1)(b) to any installation which was a common facility. That interpretation is not justified."*

Quantum

Khan v Mehmood [2022] EWCA Civ 791, 21 June 2022

- The Court of Appeal held that claims for general damages for breach of repairing covenants fall within the primary purpose of the 10 per cent uplift in *Simmons v Castle* [2012] EWCA Civ 1288 to compensate successful claimants, as a class, for being deprived of the right to recover success fees from defendants, in cases where a claimant was funding the legal costs of pursuing their claim by a conditional fee agreement (CFA) [para 58].
- The court did not accept Ms Khan's argument that, because general damages for breach of a repairing covenant are conventionally calculated by reference to a notional reduction in rent as opposed to a tariff or set of guidelines, the 10 per cent uplift should not be applied.
- The Court of Appeal held that there was nothing in the judgment in *Simmons v Castle* to suggest that the declaration should be confined to cases where damages are assessed by reference to a tariff [para 57].
- Even where the rental value is used as the basis for calculation of damages, as recognised in *Wallace v Manchester City Council* (1998) 30 HLR 1111, the particular circumstances of the tenant may lead to either an increase or a reduction in the quantification. The fact that taking a notional reduction in rent as the starting point may sometimes (though not invariably) incorporate an adjustment for inflation is no justification for excluding such damages from the scope of the uplift [para 57].

Quantum

***JH v Camden LBC* -** County Court at Clerkenwell and Shoreditch, 21 June 2020

JH was a long leaseholder of a basement flat situated in a converted Victorian era house. Camden was the freeholder. The flat had been affected by rising damp and water ingress, which caused the occurrence of damp and mould inside the flat. The matter was initially settled by Tomlin Order in April 2021 and Camden agreed to carry out repairs by August 2021. However, Camden failed to carry out the outstanding repairs pursuant to the terms of the Tomlin Order. In September 2021, JH issued an application to restore the proceedings and enforce the terms of the Tomlin Order. At a hearing in December 2021, the court made an injunction order on the same terms as the schedule to the Tomlin Order. To avoid further breaches, the court listed a hearing 28 days later to consider imposing a penal notice if works had not started. A damages hearing was listed after six months, again to ensure further oversight by the court.

Damages were awarded for the period by which the repairs should have been completed in August 2021 until the damages claim was heard in June 2022. Using the notional rack rental value, District Judge Beecham awarded £5,950 in general damages, £420.91 in special damages, as well as some minor outstanding works. The general damages award equated to 40 per cent of the notional market rent from the date works should have been completed until the date of the hearing, being 9½ months. Applying *Moorjani v Durban Estates Ltd* [2015] EWCA Civ 1252; March 2017 *Legal Action* 30, damages were awarded for the full 9½ months, even though JH was not occupying the flat for approximately five of those months.

PERSONAL INJURY AND DISREPAIR

AN ASTHMA CLAIM

PRACTICE AND PROCEDURE

PATRICK SPENCE- DOWSE & CO

9 FEBRAURY 2023

THE LAW– A VERY BRIEF REMINDER

In pursuing PI claims housing practitioners will be relying on a mix of:

- Contractual rights- express and implied- under the terms of the tenancy in respect to disrepair and maintenance, and fitness for human habitation,

and

- Tort: "*Tortious duties exist by virtue of the law itself and are not dependent upon the agreement or consent of the person subjected to them*" (Winfield).

Class of tortious claimants include: tenants, other members of the household, children and visitors.

THE LAW– A VERY BRIEF REMINDER

- Defective Premises Act 1972 Section 4
  - Subsection (1), (2) and (3)- superimpose a “duty to take care” on top of repairing obligations such that the landlord may be liable for personal injury when he “ought…. to have known” of the risk of injury
  - And additionally under subsection (4) – A landlord who has a right to enter to carry out any kind of maintenance or repair is treated as if he or she were under an obligation to maintain or repair (so Court of Appeal held in McAuley v Bristol CC (1992))

  (and NB: DPA extends to whole letting, eg outdoor space)

- Occupier’s Liability Act 1957.- common parts controlled by the landlord

- Common law negligence

- Common law nuisance

- [**Don’t forget**: Statutory nuisance under EPA 1990– Magistrates have limited power to award compensation for any PI, loss or damage resulting from the offence: ie. 6 months only before Information laid; but if asthma prognosis is bad, may still have real value]

The limitation dilemma

- 3 years for PI v 6 years for breach of contract- in other words, a risk D will plead 3 year limitation and general damages for disrepair are reduced

- Balance it up case by case- which claim has most value?

- Low value PI claims might best be pleaded under increased "discomfort and inconvenience" due to claimant's ill health- **but perhaps sometimes a cop-out**

- One claim or separate claims? If possible, get the landlord to agree an approach

- **<u>But note</u>**: social landlords may want cases pursued separately because PI costs will be covered by public liability insurance, but disrepair costs will not.

Asthma claims- gathering evidence

- Detailed history from tenants- how bad are the symptoms? Impact on activities of daily living.
- Landlord maintenance and repair records
- Expert surveyor reports
- Dated photographs and videos of damp and mould
- Environmental health visits and notices
- GP notes* and letter from GP
- Health visitors and other health professionals

Asthma claims - gathering evidence

***GP Notes extract:-**

08.06.20- Asthma annual review "History of asthma (situation); asthma causes daytime symptoms 1 to 2 times per week; …night time symptoms 1 to 2 times per week; never smoked;…additional comments; My asthma is worse at night and I have increased both my inhalers"

21.01.21- "Emergency asthma admission since last encounter (Jul-2020)…referral to asthma clinic..liaise with GP re housing authority as pt lives in flat with mould and damp- exacerbating asthma symptoms dramatically".

Advice to client: report symptoms to GP and tell doctor about housing conditions. Respiratory illnesses have multiple environmental causes.

Asthma claim: risk assessment and CFA funding

- Are there reasonable prospects of success?- i.e. 60% or better
- Risk on causation?: unless the medical history includes reference to asthma and damp and mould in housing, are you going to take the risk?
- Assess quantum
- Advising client about funding options and costs – **keep attendance notes (CPR PD 21 para 11.3)**
- Success fees, and deductions capped at 25% in relation to damages
- AEI policy: Abbey Legal Personal Injury Management Scheme:
  - £299, £479, £1,799 premiums (<5k, <25k, <100k)
  - Covers medical reports, court fees, costs awarded to defendant

Pre-Action Protocol for Housing Conditions Claims (England)

“**3.5** Housing conditions claims may contain a personal injury element. If the personal injury claim requires expert evidence other than a General Practitioner’s letter, the Personal Injury Pre-Action Protocol should be followed for that element of the housing conditions claim. If the personal injury claim is of a minor nature, and will only be evidenced by a General Practitioner’s letter, it is not necessary to follow the Personal Injury Pre-Action Protocol. If the situation is urgent, it would be reasonable to pursue separate housing conditions and personal injury claims, which could then be case managed together or consolidated at a later date.”

Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims

SCOPE?

(18) 'public liability claim'—

a) means a claim for damages for personal injuries arising out of a breach of a statutory or common law duty of care made against—
   (i) a person other than the claimant's employer; or
   but
b) does not include a claim for damages arising from a disease that the claimant is alleged to have contracted as a consequence of breach of statutory or common law duties of care, other than a physical or psychological injury caused by <u>an accident or other single event</u>

Pre-Action Protocol for Disease and Illness Claim

SCOPE?

2.1 This protocol is intended to apply to all personal injury claims where the injury is not as the result of an accident but takes the form of an illness or disease.

2.2 This protocol covers disease claims which are likely to be complex and frequently not suitable for fast-track procedures even though they may fall within fast track limits. Disease for the purpose of this protocol primarily covers any illness physical or psychological, any disorder, ailment, affliction, complaint, malady, or derangement other than a physical or psychological injury solely caused by an accident or other similar single event.

2.3 In appropriate cases it may be agreed between the parties that this protocol can be applied rather than the Pre-Action Protocol for Personal Injury Claims where a single event occurs but causes a disease or illness.

2.4 This protocol is not limited to diseases occurring in the workplace but will embrace diseases occurring in other situations for example through occupation of premises or the use of products. It is not intended to cover those cases, which are dealt with as a 'group' or 'class' action.

Pre-Action Protocol for Disease and Illness Claim:

Experts- “a flexible approach”

9.1 In disease claims expert opinions may be needed on one or more of the following –

- knowledge, fault, causation and apportionment;
- condition and prognosis;
- valuing aspects of the claim

9.4 The protocol recognises that a flexible approach must be adopted in the obtaining of medical reports in claims of this type. There will be very many occasions where the claimant will need to obtain a medical report before writing the letter of claim. In such cases the defendant will be entitled to obtain their own medical report. In some other instances it may be more appropriate to send the letter of claim before the medical report is obtained. Defendants will usually need to see a medical report before they can reach a view on causation.

The Claims Portal (www.claimsportal.org.uk) for low value accident claims (not for asthma claims)

"The Claims Portal facilitates secure electronic exchange of all information relating to a claim, including documentation, such as medical reports, between claimant lawyers and insurers/compensators."

- Public liability accident claims worth up to £25,000
- Must find insurer and policy number- NB social landlords will provide upon request
- Applies to children but not 'protected parties' [see Protocol para 4.3(2) and cpr 21.1(2)]
- Fixed costs only: £900 (<10k); £1,600 (>10k); if it goes to Stage 3, an extra £250 (and £150 for advice on child settlement): see rule 45.18
- Stage 3- court assessment of damages- see Practice Direction 8B
- Case falls out of Claims Portal under various events: eg no admission and time expires (8 weeks), revaluation, contributory negligence alleged, and disease claims.

Child settlement: recovering success fee and AEI premium from damages CPR 21.12

(1) Subject to paragraph (1A), in proceedings to which rule 21.11 applies, a litigation friend who incurs costs or expenses
on behalf of a child or protected party in any proceedings is entitled on application to recover the amount paid or payable out of any money recovered or paid into court to the extent that it –
(a) has been reasonably incurred; and
(b) is reasonable in amount.

(1A) Costs recoverable in respect of a child under this rule are limited to—
(a) costs which have been assessed by way of detailed assessment pursuant to rule 46.4(2);
(b) costs incurred by way of success fee under a conditional fee agreement or sum payable under a damages based
agreement in a claim for damages for personal injury where the damages agreed or ordered to be paid do not exceed £25,000, where such costs have been assessed summarily pursuant to rule 46.4(5), or
(c) costs incurred where a detailed assessment of costs has been dispensed with under rule 46.4(3) in the circumstances set out in Practice Direction 46 [ie**. *success fee recovery distinct from other non-recoverable costs chargeable to your client*]*.*

(2) Expenses may include all or part of –
(a) a premium in respect of a costs insurance policy (as defined by section 58C(5) of the Courts and Legal Services Act 1990); or

Child settlement: recovering success fee and AEI premium from damages : CPR PD 21

11.2 In all circumstances, the litigation friend must support a claim for payment out in relation to costs or expenses by

filing a witness statement setting out—

(1) the nature and amount of the costs or expense; and
(2) the reason the costs or expense were incurred.

11.3 Where the application is for payment out of the damages in respect of costs pursuant to rule 21.12(1A) the witness statement must also include (or be accompanied by)—

(1) a copy of the conditional fee agreement or damages based agreement;
(2) the risk assessment by reference to which the success fee was determined;
(3) the reasons why the particular funding model was selected;
(4) the advice given to the litigation friend in relation to funding arrangements;
(4A) a copy bill or informal breakdown in the form of a schedule of the solicitor and own client base costs incurred;
(5) details of any costs agreed, recovered or fixed costs recoverable by the child; and
(6) confirmation of the amount of the sum agreed or awarded in respect of—
(a) general damages for pain, suffering and loss of amenity; and
(b) damages for pecuniary loss other than future pecuniary loss, net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions

MOULD AND DAMP: “ POTENT CAUSES OF THE ONSET OF ASTHMA”
Dr John Collins, MD FRCP, Consultant Respiratory and General Physician
Extract from a May 2022 medico-legal report

“Mould and damp have been recognised to be potent causes of the onset of asthma and resistance to treatment.”

“Asthma is accompanied by breathing difficulty, with limitation in mobility and reduction of the capacity to complete activities of daily living and work.”

“The increased severity of asthma caused by mould and damp may persist even when exposure to those conditions ceases.”

“The degree and duration of an increase in symptoms of asthma cannot be predicted or defined from a statistical basis since asthma reactivity and duration are subject to multiple potential provocative factors in the environment, and the characteristics of individuals very widely.”

“Mould and damp are recognised as potent causes of both duration and severity of asthma and asthma may persist indefinitely after the individual has been freed from further exposure to those conditions.”

References: 1) Woodcott A, Mould and Asthma: Time for indoor climate change? – Thorax (2007); 62: 745-74.; 2) D W Denning et al. The link between fungi and severe asthma: A summary of the evidence https://erj.ersjournals.com>content.

Assessing General Damages for Asthma Injuries

Judicial College Guidelines (16th edition) April 2022: Chapter 6 – injuries to internal organs- Section (D) Asthma

Description		Amount
(a) Severe and permanent disabling asthma, causing prolonged and regular coughing, disturbance of sleep, severe impairment of physical activity and enjoyment of life, and where employment prospects, if any, are grossly restricted.		**£43,060 to £65,740**
(b) Chronic asthma causing breathing difficulties, the need to use an inhaler from time to time, and restrictions of employment prospects, with uncertain prognosis.	**to**	**£26,290 £43,010**
(c) Bronchitis and wheezing, affecting working or social life, with the likelihood of substantial recovery within a few years of the exposure to the cause.	**to**	**£19,200 £26,290**
(d) Relatively mild asthma-like symptoms often resulting, for instance, from exposure to harmful irritating vapour.	**to**	**£10,640 £19,200**
(e) Mild asthma, bronchitis, colds, and chest problems (usually resulting from unfit housing or similar exposure, particularly in cases of young children) treated by a general practitioner and resolving within a few months.	**up to**	**£5,150**

Assessing General Damages for Asthma Injuries

Kemp and Kemp (Sweet & Maxwell):The Quantum of Damages: Section K: Internal Organs: K2 Asthma

- **PSLA:** P1: £10,000 [£21,050 + 10% = £23,000]; P2: £2,000 [£4,590 + 10% = £5,000]
- **Trial Date:** March 7, 1996
- **Court:** Liverpool County Ct

"The first claimant suffered from asthma when she had leased and occupied a flat within a Victorian dwelling house for a period of four years. There was medical evidence to support her contention that her condition had been exacerbated throughout the period of occupation due to adverse living conditions. Her daughter, the second claimant, had also suffered from constant chest infections and mild asthma, which again had been exacerbated by the living conditions. Although none of the rooms was unusable, they were all affected by penetrating damp. The windows were also in a state of disrepair, giving rise to draughts. Also, the electricity kept going off."