

THAT IS SO UNFAIR!

A guide to unfair contract terms in residential tenancy agreements

A tenancy agreement is a contract between a landlord and a tenant. The tenancy agreement sets out the terms under which the landlord lets and the tenant takes the property. The landlord and the tenant are generally free to agree whatever terms they wish but, in reality, the tenancy agreement is usually drawn up by the landlord and in many cases is a standard document. Tenancy agreements are therefore often drawn heavily in favour of the landlord.

However, residential landlords should reconsider their standard tenancy agreements in the light of the Unfair Terms in Consumer Contracts Regulations (the UTCCR). The UTCCR have been in force since 1999 and operate to make 'unfair' terms in consumer contracts unenforceable. More recently, the UTCCR have been held in a landmark case to apply to tenancy agreements as well as other consumer contracts. The Office of Fair Trading (the OFT) has issued guidance on what types of tenancy agreement terms might be unfair. Click [here](#) for the full guidance and [here](#) for a short leaflet aimed at tenants.

The UTCCR covers contracts which are made between a 'seller or supplier' and a 'consumer'. A seller or supplier is an individual or a business, acting for purposes relating to his trade, business or profession. A consumer is an individual acting for purposes outside of his trade, business or profession. The UTCCR therefore apply to residential tenancy agreements but may also apply to long leases and, possibly, some commercial leases if the tenant is considered to be a consumer.

In order for a term to be caught by the UTCCR, it must be one that the consumer has not had an opportunity to negotiate, and which causes a significant imbalance in the parties' rights to the detriment of the consumer. Some of the main terms in tenancy agreements that the OFT says might be unfair include:

- Unreasonable rates of interest for late payment
- Excessive penalties for leaving goods in the premises at the end of the tenancy
- A right to forfeit (terminate) the agreement for minor breaches
- A right for the landlord to terminate the agreement without reason, where the tenant does not have a similar right
- The exclusion or limitation of liability for the state of the property
- The exclusion of the right to set-off
- An excessive right for the landlord to enter the property
- A right to claim legal costs over and above what is reasonable
- An obligation to pay for repairs which are the landlord's responsibility (for example, section 11 of the Landlord and Tenant Act 1985 contains certain statutory repairing obligations for landlords)
- An obligation to put the property back in a better state than it was when the tenancy was granted
- A clause which prohibits assignment absolutely (i.e. transferring the tenancy agreement to someone else)

- The right for the landlord to retain the deposit at the end of the agreement without challenge
- Any other obligation which requires the tenant to do something that is not reasonable (such as to have the flat professionally cleaned or to insure personal belongings)
- Terms which contain legal jargon or long complicated sentences

If a landlord or tenant is unsure about whether a clause is unfair, he should seek legal advice. Only a court can decide whether a clause is unfair although the OFT has a duty to consider any complaint it receives about unfair standard terms and also has the power to take action on behalf of consumers in general. The OFT has standing to bring proceedings against suppliers (including landlords) to protect consumers (including tenants).

The list of potentially unfair terms above is not exhaustive and each term will be considered individually. It is up to tenants to challenge the validity of individual clauses but landlords should take action to ensure that their standard agreements are compliant or give their tenants the opportunity to negotiate the terms of the agreement. Finally, the Law Commission has proposed new legislation that brings together several areas of consumer law and which is intended to make consumer rights much clearer. However, it is not known if or when the proposals will be implemented.

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