TDS
Tenancy Deposit Scheme

Our approach to unfair contract terms

- **Here are some pointers from TDS on our approach to claims about unfair contract terms. We hope that you will find them informative and helpful in deciding if you want to proceed with sending a dispute to us.**

- **This document is for guidance only – it is not intended to guarantee when an award will be made.**

- **Each dispute is different and the actual award made will be based on our interpretation of the specific evidence presented to us.**

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Many of the disputes we receive centre on arguments that the tenancy agreement "*says the tenant has to pay*", or that a particular clause in a tenancy agreement is "*unfair".*

In approaching such arguments, it is firstly necessary for TDS to determine the nature of the claim being made:

- is the charge being claimed for the cost of making good a breach of contract, or
- is the charge being claimed for a fee that the tenant is required to pay as a core term of the tenancy agreement (i.e. not a cost of making good a breach of contract)?

Where the charge being claimed for is the cost of making good a breach of contract

In approaching claims of this nature, the adjudicator will look for:

- an obligation in the tenancy agreement requiring the tenant to do or not do something – for example to clean, not to cause damage;
- evidence to show that the tenant is in breach of that obligation – for example a comparison of the check in and check out reports, and any other supporting evidence, shows that the property was less clean than at the start of the tenancy, or that damage had indeed taken place.
- evidence to quantify the loss the landlord claims to have suffered as a consequence – for example, invoices, estimates or receipts to show the cost of cleaning or making good damage.

For the remainder of this guidance, we will concentrate on claims for the cost of a professional clean at tenancy end (the most commonly arising scenario) and the types of situation in which TDS might make no award.

The wording of cleaning clauses in tenancy agreements will vary widely, but arguably the most common expectation we will see is that the tenant must leave the property cleaned to a professional standard. Many agents and landlords regard this as an 'absolute' obligation – i.e. the property must be left in that condition in any event, and that the tenant is responsible for the cost of cleaning to that standard if they fail to do this themselves.

The approach that TDS will take is generally to start from the presumption that the tenant can only normally be required the leave the property in the condition in which they found it (allowing for wear and tear, where relevant and appropriate). This is because it is a general legal principle that when claiming for a breach of contract, the landlord is entitled to be put in the position they ought to have been in at the end of the tenancy as if the breach of contract had not occurred – i.e. the property is in the same state of cleanliness as it started out. Where it isn't, the adjudicator will look to make an award for the cost of bringing the property back up to that standard. This will not therefore be for the cost of a full professional clean at tenancy end, if the property was not also shown to be professionally clean at the start of the tenancy.

Typically therefore, even though a tenancy agreement might demand a full professional clean at tenancy end, the adjudicator will not make an award which would put the landlord in a better position at the end of the tenancy than at the start. Examples of situations where no/a reduced award for the cost of cleaning will be made include the following:

- a check in report which:
    - makes no reference to the cleanliness of the property at the start of the tenancy for example "*the check in report does not refer to cleanliness and there is no general disclaimer to the effect that items were in good clean condition unless otherwise stated*";

- does not specify that the property was professionally clean at the start of the tenancy (e.g. "*cleaned to a good standard*", "*generally clean*" "*clean but with some oversights*")

- suggests that the property had not been cleaned for the start of the tenancy, for example "*the check in report/inventory states that items are in good condition unless otherwise stated."* However, TDS regards such statements as indicative of general condition, rather than cleanliness.

- a check out report which:

  - indicates that the property was generally clean, with some oversights, at the end of the tenancy, but not that a full professional clean was needed;

  - made no reference to any defects with cleaning at the end of the tenancy;

  - reported that the property had been cleaned to at least the same standard as at the start of the tenancy.

In summary, the adjudicator will not make a full award for the cost of professional cleaning if (s)he concludes from the evidence presented that:

- the deterioration in the property's cleanliness only required cleaning in certain specific areas rather than a complete clean throughout;

- the property was in a similar condition to check in and it would be unreasonable for the tenant to meet the cost of further cleaning;

- the evidence does not suggest that the property was less clean at the end of the tenancy than the beginning;

- there is uncertainty about the property's cleanliness at either the start or end of the tenancy.

It has been suggested that in taking such an approach, TDS determines whether a particular contract term is unfair, and that TDS has no legal authority to do this.

It is indeed not for TDS to 'rule' in its adjudications on whether a standard contract term used in a tenancy agreement is potentially unfair. This is ultimately a matter dealt with by the Courts in interpreting and applying the provisions of the Unfair Terms in Consumer Contracts Regulations 1999 ('the Regulations').

However although TDS is not empowered to 'enforce' the Regulations, neither can we ignore them completely. As an adjudicator, we must have regard to what is fair and reasonable in all the circumstances – this is no different to the approach taken by any ADR provider, or by the Courts. We will consider whether standard terms (i.e. those that have not been individually negotiated) used by landlords in pre-formulated tenancy agreements with tenants are fair, clear, and reasonable.

We consider that the guidance issued by the Office of Fair Trading on unfair contract terms is useful to us in making such judgements. Their effect and the requirement for fairness and reasonableness in general terms, mean that a tenant who fails to fulfil his obligations cannot be required to pay a disproportionately high sum in compensation. Clauses which are construed as allowing a landlord to impose unfair financial burdens on a tenant, or which require a tenant to face a financial penalty that is appreciably greater than they would face under normal circumstances (in other words, allow landlords to benefit considerably at the tenant's expense),

are potentially unfair. In those circumstances, it would be perverse for TDS to make an award that conflicted with the very clear guidance issued by the OFT.

In conclusion, our general approach to 'breach of contract' claims is that tenants should not have to pay more than the cost of making up the deficit caused by their default. Regardless of the effect of the Regulations, a term that requires the tenant to pay more in compensation for a breach than a reasonable pre-estimate of the loss caused to the landlord is likely to be void as a penalty under common law. Any awards that TDS makes are therefore based on what is considered/shown to be the actual loss suffered by a landlord.

Would TDS ever regard the need to leave a property professionally clean at tenancy end as an absolute obligation?

Where a clause is stated in the tenancy agreement to be a special clause and has clearly been individually negotiated with the tenant, we recognise that the obligation can be considered absolute and factors such as the condition at the start and end of the tenancy do not need to be considered. But the adjudicator will want to see evidence to show that this clause was highlighted and specifically agreed to by the tenant, rather than it forming part of the 'small print'.

A clause which is inserted into a contract will not automatically be deemed to be fair just by virtue of its presence. An adjudicator must also consider when and how the tenant was made aware of his potential liability. For example, it could be considered unreasonable for a tenant to have to read a website to understand further costs which are applicable at the end of the tenancy without assessing whether the tenant has access to the internet or not. A further example could be where an agent expects a potential tenant to sign an agreement containing the charges without explanation, where their first language is not English

Where the charge being claimed is a fee that the tenant is required to pay as a core term of the tenancy agreement (i.e. not a cost of making good a breach of contract)

We are often presented with cases where tenancy agreements make provision for agents to charge a particular sum for items such as check out fees. We differentiate costs claimed for dealing with a tenant's breach of contract from check-out fees of a specified amount, which are core terms of the contract and not related to a tenant's breach. Where a check out fee is specified in the agreement, we will award it – provided we have evidence that a check out was done. We will revise a check-out fee downwards where it was stated to be for an unspecified amount, and the amount then actually charged was unreasonably high.