

Early termination fees

What does it mean for you?

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We all know about the [Tenant Fees Act \(the Act\)](#) and [supporting Guidance](#) which tells us what fees we can charge tenants and what fees are not permitted, in any circumstances.

This guide, jointly created by TDS and mydeposits, looks at the approach we should all take when a tenant wants to leave the property before the end of the fixed term, or without the landlord's permission. What should you think about when looking to charge early termination fees? Can you support these charges with evidence, do they comply with the Act and are they reasonable? In the event of a formal dispute, an adjudicator will decide if the recommended steps below have been followed and the claim for costs is reasonable.

The Act makes it clear that early termination charges can be passed on to a tenant who asks to leave the tenancy before the end of the fixed term. But these charges must not exceed:

- the rent that would have been charged to the end of the fixed term or to the point any break clause could be activated
- the loss suffered by the landlord as a result of the early termination
- the agent's reasonable costs in relation to the tenancy ending

What should you do first?

In every situation, where a tenant asks to leave the property before the end of the fixed term, remind them, in writing, of their contractual responsibilities and what the consequences are of breaking the contract before the end date.

TOP TIPS

- i. Point out the tenancy agreement clause setting out the tenant's responsibilities, which ideally should include a working example of an early termination and any responsibility for commission
- ii. Provide a worst case scenario to the tenant of their total rent liability to the end of the fixed term/break clause as a calculation leaves no questions unanswered, but mention this cost may be reduced or minimised if the property is relet and ideally give a working example of this scenario
- iii. Any claim for loss must only be for the actual loss, and no more - it cannot exceed the rent payable for the remainder of the fixed term/notice period, taking into account any break clause

The key to applying early termination fees and any reletting costs incurred is to consider the different relationships involved; namely between landlord/agent and landlord/tenant, before looking at the evidence requirements to prove:

1. The agent's reasonable costs to re-let the property, on behalf of the landlord
2. The landlord's financial losses, as a result of the tenant leaving early

Where the tenancy has started and a tenant chooses to leave early, it is likely that the landlord will incur costs for setting up a subsequent new tenancy, potentially including the letting agent's commission fees for finding a new tenant, which most landlords will look to recover from the departing tenant.

Remember there is always an option for the parties to discuss and agree different terms to end the tenancy early. Where there is evidence, in writing (preferably by deed of surrender), that the tenant left the property

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early after an agreement was reached by the parties, the general rule is that the tenant will be unable to raise a dispute about this agreement.

Understanding what's involved

If the tenant wishes to end the tenancy early, they should check whether the tenancy agreement contains a clause saying that they are responsible for commission paid, or payable, by the landlord to the agent, for the remainder of the tenancy.

Commission is the letting agent's fee for setting up/renewing/introducing the tenancy/tenant and is calculated in line with the fixed term or in the event of a statutory periodic or renewal of tenancy, is charged in line with the letting agent's terms of business. For more detail on commission fees, see the sections below.

The loss can be calculated from when the tenant stops paying rent. If the property is relet, the landlord's loss, due to the tenancy ending early, will be minimised as the new tenant will pay rent to cover any period outstanding on the original fixed term (to prevent double recovery of rent)

The tenant should also be aware of any responsibility in the tenancy agreement to pay commission still outstanding from the day the tenant stops paying rent to the end of the original tenant's fixed term/break clause.

What is good evidence to support reasonable re-letting costs or actual losses incurred in the event of a dispute?

To support a claim, you should expect to provide evidence that:

- the tenant asked to end the tenancy early, and was reminded of their contractual responsibility for costs as listed in the tenancy agreement
- the tenant was given clear information of what potential costs they would be responsible for if they proceeded with moving out before the tenancy end date/break clause, including a working example of how the outstanding commission and any other relevant losses/costs would be calculated
 - OR that the tenant did not wait for agent/landlord to accept the early termination request
 - OR that the tenant left without enquiring
- the original signed tenancy agreement containing the clause clearly explaining to the tenant their responsibilities for early termination costs
- the tenant leaving early has caused the agent/landlord to spend time and money for things such as remarketing, advertising, referencing and inspection reports. Invoices will be necessary to prove the expense.

When claiming for commission fees in the following scenarios, additional evidence will be required:

1. If the same agent re-lets the property, the original commission paid or invoiced to the landlord, by the agent for the tenancy (whether paid annually or monthly, in arrears or in advance) as

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well as evidence the landlord is being held responsible for a new commission, though evidence of the second commission payment is not necessary

2. If a different agent re-lets the property, the same principle as above applies, except that evidence of the second commission payment will be required from the new agent, leaving the landlord or first agent to confirm the landlord remains responsible for the first. This may require more communication with the landlord to obtain evidence of the second commission charge, but it will be in their interest.

When will claims for commission be unsuccessful?

The obvious answer to this is where the evidence listed above has not been provided. However, the following situations will also prevent a landlord claiming for commission fees directly:

1. Where a landlord has found the new tenant, our authority is limited to making an award for rent up to the date the property is re-let but not actually on the commission for the rest of the term. The view is that the landlord has not actually suffered a loss in this situation. The landlord can pay the original commission from the rent they are receiving from the new tenant, as they are not having to pay a second commission charge.
2. If the landlord decides not to re-let the property after the tenancy ended early, the landlord will need to agree a reasonable early termination settlement with the tenant to cover their on-going responsibilities for allowing the tenant to leave early.

As they will not be finding a new tenant or continuing to receive rent, the loss is different to when they do re-let the property. Legal opinion suggests that it is reasonable for the termination agreement to recognise that the landlord has minimised his loss by ceasing to charge rent but would be entitled to make a claim to cover outstanding responsibilities where they do not exceed any outstanding rent.

In relation to a dispute in this situation we would need to see all the evidence listed in the section above plus confirmation no new tenancy was being entered into.

Can early termination fees apply if the tenant doesn't move in?

A tenant who signs the tenancy agreement should be aware that it is usually binding and there is no 'cooling off' period if they then decide not to move in. The tenant will still need to ask to end the tenancy early and could be responsible for reasonable re-letting costs. The agent/landlord will still have to provide the same supporting evidence, listed above.