

Guidance on unfair terms in tenancy agreements

September 2005

OFT356

Contacting the OFT or local trading standards services

If you think that any of the standard terms in a consumer contract are unfair you can contact the OFT at the address below or your local trading standards service. You can find contact details for your local trading standards service in the telephone book or at www.tradingstandards.gov.uk

If you have any comments on this guidance, please write to:

Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX
Email: enquiries@oft.gsi.gov.uk

Copies of the OFT's other documents relating to unfair contract terms, including the explanatory OFT briefing note *Unfair standard terms* (OFT143), and other OFT publications are available free of charge from:

EC Group, Swallowfield Way, Hayes, Middlesex UB3 1DQ
Tel: 0800 389 3158 email: oft@ecgroup.uk.com

Summaries of cases that the OFT or other enforcers have taken forward under the UTCCRs can be found on the Consumer Regulation Website (CRW), which is at www.crw.gov.uk

The Regulations

Copies of the original unamended text of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) can be purchased, current price £2.00, from Stationery Office bookshops or by post from:

The Stationery Office Publications Centre, PO Box 29, Norwich NR3 1GN

Copies are also available on the internet at: www.hmso.gov.uk/si/si1999/19992083.htm

Copies of the *Unfair Terms in Consumer Contracts (Amendment) Regulations 2001* are available from the Stationery Office as above, current price £1.50, or on the internet at: www.hmso.gov.uk/si/si2001/20011186.htm

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1 INTRODUCTION

- 1.1 This guidance explains why we consider some standard contract terms used in tenancy agreements to be potentially unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations). The guidance supersedes the guidance we issued on this subject in November 2001. The relationship between the Regulations and landlord and tenant law is complex, and we hope this guidance will further clarify the position. It represents our considered views and the basis on which we are likely to take enforcement action. It also offers suggestions for achieving fairness. Ultimately it is for the courts to decide whether any term is unfair.

Aim of guidance

- 1.2 Standard terms (ie: those that have not been individually negotiated) used by landlords in pre-formulated tenancy agreements with tenants must be fair and clear. Our aim is to encourage landlords to revise their contracts to comply with the Regulations and to assist them in doing so. The Regulations set a minimum standard not only of fairness but also of transparency.

Scope of guidance

- 1.3 The guidance deals primarily with potential unfairness in assured and assured shorthold tenancy agreements¹ in England and Wales. We also refer briefly to public sector and social housing agreements and to the pre-tenancy agreements that can precede an assured shorthold tenancy. The guidance does not apply to lodging arrangements.
- 1.4 The guidance assumes that, in general, landlords can be considered 'suppliers' and private tenants 'consumers' for the purposes of the Regulations. In the event of a dispute as to whether an individual small

¹ Assured and assured shorthold tenancies are now the most common forms of agreement for renting of houses and flats from private sector landlords, where the flat or house is let as separate accommodation as the tenant's main home.

landlord is a supplier, it will be for a court to decide whether the Regulations apply in that case.

Unfair Terms in Consumer Contracts Regulations 1999

- 1.5 All suppliers using standard contract terms with consumers must comply with the Regulations. These implement the EU Directive 93/13/EEC on unfair terms in consumer contracts. They came into force on 1 July 1995 and were re-enacted in 1999 (coming into force on 1 October 1999). The Court of Appeal has now confirmed² that the Directive and Regulations apply to contracts relating to land (that is, contracts for the disposal of an interest in or rights of occupation over land); that the Directive and the Regulations apply to public authorities such as a local council (even where the landlord has a duty to supply housing); and that, when acting in a business capacity (eg: as a landlord), a council is a 'seller or supplier' and tenants are 'consumers' within the meaning of the Regulations and the Directive.
- 1.6 We have issued extensive guidance on the Regulations, in particular the Briefing Note *Unfair standard terms* (OFT143, published 2000), and the comprehensive *Unfair contract terms guidance* (OFT311, published 2001). These publications give a fuller explanation of certain points made below about the Regulations and consumer contract terms in general.

Enforcement

- 1.7 The Regulations provide that unfair terms are not binding on consumers. It is open to consumers themselves to challenge terms they consider unfair.
- 1.8 Under the Regulations the OFT has a duty to consider any complaint it receives about unfair standard terms. Where the OFT considers a term to be unfair, it has the power to take action on behalf of consumers in general to

² *The London Borough of Newham v Khatun, Zeb, Iqbal and the Office of Fair Trading* [2004] EWCA Civ 55.

stop the continued use of the term, if necessary by seeking an injunction in England and Wales, or an interdict in Scotland. Since 1999 we have shared these powers with a range of other enforcers. These include certain national regulatory bodies,³ all local authorities providing a trading standards service, and Which?, formerly known as the Consumers' Association.

- 1.9 In addition, Part 8 of the Enterprise Act 2002, which came into force on 20 June 2003, gives the OFT and certain other bodies a new enforcement mechanism against traders which breach consumer legislation. The new legal framework introduced by Part 8 enables the OFT and other enforcers to seek enforcement orders against businesses that breach UK laws giving effect to EC Directives listed in Schedule 13, where the collective interests of consumers are harmed. These include EU Directive 93/13/EEC on unfair terms in consumer contracts. In addition, the Enterprise Act gives the OFT a coordinating role to ensure that action is taken by the most appropriate enforcement body in each case. More information on the Enterprise Act can be found on OFT's website, www.offt.gov.uk.
- 1.10 The OFT exercises its enforcement powers under the Regulations or the Enterprise Act, in line with the general enforcement principles of an Enforcement Concordat promoted by the Cabinet Office in partnership with the Scottish Administration and various local authority associations. For example, we take account of the level of actual or potential consumer detriment and take only necessary and proportionate action, having given businesses a reasonable opportunity to put things right. Any publicity will be accurate, balanced and fair.
- 1.11 The OFT and enforcers may take action against unfair terms under either the Regulations or the Enterprise Act (or both) and may accept an undertaking from the business that it will stop the infringing conduct, eg: using or relying on unfair terms. But if our concerns are not satisfactorily addressed by this

³ See Schedule 1, Part One, of the Unfair Terms in Consumer Contracts Regulations 1999, as amended.

means or otherwise we can apply to the courts and seek an enforcement order. If the infringement needs to be tackled urgently the court may make an interim enforcement order. In very urgent cases, where we think that an enforcement order should be sought immediately, an enforcer can start court proceedings without entering into consultation. If an enforcer other than the OFT proposes to take such action, we must authorise it.

Use of the guidance

- 1.12 This guidance is designed to help landlords, letting agents, and suppliers of standard or model terms to meet the requirements of the Regulations. It will also assist housing advisers and bodies with powers to enforce the Regulations. We expect those using, or recommending, standard pre-formulated tenancy agreements to review their terms and conditions in light of the guidance and amend or remove any unfair terms from their contracts.
- 1.13 This guidance focuses specifically on tenancies, and is not intended to provide a comprehensive statement of our views on the interpretation of the Regulations in other contracts. Fuller discussion of general issues regarding unfair terms can be found in our *Unfair contract terms guidance* (OFT311), to which reference⁴ is made in the body of the guidance below. Schedule 2 to the Regulations lists some types of standard term that may be found unfair. The list is illustrative only, rather than exhaustive or comprehensive. A term is not necessarily unfair just because it appears in it. We have identified a number of other commonly occurring terms that do not directly correspond to those in the Schedule, but may be regarded as unfair, and discuss these in Chapter 5.
- 1.14 Because unfair terms are legally unenforceable against consumers, it is in landlords' interests as well as tenants' that terms should be fair. The final decision about fairness lies with the court, but we believe that by applying

⁴ The main guidance is separated into 'Groups' and we follow this format in this guidance, although not all the Groups are mentioned in Annexe B.

the principles set out in our guidance, including that referred to in paragraph 1.6 above, landlords should be better able to produce terms that meet the standards of fairness and transparency required.

2 THE TEST OF FAIRNESS

- 2.1 The Regulations apply a test of fairness to most standard terms (terms that have not been individually negotiated)⁵ in contracts used by businesses with consumers. The test does not apply to terms that set the price or describe the main subject matter of the contract (usually referred to as 'core' terms) provided they are in plain and intelligible language.
- 2.2 Both types of core term are terms that are genuinely central to the bargain between the supplier and the consumer. Stating a term in plain vocabulary alone does not mean that it is a core term. If a term is illegible or hidden away in small print as if it were unimportant, the test of fairness is still likely to apply. The OFT believes that the exemption for core terms will apply only to terms that are expressed or presented in such a way that they are, or at least are capable of being, at the forefront of the consumer's mind in deciding whether to enter the agreement.
- 2.3 Terms in a tenancy agreement stating the rent, the details of the property, and the length of the tenancy are likely to be considered core terms.
- 2.4 Regulation 5 (1) provides that a standard term is unfair 'if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'.
- 2.5 The requirement of 'good faith' embodies a general principle of fair and open dealing.⁶ It means that terms should be expressed fully, clearly and legibly and that terms that might disadvantage the consumer should be given

⁵ Regulation 5(2) provides that a term will not be regarded as individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

⁶ Per Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 All ER 97, HL.

appropriate prominence. However transparency is not enough on its own, as good faith relates to the substance of terms as well as the way they are expressed and used. It also requires a supplier not to take advantage of consumers' weaker bargaining position, or lack of experience, in deciding what their rights and obligations shall be. Contracts should be drawn up in a way that respects consumers' legitimate interests.

- 2.6 In assessing fairness, we take note of how a term **could** be used. A term is open to challenge if it is drafted so widely that it could be relied on in a way to harm consumers. It may be considered unfair if it could have an unfair effect, even if it is not at present being used unfairly in practice and there is no intention to use it unfairly. In such cases landlords could achieve fairness by redrafting the term more precisely, so that it reflects their practice and intentions.
- 2.7 Transparency is also fundamental to fairness. Regulation 7 introduces a further requirement that standard terms must use **plain and intelligible** language. Terms should not just be clear for legal purposes. When we assess fairness, we also have to consider what a consumer is **likely** to understand by the wording of a clause. Even if a clause would be clear to a lawyer, we will probably conclude that it is potentially unfair if it is likely to mislead, or be unintelligible to consumers. Contracts should be in language that is plain and intelligible to ordinary people. Consumers should also have the chance to read all the terms before agreeing to the contract.
- 2.8 The example terms given in Annexe B are taken from standard tenancy contracts where we and other enforcers have secured changes or the terms have been withdrawn from use. We consider these terms to have potential for unfairness. We have edited some of the wording in the interests of clarity. Where possible, we have included examples of ways of revising terms, including example terms to which we have not raised objection. However, we cannot guarantee the fairness of these example revisions. We have a statutory duty to consider complaints about **any** terms brought to our attention, including the example revisions or terms with a similar effect.
- 2.9 New complaints and other evidence can sometimes shed new light on the potential for unfairness in terms that we have previously reviewed. The assessment of fairness requires consideration of **all** the relevant circumstances and of the effect of other terms in the contract – Regulation

6(1). This means that a form of words that is considered fair in one agreement is not necessarily fair in another.

- 2.10 As noted at paragraph 1.8 above, the OFT shares enforcement powers, both under the Regulations themselves and under the Enterprise Act, with a range of other enforcers. The legislation contains mechanisms to help us promote co-coordinated enforcement action, but the other enforcers are legally entitled to form their own views on what is fair and unfair and to take action accordingly. In addition, consumers are able to use the Regulations to protect themselves from unfairness and to take action to challenge terms. The court is the ultimate arbiter of whether a term is unfair.

3 ANALYSIS OF UNFAIR TERMS IN SCHEDULE 2

3.1 Schedule 2 to the Regulations lists some types of standard term that may be regarded as unfair. The list is illustrative rather than exhaustive or comprehensive. A term is not necessarily unfair just because it appears on the list. We have identified a number of other commonly occurring terms that do not directly correspond to those in the Schedule as having potential for unfairness, and we discuss these in Chapter 4. Examples of standard terms we consider may be regarded as unfair and possible ways of revising them to achieve fairness are included at Annexe B.

Groups 1 and 2: Exclusion and limitation clauses - paragraphs 1(a) and (b) of Schedule 2

3.2 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him.

Exclusion and limitation clauses in general

3.3 We are likely to object to disclaimers or exemption clauses that try to exclude or limit the landlord's liability, particularly if they try to prevent tenants from seeking redress from landlords who have not complied with

their obligations. These clauses take many different forms - see paragraphs dealing with groups 2(a) to 2(g) below.

- 3.4 We are likely to object to disclaimers that try to exclude or limit liability for breach of 'implied' terms. A term will sometimes be implied into a contract, even if it is not expressly included in the written or oral contract, by a statutory provision or by common law, in order to protect consumers or to make the agreements work. A term excluding liability for these implied terms may allow one party to act unreasonably or negligently.
- 3.5 Other legislation makes the use of many disclaimers invalid or illegal. The fact that a term is void under other legislation, and therefore unenforceable before a court, does not make it fair under the Regulations. Such a term is both pointless and potentially misleading.
- 3.6 We object to disclaimers that could be used to defeat the legitimate claims of consumers even where they may have been introduced to deal with unjustified demands. We are concerned with the **effect** of terms, and not just the intentions behind them. If the potential effect of a term goes further than intended, it may be possible for a landlord to make it fair by cutting back its scope.
- 3.7 If a term achieves the same effect as an unfair exemption clause, it will be unfair whatever its form or mechanism. This applies, for instance, to terms that 'deem' things to be the case, whether they really are or not, with the aim of ensuring no liability arises in the first place. We not only object to terms that limit the landlords' liability but also to those that exclude their liability altogether.
- 3.8 The purpose of the Regulations is to give consumers additional protection against terms that may be unfair, even though the common law or statute does not prevent their use. Terms that exclude liability 'as far as the law permits' or 'save as may be prohibited by statute', are no more likely to be fair than those that do not have that wording. They are also open to objection because they are not clear to those without legal knowledge. Tenants are not likely to be aware of the underlying statutory provisions.

Sub-contractors

- 3.9 We regard disclaimers covering problems caused by a landlord's agents or sub-contractors in the same way as those covering loss or damage caused directly by the landlord's own actions. A tenant is likely to have had no choice about the agent or sub-contractors used, and has no contractual rights against them. The landlord has chosen to enter into agreements with them, and therefore should not seek to disclaim any legal liability that they have for the defaults of their agents or contractors.

Group 1: Exclusion of liability for death or personal injury

- 3.10 In general, contracts cannot legally exclude liability for death or injury caused by negligence, and terms that purport to exclude this liability in tenancy agreements may be void and ineffective in any case. Such terms should not appear in tenancy agreements. A landlord must keep the common parts of the property reasonably safe⁷ and owes a duty of care to tenants and their visitors. In certain circumstances⁸ a landlord is under an obligation to take reasonable care to ensure that anyone who might be affected by a defect is reasonably safe from personal injury or damage to their property.
- 3.11 We object to terms allowing landlords to seek to deprive tenants of compensation in any circumstances in which they would normally be entitled to it by law. General disclaimers such as those stating that visitors enter premises 'at their own risk' could have the effect of excluding liability for death or personal injury. Even if the landlord does not intend to use the term in this way, it may still be unfair. Such terms may be acceptable if they are qualified so that liability for loss or harm is accepted if the landlord is at fault, or is disclaimed only where someone else, or a factor outside anyone's control, is to blame. Other types of conduct involving breach of duty can also cause death or injury, so unless this liability is also accepted, accepting

⁷ Landlords, if they are occupiers under the Occupiers Liability Act 1957, ie: if they have retained control over part or all of the premises, will owe a 'common duty of care' to visitors and therefore be liable for an injury occurring on the premises.

⁸ Defective Premises Act 1972 s.4 imposes this obligation where the landlord is under a duty to repair.

liability only for negligence does **not** necessarily remove all risk of unfairness.

- 3.12 We would regard any term having the effect of transferring landlords' statutory obligations to their tenants as being unfair. Landlords are required to comply with a number of statutory obligations, such as those concerning gas safety. If landlords purport to transfer their responsibility to meet statutory requirements to their tenants they are effectively disclaiming liability for failure to meet those requirements.

Group 2(a): Exclusion of liability for the state of the property and furnishings

- 3.13 Unlike suppliers of goods, landlords are not obliged under the contract to ensure that what they provide to tenants meets a requirement of satisfactory quality.⁹ However this does not mean that landlords can let property on a residential tenancy in a poor condition. They normally¹⁰ have a statutory duty to ensure that the structure and exterior of the property (including drains, external pipes and gutters and external glass such as windows) are in reasonable repair, and that certain major installations, such as boilers, sinks, baths, and WCs are in working order.¹¹ They are responsible for the safety of gas¹² and electrical appliances¹³ supplied, and the fire safety of fixtures and

⁹ At the start of a tenancy for furnished premises, under common law there is an implied condition in the tenancy agreement that the premises are fit for human habitation. It is a minimum standard that applies only at the start of a tenancy for residential furnished premises.

¹⁰ The landlord's repairing covenant is implied into the agreement – sections 11-14 Landlord and Tenant Act 1985. However, this does not apply to leases for longer than seven years.

¹¹ Sections 11(1)(a), (b) and (c) Landlord and Tenant Act 1985.

¹² See the Gas Safety (Installation and Use) Regulations 1998.

¹³ See, for example, the Electrical Equipment (Safety) Regulations 1994 and other regulations made under the Consumer Protection Act 1987.

furnishings that go with the tenancy.¹⁴ These duties apply from the moment the tenancy begins.

- 3.14 We have concerns over terms that have the object or effect of protecting landlords from liability to tenants for defects in the premises let to them, for which the landlord would otherwise be liable,¹⁵ whatever the form of words used or the legal mechanism involved. We also regard terms that give incomplete information about the landlord's repairing responsibilities as potentially unfair, because they can be misleading.

Transfer of repairing obligations

- 3.15 We object to terms that require the tenant to carry out repairs that are legally the responsibility of the landlord (see paragraph 3.12). These terms are void, unenforceable and misleading. Landlords are under a covenant to undertake these repairs that is implied by statute into the tenancy agreement, and cannot exclude their liability for failure to abide by such a covenant. A term dealing with the tenant's responsibility in this area should be drafted so that it cannot be interpreted in such a way as to relieve landlords of their obligations. Even where a landlord does not have a statutory duty to repair, we object to terms that have the effect of making the tenant liable for what would otherwise be considered fair wear and tear.

State of repair

- 3.16 Ideally, the parties to a tenancy agreement should clearly agree the condition of the property when let. In practice, a prospective tenant is unlikely to employ a surveyor or to know whether a statement declaring a certain state of repair is correct. Standard terms about the structural state of the property, or fitness for habitation, at the time of letting may be potentially unfair if the tenant is required to accept them without question. We do not object to terms that reflect agreement about obvious conditions that the

¹⁴ See the Furniture and Furnishings (Fire)(Safety) Regulations 1988 (as amended).

¹⁵ See, for example, s.4 of Defective Premises Act 1972.

tenant could confirm by looking round the property, where the tenant is given a full opportunity to do this. We object to terms that deem an inventory recording the state of repair at the property to be correct if not challenged within an excessively short period, because the tenant should be given a reasonable opportunity to check this.

Group 2(b): Exclusion of liability for poor service

- 3.17 Consumers can normally expect the services that they have contracted for to be carried out to a reasonable standard. This applies not just to the main services performed in letting a property, but to everything that should be done as part of the transaction, including any additional services that a landlord may agree to provide. Repairing obligations must also be carried out effectively.
- 3.18 We are particularly likely to consider any term that might relieve landlords of the obligation to take reasonable care in any of their dealings with tenants, to be unfair. We would object to terms excluding the landlord's or agent's liability, for example, an exclusion of liability for damage they have caused to the tenant's belongings. We would not object to a term excluding liability only for losses where the landlord or his agent are not at fault, or which were not foreseeable when the tenancy agreement was entered into.

Disclaiming liability where the tenant is at fault

- 3.19 Terms that disclaim the landlord's liability for loss or damage that is the tenant's fault may be acceptable. This does not mean that a disclaimer that operates only when the tenant is in breach of a covenant is necessarily fair. We would object to a term if it could deprive tenants of all redress if they commit a trivial or technical breach of the term, or where the landlord may be partly responsible for the damage done or for the loss or harm suffered by the tenant. If landlords have not complied with fire safety requirements, or fail to repair locks to common parts, they should not be able to rely on a contract term to escape their share of liability for any resulting fire or theft. In particular, this applies if the tenants were required to take unusual or

unreasonable precautions, or if the agreement did not make these required precautions sufficiently clear.

Group 2(c): Limitations of liability

- 3.20 For a contract to be fully and equally binding on both supplier and consumer, each party should be entitled to full compensation if the other fails to honour its obligations. We object to terms that limit the landlord's liability just as we object to those that exclude it altogether.

Limiting the landlord's liability

- 3.21 Many types of term, not just those that cap available compensation, can limit a landlord's liability. They include terms that require tenants to meet costs that could arise through the landlord's default. For example, we would object to terms requiring the tenant to pay a call-out charge if the landlord was called out to make repairs for which the landlord was legally responsible. We do not object to terms that allow the landlord to charge reasonably for dealing with problems arising from the tenant's fault (but see Group 5 on the need to avoid imposing any unfair penalty).

Group 2(d): Time limits on claims

- 3.22 For a contract to be considered balanced, each party's rights must remain enforceable against the other for as long as is reasonably necessary. In addition, those rights must be adequate in other respects. The law allows a reasonable time for making claims where the parties have not agreed a definite period. We would object to a term that imposes a shorter time than is reasonable, putting tenants at risk of losing their rights to redress before they would normally lapse by law.
- 3.23 We are likely to object to terms that appear to allow landlords to refuse to carry out repairs with impunity if tenants do not notify them of damage to the property immediately or within an unduly short period of time. Landlords are not entitled to avoid their legal responsibilities towards tenants who are unable to notify them or their agent of a need for repairs immediately for reasons beyond their control and involving no fault on their part.

- 3.24 It is in the tenant's own interest to notify the landlord or his agent of a defect or problems relating to the tenancy as soon as reasonably possible. This is particularly the case when repairs to the premises are needed quickly. However, a landlord's duty of care under the Defective Premises Act¹⁶ is not dependent on notification of a defect. It arises when he ought, in all the circumstances, to have known of it. Complete loss of the right to repairs carried out by the landlord, on the basis that the tenant has failed to notify the landlord of the need for repairs within a set period, is likely to be considered an unfair sanction. A landlord under a repairing obligation may not refuse to undertake repairs or unreasonably limit his responsibility for them.
- 3.25 One way to avoid unfairness is for the term to require notification as soon as is reasonably possible of any disrepair or damage of which the tenant becomes aware and that requires action by the landlord. A distinction may be drawn between the time allowed for problems that require urgent action, and those where they do not. Any term encouraging tenants to act promptly is more likely to be fair, and to be effective, if clear language is used, and if the term is appropriately highlighted. Landlords should not include disproportionate sanctions in this type of term or set arbitrary periods in which the tenant must notify the landlord of disrepair.

Group 2(e): Terms excluding the right of set-off

- 3.26 Terms that obstruct tenants' ability to use their right to redress may be unfair. One legitimate way for a consumer to obtain compensation from a supplier is to exercise the right of set-off. For example, at common law, a tenant has the right to set-off damages for disrepair against rent and recoup the cost of repairs, which are the landlord's responsibility, against future rent.¹⁷ Where a consumer has a claim under the contract against a supplier, the law generally allows the amount of that claim to be deducted from anything the consumer has to pay. This helps prevent unnecessary legal proceedings.

¹⁶ Section 4(2) of Defective Premises Act 1972.

¹⁷ *Lee-Parker v Izzet* [1971] 1 WLR 1688.

We are likely to object to terms that require rent to be paid clear or free of deductions because this has the effect of denying tenants their right of set-off.

- 3.27 Tenants should exercise the right of set-off with caution and should always seek advice, preferably legal advice, before doing so, but that does not justify terms that stop them from exercising it at all. We do not object to terms that warn tenants of the potential consequences of attempting to rely on the right of set-off to withhold sums that are not properly owing to them. However, if the right of set-off is excluded in all instances, tenants may have (or believe they have) no choice but to pay their rent in full, even where they have incurred costs as a result of a breach of an obligation, such as a repairing obligation, by the landlord. To obtain redress, they then have to go to court. The costs, delays, and uncertainties involved may, in practice, force them to give up their claim, and deprive them of their rights.

Group 2(f): Exclusion of liability for delay

- 3.28 The law requires that services are carried out when agreed, or, if no date is fixed, within a reasonable time. We object to terms that unfairly exclude liability for delay or permit excessive margins of delay after an agreed date. Both types of term allow the landlord to ignore the convenience of tenants, and to disregard verbal commitments to deadlines.

Landlord's liability for delay

- 3.29 This objection particularly applies to repairing covenants in tenancies. Delays in carrying out repairs can be caused by circumstances genuinely beyond the landlord's control, but that does not make it fair to exclude liability for **all** delays, however caused. Such terms protect landlords indiscriminately, whether or not they are at fault. We do not object to exclusions of liability for delays where these are unavoidably caused by genuine factors beyond the landlords' control and which could not be their fault. We object to terms that enable landlords to refuse redress where they are at fault, for example by not taking reasonable steps to prevent or minimise delay.

Group 2(g): Exclusion of liability for failure to perform contractual obligations¹⁸

- 3.30 A term that could allow landlords to refuse to carry out their side of the contract or any important obligation under it, at their discretion and without liability, can distort the balance of the contract to the tenant's disadvantage. We object to terms that permit the landlord to cancel or suspend provision of any significant benefit under the contract.
- 3.31 Although the intention may be reasonable, for example, to protect landlords from the effects of circumstances outside their control, or to protect the interests of other tenants, we would take into account any potential unfair effect of the term. If an exclusion clause goes further than is strictly necessary to achieve a legitimate purpose, it could give scope for abuse, and thus upset the balance of the contract to the detriment of the tenant.

Rights of entry to the property

- 3.32 We would object to a provision giving the landlord an **excessive** right to enter the rented property. Under any kind of lease or tenancy, a landlord is required by common law to allow his tenants 'exclusive possession' and 'quiet enjoyment' of the premises during the tenancy. In other words, tenants must be free from unwarranted intrusion by anyone, including the landlord. Landlords are unfairly disregarding that basic obligation if they reserve a right to enter the property without giving reasonable notice or getting the tenant's consent, except for good reason.

¹⁸ This 2(g) category relates exclusively to terms which exclude the landlord's liability to provide redress for failure to perform contractual obligations. Terms which bind the tenant to continue with a contract (ie: to pay) regardless of whether the landlord defaults represent a different form of unfairness (see Groups 3 and 15).

- 3.33 The same principles apply to terms giving **excessive** rights to the landlord to demand access for prospective new tenants or purchasers to view the premises.
- 3.34 A term dealing with rights of entry is unlikely to be challenged if it reflects the ordinary legal position. This recognises that a landlord who is responsible for carrying out repairs to the property needs reasonable access for two specific purposes: firstly, in order to check whether repairs are necessary,¹⁹ and secondly, to carry them out.²⁰ Reasonable access means access at reasonable times, and with at least 24 hours notice in writing, unless there are exceptional circumstances.

Group 3: Binding consumers while allowing the supplier to provide no service - paragraph 1(c) of Schedule 2

- 3.35 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:
- (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone.
- 3.36 A term that binds tenants to go on paying when services are not provided as agreed is clearly unfair. In principle, it may be acceptable for terms to allow a landlord some flexibility in the performance of duties under the tenancy agreement if they specify the circumstances in which any contractual obligations do not have to be fulfilled, but this does not apply where the circumstances in question are effectively under the control of the landlord. For example, a term requiring the tenant to pay for services to be provided

¹⁹ Section 11(6) of the Landlord and Tenant Act 1985 allows a landlord with repairing obligations under section 11(1) to enter the premises on 24 hours notice in writing in order to inspect them.

²⁰ There is an implied term in a tenancy agreement that the tenant will give the landlord reasonable access if the agreement imposes liability on the landlord to carry out repairs (see *Saner v Bilton* (1878) 7 Ch D 815). In relation to assured tenancies, section 16 of the Housing Act 1988 implies a similar right.

by the landlord such as cleaning or gardening after the services were discontinued would be open to challenge.

Group 4: Retention of prepayments on consumer cancellation²¹ - paragraph 1(d) of Schedule 2

3.37 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract.

3.38 In general we consider terms to be unfair if they exclude the consumer's basic rights under contract law to the advantage of the supplier. Consumers are entitled to a refund of prepayments made under a contract that does not go ahead, or that ends before they have enjoyed any significant benefit.

3.39 Any party to a contract normally has the right to cancel it and receive a full refund of any prepayments (possibly compensation as well) if the other party breaks the contract in a way that threatens its whole value to him. A term that rules out the refund of a substantial prepayment or deposit, in any circumstances, conflicts with this principle, and is likely to be unfair.

3.40 A tenant who cancels wrongfully, and thereby causes loss to the landlord, cannot expect a full refund of all prepayments. However we are likely to consider a term that deprives the tenant of everything paid in advance, regardless of the actual costs or losses caused by the cancellation, to be an unfair penalty (see Group 5).

²¹ Note that retention of a prepayment is often a form of penalty, and so could be challenged by reference to paragraph 1(e) of Schedule 2, but it is dealt with by reference to paragraph 1(d) where there is specific reference to it.

Pre-contract deposits and 'security' deposits

- 3.41 A 'no refund' term where the tenant is required to make a substantial prepayment before a tenancy agreement is signed, is likely to be unfair. It is common for letting agents to seek a deposit from the prospective tenant once a property has been selected, but terms that preclude refunds of this type of deposit, under any circumstances, may be considered unfair.
- 3.42 Terms governing the tenant's right to recover prepayments can be made fair by limiting them to the ordinary legal position. Where cancellation is the fault of the tenant, the landlord or agent is entitled to hold back from any refund of prepayments a reasonable sum to cover **either** the net costs **or** the net loss of profit resulting directly from the default,²² but not **both** where this would lead to double counting. Tenants would be at fault if, for instance, they gave false or misleading information, but not merely because the landlord thought their references were not sufficiently good (see paragraph 3.68). The landlord or agent is not entitled to keep any money that could reasonably be saved by finding another tenant, for example.
- 3.43 An alternative is to set a pre-contract deposit that reflects only the ordinary reasonable expenses necessarily incurred by the landlord. Such a genuine 'deposit' can legitimately be kept in full, since it would be a reservation fee rather than an advance payment. However, such a deposit will normally be no more than a token amount. Otherwise it is liable to be seen as a disguised penalty, even if it is expressed as a payment for a service (see paragraph 3.58).

Group 5: Financial penalties – paragraph 1(e) of Schedule 2

- 3.44 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:
- (e) requiring any consumer who fails to fulfil his obligation to pay a

²² See Group 5 on the need to avoid double counting.

disproportionately high sum in compensation.

- 3.45 It is unfair to impose excessive sanctions for a breach of contract. 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. Other types of excessive sanction are considered in Chapter 4, Group 18(c).
- 3.46 We regard a requirement to pay unreasonable interest on arrears of rent, at a rate substantially above the clearing banks' base rates, as an unfair penalty. We regard the imposition of a fixed daily or monthly charge for overdue rent, and regardless of the amount due or the surrounding circumstances, as being penal rather than compensatory in nature, and unfair. Tenants would have to pay more than the cost of making up the deficit caused by their default.
- 3.47 Other kinds of penal provisions which may be unfair are damages and costs clauses stating that the landlord or agents can claim:
- **all** their costs and expenses, not just their net costs
 - **both** their costs **and** their loss of profit, if this would lead to 'double counting', and
 - their legal costs on an 'indemnity' basis, not just those reasonable costs reasonably incurred, as this could allow the landlord to incur unreasonable legal costs (for example, by serving a notice on the tenant when this is not legally necessary) and pass them on to the tenant. The words 'indemnity' and 'indemnify' are also objectionable as legal jargon (see Chapter 5, Group 19).

Potentially excessive penalties

- 3.48 We may object to a penalty that stipulates a fixed sum to be paid in all instances, if the amount is too high in some cases. For example, a fixed

charge for repairs, following damage or default by the tenant, may not reflect the actual costs involved and may be challenged on that basis.

- 3.49 We would object to a term in a fixed term tenancy that requires a tenant who leaves early, without the landlord's agreement, to pay rent for the remainder of the period in full. Although a landlord is normally entitled to the rent for the whole of the term, whether or not the tenant remains in occupation, a tenant may have a valid defence to a claim for rent. In those circumstances such a term would be an excessive penalty. This would also allow landlords to escape their obligation to reduce (or 'mitigate') their loss, by re-letting the property to another tenant.
- 3.50 We consider that terms providing for fixed charges for sending reminders for overdue rent at fixed intervals are unfair if they do not take into account the circumstances or the need for such reminders. Landlords are entitled to recover the reasonable costs they incur in obtaining outstanding rent or other amounts due to them, but should not impose arbitrary charges, either directly or through their agents. We object to terms making tenants liable for all costs arising if rent arrears are transferred to debt collection agencies, because the circumstances may not justify a tenant having to face the liability for all of the costs and so a court may direct that the tenant should not have to pay those costs. The landlord's remedy for non-payment of rent arrears is a civil claim and the tenant is entitled to the protection of the court in this matter.
- 3.51 We would object to a term requiring payment of damages, to an amount equal to the full former rent, for the period that **any** of the tenant's belongings are left in the property at the end of the tenancy. This might be fair where the property is left full of bulky furniture and other discarded belongings that would prevent the landlord from re-letting the property, but not where a tenant has left some small items that could easily and cheaply be removed. We are not likely to object to a term making the tenant liable to meet the reasonable costs of removal and storage or disposal. For other terms dealing with discarded belongings generally, see Chapter 4, Group 18(c).
- 3.52 We would also object to a term requiring payment of damages, to an amount equal to the full former rent, for the period that all the keys are not returned at the end of the tenancy. The costs of replacing the locks, where required,

or obtaining replacement keys may be considerably less than the penalty charge demanded.

Forfeiture of security deposits

- 3.53 We object to terms that require the forfeit of the **whole** of a tenant's security deposit if the property is left in a damaged state at the end of the tenancy. Landlords can fairly say that they will deduct the reasonable costs caused directly and foreseeably by the tenant's failure to take reasonable care of the property, but they should not be able to profit from the term. We are likely to challenge a term that could give landlords an unfair windfall, for example, when disrepair is minor and easily rectified. We would also object to terms providing for deductions from the deposit for defaults that may not be the fault of the tenant or those for whom they are responsible.

Penalties involving undue discretion

- 3.54 We would object to a term allowing the landlord or the agent sole discretion to set the amount to be deducted from the rental deposit to cover damage caused by the tenant.²³ This could be used to impose an excessive penalty. Such terms may be vague or unclear or have the effect of misleading tenants about what they will be required to pay in the event of default. Tenants rarely know that landlords are required to mitigate, or reduce, their loss, and may believe that landlords or agents can claim more than they are really entitled to. In general, it is the duty of the party who claims damages for breach of contract to take reasonable steps to mitigate the loss arising.

²³ Terms giving an excessive discretion as to whether a penalty should be imposed at all – ie: as to whether the tenant is in breach - involve an entirely different form of unfairness, and are dealt with in Group 18(g).

Legal costs

- 3.55 Terms sometimes require the tenant to pay all the landlord's costs in bringing any court proceedings, regardless of their outcome. Under English law the award of legal costs in court proceedings is always at the discretion of the court.²⁴ Such a term could be relied upon to charge the tenant excessive legal costs and also allow the landlord to seek to recover the costs of an action which a court would be likely to dismiss. A court normally awards costs against the party at fault. There is no objection to a term saying that tenants who break the terms of the tenancy can expect to have to meet any reasonable legal costs properly incurred as a result.
- 3.56 For similar reasons, we would object to any term that appears to allow a landlord to claim more compensation from a tenant in court proceedings than would actually be awarded. Such terms are misleading, cannot be enforced, and could be used to make a tenant comply with demands that have no legal basis.
- 3.57 We also object to terms that purport to require tenants to pay legal costs on an indemnity basis. The word 'indemnify' is legal jargon, which, if understood at all, is liable to be taken as a threat to pass on legal and other costs incurred without regard to reasonableness.

Disguised penalties

- 3.58 We will object to any term that requires excessive payment in the event of the tenant's early termination of the agreement, or where the tenant does anything else against the landlord's wishes. A penalty clause may have the appearance of a 'core' term,²⁵ but, if it has the **effect** of an unfair penalty, the form of the term is not relevant and it will be regarded as a penalty clause. A penalty cannot be made fair by transforming it into a provision requiring

²⁴ Further, where a tenancy agreement contains an express provision stating that the tenant is liable to pay the landlord's costs of any court proceedings, a court may direct that such express provision is overridden – *Bank of Baroda v Panessar* [1986] 3 All ER 751 at 764.

²⁵ See paragraphs 2.1 and 5.11.

payment of a fee for exercising a contractual option. For instance, we would object to a term requiring payment of the full rent for the whole period of the tenancy where the tenant ends the tenancy early. We are unlikely to object to a term requiring a tenant to pay a reasonable re-letting fee and the rent due until the property is re-let, where this would be less than the outstanding rent for the remainder of the fixed term.

Unbalanced penalties

- 3.59 Even though a penalty is not excessive it may still be unbalanced if it is imposed only on the tenant where the breach could also be committed by the landlord. For instance, we would object to a term requiring tenants to meet the landlord's costs if they fail to keep an appointment where no such sanction is applied to the landlord. Fairness is more likely when terms put both parties on an equal footing on matters of equal importance to them.

Group 6: Cancellation clauses - paragraph 1(f) of Schedule 2

Group 6(a): Unequal cancellation rights

- 3.60 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:
- (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer.

Misleading termination clauses

- 3.61 Tenants with assured and assured shorthold fixed term tenancy agreements are legally protected against eviction before the fixed term expires. We do not object to the inclusion of terms allowing either party to terminate the agreement early (known as 'break clauses'), but would challenge any term stating or implying that the tenant could be evicted at any time at the landlord's discretion as being seriously misleading.
- 3.62 A fixed term tenancy comes to an end when the fixed term runs out and a tenant does not have to give notice to end it. Landlords may include clauses

in tenancy agreements setting out their legal powers to end the tenancy ('forfeiture' clauses) but we object to forfeiture clauses that are not in plain language and that do not make the legal position with regard to eviction completely clear to the tenant, ie: that a landlord is obliged to seek a court order to recover possession if the tenant remains in occupation (see Group 18(c) for our views on these terms).

- 3.63 We would object to a term suggesting that the tenant's rights are more limited when an agreement is terminated than is in fact the case. An example would be a term suggesting that the tenant's obligations to pay charges such as council tax can never come to an end before the expiry of the fixed period of the tenancy, even where the tenant leaves the property and is replaced by another tenant during that period.
- 3.64 An assured shorthold tenancy that has no fixed term gives the tenant security of possession for the first six months of their occupancy of the property and a landlord cannot bring the tenancy to an end during that period except by forfeiture (see above).
- 3.65 Landlords sometimes choose to use a 'break' clause allowing them to bring the agreement to an end on service of two months' notice. We would object to such a term if it was not balanced by a similar provision allowing the tenant to give notice in the same way.

Group 6(b): Supplier's right to cancel without refund

- 3.66 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:
- (f)permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract.

Refund of prepayments

- 3.67 Under a pre-tenancy agreement the tenant pays a deposit to the landlord or agent to secure a property before signing the actual tenancy agreement. We object to cancellation clauses if they allow the landlord or agent to cancel without acknowledging any right of tenants to a refund of prepayments,

particularly where the terms state that the landlord can decide not to grant a tenancy, and retain the tenant's pre-contract deposit.

- 3.68 A landlord may refuse to offer a tenancy if the tenant's references are unsatisfactory or the tenant fails the verifying or screening process used by the landlord or the agent. However, because landlords or agents have the right to decide what is unsatisfactory or the criteria for failing the screening process, there is scope for them to enjoy unlimited discretion to refuse the tenancy, and so to unfairly retain the deposit. This is unacceptable in our view. Where the landlord cancels a pre-tenancy agreement in response to the tenant's serious breach of contract, he may be entitled to retain some or all of the tenant's prepayment as compensation for any loss directly caused by the breach. We may regard a term as unfair if it makes a substantial prepayment non-refundable in all such cases, regardless of whether the landlord has suffered any loss of this kind.
- 3.69 A tenant would be in serious breach if, for example, he induced the landlord to enter the pre-tenancy agreement by knowingly giving a false statement or misleading information, or instigating someone else to do so on his behalf. In this instance it could be fair for the landlord to keep as much of the prepayment as is reasonably required to cover his legitimate expenses. However we would expect there to be a full refund of all pre-payments where there has been no breach of the agreement by the tenant and the landlord chooses not to proceed with the tenancy, whether or not the landlord views the tenant's references as satisfactory.

Group 7: Supplier's right to cancel without notice - paragraph 1(g) of Schedule 2

- 3.70 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:
- (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

Misleading eviction clauses

- 3.71 Legal protection for tenants against eviction ensures that most tenancy agreements cannot normally be terminated, for whatever reason, without notice. We would challenge a term suggesting that the tenant could be evicted without notice or without the landlord needing to obtain a court order beforehand, on the basis that it is seriously misleading.

Group 8: Excessive notice periods for consumer cancellation - paragraph 1(h) of Schedule 2

- 3.72 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express his desire not to extend the contract is unreasonably early.

- 3.73 A term stating the length of the tenancy is likely to be one of the most important 'core' terms of the contract (see Chapter 2, paragraph 2.1). However a subsidiary term used to extend the tenant's liability to pay rent, and relying on the tenant's inertia or ignorance to do so, could be considered unfair.

Overlong notice periods

- 3.74 An unreasonably long notice period²⁶ for termination of an assured periodic tenancy agreement can lead to tenants paying for accommodation they no

²⁶ If the tenancy is an assured periodic tenancy, which may have arisen as a result of an original fixed-term tenancy expiring, a tenant will be able to end the periodic tenancy by serving a notice to quit on the landlord. A notice to quit served by landlords has no effect upon assured periodic tenancies. A landlord needs to obtain an order of the court, or to accept the tenant's surrender of the tenancy (Housing Act 1988 s.5). As for notice to quit served by a tenant, various rules apply which mean that, unless otherwise agreed, the minimum period of notice to end such a tenancy is normally

longer want or need. This is likely if tenants have to give notice long before they are able to predict their future needs. If tenants are required to give notice well before they would naturally be considering it, they could easily forget to give notice at the right time.

- 3.75 Significant problems obviously do not arise where periodic tenancies run (as they commonly do) for short periods, such as from week to week or month to month, but may occur where they run for a longer time, such as six months or more.
- 3.76 The unfair effect of a long notice period may be more severe because of the law regarding rights to 'assign' the tenancy (see Chapter 4, Group 18(d)). This type of periodic tenant may have no right to find a satisfactory substitute to assign the obligation to pay rent. If forced to move after the opportunity to give notice to quit has passed, he may find himself with no choice but to pay rent for a substantial period, even though someone suitable is willing to take his place.²⁷

Overlong period for renewal

- 3.77 Some tenants enter a fixed term tenancy on the understanding that it is likely to be renewable (providing all obligations have been observed). In such cases, a term requiring the tenant to give an excessive period of notice to indicate a wish to renew may also be open to challenge for the reasons explained above.

the same as the period for a single instalment of rent, subject to a maximum of six months notice period, and the statutory minimum of four weeks.

²⁷ S.15(2) of the Housing Act 1988 allows landlords in assured periodic tenancies to refuse consent to an assignment or subletting, even where refusal is unreasonable. However where the tenant has a contractual (ie: not statutory) periodic tenancy, s.15(2) will not interfere if the parties have already agreed terms dealing with assignment and subletting (s.15(3)).

Notice not required for fixed term agreements

- 3.78 A tenant is not required to give notice to bring the tenancy to an end at the end of the fixed term. That is because a fixed term agreement comes to an end at the end of the fixed term, and no periodic tenancy will arise if the tenant then leaves. We appreciate that landlords will want to ensure that their properties are not left empty between tenancies, but object to terms that impose a contractual obligation on the tenant to give notice in order for the tenancy to be terminated at the end of the fixed term. This could allow the landlord to impose a substantial financial penalty on tenants who do not realise that notice is not required, by requiring them to pay rent for a period after the end of the fixed term. Terms such as this are not necessary to protect landlords from the possibility that their property will be left empty, as the law allows landlords to recover possession at the end of the fixed term by serving at least two months' notice, and they could do so where their current tenant fails to indicate when asked whether they intend to stay on. The landlord and tenant could of course still agree to a renewal of the tenancy even after such notice was served.

Group 9: Binding consumers to hidden terms²⁸ - paragraph 1(i) of Schedule 2

- 3.79 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:
- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.

²⁸ It is not 'hidden' terms themselves that are indicated to be unfair, but any term which binds the consumer to accept or comply with them – or, in legal jargon, 'incorporates' them 'by reference'. However, terms, of whose existence and content the consumer has no adequate notice at the time of entering the contract, may not be binding under the general law, in any case, especially if they are onerous in character.

- 3.80 We consider terms that bind tenants to unseen obligations unfair. It is a basic requirement of contractual fairness that consumers should always have an opportunity to read and understand terms before becoming bound by them (see Chapter 5, Group 19).

Incorporation of rules

- 3.81 Some terms appear to bind tenants to accept rules and regulations that are not embodied in the tenancy agreement. Terms like these, that require acceptance of rules made **after** the agreement is signed, may also be unfair because they allow landlords to vary the agreement to their advantage (see Group 10).

Incorporation of other terms

- 3.82 It is essential that the attention of tenants is drawn effectively to all potentially important contractual provisions, **before** they commit themselves. The terms and conditions may not suffice to communicate this adequately to tenants. Personal explanations, summaries of tenants' obligations, and other forms of written guidance all play a useful part in drawing tenants' attention to the more important terms. It is important to note that tenants may well not be bound to rules or provisions set down in other documents used by the landlord unless they have had the opportunity to inspect these documents before signing the agreement.
- 3.83 Landlords commonly use terms prohibiting tenants from acting in a way that affects the landlord's insurance, without explaining to the tenant what this means in practice. We object to such terms because the tenant has no way of knowing the scope of the insurance or what may affect it. These terms are not objectionable if the contract stipulates that the landlord will provide a summary of the relevant insurance requirements as part of the agreement. Similarly there is no objection to a term requiring tenants to observe the obligations of a head lease, provided the contract ensures that these obligations have been brought to their attention in sufficient time to consider them properly before entering the agreement.

Distance sales schemes – cooling off periods

- 3.84 Landlords or agents must ensure that they comply with the requirements of the Distance Selling Regulations where applicable and provide a 'cooling off' period (see also Group 18(f)). The Distance Selling Regulations will apply when the landlord or agent is using an organised distance sales scheme, letting properties without any face-to-face contact with the prospective tenant,²⁹ for rental agreements for short leases of under three years. On occasion, contracts may be entered into over the phone or by other means, and similarly a short 'cooling off period' must be allowed for the tenant to read and get advice on the terms. This helps achieve fairness since tenants can pull out without loss of deposit or other penalty if they find the agreement is not what they expected. Not all tenancy agreements have to be in writing, but those that are for a fixed term of longer than three years do have to be prepared as a deed.

Pre-contract deposits

- 3.85 If the landlord or agents take a non-refundable pre-contract deposit, they may in effect bind the prospective tenant to accept terms 'sight unseen'. We are likely to consider a non-refundable deposit to be unfair in any case (see Group 4), and it is particularly open to challenge where tenants become bound before they have the chance to become acquainted with the terms of the tenancy agreement.

²⁹ A distance contract is defined by The Consumer Protection (Distance Selling) Regulations 2000 as 'any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or services provision scheme run by the supplier who, for the purposes of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded'. The Regulations state that there should be a cooling off period of seven working days beginning with the day after the consumer agrees to go ahead with the project.

Group 10: Supplier's right to vary terms generally - paragraph 1(j) of Schedule 2

3.86 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.

3.87 A term enabling a landlord to alter the terms of the contract after it has been agreed, without the need for the consent of the tenant, is clearly potentially unfair. A contract cannot be considered balanced unless both parties are bound by their agreed obligations. See also Groups 11 and 12.

3.88 We are likely to consider a term unfair if it could be used to force the tenant to accept increased costs or penalties, unreasonable requirements, or reduced benefits. This is so even if the landlord does not intend to use it in that way, and expects to rely on it to make only minor changes. In that case landlords need to narrow the wording to reflect their intended use of the term. This also applies to terms giving landlords the right to make 'corrections' to contracts at their discretion and without liability.

Power to make rules

3.89 A power for the landlord to make rules binding tenants can also amount to a general right to vary terms. We are likely to object to a term that gives the landlord a broad discretion that could be used to impose new restrictions, penalties or burdens unexpectedly on the tenant.

3.90 Landlords are not required to offer the tenant a new tenancy on the same terms as the one that has expired. Concerns arise only where a term permits a landlord to vary the terms in an **existing** tenancy as explained in paragraph 3.88 above.

3.91 We object to variation clauses in fixed term tenancies and to any right to introduce changes to the terms of a tenancy agreement that could have a significant effect on tenants **while they remain bound and cannot end their tenancy before the terms of the agreement are changed.** This also

applies to continuing 'periodic' tenancies, where a period of notice must be given before the agreement can come to an end.

3.92 A variation term is less likely to be found unfair if:

- its effect is narrowed, so that it can be used to vary terms to reflect changes in the law, for example, rather than be used to change the balance of advantage under the contract, or
- the reasons for using it are stated in the contract and are clear and specific enough to ensure the power to vary cannot be used at will to the detriment of tenants (see paragraph 3.97).

3.93 Some tenancies say that variations will only be made 'reasonably'. However the use of the word 'reasonable' is unlikely to make the term fair, unless the context makes it clear to the tenant how this discretion will be exercised.

Group 11: Right to change what is supplied - paragraph 1(k) of Schedule 2

3.94 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided.

3.95 We explain our general objections to variation clauses in Group 10. The type of variation clause we discuss here would allow landlords to substitute something different from what they had agreed to supply. This would conflict with the tenant's legal right to have what the landlord agreed to provide, in all significant respects, rather than something similar or equivalent.

Discretion to make changes

- 3.96 A term that allows the landlord discretion to significantly alter the building or remove or change its furniture, during the currency of the tenancy agreement, (see paragraph 3.91) is likely to be unfair, as is a term allowing the landlord to move the tenant to a different property. A term that allows landlords to vary what they supply should be clearly restricted to minor technical adjustments that do not disadvantage the tenant, or to changes required by law.
- 3.97 If a tenant can readily predict how the variation term will be used, because it includes a valid reason for making a particular change in the future, then the term may be fair. We will consider a reason 'valid' only if it offers real protection to tenants against unacceptable changes in their situation. We are not likely to accept vague or unclear reasons as valid.
- 3.98 In a fixed term agreement, no statement of reasons can justify making tenants:
- continue to pay for a property substantially different from the one they agreed to rent, or
 - pay increased rent to reflect an alleged improvement in the property that has been imposed by the landlord without their agreement.

Group 12: Price variation clauses paragraph 1(I) of Schedule 2

- 3.99 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:
- (I) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

3.100 We give general objections to variation clauses at Group 10 and discuss here terms that allow the landlord to increase the price. Payment of the price is the most important of all the tenant's contractual obligations, and a right for the landlord to vary that price has the clearest potential for unfairness.

Rent increases

3.101 Rent increases may be agreed between the parties, but legislation restricts the freedom of landlords to **impose** rent increases in particular circumstances and in particular kinds of tenancy.³⁰ We have serious concerns over terms allowing rent to be increased arbitrarily by the landlord without reference to clear and objective criteria or an independent valuer.

3.102 Rent variation clauses are more likely to be fair as follows:

- where the amount and timing of any rent increases are specified (the precise amounts for each year or within narrow limits if not precisely stated), they effectively form part of the agreed price.³¹ As such, they may be regarded as 'core' terms setting the price, provided the details are clear, in plain intelligible language, and are adequately drawn to the tenant's attention
- terms that permit increases linked to a relevant published price index outside the landlord's control, such as the RPI, are likely to be

³⁰ See, eg: section 13 of the Housing Act 1988.

³¹ But see decision in *Bankway Properties Ltd v Penfold-Dunsford and another* [2001] EWCA Civ 528 where it was found that the rent review clause was merely a device or provision that would enable the landlord to obtain possession of the premises and reduce the level of protection available to an assured tenant under the Housing Act 1988.

acceptable, as paragraph 2(d) of Schedule 2 to the Regulations indicates,³² and

- rent review clauses that allow for an increase in the rent to be determined in the light of objective factors by a person who is wholly independent of the landlord. A fair alternative, where the parties cannot agree a new rent, is to agree that the matter should be referred to an independent expert.

3.103 A fair rent term would also include provision for the landlord to give notice of the increase that was long enough to allow a tenant who did not wish to pay rent at the higher rate to leave before the increase took effect. However, such a provision would not necessarily render a rent variation term fair in itself.

Increase of charges other than rent

3.104 A price variation clause is not necessarily fair just because it is linked to external circumstances. We may object to a right to increase prices to cover increased costs experienced by the landlord during a standard fixed term tenancy, except where such an increase directly reflects an increase in utility charges or council tax where those charges are included in the rent. Landlords are much better able to anticipate and control most changes in their costs than their tenants. In any event, such terms are open to abuse in practice, because tenants will be unable to determine whether the increases imposed on them are reasonable and match actual cost increases.

Group 13: Supplier's right of final decision - paragraph 1(m) of Schedule 2

3.105 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

³² Paragraph 2(d) of Schedule 2 provides that 'paragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described'.

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract.

3.106 We are always likely to challenge terms that allow landlords unilaterally to take themselves outside the normal rules of law. Disputes over what a term means or how it applies can normally be referred to the courts, if either party so chooses. The two different types of term illustrated above appear to take away this right from the tenant (for others, see Chapter 4, Group 18(g)).

Landlord's right to determine whether he is in breach

3.107 If landlords reserve the right to decide whether they have performed obligations properly, then they can unfairly refuse to acknowledge that they have breached the agreement, and deny redress to the tenant. For instance, a term might give the landlord's agent or surveyor the final decision on whether repairs have been satisfactorily carried out. This would mean that the landlord could avoid giving the tenant redress for inadequate repair work. Terms like these can operate as exemption clauses (see Groups 1 and 2). This type of term is more likely to be fair if an element of independent adjudication is introduced into it. That would allow a tenant who is unhappy with the landlord's interpretation of the contract to refer the matter to an independent expert, ombudsman or arbitrator. However, **compulsory** arbitration clauses are unfair (see paragraphs 3.134 and 3.135).

3.108 Terms that allow the landlord to decide when tenants are in breach of their obligations are open to similar objection (see Chapter 4, Group 18(g)).

Right to determine the meaning of terms

3.109 If landlords reserve the right to decide the meaning of a term they are effectively able to alter the way it works to suit themselves. We object to a term like this because it operates as a right to vary terms generally, as discussed in Group 10.

Group 14: Entire agreement and formality clauses - paragraph 1(n) of Schedule 2

Group 14(a): Entire agreement clauses

- 3.110 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:
- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents...
- 3.111 It is central to good faith in any agreement that the parties keep their word. Good faith demands not only that the parties to a contract are bound by their promises, but also by any other statements they or their representatives make to secure the other person's agreement. If a standard term excludes liability for these unwritten promises and statements, there is considerable scope for prospective tenants to be misled about their rights where the landlord fails to comply with any obligations or understandings. We object to terms that exclude or disclaim responsibility for what is said, but not written.
- 3.112 We also object to terms that have a similar effect by saying that employees or agents have no authority to make binding statements or amendments to the contract. This could enable the landlord to disclaim liability for oral promises, even when the tenant relies on these promises reasonably and in good faith. There is clear scope for bad faith if landlords can simply disclaim responsibility on the basis of a legal technicality. This weakens the incentive for landlords to take care in what they say, and to ensure that their employees and agents do so.
- 3.113 Although it may be argued that such terms achieve 'certainty' about the statements binding the parties this is at the unacceptable price of negating the tenant's certainty about what was agreed, and at the cost of excluding

the tenant's right to redress for misrepresentation and breach of obligation³³ (see Groups 1 and 2 on unfair exclusion clauses).

- 3.114 The ordinary position under the law of contract strikes a fairer balance where no such clause is used. It respects the need for certainty since it assumes that a coherent contractual document normally contains all the terms of the agreement.³⁴ However it allows for the possibility that the court may have to take other statements into account in order to work out the real intentions of the parties, and to prevent bad faith.
- 3.115 We do not object to terms warning that the law favours written terms, so long as this does not undermine the court's power to consider other statements where necessary. For example, a tenancy agreement may include a statement warning that it is a binding document, and that tenants should read it carefully to ensure it contains everything they want and nothing they are not prepared to agree to.
- 3.116 Such a warning can strengthen written terms provided that tenants are genuinely likely to see, understand and act on it. If this is the case, there is less scope for misunderstanding, and thus less likelihood of plausible allegations that oral statements were relied on. The warning needs to be sufficiently highlighted to draw it to the tenant's attention and the agreement must be drafted in plain intelligible language, or the tenant will be unable to spot a potential contradiction between what is said and what is printed. For the same reason, prospective tenants must have a full opportunity to read the agreement before signing it. This is, in any case, required by the legislation (see Chapter 5, Group 19). Tenants should be able to read the

³³ Terms in a lease exceeding three years have to be in writing to be enforceable – section 53-54 Law of Property Act 1925. A term which states that all additions or variations to the agreement must be in writing may therefore meet no objection where it appears in a long leasehold agreement or a tenancy of unusually long duration. However, any term that could have the effect of excluding liability for misrepresentation is liable to challenge, whatever the length of lease involved.

³⁴ This is known to lawyers as the 'parol evidence' rule.

agreement before being asked to pay a holding deposit or becoming financially bound in any way.

- 3.117 The effect of such a warning can be reinforced if the tenant is encouraged to ask questions and clarify uncertainties. Giving a telephone number to ring and a 'cooling off' period in which this can happen may also be helpful. However, we object to tenants being asked to make unfair declarations that they have read and understood terms, and discuss this at Group 18(d).

Group 14(b): Formality requirements - paragraph 1(n) of Schedule 2

- 3.118 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

(n) ...making his [the seller's or supplier's] commitments subject to compliance with a particular formality.

- 3.119 In a fairly balanced contract, the rights of all the parties must be secure and enforceable, and not at risk of being lost without good reason. Under the general law, contracts normally remain binding on both parties unless a breach by one of them threatens the whole value of it for the other.

- 3.120 A landlord should not be able to rely on a term to opt out of important obligations where the tenant commits only a technical breach of contract such as failure to observe formalities that are there for the landlord's administrative convenience. An example would be a term stating that the landlord would not be responsible for dealing with something if the tenant did not confirm it in writing, when the tenant may have verbally notified them of it. Tenants may well overlook or forget to observe a formality if it is not obvious or important, or if the landlord does not make a point of drawing it to their attention. This particularly applies if they have to comply with it at some time in the future without any reminder. We object to terms imposing severe

penalties for trivial breaches that may be committed inadvertently, because they are disproportionate.

- 3.121 For instance, tenants are entitled to the return of their security deposit (minus appropriate deductions for breaches of the agreement) at the end of the tenancy, and should not be required to comply with unnecessary formalities imposed by the landlord in order to get their deposit back. We are likely to object to terms that provide that the landlord will not refund the deposit, either in full or in part, where the tenant has not complied with some formality that the landlord considers necessary. For example, terms stating that the landlord will retain the deposit until the tenant provides them with a forwarding address, or produces receipts to confirm that all utility bills or other charges arising from the agreement have been paid when some other evidence of payment is sufficient evidence, may be regarded as unfair.
- 3.122 We have concerns where compliance with a formality involves excessive costs or inconvenience, such as a requirement to use registered post for a written notification when notification by ordinary post would be perfectly adequate.
- 3.123 A formality requirement may be considered fair, if:
- it requires a tenant to do things that are reasonably necessary
 - any sanction for non-compliance is proportionate and does not involve loss of important rights for the tenant, and
 - the need to comply with the formality is adequately drawn to the tenant's attention as close as possible to the time when it has to be complied with.
- 3.124 The more severe the penalty, the more clear and prominent the information about how to avoid it must be.
- 3.125 Tenants may enter a fixed term tenancy on the understanding that it is likely to be renewable if all obligations are observed. We may also object to a term

that makes renewal conditional on compliance with excessive formality requirements.

Group 15: Binding consumers where the supplier defaults - paragraph 1(o) of Schedule 2

3.126 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his.

3.127 Exemption clauses (see Group 2(g)) exclude the landlord's liability to provide compensation for breach of contract. However, we are even more likely to object to a term that requires tenants to comply with all their obligations (such as paying the rent) when landlords fail to perform their own obligations.

3.128 An example of this type of term is one that could require the tenant to continue to pay rent even if the property he rents is destroyed by fire or otherwise rendered uninhabitable. We are likely to consider unfair a term that requires the tenant to resume paying rent immediately, if the period allowed for reinstatement is longer than the period a tenant can be reasonably expected to remain in temporary accommodation.

Group 16: Supplier's right to assign without consent - paragraph 1(p) of Schedule 2

3.129 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:

- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement.

Landlord's right to assign

- 3.130 In general, there is no objection to an unrestricted right for the landlord to assign his interest in a tenancy agreement. Tenants' rights under tenancies and the general law are normally unaffected by such an assignment. However, any term that seems to reduce a tenant's rights where the landlord sells on, or to misrepresent the ordinary legal position, is likely to be considered unfair.
- 3.131 We deal with terms that deprive the tenant of the right to assign in Chapter 4, Group 18(d).

Group 17: Restricting the consumer's remedies – paragraph 1(q) of Schedule 2

- 3.132 Schedule 2, paragraph 1, states that terms may be unfair if they have the object or effect of:
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.
- 3.133 These terms are similar in effect to exclusion and limitation clauses (see Groups 1 and 2) since they could be used to prevent or hinder tenants from seeking redress when the landlord is in default.

Compulsory arbitration clauses

- 3.134 Section 91 of the Arbitration Act 1996 makes a compulsory arbitration clause, ie: a term that requires that disputes between the parties must be

submitted to arbitration, automatically unfair under the Regulations if it relates to claims of £5,000 or less, or £3,000 in Northern Ireland.³⁵ This is always unfair under the Regulations, regardless of circumstances. A compulsory arbitration clause made unfair in this way by the 1996 Act is legally ineffective and open to regulatory action in all cases. We may also object to compulsory arbitration clauses that are for amounts above the small claims threshold or apply to non-financial issues.

- 3.135 In general, arbitration may be an effective way of dealing with the dispute - but **the element of compulsion must be removed** from the terms. This can be done by making it clear that, at the time when the dispute arises, tenants (or both parties) are free to choose whether to go to arbitration or not. Arbitration in the UK is fully covered by legal provisions, and so we are not likely to object to voluntary arbitration clauses provided they are in clear language and not misleading.

³⁵ Section 91 of the Arbitration Act 1996 'relates to a claim for a pecuniary remedy'. It applies to claims for modest amounts, ie: the small claims upper limit.

4 ANALYSIS OF OTHER TERMS CONSIDERED POTENTIALLY UNFAIR

Group 18: other terms

4.1 The indicative and illustrative list in Schedule 2 to the Regulations includes types of terms commonly used over the EU as a whole, not in any one particular member state. The list is expressly said to be non-exhaustive. We have found a range of other terms in use in tenancy agreements in the UK that could be unfair in ways that are similar to those terms listed in Schedule 2, but which operate differently. The most commonly used terms in this category are discussed here. The categories (a) – (h) correspond to the sub-headings 18(a) to 18(h) of Group 18 in *Unfair contract terms guidance* (OFT311). Those that breach the plain language and transparency requirements of the Regulations are discussed in Chapter 5, Group 19.

Group 18(a): Allowing the landlord to impose unfair financial burdens

4.2 In a fairly balanced contract the parties must be subject only to the obligations that they agree to accept. We object to any term that allows the landlord to impose an unexpected financial burden on the tenant. This is similar in effect to a price variation clause (see Group 12) and cannot be considered an exempt 'core' term because it does not clearly set an agreed price.

4.3 We would challenge an explicit right to demand payment of unspecified amounts at the landlord's discretion. The same objections apply even if the terms are merely unclear about what will be payable, because such a term can in practice be used to impose unexpected and excessive demands. We have concerns about the potential unfair effect of terms, as well as the intentions behind them, and do not consider the purpose of such terms relevant if their potential effect could be unfair.

4.4 Some examples of charges that are open to the objections outlined above are as follows:

- **vague charges** - terms requiring the tenant to 'meet all existing and future charges and outgoings in respect of the property', or using similarly vague wording. This could refer to utility bills and council tax, but the wording might cover other 'outgoings'³⁶ that are nothing to do with the tenant and may be for the landlord or former tenants to pay. We object similarly to certain terms requiring payment of all standing charges, or for other services, when these are open-ended charges that could relate to use by others outside the term of the tenancy. Tenants can fairly be made responsible for paying only those charges directly attributable to their use of the property
- **cleaning charges** - a requirement to pay for cleaning at the end of the tenancy may be unfair if it is vague or unclear about the basis on which money will be demanded, or the extent of the cleaning involved. Such a term is more likely to be fair if the amount of the charge is expressly limited to reasonable compensation for a failure to take care of the property (see also our views below on excessive charges)
- **legal costs** - we are likely to object to terms requiring the payment of legal or drafting costs which are unstated, and effectively at the discretion of the landlord or his solicitor – for instance, payment of costs incurred in drafting and serving notices, and
- **compulsory insurance** – we object in particular to terms requiring tenants to purchase specific insurance, or insurance provided by an insurer specified by the landlord or agent. This may provide the landlord or agent with additional income by way of commission at the

³⁶ See Group 19 for our views on plain and intelligible language.

expense of the tenant having to pay higher premiums than on the open market. In such circumstances this is effectively a disguised addition to rent and, in the absence of market forces, the tenant will have no protection against unreasonable premium increases (see also our views below on compulsory contents insurance).

- 4.5 We are less likely to object to terms that have a comparable effect to those described above if they are specific and transparent about what must be paid and in what circumstances. If the term is specific and is clearly a charge for something that is part of the subject matter of the agreement, it may even be considered a 'core' term and thus exempt from assessment for fairness, provided it is in clear language and properly drawn to the tenant's attention (see Chapter 5, paragraphs 5.11 to 5.12). This may not be the case if the term is a 'disguised penalty', that is, a term calculated to make tenants pay excessively for doing something that would normally be a breach of contract (see paragraph 3.58).
- 4.6 Where a precise amount cannot be stated, it should be clear how it will be set. On occasion, it may be enough to say that it will be reasonable. This applies only where the basis of the charge is fairly obvious to the tenant, for instance where there are identifiable and verifiable costs that have to be covered, but they should not be exceeded.

Unreasonable and unexpected charges

- 4.7 The terms described above are considered unfair because they reserve to the landlord, expressly or in effect, the discretion to impose additional charges. But terms that themselves directly impose charges may be open to objection if, through lack of reasonableness and transparency, they too can result in unanticipated financial burdens for tenants. We do not regard ancillary payment obligations as transparent unless **either** they conform to what a reasonable person would expect to find in a tenancy agreement **or** they are drawn as clearly and fully to the tenant's attention as the obligation to pay rent itself – ie: rather than appearing ordinarily in the body of the contract.
- 4.8 Reasonableness and transparency issues are dealt with more fully below at Groups 18(h) and 19, but these additional objections are mentioned here

because they apply to tenancy provisions very similar to (or indeed the same as) the terms described above, in particular the following:

- **excessive cleaning charges** - as a matter of normal practice in short lets, reflecting the common law, tenants are expected to return the property in as good and clean a condition as it was when they received it, with fair wear and tear excepted. We therefore commonly object to terms that could be used to make the tenant pay for the property to be cleaned to a higher standard than it was in at the start of the tenancy, or that require cleaning regardless of whether or not this is necessary for the tenant to comply with their normal obligations with regard to the state of the property
- **unnecessary legal costs** - we consider it unreasonable to charge the tenant drafting and other legal costs unless these are both appropriate (ie: not involving unnecessary formalities) and properly drawn to the attention of the tenant at the time of entering the agreement, and
- **unnecessary insurance** requirements - we consider that whether tenants wish to insure their own personal belongings is a matter for them and that it is unreasonable for the landlord to make this a contractual requirement.

Group 18(b): Transferring inappropriate risks to tenants

4.9 We are likely to consider a term making a tenant carry risks that the landlord is better able to bear to be unfair. A risk lies more appropriately with landlords if:

- it is within their control
- it is a risk the tenant cannot be expected to know about, or
- the landlord can insure against it more cheaply than the tenant.

Transfer of the landlord's risk

- 4.10 We have particular concerns about terms that make the tenant bear a risk that landlords could remove, or at least reduce, by taking reasonable care in carrying out their obligations, for instance their repairing or fire-safety obligations. Such terms effectively allow the landlord to be negligent with impunity and we may object to them as exclusion clauses (see Groups 1 and 2).
- 4.11 We are likely to object to a term that requires the tenant to meet all or part of the excess payable on a building's insurance claim in relation to the property. Landlords are under a duty to maintain the structure of the building and this risk is their responsibility even though the claim may not arise through their fault. This does not mean that tenants are not liable for damages where they are at fault, but they should not be required to bear this risk in all instances. Similarly we would object to a term making the tenant liable for damage done by third parties outside their control, for example, repairs required following a burglary or vandalism.

Tenant guarantees

- 4.12 Occasionally a landlord seeks a guarantee from a tenant who wishes to leave before the end of the tenancy, and who has proposed a suitable replacement to the landlord. A requirement to give such a guarantee 'on assignment' may be acceptable, provided the guarantee is not excessive. The law³⁷ permits the landlord to require the original tenant to guarantee only his immediate assignee, and we would be likely to object to any term that went beyond those obligations permitted by the applicable legislation.
- 4.13 The law recognises the right of landlords to require such a guarantee in certain circumstances,³⁸ and sets standards that the guarantee needs to

³⁷ Section 16 of The Landlord and Tenants (Covenants) Act 1995.

³⁸ Section 16 of the Landlord and Tenant (Covenants) Act 1995 – which applies to tenancies entered into after 1 January 1996. Any clause which exceeds the permitted limits of an authorised guarantee

meet. For example, these standards protect the outgoing tenant from claims about the performance of the tenant's obligations by anyone he did not choose to replace him, or arising from non-payment of a higher level of rent than was originally agreed. Whether any particular requirement in a guarantee meets these standards is a matter on which landlords and tenants should seek legal advice.

Indemnities against risk

- 4.14 We are likely to object to terms requiring that landlord be 'indemnified' for costs, because these could arise where the tenant is not at fault and where the landlord could be at fault. The word 'indemnify' is legal jargon, and is liable to be taken as a threat by the landlord to pass on legal and other costs incurred without regard to reasonableness (see also paragraph 3.47, 3.57 and Group 19).

Group 18(c): Unfair enforcement powers

- 4.15 We consider there is an unfair imbalance in a contract if it gives one party the power to impose disproportionately severe penalties on the other, or if it misleadingly threatens sanctions over and above those that can actually be imposed. See also our views about financial penalties in Group 5.³⁹

agreement is void under s.25 of the Act, and liable to challenge as misleading and unfair under the Regulations.

³⁹ As with Group 5, Group 18(c) is only relevant where the problem is that a penalty is, or can be, too severe. Where there is a provision that the landlord can impose a penalty when the tenant is not at fault at all, the term belongs in Group 18(g) (right to determine whether the tenant is in breach).

Forfeiture and similar termination clauses

- 4.16 The law gives residential tenants considerable protection against arbitrary or immediate termination of their rights of occupation.⁴⁰ Standard forfeiture clauses usually include a provision that the landlord may 're-enter' the property. In principle, we see no objection to the landlord reserving such a right but any term doing so must make clear the circumstances in which the landlord can use that right. The use of the legal expression 're-enter' without a clear explanation of the tenant's rights may be misleading, because the landlord must obtain a court order before they can actually enter the property, evict the tenant and regain possession of the property. The fact that such terms have long been extensively used does not make them fair.
- 4.17 We particularly object to forfeiture clauses that are not in plain language (see Group 19) because such terms are especially likely to leave the legal position with regard to eviction and possession unclear to the tenant. Forfeiture or re-entry clauses need to refer to the tenant's legal rights, at least in general terms, to be more acceptable. We may object to terms that do not make it clear that the landlord must obtain a court order before they can evict a tenant and re-enter the property. Although it may be helpful to advise the tenant to seek independent legal advice where eviction is threatened, this will not be enough to avoid unfairness if the term does not clearly refer to the need for court proceedings.
- 4.18 We also object to terms that allow the landlord to deem a property to have been abandoned or surrendered in circumstances where the law would not. For example, a term allowing the landlord to deem a property to have been abandoned purely on the grounds that a tenant had been away for a set period of time would be likely to be considered unfair, as the law requires other conditions to be satisfied before a property can be considered to be abandoned. As with forfeiture clauses, we consider that it is unfair for terms to purportedly allow the landlord greater powers to end the tenancy than are available to them under the law.

⁴⁰ Protection from Eviction Act 1977. A landlord may be liable for damages in the event of an unlawful eviction, Section 27 Housing Act 1988.

Goods belonging to the tenant

- 4.19 Similar principles apply to other terms that appear to allow landlords to take direct action to secure redress that the court would not necessarily allow. We would object to a term permitting the landlord or his agents to enter the property without notice and to take goods in lieu of unpaid rent. Although distress for rent is a common law remedy, a landlord will need prior approval of the court to do this in certain types of tenancy,⁴¹ including recent assured and assured shorthold tenancies.
- 4.20 Terms sometimes deal with goods left in the property at the end of the tenancy. The law⁴² makes detailed provision about how such goods should normally be treated, if they have not clearly been discarded deliberately. A contract need not reflect these rules in detail provided it does not override or contradict them. We are unlikely to object to terms indicating that belongings left behind may be sold, upon written notice or, where the tenant cannot be found, after reasonable steps have been taken to trace the tenant. There is likely to be no objection to a provision for the landlord's costs to be deducted from the proceeds of sale, and that these may include reasonable storage costs (see Group 5 also).

Other charges as rent

- 4.21 We take the view that it is unfair to change the nature of a debt owing to the landlord by means of a contractual term. We are likely to object to terms that deem outstanding interest, administration or service charges, or any other monies owing to the landlord other than rent, as being rent or provide for them to be deducted from the rent account. Housing legislation provides that arrears of rent may be treated differently from other debts, particularly in

⁴¹ Leave is required for tenants with Housing Act 1988 protection - see s.19(1) Housing Act 1988.

⁴² The Torts (Interference with Goods) Act 1977, sections 12 and 13, and see *The Lusitania* [1986] QB 384.

relation to eviction, and we consider it is unfair for landlords to seek to enforce these other debts in this way.

Group 18(d): Unreasonably excluding the tenant's right to assign or sublet

- 4.22 The law ordinarily allows purchasers to sell on (or 'assign') to someone else what they have bought and this applies to tenancies as to other property. Most tenants can also, in principle, let property that has been let to them (sub- or underletting) provided they continue to observe the obligations under their own tenancy. Terms that restrict these rights may be considered unfair if they prevent a tenant, who wants to leave the property before the end of the tenancy and can provide a suitable replacement tenant, from doing so.
- 4.23 Our concerns arise only where contract terms allow landlords to refuse to accept the early surrender of fixed term agreements and insist that tenants pay rent for the whole of the period of the tenancy. If tenants need to leave, it is not fair for them to be bound to pay rent if another suitable person is willing and able to do so. For this reason we consider that, in fixed term tenancies, an absolute ban on both assignment and subletting may be considered unfair.
- 4.24 The law says that where the contract provides that the landlord's consent is required before a tenant is allowed to 'assign' or sublet a fixed term tenancy, the landlord may not withhold consent unreasonably.⁴³ In other words, if the tenant wants to move before the end of the fixed term, and can find someone else to pay the rent for the rest of the term, then the landlord can object if the person involved is unsuitable, but cannot block the transaction without good reason.
- 4.25 Landlords have a legitimate interest in preventing their property from passing into the hands of unsuitable tenants. However, in fixed term tenancies, this

⁴³ Section 19(1)(a) Landlord and Tenant Act 1927.

does not justify an arbitrary right to withhold consent to assignment and subletting. Where tenants are committed to pay rent for a period of months or years, they too have a legitimate interest at stake. We take the view that there is unlikely to be an objection to a term that states that the landlord may prohibit assignment or subletting for a minimum period at the start of the tenancy, for example, for the first three months in an agreement of six months or longer.

- 4.26 We may also object to a term that gives a landlord excessive discretion to refuse consent to any proposed assignment or subletting, on the basis that it is misleading. Where there is an express provision for assignment or subletting in the contract, the law does not allow landlords letting a fixed term tenancy to withhold their consent unreasonably. Expressly allowing a tenant to assign or sublet by consent that is not to be unreasonably withheld is considered a fairer balance.
- 4.27 We have similar objections to terms that allow assignment and subletting only if the tenant accepts unreasonable conditions, such as giving over-extensive guarantees (see paragraphs 4.12 to 4.13).
- 4.28 A ban on assignment is more likely to be fair if the tenant's right to find a suitable sub-tenant is acknowledged. Conversely, a prohibition on subletting may be acceptable if a tenant who leaves the property early is free to assign. We are unlikely to object to a prohibition on assignment or subletting where the agreement allows the tenant to terminate the tenancy early.

Group 18(e): Tenant declarations

- 4.29 Contracts frequently require tenants to make standard declarations, for example that they have read or understood the terms of the contract, or that the terms have been explained to them. Sometimes, the contract may require the tenant to agree to the declarations for the contract to proceed, whether or not the declarations reflect the facts and true position. Tenants often regard the declarations as a mere formality, and are unable to predict the potential disadvantage of apparently making them.
- 4.30 We are likely to object to any standard declaration that appears to indicate that the tenant has been dealt with fairly and properly, as in paragraph 4.29

above, and to declarations that the tenant has received or seen documents. Terms often refer to tenants having received an accompanying leaflet, or require tenants to confirm that the landlord has discharged specific responsibilities such as having produced the gas safety certificate. We are particularly likely to object to declarations about the condition of a property, or any other matter that could be established with certainty only by a surveyor, lawyer or other expert.

- 4.31 Landlords may only intend to use such declarations to stop tenants making baseless allegations, but they could be used to bar legitimate, as well as unfounded, claims. This gives rise to the same concerns as set out in Groups 1 and 2.
- 4.32 Declarations about matters wholly within the tenant's knowledge can be acceptable (such as their age or occupation), and where the prospective tenant has a free choice about what to say. However whether any declaration is fair will depend on how it is used. If tenants are routinely told or given to understand that they are **required** to say one thing for the tenancy agreement to go ahead, we are likely to consider the declaration as unfair and legally ineffectual as if the written words gave no apparent choice. The Regulations apply to unwritten terms as much as to written terms.

'Have read and understood' declarations

- 4.33 Declarations that the tenant has read and/or understood the agreement give rise to special concerns. The underlying EU Directive, which the Regulations implement, states that terms must be clear and intelligible, and that consumers must have a proper opportunity to read all of them (see Chapter 5, Group 19). The inclusion of a declaration of this kind requires tenants to say these conditions have been met, whether that is true or not.
- 4.34 In practice, tenants often do not read, and rarely understand **fully**, any but the shortest and simplest agreements. The fact that this may be undesirable does not justify the inclusion of declarations of doubtful truth or validity. The purpose of declarations of this kind is clearly to bind tenants to terms, regardless of whether they have any real awareness of what they mean. Such statements are open to the same objections as provisions binding tenants to terms they have not seen at all (see Group 9).

- 4.35 A clear and prominent warning that the tenant **should** read and understand the terms before signing them is more likely to be acceptable. The potential advantages of such wording, providing that certain conditions are met, are described in paragraphs 3.115 to 3.116.

Declaration of surrender of a tenancy

- 4.36 We consider it is misleading and generally unfair to include within the tenancy agreement a separate declaration that tenants have to sign from the outset, indicating their intention to surrender the property at the end of the fixed term of the tenancy. This could lead tenants to understand that they have contracted out of their legal rights, and that as a result the landlord is entitled to reclaim the property at the end of the tenancy without following the legal requirements to regain possession. Such terms are legally unenforceable by virtue of section 5(5) of the Housing Act 1988.

Group 18(f): Exclusions and reservations of special rights

- 4.37 We may consider unfair any term that could deprive tenants of normal protection under the law. The Regulations clearly indicate that terms excluding rights to redress for breach of contract may be unfair (see Groups 1 and 2). However, tenants also enjoy protection under legislation that operates separately from contract law.
- 4.38 The law relating to data protection is an example.⁴⁴ We are likely to challenge any term or statement that could be understood to permit the landlord to pass on information about the tenant more freely or widely than would otherwise be allowed under the Data Protection Act. A term about the

⁴⁴ It should be noted that the Information Commissioner has powers under the Regulations to take action against unfair terms.

use or disclosure of personal information that does not inform tenants how their information may be processed is likely to be unfair.

- 4.39 Terms about the use or disclosure of personal information may be acceptable if they are modified so that the protection offered by the law is not diminished. We are not likely to object if the tenant can freely choose to agree to them or not, for example, by use of an optional clause separate from the rest of the tenancy agreement. The potential for fairness will be increased if the implications of the choice are indicated and drawn to the tenant's attention.
- 4.40 Similarly, tenants should not be required to contract out of the protection offered by other legislation, such as that dealing with the installation and servicing of gas and electrical appliances. A declaration by the tenant that the law has been complied with on this type of issue can have the same effect as this type of term, and thus undermine the legal protection for the tenant (see Group 18(e)).

Distance Selling Regulations

- 4.41 The Distance Selling Regulations give protection to consumers entering contracts 'at a distance' – for example, by post, over the telephone or on the internet⁴⁵ where the supplier operates an organised distance selling scheme. These consumers have a right to certain information before the contract is concluded, and normally have a right to cancel during a 'cooling off' period. Terms in 'distance selling' contracts for tenancies of under three years that appear to exclude or restrict these rights will be unfair. The law expressly

⁴⁵ The Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334).

states that contract terms inconsistent with the regulations will be void. This does not, of course, make such terms fair (see paragraph 3.5). For further information see

www.offt.gov.uk/Business/Legal+Powers/Distance+Selling+Regulations/default.htm

Group 18(g): Landlords' discretion in relation to obligations

- 4.42 We object to terms that purport to give landlords the ability to free themselves from compliance with their obligations, or to decide whether the tenant is in breach of the agreement and should be penalised.

Rights to determine how the landlord's own obligations are performed

- 4.43 The law allows suppliers a reasonable degree of flexibility about how and when they carry out obligations in the absence of specific promises on these points. A term giving the landlord complete freedom to make arrangements to carry out repairs or maintenance allows the tenant's needs to be disregarded, and can have the same effect as an exclusion of liability for causing loss and inconvenience. Any such provision is likely to be unfair if it allows the landlord to act unreasonably.

Rights to determine whether the tenant is in breach⁴⁶

- 4.44 Any term may be unfair if it gives the landlord, or the agent, excessive power to decide whether the tenant should be penalised or obliged to make reparation, or deprived of any benefits under the tenancy agreement.
- 4.45 We would object to a term giving the landlord or the agent the final decision as to whether the tenant is liable to carry out, or pay for, repairs or

⁴⁶ The question of whether any penalty is excessive is entirely separate, and dealt with under Groups 5 (financial penalties), 18(c) (other unfair enforcement powers), and 18(h) (unreasonable ancillary obligations and restrictions).

maintenance work. Similarly we would object to a term that provided that the landlord or their agent would be entitled to decide whether such work had been adequately completed, such as a requirement that the work must be completed to the landlord's satisfaction. We would also object to a term giving landlords the sole right to decide what constitutes a breach of a requirement not to cause a nuisance to themselves or neighbouring residents.⁴⁷ A term prohibiting a tenant from causing nuisance or annoyance to a landlord is potentially unfair because it allows the landlord to decide whether the tenant is causing nuisance or annoyance, and is thus in breach of the agreement.

- 4.46 Fairness is more likely where there is a clear procedure where the tenant, if unhappy with the decision about being in breach, can refer the matter to an independent expert, ombudsman or arbitrator. However **compulsory** arbitration clauses are unfair (see Group 17).

Group 18(h): Unreasonable ancillary obligations and restrictions

- 4.47 We will generally consider terms to be unfair if they impose requirements or restrictions on the tenant that are more severe than is necessary to protect the landlord's real interest in safeguarding his property, and put tenants at risk of incurring penalties if they breach those requirements or restrictions (see also Groups 5 and 18(c)).
- 4.48 Excessive penalties are themselves unfair, but fairness cannot be achieved by reducing the penalty imposed for breaching unreasonable obligations or restrictions, because it is the obligations or restrictions themselves that are the source of unfairness. Where terms are not required to protect any legitimate interest of the landlord, **any** penalty they demand must be considered potentially excessive and unfair.
- 4.49 The ultimate sanction for breach of a term of a tenancy is termination of the agreement and eviction of the tenant. There should be no possibility within

⁴⁷ See *Camden LBC v McBride* [1999] 1CL 284.

the contract, however remote, of any attempt by the landlord to terminate the agreement and evict the tenant for a default that poses no real threat to the landlord's legitimate interests.

- 4.50 Landlords need to restrict the tenant's use of the property to a degree and impose obligations in the interests of good estate management. However, these terms must be reasonable, taking into account the type and location of the property, and whether the particular term has been introduced as a result of obligations placed on the landlord. Landlords may be bound by restrictive covenants in the contracts by which they hold the property or by other obligations such as residents' committee rules. Terms binding the tenant to comply with these obligations and restrictions are unlikely to raise objections, provided that the tenant is made aware of them when they are considering entering the agreement.
- 4.51 We object to terms in tenancy agreements that impose obligations or restrictions that are or can be wholly unreasonable, or that give the landlord the power to make unreasonable conditions. Our objections apply even if such a term does not always operate wholly unreasonably in all circumstances. There is less risk of unfairness where a term's scope is limited to the problem it is designed to prevent or resolve.
- 4.52 We take the view that in short fixed term agreements, such as one for a year or less, a standard term making the tenant liable to redecorate the property regardless of whether the tenant has done something to make it necessary may be regarded as unfair. The potential effect of such a term is to require tenants to return the property in a better condition than that in which they received it and for landlords to benefit considerably at the tenants' expense. We do not object to terms requiring tenants to redecorate or pay for redecoration where they have caused deterioration to the décor at the property beyond what could be described as fair wear and tear.
- 4.53 Where tenants are responsible for undertaking repairs, in consequence of some default on their part, we consider that terms requiring that repairs be undertaken within an unreasonably short period of time may be regarded as unfair. It may not be possible to find a contractor and carry out the repairs

within a short period. There is not likely to be any objection to a term providing that the tenant must comply with the requirement promptly, or that the landlord will undertake the necessary work at the tenant's expense if the tenant fails to do so in an agreed period, provided that such costs will be properly incurred and be reasonable.

- 4.54 We also object to terms requiring the tenant to seek the landlord's permission to be absent from the property for any period, although there may be no objection to a tenant being asked to keep the landlord informed of any lengthy absence, and, if there are valid reasons to do so, to allow the landlord access during such a period to keep the property secured.

Table 4.1: Examples of potentially unreasonable obligations

Obligation	OFT view
To keep the property and its furnishings tidy and dusted at all times.	When to do this is a matter for the tenant to decide, although we see no objection to terms requiring that the tenant must keep the property reasonably clean in order to avoid excessive deterioration.
To drain down appliances whenever the property is left vacant.	The tenant should only be required to take reasonable precautions to prevent freezing.
To comply with notices etc, in an unduly short time.	The general law requires contracting parties to comply with their obligations reasonably promptly.
To join with the landlord in opposing statutory notices.	This could force tenants to incur difficulties and costs in opposing notices that do not affect their interests.
To join with landlord in making insurance claims.	This is a matter for the tenant to decide.

Table 4.2: Examples of potentially unreasonable prohibitions

Obligation	OFT view
Against keeping any inflammable materials.	The term should be narrowed so that it does not include small items for domestic use, such as boxes of matches.
Against moving furniture.	This should be narrowed so it does not preclude tenants from moving furniture such as chairs.
Against having guests overnight.	This is normal use and enjoyment of the property on an occasional basis.
Against keeping any pets.	Our objection is to blanket exclusions of pets without consideration of all the circumstances. Such a term has been considered unfair under comparable legislation in another EU member state because it could prevent a tenant keeping a goldfish. We are unlikely to object to a term prohibiting the keeping of pets that could harm the property, affect subsequent tenants or be a nuisance to other residents.
Against changing the phone or utility supplier.	The tenant should have the choice of supplier although he may be required to keep the landlord informed of any change and to return the account to the original supplier at the end of the tenancy.
Against the display of any notices.	This should be narrowed to the type of notice that is precluded eg: potentially offensive notices.
Against making any noise that can be heard outside the property.	This should be narrowed to preclude excessive noise that may cause a disturbance.

4.55 One way to avoid unfairness is for the term to provide that the conduct is allowed only **'with the landlord's consent, which will not be unreasonably withheld or delayed'**.

5 TERMS BREACHING REGULATION 7 (PLAIN ENGLISH AND INTELLIGIBLE LANGUAGE)

Group 19: Regulation 7 - plain and intelligible language

5.1 Regulation 7 provides:

- (1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.
- (2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail.....

5.2 The purpose of the Regulations is to protect consumers, including tenants, from one-sided agreements. The EU Directive implemented by the Regulations requires that 'the consumer should actually be given an opportunity to examine all the terms' (Recital 20). The Regulations therefore demand 'transparency' in the full sense, so that the tenant can make an informed choice. It is not sufficient for terms to be clear and precise for legal purposes only - they must also be intelligible to the tenant.

5.3 We consider that a lack of clarity and openness may be a cause of unfairness in itself, if it unbalances the contract to the tenant's disadvantage. We have discussed our concerns about wide exclusion clauses that are qualified by references to legislation at Group 1. While the terms may not be unclear or uncertain in law, tenants may not be able to understand the legal references, and so be prevented or deterred from pursuing legitimate claims.

5.4 Many tenants are unlikely to be familiar with the legalistic language frequently used in tenancy agreements. They may not understand or be aware of the potentially onerous implications of more straightforward technicalities, such as references to 'indemnity' (see paragraph 4.14). We object to jargon in all its forms. That includes legal jargon unless there is a clear explanation of the meaning of the phrase. We would challenge commonly used jargon such as 'joint and several liability', 'lien', 'time is of the essence', 'indemnify', 'liquidated damages', 'determine', 'demised', 'vitiating', 'void or voidable' or 'estopped' unless there is a clear explanation alongside. This particularly applies to references to joint and several liability because

tenants and their guarantors are unlikely to understand the scope of this liability without a full explanation of the obligations involved.

- 5.5 Where a term is ambiguous, a court may be able to find at least one fair meaning in it, and enforce it on that basis, rather than declaring it unfair and void through lack of clarity. Landlords sometimes argue that a term is not unfair because it could have a fair meaning, and that the most favourable interpretation is the operative one. However, the Directive makes clear that the 'most favourable interpretation' rule is intended to benefit consumers in private disputes, not to give suppliers a defence against regulatory action (see Regulation 7(2)). We may also challenge ambiguity in a term if it could disadvantage tenants, even if one of its possible meanings is fair.
- 5.6 Ordinary words should be used as far as possible, and in their natural sense and the contract should be organised clearly. Sentences should be short, and the text of the contract should be divided into easily understood sub-headings covering recognisably similar issues. We have found long sentences to be a particular problem in tenancy agreements. Statutory references, elaborate definitions, technical language, and extensive cross-referencing between terms should be avoided.
- 5.7 Print must be legible. This depends not only on the size of print used, but also its colour, that of the background, and the quality of the paper used. Plain language is of little value unless, as required by Recital 20 of the Directive, tenants are actually given an opportunity to examine all the terms. Where a tenancy agreement is long or detailed, a 'cooling-off period' may be desirable or even necessary to ensure compliance (see paragraph 3.86).
- 5.8 We do not argue that all tenants must understand every word of every contract, but that they must have a real chance to learn, by the time the contract is binding, about terms that might disadvantage them. To do this, significant points in the contract can be highlighted, and unavoidable technicalities explained. Information can be given earlier, in brochures and even advertisements, and explanatory material, such as a summary, can also be provided with the contract.
- 5.9 Transparency assists fairness in terms. When tenants understand what they are agreeing to, there is less scope for doubting that the 'requirement of good faith' has been met. However the requirement of good faith cannot be

met solely by transparency.⁴⁸ Disputes arising between landlord and tenant are also less likely to arise if both sides understand their obligations from the outset. Many companies and trade associations have seen potential commercial advantages in having clear and well-presented standard contract terms, and a number of organisations and individuals specialise in plain language drafting.

- 5.10 Tenancy agreements normally include specific provisions for dealing with repairs. There are certain common expressions used in these agreements that have particular legal constructions. For example, the requirement to 'keep a property in good repair' obliges the tenant to put the property in repair at the start of the tenancy if it is in a state of disrepair.⁴⁹ Tenants will not necessarily understand the scope of a repairing obligation unless it is clearly brought to their attention.

Core terms

- 5.11 To the extent that a tenant can read and understand them, terms that define the main aspects of what is being supplied under the contract, or set the price to be paid, are exempt from the test of fairness. We do not consider that plain vocabulary alone meets this requirement. If a 'core' term is illegible, or hidden away in small print as if it were unimportant, when it is in fact potentially burdensome, then we will apply the test of unfairness to it.
- 5.12 Terms are unlikely to be considered 'core' if they are not prominent and not at the forefront of the tenant's mind in deciding whether to enter the contract. In particular, this means that all charges and the period of the agreement need to be expressed and presented in a way so that they are transparent. All charges made to a consumer should be expressed as inclusive of VAT.

⁴⁸ See the OFT's *Unfair Standard Terms* briefing note on other aspects.

⁴⁹ *Proudfoot v Hart* (1890) 25 QBD 42.

5.13 Any term that imposes an obligation (particularly a financial burden) or a restriction that a tenant would not normally expect to find in a tenancy agreement is open to suspicion of unfairness if it is included solely in small print in the main body of a lengthy and technical agreement. Generally, tenants under short term or periodic tenancies expect that rent will cover costs associated with taking on a tenancy other than those whose amount is determined by the tenant (such as heating, phone bills and so on), and council tax. Any term imposing substantial additional costs or charges that are outside the tenant's control needs to be clearly and specifically drawn to their attention at the time the contract is entered into.

ANNEXES

A PUBLIC SECTOR AND SOCIAL HOUSING TENANCIES

A.1 The Regulations apply to public sector and social housing tenancies. There are differences in the application of the Regulations, mainly to take account of differences in the legislation applicable. The principles discussed in the Guidance will apply with some exceptions to reflect the differences in housing legislation.

Accountability and regulation

A.2 Unlike private landlords, public authorities are publicly accountable and all local authorities must reach decisions in accordance with the principles of public law. They are expected to act fairly and to respect the legitimate expectations of the tenant. We take into account the different legal and regulatory environments in which public sector and social housing landlords work when considering complaints about possible unfairness in their tenancy terms.

Scope of Regulations

A.3 The question of whether the Regulations and the Directive they implement apply to public sector and social housing tenancies was settled by the Court of Appeal in the case of *The London Borough of Newham v Khatun, Zeb, Iqbal and the Office of Fair Trading*, 24 February 2004.⁵⁰ The court decided that the Directive and the

⁵⁰ *The London Borough of Newham v Khatun, Zeb, Iqbal and the Office of Fair Trading* [2004] EWCA Civ 55.

Regulations apply to public authorities such as the Council, and that the Council and its tenants could be considered a 'seller or supplier' and 'consumers' respectively within the meaning of the Directive and the Regulations, even where the Council was acting under a statutory duty to supply accommodation.

B EXAMPLES OF UNFAIR TERMS AND WAYS OF REVISING THEM

B.1 Please note this annexe comprises examples of standard terms used by landlords in tenancy agreements that the OFT has seen, and the ways in which they were revised to meet concerns raised by the OFT. It is **not** a list of terms that will always be found fair or unfair. The revised terms are not recommended as being definitely fair, as the OFT cannot clear or approve terms, and the revisions given are by no means the only ways to address the issues of unfairness identified in the original terms. We have edited some of the examples in order to help readers see more easily what the OFT considers to be fair or unfair, such as where a term deals with several issues or contains irrelevant wording.

Groups 1 and 2 - Exclusion and limitation clauses – paragraphs 1(a) and (b) of Schedule 2

Exclusion of liability – 'As far as the law permits'	
Unfair term	Way of revising term
The landlord excludes any and all liability that may otherwise attach to him whatsoever in connection and regard to the demised premises by virtue of common law, the Occupiers Liability Act 1957, the Demised Premises Act 1972, the Consumer Protection Act 1987 and the Latent Damage Act 1986 insofar as he is able by law.	Term deleted.

Exclusion of liability for causing death or personal injury	
Unfair term	Way of revising term
The landlord shall not be liable or responsible for any injury or damage suffered by the tenant or any occupier of the property or any person being on the property with his express or implied permission, by reason of any defect on the property, or through the neglect, default or misconduct of any agent or other servant employed by the landlord.	Term deleted.

Group 2(a): Exclusion of liability for the state of the property and furnishings

Landlord's repairing obligations	
Unfair term	Way of revising term
The property is reserved 'as seen'. No alterations will be done once you have agreed to reserve the property.	Term deleted.

Transfer of landlord's repairing obligations	
Unfair term	Ways of revising term
The tenant agrees to look after the property and in particular clean, and keep free from obstructions, all drains sanitary apparatus waste pipes and ducts belonging to, or forming part of, or which serve the property and in addition, where the property is a house, the gutters and sewers; and to keep the landlord and all other tenant and occupiers of the building of which the property forms part (if it forms part of a larger building) fully indemnified against his failure to comply with this covenant.	Sections 11-14 of the Landlord and Tenant Act 1985 (as amended) apply to the agreement. These require the landlord to keep in repair the structure and exterior of the property and keep in repair and proper working order the installations in the property for the supply of water, gas, electricity, sanitation and for space and water heating.
	The tenant agrees not to cause blockage to the drains and pipes gutters and channels in or about the property.

Transfer of landlord's repairing obligations	
Unfair term	Way of revising term
<p>The tenant will be responsible for the following:</p> <ul style="list-style-type: none"> • the annual Corgi certificate and servicing of any gas boiler and any gas fires • any replacement of immersion heater or thermostat malfunctioning • the first £100 plus VAT of any major repair • any maintenance of the central heating including the cost of replacement pump • the cost of replacing any ballcock • all drips from radiators, radiator valves, water tanks or cylinders and ballcocks. 	<p>Term deleted.</p>

Transfer of landlord's repairing obligations

Unfair term

The tenant agrees to replace any glass broken during the tenancy.

Way of revising term

To replace all broken glass promptly with the same quality glass, where the tenant his family or visitors cause the breakage.

State of repair

Unfair term

The tenant acknowledges that at the date of this lease the property is in substantial and good repair and order.

Way of revising term

Term deleted.

Group 2(b): Exclusion of liability for poor service

Excluding the landlord's liability

Unfair term

The landlord will not be responsible for any loss or inconvenience suffered as a result of failure of any other supply or service to the premises by any other party or body.

Way of revising term

The landlord will not be responsible for any loss or inconvenience suffered as a result of a failure of supply or service to the premises, supplied by the third party, where such failure is not caused by an act or omission on the part of the landlord.

Group 2(c): Limitations of liability

Limiting the landlord's liability	
Unfair term	Way of revising term
I agree that no claim will be brought in respect of uninsured possessions.	Term deleted.

Group 2(d): Time limit on claims

Time limits on notifications	
Unfair term	Way of revising term
When you take possession of the property you will have a period of three days to report in writing anything that is wrong with the property. After that you may be charged for anything that is not considered fair wear and tear.	The tenant will inform the landlord promptly as soon as any repairs or other matters falling within the landlord's obligations to repair the property come to the notice of the tenant.

Group 2(e): Terms excluding the right of set-off

Excluding tenant's right to set off	
Unfair term	Way of revising term
The tenant agrees to pay the rent at the times set out in the agreement without exercising any right or claim to legal or equitable set off. All payments to be made by the tenant under this agreement shall be made in full without any set-off, abatement, restriction, or condition and without any deduction for or on account of any counterclaim.	The tenant pays the deposit as security for performance of the tenant's obligations and it may be used to pay to compensate the landlord for the reasonable costs of any breach of those obligations or against any outstanding rent, unless lawfully withheld by the tenant.

Group 2(g): Exclusion of liability for failure to perform contractual obligations

Rights of entry to property

Unfair term	Way of revising term
The tenant must and agrees to permit the landlord and its agents or servants with or without workmen to enter the property at any time.	To permit the landlord, and any superior landlord, or his agent or contractors or those authorised by the landlord, upon giving at least 24 hours notice in writing (except in an emergency) to enter the property at all reasonable times for the purpose of inspection and repair.

Rights of entry to property

Unfair term	Way of revising term
To permit intending purchasers, tenants or others authorised by the landlord or its agents in writing to enter and inspect the premises at all reasonable times.	On giving the tenant at least 24 hours notice in writing, to allow the landlord, or any person acting on behalf of the landlord, access to view the property, during normal working hours, accompanying a prospective tenant or purchaser of the property.

Group 4: Retention of prepayments on consumer cancellation - paragraph 1(d) of Schedule 2

Pre-contract deposit and 'security' deposit	
Unfair term	Way of revising term
To make an application you must provide a holding deposit equal to one month's rent plus £200 per person. If you or any of the prospective tenants withdraw from the proposed let for any reason the above payment will not be refunded.	Once you have successfully passed the referencing procedure you are required to pay a holding deposit which is equal to one month's rent. If the tenant withdraws from the agreement thereafter, other than due to the landlord's default, then the holding deposit will be used to off-set the landlord's reasonable costs incurred until the property is re-let.

Retention of security deposit	
Unfair term	Way of revising term
We require a security deposit equivalent to six weeks' rent to be paid by the specified date in full or the property will be re-let and any funds held will be retained by the company.	The agent shall hold the deposit throughout the term of the tenancy on behalf of the landlord in case the tenant should fail to comply with the terms of this agreement.

Group 5: Financial penalties – paragraph 1(e) of Schedule 2

Unreasonable interest and charges	
Unfair terms	Way of revising terms
Interest will be charged on any outstanding arrears on the first of each month (the same to apply after as well as before any Judgment) of 3 per cent, per calendar month.	To pay interest at the rate of x per centum per annum above the base minimum lending rate of [name] Bank on any rent or other money lawfully due which is in arrears for more than fourteen days after the day on which it became due. ⁵¹
Unpaid rent will carry interest at 15% per annum...	
A charge of £3.50 per day plus VAT shall be levied and fall due each day the account is in arrears. This is calculated from the next working day after the date that the funds were to be received until all arrears, including but not limited to letter charges, administrative charges, arrears management charges, interest and all fees levied in accordance with the tenancy agreement have been settled, ie: upon the clearance of funds.	

Potentially excessive penalty

⁵¹ In this example, x is an interest rate that reflects a genuine pre-estimate of the reasonable costs that late payment by the tenant will cause the landlord to incur.

Unfair term	Way of revising term
The tenant must pay a minimum charge of £100 to remove furniture left behind.	The landlord will give the tenant notice that he considers that items have not been cleared and if the tenant has failed to collect the items promptly thereafter, the tenant will be liable for all reasonable costs of disposal.

Potentially excessive penalty	
Unfair term	Ways of revising term
Should it be necessary to send a letter with regards to late payment of rent, these are chargeable to the tenant at a rate of £35 plus VAT. Personal visits are charged at £75 plus VAT. Should a cheque be returned or payment cancelled a charge of £25 plus VAT per cheque will be levied in addition to the charges for late settlement of rent. Any rent paid other than by standing order will incur a charge of £50 plus VAT per payment.	<p>The tenant is responsible for any reasonable costs reasonably incurred required to compensate the landlord for any breach of obligation on the tenant's part.</p> <p>[The tenant must] pay the reasonable costs of the Landlord's Agent for each letter the Agent, acting reasonably, has to send to the tenant concerning breaches of the tenancy agreement.</p>

Potentially excessive penalty	
Unfair term	Way of revising term

<p>The agent shall hold the deposit until such time as the tenant provides the agent with the tenant's new address.</p>	<p>The deposit, or appropriate balance, will be returned as soon as reasonably practicable after deduction of any money which is properly due to the landlord arising from the tenant's breach or failure to comply with the tenant's obligations under this agreement. The tenant is asked to supply a contact address when the tenancy comes to an end.</p>
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<p>Potentially excessive penalty</p>	
<p>Unfair terms</p>	<p>Way of revising term</p>
<p>If the rent shall be 14 days in arrears then the full amount to the end of the tenancy shall become due.</p>	<p>Terms deleted.</p>

Any failure on the part of the tenant to comply with this obligation shall without prejudice to any other rights that the landlord might have entitle the landlord to an additional three weeks rent by way of liquidated damages for the loss it is anticipated he will suffer.

In the event of the property being left in an untidy or dirty state thereby detracting from the desirability of the property the landlord shall have the right to receive payment from the tenant of a sum equivalent to three weeks rental.

Potentially excessive penalty

Unfair term	Way of revising term
To pay an amount that is equal to rent until you return all keys.	To return the keys of the property to the agent on the agreed termination date or the end of the tenancy (whichever is sooner). The tenant also agrees to pay for any reasonable charges incurred by the agent in securing the property against re-entry where keys are not returned.

Potentially excessive penalty

Unfair term	Way of revising term
In the absence of a forwarding address the agents shall be entitled to instruct enquiry agents at the cost of the tenant to obtain such address and trace the tenant, if required.	Term deleted.

Potentially excessive penalty	
Unfair term	Way of revising term
In the event that the tenant shall unlawfully repudiate or attempt to unilaterally terminate this agreement prior to the expiry of the tenancy and without prejudice to all claims by the landlord against the tenant at common law or otherwise to pay to the landlord the full cost of re-letting the property (including all agents fees and disbursements).	With the landlord's or his agent's prior consent and subject to certain conditions that may include paying the landlord's reasonable costs associated with re-letting the premises, the tenant will be allowed to surrender or give up this tenancy before it could otherwise lawfully be ended.

Potentially excessive penalty	
Unfair term	Way of revising term
The landlord may, if the tenant fails to keep the property in a clean and presentable condition, employ the services of a professional to do so and charge the tenants any costs incurred therefore.	Term deleted.

Potentially unfair penalties (legal costs)	
Unfair terms	Ways of revising terms

<p>To pay to the landlord on demand all legal and other costs and disbursements and VAT where appropriate, incurred by the landlord in enforcing or attempting to enforce (whether by legal process or otherwise) the provisions of this agreement (including without prejudice to the generality of the foregoing) recovering rent or other monies payable hereunder or recovering possession of the property for any reason whatsoever or any other action arising out of any breach non-performance of non-observance by the tenant of the provisions of this agreement.</p>	<p>To protect the landlord from loss arising from any claim as a consequence of any breach by the tenant of any covenant contained in this agreement.</p>
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Potentially unfair penalties (legal costs) continued	
Unfair terms	Ways of revising terms
<p>To repay to the landlord on an indemnity basis within seven days of being demanded and as additional rent all costs incurred by the landlord in or in contemplation of any proceedings by the landlord arising from any breach by the tenant of the obligations herein contained (whether or not the same shall proceed to court and whether or not the tenant shall be entitled to</p>	<p>To pay, unless a court orders otherwise, the landlord's reasonable legal costs and expenses (including VAT) properly incurred in enforcing this agreement.</p>

<p>relief there from by order of the court).</p>	
<p>To indemnify and keep indemnified the landlord for his loss liability claims or damages incurred or suffered as a consequence of any breach by the tenant of any covenant contained in this agreement whether for the payment of rent or otherwise whatsoever and in the case of legal costs on an indemnity basis.</p>	

Group 6: Cancellation clauses – paragraph 1(f) of Schedule 2

Group 6(a): unequal cancellation rights

Cancellation for the landlord only	
Unfair term	Way of revising term
The landlord may bring the tenancy to an end at any time before the expiry of the fixed term (but not within six months of the commencement date) by giving to the tenant at least two months' written notice stating that the landlord requires possession of the property. A notice under section 21 of the Housing Act 1988 will suffice to implement this sub-clause.	Term deleted.

Misleading termination clause	
Unfair term	Way of revising term
It is hereby agreed that if the property shall without consent... be left empty or unoccupied then the landlord may re-enter the property and immediately thereon the tenancy shall absolutely determine without prejudice to any other remedy of the landlord.	Term deleted.

Group 6(b): supplier's right to cancel without refund

Withholding refund	
Unfair term	Way of revising term
The tenancy application fee is non-refundable. If you or any of the prospective tenants are rejected by the referencing agency and the tenancy does not go ahead as a result, the above payment will not be refunded.	Term deleted.

Group 8: Excessive notices for consumer cancellation – paragraph 1(h) of Schedule 2

Notice not required in a fixed term contract⁵²

⁵² These examples are from agreements for fixed term tenancies. The legal requirements for ending periodic tenancies are different and the same objections will not apply.

Unfair terms	Way of revising terms
<p>At least one month's notice is required from the tenant before termination of existing contract. Failure to do so may result in the deposit being retained by the landlord due to loss of income.</p>	<p>The tenant is asked to keep the landlord informed of whether he intends to leave at the end of the fixed term or renew the tenancy.</p>
<p>Please note the contract is for a term certain and can only be terminated by giving notice. Should the tenant not wish to renew the contract at the end of the agreed term notice in writing of two calendar months... must still be given. Failure to comply with the forgoing will result in proceedings being taken for recovery of the notice period.</p>	

Group 9: Binding consumers to hidden terms – paragraph 1(i) of Schedule 2

Incorporation of other terms	
Unfair term	Way of revising term
<p>To perform and observe at all times during the term, the conditions and stipulations contained in the superior lease...</p>	<p>To perform and observe at all times during the term, the conditions and stipulations contained in the superior lease that were notified to the tenant prior to the commencement of the tenancy.</p>

Incorporation of insurance provisions

Unfair term	Way of revising term
Not to do or permit to be done in or about the property any act or thing which may render void or invalidate any insurance of the property or the building against fire or otherwise increase the ordinary premium for such insurance.	Details of the landlord's insurance are provided with this agreement. The tenant shall not do or permit to be done in or about the property any act or thing which may render void or invalidate the insurance of the property or the building against fire or otherwise increase the ordinary premium for the insurance.

Group 10: Supplier's right to vary terms generally – paragraph 1(j) of Schedule 2

Variation

Unfair term	Way of revising term
The company may without notice add to, vary, suspend and alter the services applicable to the terms and conditions on 1 January annually. Any variation of these terms and conditions will be effective from the new year.	On renewal of your agreement and with notice, the company may add to, vary, suspend and alter the services applicable to the terms and conditions. Any variation of these terms and conditions will be immediately effective in the new agreement.

Power to make rules

Unfair term	Way of revising term
To abide by any rules or Regulations the landlord may from time to time make for the management of the building or any part of it and if the	To comply with any rules and regulations reasonably required by the landlord or the agent from time to time for the proper management

<p>dwelling be a flat the lessee of the flat to observe any regulations the lessor of the building may impose.</p>	<p>or improvement of the property... the landlord will discuss any new rules and regulations with the tenant before they are introduced and will take reasonable account of the tenant's views.</p>
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Group 11: Right to change what is supplied - paragraph 1(k) of Schedule 2

Landlord may make changes	
Unfair term	Way of revising term
... excepting and reserving unto the landlord the right for the landlord to build alter rebuild erect increase the height of or add to any part of the said premises in such manner in all respects as the landlord shall think fit without any consent on the part of the tenant being required and without any liability to pay compensation on the grounds of any interference with the access of light or air to the premises or otherwise.	Term deleted.

Group 12: Price variation clause – paragraph 1(l) of Schedule 2

Rent increase	
Unfair term	Way of revising term
[In a six-month fixed term tenancy] the landlord may increase the rent by giving the tenant not less than one month's notice in writing of the increase.	Term deleted.

Rent increase	
Unfair term	Way of revising term
<p>[In a 12-month fixed term tenancy] The landlord may increase the rent at any time during the term by giving the tenant at least 14 days' notice in writing prior to a rent payment day, specifying the new rent. The tenant will then pay the increased amount as rent on and from that rent payment day. If the tenant does not agree to the amount specified he may give the landlord not less than two months' notice in writing expiring any day terminating the tenancy from that day.</p>	<p>The landlord may increase the rent after the expiry of the fixed term of the agreement by giving the tenant at least two months' notice in writing prior to a rent payment day specifying the amount of the new rent. The landlord will not increase the rent during the fixed term of the tenancy.</p>

Group 14: Entire agreement and formality clauses - paragraph 1(n) of Schedule 2

Group 14(a) – entire agreement clauses

Entire agreement	
Unfair terms	Way of revising terms

<p>The tenancy agreement constitutes the whole and only agreement between the parties relating to the tenancy and save to the extent repeated in this tenancy agreement supersedes and extinguishes any prior draft agreements undertakings representation warranties and arrangements of any nature whatsoever whether or not in writing relating there, (including any offer letter).</p>	<p>Term deleted.</p>
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<p>Entire agreement continued</p>	
<p>Unfair terms</p>	<p>Way of revising terms</p>
<p>Each party acknowledges that in entering into this tenancy agreement on the terms set out in this tenancy agreement it is not relying upon any representation warranty promise or assurance, made or given by any other party or any other person whether or not in writing at any time prior to the execution of this tenancy</p>	<p>Term deleted.</p>

agreement which is not expressly set out herein.	
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Group 14(b) – formality requirements

Notification of tenant's absence	
Unfair term	Way of revising term
[The tenant must] Not leave the property vacant or unoccupied for a period in excess of 28 consecutive days without first giving written notice to the landlord or the agent of the intention so to do and obtaining a written acknowledgement of such notice from the landlord.	Not leave the property unoccupied for more than 28 days without providing the landlord with reasonable notice.

Unreasonable postal requirements	
Unfair term	Way of revising term
Any notice concerning this agreement shall be served on the landlord by registered post.	Any notice concerning this agreement shall be in writing and shall either be left or sent by first class post to the address for service.

Unreasonable requirements for proof	
Unfair term	Way of revising term
Proof of contact with the office must be retained by the tenant including recorded delivery receipt, receipt from the agent in regard to hand	You are advised to obtain and retain written confirmation of any matters affecting this agreement from the

delivery or receipt from the agent in regard to confirmation of fax received.	agent or the landlord.
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Receipts

Unfair term	Way of revising term
To provide to the landlord or the agent receipts in respect of all water gas electricity and telephone services as evidence of payment up to the date of termination before the deposit is refunded.	Before the deposit is refunded by the agent on behalf of the landlord, the tenant must be able to demonstrate that bills for charges for water, gas, electricity and telephone services, for which he is liable for the duration of the tenancy, have been paid.

Group 17: Restricting the consumer's remedies – paragraph 1(q) of Schedule 2

Compulsory arbitration

Unfair terms	Way of revising terms
Any dispute arising between the landlord and the tenant shall be referred to arbitration, the cost whereof to be borne equally between the landlord and tenant.	Any dispute may be submitted to arbitration if both parties agree to that in writing after the dispute has arisen.

<p>If the landlord and the tenant do not agree on the fair proportion payable, either party may apply to the agent to act as an expert in determining the dispute and whose decision (including the decision as to costs) shall be final and binding.</p>	
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Group 18: other terms

Group 18(a): Allowing the landlord to impose unfair financial burdens

Vague charges	
Unfair term	Way of revising term
<p>The landlord reserves the right to remove or have removed any obstruction to the common areas of any building and at his discretion levy a charge, payable on demand on the tenant for so doing.</p>	<p>If the tenant causes any obstruction to the common areas of the building then the landlord, acting reasonably, may charge the tenant the costs of removing the obstruction.</p>
Vague charges	
Unfair term	Way of revising term
<p>To pay the Council tax, water, sewerage and environmental charges.</p>	<p>To pay during the term a proportionate part of the Council tax, the water sewerage and environmental charges for the house, and to pay for utility supplies consumed and the television licence fee for the house.</p>
Vague charges	
Unfair term	Way of revising term
<p>If it is brought to the attention of the</p>	<p>At the end of the tenancy, the</p>

landlord that bills for the property have not been paid then your deposit may be used to cover them.	landlord may use the deposit to pay unpaid accounts or charges for water, electricity or gas or other fuels used by the tenant in the premises, unless lawfully withheld by the tenant.
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Charges for which the tenant is not liable

Unfair term	Way of revising term
...the tenant will pay the reconnection charges... if services are disconnected.	Where the tenant allows, either by default of payment or specific instruction, the utility or other services to be cut off, whether during or at the end of the tenancy, the tenant is to pay, or be liable to pay, the costs associated with reconnecting or resuming those services.

Unjustified demands

Unfair term	Way of revising term
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<p>...the deposit shall be held by the agent and the agent shall be obliged to account to the landlord for payment if the landlord requires the payment thereof by reason of a purported breach by the tenant of any of his covenants contained in the agreement (whether or not the claims of the landlord are justifiable).</p>	<p>The landlord or the agent shall notify the tenant in writing of any deductions made under the agreement and specify the amounts deducted and the reasons for any deduction made. At the end of the tenancy the landlord or agent shall return the deposit (subject to any reasonable deductions made under this agreement) as soon as reasonably practicable.</p>
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Group 18(b): Transferring inappropriate risks to tenants

Transfer of landlord's risk	
Unfair term	Way of revising term
<p>To take all reasonable precautions necessary in the circumstances to prevent any damage to the water or heating systems by freezing or other natural phenomenon and in the event of such damage caused by the failure of the tenant to take such reasonable precautions the tenant shall immediately and at the tenant's own expense effect by properly qualified contracts all such repair and replacement as may be necessary to reinstate the system in good working order and also to repair and make good any</p>	<p>To take all reasonable precautions to prevent damage occurring to any pipes or other installations to the property that may be caused by frost, provided the pipes and other installations are kept adequately insulated by the landlord.</p>

consequent damage that may have been caused to the property or the decorations thereof.	
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Transfer of risk	
Unfair term	Way of revising term
The tenant shall be responsible for all damage to the property or its utilities furnishings or fittings where caused by vandals or any other person or thing and whether caused by deliberate act or an act of waste or neglect ...	The tenant shall make good all damage and breakages to the property and its contents that may occur during the term, that are the responsibility of the tenant (with the exception of fair wear and tear and accidental damage by fire).

Indemnity against risk	
Unfair terms	Way of revising terms
The tenant will notify the landlord ... as soon as the defect comes to the tenant's notice and to indemnify the landlord against any liability which may be incurred by the landlord whether to the tenant or any other party as a result of any such defect which has not been notified promptly by the tenant.	The tenant will promptly notify the landlord or landlord's agent of any defects to the property (whether or not caused by the act default or neglect of the tenant) of which he becomes aware.
To indemnify the landlord against any liability which may be incurred by the landlord whether to the tenant or to any other party as a result of such a defect not having been notified by the tenant to the landlord within 24 hours.	

Group 18(c): Unfair enforcement powers

Forfeiture and similar termination clauses	
Unfair terms	Ways of revising terms
<p>If the rent or any instalment or part thereof shall be in arrears for at least seven days after the same shall have become due (whether legally demanded or not) or if there shall be a breach of any of the terms and conditions of this agreement on the part of the tenant herein contained the landlord may re-enter the property and immediately thereupon the tenancy shall absolutely determine without prejudice to the other rights and remedies of the landlord.</p>	<p>If the tenant is at least 21 days late in paying the rent or any part of it, whether or not the rent has been formally demanded, or has broken any terms of this agreement then, subject to any statutory provisions, the landlord may forfeit (ie: bring to an end) the tenancy and recover possession of the property. Any other rights or remedies the landlord may have will remain in force.</p> <p>(Note: This clause does not affect any rights of the tenant under the Protection from Eviction Act 1977. The landlord cannot enter the property or evict a tenant without a court having first made an order for possession).</p>
<p>If the premises shall be left unoccupied for more than 21 days the landlord may give notice that the landlord seeks possession of the premises.</p>	<p>The Landlord can only remove the Tenant from the Premises by giving</p>

<p>During the last three months of the tenancy or at any time if any rent or part thereof shall be in arrears and unpaid for a period of 14 days or more to permit the landlord to re-enter on the premises to affix notice boards for the re-letting or selling of the</p> <p><i>Continued</i></p> <p>property and not to remove or obscure the same.</p>	<p>the Tenant notice in writing of his intention to seek a possession order (even after the Term of this Agreement has expired) and by obtaining a court order. The court will only order the Tenant to leave the Premises before the expiry of the Term if</p> <p><i>Continued</i></p> <p>one of the reasons set out in paragraph 25.1 of this Agreement is proved.</p>
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Goods belonging to the tenant	
Unfair term	Way of revising term
<p>In the event that the tenant's belongings are left in the property after the tenant has vacated it, such belongings will be deemed abandoned and the landlord may remove, sell or dispose of these without being liable to pay for any compensation. The tenant will be liable for all costs of removal and disposal or any other losses and these costs and losses may be taken out of any deposit.</p>	<p>The tenant will be responsible for meeting all reasonable removal and/or storage charges when items are left in the premises. The landlord will remove and store them for a maximum of one month. The landlord will notify the tenant at the last known address. If the items are not collected within one month, the landlord may dispose of the items and the tenant will be liable for the reasonable costs of disposal. The costs may be deducted from any sale proceeds or the deposit and if there are any costs remaining they will remain the tenant's liability.</p>

All charges as rent	
Unfair term	Way of revising term
The tenant agrees to pay as additional rent all other moneys which may become payable to the landlord under the terms of the agreement ...	Term deleted.

Group 18(d): Excluding the tenant's right to assign or sublet

Excluding assignment and subletting	
Unfair term	Way of revising term
The tenant must not assign underlet charge part with or share possession or occupation of the property or any part of it.	The tenant must not assign underlet or part with or share possession of the whole or any part of the property without the permission of the landlord, such permission not to be unreasonably withheld.

Group 18(e): tenant declarations

'Have read and understood' declarations	
Unfair terms	Way of revising terms
<p>I have been given a copy of the tenancy leaflet. I understand and agree the conditions in this tenancy agreement.</p> <hr/> <p>Your signature on this document will be taken as an acknowledgement that you fully understand the terms and conditions.</p>	<p>Important: This agreement contains the terms and obligations of the tenancy... You should read it carefully to ensure that it contains everything you want to form part of the agreement and nothing that you are not prepared to agree to. If you do not understand this agreement or anything in it, it is strongly suggested you ask for it to be explained to you before you sign it. You might consider consulting a solicitor, Citizens Advice or Housing Advice Centre.</p>

General declaration	
Unfair term	Way of revising term
<p>I acknowledge receipt of the company's terms of business and agree to be bound by its condition and I sign this agreement and agree that this contract hereby created is both fair, written in good faith and in plain intelligible language.</p>	<p>I acknowledge receipt of these terms of business and agree to be bound by the conditions...</p>

Group 18(g) – Landlord's discretion in relation to obligations

Right to determine how the landlord's obligations are performed	
Unfair term	Way of revising term
In the event of disagreement between the landlord and the tenant about the responsibility for, extent or value of any dilapidations the decision of the landlord's inventory clerk as to such matters shall be final.	Term deleted.

Right to determine whether the tenant is in breach	
Unfair term	Way of revising term
... any assessment made by the landlord's agent of any compensation payable will be final and binding upon the tenant.	Term deleted.

Excessive discretion	
Unfair term	Way of revising term
The tenant shall forthwith remove any clothes curtains placards notices or articles in or upon the premises which are visible from the exterior of the premises and which in the opinion of the landlord are offensive and undesirable upon being required by the landlord to do so.	Not to place or exhibit any notice board or notice visible from outside the premises advertising any profession trade or business or any goods or services.

Excessive discretion	
Unfair term	Way of revising term

Not to cause annoyance to the landlord by noise singing or music of any description whether by radio or other equipment at any time...	Not to use the premises or allow others to use the premises in a way which causes a nuisance, annoyance or damage to neighbouring, adjoining or adjacent property; or to the owners or occupiers of them. This included any nuisance caused by noise.
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Excessive discretion

Unfair term	Way of revising term
To keep and leave the grass cut and the borders free from weeds to the satisfaction of the landlord or the agent.	The tenant agrees to cut the grass regularly in the growing season and to weed the borders.

Excessive discretion

Unfair term	Way of revising term
Pay for washing and cleaning of all items which shall on the opinion of the agent have been soiled during the tenancy. The agent's decision shall be final and binding on the tenant.	To wash and clean all items that may have become soiled during the tenancy.

Excessive discretion

Unfair term	Way of revising term
In a proper and workmanlike manner and to the complete satisfaction of the landlord's surveyor to paint the	Term deleted.

woodwork.	
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Group 18(h): Unreasonable ancillary obligations and restrictions

Potentially unreasonable obligation	
Unfair term	Way of revising term
Insurance, this is not negotiable. The tenant will be required to take out our (ie: the agent's) insurance against accidental damage to the landlord's fixtures and fittings.	The tenant is advised to take out insurance for the tenant's contents.

Potentially unreasonable obligation	
Unfair term	Way of revising term
To clean all windows once per fortnight and to open the windows of all living rooms kitchen and bathrooms for ten minutes daily. To open the windows of the kitchen after cooking and the bathroom after bathing for ten minutes.	The tenant must ensure that all rooms are properly ventilated.

Potentially unreasonable obligation	
Unfair term	Way of revising term
The tenant will be required to carry out any repairs and make good any damage destruction or loss within seven days following service of the notice.	The tenant shall comply, within a reasonable time, with any notice from the landlord advising the tenant of the need to attend to any items of repair or maintenance for which the tenant is responsible.

Potentially unreasonable obligation	
Unfair term	Way of revising term
To keep the windows of the property suitably dressed with curtains when viewed from the exterior and where the property consists of a flat within the building the same shall match in colour and approximate design those of adjoining flats.	Term deleted.

Potentially unreasonable obligation	
Unfair term	Way of revising term
To leave the oven clean with no evidence of burnt food or grease all chrome and glass to be shining with no stains and cooker rings cleaned.	To leave the oven in the same state of cleanliness as it is listed in the inventory.

Compulsory insurance	
Unfair term	Way of revising term
The tenant agrees to insure the permitted occupiers and their invitees against personal injury and against damage to or loss of personal effect and other belongings that might be on the property.	The landlord's insurance does not cover the tenant's possessions. The tenant is strongly advised to insure his own possessions with a reputable insurer.

Insurance	
Unfair term	Way of revising term
The tenant must insure the belongings of the tenant.	The tenant is advised to take out insurance for his own possessions.

Cleaning charges

Unfair term

To have the outside and interior of all windows professionally cleaned.

Way of revising term

The tenant agrees to keep the windows clean.

Potentially unreasonable restriction

Unfair term

[The tenant must not] change the utility supplier without the landlord's consent in writing.

Way of revising term

Term deleted.

Potentially unreasonable restriction

Unfair term

[The tenant must not] allow children on the premises.

Way of revising term

[The tenant must not] allow children to live in the property without the landlord's consent which will not be unreasonably withheld.

Potentially unreasonable restriction

Unfair term

[The tenant must not] have any pet on the premises without the prior written permission of the landlord which may be withdrawn at any time.

Way of revising term

[The tenant must not] allow others to keep any birds or animals at the property (other than in secure cages or container) without the consent of the landlord such consent not to be unreasonably withheld, delayed or withdrawn.

Potentially unreasonable restriction

Unfair term	Way of revising term
[The tenant must not] keep any combustible offensive or dangerous fluids, fuels or materials on the property.	[The tenant must not] keep any dangerous or inflammable goods materials or substances in or on the premises apart from those required for general household use.

Group 19: Regulation 7 – plain and intelligible language

Examples of the use of jargon that did not meet transparency requirements:

- the 'Landlord' shall include the Landlord's successors in title and assigns
- where the party consists of more than one person the obligations apply to and are enforceable against them jointly and severally
- to strictly comply with all statutory Regulations and requirements in respect of the property and contents
- time is of the essence
- yielding and paying therefore unto the Landlord during the said term hereby granted the Annual Rent...
- without prejudice to the generality of the foregoing..., and
- the tenant will indemnify the landlord against any claim arising.

Specific revisions

- joint and several liability: Where the tenant consists of more than one person they will all have joint and several liability under this agreement (this means that they will each be liable for all sums due under the agreement, not just liable for a proportionate part)

- joint and several liability: In the case of sharing the premises, each tenant is wholly responsible for all rents due, ie: if one or more persons fail to pay their proportion the other occupants are obliged to pay the difference
- indemnity: To protect the landlord from loss arising from any claim in respect of the items listed.

C TYPES OF TERMS IN TENANCY AGREEMENTS MENTIONED IN THIS GUIDANCE

Additional charges, landlord's right to make

— generally Group 18(a)

— by way of penalty Group 5

Ambiguous terms Para 5.5

Arbitration clauses Group 17

Assignment

— by tenant, prohibition on Group 18(d)

— by landlord, rights of Para 3.130

— guarantees on Para 4.12

Binding tenant where landlord defaults Group 15

Breach of contract

— landlord's right to determine whether he is in breach Para 3.107

— landlord's right to determine meaning of terms Para 3.109

— landlord's power to determine penalty for Para 4.42

— technical breach by tenant due to formality requirement Group 14(b)

use of arbitration Para 4.46

Cancellation

- penalties Para 3.49
- pre-tenancy agreement Para 3.41
- without notice Para 3.71
- period of notice Group 8

Changes

- landlord's discretion to make Para 3.96
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Charges

- landlord's right to make additional Group 18(a)
- indemnity charges Para 3.47
- unbalanced charges Para 3.59
- vague charges Para 4.4
- cleaning charges Para 4.4
- charges treated as rent Para 4.21
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- time limits for notification Group 2(d)

Compulsory arbitration clauses Para
3.134

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— landlord's rights to claim	Group 5
Data protection rights	
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— by tenant	Group 18(e)
— about legal compliance	Para 4.40
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- on cancellation by the landlord Para 3.67
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Disclaimers where tenant is at fault Para 3.19

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- of landlord to make changes Para 3.96
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Entire agreement clauses Group
14(a)

Entry

- to premises, right of, for enforcement purposes Group 18(c)

Eviction

- misleading clauses Para 3.71

Excessive notice periods for tenant cancellation Group 8

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Excessive rights of entry given to landlord	Para 3.32
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— 'so far as the law permits'	Para 3.8
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Goods belonging to the tenant	Para 4.19
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— by tenants	Para 4.12
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Indemnity

- landlord's costs Para 3.47
- tenant to indemnify landlord against risks Para 4.14

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- landlord's right to pass on Para 4.38

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- exclusion of liability in relation to Group 1

Insurance

- compulsory insurance requirements Para 4.4
- terms binding tenants to landlord's insurance Para 3.83

Intelligibility

Group 19

Interest rate penalties

Para 3.46

Interpretation of contract, landlord's right to determine

Group 13

Legal action

- tenant to pay the landlord's legal costs Para 3.55

Liability

- clauses limiting landlord's liability Group 2(c)
- clauses excluding landlord's liability Groups 1 and 2

Loss of profit, right to claim

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- not required at end of fixed term Para 3.78
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- requirements, procedures Group 14(b)

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Group

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— of contract terms

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Group 11

— of price

Group 12