

## TENANCY DEPOSIT SCHEME

### THE REQUIREMENT AND IMPLICATIONS OF NON-COMPLIANCE

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*Research by the Centre for Economics and Business Research in February 2016, revealed that **one landlord in six** did not have their tenants' deposits held or insured by the Tenancy Deposit Scheme, My Deposits or the Deposit Protection Service, as required since 2007, leaving their tenants vulnerable to unfair losses when they move. The study found that there is no enforcement of the rules and the only redress for tenants is to take their landlord to court.*

#### INTRODUCTION

1. Within residential letting it has long been established practice that a Deposit is required / demanded from a tenant when entering into a residential tenancy under the Housing Act 1988. These being tenancies which are known as Assured Shorthold Tenancies lasting usually 6 months but may last longer. At the end of the tenancy the parties may sign up to a new assured shorthold tenancy or the tenancy could simply continue as a periodic assured short hold tenancy.
2. There were widespread concerns that Landlords were unfairly holding onto the deposit at the end of the tenancy. What was developed was set out in Section 212 – 215 Sch 10 of the Housing Act 2004 and subsequently amended by the Localism Act 2011 Section 184 and the Deregulation Act 2015.
3. The overall aim being to secure the deposit and create a process to resolve any dispute of the repaying the deposit, free of charge (The Dispute Service Ltd, the scheme administrator) and the ensure the Tenant is provided with the required information about where and how the deposit is secured.
4. The Act came into force on **6 April 2007**. It set up tenancy deposit schemes to safeguard tenancy deposits paid in connection with assured shorthold tenancies, provided for the imposition of sanctions for failure to comply with the requirements of such schemes and set up structures to facilitate the resolution of disputes in connection with such deposits.
5. The schemes are either custodial ones as in this case, in which the deposit is paid by the landlord into a designated account and held by the scheme administrator until it falls to be paid (either wholly or in part) back to the landlord or tenant; or insurance-based, in which (in short) the landlord keeps the deposit but its return is protected by insurance cover maintained by the scheme administrator.
6. The schemes are either custodial (paid into scheme), in which the deposit is paid by the landlord into a designated account and held by the scheme administrator until it falls to be paid (either wholly or in part) back to the landlord

or tenant; or insurance-based, in which the landlord keeps the deposit but its return is protected by insurance cover, this being maintained by the scheme administrator.

### Who is liable/ responsible?

7. The burden of ensuring that the deposit is within the scheme and also notification of the scheme is sent to the tenant falls within the Act on the Landlord – see S213 (3). However, following the case of ***Draycott & Draycott and Hannells Letting Limited (2010) EWHC 217 (QB)*** the letting agent can be subject to penalty for failure to comply with the Act. This same case led to the amendment of the legislation through the Localism Act 2011 that the requirement of placing the deposit within a scheme be increased to 30 days and failure would be subject to sanction. The period of 14 days referred to in ss 213(3) and (6) has since been increased to 30 days by s 184 of the Localism Act 2011 since **6<sup>th</sup> April 2012**.
  
8. There are three TDP schemes:-
  - a. Deposit Protection Services (DPS) <http://www.depositprotection.com/>
  - b. Tenancy Deposit Scheme (TDS) <https://www.tenancydepositscheme.com/>
  - c. My Deposits Scheme <https://www.mydeposits.co.uk/>
  - d. There are separate TDP schemes in Scotland and Northern Ireland.
  
9. A position which was tested and found to be the case of ***Potts and Densley and Pays (2011) EWHC 114 (QB)*** and ***Honeysuckle Properties and Fletcher (2010) EWCA Civ 1224***. This was an important issue in that in a custodial scheme, on strict reading of the legislation, the landlord could escape sanction if he complied with the requirements under s213 before the date of a hearing.
  
10. This led to situations in which a tenancy had ended as such the Landlord could not protect the deposit, ***Gladehurst Properties Limited and Hashemi (2011) EWCA Civ 604***. It was found that the court did not have the powers to impose a sanction. Again subsequently amended by the Localism Act.

### **Section 213 Requirements relating to tenancy deposits**

1. Any tenancy deposit paid to a person in connection with a **shorthold tenancy** must, as from the time when it is received, be dealt with in accordance with an authorised scheme.
2. No person may require the payment of a tenancy deposit in connection with a shorthold tenancy which is not to be subject to the requirement in subsection (1).
3. Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied

- with by the landlord in relation to the deposit within the period of 14 days (amended to 30) beginning with the date on which it is received.
4. For the purposes of this section “the initial requirements” of an authorised scheme are such requirements imposed by the scheme as fall to be complied with by a landlord on receiving such a tenancy deposit.
  5. A landlord who has received such a tenancy deposit must give the tenant and any relevant person such information relating to
    - a. the authorised scheme applying to the deposit,
    - b. compliance by the landlord with the initial requirements of the scheme in relation to the deposit, and
    - c. the operation of provisions of this Chapter in relation to the deposit, as may be prescribed.
  6. The information required by subsection (5) must be given to the tenant and any relevant person
    - a. in the prescribed form or in a form substantially to the same effect, and
    - b. within the period of 14 days (30) beginning with the date on which the deposit is received by the landlord...
  7. No person may, in connection with a shorthold tenancy, require a deposit which consists of property other than money.
  8. In subsection (7) “deposit” means a transfer of property intended to be held (by the landlord or otherwise) as security for
    - a. the performance of any obligations of the tenant, or
    - b. the discharge of any liability of his, arising under or in connection with the tenancy.
    - c. The provisions of this section apply despite any agreement to the contrary.
  9. In this section “prescribed” means prescribed by an order made by the appropriate national authority;
  10. “property” means moveable property;
  11. “relevant person” means any person who, in accordance with arrangements made with the tenant, paid the deposit on behalf of the tenant.

### **The Deposit**

12. Rent in advance is not a deposit – **Johnson & Others and Old (2013) EWCA Civ 415.**

#### **What is the Prescribed Information?**

13. Although Prescriptive by nature the courts have taken the view that where the information passed is “substantially to the same effect” they are content that compliance has taken place, however this is clearly a matter of fact or degree – **Ravenself Properties Ltd and Hall (2001) EWCA Civ 2034.**
14. However, the landlord has to be seen to doing enough – **Ayannuga and Swindells (2012) EWCA Civ 1789.**
15. The prescribed information requirement is to be dealt with to the same importance as the protection requirement – **Suurpere and Nice (2011) EWHC 2003 (QB)**

16. As stated the obligation to provide the prescribed information is as important as the duty to safeguard the tenant's deposit. Moreover, the obligation to provide the prescribed information is that of the landlord personally but the agent could be also found liable.
17. The provision of information to the tenant by the Deposit Protection Service, and the availability of information on the Deposit Protection Service website, does not amount to compliance by the landlord with its obligations under those provisions.
18. *The following is prescribed information for the purposes of s 213(5) - **Housing (Tenancy Deposits) (Prescribed Information) Order 2007, SI 2007/797 art 2(1)**:*
  1. *the name, address, telephone number, email address and any fax number of the scheme administrator of the authorised tenancy deposit scheme applying to the deposit;*
  2. *any information contained in a leaflet supplied by the scheme administrator to the landlord which explains the operation of the provisions contained in the Act ss212 – 215 (the procedures that apply under the scheme by which an amount in respect of a deposit may be paid or repaid to the tenant at the end of the shorthold tenancy ('the tenancy'));*
  3. *the procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy,*
  4. *the procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid or repaid to the tenant in respect of the deposit;*
  5. *the facilities available under the scheme for enabling a dispute relating to the deposit to be resolved without recourse to litigation; and*
  6. *the following information in connection with the tenancy in respect of which the deposit has been paid:*
    - a. *the amount of the deposit paid;)*
    - b. *the address of the property to which the tenancy relates;*
    - c. *the name, address, telephone number, and any email address or fax number of the landlord;*
    - d. *the name, address, telephone number, and any email address or fax number of the tenant, including such details that should be used by the landlord or scheme administrator for the purpose of contacting the tenant at the end of the tenancy;*
    - e. *the name, address, telephone number and any email address or fax number of any relevant person;*

- f. *the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy; and*
- g. *confirmation (in the form of a certificate signed by the landlord) that the information he provides under heads (1)–(6) above and this head is accurate to the best of his knowledge and belief and that he has given the tenant the opportunity to sign any document containing the information provided by the landlord under the Order by way of confirmation that the information is accurate to the best of his knowledge and belief.*

### **Tenancies in existence before 6<sup>th</sup> April 2007**

19. The legislation being further amended by the addition of S215B on **26 March 2015** through the Deregulation Act 2015 s115(1)(a) which states was required to adjust for the case of **Superstrike Ltd and Marino Rodrigues (2013) EWCA Civ 669**. The Superstrike case found that when a tenancy which was in place before the 6<sup>th</sup> April 2007 and that tenancy then became a period assured shorthold tenancy then there was a requirement for the landlord to again comply with the deposit protect and provision of information in a prescribed form.

### **215B Shorthold tenancies: deposit received on or after 6 April 2007**

*This section applies where —*

*(1) on or after 6 April 2007, a tenancy deposit has been received by a landlord in connection with a shorthold tenancy (“the original tenancy”),*

*(2) the initial requirements of an authorised scheme have been complied with by the landlord in relation to the deposit (ignoring any requirement to take particular steps within any specified period),*

*(3) the requirements of section 213(5) and (6)(a) have been complied with by the landlord in relation to the deposit when it is held in connection with the original tenancy (ignoring any deemed compliance under section 215A(4)),*

*(4) a new shorthold tenancy comes into being on the coming to an end of the original tenancy or a tenancy that replaces the original tenancy (directly or indirectly),*

*(5) the new tenancy replaces the original tenancy (directly or indirectly), and when the new tenancy comes into being, the deposit continues to be held in connection with the new tenancy, in accordance with the same authorised scheme as when the requirements of section 213(5) and (6)(a) were last complied with by the landlord in relation to the deposit.*

*(6) In their application to the new tenancy, the requirements of section 213(3), (5) and (6) are treated as if they had been complied with by the landlord in relation to the deposit.*

*(7)The condition in subsection (1)(a) may be met in respect of a tenancy even if the tenancy deposit was first received in connection with an earlier tenancy (including where it was first received before 6 April 2007).*

*(8)For the purposes of this section, a tenancy replaces an earlier tenancy if—*

- a. the landlord and tenant immediately before the coming to an end of the earlier tenancy are the same as the landlord and tenant at the start of the new tenancy, and*
- b. the premises let under both tenancies are the same or substantially the same.*

## **Sanction**

### **Financial Sanction**

### **Proceedings**

#### ***s214 Proceedings relating to tenancy deposits***

(1)Where a tenancy deposit has been paid in connection with a shorthold tenancy, the tenant or any relevant person (as defined by section 213(10)) may make an application to a county court on the grounds—

(a)that section 213(3) or (6) has not been complied with in relation to the deposit, or

(b)that he has been notified by the landlord that a particular authorised scheme applies to the deposit but has been unable to obtain confirmation from the scheme administrator that the deposit is being held in accordance with the scheme.

(1A)Subsection (1) also applies in a case where the tenancy has ended, and in such a case the reference in subsection (1) to the tenant is to a person who was a tenant under the tenancy.

(2)Subsections (3) and (4) apply in the case of an application under subsection (1) if the tenancy has not ended and the court—

(a)is satisfied that section 213(3) or (6) has not been complied with in relation to the deposit, or

(b)is not satisfied that the deposit is being held in accordance with an authorised scheme, as the case may be.

(2A)Subsections (3A) and (4) apply in the case of an application under subsection (1) if the tenancy has ended (whether before or after the making of the application) and the court—

(a)is satisfied that section 213(3) or (6) has not been complied with in relation to the deposit, or

(b) is not satisfied that the deposit is being held in accordance with an authorised scheme, as the case may be.

(3) The court must, as it thinks fit, either—

(a) order the person who appears to the court to be holding the deposit to **repay it to the applicant**, or

(b) order that person to **pay the deposit into the designated account** held by the scheme administrator under an authorised custodial scheme, within the period of **14 days** beginning with the date of the making of the order.

(3A) The court may order the person who appears to the court to be holding the deposit to repay all or part of it to the applicant within the period of 14 days beginning with the date of the making of the order.

(4) The court must order the landlord to pay to the applicant a sum of money not less than the amount of the deposit and not more than three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order.

(5) Where any deposit given in connection with a shorthold tenancy could not be lawfully required as a result of section 213(7), the property in question is recoverable from the person holding it by the person by whom it was given as a deposit.

(6) In subsection (5) “deposit” has the meaning given by section 213(8).

## **S21 Possession implications**

### **Section 215 Sanctions for non-compliance**

(1) Subject to subsection (2A), If a tenancy deposit has been paid in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy at a time when—

b. (a) the deposit is not being held in accordance with an authorised scheme, or

c. (b) section 213(3) has not been complied with in relation to the deposit.

(2) Subject to subsection (2A), If section 213(6) is not complied with in relation to a deposit given in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy until such time as section 213(6)(a) is complied with.

(2A) Subsections (1) and (2) do not apply in a case where—

(a) the deposit has been returned to the tenant in full or with such deductions as are agreed between the landlord and tenant, or

(b)an application to a county court has been made under section 214(1) and has been determined by the court, withdrawn or settled by agreement between the parties

(3)If any deposit given in connection with a shorthold tenancy could not be lawfully required as a result of section 213(7), no section 21 notice may be given in relation to the tenancy until such time as the property in question is returned to the person by whom it was given as a deposit.

(4)In subsection (3) “deposit” has the meaning given by section 213(8).

(5)In this section a “section 21 notice” means a notice under section 21(1)(b) or (4)(a) of the Housing Act 1988 (recovery of possession on termination of shorthold tenancy).

S215A is designed for transitional period and no longer has any useful implication.

## **Conclusion**

### **Tenant Issuing proceedings**

#### **Tenancy Ended**

22. If the tenancy has ended and the tenant applies for the return of his deposit to the County Court. If you client has not complied with the scheme then he will automatically have to repay the minimum amount of the value of the deposit the tenant or up to three times that amount. Clearly this is within the discretion of the Judge dependent on the nature and behavior of the parties.

#### **Tenancy Current**

23. No compliance with the scheme on an application by the tenant would result the court ordering the landlord to comply with the scheme within 14 days or to return the deposit. In addition he would sanction the landlord to up to three times the value of that deposit.

#### **Landlord seeking possession through service of a s21 notice.**

24. The s21 notice would not be valid as such the application for possession would be struck out – see above for the sanction the court would impose for non-compliance.

25. If your landlord client wishes to seek possession through the s21 procedure please check that the scheme has been complied with. If it has not then the deposit or an agreed part of that deposit will need to be returned to the tenant before the s21 notice is served.

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