protecting
tenancy
deposits

The Housing Act 2004 and the changes introduced by the Localism Act 2011

Introduction

Since the introduction of the Tenancy Deposit Protection legislation in 2007, a number of court cases have interpreted its practical effect. In particular, the following cases determined that a tenant cannot bring a case for breach of the deposit protection legislation once a tenancy has ceased to exist, nor may they sue where monies are protected prior to the court hearing:

- Gladehurst Properties Ltd v Hashemi (*defence that tenancy had ended*)
- Draycott & Draycott v Hannells Letting Limited (*deposit protected late*)
- Tiensia v Vision Enterprises Ltd (t/a Universal Estates) (*deposit protected late*)
- Harvey v Bamforth (*issued prescribed information late*)

The defences raised in these cases have now been superseded by provisions in the Localism Act 2011, which makes important changes to tenancy deposit protection under the Housing Act 2004.

When do the Localism Act changes come into effect?

The changes to tenancy deposit protection in the Localism Act come into effect on 6th April 2012, meaning that:

- New tenancies created on or after 6th April 2012 will be covered by the new requirements
- Tenancies already in existence on 6th April 2012 will have 30 days to comply with the new requirements, if they have not already done so.
- The new requirements will only apply to Court proceedings for a breach of the Housing Act, where those proceedings started on or after 6th April 2012.

The effects of the changes are, in summary, that:

- **The deposit must be protected and the Prescribed Information provided within 30 days. For TDS members this will mean that the tenant must have received the Prescribed Information (including the explanatory leaflet What is the Tenancy Deposit Scheme?) and the TDS deposit protection certificate, and the deposit must have been registered on the TDS tenancy database.**

- **This is an absolute time limit and a tenant will be able to make a claim from 31 days after deposit payment if the requirements relating to protection have not been met. The claim will be for the return of the full sum of the deposit along with a penalty of between one and three times the sum of the deposit, to be awarded at the discretion of the Court.**

- **The claim can still be made even if the deposit has been protected after 30 days, although the courts will then take the fact that protection has occurred into account when deciding what level of penalty to impose.**

- **If a landlord fails to meet the initial requirement to register the deposit on the TDS tenancy database, no Section 21 Notice can be served until either the landlord returns the deposit to the tenant in full or with such deductions as the tenant agrees; or if the tenant has taken proceedings against the landlord for non-protection and those proceedings have been concluded, withdrawn or settled (for example, by the court awarding damages being the return of the deposit or a fine not more than three times the value of the deposit).**

- **If a landlord fails to serve Prescribed Information, (s)he cannot serve a Section 21 Notice until the Prescribed Information has been served - but this can be more than 30 days after receiving the deposit.**

- **Tenants can make an application to a county court for a penalty award even where the tenancy has ended.**

A more detailed explanation of the changes introduced by the Localism Act follows.

An increased time limit for protecting deposits and providing Prescribed Information

Section 213 of the Act sets out the primary obligation on the landlord to protect the deposit and give the tenant appropriate information about where it is being held and who provides the protection in relation to it. **Subsections 1 and 2** make clear that any deposit paid must be placed with a scheme and that no deposit can be demanded at all if there is any intention not to place it with a scheme.

> *(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).*

Subsection 3 sets out that the landlord must comply with the 'initial requirements' of at least one of the schemes within *30 days* after the deposit is received and **subsection 4** gives a definition of the phrase 'initial requirements'.

> *(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 30 days 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.*

Subsection 5 is one of the most important parts. It requires that the landlord to give the tenant information about which scheme is holding the deposit in a prescribed form.

> *(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.*

This subsection is supported by the **Housing (Tenancy Deposits)(Prescribed Information) Order 2007** which sets out in some detail what information has to be given.

Subsection 6 is the subsection that effectively creates the 30 day time period in relation to tenancy deposit protection.

> *(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 30 days beginning with the date on which the deposit is received by the landlord.*

Subsection 6(a) therefore means that the prescribed information discussed in subsection 5 and set out in the Prescribed Information Order must be given to the tenant and any relevant person.

Subsection 6(b) means that this information must be given within 30 days of the deposit being received by the landlord. It is this requirement to give the prescribed information within 30 days which forms the heart of the legislation.

In the original legislation this time period was 14 days but that has now been increased by the Localism Act 2011 to 30 days. This removes the ability of landlords/agents to rely on an 'administrative oversight' for any delay in protection.

Closing the loophole

The main problem with the original legislation was that there was no ability to make an application on the basis of non-compliance with **section 213(6)(b)**. In effect this meant that there was a penalty for not giving the prescribed information (as required by **section 213(6)(a)**) and for not protecting the deposit, but there was no penalty in the legislation for not providing the information within the period of time specified (as required by section **213(6)(b)**).

The Localism Act sweeps away this loophole in its entirety, dealing with the decisions in a number of high profile court cases like Universal Estates v Tiensia.

The Act now allows an application to be made to the Court on the basis that the landlord has not complied with **section 213(6)(b)**. Therefore, on the 31st day after the payment of the deposit money to the landlord the tenant can make an application to the court if the money has not been protected and the prescribed information given. In fact, if the deposit is registered or the prescribed information is given at any time after the 30 day window the tenant has a right to make a claim.

Protection after the tenancy has ended

Section 214 of the Act is the part of the legislation that penalises landlords for non-protection and allows for claims to be made by tenants. **Subsection 1** starts by stating that, where a tenancy deposit has been paid, then the tenant or someone who has paid the deposit on their behalf may make an application to the courts on the basis that the initial requirements of a scheme have not been complied with or that there has been no compliance with section 213(6), which relates to the provision of prescribed information.

> *(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.*

The Localism Act inserts a new **subsection 1A**, in order to deal with the decision of the Court of Appeal in *Gladehurst Properties v Hashemi* which held that the court could not order the penalties to be paid to a tenant after the end of the tenancy. This means that even if a tenancy has ended the tenant may still make an application to the County Court on the grounds that the landlord has not protected the deposit or supplied the tenant with the prescribed information within the specified 30 day period.

Subsection 2 requires the court to take a view as to the protection status of the deposit and then requires it to apply the next two subsections if it considers that the deposit is not protected or that the information has not been given.

(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

Now, if a tenant makes an application to the County Court once the tenancy has ended, the landlord will no longer be able to retrospectively protect the deposit in order to comply with the Act.

Revised sanctions for non-protection

Subsections 3, 3A, and 4 of Section 214 set out the actual penalties themselves.

- Subsection 3 states that the court must order the person who is holding the deposit to either repay it to the tenant or to pay it into the custodial scheme.

- Subsection 3A is a new insertion from the Localism Act. It only applies where the tenancy has come to an end before the claim was issued by the tenant. In that case the court must order the person holding the deposit to pay some or all of it back to the tenant.

- Subsection 4 requires, in addition, that the court must order that a penalty is paid by the landlord to the tenant. In the original legislation the penalty sum was fixed at a sum equal to three times the amount of the deposit. The Localism Act changed this so that the penalty can be varied between one and three times the amount of the deposit as the court sees fit.

The original legislation made use of the words 'must also' in subsection 4. This caused some difficulty as some landlords paid the deposit monies back to the tenant and then argued that as they had returned the money the court could not order them to pay it back as demanded by subsection 3 and so could not then 'also' require them to pay the penalty of three times the deposit sum. This argument has been swept away by the Localism Act which has simply removed the word "also" from subsection 4.

((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.

Section 21 notices

Section 215 has been the subject of considerable modification as a result of the Localism Act. It sets out further penalties for a failure to protect the tenancy deposit and prevents the giving of a notice under

section 21 of the Housing Act 1988, which gives a landlord the right to obtain a court order to recover possession

Under subsection 1, no section 21 notice can be given where the deposit is not being held in accordance with an approved scheme or where the deposit has not been protected within 30 days.

> *(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—*
> *(a) the deposit is not being held in accordance with an authorised scheme, or*
> *(b) section 213(3) has not been complied with in relation to the deposit.*

Subsection 2 prevents the giving of a section 21 notice where the prescribed information has not been given to the tenant and continues to prevent the giving of such a notice until the prescribed information has been provided.

> *(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.*

This means that a landlord who has not served the Prescribed Information will not be able to serve a s21 notice until such time as the landlord does serve the Prescribed Information.

Failure to protect the deposit within 30 days is less easy to remedy. Subsection 2A only allows a section 21 notice to be served in cases where the landlord has failed to properly comply with the deposit protection provisions if:

- the landlord first returns the deposit to the tenant in full or with such deductions as the tenant agrees; or
- if the tenant has taken proceedings against him for non-protection and those proceedings have been concluded, withdrawn or settled.

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