

Deposits and Their Status - Know Where You Stand

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This article is mainly aimed at the professional letting agent, but if you are a landlord with two or more properties, in the eye of the law you are "in business" and therefore have the same responsibilities as a high street agent.

It is absolutely essential for agents, landlords & tenants to appreciate the status of dilapidation deposits, or bonds as they are sometimes referred to, and thus help prevent conflict concerning any of its retention at the end of a tenancy. I have diverged slightly into inventories to qualify one or two points.

Firstly the money belongs to the tenant, and as agent or landlord you are holding it in trust on their behalf. There are two ways in which it can be held, as landlord's agent or stakeholder. Its status should be clearly defined within the tenancy agreement, on what grounds it will be returned and when, but rarely is. You should ideally have written evidence (i.e. receipts) that all utility bills have been paid by an outgoing tenant and that all dilapidations or arrears of rent have been accounted for before returning it to a tenant, otherwise it will open to challenge. Courts in my experience expect landlords to be "spot-on"

It is advisable to hold the deposit against dilapidations only, and not arrears of rent. Why? Because you may find that some rent guarantee insurance policies will insist that rent arrears take preference and are part of legitimate deductions from the deposit before any claim is met. It follows that there could be little or no residue to pay for dilapidations if this were the case. Rent arrears and dilapidations are clearly a separate issue.

Sometimes at the end of a tenancy where damage or loss has occurred, even if it is of a minor nature, and new tenants want to obtain possession as soon as possible this puts the landlord or agent in a difficult position. There is little or no time to rectify this, especially if tradesmen are not available at short notice. If the tenancy agreement has been well written you will have had a clause that allows the agent, say 28 days for the deposit to be returned and dilapidations can then be addressed in respect of an outgoing tenant and his deposit accounted for (funds permitting). Under no circumstances should the agent be "bullied" by the tenant into returning the deposit immediately. However it should be returned as soon as you are able, but making sure all legitimate deductions have been made beforehand. Point of Note: it is inadvisable to return deposits in cash for a variety of reasons that you can probably work out for yourself.

This above though will be replaced by statutory requirements as designated by the Housing Act 2004 concerning tenant's deposits and there will be restrictive time factors concerning its return, and from 6 April 2007 all deposits for new tenancies only will have to be held in either an insured or custodial scheme. All deposits will then be held as "stakeholder" as both landlord and tenant will be able to disagree with any "disputed amount".

For further details please visit www.tds.gb.com where you will be able to download the requirements that landlords and their agents must thereafter follow.

You should in any event have prepared a dilapidation schedule and you should have the relevant tradesman available to give a written quotation (not an *estimate*) to enable you to readily account for deductions. Remember as it is the tenant's money and you must account for it properly.

Diligent agents should retain at least 1½ month's rent as a dilapidations deposit, and sometimes 2 months. Professional judgement and experience come into this. More than two months and is likely to be considered a premium, giving the right of the tenant to assign. However the Office of Fair Trading guidelines now consider it unfair to prevent a tenant assigning to a bona fide applicant.

If you hold the deposit as Stakeholder, you need both the landlord and tenant's consent when apportioning its return at the end of a tenancy. It therefore shows good management technique to have fully explained this in advance to both parties. It will save you a huge amount of problems if at the end of a tenancy there are deductions to be made. Rest assured, if there is a dispute and parties were not clearly briefed you could well find yourself in an awkward spot! Landlords should therefore consider lodging the deposit with a third party such as a solicitor, if not using the services of an agent, but again the Tenancy Deposit Scheme will obviate this

A stakeholder cannot release money to the payee without the authority of the payer. It therefore follows that both landlord and tenant have to jointly agree the apportionment of any deposit and advise the agent accordingly.

If the status of the deposit has not been defined then there are two schools of thought. Although it is the tenant's money and should not be appropriated without their consent, if an agent is involved then he is obliged to take his client's instructions if there is nothing within their Terms of Business or the tenancy agreement. The other point of view is that as a consequence of the agreement being "silent" on this issue, it might only be released upon consent of the landlord as above, or alternatively by order of a Court; this is up to the tenant to challenge I would say if he feels to have been unjustly penalised.

If held as stakeholder, until agreement has been reached, the money can just sit in the agent's client account, even if it has to go to Court for a decision to be made. It is probably better not to get involved save having assessed the dilapidations. Whilst the agent acts for the landlord, they make a professional assessment to the best of their ability. This does not mean favouring the landlord if it compromises a lawful point, or is unfair or unreasonable to the tenant.

If you hold the deposit as Landlord's Agent or Agent for the Landlord then the position is much clearer and less contentious. Agents are legally bound to return the deposit to the landlord on their instruction, even if the tenant disagrees. This may seem grossly unfair, and sometimes is, but at least you

have the knowledge that the tenant then has to negotiate with the landlord directly. Again be careful in any intervention. By all means advise your client but steer clear of making decisions in favour of either party as it could be an onerous task. A professional landlord is not in a position to arbitrate independently and therefore fairly. It is good practice to have a clause within the tenancy agreement to appoint an independent arbitrator, but again this cannot be enforced upon a tenant as it could be considered an unfair term, and mediation would be probably be the best approach.

I can hear agents say, yes, but what if the client is living abroad. My advice here would be to obtain a cast-iron indemnity from the landlord that any actions you take on his behalf in such circumstances are with his absolute and irrevocable authority including reimbursement of your own expenses. This still could put you in an invidious position, but if you are seen to take an equitably expedient stance, then you should be alright. Again make sure that if the tenant takes the landlord to Court you have a watertight case otherwise you could be considerably out-of-pocket if the landlord comes after you as agent for less than professional conduct. This situation is a real test of your ability because you are deemed to be an expert. Woe betide if you have only a scant knowledge and poor records as you will surely be "found-out". The Tenancy Deposit Scheme for Regulated Agents will test severely all aspects of deposit returns, and the accuracy of inventories, and who is going to pay for all this additional work?

A word of advice here: Courts usually dismiss claims by the tenant against the landlord's agent as they are acting with the landlord's authority as his agent.

I have seen agents get themselves into an incredible mess with protracted correspondence between parties long after the end of a tenancy. This is a completely needless waste of time and effort; if only they had been thoughtful enough to get it right in the first place.

In the case of a let only contract it would be sensible to consider not getting involved in the drawing up of an inventory, or its checkout. Let's face it if a fixed term AST of say 6 months becomes periodic and carries on for three years, it is quite likely that the landlord has not ventured into the property even if rent has been paid regularly. If repairs have been necessary sometimes tradesmen assess and carry out such work, especially on behalf of landlords who do not live locally. At determination would you want to become involved in what could be a difficult situation? The deposit could easily be insufficient to cover dilapidations anyway. If you do get involved, make sure you have made clear the appropriate fee to be charged. The Tenancy Deposit Scheme for Regulated Agents might require the agent to hold the deposit especially if the landlord has nowhere else to go but the custodial scheme.

One point here is that agents should verify that a Landlord's Gas Safety Certificate has been issued prior to commencement of the tenancy. You cannot leave it to the landlord or assume that they have had it done (unless it is a "let only" property) and you have made it clear to the landlord. It is your professional responsibility and you or the landlord might face criminal

charges for not making sure there is one should there be a fault with any appliance or boiler that threatens the health and well being of the tenant. Renewal of such certificates would normally be the landlord's responsibility if management is not involved, but point this out to the client in writing beforehand otherwise it will probably be up to you deal with this!

If you do draw up an inventory make sure it's thorough and advise the landlord to take internal or external photographs and/or a video record before the tenant takes possession, give the tenant copies and make sure they have signed photographs on the back and date them. Digital photos need to have a hard copy signed as well as the tenant being given a CD. Make sure the tenant signs the inventory on every page on entry, otherwise its use as a basis of assessment is minimised.

Deposits should be held in a designated client deposit account with a recognised bank or building society. Under no circumstances should you be tempted to "dip-in" to borrow from the client's account even if you are able to rectify it quickly in say 24 hours. National Association of Estate Agents, the Association of Residential Letting Agents and the Royal Institute of Chartered Surveyors Members are all required to produce an annual audit certificate from their accountants to their professional body to verify that they have been conducting this account in accordance with their rules. As from spring 2007 ARLA are likely to become an autonomous division within the National Association of Estate Agents which is to be renamed the *National Federation of Property Professionals*.

Deposits automatically attract interest and unless specifically stated otherwise in the tenancy agreement and any that has accrued has to be paid to the tenant at determination. With interest rates at an all-time low it is hardly worth the administrative costs to calculate it so make sure you get it right.

A good terms of business between an agent and his landlord client should specify how reasonable events are to be resolved that might arise during a tenancy. It's no good saying '*I didn't think it was relevant*', because the first three words might come to haunt you for some time afterwards.

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