

The Tenancy Deposit Schemes 12 months on...

The new tenancy deposit schemes have been operating for 12 months. This is an important review, of considerable interest to landlords and letting agents, by Daniel Dovar and Michael Walsh, barristers at 33 Bedford Row - April 2008

Introduction

The tenancy deposit schemes came into force on 6 April 2007. The idea of the schemes is to safeguard tenancy deposits and to provide ADR methods of resolving disputes in relation to deposits. From that date it has been necessary for every deposit taken by a landlord in respect of an assured shorthold tenancy to be protected by a tenancy deposit scheme. If it is not it will not be possible to serve a s21 notice and thus obtain possession (Housing Act 2004, s215).

See also para 7B(d) of the revised form N5B (Accelerated procedure claim form) which states:

"If your claim for possession is in relation to an Assured Shorthold Tenancy where a deposit was taken after 6 April 2007, you must provide evidence that such deposit is safeguarded with a tenancy deposit scheme (TDS) authorised under Part 6 of the Housing Act 2004".

The scheme applies to any deposit taken in relation to a new assured shorthold tenancy granted on or after 6 April 2007. It is not applicable to continuation tenancies, ie where the tenant stays in occupation as a statutory periodic tenant (Housing Act 1988 (HA 1988), s 5)).

Compliance

Within 14 days of accepting a deposit the landlord must enter it into a government designated tenancy deposit scheme and provide the tenant with prescribed information.

A "deposit" is defined in s213(8) as "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".

"No person may, in connection with a shorthold tenancy, require a deposit which consists of property other than money" (s213(7)). If any such non-monetary deposit is taken "no s21 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" (s215(3)).

One effect of Section 213(7) is that the tenant is precluded from giving a credit card impression or writing a cheque that is not banked.

The landlord also needs to provide the tenant with prescribed information such as the name and address of the administrator, procedures to be followed if a dispute

arises etc (HA 2004, s 213 and para 2 of the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (SI 2007/797)).

If that information is not given once again a s21 notice may not be given until the information is given (s215(2)).

The schemes

Presently, there is one custodial scheme and two insurance backed schemes.

The Deposit Protection Service (www.depositprotection.com) is the only custodial scheme which is free to join for landlords, but the actual deposit must be paid over to the scheme. The obvious disadvantage here is that the landlord loses control over the deposit monies.

The Dispute Service (www.thedisputeservice.co.uk) and Tenancy Deposit Solutions (www.mydeposits.co.uk) are insurance backed schemes, whereby the landlord registers the particular deposit with the service but does not have to hand over the deposit. There is a fee for these schemes.

Sanctions

As stated in the introduction, for so long as the requirements are not complied with a landlord will not be able to serve a notice pursuant to HA 1988, s 21 (HA 2004, s 215). Essentially the new defence available to tenants against landlords who do not comply with the scheme is merely a delaying measure. The landlord can then ensure he complies with the scheme and re-serve a s 21 notice, which will then be entirely valid.

If a tenant is concerned that his deposit is not protected by a scheme and/or he has not been provided with the prescribed information and/or the scheme administrator does not confirm that their deposit is protected then he can commence proceedings against the landlord under HA 2004, s 214. Although it appears that if, by the time of the hearing, the landlord has complied with the requirement there is no sanction. If the court finds that the landlord is in breach then it must order up to three times the amount of the deposit to be paid to the tenant within 14 days (s 214(4)) as well as ordering the deposit to be paid either into the custodial scheme or to the tenant (s 213(3)).

Dispute resolution

If the landlord and tenant cannot agree as to payment of the deposit at the end of the tenancy then the dispute can either be resolved through alternative dispute resolution (ADR) or through the courts.

Alternative dispute resolution

One of the requirements of HA 2004 was that the scheme providers must provide a dispute resolution service (HA 2004, Sch 10, para 10) and so each scheme has its own ADR process. All three schemes operate a similar adjudication process but reference should be made to the particular scheme for details of the procedure and

to obtain the relevant forms. The timetable and requirements for each scheme are set out below:

The Deposit Protection Service (DPS)

1. Landlord and tenant complete, within 28 days of the end of the tenancy, a joint repayment form notifying the Deposit Protection Service (DPS) of a dispute and requesting referral to adjudication and agreeing to submit to the same.
2. On receipt of that form, DPS issues a landlord's evidence form, which must be completed and returned within 14 days. This must set out the basis of the dispute and attach all relevant documents, ie tenancy agreement, inventory, invoices, photographs etc.
3. DPS then provides to the tenant a summary of the landlord's evidence and a tenant's response form. The tenant must return their form within 14 days with supporting documents.
4. Failure by either party to provide the documents in time will result in DPS paying the deposit to the non-defaulting party.
5. The landlord then has a further seven days in which to accept or disagree with the tenant's evidence and may put in further evidence.
6. DPS will then forward the forms to the adjudicator who will make a decision within 28 days of receipt of the papers. In the meantime, the adjudicator may call for further information from the parties.
7. DPS will pay out according to the adjudicator's decision within 10 days.

Tenancy Deposit Solutions

1. A disgruntled tenant completes a dispute notification claim form and attaches any relevant evidence.
2. Tenancy Deposit Solutions notifies the landlord of the dispute and within 10 days the landlord must pay the deposit to them and submit a counter claim on a response form attaching any evidence and agree to submit to ADR. The landlord must also provide rebuttal evidence—defined as: a signed copy of the tenancy agreement, original receipts for damaged or destroyed items and estimates, invoices or receipts for any repairs and rent account statement.
3. Failure to lodge the deposit will disqualify the landlord from using the ADR service and may result in their removal from the scheme entirely.
4. Tenancy Deposit Solutions will then pass the papers onto the adjudicator who will make a decision within 28 days and in the meantime may call for further information including oral evidence.

The Dispute Service

1. The parties are encouraged to raise the issues between themselves within 20 days of the end of the tenancy. They then have 10 days to resolve the matter. If that fails it should promptly be referred to the adjudicator.
2. Either party may instigate the dispute by submitting a notification of deposit dispute form to the adjudicator. If the landlord starts the dispute they must also lodge the deposit with The Dispute Service or within 10 days of notification that a tenant has sent in notification of a dispute.
3. Evidence in response should be submitted to the adjudicator within 10 days of notification of the dispute.
4. Failure to do so may result in disciplinary action and The Dispute Service will take steps to recover the sum.
5. The adjudicator may at their own discretion pay the deposit to the tenant where the landlord has:
 - (i) not paid their subscription;
 - (ii) not paid in the deposit;
 - (iii) not provided a written tenancy agreement;
 - (iv) not provided sufficient information about The Dispute Service;
 - (v) not provided a check-in or out inventory;or
 - (vi) unreasonably delayed the dispute.

The courts

If the parties do not agree to submit to adjudication or have missed any deadline for submission to adjudication, ie 28 days from the end of the tenancy for the DPS scheme, they must then litigate through the county court. Given that a tenancy will not be an assured shorthold tenancy if the rental is over £25,000 per annum and that the deposit is unlikely to be more than six weeks rent, a claim for a deposit alone will undoubtedly be allocated to the small claims track and proceed as a small claim. This is likely to take longer and require an oral hearing. Apart from an issue fee, the general rule is that costs are not awarded in small claims cases.

If the tenant gets a court determination in their favour then they can use that against the scheme administrator to obtain their deposit. Payment should be within 10 days of notification.

Making a claim

If the tenant decides that there is no other option but to take the landlord to court this can be done by issuing a claim in the normal way under Pt 7 of the Civil Procedure Rules (CPR) as a money claim using form N1 (available from www.hmccourts-service.gov.uk). It is also worth bearing in mind that claims can now be issued online at www.moneyclaim.gov.uk.

ADR or litigate?

The ADR schemes appear to be far better suited to deposit disputes than the courts. They are cheaper (free), quicker and the adjudicators presumably will be handling many similar disputes and will begin to build up experience of this particular type of claim.

As has already been highlighted, by issuing in the county court the parties will usually be committed to paying their own costs and if they instruct solicitors and/or counsel costs could easily surpass the value of the claim. Although one would expect a claim to be issued fairly soon after the end of a tenancy, using the courts has the advantage that the claimant has up to six years to bring the claim.

No response

Where one party refuses to engage in any process or is untraceable then HA 2004 provides for the other party to be paid out on submission of a statutory declaration confirming that 14 days have passed since the end of the tenancy and the other party cannot be contacted and there is no known address.

Conclusion

Six months after the beginning of the scheme, as of October 2007, over 600,000 deposits had been protected; over 3,300 new deposits per day. One of the insurance schemes reported that they were protecting deposits totalling over £283m. As one of the scheme providers recorded that about 20% of tenancies resulted in a dispute, it is important that landlords and tenants have a clear, quick and efficient way of dealing with the deposit at the end of their tenancy. Obviously, this is not always going to be the case and sometimes the tenant may have to resort to litigation, which is more expensive and time consuming.

Given the perceived success of the scheme in its first six months it would be a welcome extension if it were extended to cover tenancies other than assured shortholds. This would obviously give protection to those tenants who currently fall outside the scheme, such as tenants whose rent is over £25,000 per year.

However, on the whole the introduction of free adjudication services is a good way of diverting litigation from the courts and meeting the needs of landlords and tenants by giving the parties an easier and swifter resolution to their problems.

Further information can also be obtained on the Communities and Local Government website: [here](#)

Daniel Dovar is a barrister at 33 Bedford Row and co-author of Residential Possession Proceedings (7th Edition) published by Sweet & Maxwell.

Michael Walsh is a pupil barrister at 33 Bedford Row and a visiting academic tutor at King's College London.

Reproduced with permission from: Gary Webber
Property Law UK
Web : <http://www.propertylawuk.net>

Never rely totally on our standard answers and general content. Before taking action or not, always do your own specific research and seek appropriate professional advice with the full facts of the case and all documents to hand.
LandlordZONE.co.uk®