



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

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The defences raised in these cases have now been superseded by the Localism Act 2011, which makes important changes to tenancy deposit protection under the Housing Act 2004. The Localism Act has now received Royal Assent, which means that its changes are likely to come into effect in April 2012. However the precise commencement date will be set out in a Commencement Order in due course. TDS will advise members once a Commencement Order has been published.

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.**
- **No Section 21 Notice can be relied on if the deposit has not been protected and all the Prescribed Information given to the tenant within 30 days of the money being received. That said, a section 21 notice can be served in cases where the landlord has failed to properly comply with the deposit protection provisions if he 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 (for example, by the court awarding damages being return the deposit or and fine not more than three times the value of 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 must give the tenant information about which scheme is holding the deposit in a form to be set out elsewhere.

- (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) states 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) states 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.

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. **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).

- (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 a claim could not be made by the tenant after the end of the tenancy.

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) (subject to subsection (3A)) and (4) apply if on an application under subsection 1 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 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 Bill which has simply removed the word "also" from subsection 4.

- (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) *Subsection (3) does not apply in a case where the tenancy has ended at the time of the application under subsection (1), and in such a case 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.*

Section 21 notices

Section 215 has been the subject of considerable modification as a result of the Localism Act. Due to the changes made by the Act it is essentially impossible to give a section 21 notice if the deposit has not been protected and all the prescribed information given to the tenant within 30 days of the money being received. This is a very severe penalty and, for many landlords, will be of greater concern than the possibility of a claim being made against them. In order to ameliorate the severity of the penalty a new subsection 2A has been added to section 215. This allows a section 21 notice to be served in cases where the landlord has failed to properly comply with the deposit protection provisions if he 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.

- (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.

Finally, subsection 3 prevents the giving of a section 21 notice at any time where a landlord has taken something other than money by way of a deposit until that property has been returned to the tenant.

(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.

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