



## Key Documents



### Who should read this?



Tenants



Agents



Landlords

Insured

# Operational Guidance and Advice for Members

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# Introduction: What is the Tenancy Deposit Scheme?

In the private rented sector many tenants give their landlords a deposit against possible nonpayment of rent, damage to property, or other breaches of the tenancy agreement. When a tenancy comes to an end, there is often no disagreement about the return of the deposit. But sometimes there is, and this can cause much hardship, delay and inconvenience to landlords, tenants and agents.

The Housing Act 2004 (Chapter 4, sections 212-5; & Schedule 10), **as amended**, made provision for both the protection of tenancy deposits and the resolution of disputes over their return.

Subsequent Statutory Instruments have fleshed out the legislative requirements:

- the Housing (Tenancy Deposit Schemes) Order 2007;
- the Housing (Tenancy Deposits) (Prescribed Information) Order 2007;
- the Assured Tenancies (Amendment) (England) Order 2010;
- the Assured Tenancies (Amendment of Rental Threshold) (Wales) Order 2011.

The legislation came into effect on 6th April 2007. The deposits taken for all Assured Shorthold Tenancies starting or renewed on or after that date have to be covered by a tenancy deposit protection scheme. Authorised schemes must also provide a service to facilitate the resolution of disputes if a dispute arises about the allocation of the deposit at the end of the tenancy. The majority of tenancies in the private rented sector are ASTs.

TDS operates an authorised deposit protection scheme under the 2004 Act. The scheme is designed to ensure that tenancy deposits are held securely, and that disputes about allocating the deposit at the end of the tenancy are resolved quickly, cheaply and fairly.

TDS offers two membership options. The first is for landlords who own residential property in England and Wales and protect a maximum of £100,000 worth of deposits at any one point in time. A fee is payable to TDS per deposit protected. The second option is for landlords who do not meet these criteria, and for agents. An annual membership fee is payable. There is also an option under this scheme for letting agents who do not manage a property during the tenancy, which has a slightly different fee structure.

Deposits will be protected during the tenancy so they are available to be returned to the tenants if they have met the terms of the tenancy agreement. Where there is no dispute at the end of the tenancy, the deposit will be returned promptly. Where there is a dispute about the allocation of the deposit it will be dealt with fairly and quickly by a TDS adjudicator who will pay it out to the parties in accordance with the adjudication. TDS carries insurance to enable it to make payments that are due to tenants, should the member fail to transfer the deposit to TDS on time.

This guidance sets out the procedures for the operation of TDS. It should be read in conjunction with the relevant Rules of Membership and the Rules for the Independent Resolution of Tenancy Deposit Disputes.

**TDS is not in a position to provide legal advice to members. Our operational guidance on how best to comply with the legislation on tenancy deposit protection and other matters is given in good faith, but members may wish to take their own legal advice on legislative compliance issues. This guidance will be updated from time to time in the light of changes to legislation or decisions in the higher courts. The Dispute Service Ltd cannot be held liable to members in respect of this operational guidance.**

## A Membership

### 1 Eligibility

- 1.1 All providers of private residential accommodation for rent are eligible to be considered for membership of TDS and should complete the relevant online membership application form.
- 1.2 All members of Approved Bodies will gain membership unless they fail to meet essential criteria.
- 1.3 Letting agents must belong to one of the following Approved Bodies to be eligible for membership:
  - 1.3.1 Propertymark ARLA and Propertymark NAEA;
  - 1.3.2 Law Society;
  - 1.3.3 Safeagent;
  - 1.3.4 Association of Residential Letting Agents;
  - 1.3.5 Royal Institution of Chartered Surveyors;
  - 1.3.6 UK Association of Letting Agents.
- 1.4 Applicants may be subject to approval by our insurers and credit checks by TDS.
- 1.5 Members are contractually bound to comply with the conditions of TDS. Failure to do so could lead to termination of membership.
- 1.6 Information about the annual subscription charges for letting agents and corporate landlords, and deposit protection charges for landlords, are published on our website.

### 2 Can we recover the costs of our membership?

- 2.1 The Housing Act 2004 is silent about recovery of the costs. Members must be aware of the requirements of the Tenant Fees Act 2019. However, members are advised to consider also the implications of the Unfair Terms in Consumer Contract Regulations in drafting clauses for inclusion in tenancy agreements. Those who belong to professional bodies should follow their advice.

- 2.2 Members should only charge enough to cover their costs and should not lay themselves open to accusations of profiteering. TDS may refer such allegations to the member's Approved Body, where appropriate.

### 3 How does tenancy deposit protection work in Scotland?

- 3.1 On 7th March 2011 the Tenancy Deposit Scheme (Scotland) Regulations came into force.

These Regulations have changed the way in which landlords need to deal with deposits in Scotland.

- 3.2 Since 2nd October 2012, landlords in receipt of a tenancy deposit are obligated to transfer the deposit to a licensed operator, who will hold the deposit until the end of the tenancy.

- 3.3 SafeDeposits Scotland Ltd is an independent tenancy deposit protection scheme approved by the Scottish Ministers to operate in Scotland. SafeDeposits is a not-for-profit company limited by guarantee with its members being:

- The Dispute Service
- National Federation of Property Professionals (NFOPP)
- National Union of Students Scotland (NUS Scotland)
- Royal Institution of Chartered Surveyors (RICS)
- Scottish Association of Landlords (SAL)
- Scottish Council for Voluntary Organisations.

- 3.4 Further information about SafeDeposits Scotland is available from its website at [www.safedepositsscotland.com](http://www.safedepositsscotland.com)

### 4 How does tenancy deposit protection work in Northern Ireland?

- 4.1 On 1 April 2013, landlords taking a deposit in connection with a private tenancy were required to protect it with an approved tenancy deposit scheme.
- 4.2 The Tenancy Deposit Schemes Regulations (Northern Ireland) 2012 introduced both a custodial and insurance options for registering deposits.
- 4.3 TDS Northern Ireland Limited is a not-for-profit company and a wholly owned subsidiary of The Dispute Service Limited. It is approved by the Northern Ireland Executive to operate both an insured and custodial tenancy deposit scheme.
- 4.4 Further information about TDS Northern Ireland is available from [www.tdsnorthernireland.com](http://www.tdsnorthernireland.com)
- 5.4 The Prescribed Information may be attached to the tenancy agreement, or served as a stand-alone document. Where the deposit is received when the tenancy agreement is signed, it is recommended that the Prescribed Information is attached to it. All parties must have a copy of these pages.

## B Documentation

### 5 Initial documentation

- 5.1 TDS members, who complete a new assured shorthold tenancy after they join the scheme, should ensure that at or before the start of the tenancy, they give the tenant(s) a copy of the tenancy agreement and serve Prescribed Information on them. They should also serve Prescribed Information on any person who may have contributed to the deposit on the tenant's behalf.
- 5.2 Sections 213 (5) and (6) of the 2004 Act require a Landlord (which is defined to include any agent acting on their behalf) to provide this Prescribed Information, which includes any leaflet published by the applicable tenancy deposit protection scheme. It must be given within the statutory time limit of 30 days (see paragraph 4.3 below). Members who fail to comply are in breach of the legislation.
- 5.3 Members can find the Prescribed Information in which the Housing Act 2004 requires to be given to the tenant Section A of our Prescribed Information and Suggested Clauses for tenancy agreements and Terms of Business. This must be served within 30 days of the deposit having been received on a new AST, or within 30 days of the tenancy becoming an Assured Shorthold Tenancy within the meaning of the Housing Act 1988 if this occurs after the receipt of the deposit, irrespective of whether or not the funds have been cleared (the 'statutory time limit). Where the tenancy started before 6th April 2007, it should be served on or before the date of renewal, including any statutory periodic tenancy which arises post 6 April 2007.
- 5.5 The tenants must also be given the document **What is the Tenancy Deposit Scheme?** with the Prescribed Information (we recommend that Members attach it to the Prescribed Information). It can be downloaded from the website or bought in hard copy from TDS.
- 5.6 Members are recommended, but not required, to use the suggested clauses detailed in Section B of our Prescribed Information and Suggested Clauses for tenancy agreements and Terms of Business within their tenancy agreements.
- 5.7 The clauses in Section B are suggested clauses only and can either be included in relevant part of your tenancy agreement where you deal with deposits, or incorporated as a separate section.
- 5.8 The person who receives and retains the deposit will need to be the person who is registered with the authorised tenancy deposit scheme. It is not a requirement for the landlord's contact details to be included in the tenancy agreement, although it would appear from reading The Housing (Tenancy Deposits) (Prescribed Information) Order 2007 paragraph 2. 1. (g) (iii) that it is a legal obligation. The Order specifies that

the name, address, telephone number, and any e-mail address or fax number of the landlord must be provided. But, following legal clarification sought by TDS, CLG has now made it clear whose contact details they require to activate tenancy deposit protection. Depending on who actually holds the deposit, they need to be those of the landlord or the appointed agent. Thus, in instances where the deposit is taken and held by a letting agent, the landlord's details will not need to be included in this information.

5.9 The Prescribed Information requires you to record the **tenant's contact address after the tenancy ends**. Members are advised to collect this information as part of the tenancy application process and record this in the Prescribed Information. Of course a tenant may not know where they will be when they move out of the property. However we would suggest that in most cases it must be possible for a tenant to give an address for a friend or family member where they can be contacted. This address can be a next of kin or work address. If the tenant really cannot provide a contact address, then we recommend that Members record in the Prescribed Information that this information has not been provided by the tenant – and get the tenant to sign it. We also recommend that you include email addresses and telephone numbers in the Prescribed Information for contact purposes.

5.10 You will need to be aware that in any case, the Landlord and Tenant Act 1987, section 4.7 requires that the landlord's actual address must be on every rent demand. Under the Landlord and Tenant Act 1984 the landlord's actual address must be provided in writing within 21 days if the tenant asks for it, or the agent can be fined £2,500. You are advised to include it in the documentation as a matter of course.

6.1 No, but the use of inventories and schedules of condition, where appropriate, can significantly reduce the incidence of disputes at the end of the tenancy. Where disputes do arise, they provide the evidence-base to make resolution much easier – either through ADR or by the courts. TDS takes the view that without properly completed inventories at check-in and check-out, a claim for deductions from a tenant's deposit will be significantly more difficult (if not impossible) to make.

6.2 Members are strongly advised to prepare an inventory and schedule of condition to be signed by both the landlord (or agent on his behalf) and the tenant at the start of the tenancy. It should be up-dated at the end of the tenancy to show the changes in the property and its contents which have taken place over that period. In their absence members will find it very difficult to demonstrate that the property has deteriorated during the tenancy, or that the tenant is liable for it. Failure to produce inventories will be taken into account by TDS in the adjudication, and may lead directly to a determination being made in favour of the tenant.

6.3 Tenants may not always sign and return the inventory. Members may want to advise them in writing that it is in their interests to do so; and to warn them that if they do not, they may find it difficult to prove their case in the event of a dispute. Members should also keep a record of having sent, or given, the inventory to the tenants and submit this to TDS in the event of a dispute.

6.4 The legislation does not void an existing inventory that was undertaken in good faith prior to the new law, as long as it was thorough and complete. However, there is some concern that original inventories, some quite a few years old, might suffer under scrutiny when applying the ADR procedures. Some landlords drew up their own inventories. If they now prepare a new one at the next extension of the tenancy it can in no way

## 6 Are inventories compulsory?

be representative of the condition of the property at the time the tenant moved in. But it would give a benchmark going forward. It could also be used to take a view about any dilapidations over the period of the tenancy to date.

6.5 TDS produces a **guide to check in and check out reports, inventories and schedules of condition** which explains our views on best practice for the inventory process, and how an adjudicator will approach them. You can get this from the member's section of the TDS website.

6.6 Where one or more of the tenants is replaced during the tenancy it is unlikely that the parties will want to go to the expense of a revised inventory and schedule of condition. But the landlord/agent may find themselves in difficulties if there are any disagreements over dilapidations at the end of the tenancy, and there is nothing to show who might be responsible. It would be advisable, and would be in everybody's interests, for there to be some agreement between outgoing and incoming tenants about how dilapidations will be dealt with at the end of the new tenancy. For further information please see the Guidance for a change of sharers mid-tenancy available from the member's section of the TDS website.

## 7 **Do we have to serve the Prescribed Information afresh when we renew a tenancy?**

7.1 Following the case of Superstrike Ltd V Rodrigues, the Court of Appeal ruled that a statutory periodic tenancy constituted a new tenancy. In this case, although the landlord received the deposit prior to the 6 April 2007, the periodic tenancy arose after this date and it was decided that the deposit should have been protected and Prescribed Information served – including any scheme leaflet.

7.2 The Deregulation Act 2015 has made provision for circumstances where the Prescribed Information documents may need to be re-served on the tenants and any relevant person. Members are guided

to make sure that they have complied with the tenancy deposit registration requirements in respect of the the tenancy deposit that has been received.

7.3 In these circumstances, if a Court was persuaded by these arguments then a landlord who had either not re-protected the deposit or with a protected deposit who had not served the Prescribed Information on the renewal of the tenancy or the creation of a statutory periodic tenancy, might be unable to serve a section 21 notice. They might also be subject to a financial penalty of between one and three times the deposit (plus the return of the deposit itself).

7.4 We recommend that in order to ensure full compliance with the implications of the Superstrike decision, you should re-serve the Prescribed Information within 30 days of each renewal or the creation of a statutory periodic tenancy.

## C Deposits

### 8 **What is a deposit?**

8.1 **Any money taken for security in respect of a tenant's obligations or liabilities connected with the tenancy** must be secured in a tenancy deposit protection scheme. This includes any extra payments where the intention is to hand them back to the tenant if there is no call to retain them e.g. rent charged each month to offset against excessive cleaning or damage, or forward payment of water rates.

8.2 **A holding deposit** does not need to be statutorily protected – but please also see paragraph 18.

8.3 Rent paid in advance is not a deposit. But a deposit paid as a “rent deposit” is a tenancy deposit under Section 212(8) of the Housing Act 2004, and, therefore, must be protected in an authorised scheme.

8.4 An administration fee paid to the landlord with an expectation that all or any of it will be refunded at the end of the tenancy

must be treated as a tenancy deposit and protected under a scheme. However, if it is non-refundable, it is not a deposit. This may occur where, for instance, a fee is charged for repairs or the replacement of broken items which normally would get deducted as expenses from the tenant's deposit, but which, according to the tenancy agreement, will be repaired or replaced at the landlord's own expense.

requirement' of TDS (see section 26). Members who fail to comply will be in breach of both the Act and the Rules of Membership applicable to their category of membership.

In the event of a dispute the adjudicator may therefore award the deposit to the tenant without adjudication.

## 9 Holding the deposit

9.1 On receiving the deposit, the member will immediately give the tenant a written receipt unless the tenancy agreement, which can contain the clauses set out in our **Prescribed Information and suggested clauses for tenancy agreements and terms of business**, and the Prescribed Information are signed at the same time.

9.2 Within 30 days of having received the deposit, or within 30 days of the tenancy becoming an Assured Shorthold Tenancy within the meaning of the Housing Act 1988 if this occurs after the receipt of the deposit, the tenant must have received the Prescribed Information, including the explanatory/scheme leaflet, and the deposit must have been registered on the TDS tenancy database. **The 30 days apply from the point that the landlord/agent receives the deposit monies rather than cleared funds.** If the cheque bounces or funds are not cleared, this constitutes a breach of the tenancy agreement between the landlord and the tenant. For the purposes of the tenancy deposit legislation, the clock starts from when the landlord/ agent receives the deposit or from when the tenancy becomes an Assured Shorthold Tenancy within the meaning of the Housing Act 1988, if this occurs after the receipt of the deposit.

9.3 Meeting the initial requirements of an approved scheme and serving the Prescribed Information within 30 days are both requirements of the legislation. Registering the deposit on the TDS tenancy database when first received or on first deemed receipt, is the 'initial

9.4 Landlords must hold their tenant's deposits in a UK bank account as a minimum. Letting Agents and Corporate Landlord Members must, in addition, ensure that the account in which they hold deposits is a **ring-fenced client account**. If any Member belongs to a professional, accreditation or trade body they must also hold deposits in accordance with any additional rules they have, and/or with the requirements of their bonding provider.

9.5 Deposits for any ASTs starting on or after 6th April 2007 must continue to be protected even if they become periodic.

## 10 Can we have more than one ring-fenced client account?

10.1 Yes. We appreciate that some members have different elements to their business, sometimes doing both letting and management. It might be administratively simpler to have more than one ring-fenced client account in order to avoid unnecessary complexity.

11 How do we deal with tenancies starting before 6th April 2007?

11.1 **The key date is when the deposit was received.** Where agreements were signed before 6th April 2007 to come in to effect after that date, and the deposit was taken before it, the legislation won't apply. You may need to add the required clauses as an addendum to it, signed by all parties. If you took the deposit after 6th April 2007, irrespective of when the tenancy agreement was signed, the legislation will apply.



- 11.2 If the deposit is being paid by cheque, the date it is received is the date you get the cheque and not the date the funds are cleared.
- 11.3 The “Deposit Received” date is not necessarily the same as the “Deposit Protection Start Date”. The latter will normally be when the tenancy agreement is executed.
- 11.4 If a landlord has an AST which started before 6th April 2007 and goes on to become a Statutory Periodic Tenancy after 6th April 2007, the deposit should be protected and Prescribed Information issued to the tenant.
- 11.5 If, at the end of an AST which started before 6th April 2007, the tenant wants to stay on there are two options:
- 11.5.1 The tenancy becomes periodic (e.g. carries on from month to month subject to notice) and the only lawful way in which the rent can be increased under such a periodic tenancy e.g. by way of a section 13 notice, which is a prescribed notice.
- 11.5.2 A “replacement” tenancy is created if tenancy does not go periodic when the fixed term expires i.e. a further fixed term is agreed between the parties. Whilst some in the industry might talk of a Memorandum of Extension (or use other words to describe paperwork) to facilitate this process, the Housing Act 1988 as amended by the 1996 Act solely refers to a “replacement” tenancy. Any such paperwork, no matter what it is called, therefore creates a “replacement” tenancy.
- 11.6 In both of the scenarios above, the deposit is caught under the TDP legislation and, at that time, must be protected and Prescribed Information issued. The scheme leaflet What is the Tenancy Deposit Scheme forms part of the Prescribed Information.
- 12 Can the deposit be paid on behalf of the tenant, and by instalments?**
- 12.1 Section 213(1) of the Housing Act 2004 requires any tenancy deposit paid to a person in connection with a shorthold tenancy, as from the time when it is received, to be dealt with in accordance with an authorised scheme.
- 12.2 Where the deposit is paid on behalf of the tenant by someone else – e.g. parent, local authority, charity, employer – this relationship does not need to be entered on to the database. As long as it is recorded in the tenancy agreement we will take it into account if there is a dispute. The deposit will be returned to the tenant unless it is clear in the tenancy agreement that it should be paid to someone else; or the tenant subsequently gives us written authority to pay it to someone else.
- 12.3 TDS members should protect the deposit, even if it’s paid to them in instalments, by taking the following steps:
- 12.3.1 protecting the deposit on the basis of the total amount of the deposit they expect to receive for the tenancy over its life;
- 12.3.2 complying with the Prescribed Information requirements, within 30 days of the first instalment having been paid, but referring to the whole amount of the deposit they expect to receive;
- 12.3.3 retaining each deposit instalment as they receive it; there is no need to notify the Scheme;
- 12.3.4 if either party raises a dispute regarding the disposition of the deposit, the member must notify TDS if they have not yet received the full deposit amount, and how much they have received (in case the tenant is trying to claim back deposit monies they have not even yet paid over to their landlord); and
- 12.3.5 retaining throughout the tenancy a proper record of the instalments received as evidence

of whether they have, or have not, received the full amount of the deposit due as set out above.

12.4 Rent deposit schemes are typically administered by local authorities and the voluntary sector. Most do not provide for deposits to be paid in instalments. Those who do may want to look at alternatives because a deposit paid in instalments in an insurance-based scheme may be administratively burdensome for the landlord.

12.5 Some local authorities and voluntary bodies operate rent guarantee schemes, instead of rent deposit schemes. As no deposit is paid, the statutory tenancy deposit provisions will not apply. Others are looking at an arrangement whereby the tenant continues to pay the deposit in instalments, but to the local authority and voluntary organisation, not the landlord. In these cases the recipient would have paid the full deposit to the landlord, and received the Prescribed Information, at the outset. If they give a bond to landlords at the start of the tenancy, and did not hand over any money it would not fall within the provisions of the Housing Act 2004.

12.6 Some charities give tenants the opportunity to save up money to cover any deposit that may be taken for damage on leaving the property. Prior to 6th April 2007 this money was held by the charity and repaid to the tenant if not necessary. If there was damage then the charity would negotiate how much is paid to the landlord. Again, as no money is presented as deposit it does not constitute a deposit under the Act.

### **13 What happens with non-managed properties?**

13.1 Whether the agent or the landlord is going to hold the deposit is a matter for them to determine. **We can only deal with disputes where the deposit is being held by a member of TDS.** We can't deal with disputes over deposits held by a landlord who is not a TDS member because we need to have the money transferred to us to resolve the

dispute and pay it out.

13.2 Where the agent lets the property and passes the deposit to the landlord, they **must ensure that the landlord understands their legal responsibilities** concerning deposit protection. The liability for deposit protection then passes clearly to the landlord. (Please see **Prescribed Information and Clauses for inclusion in Terms of Business, Assured Shorthold Tenancies (ASTs) and non-Assured Shorthold Tenancies (non-ASTs)**).

13.3 The legal position is unclear. Some lawyers have advised that, if the agent is not going to hold the deposit for the duration of the tenancy, he should not hold it at all – even if only to pass it on to the landlord. The deposit should be transferred directly from the tenant to the landlord.

13.4 For letting agent Members of TDS, there is a facility to designate tenancy deposits as Let Only on the TDS Tenancy Database. These are charged for, and dealt with, differently and for further information, please refer to the **Tenancy Deposit Scheme for Lettings Agents and Corporate Landlords: Membership Rules**.

### **14 What if an agent holds the deposit but does not manage the property?**

14.1 When TDS receives notification of a dispute it will contact the member for any comments it may have and, of course, we will still need them to send us the deposit as required by the Tenancy Deposit Scheme for Lettings Agents and Corporate Landlords: Rules of Membership.

14.2 Members may be concerned that the agent may not know when the tenancy has ended or when the checkout has taken place and may therefore not be in a position to meet any time requirements concerning the return of the deposit. Agents would be advised to ensure that they had suitable clauses in their tenancy agreements and terms of business to cover this eventuality.

- 14.3 Please bear in mind that there is a relationship between usage of TDS and the size of the subscription. The less use a firm makes of TDS in a given year, the greater the likelihood, that they will get a discount in the following year.
- 14.4 For letting agent Members of TDS, there is the option to designate tenancy deposits as Let Only on the TDS Tenancy Database. These are charged for, and dealt with, differently and for further information, please refer to the **Tenancy Deposit Scheme for Lettings Agents and Corporate Landlords: Membership Rules.**
- 15 How should we deal with pet deposits?**
- 15.1 Please refer to the Tenant Fees Act 2019 and the tenancy deposit cap
- 16 Does a holding deposit need to be protected?**
- 16.1 A holding deposit is not a tenancy deposit for the purposes of section 212 of the Housing Act 2004 and will not be required to be held under an authorised scheme. A deposit is only required to be placed in a scheme if it is money held which is paid as security for the performance of any obligations of the tenant or the discharge of any liability of his, arising under or in connection with the tenancy. So if the tenancy agreement has not been entered into, or there are no contractual obligations resting on the tenant when s/he pays the holding deposit, the deposit paid is not a deposit for the purposes of the Act. However the requirements of the Tenant Fees Act 2019 needs be taken into account in respect of the amount, term and circumstances that a holding deposit can be held.
- 16.2 However, if a landlord has a holding deposit in respect of a person who subsequently becomes his tenant, then the landlord must either return the holding deposit to the tenant (so that the tenant can give it to him again as a tenancy deposit) or retain it, and protect it in a scheme within 30 days of the tenant agreeing to enter into a tenancy (i.e. from the date that the holding deposit becomes a tenancy deposit).
- 16.3 You might find it helpful to put a clause in your documentation which defines the event(s) which constitute the transformation of a holding deposit into a tenancy deposit, and commits you to putting the relevant details on the tenancy database within 30 days thereof. At that date you would also serve the Prescribed Information on the tenant, if you hadn't already done so.
- 17 Can the deposit be used to defray costs or arrears during the tenancy?**
- 17.1 If both the landlord and tenant agree in writing, then yes. But the deposit holder cannot release the deposit during the tenancy without the consent of both parties.
- 17.2 Sometimes landlords have instructed agents to pay overdue rent from the deposit held during the tenancy term to meet mortgage payments etc. This would usually be replaced when the tenant paid the rent late so that the deposit would normally be replenished by the end of the tenancy. As deposits can no longer be held as "agent of the landlord" deductions cannot be made during the tenancy without the consent of both parties.
- 18 Does the Act cover tenancies where the rent exceeds £25,000?**
- 18.1 Yes. The £25,000 upper limit set out in schedule 1 of the Housing Act 1988 was amended by the Assured Tenancies (Amendment) (England) Order 2010 (Statutory Instrument 2010 Number 908). Tenancies in England which fell outside the Housing Act 1988 on the basis of the high rent exemption set out in Paragraph 2(1) of Schedule 1 now fall within the Act provided that the annual rent does not exceed £100,000. This change occurred immediately on 1st October 2010. If these tenancies began before 28th February 1997 or were previously Assured tenancies they will become Assured tenancies on that date. All other tenancies will become Assured Shorthold

- Tenancies. Tenancies that fell outside the Act for other reasons (e.g. Company Let agreements) will not be affected and will continue to fall outside the Housing Act 1988. The change will take place automatically irrespective of the wording used in the tenancy agreement or the actions of the parties or their agents.
- 18.2 The same increase took effect in Wales from 1st December 2011 in Wales as a result of the Assured Tenancies (Amendment of Rental Threshold) (Wales) Order 2011.
- 18.3 We understand that, although the position is yet to be tested by the Courts, the new legislation applies to all existing and new tenancy agreements. This is in accordance with the 'best practice' recommendations expressed by CLG.
- 18.4 The upper limit applies to individual tenancies, and not the amount payable in respect of the property. If, for example, four tenants each entered into separate tenancy agreements under which they were each required to pay £6,000 per year for an AST in respect of a shared house, each of those deposits would need to be protected. But if they were joint tenants entering into a single tenancy agreement under which they were jointly and severally liable to pay £24,000 per year, there is only one deposit which would need to be protected in accordance with tenancy deposit protection legislation.
- 19 Why is the deposit protection date different from the tenancy start date?**
- 19.1 The tenancy start date is the date when the tenancy will begin as specified in the tenancy agreement.
- 19.2 This will often not be the same date the deposit is protected, which is when the landlord/agent registers it with TDS. The deposit will usually have been received before the start of the tenancy e.g. when the tenant signs the agreement. It must be registered within 30 days of its receipt or within 30 days of the tenancy becoming an Assured Shorthold Tenancy within the meaning of the Housing Act 1988, if this occurs after the receipt of the deposit.
- 20 Is sub-letting subject to Tenancy Deposit Protection?**
- 20.1 Yes. For example, tenant farmers may rent the houses on their land and take a deposit. They are still subject to the provisions of the Housing Act 2004 i.e. they must become a member of a tenancy deposit protection scheme or lodge the deposit with someone who is.
- 20.2 This only applies to ASTs. Most tenancies on farms would be classified as agricultural unless the tenancy meets the conditions for an Assured Agricultural Occupancy has been completed and approved.
- 21 Who should get any interest earned on the deposit?**
- 21.1 We recommend that the tenancy agreement specifies to whom any interest on the deposit will belong.
- 21.2 If you want to be able to add the interest to the deposit, and to use them together when settling any claim by the landlord, ensure that this set out in the tenancy agreement. If there is a dispute, please tell us how much of the amount sent to us is deposit and how much is interest. You must also make it clear to its recipient that interest stops accruing when the money is sent to TDS.
- 22 If the landlord lives abroad does the deposit have to be protected?**
- 22.1 Any deposit taken in England and Wales after 6th April 2007 in respect of an Assured Shorthold Tenancy has to be protected, irrespective of the country of the landlord's residence. If the landlord uses a managing agent, and they hold the deposit, it could be covered by TDS. A Landlord can register to use the Tenancy Deposit Scheme for Landlords even if they are based overseas, but the deposit must remain in a UK bank account. Where a company wishes to join the Tenancy Deposit Scheme for Landlords, they must be UK domiciled.

## D Tenancy database

### 23 Registering tenancies

- 23.1 Section 213 (1) of the 2004 Act stipulates that a Deposit must, as from the time when it is received, be dealt with in accordance with an authorised scheme. A Landlord or his Agent may receive a Deposit when payment is made, or be deemed to have received it at some other time.
- 23.2 A Deposit may be deemed to have been received more than once. Examples of when a Deposit is received or deemed to have been received by a Landlord include when:
- 23.2.1 payment of some or all the Deposit is made by the Tenant and/or by a Relevant Person to the Landlord and/or to someone acting on the Landlord's behalf;
  - 23.2.2 a Fixed Term Tenancy expires and the Deposit continues to be held under a new tenancy agreement;
  - 23.2.3 a Fixed Term Tenancy expires and the Deposit continues to be held in relation to a Statutory Periodic Tenancy;
  - 23.2.4 a Deposit is "topped up" (perhaps because the Tenant wants to keep a pet or because the value of the Deposit has decreased over time);
  - 23.2.5 a property is sold subject to the tenancy (the new owner will be deemed to have received the Deposit on completion of the sale).
- 23.3 It is prudent for Members to take a cautious approach when deciding when a Deposit was received. For example, if there are Joint Tenants and each contributes separately towards the Deposit, it is prudent to treat the date of receiving the first contribution as the date the Deposit was received – even if there are further instalments to follow. It is prudent to assume the Statutory Time Limit runs from the date it was first received by the Landlord or the Agent, whichever is the sooner. It is prudent to

assume that a Deposit is received when a cheque is paid rather than when the cheque clears.

### 24 Initial requirements

- 24.1 Section 213 (3) of the 2004 Act requires a Landlord to comply with the initial requirements of an authorised tenancy deposit protection scheme within the Statutory Time Limit.
- 24.2 The scheme's 'initial requirements' are that the Member must enter all the required details about a Deposit, where that Deposit has not previously been Protected, on to the TDS tenancy database.
- 24.3 After the Member has entered all the required details relating to a Deposit on the TDS tenancy database for the first time, the Member does not need to do so again for a renewed AST. There are no initial requirements if the deposit is carried forward to a renewed AST or statutory periodic tenancy.
- 24.4 Although not an initial requirement to do so, Letting Agent members who register deposits as 'Let Only' and Landlords registering deposits via the Tenancy Deposit Scheme for Landlords must ensure that they comply with the respective Scheme Rules which requires them to accurately update the TDS tenancy database if a renewed tenancy is created at the expiry of the fixed term or if there is a material change to the registered tenancy. Failure to do so will be a breach of the Scheme Rules and may result in a default award in the event a dispute is referred to TDS.
- 24.5 To correctly register a deposit, information about the landlord(s), the tenancy itself and all the tenants must be provided. Members must ensure that the data they enter is correct and kept up to date to reflect changes during the tenancy.

### 25 Tenancy Deposit Protection Certificate

- 25.1 When the tenancy information has been successfully entered, the system will provide you with a Tenancy Deposit Protection Certificate. The member is

responsible for copying the Certificate to the tenant. Where the member is an agent, they are also free to copy the certificate to the landlord. If you issued a new tenancy agreement, or renewed a tenancy agreement, after 6th April 2007 and a deposit was involved, you must make sure the deposit was registered within 30 days or else you may not be able to enforce a Section 21 notice.

- 25.2 The Tenancy Deposit Protection Certificate contains, amongst other things, a unique identifying code. This will enable tenants and landlords to use the TDS website to check that the deposit has been registered, and to follow the progress of a dispute if there should be one. It is therefore important that members forward the Tenancy Deposit Protection Certificate to the tenants.

## **26 Do we have to register non-ASTS?**

- 26.1 These deposits cannot be protected by TDS under the statutory scheme, and must not be registered on the tenancy database.
- 26.2 TDSRA ceased to operate from 1st October 2010. We consider it more appropriate to focus our resources on the resolution of disputes that fall under TDP legislation.

## **27 What do we do if we have registered a tenancy by mistake?**

- 27.1 Letting agents and corporate landlords will be able to amend the entry on the database to show that it was entered by mistake, and it will effectively be deleted.
- 27.2 Letting agents who have designated a tenancy as 'Let Only' and Landlord members are able to make only limited changes to the TDS Tenancy Database. If a tenancy deposit has been registered in error you should contact [deposits@tenancydepositscheme.com](mailto:deposits@tenancydepositscheme.com). There will be no refunds of any charges due.

## **28 What are the implications if the registration of a tenancy has been delayed?**

- 28.1 For instance, the tenancy agreement stated quite properly how the deposit would be protected. Due to an oversight, it was registered after the 30 day Statutory Time Limit. The proof of registration was posted to the tenant.
- 28.2 The tenant's legal adviser claimed that, as the tenants did not receive proof that the deposit was registered within 30 days, they intend to apply to the Court for the deposit plus a penalty of between one and three times its amount.
- 28.3 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 and Prescribed Information 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.
- 28.4 The claim can still be made even if the deposit has been protected, or the Prescribed Information provided, 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.
- 28.5 If a landlord fails to meet the initial requirement to protect the deposit, 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).
- 28.6 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.

- This will not prevent a tenant from issuing proceedings for late provision of the Prescribed Information and seeking a penalty award.
- 28.7 If you find yourselves in this situation you will need to take your own legal advice.
- 29 What will TDS do if the tenancy hasn't been registered within the Statutory Time Limit?**
- 29.1 The Housing Act 2004 allows the tenant to go to court and seek between one and three times the deposit by way of compensation. Tenants will need to seek independent advice on the merits of their case.
- 29.2 If the information specified in paragraph 6.3 of the **Tenancy Deposit Scheme for Landlords Membership Rules** or paragraph 6.3 of the **Tenancy Deposit Scheme for Lettings Agents and Corporate Landlords Membership Rules** is not entered, TDS will cover the deposit as long as it is held by a member. But if there is a dispute at the end of the tenancy, and information has not been entered into the TDS database, the deposit may be awarded to the tenant without formal adjudication.
- 29.3 We will generally take a pragmatic view. If the tenancy has been registered before it comes to an end, and the delay has not caused any loss or distress, we will deal with any dispute in the normal way. But we will look at each case on its merits and this does not preclude the tenant from taking the matter to Court.
- 29.4 **TDS may at its own discretion allow a Member to Protect a Deposit outside the Statutory Time Limit, but not where a Tenancy has already ended.** Guidance on the factors TDS takes into account can be found in our guidance document TDS and the late protection of deposits available from the TDS website. The fact that TDS has permitted late registration will not in itself prevent a Tenant or Relevant Person from taking legal proceedings against a Landlord for failure to comply with the 2004 Act.
- 29.5 TDS will not be liable for any loss the Member suffers or costs which the Member incurs as a result of TDS refusing to protect a deposit outside the Statutory Time Limit.
- 30 What do we do about changed and replacement tenancies?**
- 30.1 Any changes during the course of a tenancy must be recorded on the database. This includes a renewal of a tenancy agreement where the tenant and landlord details remain the same. Dependent on your membership category, further Deposit Protection Charges may be incurred and this will be confirmed with you before any changes take effect.
- 30.2 Some changes will require that the Prescribed Information and scheme leaflet are re-served on the tenants and any relevant person. Deregulation Act 2015.
- 30.3 The situation may arise where a landlord buys a house with a sitting tenant; or an agent takes over a portfolio or the management of a single property. In both of these circumstances the new "landlord" (this includes the agent where one has been instructed) has now "received" deposit money which requires covering by a scheme (if it was an old pre-6th April 2007 tenancy) and new Prescribed Information being served. Indeed the old landlord or agent may have held the deposit under one insured scheme and the new one uses another scheme so the details of the Prescribed Information may have changed. If the landlord/agent buys the limited company then there is no new receipt as the limited company still holds the money.
- 31 What if the property is no longer managed by a member agent?**
- 31.1 It may well be that during the course of the tenancy, management of it passes from the original agent. **The terms and conditions of TDS continue to apply,** regardless of a change to the ownership or management of the business or the

property.

31.2 If the tenancy is **still managed by a member** there this is not likely to be a problem. The deposit should be passed to the new owner/manager. The record will need to be modified to show this, either directly on the database or by telephoning our customer contact centre.

31.3 If the property is sold to a **landlord who manages it her/himself**, or instructions are given to a non-member agent, in effect the tenancy is being withdrawn from TDS and Members should refer to the section dealing with change in the ownership or management of the property in the relevant set of Membership Rules. As this will require a new tenancy agreement, the database record will need to show that the original tenancy has come to an end.

31.4 Members **must promptly inform the tenants** of those properties covered by TDS that they are being transferred to another agent (or manager) or otherwise are ceasing to manage their properties. They must also tell the tenants who is now managing the property and confirm that that the Membership Rules still apply until other arrangements have been made. For full details about the length of time that the deposit will be protected please refer to the **Tenancy Deposit Scheme for Lettings Agents and Corporate Landlords: Membership Rules**.

## **32 What do we do about deposits transferred from TDS to another TDP Scheme?**

32.1 We see a number of cases where the agent has been dis-instructed and the landlord wants to transfer, or has transferred, the deposit to another scheme. It has been argued that, because the agent is holding the deposit as stakeholder, this can't be done without the consent of the tenant. This is not the case as long as the parties understand that there is a difference between paying out the deposit and moving it to another protection scheme.

32.2 The tenant has no choice about which of the approved schemes will protect the deposit – that is the landlord's/agent's legal responsibility. It follows that the tenant does not have a veto over whether or not it is switched mid-term.

32.3 The purpose of the stakeholder concept is to prevent the agent being pressurised to pay the money to the landlord (or, indeed, the tenant) without justification. As long as the tenant has confirmation that the deposit is protected by another scheme, they suffer no loss or disadvantage. If there is a dispute, and it emerges that the deposit was still protected by us, TDS could deal with the dispute. On the other hand, if there is a dispute, and it emerges that protection of the deposit with TDS had validly ended but hadn't been re-registered, we could only advise the tenant to seek legal redress.

32.4 In order to protect their interests, Members are strongly advised to do the following when deposits are transferred from TDS to another TDP scheme:

- Pay the deposit to the new deposit protection scheme directly (in the case of the custodial scheme) rather than to the landlord. This will prevent any confusion about where responsibility for it lies.
- End the tenancy with an end-type of "transfer" on the TDS database using the date of transfer as the end-date.
- Write to the landlord to confirm that the deposit is protected.
- Ensure that the landlord has provided a Certificate number (in the case of insurance backed schemes) to demonstrate that the deposit has been registered with another scheme before passing deposit monies to the landlord.
- Write to the tenant to advise them that the deposit has been transferred, and that it is still protected.
- Create an addendum to the tenancy agreement to confirm the changed



arrangements, and serve new revised Prescribed Information.

- 32.5 The same principles apply when deposits are transferred from another TDP scheme to TDS.
- 32.6 For the avoidance of doubt agents should ensure that a procedure to cover such eventualities is contained in their terms of business.

## E At the end of the tenancy

### 33 What do we have to do at the end of the tenancy?

- 33.1 For Letting Agents and Corporate Landlords, please enter the relevant information on the database to show that it has come to an end.
- 33.2 For Let Only designated tenancies or deposits registered by landlords, the protection of the deposit will continue automatically on an assumed 'same terms' statutory periodic tenancy at the end of the fixed term. Landlord and Letting Agents should reflect on the TDS Tenancy Database if the tenancy agreement has renewed in any other way or if the tenancy has ended.
- 33.3 It is the Member's responsibility to ensure that the TDS Tenancy Database correctly reflects what has happened when a tenancy ends.
- 33.4 TDS bases its membership subscriptions for Lettings Agents and Corporate Landlords on the number of tenancies registered on its tenancy database on a particular date. It is therefore in the member's own interests that their portfolio is up to date; in particular, that tenancies which have ended are closed on the database. If you have any problems in closing tenancies and you use third party or bespoke software to upload tenancy information to our database, please contact your supplier. If you upload tenancy information manually. Please contact our operations team [deposits@tenancydepositscheme.com](mailto:deposits@tenancydepositscheme.com)

### 34 Why is the date at which tenancy protection ended different from the tenancy end date?

- 34.1 The tenancy date is the date the tenancy actually ended – which is not necessarily the same as the date it was supposed to end, according to the tenancy agreement.
- 34.2 This should be the date when the protection can be removed, if there has been no dispute over the return of the deposit once the tenancy has ended.
- 34.3 Where there is a dispute over the return of the deposit, it remains protected until the dispute has been resolved.
- 34.4 In summary, the events leading to un-protection are:
- Notification that the tenancy has ended and there is no amount in dispute, where the Member is a letting agent or a corporate landlord; OR
  - ADR process completed where there is a deposit dispute; OR
  - Decision of the Court (if TDS is aware of court being used).

### 35 If there is no dispute at the end of the tenancy

- 35.1 If there is no dispute about how to deal with the deposit at the end of the tenancy, the member will settle it directly with the tenant (and the landlord, if the member is an agent) as they agree between them. The member must promptly pay the landlord and the tenant the amount that they have agreed is due to each of them.
- 35.2 When any agreed amounts have been paid, and/or none of the deposit remains in dispute, the member must promptly confirm to TDS that the tenancy has ended. TDS will then contact the tenant(s) to inform them that the member is ready to end protection of the deposit. The tenant (or one of the joint tenants) may object to ending protection of the deposit if the tenancy has not ended. In such cases, the deposit will remain protected.

## 36 If the landlord or agent wants to make a deduction

- 36.1 The parties should try to reach agreement where they can, and narrow down the issues in dispute. The member must promptly pay to the person entitled any deductions that have been agreed. The member must promptly return to the tenant any part of the deposit that the landlord or member does not intend to claim.
- 36.2 The member must contact the tenant in writing promptly after the end of the tenancy if they or the landlord propose to make any deductions from the deposit. The member must describe the nature of each deduction and the amount proposed. If the exact amount is not known, the member must give the tenant an estimate, and make it clear to the tenant that the estimate may be revised once quotations have been obtained. The member's letter or email should ask the tenant to indicate which (if any) of the proposed deductions s/he agrees, and which (if any) s/he disputes. The member's letter or email must refer to the Scheme Rules and the Scheme Leaflet available to view on the TDS website ([www.tenancydepositscheme.com](http://www.tenancydepositscheme.com)), copies of which are also available from TDS upon request.
- 36.3 If the tenant does not agree to any proposed deduction from the deposit, the tenant should try to inform the member of his/her objection as soon as practicable after being notified of the proposal.
- 36.4 The member must give the tenant a reasonable time in which to say whether they object or agree to proposed deductions. If the tenants do not respond to your letters at the end of the tenancy you may want to construe their silence as consent to your proposals for allocating the deposit. **However our Scheme Rules make it clear that the member must not take the tenant's failure to object as an indication of their agreement to the proposed deductions.** There is always a risk that the tenant will surface eventually and make

a case. The landlord/agent may then want us to adjudicate as there is a dispute. We will usually do so, but may decline if the amount at stake appears to be trivial.

## 37 Do we have to return the deposit within 10 calendar days?

- 37.1 Any part of the deposit that is not disputed should be repaid as soon as possible.
- 37.2 If either party does not receive the share of the deposit to which they believe they are entitled within 10 days of asking the member to return it (beginning with the date the request was made) that party is entitled to apply to TDS for ADR.
- 37.3 There is nothing in the legislation to stop members paying out the deposit earlier.

## 38 Must the rent be paid up?

- 38.1 Tenants may not unlawfully withhold their rent. Where the rent has not been paid in full, TDS will make reasonable attempts to establish the grounds for this and take them into account in making his adjudication. Where non-payment of rent is relevant to the dispute, a copy of the rent account must be sent to TDS as soon as practicable after notification of a dispute. If the member cannot or will not provide it, TDS will take note of this in his adjudication.
- 38.2 Where the tenancy agreement specifies that the deposit may cover non-payment of rent, it is open to the landlord or the agent to trigger a dispute over the rent owed and ask TDS to determine that the deposit should be paid to/retained by them to cover the unpaid rent.
- 38.3 If the deposit covers rent, and undisputed rent arrears are less than the total deposit held, TDS will adjudicate on the balance of the deposit it is also in dispute.
- 38.4 Members are advised to make provision for giving the tenant a record of their rent payments on request, and to inform them of how to go about doing so.

**39 Can the landlord be required to make an insurance claim for any damage?**

- 39.1 No-one can be forced to claim on their insurance.
- 39.2 If there is a contractual obligation for one of the parties to insure an item then they should do so. If they fail to do so, the other party cannot be expected to pay for the loss. However, this must be included in the tenancy agreement.

**40 What should the deposit-holder do if they cannot contact one of the parties at the end of the tenancy?**

- 40.1 TDS is prevented by law from adjudicating where, despite making reasonable efforts to do so, TDS is unable to contact the landlord or the tenant.
- 40.2 The member must share with TDS any relevant information they may have about the missing party's whereabouts, as long as it is lawful to do so.
- 40.3 If the missing party cannot be contacted within a reasonable period the tenant or landlord will need to claim the disputed amount through the county court if they want to take things further.
- 40.4 This is not the same as one of the parties failing to respond to TDS when a dispute has been lodged. Our approach to this is explained in paragraph 62 below.

**41 How do we record the disposition of a deposit when one of the parties has disappeared?**

- 41.1 Paragraphs A18-21 of our **Prescribed Information and Suggested Clauses for tenancy agreements and Terms of Business** set out what the agent must do if the landlord or tenant cannot be contacted at the end of the tenancy.

**42 What do we do where a deposit is returned before the end of the tenancy?**

- 42.1 If the deposit is returned early, our statutory interest in it comes to an end. You must therefore record the end of

the tenancy as at the date the deposit is returned. There is clearly no dispute and this won't affect the security of the tenant or the validity of the ongoing tenancy. You should ensure that your files clearly record that the deposit has been returned early by mutual consent.

**43 What do we do where the tenancy is renewed, but the deposit is changed? Does it have to be entered as a new tenancy?**

- 43.1 No. But you will have to do the following:
  - 43.1.1 Provide an addendum to the existing tenancy agreement, specifying the changes.
  - 43.1.2 Amend the tenancy record on the TDS database to show the new deposit amount and end date.
  - 43.1.3 Download and pass on to the tenant(s) a revised tenancy registration certificate with the new data.
  - 43.1.4 Pay a charge for protecting the new Deposit, where applicable to your category of Membership.

**44 If a tenant makes an offer that is lower than the amount claimed can we deduct it from the deposit and continue to pursue the higher claim?**

- 44.1 It is better not to. By deducting the lower amount it is possible that the tenant could say their offer has been accepted. If a tenant argued that they had made an offer – and by deducting money from the deposit the landlord had accepted that offer – we would need to consider all correspondence between the parties to determine if the landlord could legally ask for more.
- 44.2 If the agent paid the landlord the offered amount and we said that as a result we could make no further award, the landlord might seek to pursue the agent on the basis that their actions had precluded pursuit of the full claim.

44.3 To avoid these complications the full sum in dispute should be sent to TDS to enable us to consider if the offer is fair.

#### **45 When can the deposit be paid out?**

45.1 Members may make payments from the deposit if **both** the landlord and the tenant agree.

45.2 Whilst any part of the deposit remains in dispute the disputed amount must not be paid to either party until directed by an adjudicator or by the courts, unless payment is made in accordance with **Rules 3.25 to 3.33 of the Rules for the Independent Resolution of Tenancy Deposit Disputes** (which apply where a landlord or tenant cannot be contacted).

## **F Disputes**

#### **46 When can a dispute be triggered?**

46.1 From 1 April 2013 the time limits for submitting a dispute to TDS for ADR are:

- **not sooner than** 10 calendar days after the date the tenancy lawfully ended; and
- **not later than** three months after the date the tenancy lawfully ended.

46.2 It is essential that the member has made their best endeavours to resolve the dispute before it is referred to TDS. They must be able to provide evidence that they have done so. We may refer the dispute back to the member if we feel that their efforts have been inadequate, as long as we are satisfied that this would not be detrimental to the tenant (or the landlord, if an agent is involved).

46.3 Formally, members have a maximum of 10 calendar days to resolve the dispute because the Housing Act makes it clear that if the tenant does not receive the deposit within 10 days of asking the member to return it (beginning with the date the request was made) the tenant is entitled to apply for ADR. If the member cannot resolve the dispute in this time, or if either the landlord or the tenant remains dissatisfied, the dispute should be referred promptly to TDS. If the parties

cannot agree within that time, any of them may claim that a dispute exists by default and apply to TDS for adjudication.

46.4 Members should also try to deal with any issues which arose during the course of the tenancy and are outstanding.

46.5 We have been asked what constitutes agreement or dispute between the landlord and the tenant. There is agreement when they decide how the deposit shall be allocated between them. There is a dispute when they cannot agree, despite the mediation of a third party e.g. the agent.

#### **47 Who can ask TDS for adjudication?**

47.1 Any of the parties: the landlord, the agent or the tenant. Unless the TDS member uses our TDS Direct product in which case only the tenant will be able to raise a tenancy deposit dispute for TDS to consider.

47.2 We will only accept disputes from the parties to the tenancy agreement, and/or the agent where one is involved. This is because we have had cases where people have brought forward a dispute, purporting to act for the tenant(s) or the landlord, but without their authority e.g. parents, guarantors, neighbours, members of a political party, etc. If anyone is to act as a representative, they must have written authority to do so. Agents generally have this authority for their landlords by way of their terms of business. The only exceptions to this would be where the disputant was precluded by illness or death – of which we would have to see documentary evidence.

47.3 If a Building Society was to repossess a property, where the deposit paid by the tenant is protected under the Scheme, as a Mortgagee it would be able to instigate a dispute. They are entitled to receive income, including rents and profits. They would effectively take over any rights and liabilities the landlord would have in relation to the deposit, including the right to dispute a claim made by a tenant for its return.

## 48 What is the procedure for asking TDS to resolve a dispute?

- 48.1 Before asking TDS to resolve the dispute through ADR a party must have made reasonable attempts to:
- resolve the dispute informally;
  - ascertain (and try to agree with the other party/ies) what is in dispute; and
  - copy to the other party/ies all relevant documents about the Dispute which they do not already have (e.g. check-out reports; quotations).
- 48.2 All applications must be made on a Dispute Application Form available via the TDS website. If no claim for ADR has been submitted within 3 months after the end of the tenancy, the parties will need to negotiate a settlement or use some other means of resolving their dispute (for example, court proceedings).
- 48.3 TDS will only accept one application for ADR per tenancy agreement. Members must make this clear to joint tenants. Once a dispute has been accepted for ADR, joint tenants may submit individual responses if they wish, but they may not lodge a separate dispute for that tenancy agreement.
- 48.4 If the parties agree that the dispute should be resolved by TDS, they must also agree to accept the ADR decision. In submitting the Dispute Application Form or Dispute Response Form, the parties agree that our adjudication is final and binding. There is no appeal against it within the rules of the Tenancy Deposit Scheme, but they are entitled to complain about the way their case was handled if they want to. (Please see our guidance document **What to do if you're unhappy with our service.**)
- 48.5 TDS will not be able to resolve a dispute if it is already the subject of court proceedings, or if the parties have reached a legally binding agreement on the allocation of the deposit. If the dispute is referred to the courts, the disputed amount must still be sent to TDS. We will pay it out according to the decision of the

court.

- 48.6 Where only part of a disputed amount is subject to court proceedings or is the subject of a binding agreement, we may (in our discretion) deal with the remainder of the dispute.
- 48.7 We may refuse ADR in cases which are, in our opinion:
- being pursued unreasonably;
  - frivolous;
  - vexatious;
  - seeking to raise again matters which:
    - (a) TDS has already adjudicated upon;
    - (b) have already been determined by another similar dispute resolution process;
    - (c) have been determined by litigation.

## 49 What steps does TDS take to resolve the dispute?

- 49.1 All parties to the dispute are able to submit and review forms and evidence through TDS's secure on-line portal before the case is referred to an adjudicator. The parts of the forms containing the parties' current contact details are not available for other parties to see, but other parts of the forms, and all supporting evidence, is. TDS will not redact (hide) evidence submitted with the forms.
- 49.2 Applicants must give a concise summary of their case on the Dispute Application Form. They can complete this online or download it from our website [www.tenancydepositscheme.com](http://www.tenancydepositscheme.com). This will tell us what the dispute is about and who is involved. We need them to complete this form because we have to copy it to the other party for their response.
- 49.3 The Dispute Application Form requires applicants to state what the claim is for (e.g. cleaning, arrears, damage) and how much is claimed. Applicants may set out a more detailed explanation of their case on additional pages if they believe it would be helpful. Applicants must send TDS a copy of all documents **relevant** to

the case (e.g. tenancy agreement; check-in report; check-out report; invoices, relevant emails).

- 49.4 We will check that we can deal with the dispute and that it falls within the time limits in our rules. We will also check that the applicant has filled in the Dispute Application Form properly. If not, we will return it to them to complete.
- 49.5 If everything is okay, we will acknowledge receipt of the dispute and will make a copy of the form (other than the personal and payment details sections) and its accompanying evidence available to the other party/ies to the dispute through TDS's secure on-line portal. We will ask the deposit holder to send us the amount in dispute – even if the dispute will be going to court. We will give the other party/ies the opportunity to submit their evidence and any documents that they wish the adjudicator to take into account. The respondent(s) will also have the opportunity to mention any other aspect of the dispute which has not been raised by the applicant.
- 49.6 A person responding to a dispute must send their Dispute Response Form and all the evidence which they wish the adjudicator to consider within 10 working days, which begins with the day after that on which we contacted them to ask for their consent to ADR.
- 49.7 If a respondent raises new aspects of the dispute, we will give the applicant the opportunity to respond to them. We will not otherwise send a copy of that response to the other party/ies and there will be no opportunity to reply unless the applicant raises new issues. As the ADR process is intended to resolve disputes quickly, each side has just the one opportunity to respond to issues raised by the other.

## **50 How will TDS adjudicate?**

- 50.1 TDS can only decide on the basis of the facts presented. It is important that if the tenant raises the dispute, the member makes a response to support their claim -

and vice versa. In addition to responding to the matters, the other party should detail in their submission any other areas of dispute or relevant facts which have not been mentioned by the party who made first sent the dispute to TDS. In this event, TDS may allow the party who raised the dispute to respond to such additional facts and matters.

- 50.2 Where we are satisfied that the case is suitable for ADR, we will send it to an adjudicator.
- 50.3 The adjudicator will consider all the evidence submitted by the parties and decide how the disputed amount is to be allocated between the parties to the dispute.
- 50.4 The onus is on the person who wishes to make a deduction from the deposit to prove (on the balance of probabilities) that they are entitled to it. The adjudicator will work on the presumption that the disputed amount is the tenant's money, unless and until the agent or the landlord demonstrates that they are entitled to it. Where possible, the parties should support any assertions they make with documentary evidence.
- 50.5 TDS will adjudicate on the basis of the documents presented and does not go looking for evidence. If the member has had to repair damage, they should supply evidence of it and receipts for the cost of repairs.
- 50.6 The adjudicator will state the reasoning behind the allocation and state the amount to be awarded to each party in a brief report. The report will usually only comment on those aspects of the evidence which are relevant and material to the allocation of the disputed deposit.
- 50.7 TDS will send a report of the adjudication, to the tenant, the landlord and the agent. At our discretion we may also send copies in confidence to the member's Approved Body, provider of bonding, or other people or organisations we consider should be informed.

## 51 How long does it take TDS to resolve the dispute?

51.1 The adjudication will normally be completed in 28 days of TDS receiving the agreement of both parties to use ADR and TDS receiving all the evidence to be considered by the adjudicator.

51.2 We make our best endeavours to complete the whole process in about 40 working days i.e. from when we first receive the dispute, through to adjudication and payment.

51.3 TDS will send a copy of the adjudicator's report to each of the parties to the Dispute by email or post. We will pay out the deposit within 10 days of the adjudication, although we will try to do so in 5 days or less. We pay the amounts awarded by cheque or bank transfer as requested.

51.4 TDS has discretion to vary the time limits for the ADR process where we consider it is in the interests of justice for us to do so. This might be for instance because it is necessary to.

- refer a dispute response back to the applicant for comment;
- seek expert advice;
- clarify evidence;
- accommodate the particular circumstances of one of the parties, for instance if they are in hospital.

## 52 Do we have to refer deposit disputes to TDS?

52.1 The parties have the choice of whether to use TDS to resolve the dispute, or to take their dispute to the courts. Both landlord and tenant have to agree if the dispute is to be referred to TDS.

52.2 When disputes are referred to TDS, the parties accept that the **adjudication is final and binding. In submitting the Dispute Application Form or Dispute Response Form, the parties agree that our adjudication is final and binding.** There is no appeal against it within the rules of the Tenancy Deposit

Scheme, but they are entitled to complain about the way their case was handled if they want to. (Please see our guidance document **What to do if you're unhappy with our service.**)

52.3 This does not remove the parties' statutory rights to seek judicial review if they wish. However, this may be expensive and time-consuming, and leave may not be granted by the court. The parties are also free to complain to TDS about how their dispute was handled.

52.4 Where TDS is made aware that a party to a dispute intends to take, or has taken, the dispute to court, TDS will assume that the party in question does not consent to ADR and will not refer the case to an adjudicator.

52.5 Whichever route is chosen, the disputed deposit must be submitted to TDS. TDS will then pay it out according to the adjudication or the decision of the court, as appropriate.

52.6 TDS will not generally deal with disputes where the amount of the deposit in dispute for a non-AST is £5,000 or more, although we may do so at our discretion if we consider it would be appropriate to the facts of the case. In such circumstances we will discuss the appropriate method of resolution with the parties and seek their written consent to proceed.

## 53 Do the Dispute Application Form and Dispute Response Form need to be signed?

53.1 The forms are designed to avoid the need for manual signature, although the parties will need to confirm that they understand and agree to the process when they submit them to us.

53.2 During the course of 2013 we will be introducing the ability for parties to a tenancy to raise their dispute with TDS, complete forms, and submit evidence electronically. The parties will need to confirm that they understand and agree to the process on-line.

## **54 What will happen to the deposit during the adjudication?**

- 54.1 In the event of a dispute the member is obliged to transfer the disputed deposit to TDS so that TDS can pay it out in accordance with the decision of the adjudicator or the Court:
- if a member applies to TDS for ADR, the member must send TDS (a) the Dispute Application Form and at the same time send TDS (b) the full deposit less any payments that have been agreed by the parties in writing and already paid to the person entitled.
  - where a party other than a member submits the Dispute Application Form, the member must send TDS (a) the Dispute Response Form and (b) so much of the deposit as TDS directs within 10 calendar days of receiving a direction from TDS to do so. They must do so whether or not they intend to contest it.
  - if TDS is notified that court proceedings relating to the deposit have been started, the member must send TDS so much of the deposit as TDS directs within 10 calendar days of receiving a direction from TDS to do so.
- 54.2 The member must send the disputed amount to TDS by cheque or send TDS evidence that it has been transferred by bank transfer. The instruction to the bank to remit the money to TDS must include a reference which enables it to be linked to the dispute in question e.g. property address, TDS case reference number. Experience has shown that failure to do so inevitably leads to confusion and delay.
- 54.3 If the member does not send us the deposit, or only sends us part of the deposit, we will continue with the adjudication regardless. Where an award is made to the tenants, they will be paid first. There may be a shortfall in the amount available to settle an award to the landlord or the agent. We would expect them to resolve this between themselves.
- 54.4 When considering the renewal or

termination of membership, TDS may take into account a member's failure to pay deposits as and when directed.

## **55 What happens if the member agent becomes insolvent?**

- 55.1 TDS will work closely with the appointed liquidators to make available any funds in the ring-fenced client account that are still on hand. Tenants and landlords should try to resolve the allocation of the deposit in the normal way at the end of the tenancy. If there is a dispute, they should submit it to TDS within the specified timescale for doing so, who will resolve it. TDS has a cash reserve so that it can continue with the adjudication and pay out accordingly, and will pay to the tenant any award to which s/he is entitled. If any award is made to the landlord, s/he will have to register as a creditor of the agent with the liquidator.
- 55.2 TDS will make a claim under its insurance policy with Norwich Union/Royal Sun Alliance. If the member agent belongs to an Approved Body which has agreed to bear some or all of this default risk, the insurers will seek reimbursement from the Approved Body. The Approved Body will then seek to recover the money from the member and undertake such disciplinary action as it considers necessary, taking into account any reports by TDS concerning the member's conduct.
- 55.3 When a Member becomes insolvent, TDS will normally take steps to terminate their membership of the Scheme. The length of time for which a deposit will be protected when membership ends, is driven by when membership ends:
- As from 6 April 2011, TDS will continue to protect registered deposits for 3 months from the date notice is served on the member, or until the landlord/agent make alternative arrangements for the protection of any deposit with another scheme, whichever occurs first. Access to alternative dispute resolution only remains available if the tenancy ends within the protection period.



- 55.4 Tenants cannot make a claim until their tenancy has ended. We will then treat a request for the deposit as a dispute in the normal way i.e. make an adjudication and allocate the deposit in accordance with it – except that we are only able to make a payment to the tenant. The landlord has to register as a creditor of the agent in respect of their share of the award. They may wish to also approach the professional body with which the agent held membership.
- 55.5 We need some evidence that the tenancy, and therefore the claim, was genuine. Ideally we should get a copy of the tenancy agreement, even if relevant clauses are missing. Failing that, we would accept a copy of the Tenancy registration certificate – but it may be that the agent didn't get round to registering the tenancy. If neither of these is available the tenant should submit other evidence of residence e.g. utility bill, Council Tax demand, copy of entry in Electoral Register, library card, etc. Alternatively, the tenant could send us a deposition sworn in front of a solicitor.
- 55.6 Before a reward can be made a tenant will be asked to provide evidence of payment of the deposit. This may be in the form of a signed receipt or a bank or credit card statement.
- 56 Why can't TDS pay any of the deposit to the landlord?**
- 56.1 Tenancy Deposit legislation and all three contracted schemes are only required to protect the tenant's interest in the deposit. As a consequence our insurance cover is arranged to protect the tenant's interest.
- 56.2 Landlords who use an agent who are a member of one of the Approved Bodies detailed in 1.3 of this document have the benefit of the client money protection schemes operated by these bodies. These protect all clients' money up to certain limits against misappropriation by their members. Landlords will be able to seek reimbursement from them.
- Details can be found on the websites of the organisations concerned.
- 57 What disputes will TDS consider?**
- 57.1 TDS will not consider disputes which relate to anything other than the return of a tenant's deposit at the end of a tenancy.
- 57.2 The TDS adjudication will relate only to apportionment of the deposit. TDS has no power to award an amount higher than the amount of the deposit held and has no power to award the payment of costs by either party. Accordingly, each party will bear their own costs (if any) in connection with resolution of the dispute.
- 57.3 If the sum claimed is in excess of the deposit (or the available balance of the deposit after agreed deductions) the adjudicator will deal with the different aspects of the claim in the order set out in the tenancy agreement, where one has been specified. This may simply be the order in which the tenancy agreement lists the purposes for which the deposit may be used. If the landlord wishes to pursue the tenant for any money over and above the deposit (or remaining balance after agreed deductions), they may need to seek independent advice about what action they could take, as TDS is unable to deal with such matters.
- 57.4 The adjudicator will not set off claims, or consider counterclaims, made by the tenant(s) or a relevant person. If a tenant or relevant person believes they have a claim against the landlord or the agent, they should seek advice from an appropriate source and may prefer to take court proceedings, where such matters could be considered.
- 57.5 TDS will not arrange ADR for disputes between tenants. The adjudicator will only allocate the deposit between the landlord and the tenants (and sometimes the agent, where they may also have a claim against the Deposit).
- 57.6 **There is no minimum amount in dispute below which TDS will refuse to adjudicate.** However, if we consider that the sum concerned is so small and/

or the issues straightforward, we may return it to the member to resolve without our involvement.

## 58 What evidence will TDS need?

58.1 **Please note that it is not for us to go looking for evidence.** Adjudications are made on the basis of the material sent to us. It is important that you send us the information that you feel will support your case. Normally we won't ask the parties for more information. TDS will normally only seek further evidence if it is clear that particular evidence critical to ADR exists, was intended to be submitted, and was omitted in error.

58.2 The parties do not attend any hearing and the adjudicator will not visit the property. All the evidence which a party to a dispute wishes to be considered by the adjudicator should be submitted with their case. Parties should not assume that the adjudicator will raise any enquiries with them or ask for any evidence they may have omitted. The burden of proof will be on the landlord to justify any claim to the deposit.

58.3 For example, it is not sufficient to say "I know the wall wasn't damaged at the start of the tenancy, but it is now" without some evidence to back it up. Under those circumstances, we are likely to return the disputed deposit to the tenant. We will not be able to take into account anything you send us once the case has been despatched to an adjudicator.

58.4 The Dispute Application and Dispute Response Forms include a checklist of the sort of evidence that can be helpful to the adjudicator. The parties should send with their form as many of the following documents as possible and relevant:

- a copy of the tenancy agreement;
- a copy of the check-in inventory and schedule of condition if they were included in the initial documents;
- receipts for any work done following the check-out; and, if available, estimates for intended work;

- a copy of the check-out inventory and schedule of condition;
- a statement of the rent account.

58.5 You must let us have all the evidence you consider is necessary to support your case. If that is not possible, please tell us why on your **Dispute Application Form** or **Dispute Response Form** as appropriate. The onus is for the party making a claim to the tenant's deposit to support their proposed deductions with evidence, or their claim will fail.

58.6 Members should note that we may reject cases where the parties submit large quantities of information that is not relevant to the case (e.g. duplicates of documents, copies of all emails exchanged between the parties, whether relating to the dispute or not) or where the Dispute Application and Response Forms submitted are incoherent, incomplete or which appear to TDS to be an abuse of the ADR process.

58.7 The parties to the dispute will not be able to send us extra material after we have sent the case to an adjudicator. Nor will we be able to accept new evidence after the adjudication is finished.

58.8 We cannot accept physical evidence such as damaged items. This type of evidence does not compare an item's condition between the start and end of a tenancy, in the same way that check-in and check-out inventories can do. However, you may wish to send us a professional report from a suitably qualified person who can give an opinion to support your claim.

58.9 Both parties may also send any other evidence, such as photographs, videos, receipts and correspondence, to support their case. If you send photographs, videos or digital recordings you must sign them, give the date they were taken and say which part of the dispute they relate to.

58.10 Please consider the guidance given in **Use of photographs, videos and DVDs**. Photographs need to be of a good

quality and clearly show the size, nature, extent, location, etc. of the dilapidation they aim to depict.

58.11 **If a claim is made but is not defended it will not necessarily be upheld automatically.**

The adjudication decision is made purely on the evidence presented. If one party does not respond, then this will be taken into account, but is not grounds for a default award.

58.12 Agents do not need to get the disagreement in writing from the landlord or tenant in order for them to try to resolve the dispute. However, it is useful to get them to write it down because it will help them understand the merits of their case. TDS does need it in writing, however. We will always ask the respondent for their side of the story and we have to be able to copy to them what the applicant has put down.

**59 Do both parties need to consent to ADR?**

59.1 The parties are not obliged to use the ADR process. The person who applies to TDS for ADR must confirm on the Dispute Application Form that they consent to the dispute being resolved through the ADR process.

59.2 TDS will give the other party/ies to the dispute the opportunity to respond to the issues raised on the Dispute Application Form. If a person wishes to make a response, they must confirm on the Dispute Response Form that they consent to the dispute being resolved through the ADR process.

59.3 If a party indicates that they intend to take the dispute to court, TDS will assume that party does not consent to use ADR.

**60 So what happens if one of the parties doesn't respond to the dispute?**

60.1 As long as TDS is satisfied that the tenant or landlord received TDS's request for consent, the parties will be deemed to have given consent if s/he does not object

to ADR in writing within 10 working days. The period of 10 working days begins with the day after that on which TDS contacted the landlord to ask for consent. If TDS is not able to satisfy itself that the landlord received TDS's request for consent to ADR, TDS cannot refer the case for ADR. The tenant is likely to have to go to court if they want to take things further.

60.2 In practical terms this means we are able to assume that a landlord or tenant who does not respond to a dispute raised with TDS consents to ADR.

60.3 Where we do adjudicate in the absence of a parties' response, the claim will not automatically be upheld. We would still need to look at whether the evidence supported the claims made.

**61 Dealing with joint tenants**

61.1 If any one joint tenant objects to using ADR, by informing TDS in writing before the case is referred to the adjudicator, the Dispute cannot be resolved through TDS. One of the parties will have to start court proceedings if they cannot reach agreement and want to take things further.

**62 How much does an adjudication cost?**

62.1 If an AST is covered by the annual membership subscription and Deposit Protection Charges paid by Members, there is no charge for adjudication.

62.2 For disputes involving non-ASTS, TDSRA ceased to operate from 1st October 2010. We consider it more appropriate to focus our resources on the resolution of disputes that fall under TDP legislation. However, for the benefit of our Members, we may agree to resolve any disputes over the allocation of deposits relating to non-ASTs created or renewed after 1st October 2010, by agreement.

**63 How does TDS deal with offers to settle a dispute?**

63.1 TDS will assume that the parties have stopped negotiating about the dispute when it is submitted to TDS, unless there is clear evidence to the contrary.

- 63.2 Where TDS is not aware of the existence of a binding agreement about the apportionment of the deposit, TDS will pay the award decided by the adjudicator (recovering any shortfall from the member where applicable). It will then be for the parties to enforce the terms of any separate agreement they had previously reached about the deposit. TDS will not accept responsibility for allocating the deposit in accordance with an agreement that the parties have reached between themselves, if we were not made aware of that agreement before the adjudicator started to review the case.
- 63.3 We will take into account offers that we know have been determined before the adjudicator starts to review the case. If the offer has been accepted the parties will effectively have agreed how some of the deposit should be allocated before the dispute has been submitted to us. TDS will then only adjudicate the part of the deposit that remains in dispute. Where an offer has been rejected or withdrawn before the adjudicator we will consider whether this has any bearing on the dispute. If the parties have reached an agreement that is not legally binding, the adjudicator may take account of that agreement, but is not bound to follow it.
- 63.4 As far as the law is concerned, if you have made an offer to settle it generally remains on the table until either the other party accepts or rejects it; or you withdraw it. It is your responsibility when making an offer to make your intentions clear to the other party to the dispute, including any time limits you wish to set.
- 63.5 Sometimes parties continue to negotiate, or leave offers open, after a dispute has been submitted to TDS for dispute resolution. We're happy if they want to carry on their negotiations, but they must tell us so we that can suspend the adjudication until they have been concluded. We can't take into account the shifting state of negotiations or offers to which there has been no response. We have to adjudicate on the basis of the evidence that the parties submit. This will include taking a view about whether the person making an offer did so in an acknowledgement of liability, or to bring about a settlement. The former may overcome the absence of other supporting evidence – a bit like a confession. The latter is more of a negotiating ploy and would usually be discounted.
- 63.6 The adjudicator may take into account any offers made by either party unless clearly stated to be made WITHOUT PREJUDICE. Once an award has been made, the award cannot be challenged by one of the disputants purely on the grounds that the other party was previously prepared to make a higher offer than the amount that was awarded.
- 64 Who are the adjudicators?**
- 64.1 TDS' adjudicators are trained, experienced and have the skills necessary to make fair and reasoned decisions. They operate in accordance with TDS' Adjudicators' Code of Conduct. TDS encourages a consistent approach to certain commonly recurring types of dispute. However, the facts in cases may differ and Disputes may be more complex than the parties themselves realise.
- 64.2 The adjudicators all have extensive experience of the PRS and/or ADR, and have been given further training specific to TDS. They come from a range of relevant backgrounds: lawyers, inventory clerks, rent officers, surveyors, letting agents and property managers.
- 64.3 TDS' adjudicators are also at least Associate Members of the Chartered Institute of Arbitrators (ACI Arb) - this means that they have been able to demonstrate a professional commitment to the encouragement and promotion of private dispute resolution, together with demonstrable experience and a proven track record at least equal to CI Arb's entry qualification examinations.
- 65 Can a dispute be settled without adjudication?**
- 65.1 If at any time after a notification of a dispute is referred to TDS and the parties

reach an agreed settlement of the dispute, they may jointly request, in writing, that the dispute is withdrawn and that TDS ceases their adjudication of it. As an example, we received the Dispute Application Form and a cheque for the disputed amount from an agent. Before we processed it, the agent called to say that the dispute had been settled and could we please refund the money to him. We were happy to do so, but only after we had received the written agreement of the other parties.

65.2 We may in our discretion stop an adjudication and make a determination on the basis of the settlement agreed between the parties.

## **66 Can we send in documentation “Without Prejudice”?**

66.1 We have noticed that there is a tendency for parties to a dispute to head correspondence “Without Prejudice”. These documents have been sent in with the other dispute papers and it could be assumed the parties want us to take them into consideration.

66.2 However, strictly speaking, if a document is headed “Without Prejudice”, it should be disregarded and treated as “unseen”.

66.3 Our advice to disputants is therefore that the term is not used at all or a declaration waiving the right to “Without Prejudice” is submitted with the papers. If a waiver is not submitted, we will have to apply the legal interpretation and exclude the papers as evidence.

## **67 Will TDS award include VAT?**

67.1 TDS make awards on the basis of the claims received. These should be for the full amount paid, or expected to be paid i.e. claims should be inclusive of VAT if it is relevant.

## **68 How does TDS deal with a case where there is no dispute over damage/condition but over the amount being claimed?**

68.1 This will depend on the circumstances of the case. For instance, a tenant has replaced a broken lampshade with

another that is not identical to the old one, and the landlord claims £10.00 to rectify matters. If there was no description of the lampshade in the check-in and check-out report, we would probably take the pragmatic view that the landlord has been left with a working lampshade and make no further award. In order to make an award to the landlord, we would want to see evidence from him/her to show that the lampshade provided was not adequate – for example, a particular type of lampshade was described at check-in which enables us to conclude that the replacement offered is not ‘like for like’; or cases where, for instance, the original lampshade was part of a matching set.

68.2 We suggest that members present evidence to support the cost claimed, such as in the form of invoices/receipts or quotations/estimates. The absence of these will not necessarily prove fatal to a landlord’s claim. In the example given, we would look to the description of the original item given in the inventory/check-in report, so that we could quantify the price of a similar replacement from typical high street retailers. We will generally refer to information publicly available on the internet when verifying costs claimed. If we have insufficient evidence to identify the cost or quality of the original lampshade, then we will generally base our award on the cost of an average, ‘mid-range’ replacement item.

68.3 When awarding the cost of a replacement item, we will consider whether the landlord is seeking betterment. S/he cannot expect to be placed in a better position at the end of the tenancy than he/she would otherwise have been in the absence of the loss or damage concerned. Clearly for low cost items the issue is less significant than for other more expensive items; and where the costs involved are modest, betterment will not always feature in our calculations. However, we will want to see some evidence about the age, cost and quality when new of the original item so that we can make the appropriate calculation.

**69 Does the amount being claimed by the landlord actually have to have been spent?**

69.1 A landlord claims the cost of redecoration due to damage caused by a tenant, but does not get this work done before the next tenant moves in; or – where the tenant damages a carpet but not sufficiently to warrant immediate replacement - the landlord wants a contribution towards the eventual cost of replacement but obviously has no invoice.

69.2 Our approach here is firstly to identify whether the landlord has suffered a loss, and then to place a value on it. In doing so, an assessment of any allowance to be made for betterment will often be relevant, and we will look to see how old the carpets were, or when the decoration was last renewed. Where a loss can be substantiated, then the normal approach of making an award for the reasonable costs of remedying the position will apply. We are essentially compensating the landlord for the loss suffered, and it is a matter for him/her to decide when/how they choose to use that money.

69.3 Tenants may often claim that a landlord's loss is reduced or non-existent where the property is being marketed for sale or has already been sold. The fact that a property is being sold will always be of interest as the landlord must show loss in order to claim from the deposit. If the property is sold at full value then there can, in principle, be no loss. However there may be circumstances where it would be reasonable to acknowledge that the landlord will want to redecorate and repair in order to present the property in a sound and marketable condition to achieve the highest price – unless the evidence clearly suggests this was not the case.

69.4 Each case will depend on its particular circumstances. For example:

69.4.1 a landlord charging the tenant for the removal of a satellite dish where the property is being sold may not be successful in his claim.

It could be considered unlikely that the landlord will remove the dish and more importantly that it is unlikely its presence will affect the market value.

69.4.2 where a tenant has redecorated without permission, we are unlikely to make an award where the landlord is unable to show a need to incur redecoration costs or a loss on the value of the property.

**70 If the landlord intends to sell the property, will this affect TDS's award?**

70.1 If a comparison of the check-in and check-out reports demonstrates that the property's condition had deteriorated during the tenancy, then the landlord would be entitled to compensation. We are unable to quantify an equity reduction as a result of any damage. It is worth pointing out that, in any event, equity reduction limits the level of damages that can be claimed, rather than forming the basis of assessment.

70.2 Nor are we in a position to know if a property was definitely sold at the end of a tenancy or at what price. It is not for us to go looking for evidence, but consultation of the Land Registry would not necessarily help in any case. It could build a delay into our procedures, and prices given on the register would only be a guideline. People sometimes sell at to friends, relations and their companies when it suits them, at below market value.

**71 What is TDS' approach to fees charged by agents for arranging works required at the end of a tenancy?**

71.1 Many agents charge fees because of a tenant's breach of their obligations under the tenancy agreement. This is perfectly acceptable and we award such fees if the tenancy agreement allows for them as a deduction from the deposit. However, in some instances the charge can appear disproportionate for the amount of work required (for instance it could be referred to in the tenancy agreement but

expressed in percentage terms). Whilst TDS does not get into the territory of unfair contract terms, we do have to make awards on what we believe is fair and reasonable. If fees appear excessive, the ICE will temper his award accordingly.

## 72 What should agents do where the landlord is relying on them to prepare the case on her/his behalf?

- 72.1 Agents owe landlords a duty of care if submitting a Dispute Application Form on a landlord's behalf. This includes:
- 72.1.1 explaining to a landlord before letting what holding the deposit as stakeholder involves, where the tenancy is not an AST, and ensuring that landlords receive appropriate information about the appropriate tenancy deposit protection scheme where the tenancy is an AST;
  - 72.1.2 where the claim exceeds the amount of the deposit, advising the landlord when court proceedings may be more appropriate than adjudication or advising the landlord to take legal advice before making his decision;
  - 72.1.3 making it clear to the landlord that ultimate responsibility for evidence is his, and taking time to agree with the landlord what documents are needed to support the case (some judgement on the agent's part will be required);
  - 72.1.4 for their own protection, obtaining confirmation from the landlord that there is nothing else that he would wish to submit;
  - 72.1.5 keeping an accurate record of what documents were sent to TDS;
  - 72.1.6 making sure that landlords know where they can get a copy of TDS' Scheme Rules or providing a copy of them before the landlord agrees to adjudication.
- 72.2 There would be no objection, in principle, for an agent to charge a reasonable

amount for handling a landlord's application for adjudication – but agents should tell landlords when accepting their initial instructions that this charge will apply and detail this in their terms of business.

## G After the adjudication

### 73 What will happen to the deposit once TDS has adjudicated?

- 73.1 Where TDS finds wholly or partly in favour of the tenant, TDS will seek to make payment within 5 working days of the adjudicator's decision, **normally by cheque by post** as specified by the parties. The tenant must provide an address to which the adjudication and notification of payment can be sent.
- 73.2 The cheques must be cashed or deposited (i.e. paid into their own or another account by the person to whom the cheque is made out) within six months of the date on the cheque. If it is not, the money will be transferred to a separate bank account of TDS and the interest earned will be used as a contribution to defray the costs of TDS. If the person to whom the money was awarded subsequently seeks to claim it they will need to contact TDS to obtain a new cheque and may be required to provide additional evidence of their identity. If the money is unclaimed after six years it will be used towards the costs of TDS or otherwise as the Board may in its discretion determine.
- 73.3 **Payments can be made by bank transfer**, but this may take longer if it is necessary to set up a bank mandate. We will also have to make a charge to cover the bank's fees and our own additional administration costs.
- 73.4 **Payments in cash** can only be made in exceptional circumstances and will require special arrangements, which may take longer.
- 73.5 In the event that TDS awards all or part of the deposit to the landlord, **the member agent can request TDS to send it direct to the landlord or to return it to**

**them.** If they choose the latter, it is the member agent's responsibility to pass it on to the landlord and this can only be done where the landlord consents to this arrangement.

73.6 Can the agent ask for part of an award to the landlord to be remitted to him to cover any outlays he has made? Yes – providing the landlord specifically authorises it for a given dispute or the prospect of it is included in the terms of business signed by the landlord.

73.7 There is no limit in the Act as to what TDS can award, but it will never exceed the amount of the deposit.

#### **74 How does TDS deal with joint tenancies?**

74.1 The tenancy agreement should stipulate to whom the deposit should be paid at the end of the tenancy. The agent should ensure that a fresh tenancy agreement is issued, incorporating any change to this stipulation, when tenants are replaced.

74.2 Where it is not specified in the tenancy agreement, and TDS makes an award to the tenants, **TDS will allocate it equally to each of those named in the tenancy agreement.** He will send each of them the appropriate amount separately, by cheque or bank transfer as requested.

74.3 The only **exception** to this is where the joint tenants authorise a different allocation of the award, in writing and signed by all of them. This applies even where it is clear that the tenants are husband and wife – we cannot assume that they have a joint account; or that they want the money paid into it.

74.4 It is the responsibility of joint tenants to inform the agent if one of them moves out, so that the agent can modify the tenancy agreement accordingly. It is advisable for agents to tell them this when they sign the original tenancy agreement, and explain that their failure to do so could jeopardise the return of the deposit.

74.5 For further information on what to do

with a change of tenant(s), please refer to our guidance document **Guidance on a change of sharers mid tenancy.**

#### **75 How does TDS deal with payments when one of the recipients has died?**

75.1 If TDS is advised that someone eligible to receive some or all of the disputed deposit has died, there will inevitably be some delay whilst we establish who is entitled to inherit it.

75.2 We will need to see the original Death Certificate or a copy made from it. We will also have to request a copy of the Grant of Probate or Letters of Administration where these have been issued with the Court Seal impressed. If these have been made, the payment will have to be to the Executor or Administrator named in the Probate/ Letters of Administration. However, if we can establish that there are no proceedings taking place through the Family Court to obtain a Grant of Probate etc. we will be able to pay the surviving spouse.

75.3 All documents will be photocopied for the TDS file and the originals sent back to the sender by recorded delivery with a TDS stamp on the reverse to show they have been seen by us.

#### **76 Is a TDS adjudication legally binding?**

76.1 Yes. If the parties agree that the dispute should be resolved by TDS, they must also agree to accept the ADR decision. **In submitting the Dispute Application Form or Dispute Response Form, the parties agree that our adjudication is final and binding.** There is no appeal against it within the rules of the Tenancy Deposit Scheme, but they are entitled to complain about the way their case was handled if they want to. (Please see our guidance document **What to do if you're unhappy with our service**).

76.2 This does not remove the statutory rights of the parties to ask the court to set his adjudication aside. In doing so, one or both parties may find themselves exposed to a costs liability.



**77 What should the parties do if they have any questions about the adjudication or the repayment?**

77.1 They must contact TDS, not their Approved Body or other membership organisation, who will answer or forward their queries as appropriate.

## H Changes to the business

**78 Will we be charged for new offices/ branches that we open during the year?**

78.1 No, but please let us know the details of the branch by telephoning the customer contact centre or by emailing the details to [deposits@tenancydepositscheme.com](mailto:deposits@tenancydepositscheme.com)

**79 Will we get a refund for offices/ branches that we close during the year?**

79.1 No, but please let us know the details of the branch by telephoning the customer contact centre or by emailing the details to [deposits@tenancydepositscheme.com](mailto:deposits@tenancydepositscheme.com)

**80 What will happen if an agent sells all or part of their business?**

80.1 Members should refer to the section dealing with change in the ownership or management of the property in the Tenancy Deposit Scheme for Lettings Agents and Corporate Landlords Membership Rules.

**81 How do we transfer a branch and its deposits from one member firm to another?**

81.1 When you log in as a member, use the search and display box to find the branch/ landlord. Using the search results select the branch. There will be a link at the top saying 'click here to move this branch'. You will then be redirected to a page where you can search for the destination and move the branch.

**82 What are the implications for deposit protection when one agent acquires another?**

82.1 A transfer between agents does not constitute a new AST, and therefore a deposit taken by the previous agent prior to 6th April 2007 does not need to be protected. If an agent sells his book to another agent it's a commercial decision and nothing to do with the tenancy or the tenant.

82.2 The only exception to this is where the tenancy agreement carries the name of the agent. If there is a new agent, the tenancy agreement would need to be changed by addendum or replacement. This would constitute a new or replacement tenancy and the deposit would need to be protected and the appropriate steps taken to comply with the tenancy deposit protection requirements.

**83 What will we be charged if we cease to be a member of a professional, accreditation or trade body during the year?**

83.1 We will charge you an additional amount to reflect your new status. For instance:

83.1.1 ARLA Propertymark withdraws the membership of ABC Lettings on 25 May. They are still members of Safeagent. Their subscription therefore increases by the difference between the two categories of membership.

83.1.2 Safeagent terminates the membership of the Little Red Riding Hood Estate Agency on 10 October. They are now unaffiliated. Little Red Riding Hood Estates should speak to the Operations Team to see whether there are other opportunities to accommodate them in Membership.

83.1.3 Please see our website for the current subscription rates.

**84 If a member of TDS has paid the full Safeagent fee and then, during the membership year, becomes a member of ARLA Propertymark do they get a**

**pro-rata refund on their membership fee?**

- 84.1 No. It will not be possible to give them the benefit of their membership of the approved body concerned until the following year.

**85 Managing properties in receivership**

- 85.1 Agents are frequently appointed to manage property which is in receivership. The exowner may not be co-operative, and both documentation and the deposit may have gone missing.
- 85.2 Make an inventory and schedule of condition when you take over a property without them, and accept that you will have to write-off any dilapidations which may have occurred before then. If you are unwilling or unable to do an inventory you will not be able to justify retaining the deposit on the grounds that the tenant has left the property in a worse state than they found it.

## NOTES

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