Your TDS guide to:

A Guide to the Legislation

Steve Harriott
The Dispute Service Ltd

Third Edition, February 2020

TDS
Tenancy Deposit Scheme
Insured Custodial

Contents

The information in this guide is given in good faith but landlords and agents may wish to take their own legal advice on the matters dealt with in this guide.

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About the author

Steve Harriott is the Chief Executive of The Dispute Service Ltd, a post he has occupied since September 2010. He has written widely on tenancy deposit protection and produces a regular blog. In addition to his work in the area of deposit protection he has also co-written a leading textbook on social housing.

About this guide

This guide has been produced to give an overview of the legislation on tenancy deposit protection in England and Wales. It also gives details of significant court cases that have clarified the law on deposit protection.

About the Tenancy Deposit Scheme

The Tenancy Deposit Scheme (TDS) is operated by The Dispute Service Ltd.

TDS is an industry owned and government approved tenancy deposit protection scheme for the residential lettings market. We are not for profit and do not have any shareholders. This means that any surpluses can be put back into the business to improve the service for our customers.

We support our letting agents and landlord customers to meet their legal obligations to protect tenancy deposits and allow them to retain control of the deposits so they can better manage the end of tenancy process. Where tenancies end in dispute we can provide a free and high quality adjudication service.

This enables our customers to focus on their core business of letting homes successfully, safe in the knowledge that deposits are properly protected and disputes can be handled. Through our expert advice, education and training services we help our customers minimise disputes, keep their tenants happy and drive down the cost of deposit protection.

Introduction

This is an updated guide to the legislation on tenancy deposit protection in England and Wales. It is aimed at landlords, lettings agents and tenants and gives both a broad overview of the legislation and details of the more important court cases in relation to tenancy deposits.

The core legislation is to be found in the Housing Act 2004 sections 212-215 and Schedule 10, as amended by the Localism Act 2011, Deregulation Act 2015, Housing and Planning Act 2016 and the Tenant Fees Act 2019. Related legislation is also to be found in a number of Statutory Instruments.

Scotland introduced its own version of tenancy deposit protection in July 2012 and there are now three custodial schemes operating, of which the largest is SafeDeposits Scotland Ltd (a subsidiary of The Dispute Service Ltd).

In Northern Ireland new tenancy deposit regulations came into force in April 2013 and there are three schemes running (two of which offer both the insurance and custodial scheme and one which simply offers the custodial scheme). TDS Northern Ireland Ltd (a subsidiary of The Dispute Service Ltd) now has 85% of the market in Northern Ireland.

Tenancy Deposit Legislation in England and Wales

Housing Act 2004 sections 212-215, Schedule 10
Housing Act 2004 (Commencement No. 7) (England) Order 2007
Housing Act 2004 (Commencement No. 4) (Wales) Order 2007 Housing (Tenancy Deposit Schemes) Order 2007
Housing (Tenancy Deposits) (Prescribed Information) Order 2007
Assured Tenancies (Amendment) (England) Order 2010
Assured Tenancies (Amendment of Rental Threshold) (Wales) Order 2011
Localism Act 2011 Section 184
The Localism Act 2011 (Commencement No. 4 and Transitional, Transitory and Saving Provisions) Order 2012
Deregulation Act 2015
Housing and Planning Act 2016
Tenant Fees Act 2019

Landlords and their agents

The legislation uses the term ‘landlord’ throughout, but section 212(9)(a) of the Housing Act 2004 makes it clear that where a landlord uses an agent to retain and manage the deposit then the legal obligations apply also to the agent.

Why was tenancy deposit protection legislation introduced?

The Housing Act 2004 legislation was introduced because of a widespread concern that landlords were unfairly withholding their tenants’ deposits. The Act was designed to achieve two objectives:

- ensure that tenancy deposits were protected in a government authorised scheme; and
- give tenants access to a free dispute resolution service if they were unable to agree with their landlord on how the deposit should be allocated at the end of the tenancy.

The 2004 Act had two core requirements:

1. That deposits should be protected in an authorised scheme within 30 days of receipt (increased **from 14 days** in April 2012); and
2. That tenants should be provided with Prescribed Information about where their deposit was protected and how the tenancy deposit protection scheme operated. This Prescribed Information had to be provided by the landlord within 30 days of the deposit being received (increased **from 14 days** in April 2012).

From 6 April 2007 these new requirements came into force. In 2020 there are now three tenancy deposit schemes offering both custodial and insurance backed protection.

Custodial scheme

With a custodial scheme, the landlord pays the deposit to the scheme, which then holds the tenant's deposit and keeps it during the lifetime of the tenancy. The scheme makes no charge to the landlord, and it is expected to fund itself through the interest it earns on the deposits it holds. At the end of the tenancy the custodial scheme will return the deposit to the parties in accordance with their agreement. In the event there is no such agreement the scheme will adjudicate on any proposed deductions by the landlord and will pay the deposit to the parties in accordance with the adjudication.

Insurance backed scheme

In an insurance backed scheme the landlord or lettings agent registers the deposit with a scheme, paying the scheme a fee to protect it, but retains the tenancy deposit during the lifetime of the tenancy. If there is a dispute about any deductions at the end of the tenancy, the scheme can then adjudicate on that dispute and will ask the landlord or lettings agent to send the disputed deposit to the scheme. The scheme carries insurance which will give the tenant protection against loss of a deposit due to bankruptcy of the deposit holder or a failure by the landlord or lettings agent to pay the disputed amount of the deposit to the scheme or the tenant.

Which tenancy deposits need to be protected?

The tenancy deposit protection legislation applies to all new tenancy deposits taken on or after 6 April 2007 for qualifying assured shorthold tenancies. Schedule 1 to the Housing Act 1988 (which identifies tenancies which cannot be assured tenancies) originally specified that in England and Wales a tenancy could not be an assured shorthold tenancy if its annual rent was over £25,000.

The Assured Tenancies (Amendment) (England) Order 2010 increased this annual rent threshold to tenancies in England to £100,000 from 1 October 2010. This means that from that date any deposit taken for an assured shorthold tenancy with a rent of up to £100,000 a year comes within the scope of the tenancy deposit legislation.

In Wales the **Assured Tenancies (Amendment of Rental Threshold) (Wales) Order 2011** similarly increased the threshold for a tenancy to be an assured shorthold tenancy to £100,000 a year. This took effect from 1 December 2011.

So, in England and Wales if a deposit is taken on an assured shorthold tenancy with an annual rent of up to £100,000 it must be protected in a tenancy deposit scheme.

Deposits taken on or after 6 April 2007 for assured shorthold tenancies with an annual rent threshold of up to £100,000 must be protected.

Deposits taken before 6 April 2007

The Act was originally not thought to apply to deposits which had been taken on qualifying assured shorthold tenancies before 6 April 2007 and which subsequently became a statutory periodic tenancy on or after 6 April 2007. However, in June 2013 the Court of Appeal handed down a judgment in Superstrike Ltd v Marino Rodrigues. This related to a tenancy deposit taken on a fixed term assured shorthold tenancy before 6 April 2007. The tenancy subsequently became a statutory periodic tenancy after 6 April 2007. The Court of Appeal ruled that a statutory periodic tenancy is a **new** tenancy and as such the deposit should have been protected when that new statutory periodic tenancy was created. Similarly, a deposit taken before 6 April 2007 on a fixed term tenancy comes within the scope of the tenancy deposit legislation if the tenancy is subsequently renewed on or after 6 April 2007. This case is discussed in more detail later in this guide. However the Deregulation Act 2015 introduced amendments to the Housing Act 2004 to address the judgment in Superstrike.

Housing Act 2004

Section 212: Tenancy Deposit Schemes

This section looks at the core legislation in more detail:

- the left hand column sets out the legislation as amended;
- the right hand column gives a commentary.

Section 212: Key points

The Ministry of Housing, Communities & Local Government (MHCLG) is given powers to establish tenancy deposit schemes to operate in England and Wales.

Section 212	COMMENTARY
1. The appropriate national authority must make arrangements for securing that one or more tenancy deposit schemes are available for the purpose of safeguarding tenancy deposits paid in connection with shorthold tenancies.	***The appropriate national authority is the Ministry of Housing, Communities and Local Government and the Welsh Government. In practice MHCLG has been the lead authority in establishing and monitoring the tenancy deposit legislation.***
2. For the purposes of this Chapter a "tenancy deposit scheme" is a scheme which (a) is made for the purpose of safeguarding tenancy deposits paid in connection with shorthold tenancies and facilitating the resolution of disputes arising in connection with such deposits, and (b) complies with the requirements of Schedule 10.	***A tenancy deposit protection scheme exists to protect tenancy deposits paid in relation to assured shorthold tenancies and to provide a free dispute resolution service. Schemes may either be custodial (where the scheme holds the deposit) or insurance backed (where the landlord/ agent registers the deposit and the scheme is insured to ensure the tenant will get back the deposit that is due to them). Schedule 10 sets out the Government requirements for running the scheme.***

Section 212	COMMENTARY
3. Arrangements under subsection (1) must be arrangements made with any body or person under which the body or person ("the Scheme administrator") undertakes to establish and maintain a tenancy deposit scheme of a description specified in the arrangements.	***This makes it clear that the scheme administrator is the person who operates the scheme.***
4. The appropriate national authority may - (a) give financial assistance to the scheme administrator; (b) make payments to the scheme administrator (otherwise than as financial assistance) in pursuance of arrangements under subsection (1).	***The Act permits MHCLG to offer financial assistance to a scheme (which it did in 2010 to the custodial scheme). TDS has not received any financial assistance from MHCLG.***
5. The appropriate national authority may, in such manner and on such terms as it thinks fit, guarantee the discharge of any financial obligation incurred by the scheme administrator in connection with arrangements under subsection (1).	
6. Arrangements under subsection (1) must require the scheme administrator to give the appropriate national authority, in such manner and at such times as it may specify, such information and facilities for obtaining information as it may specify. (a) For further provision about what must be included in the arrangements see section 212A.	***This enables MHCLG to require scheme administrators to provide it with information it needs to oversee the operation of the tenancy deposit schemes.***
7. The appropriate national authority may make regulations conferring or imposing (a) on scheme administrators, or (b) on scheme administrators of any description specified in the regulations, such powers or duties in connection with arrangements under subsection (1) as are so specified.	***MHCLG has set out its requirements in the service concession agreements which each scheme administrator has entered into.***

Section 212	COMMENTARY
8. In this Chapter -	***This section sets out the definitions of key terms in the legislation.***
“authorised”, in relation to a tenancy deposit scheme, means that the scheme is in force in accordance with arrangements under subsection (1);	***Authorised schemes are those approved by MHCLG and which have entered into a service concession agreement with MHCLG.***
“custodial scheme” and “insurance scheme” have the meaning given by paragraph 1(2) and (3) of Schedule 10);	***The custodial scheme holds the deposit during the tenancy. The insurance scheme will hold insurance to ensure that tenants can be paid back the share of the deposit owing to them at the end of the tenancy if the deposit holder fails to do so.***
“money” means money in the form of cash or otherwise;	***This defines “money”.***
“shorthold tenancy” means an assured shorthold tenancy within the meaning of Chapter 2 of Part 1 of the Housing Act 1988 (c. 50);	***This defines a shorthold tenancy.***
“tenancy deposit”, in relation to a shorthold tenancy, means any money intended to be held (by the landlord or otherwise) as security for– (a) the performance of any obligations of the tenant, or (b) the discharge of any liability of his, arising under or in connection with the tenancy.	***This defines a tenancy deposit.***
9. In this Chapter - (a) references to a landlord or landlords in relation to any shorthold tenancy or tenancies include references to a person or persons acting on his or their behalf in relation to the tenancy or tenancies, and (b) references to a tenancy deposit being held in accordance with a scheme include, in the case of a custodial scheme, references to an amount representing the deposit being held in accordance with the scheme.	***This section makes it clear that where there is a reference to a landlord it will also include agents acting on the landlord’s behalf. However this does not apply in relation to the Prescribed Information Order as a result of amendments in the Deregulation Act 2015.***

Section 212A	COMMENTARY
212A Provision of information to local authorities 1. Arrangements under section 212(1) made by the Secretary of State must require the scheme administrator— (a) to give a local housing authority in England any specified information that they request, or (b) to provide facilities for the sharing of specified information with a local housing authority in England. 2. In subsection (1) “specified information” means information, of a description specified in the arrangements, that relates to a tenancy of premises in the local housing authority’s area. 3. Arrangements made by virtue of this section may make the requirement to provide information or facilities to a local housing authority conditional on the payment of a fee. 4. Arrangements made by virtue of this section may include supplementary provision, for example about— (a) the form or manner in which any information is to be provided, (b) the time or times at which it is to be provided, and (c) the notification of anyone to whom the information relates. 5. Information obtained by a local housing authority by virtue of this section may be used only— (a) for a purpose connected with the exercise of the authority’s functions under any of Parts 1 to 4 in relation to any premises, or (b) for the purpose of investigating whether an offence has been committed under any of those Parts in relation to any premises. 6. Information obtained by a local housing authority by virtue of this section may be supplied to a person providing services to the authority for a purpose listed in subsection (5). 7. The Secretary of State may by regulations amend the list of purposes in subsection (5).	***This section was added through the 2016 Housing and Planning Act and requires the tenancy deposit schemes to provide specified information to a local housing authority in England.***

Housing Act 2004

Section 213: Requirements relating to tenancy deposits

Section 213: Key points

The deposit must be protected with a tenancy deposit scheme within 30 days from the date on which it is received.

Within the same 30 day period the landlord must supply the tenant with Prescribed Information about the deposit and where it is lodged.

Section 213	COMMENTARY
1. Any tenancy deposit paid to a person in connection with a shorthold tenancy must, as from the time when it is received, be dealt with in accordance with an authorised scheme.	***This clause requires landlords (or agents) to protect deposits in accordance with the requirements of an approved scheme.***
2. No person may require the payment of a tenancy deposit in connection with a shorthold tenancy which is not to be subject to the requirement in subsection (1).	***Landlords cannot require the payment of a tenancy deposit in connection with an assured shorthold tenancy unless it is to be protected by a tenancy deposit scheme.***
3. Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of 30 days beginning with the date on which it is received.	***Each scheme has its own set of initial requirements setting out what landlords (and agents) need to do to register and protect deposits. This clause says that these initial requirements must be met within 30 calendar days of the deposit having been received.***
4. For the purposes of this section "the initial requirements" of an authorised scheme are such requirements imposed by the scheme as fall to be complied with by a landlord on receiving such a tenancy deposit.	***This reiterates that the initial requirements are those things that a scheme says must be done by a landlord when they receive a tenancy deposit.***

Section 213	COMMENTARY
5. A landlord who has received such a tenancy deposit must give the tenant and any relevant person such information relating to– (a) the authorised scheme applying to the deposit, (b) compliance by the landlord with the initial requirement of the scheme in relation to the deposit, and (c) the operation of provisions of this Chapter in relation to the deposit, as may be prescribed.	***This section requires the landlord to give to the tenant and any relevant person certain information about which scheme has protected the deposit, how the landlord has complied with the initial requirements of a scheme and how the tenancy deposit protection scheme works.***
6. The information required by subsection (5) must be given to the tenant and any relevant person– (a) in the prescribed form or in a form substantially to the same effect, and (b) within the period of 30 days beginning with the date on which the deposit is received by the landlord.	***This section says that the information must be given in the prescribed form or in a form substantially to the same effect and within 30 days of the deposit having been received. The detail of the Prescribed Information is to be found in the Housing (Tenancy Deposits) (Prescribed Information) Order 2007.***
7. No person may, in connection with a shorthold tenancy, require a deposit which consists of property other than money.	***Deposits can only be in the form of money.***
8. In subsection (7) "deposit" means a transfer of property intended to be held (by the landlord or otherwise) as security for – (a) the performance of any obligations of the tenant, or (b) the discharge of any liability of his, arising under or in connection with the tenancy.	***This section makes it clear that a deposit is given as security to ensure a tenant complies with the obligations under the tenancy or to help meet the cost of the tenant not discharging the liabilities under the tenancy agreement.***
9. The provisions of this section apply despite any agreement to the contrary.	***Section 9 makes it clear that landlords cannot seek to contract out of these requirements.***

Section 213	COMMENTARY
10. In this section– - “prescribed” means prescribed by an order made by the appropriate national authority; - “property” means moveable property; - “relevant person” means any person who, in accordance with arrangements made with the tenant, paid the deposit on behalf of the tenant.	***This section deals with definitions.*** ***A relevant person is defined as anyone who had paid a deposit on behalf of a tenant (e.g. a parent). Any relevant person must be provided with the Prescribed Information within 30 days of the deposit being received.***

Housing Act 2004

Section 214: Proceedings relating to tenancy deposits

Section 214 is the part of the legislation that penalises landlords for non-protection of the deposit and allows for claims to be made by tenants. Some sections were amended by the Deregulation Act 2015.

Section 214: Key points

Deposits must be protected and the Prescribed Information given to tenants within 30 days of receiving the deposit.

Failure to do so means that the tenant can go to Court during the tenancy or after it has ended, and seek a financial penalty against the landlord.

The Court can order that the deposit be returned or placed elsewhere and impose a penalty of between one and three times the deposit.

Section 214	COMMENTARY
1. Where a tenancy deposit has been paid in connection with a shorthold tenancy on or after 6 April 2007, the tenant or any relevant person (as defined by section 213(10)) may make an application to the county court on the grounds - (a) that section 213 (3) or (6) has not been complied with in relation to the deposit, or (b) that he has been notified by the landlord that a particular authorised scheme applies to the deposit but has been unable to obtain confirmation from the scheme administrator that the deposit is being held in accordance with the scheme.	***This section says that a tenant or a relevant person can apply to the County Court for an order if the landlord (or their agent) has not complied with section 213(3) (protection of deposits within 30 days of receipt) or section 213(6) (provision of the Prescribed Information within 30 days of receipt of the deposit) or that the tenant has been unable to obtain confirmation from a scheme that the deposit is protected by it.***
1A. Subsection (1) also applies in a case where the tenancy has ended, and in such a case the reference in subsection (1) to the tenant is to a person who was a tenant under the tenancy.	***Section 214(1) also applies if the tenancy has ended (this was an amendment under the Localism Act 2011 because the previous legislation had been interpreted as excluding tenancies which had ended).***

Section 214	COMMENTARY
2. Subsections (3) and (4) apply in the case of an application under subsection (1) if the tenancy has not ended and the court - (a) is satisfied that section 213(3) or (6) has not been complied with in relation to the deposit, or (b) is not satisfied that the deposit is being held in accordance with an authorised scheme, as the case may be.	***Where the tenancy has not ended then the penalties in sections 3 and 4 apply if the Court is satisfied that the deposit is not held in an authorised scheme, or if it has not been protected within 30 days, or the Prescribed Information has not been served in 30 days of the deposit being received.***
2(A). Subsections (3A) and (4) apply in the case of an application under subsection (1) if the tenancy has ended (whether before or after the making of the application) and the court - (a) is satisfied that section 213(3) or (6) has not been complied with in relation to the deposit, or (b) is not satisfied that the deposit is being held in accordance with an authorised scheme, as the case may be.	***Where the tenancy has ended then the penalties in section 3A and 4 apply if the Court is satisfied that the deposit is not held in an authorised scheme, or if it has not been protected within 30 days or the Prescribed Information has not been served within 30 days of the deposit being received.***
3. The Court must, as it thinks fit, either - (a) order the person who appears to the Court to be holding the deposit to repay it to the applicant, or (b) order that person to pay the deposit into the designated account held by the scheme administrator under an authorised custodial scheme, within the period of 14 days beginning with the date of the making of the order.	***This penalty applies to tenancies which have not ended and allows the Court to either order the person holding the deposit to repay it to the tenant or into an authorised custodial scheme within 14 days of the order being made.***
3(A). The court may order the person who appears to the court to be holding the deposit to repay all or part of it to the applicant within the period of 14 days beginning with the date of the making of the order.	***This penalty applies to tenancies which have ended and allows the Court to order the person holding the deposit to repay all of it to the tenant within 14 days of the order being made.***

Section 214	COMMENTARY
4. The Court must order the landlord to pay to the applicant a sum of money not less than the amount of the deposit and not more than three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order.	***Section 4 deals with the sanction for non-compliance (whether or not the tenancy has ended) and requires the Court to order the landlord to pay to the tenant a sum of money not less than the amount of the deposit and not more than three times the deposit within 14 days of the making of the order.***
5. Where any deposit given in connection with a shorthold tenancy could not be lawfully required as a result of section 213(7), the property in question is recoverable from the person holding it by the person by whom it was given as a deposit.	***If a deposit is provided which is not in money then the Court can order it to be recovered from the person holding it.***
6. In subsection (5) “deposit” has the meaning given by section 213(8).	***This refers back to the earlier definition of a deposit.***

Housing Act 2004

Section 215: Sanctions for non-compliance

Section 215 sets out further sanctions for a failure to protect the tenancy deposit. Specifically it prevents the giving of a notice under section 21 of the Housing Act 1988, which gives a landlord the right to obtain a Court order to recover possession. The Deregulation Act 2015 made some further changes to this section.

Section 215: Key points

A section 21 notice to obtain possession of the property cannot be served if the deposit has not been protected. This can only be remedied by:

- returning the deposit in full or with agreed deductions; or by
- a County Court hearing about the failure to protect having been concluded, withdrawn or settled.

A valid section 21 notice cannot be served if the Prescribed Information has not been served. However this can be remedied by the landlord serving the Prescribed Information, even if at a later date but there may still be a financial penalty.

Section 215	COMMENTARY
1. Subject to subsection (2A), if (whether before, on or after 6 April 2007) a tenancy deposit has been paid in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy at a time when the deposit is not being held in accordance with an authorised scheme.	***This section was inserted by the Deregulation Act 2015 to deal with the Charalambous case. It says that if a deposit has been paid in connection with a shorthold tenancy (regardless of the date) then no section 21 notice can be given unless the deposit is protected with a scheme.***
1(A). Subject to subsection (2A), if a tenancy deposit has been paid in connection with a shorthold tenancy on or after 6 April 2007, no section 21 notice may be given in relation to the tenancy at a time when section 213(3) has not been complied with in relation to the deposit.	***If the deposit was taken on or after 6 April 2007 no section 21 notice may be given if the scheme's initial requirements to protect the deposit have not been complied with.***

Section 215	COMMENTARY
2. Subject to subsection (2A) if section 213(6) is not complied with in relation to a deposit given in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy until such time as section 213(6)(a) is complied with.	***Similarly a landlord cannot serve a valid section 21 notice if the Prescribed Information has not been served. Once it has been served then a section 21 notice can be issued. This does not apply if the deposit has been returned in full to the tenant or with agreed deductions (see s215 (2A) below). Or if the Court has heard a case for a penalty, it has been concluded, withdrawn or settled by agreement between the parties.***
2(A). Subsections (1), (1A) and (2) do not apply in a case where - (a) the deposit has been returned to the tenant in full or with such deductions as are agreed between the landlord and tenant, or (b) an application to the county court has been made under section 214(1) and has been determined by the court, withdrawn or settled by agreement between the parties.	***This makes it clear that a section 21 notice can be served if the deposit has not been protected for a deposit taken before 6 April 2007 or, within 30 days for a deposit taken on or after 6 April 2007 or the Prescribed Information not served only if the deposit has been returned in full or with agreed deductions, or if a hearing for late service or protection has been determined by the Court, withdrawn or settled between the parties.***
3. If any deposit given in connection with a shorthold tenancy could not be lawfully required as a result of section 213(7), no section 21 notice may be given in relation to the tenancy until such time as the property in question is returned to the person by whom it was given as a deposit.	***This section makes it clear that if a deposit is not in money then a section 21 notice cannot be served until the property taken as a deposit is returned.***
4. In subsection (3) "deposit" has the meaning given by section 213(8).	***This cross references the definition of a deposit.***
5. In this section a "section 21 notice" means a notice under section 21(1)(b) or (4)(a) of the Housing Act 1988 (recovery of possession on termination of shorthold tenancy).	***This is the definition of a section 21 notice.***

Housing Act 2004

Section 215A: Statutory periodic tenancies: deposit received before 6 April 2007

This new section was inserted by the Deregulation Act 2015 to deal with the issues caused by the Superstrike decision in the Court of Appeal.

Section 215(A)	COMMENTARY
1. This section applies where— (a) before 6 April 2007, a tenancy deposit has been received by a landlord in connection with a fixed term shorthold tenancy, (b) on or after that date, a periodic shorthold tenancy is deemed to arise under section 5 of the Housing Act 1988 on the coming to an end of the fixed term tenancy, (c) on the coming to an end of the fixed term tenancy, all or part of the deposit paid in connection with the fixed term tenancy is held in connection with the periodic tenancy, and (d) the requirements of section 213(3), (5) and (6) have not been complied with by the landlord in relation to the deposit held in connection with the periodic tenancy.	***s215A(1) applies to a deposit taken before 6 April 2007 on a fixed term shorthold tenancy and where the tenancy becomes a statutory periodic tenancy on or after 6 April 2007. The deposit has not been protected nor has the Prescribed Information been served.***
2). If, on the commencement date - (a) the periodic tenancy is in existence, and (b) all or part of the deposit paid in connection with the fixed term tenancy continues to be held in connection with the periodic tenancy - section 213 applies in respect of the deposit that continues to be held in connection with the periodic tenancy, and any additional deposit held in connection with that tenancy, with the modifications set out in subsection (3).	***If on 26 March 2015 the periodic tenancy still exists and the deposit (all or part) is still being held then the deposit needs to be protected and Prescribed Information provided. This will all need to be done within 90 days of 26 March 2015 (ie. by 23 June 2015).***

Section 215(A)	COMMENTARY
3. The modifications are that, instead of the things referred to in section 213(3) and (5) being required to be done within the time periods set out in section 213(3) and (6)(b), those things are required to be done - (a) before the end of the period of 90 days beginning with the commencement date, or (b) (if earlier) before the first day after the commencement date on which a court does any of the following in respect of the periodic tenancy - (i) determines an application under section 214 or decides an appeal against a determination under that section; (ii) makes a determination as to whether to make an order for possession in proceedings under section 21 of the Housing Act 1988 or decides an appeal against such a determination.	***In such cases the landlord needs to protect the deposit and serve the Prescribed Information and Scheme Leaflet within 90 days of 26 March 2015. However it will need to be done earlier before the first day on which a Court decides:*** • ***an application for a penalty under s214 or decides an appeal under that section.*** • ***a possession order under s21 of the Housing Act 1988 or decides an appeal.*** ***So if there is a Court hearing pending under s214 or s21 after the commencement date the deposit needs protecting and the Prescribed Information served before the Court hearing.***
4. If, on the commencement date - (a) the periodic tenancy is no longer in existence, or (b) no deposit continues to be held in connection with the periodic tenancy, the requirements of section 213(3), (5) and (6) are treated as if they had been complied with by the landlord in relation to any deposit that was held in connection with the periodic tenancy.	***Paragraph 4 says that if on 26 March 2015 the periodic tenancy is no longer in existence or no deposit is held then the Act says that the requirement to have protected the deposit and serve Prescribed Information within 30 days are treated as if they had been complied with. This is designed to stop claims for penalties if tenancies had ended or the deposit was no longer being held.***
5. In this section "the commencement date" means the date on which the Deregulation Act 2015 is passed.	***The Commencement date is now set as 26 March 2015 .***

Housing Act 2004

Section 215B: Shorthold tenancies: deposit received on or after 6 April 2007

This section was inserted by the Deregulation Act 2015 to address the issues in the Superstrike Judgement.

Section 215(B)	COMMENTARY
1. This section applies where— (a) on or after 6 April 2007, a tenancy deposit has been received by a landlord in connection with a shorthold tenancy ("the original tenancy"), (b) the initial requirements of an authorised scheme have been complied with by the landlord in relation to the deposit (ignoring any requirement to take particular steps within any specified period), (c) the requirements of section 213(5) and (6) (a) have been complied with by the landlord in relation to the deposit when it is held in connection with the original tenancy (ignoring any deemed compliance under section 215A(4)), (d) a new shorthold tenancy comes into being on the coming to an end of the original tenancy or a tenancy that replaces the original tenancy (directly or indirectly), (e) the new tenancy replaces the original tenancy (directly or indirectly), and (f) when the new tenancy comes into being, the deposit continues to be held in connection with the new tenancy, in accordance with the same authorised scheme as when the requirements of section 213(5) and (6) (a) were last complied with by the landlord in relation to the deposit.	***This section covers statutory periodic tenancies where the deposit was received on or after 6 April 2007 on a fixed term assured shorthold tenancy where the deposit was properly protected on the original tenancy and the Prescribed Information served.*** ***This clause relates to the new assured shorthold tenancy replacing the original tenancy or a periodic tenancy replacing the original tenancy.***

Section 215(B)	COMMENTARY
2. In their application to the new tenancy, the requirements of section 213(3), (5) and (6) are treated as if they had been complied with by the landlord in relation to the deposit.	***When the assured shorthold tenancy comes to an end a new tenancy arises and the deposit continues to be held in the same scheme then the requirement to protect the deposit and issue Prescribed Information do not need to be redone.***
3. The condition in subsection (1) (a) may be met in respect of a tenancy even if the tenancy deposit was first received in connection with an earlier tenancy (including where it was first received before 6 April 2007).	***Section 3 says that these provisions may also apply to a deposit received on an earlier tenancy (including one where the deposit was received before 6 April 2007). This clause makes it clear that this can also apply if the tenancy replaces an earlier tenancy and that the deposit was first received in connection with that earlier tenancy before or after 6 April 2007. So a deposit taken on an assured shorthold tenancy before 6 April 2007 which then became a new fixed term tenancy but the deposit is protected there is no need to re-issue the Prescribed Information or reprotect the deposit.***
4. For the purposes of this section, a tenancy replaces an earlier tenancy if - (a) the landlord and tenant immediately before the coming to an end of the earlier tenancy are the same as the landlord and tenant at the start of the new tenancy, and (b) the premises let under both tenancies are the same or substantially the same.	***This section applies to a replacement tenancy as long as the landlord and tenants are the same and that the premises being let are the same or substantially the same as those let under the earlier tenancy. The implication here is that if there are changes to the landlord or tenant(s) or to the premises then the deposit must be reprotected and the Prescribed Information re-issued.***

Housing Act 2004

Section 215C:
215A and 215B: transitional provisions

There are a number of transitional provisions which affect these amendments.

Section 215(C)	COMMENTARY
1. Sections 215A and 215B are treated as having had effect since 6 April 2007, subject to the following provisions of this section.	***This clause says that the new Sections 215A and 215B are treated as having had effect since 6 April 2007.***
2. Sections 215A to 215B do not have effect in relation to - (a) a claim under section 214 of this Act or section 21 of the Housing Act 1988 in respect of a tenancy which is settled before the commencement date (whether or not proceedings in relation to the claim have been instituted), or (b) proceedings under either of those sections in respect of a tenancy which have been finally determined before the commencement date.	***However Sections 215A and 215B do not have effect in relation to any claim under s214 of the Housing Act or under section 21 of the 1988 Housing Act which is settled before 26 March 2015. In addition the new clauses do not apply to any proceedings that have been finally determined before the 26 March 2015.***
3. Subsection (5) applies in respect of a tenancy if - (a) proceedings under section 214 in respect of the tenancy have been instituted before the commencement date but have not been settled or finally determined before that date, and (b) because of section 215A(4) or 215B(2) the court decides - (i) not to make an order under section 214(4) in respect of the tenancy, or (ii) to allow an appeal by the landlord against such an order.	***However if proceedings have started for a penalty under the tenancy deposit provisions of s214 of the Housing Act 2004 before 26 March 2015 but have not been settled or finally determined by that date and the Court decides not to make an order because of s215A(4) or change to s215B(2) or to allow an appeal by the landlord against such an order then the Court cannot order the tenant or any relevant person to meet the landlord's costs.*** ***This also applies if possession proceedings are brought under s21 of the 1988 Housing Act.***

Section 215(C)	COMMENTARY
4. Subsection (5) also applies in respect of a tenancy if - (a) proceedings for possession under section 21 of the Housing Act 1988 in respect of the tenancy have been instituted before the commencement date but have not been settled or finally determined before that date, and (b) because of section 215A(4) or 215B(2), the court decides - (i) to make an order for possession under that section in respect of the tenancy, or (ii) to allow an appeal by the landlord against a refusal to make such an order.	***s215A(4) relates to the fact that the tenancy has ended, no deposit is held and the clause deems that the legislation has been complied with.*** ***s215B(2) says that the legislation has been complied with as long as the deposit was properly protected in the first place.***
5. Where this subsection applies, the court must not order the tenant or any relevant person (as defined by section 213(10)) to pay the landlord's costs, to the extent that the court reasonably considers those costs are attributable to the proceedings under section 214 of this Act or (as the case may be) section 21 of the Housing Act 1988.	
6. Proceedings have been "finally determined" for the purposes of this section if - (a) they have been determined by a court, and (b) there is no further right to appeal against the determination.	
7. There is no further right to appeal against a court determination if there is no right to appeal against the determination, or there is such a right but— (a) the time limit for making an appeal has expired without an appeal being brought, or (b) an appeal brought within that time limit has been withdrawn.	
8. In this section "the commencement date" means that date on which the Deregulation Act 2015 is passed.	***The commencment date was 26 March 2015***

Prescribed Information

Housing (Tenancy Deposits) (Prescribed Information) Order 2007

The Prescribed Information Order was amended in part by the Deregulation Act 2015 to make it clear that where an agent is acting on behalf of a landlord in relation to tenancy deposits then it is acceptable for the contact details of the agent to be given rather than those of the landlord.

Housing Order 2007: Key points

As seen above the issuing of Prescribed Information to every tenant and relevant person within 30 days of receiving the deposit is a key requirement of the legislation and if it is not provided or is provided late then there are penalties which can be applied to landlords by the Courts.

Prescribed Information relating to tenancy deposits	COMMENTARY
1. The following is Prescribed Information for the purposes of section 213(5) of the Housing Act 2004 ("the Act") -	***This cross references the requirement to provide Prescribed Information as set out in the Housing Act 2004.***
(a) the name, address, telephone number, e-mail address and any fax number of the scheme administrator of the authorised tenancy deposit scheme applying to the deposit;	***These are the contact details for the scheme administrator.***
(b) any information contained in a leaflet supplied by the scheme administrator to the landlord which explains the operation of the provisions contained in sections 212 to 215 of, and Schedule 10, to the Act;	***The landlord is required to provide a copy of the scheme leaflet, which explains how the tenancy deposit scheme operates.***
(c) the procedures that apply under the scheme by which an amount in respect of a deposit may be paid or repaid to the tenant at the end of the shorthold tenancy ("the tenancy");	***The landlord should advise how deposits are to be repaid at the end of the tenancy. This can be set out in the tenancy agreement or scheme leaflet.***
(d) the procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy;	***These procedures are set out in the scheme leaflet or tenancy agreement.***

Prescribed Information relating to tenancy deposits	COMMENTARY
(e) the procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid or repaid to the tenant in respect of the deposit;	***These procedures are set out in the scheme leaflet or tenancy agreement.***
(f) the facilities available under the scheme for enabling a dispute relating to the deposit to be resolved without recourse to litigation; and	***These procedures are set out in the scheme leaflet.***
(g) the following information in connection with the tenancy in respect of which the deposit has been paid	***This is information that the landlord must provide to the tenant.***
I. the amount of the deposit paid;	
II. the address of the property to which the tenancy relates;	
III. the name, address, telephone number, and any e-mail address or fax number of the landlord;	
IV. the name, address, telephone number, and any e-mail address or fax number of the tenant, including such details that should be used by the landlord or scheme administrator for the purpose of contacting the tenant at the end of the tenancy;	
V. the name, address, telephone number and any e-mail address or fax number of any relevant person;	
VI. the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy; and	
VII. confirmation (in the form of a certificate signed by the landlord) that -	***The landlord needs to certify that the information provided is correct to the best of his knowledge and belief and to give the tenant(s) the opportunity to sign any such document to confirm that it is accurate to the best of their knowledge and belief.***
(aa) the information he provides under this sub-paragraph is accurate to the best of his knowledge and belief; and	
(bb) he has given the tenant the opportunity to sign any document containing the information provided by the landlord under this article by way of confirmation that the information is accurate to the best of his knowledge and belief.	

Prescribed Information relating to tenancy deposits	COMMENTARY
2. For the purposes of paragraph (1)(d), the reference to a landlord or a tenant who is not contactable includes a landlord or tenant whose whereabouts are known, but who is failing to respond to communications in respect of the deposit.	***This makes it clear that a not contactable landlord or tenant includes someone whose whereabouts are known but who fails to reply to communications about the deposit.***
3. In a case where the initial requirements of an authorised scheme have been complied with in relation to the deposit by a person ("the initial agent") acting on the landlord's behalf in relation to the tenancy- (a) references in paragraphs (1)(b), (g)(iii) and (vii) to the landlord are to be read as references to either the landlord or the initial agent; (b) references in paragraphs (1)(d), (e), (g)(iv) and (vi) and (2) to the landlord are to be read as references to either the landlord or a person who acts on the landlord's behalf in relation to the tenancy.	**These are the new sections inserted by the Deregulation Act 2015.** ***Section 3 is relevant where an agent has first registered a deposit with a scheme (the initial agent). Where this has happened the name and contact details of the agent can be given instead of the landlord and the agent can sign the Prescribed Information instead of the landlord.*** ***In other cases the amendment makes it clear that references to the word landlord can be read as references to either the landlord or the landlord's agent.*** ***If an agent did not protect the deposit in the first case and was not therefore the initial agent referred to in 3 above the amendment makes it clear that the landlord's details need to be given in the contact details and that they need to sign the Prescribed Information but that in other cases the agent can replace the landlord in other parts of the Prescribed Information.***
4. In any other case, references in paragraphs (1)(d), (e), (g)(iv) and (vi) and (2) to the landlord are to be read as references to either the landlord or a person who acts on the landlord's behalf in relation to the tenancy.	
5. Section 212(9)(a) of the Act (references to landlord include persons acting on landlord's behalf) does not apply for the purposes of this article.	***This makes it clear that the wording in 212(9)(a) does not apply in respect of this article 3.***

Prescribed Information Order

3 Article 2(3) to (5): transitional provisions

The Deregulation Act introduced transitional provisions relating to these changes to the Prescribed Information similar to those relating to the Superstrike amendments. These transitional provisions were drafted to avoid settled cases being re-opened and to avoid tenants being penalised for cases which are finally decided under the new legislation.

Prescribed Information Order	COMMENTARY
1. Paragraphs (3) to (5) of article 2 are treated as having had effect since 6th April 2007, subject to the following provisions of this article.	***Paragraph 1 makes it clear that the amended provisions as set out in Article 2(3) to (5) are treated as having had effect since 6th April 2007.***
2. Paragraphs (3) to (5) of article 2 do not have effect in relation to - (a) a claim under section 214 of the Act or section 21 of the Housing Act 1988 in respect of a tenancy which is settled before the commencement date (whether or not proceedings in relation to the claim have been instituted), or (b) proceedings under either of those sections in respect of a tenancy which have been finally determined before the commencement date.	***However paragraph (2) says that the amendments to the Prescribed Information do not have effect in relation to any case relating to a s21 claim or a claim for a penalty under s214 where these matters are settled or a hearing had been finally determined. This prevents old cases being re-opened.***
3. Paragraph (5) applies in respect of a tenancy if - (a) proceedings under section 214 of the Act in respect of the tenancy have been instituted before the commencement date but have not been settled or finally determined before that date, and (b) because of paragraphs (3) to (5) of article 2, the court decides - (i) not to make an order under section 214(4) of that Act in respect of the tenancy, or (ii) to allow an appeal by the landlord against such an order.	***Paragraph 3 and 4 make it clear that if a claim for possession under s21 is awarded to a landlord following a tenant challenge because a judge has relied on the amended wording in article 2 then costs should not be awarded against the tenant. Similarly if a tenant fails to obtain a penalty under s214 because the court applies the amended wording in article 2 then the court should not award costs against the tenant.***

Prescribed Information Order	COMMENTARY
4. Paragraph (5) also applies in respect of a tenancy if - (a) proceedings for possession under section 21 of the Housing Act 1988 in respect of the tenancy have been instituted before the commencement date but have not been settled or finally determined before that date, and (b) because of paragraphs (3) to (5) of article 2, the Court decides - (i) not to make an order under section 214(4) of that Act in respect of the tenancy, or (ii) to allow an appeal by the landlord against such an order.	
5. Where this paragraph applies, the Court must not order the tenant or any relevant person (as defined by section 213(10) of the Act) to pay the landlord's costs, to the extent that the court reasonably considers those costs are attributable to the proceedings under section 214 of the Act or (as the case may be) section 21 of the Housing Act 1988.	
6. Proceedings have been "finally determined" for the purposes of this article if - (a) they have been determined by a court, and (b) there is no further right to appeal against the determination.	
7. There is no further right to appeal against a court determination if there is no right to appeal against the determination, or there is such a right but - (a) the time limit for making an appeal has expired without an appeal being brought, or (b) an appeal brought within that time limit has been withdrawn.	

Prescribed Information Order	COMMENTARY
8. In this article "the commencement date" means the date on which the Deregulation Act 2015 is passed."	
4. The amendments made by this section to the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (S.I. 2007/797) do not affect a power to use subordinate legislation to amend or revoke that Order.	
5. In subsection (4), "subordinate legislation" has the same meaning as in the Interpretation Act 1978.	

The Prescribed Information is in effect a variety of information to be provided by the landlord to the tenant and any relevant person and this is usually provided in a number of documents:

- The tenancy agreement; and
- A template form produced by the tenancy deposit protection schemes with the accompanying scheme leaflet or terms and conditions.

It is essential that the information provided covers all of the requirements of the Prescribed Information Order and is supplied within 30 days of the deposit having been received. Ensuring that the landlord certifies that the information is correct to the best of his knowledge and belief is also a specific requirement as well as certifying that he has given the tenant an opportunity to certify that the information provided is accurate to the best of his knowledge and belief.

Other key provisions

Housing Act 2004 (Commencement No. 7) (England) Order 2007
Housing Act 2004 (Commencement No. 4) (Wales) Order 2007

These are commencement orders which brought the tenancy deposit protection provisions into force in England and Wales respectively on 6 April 2007. Any deposit taken in respect of an Assured Shorthold Tenancy (with a rental value of up to £25,000 a year) after that date in England & Wales had to be dealt with under the provisions of the legislation (this rental value limit was subsequently increased to £100,000).

Housing Act 2004 Schedule 10

This Schedule sets out in detail how the tenancy deposit schemes operate. For example the Schedule covers matters such as the rules that the scheme must impose, the obligation of an insurance backed scheme to maintain insurance in respect of deposits registered with it, the amount of notice the schemes must give if they decide to terminate the membership of a landlord or wish to stop protecting a deposit, and the manner in which the schemes must operate their bank accounts.

Housing (Tenancy Deposit Schemes) Order 2007

This Order adjusted the provisions of Schedule 10 of the Housing Act 2004 itself in order to make further provisions for the operation of the custodial and insured schemes.

Assured Tenancies (Amendment) (England) Order 2010; Assured Tenancies (Amendment of Rental Threshold) (Wales) Order 2011.

These Orders increased the annual rent threshold from £25,000 to £100,000. Any deposit taken on an Assured Shorthold Tenancy with rent up to the threshold must be protected.

Localism Act 2011 section 184

This Act amended the Housing Act 2004 to address the judgments made in the Court of Appeal, which effectively meant that landlords could escape the penalties that were set out in the legislation as long as they protected deposits before the day of a court hearing. The amendments also dealt with a Court judgment that effectively meant that if a tenancy had ended the tenant could not bring an action for non-protection of the deposit.

At the same time the amendments increased the time limit for protecting deposits and supplying the Prescribed Information from the previous 14 days from receipt of the deposit to 30 days from its receipt.

The Localism Act 2011 (Commencement No. 4 and Transitional, Transitory and Saving Provisions) Order 2012

This Order brought the new arrangements into effect from 6 April 2012.

Transitional etc. provisions: Tenancy Deposit Schemes	COMMENTARY
1. Subject to paragraph (2), the amendments made by section 184 of the Act apply in respect of any tenancy deposit received by a landlord in connection with a shorthold tenancy where the tenancy was in effect on or after 6th April 2012.	***These amendments only apply to tenancies which were in effect on or after 6 April 2012. Tenancies which ended before 6 April 2012 are not affected by these amendments and the legislation as originally enacted applies.***
2. Those amendments do not apply in respect of a tenancy deposit received by a landlord in connection with a shorthold tenancy where - (a) the tenancy was in effect on or after 6th April 2012, and (b) the landlord has, before the end of the period of 30 days beginning with that date - (i) complied with the initial requirements of an authorised scheme in relation to the deposit, and (ii) given to the tenant and any relevant person the information prescribed for the purposes of section 213(5) of the Housing Act 2004.	***This paragraph makes it clear that the Localism Act amendments do not apply to deposits where the deposit was in effect on or after 6 April 2012 and that within 30 days of that date (i.e. to 5 May 2012) the landlord had protected the deposit and supplied the Prescribed Information. This paragraph was included to ensure that landlords who may not have protected deposits as a result of the earlier Court of Appeal rulings had an opportunity to comply with the legislation before the new penalties applied.***

Tenant Fees Act 2019

This Act only applies to England and caps deposits at no more than 5 weeks rent where the annual rent is less than £50,000 pa or 6 weeks rent where the annual rent is £50,000 or more. The provision came into effect on the 1 June 2019. Deposits above the cap which were taken before the 1 June 2019 do not need to be repaid unless the tenancy is renewed on or after 1 June 2019. When it is renewed the excess deposit must be repaid.

Schedule 1, Part 2	COMMENTARY
1. A payment of a tenancy deposit is a permitted payment.	***The Cap on deposits is 5 weeks rent where the annual rent is below £50,000 pa or 6 weeks where the annual rent is £50,000 or more.***
2. In this Act "tenancy deposit" means money intended to be held (by a landlord or otherwise) as security for - (a) the performance of any obligations of a tenant, or (b) the discharge of any liability of a tenant, arising under or in connection with a tenancy.	
3. But if the amount of the tenancy deposit exceeds - (a) the amount of five weeks' rent, where the annual rent in respect of the tenancy immediately after its grant, renewal or continuance is less than £50,000, or (b) the amount of six weeks' rent, where the annual rent in respect of the tenancy immediately after its grant, renewal or continuance is £50,000 or more, the amount of the excess is a prohibited payment.	
4. In this paragraph - (a) "five weeks' rent" means five times one week's rent, (b) "six weeks' rent" means six times one week's rent, and (c) "one week's rent" means the amount of the annual rent payable in respect of the tenancy immediately after its grant, renewal or continuance divided by 52.	***To calculate a weeks' rent, take the annual rent and divide by 52.***

Key Court Cases in Tenancy Deposit Protection

This section deals with Court decisions that are binding in terms of legal precedent. There may well be other cases heard in the lower Courts but the decisions in those cases are not binding in relation to other similar cases.

There were also a number of other cases in the higher Courts that led the Government to propose amendments to the law which were passed in the Localism Act 2011. These cases may still have relevance if tenants bring cases to Court which deal with issues prior to the commencement of the Localism Act changes in April 2012.

1. Ravenseft Properties Ltd and Hall [2001] EWCA Civ 2034

Relevance:

- A notice in a prescribed form or in a form substantially to the same effect is a matter of fact and degree.

Background

This Court of Appeal case related to three appeals concerning the validity of a section 20 notice for possession. It is referred to in cases about Prescribed Information because there have been challenges in the courts about the validity of the Prescribed Information issued by a landlord to a tenant and whether or not it complies with the Housing (Tenancy Deposits) (Prescribed Information) Order 2007.

Decision

The Court said that: "the question whether a notice under section 20 is in the prescribed form or is in a form "substantially to the same effect" is a question of fact and degree in each case". Subsequent cases relating to the contents of Prescribed Information have referred to this judgement. This means that the Prescribed Information may not need to be exactly to the letter of the Prescribed Information Order.

2. Draycott & Draycott and Hannells Letting Limited [2010] EWHC 217 (QB)

Relevance:

- Lettings agents can be subject to penalties for failing to comply with the deposit protection legislation.
- Late registration of a deposit will not attract a penalty if the deposit is protected at the time the case is referred to Court (since overturned by the Localism Act 2011 amendments).
- The custodial scheme rules did not impose an initial requirement to protect the deposit within 14 days.

Background

This case was one of a number in 2011 and 2012 which called into question some aspects of the original tenancy deposit legislation and led in part to the amendments in the Localism Act 2011.

The lettings agent in this case registered the deposit with the custodial scheme more than 14 days after the receipt of the deposit. It was not disputed that the deposit had been protected late. The tenant claimed the penalty of three times the deposit.

There were three issues in respect of the appeal:

1. Could an agent be held liable for a failure to protect a deposit or was it entirely a matter for the landlord?;
2. Was the requirement to register the deposit and give the required Prescribed Information within 14 days as required by section 213(6)(b) of the Housing Act 2004 subject to the penalties set out in section 214; and
3. Is it an actual or implied initial requirement of the custodial scheme that the deposit be registered within 14 days of receipt?

Decision

The Court decided that a lettings agent could be held liable for a failure to protect a deposit and this was made clear in section 212(9)(a).

In relation to the second point the Court concluded that the wording of the Act meant that a deposit did not have to be protected within 14 days as long as it was protected prior to the matter being referred to the Court.

The third point dealt with the “initial requirements” in the Housing Act 2004 and concluded that the rules of the custodial scheme at that time did not appear to make the requirement to protect a deposit within 14 days of its receipt an “initial requirement”.

This case led to the amendments in the Localism Act 2011, which made it clear that a failure to protect a deposit and provide the Prescribed Information within the new deadline of 30 days would lead to the return of the deposit and a penalty of between one and three times the deposit.

3. Tiensia and Vision Enterprises Ltd (trading as Universal Estates) Honeysuckle Properties and Fletcher [2010] EWCA Civ 1224

Relevance:

- The penalties for non-protection can be avoided if the deposit is protected and the Prescribed Information served by the date of the Court hearing (since overturned by the Localism Act amendments).

Background

These were two related cases which were considered by the Court of Appeal in 2010.

In the case of Tiensia and Universal Estates, Tiensia the tenant was being sued by the landlord for possession because of rent arrears. The tenant counterclaimed that her deposit had not been protected within the 14 day time limit. The deposit had been paid in four installments between April and June 2008 but had not been protected until October 2008.

In the Honeysuckle case there was a similar possession hearing for rent arrears with a counterclaim for late protection of a deposit. The deposit had been paid in October 2007 but not protected until September 2008.

Decision

In a majority decision, the Court agreed with the decision taken in Draycott v Hannells that late protection of a deposit will avoid a penalty as the deposit had been protected before the tenant commenced proceedings. However the Court went further and confirmed that as long as the deposit was protected and Prescribed Information served before the date of a Court hearing then there would be no penalties for non or late compliance. The Court did accept that if a tenant is forced to start court proceedings to ensure that their deposit was protected that they should be entitled to their legal costs.

The Court recognised that its decision would undermine the basis of the tenancy deposit legislation and as a result one Judge dissented from the majority opinion. It was this case that led in part to the Localism Act amendments being passed in 2011.

4. Potts and Densley and Pays [2011] EWHC 114 (QB)

Relevance:

- Confirmation that if a deposit was protected before the date of a hearing then there is no ability for the Court to exercise a penalty (since overturned by the Localism Act amendments).

Background

The tenancy was for one year from 12 May 2007 and was managed by a letting agent, who registered the deposit with TDS. In 2009 the landlord and tenant agreed that the deposit would be held by the landlord who would take responsibility for protecting the deposit. The landlord received the deposit from the agent on 18 June 2009 but on 15 June 2009 the tenants exercised a break clause to end the tenancy on 15 August 2009.

On the 10 August 2009 the landlord offered to repay the deposit in full but the tenant insisted that the deposit be registered with a scheme. The landlords did not do so and the tenant then issued proceedings for non-protection of the deposit on 12 August 2009. The deposit was lodged with the custodial scheme on 17 August 2009, two days after the tenants vacated the property. No Prescribed Information was served.

At the original County Court hearing the District Judge said it had been a "technical breach" and refused to award a penalty. The issue of the failure to supply the Prescribed Information was not addressed. The tenants appealed.

Decision

In this case the High Court decided that as the deposit had been protected by the date of the hearing then the Court could rely on the Tiensia judgment and as such no penalty could be applied for the failure to protect the deposit.

In relation to the failure to provide the Prescribed Information the High Court argued that had the case been pleaded then the Judge would have found in the tenant's favour. However this was not properly pleaded in the original hearing and as such the High Court dismissed the tenant's appeal.

5. Gladehurst Properties Limited and Hashemi [2011] EWCA Civ 604

Relevance:

- An application for a penalty cannot be made if the tenancy has ended (since overturned by the Localism Act 2011 amendments).

Background

This was a case brought by the tenants who had paid a deposit of £6,240. The deposit had not been protected. When the tenancy ended in October 2008 the deposit was not refunded fully and the landlord retained £1,123.99 for cleaning and damage. However in February 2008 the tenants claimed for the penalty of three times the deposit on the grounds that the deposit had not been protected under the provisions of section 213 of the Housing Act 2004. At the County Court hearing the District Judge struck out the claim for three times the deposit as the tenancy had already ended. There was an appeal by the tenants which was successful and the Court awarded the tenants three times the deposit. The landlord then appealed to the Court of Appeal.

Decision

The Court made reference to the Tiensia decision that the sanctions against landlords would not apply if the deposit had been protected by the date of the Court hearing. In this case however the deposit had never been protected by the landlord and once a tenancy had ended the landlord was unable to comply with the requirement to protect the deposit.

The Court of Appeal confirmed that once a tenancy had ended then the power of the Court to make an order requiring the landlord to pay three times the deposit to the tenants is no longer available. This decision meant that if a landlord failed to protect a deposit and the tenancy ended then the tenant would not be able to claim a penalty.

This was not the intention of Parliament and the amendments in the Localism Act 2011 enabled tenants in these circumstances to claim a penalty of between one and three times the deposit, to be awarded at the Court's discretion even if the tenancy had ended.

6. Suurpere and Nice [2011] EWHC 2003 (QB)

Relevance:

- Prescribed Information is of "equal importance" to the protection of the deposit.

Background

In this case Karin Suurpere was a tenant of the "inexperienced landlords" Christopher and Patricia Nice. This was a claim by the tenant against her landlords in relation to a failure to supply the Prescribed Information within 14 days of receipt of the deposit. The deposit was paid on 6 January 2009 but was not protected in a tenancy deposit scheme until 20 July 2009. The landlords did not supply the tenant with all of the Prescribed Information. The tenants left the property on 14 August 2009 and on 1 September 2009 the deposit was returned to the tenants in full.

The tenant then claimed for a failure to protect the deposit within the then 14 days and a failure to submit the Prescribed Information. The County Court judge dismissed the claim on the grounds that the tenancy had ended (see Draycott & Draycott v Hannells Letting Limited) and that the deposit had been lodged with the custodial scheme before the commencement of proceedings on 10 August 2009. The tenants then appealed.

Decision

Because the deposit had already been transferred to the approved custodial scheme before the time of the original County Court hearing, the High Court decided that the sanctions could not be applied in respect of the failure to protect the deposit (using the reasoning in Tiensia).

In relation to the Prescribed Information the landlord claimed that they had provided some of the information required. The High Court said that "Parliament regards the landlord's obligation to provide the Prescribed Information as being of equal importance to his duty to safeguard the tenant's deposit".

The Court also referred to Gladehurst Properties Limited and Hashemi which decided that the power of the Court to award a penalty to the tenants was not exercisable once the tenancy had come to an end. However in this case the Court was unclear as to whether or not the tenancy had lawfully ended and therefore the reasoning in Gladehurst would not apply.

As it was not certain that the tenancy had ended and the Prescribed Information had not been provided the Court decided that it should award the tenants three times the deposit for the failure of the landlord to supply the Prescribed Information.

7. Ayannuga and Swindells [2012] EWCA Civ 1789

Relevance:

- The importance of providing all of the Prescribed Information.

Background

This case was an appeal in relation to a case heard in the Woolwich County Court, part of which related to Prescribed Information in relation to tenancy deposits. In the original case it was clear that a deposit of £950 had been paid to the landlord. The landlord had been forced to let out the family home and the tenancy agreement made it clear that the deposit would be lodged with the custodial scheme. The Court was advised that the deposit had indeed been protected.

However the tenant had not been served with the required Prescribed Information or the scheme leaflet. Just before the Deputy District Judge gave his judgment the landlord provided more information about the deposit in a document entitled the "Additional Information Document". The Deputy District Judge concluded that although the landlord had not complied fully with the precise requirements of the Prescribed Information Order, the landlord had done enough to meet them in substance.

Decision

Lawyers for the landlord sought to argue that the failure to provide the Prescribed Information and scheme leaflet were "essentially…procedural points" which had left the appellant in "no serious or disadvantaged position". The Court of Appeal noted that the landlord had been unrepresented in the original hearing and that it was "not a case of a wealthy landlord seeking to exploit an impecunious tenant". However Lord Justice Etherton concluded that the Deputy District Judge had "reached a conclusion in relation to the deposit which was outside a proper exercise of judicial judgment and evaluation".

The Court of Appeal considered that the landlord had not done enough to meet the following requirements of the Prescribed Information Order:

- setting out the procedures that apply under the scheme by which an amount in respect of a deposit may be paid or repaid to a tenant at the end of the shorthold tenancy;
- detailing the procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy;
- explaining the procedures that apply under the scheme where the landlord and the tenant dispute the amount to be paid or repaid to the tenant in respect of the deposit;
- describing the facilities available under the scheme for enabling a dispute to be resolved without recourse to litigation.

Although the tenancy agreement and the additional information which the landlord had provided did provide some information about the process to be adopted at the end of the tenancy, it did not meet the requirements of the Prescribed Information Order. Even worse, the tenancy agreement and the additional information provided said that the deposit was being held by an agent in an insurance scheme when in fact it was taken by the landlord and transferred to the custodial scheme.

The Court referred to the case of Ravenseft Properties Limited v Hall (2001) in which the Court found that substantial compliance with the legal requirements of a Notice (in this case a section 20 Notice) was based on fact and degree. In the current case the Appeal Court found that the information provided to the tenant in respect of the deposit was not substantially compliant with the Prescribed Information Order. Reference was also made to Suurpere v Nice (2011) where the Court said that "Parliament regards the landlord's obligation to provide the Prescribed Information as being of equal importance to his duty to safeguard the tenant's deposit".

As a result the Court of Appeal allowed the tenant's appeal and required the landlord to pay the deposit of £950 to the tenant and to pay an additional £2,850 to the tenant, being three times the deposit.

It is important to note that this case was based on the law applicable prior to the amendments made in the Localism Act 2011. If this case had been heard under the present law then the penalty for non-compliance with the Order would have been to repay the deposit and a penalty of between one and three times the deposit.

8. Johnson & others and Old [2013] EWCA Civ 415

Relevance:

- Rent in advance is not a tenancy deposit.

Background

This case dealt with the question of whether a payment of rent in advance was a deposit and therefore needed to be protected. The Court of Appeal was dealing with an appeal on an order made by the Brighton County Court where a tenant claimed that the fact she had paid 6 months' rent in advance as required by the tenancy agreement meant that this should be treated as a tenancy deposit. The importance here was that had this been accepted by the Court of Appeal then the section 21 notice to end the tenancy would have been invalidated as the deposit would not have been protected.

In an initial hearing the Deputy District Judge had accepted the tenant's view that when rent payments were made six monthly in advance that at the point that those payments were made five months was actually a security deposit. As such it should have been protected and as it had not been then the section 21 notice was declared invalid. On appeal the County Court Judge took a different view and considered that rent in advance could not be construed as a deposit. In fact it had been paid to comply with a primary obligation of the tenancy to pay the rent. As such he overturned the decision of the Deputy District Judge.

Decision

On appeal to the Court of Appeal the tenant attempted to argue that the Judge was wrong in three areas:

- In holding that the tenancy agreement required the payment of 6 months' rent in advance;
- In concluding that the payment of six months' rent was not a payment of five months as "security"; and
- in concluding that the five months' rent was not a tenancy deposit.

In this case the tenant had also paid a security deposit and this had been properly protected with the custodial scheme. The Court of Appeal concluded that the tenancy agreement did indeed require that the first six months' rent should be paid in advance and this appeal on the first ground was dismissed. In relation to the second ground the Court of Appeal made a distinction between money paid to discharge an existing obligation of the tenancy (such as to pay the rent) and money paid with the intention that it be held as security for the performance of some other obligation or as security for the discharge of some other liability. The Court said that "money paid in order to discharge a current liability is not paid with the intention that it be held as a security for the discharge of that liability".

In this case the Court did not consider that the rent paid in advance was somehow being paid with the intention that it be held as security for the discharge of a liability. In conclusion the Court of Appeal decided that the rent paid in advance could not be construed as a tenancy deposit and therefore the section 21 notice was valid as the deposit had been properly protected.

9. Superstrike Ltd and Marino Rodrigues [2013] EWCA Civ 669

Relevance:

A statutory periodic tenancy is a new tenancy and if a deposit has not been previously protected then on it becoming a statutory periodic tenancy it should be protected.

Potentially, with protected deposits Prescribed Information should be re-issued when a new fixed term tenancy is issued or the tenancy becomes a statutory periodic tenancy.

Background

This case related to an assured shorthold tenancy taken out on 8 January 2007 and a deposit of £606.66 was paid. Because the legislation on deposit protection did not come into force until 6 April 2007 the deposit was not protected. On 8 January 2008 the tenancy became a statutory periodic tenancy. In June 2011 the landlord served a section 21 notice. A possession order was granted in May 2012 and then set aside by the Court in June 2012 on the grounds of non-compliance with the requirement to protect the deposit.

Decision

The Court of Appeal decided that a statutory periodic tenancy as defined by the Housing Act 1988 is a new tenancy and as such when it was created in January 2008 the deposit should then have been protected. Because the deposit had not been protected then the landlord was not entitled to serve a section 21 notice and the possession order was invalid. This decision clearly has implications for those deposits which were taken before 6 April 2007 and have remained unprotected when the tenancy has become a statutory periodic tenancy or a new fixed term tenancy has been granted. The decision means that deposits in these circumstances should be protected and Prescribed Information served.

In addition, although not addressed in this case, the second obligation under the legislation to serve the Prescribed Information would also seem to apply on a renewal or the creation of a statutory periodic tenancy. The Localism Act amendments have tightened the sanctions on landlords for failure to protect deposits on time and to serve the Prescribed Information on time. Although a landlord can protect deposits late and serve the Prescribed Information late they may still be open to a penalty of between one and three times the deposit in addition to returning the deposit. Also a section 21 notice cannot be served if the deposit has been protected late unless the deposit is first returned in full or with agreed deductions. Because of these issues it is likely that many landlords may have failed to comply with the law by not having re-issued the Prescribed Information on renewals of previously protected deposits. Although no cases have reached the higher Courts in this area the Government introduced legislative amendments in the 2015 Deregulation Act to address the implications of this decision.

This case has now been effectively reversed by the Deregulation Act 2015 amendments which require all such deposits to be protected and does not require the deposit to be re-protected and Prescribed Information served if it is renewed or becomes a statutory periodic tenancy.

10. Michalis Charalambous & Katernia Karali v Maureen Rosairie Ng and Kok Ho Ng (2014) EWCA Civ 1604

Relevance:

A valid S21 notice requires the deposit to have been protected prior to the service of that notice.

Background

This was a case relating to the non-protection of a tenancy deposit. The tenancy was a one year assured shorthold tenancy from 20 August 2002. The tenancy was renewed on the 19 August 2003 and then again on the 18 August 2004. The deposit was paid at the start of the tenancy in 2002 and was carried over and credited against the new tenancy. On 17 August 2005 a statutory periodic tenancy was created. The deposit had never been protected with an approved tenancy deposit scheme.

In October 2012 the landlords served a s21 notice to obtain possession and the tenants appealed claiming that the deposit was not protected.

Decision

The Court of Appeal argued that whilst the landlords were not required to have protected the deposit they were however precluded from issuing a s21 notice at a time when the deposit was not protected and the deposit had not been returned to the tenants.

Section 213 of the Housing Act requires deposits taken on tenancies starting on or after 6 April 2007 to be protected. Section 213 did not apply here because the tenancy began in 2005. However, section 215 of the Housing Act 2004 stated that:

(1) If a tenancy deposit has been paid in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy at a time when–

(a) the deposit is not being held in accordance with an authorised scheme, or

(b) the initial requirements of such a scheme (see section 213(4)) have not been complied with in relation to the deposit.

The Court viewed (a) as entirely separate from (b). In other words, the deposit must be protected for a s21 notice to be used, even if section 213 does not apply to the tenancy.

This case means that if a deposit is not protected then a s21 notice cannot be served.

NOTES

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