

Tenancy Deposit Schemes: The legislation bites back

The saga of the tenancy deposit scheme legislation, introduced in 2007, has taken another important turn, this time very much in favour of tenants. As those involved in letting properties on assured shorthold tenancies will know, the legislation has been the subject of a number of court cases and the government has now taken the opportunity to clarify the legislation.

The original purpose of the legislation seemed to be to punish landlords for failing to comply with requirements relating to tenancy deposits. The punishment was intended to be that a tenant could apply to court for an order that the landlord return the deposit and pay to it a penalty of three times the original deposit sum.

However, the current state of the law, following various cases, can be summarised as follows:

- As long as the landlord protects the deposit before the hearing of the tenant's application to court, the landlord will not be punished (*Tiensia v Vision Enterprises*)
- The tenant will lose its right to make an application after the tenancy has ended (*Gladehurst Properties v Hashemi*).

In our last briefing on tenancy deposits, we noted that the Localism Bill proposed some changes to the tenancy deposit legislation. The Localism Bill has been granted Royal Assent and is now the Localism Act 2011. Those parts of the Act relating to tenancy deposits are expected to come into force in April 2012.

If and when they do, the changes are these:

- The court must order the landlord to return the deposit and pay a penalty sum to the tenant if the deposit has not been protected within the statutory time period. That is, it seems, the landlord will still be punished if it belatedly protects the deposit. *Tiensia* is therefore overruled.
- The statutory time period for a landlord to protect a deposit and provide prescribed information is increased from 14 to 30 days.
- The amount of the penalty is changed from three times the amount of the deposit, to a sum between one and three times the amount of the deposit.
- The tenant may still apply to court for the return of the deposit and the penalty payment even after the tenancy has ended. *Gladehurst* is therefore overruled.

- The prohibition on serving a section 21 notice (seeking possession) where the deposit has not been protected is relaxed where either the deposit has been returned or where an application to court for the penalty payment has been made and been determined, withdrawn or settled.

Whilst there may previously have been some uncertainty, the position is now very clear. Landlords must protect deposits in a scheme, and provide the prescribed information within 30 days of taking the deposit in order to avoid an expensive court claim. Landlords could be ordered to repay the deposit, pay a penalty of up to three times the amount of the deposit and pay most of the tenant's legal costs. This now applies even if the application is made after the tenancy has ended though it is not clear whether this is intended to apply to deposits taken before the changes come into force.

Perhaps in acknowledgement of the potential harshness of the new rules, the time for compliance has been extended and the court has been given some discretion as to the amount of the penalty. There is no guidance as to how that discretion is to be exercised. Courts might be prepared to award a lower penalty where, for example, the transgression is perceived to be an innocent mistake. Landlords faced with an application to court should consider protecting the deposit before the hearing, in the hope that this will prompt the court to be lenient in setting the amount of the penalty.

The changes to the legislation unfortunately do not address the situation where a tenancy is renewed on the basis of a deposit that has been held since prior to April 2007 when the legislation came into force. Accordingly, it is advisable to protect the deposit and provide the prescribed information within 30 days of entering into the new tenancy.

Landlords and letting agents should also note that care must be taken in providing the right information to the tenant. Whilst the deposit scheme providers sometimes provide a pro forma for the prescribed information, or wording to go into the tenancy agreement, further case-specific information usually needs to be provided, and sometimes some of the information is contained in a separate leaflet that also needs to be provided.

Most professional landlords are aware of their obligations and have been diligently complying with the legislation so the changes will therefore not adversely affect them. But the changes have the potential to be very detrimental to inexperienced landlords and those who simply forget to protect the deposit in time or are prevented from doing so for some administrative reason.

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