

## CHAPTER 4

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# Tenancy deposits

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## Introduction

- 4.1 Chapter 4 of Part 6 of the Housing Act (HA) 2004 requires landlords of assured shorthold tenancies in England and Wales to deal with any tenancy deposit in accordance with an authorised tenancy deposit scheme. A landlord who fails to do so can be penalised in one of three ways, depending on to which requirements he or she has failed to adhere to – he or she can be:
- forced to return the deposit to the tenant; and/or
  - forced to pay the tenant a sum of money; and/or
  - prevented from serving the tenant with a notice under HA 1988 s21 to bring the tenancy to an end.
- 4.2 It is necessary first to consider the requirements, before considering the circumstances in which the landlord can be penalised.

## Requirements relating to tenancy deposits

- 4.3 Any person paid a tenancy deposit in connection with an assured shorthold tenancy, must, from the time it is received, deal with the deposit within an authorised scheme.<sup>1</sup> If the person is a landlord, there are two additional requirements:
- he or she must comply with the initial requirements of whichever scheme is used within 30 days of the deposit being received;<sup>2</sup> and
  - he or she must give the tenant and any relevant person details of the scheme which is protecting the deposit, confirmation that the landlord has complied with its initial requirements and any other such information as may be prescribed.<sup>3</sup>

## Authorised scheme

- 4.4 An authorised scheme is one which has been approved by the secretary of state or Welsh Ministers.<sup>4</sup> There are two types of scheme: custodial and insurance. If a landlord chooses to protect a deposit

1 HA 2004 s213(1).

2 HA 2004 s213(3).

3 HA 2004 s213(5).

4 HA 2004 s212(1), (8). There are three authorised schemes: Deposit Protection Service; My Deposits Scheme; and Tenancy Deposit Scheme.

within a custodial scheme, he or she is required to pay the amount of the deposit into a designated account held by the scheme.<sup>5</sup> Under an insurance scheme, the landlord is required to enter into an agreement to undertake to reimburse the scheme administrator for the amount of the deposit if it, or part of it, is returned by the scheme administrator to the tenant.<sup>6</sup>

## Landlord

- 4.5 A landlord includes an agent, or any person, acting on behalf of the landlord.<sup>7</sup>

## Relevant person

- 4.6 A relevant person means any person who, in accordance with any arrangements made with the tenant, paid the deposit on behalf of the tenant.<sup>8</sup>

## In connection with an assured shorthold tenancy

- 4.7 In the vast majority of cases it will be a term of the tenancy agreement that a deposit be paid. The provisions of HA 2004 also apply however wherever a deposit is paid in *connection* with an assured shorthold tenancy; the provisions are not confined to deposits which have to be paid under the terms of a tenancy agreement. For example, the requirements will apply to a deposit that has been paid after it has been demanded of a tenant orally by a landlord as a condition of entering into the tenancy.
- 4.8 The tenancy must be an assured shorthold tenancy within the meaning of Chapter 2 of Part 1 of HA 1988.<sup>9</sup> These provisions therefore do not apply to licences or other residential tenancies which are exempt from being assured by Part 1 of Schedule 1 to HA 1988.

5 HA 2004 Sch 10 para 2.

6 HA 2004 Sch 10 para 3.

7 HA 2004 s212(8).

8 HA 2004 s213(10).

9 HA 2004 s212(8). See, generally, Arden & Dymond, *Manual of Housing Law* (LAG, 10th edn, 2017), paras 1.246–1.250.

## Tenancy deposit

- 4.9 A tenancy deposit means any money intended to be held by the landlord or otherwise as security for the performance of any obligations of the tenant or the discharge of any liability of the tenant arising under or in connection with the tenancy.<sup>10</sup> Money means ‘cash or otherwise’.<sup>11</sup> In another context, the House of Lord has held that a definition of money can include money held in a bank, cheques, postal orders, stocks or shares.<sup>12</sup> Money, under the Act, does not, however, include property.<sup>13</sup>
- 4.10 Rent payable in advance is not a tenancy deposit provided that the sum of money is not intended, by the terms of the tenancy, to be held by the landlord as security for the performance of the tenant’s obligations or for the discharge of any liability of the tenant.<sup>14</sup> Likewise, a holding deposit, eg a payment taken by a letting agent which is forfeited in the event that the potential tenant chooses not to enter into a tenancy, is unlikely to be a ‘tenancy deposit’ because it is not security for the performance of any obligations arising under or in connection with the tenancy.

## Paid and received

- 4.11 Any tenancy deposit that has been paid to *any* person, in connection with an assured shorthold tenancy, must be dealt with in accordance with a scheme.<sup>15</sup> This includes deposits that were paid or received before HA 2004 came into force on 6 April 2007<sup>16</sup> (although in such a case, the tenant would not be entitled to recover the deposit or receive a penalty payment, see paras 4.27–4.31). It is also immaterial whether the deposit was paid to the landlord, or paid by the tenant, provided that it was paid in connection with the assured shorthold tenancy; accordingly, a deposit paid by someone else and a deposit paid to someone else will qualify.
- 4.12 An existing tenant, who has already paid a deposit to a landlord, is treated as having paid the amount of the deposit to the landlord in respect of any new, or replacement, tenancy, including a statutory

10 HA 2004 s212(8).

11 HA 2004 s212(8).

12 *Perrin v Morgan* [1943] AC 399, HL.

13 HA 2004 s213(7).

14 *Johnson v Old* [2013] EWCA Civ 415, [2013] HLR 26.

15 HA 2004 s213(1).

16 *Charalambous v Ng* [2014] EWCA Civ 1604, [2015] 1 WLR 3018, [2015] HLR 15.

periodic tenancy following a fixed-term (unless the landlord returns the deposit at the end of the previous tenancy). This deemed payment will arise wherever the landlord does not seek the payment out of the prior deposit for the consequences of any prior breach of the tenancy agreement.<sup>17</sup>

## Initial requirements of a scheme

- 4.13 The initial requirements of each scheme are governed by the terms of each scheme.<sup>18</sup>
- 4.14 The initial requirements of the Tenancy Deposit Scheme (TDS) are that all of the details about the deposit, as may be requested by the TDS, are entered onto the TDS' tenancy database unless the deposit is already protected, ie there is no initial requirement to enter the details of the deposit again if the tenancy is renewed or becomes a statutory periodic tenancy after a fixed-term.<sup>19</sup>
- 4.15 The initial requirements of the My Deposits Scheme (MDS) are that the deposit is protected, ie the fee is paid and all necessary information about the deposit is provided, and the prescribed information (see paras 4.17–4.20) is provided to the tenant.<sup>20</sup>
- 4.16 The initial requirements of the Deposit Protection Service (DPS) are that an application for the deposit to be protected, is made, in accordance with the scheme's rules, within 30 days of the deposit being received.<sup>21</sup>

## The prescribed information

- 4.17 HA 2004 s213(6) requires that the landlord provide the tenant the details of the scheme being used, the prescribed information and confirmation that the initial requirements have been complied with in 'the prescribed form'. To date, however, no form has been prescribed.
- 4.18 Instead, the Housing (Tenancy Deposits) (Prescribed Information) Order 2007<sup>22</sup> sets out the information that must be given to the

17 *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669, [2013] 1 WLR 3848, [2013] HLR 42.

18 HA 2004 s213(4).

19 Tenancy Deposit Scheme Rules 6.1–6.3.

20 My Deposits Scheme Rules C1 and C2.

21 Deposit Protection Service Rules 9–13.

22 2007 SI No 797.

tenant within 30 days of the deposit being received. Article 2 prescribes the following for the purposes of HA 2004 s213(6):

- (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;
- (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;
- (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');
- (d) the procedures that apply under the scheme where either the landlord or the tenant is not contactable at the end of the tenancy (even if their whereabouts are known);
- (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;
- (f) the facilities available under the scheme for enabling a dispute relating to the deposit to be resolved without recourse to litigation; and
- (g) the following information in connection with the tenancy in respect of which the deposit has been paid—
  - (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—
    - (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.

- 4.19 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, the references in paragraph (b), (g)(iii) and (vii) to the landlord are to be read as references to either the landlord or the initial agent and references in paragraphs (d), (e), (g)(iv) and (vi) to the landlord are to be read as references to either the landlord or to a person who acts on the landlord's behalf in relation to the tenancy.<sup>23</sup>
- 4.20 In the event that a statutory periodic tenancy arises after the expiry of a fixed-term, there is no requirement that the prescribed information be served within 30 days of it arising provided that the initial requirements of the scheme have been complied with and the prescribed information was originally provided to the tenant within 30 days of the deposit first being received.<sup>24</sup>

### Within 30 days

- 4.21 Both the initial requirements of the scheme and the prescribed information must be completed within 30 days of the deposit being received.<sup>25</sup> Likewise, the landlord must notify the tenant of the scheme being used, the prescribed information and confirm that the initial requirements have been complied with within 30 days of the receipt.<sup>26</sup>
- 4.22 These requirements do not, however, apply to any deposit that was received before 6 April 2012. In these cases, the initial requirements of the scheme must have been complied with and the prescribed information given to the tenant by 5 May 2012.<sup>27</sup>
- 4.23 Nor do the requirements (paras 4.18–4.19) apply where the following conditions are all satisfied:
- a) a deposit was received before 6 April 2007;
  - b) the fixed term has come to an end and a statutory periodic tenancy has arisen;
  - c) all or part of the deposit is held in connection with the statutory periodic tenancy;

23 Housing (Tenancy Deposits) (Prescribed Information) Order 2007 Article 2(3).

24 HA 2004 s215B(1), (2).

25 HA 2004 s213(3), (6).

26 HA 2004 s213(5), (6).

27 Localism Act 2011 (Commencement No 4 and Transitional, Transitory and Savings Provisions) Order 2012 SI No 628 Article 16.

- d) the deposit, as at 26 March 2015, was protected, but the landlord did not comply with the initial requirements of the scheme within 30 days of the deposit being received or had failed to provide the tenant with the prescribed information; and
- e) the landlord has complied with the initial requirements of a scheme and provided the tenant with the prescribed information by 23 June 2015.<sup>28</sup>

4.24 Where all of para 4.23a)–d) are satisfied, but the tenancy is no longer in existence or the deposit is no longer held in connection with the periodic tenancy, the requirements are treated as having been complied with.<sup>29</sup>

## Contracting out

4.25 The requirements of HA 2004 Part 6 Chapter 4 apply even if the terms of the tenancy agreement seek to exclude them.<sup>30</sup>

## Deposit not including money

4.26 No person may, in connection with an assured shorthold tenancy, require a deposit which consists of property other than money.<sup>31</sup> In the event that such a deposit is taken, it is recoverable by the person who gave it from whomever is holding it.<sup>32</sup>

## Circumstances relating to tenancy deposits in which the landlord can be penalised

### Return of deposit and penalty payment

4.27 Where a tenancy deposit was paid in connection with an assured shorthold tenancy after 6 April 2007, and the following conditions apply, the court must, on an application by a tenant or any relevant person, order that the landlord, and/or his or her agent, pay the applicant a sum of money which is not less than the amount of the deposit

28 HA 2004 s215A(1), (3).

29 HA 2004 s215A(4).

30 HA 2004 s213(2).

31 HA 2004 s213(7). For these purposes 'property' means 'moveable property': s213(10).

32 HA 2004 s214(5).

and not more than three times its amount ('the penalty payment') and/or order the deposit to be repaid to the claimant or paid into the designated account of a scheme administrator. The conditions are:

- a) the deposit is not being held in accordance with an authorised scheme; or
- b) either the initial requirements of the scheme or the prescribed requirements were not complied with within 30 days.<sup>33</sup>

4.28 Such an application may be made after the tenancy has ended<sup>34</sup> although if it has done so, the court cannot order the deposit to be paid into the designated account of a scheme administrator.<sup>35</sup>

4.29 While the sanctions are not expressed to apply to tenancies that were granted before 6 April 2007, they do apply to deposits that are deemed to be received (para 4.12) in connection with statutory periodic tenancies that came into existence after that date, but which followed the end of a fixed-term that was granted before it.<sup>36</sup>

4.30 Within the parameters of one and three times the amount of the deposit, the court has a discretion as to the amount of the penalty payment. In *Okadigbo v Chan*,<sup>37</sup> Males J said that the question of culpability is the most relevant factor in determining what order to make. In that case, the court had been entitled to award only the amount of the deposit because the error had been corrected during the tenancy, it had been the fault of managing agents (not the landlord), the defendants were not professional landlords and the breach had been admitted.

4.31 Where a statutory periodic tenancy has arisen after the expiry of a fixed-term and the landlord has failed to comply with the initial requirements of the scheme or provide the prescribed information within 30 days of the deposit being received (or of the deposit being deemed to have been received at the beginning of the statutory periodic tenancy, see para 4.12), it is arguable that a tenant is entitled to a penalty payment in respect of each tenancy.

33 HA 2004 s214(1), (2), (3), (4).

34 HA 2004 s214(2A), which was inserted to reverse the effect of *Gladehurst Properties Ltd v Hashemi* [2011] EWCA Civ 604, [2011] HLR 36.

35 HA 2004 s214(2A), (3A).

36 *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669, [2013] 1 WLR 3848, [2013] HLR 42.

37 [2014] EWHC 4729 (QB).

## Prohibition on serving a Housing Act 1988 s21 notice

4.32 If a tenancy deposit has been paid in connection with a shorthold tenancy and the following conditions apply, a HA 1988 s21 notice may not be given:

- a) the deposit is not being held in accordance with an authorised scheme (see para 4.4); or
- b) the landlord has protected the deposit but did not comply with the initial requirements of the scheme within 30 days of the deposit being received (see paras 4.13–4.16); or
- c) the landlord has failed to provide the tenant with the prescribed information (see paras 4.17–4.20),

unless:

- a) the deposit has been returned to the tenant in full or with deductions that are agreed by the tenant; or
- b) the tenant has made an application to the court for an order under HA 2004 s214(1) – ie for a penalty payment or for the deposit to be returned or protected – and that application has either been determined by the court, been withdrawn or settled.<sup>38</sup>

4.33 The date that the deposit is returned to the tenant can therefore be of crucial importance. It has been held in the county court that a deposit is deemed to be returned to the tenant once the tenant receives a cheque<sup>39</sup> or on the date that the sum is received in the tenant's bank account, rather than the date it is transferred.<sup>40</sup>

4.34 The fact that the deposit was received before 6 April 2007 is immaterial to the question of whether it needs to be held in accordance with an authorised scheme (see paras 4.3–4.4).

38 HA 2004 s215(1), (2), (2A).

39 *Yeomans v Newell*, County Court at Canterbury, 25 May 2016.

40 *Chalmiston Properties Ltd v Boudia*, County Court at Barnet, 27 October 2015.