**Tenancy Deposits - An Update**

Tenancy deposits remain a confusing area for landlords with a continual turnover of key cases. Some of these resolve issues and questions in the legislation. Some raise new problems. The deposit situation remains uncertain with the possibility of yet more legislative change in to come.

**Prescribed Information**

The Housing (Tenancy Deposits)(Prescribed Information) Order 2007 sets out the prescribed information that must be given to the tenant. This is required to be given within 30 days of receipt of the deposit under s213(6). In Ayannuga v Swindells (2012) CA (Civ) the precise requirement was considered by the Court of Appeal.

In this case landlord sought possession for rent arrears. The tenant counter-claimed on the basis that the PI Order has not been complied with. While the landlord accepted that he had not complied in full with the order he argued that the requirement was largely procedural, that the purpose of the legislation was to protect deposits (which had been done) and that the tenant could have found out all he wanted to know from the scheme administrator. The Court of Appeal held that the information requirements were not merely a minor matter of procedure. They were of real importance as they told tenants how they could seek to recover their money and how they could dispute deductions without litigation. The Court of Appeal upheld the decision of the High Court on this issue in *Suurpere v Nice & Anor* [2011] EWHC 2003 (QB). The landlord was clearly in violation of the order and the penalties of s214, Housing Act 2004 applied. Therefore the landlord was ordered to return the deposit plus a penalty equivalent to three times the deposit.

It is worth noting that deposit protection is a two-part obligation. Mere protection without the information is simply not enough to discharge the landlord’s obligations. They must also sup0ply the required information. In addition, landlords must supply that information themselves and not leave tenants to go on a hunt or work it out for themselves.

Where there is argument about whether the information the landlord has provided is sufficient then the *Ayannuga* confirms that the test is as set out by the Court of Appeal in *Ravenseft Properties Ltd v Hall* [2001] EWCA Civ 2034 . That is (with paraphrasing):

whether, notwithstanding any errors and omissions, the notice is “substantially to the same effect” in accomplishing the statutory purpose of telling the proposed tenant of their rights and the procedures operated by the relevant tenancy deposit scheme for recovering their money and contesting deductions.

The upshot is that the Prescribed Information really does matter and landlords need to ensure they have it right. This is an area of real weakness for a lot of landlords. In *Ayannuga* it was less the prescribed information that was missing and what was actually not provided was a leaflet produced by the scheme itself which set out the procedures for disputing deposit deductions. All the schemes provide some variant of this and it is often forgotten.

**Rent in Advance and Deposits**

There has long been debate about what exactly constitutes a deposit. One area that has caused concern is where the rent is taken substantially in advance. This arose in *Johnson & Ors v Old* [2013] EWCA Civ 415.

The Housing Act 2004, s212 defines a deposit as:

“*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.*

It is the practice of some landlords and agents, in cases where the tenant’s credit worthiness is in doubt to ask the tenant to pay 6 months rent in advance. At the end of the six months they commonly pay rent monthly (either on a continued fixed term or periodic tenancy) having. so to speak, proven their worth. These situations are usually expressed in the tenancy agreement as a statement that the rent is calculated monthly obligation to pay the rent monthly with a further statement stating that it is due six-monthly in advance. Less well drafted agreements are more inconsistent and have a provision requiring payment of the rent monthly and a second provision which is in tension with it stating that the rent is to be paid for six months in advance. This has led some commentators to suggest that a requirement for rent to be paid 6 monthly in advance is actually security for the tenant to fail to pay the rent monthly and it therefore it counts as a deposit.

This second scenario is what occurred here. Ms Old took a tenancy of a property. She had a good credit history but no immediate income and so she was offered a 6 month tenancy with the rent payable six monthly in advance. The tenancy was very poorly worded and expressed the rent as actually payable monthly but then had a further provision expressing the rent to be payable every 6 months. The tenancy was renewed several times for further 6 month terms on the same 6 monthly payment provision and then became periodic with the rent payable monthly. The landlord duly sought possession based on an s21 notice served some time before and this was defended on the basis that at the time the notice was served the deposit (the six months advance rent) had not been protected. The situation was made worse because the agreement was worded in such a way that it appeared that the tenant was being asked to pay the rent for the periodic tenancy at a much earlier stage. In fact there was also a separate tenancy deposit which had been properly protected but Ms Old's case was that the 6 monthly payment for the most recent tenancy was a further deposit which also required protection.

The Court of Appeal made clear that the agreement had to be considered as a whole and no single clause could be used to demonstrate that there was a deposit without looking at the whole agreement and its overall effect. This is an important point and it is often overlooked by landlords who think that a simple change of wording or a clause which does not reflect the reality will solve all their problems. With deposits, as with tenancies in general, it is the actual relationship as opposed to fancy footwork in the contracts which will interest the courts. The Court approached the main issue, was rent in advance security, by making two points. First, that there is a crucial difference between an obligation or liability and the security for that obligation or liability. A payment as security is not intended to discharge the obligation or liability. It is intended as an assurance that the obligation or liability is to be discharged at some future time. A payment which is intended to discharge the obligation or liability is just that. The fact of making the payment discharges the liability, it cannot simultaneously act as a security for an obligation that has already been discharged. Having made this first point clear the Court applied a devastating analysis by asking itself how the tenant would have responded were she asked to make a payment of the monthly rent having already paid the six months in advance. It concluded that she would have responded that she had already paid the rent. That being the case the money already paid could not possibly be a security for the discharge of the obligation but rather a discharge of the obligation to pay rent.

It should be remembered that this is not a final answer. There are some systems operated by landlord that masquerade as rent in advance but are, in reality, deposits. The test applied in this case is a very good guide though. If the tenant is asked to pay rent for a specified period can they legitimately reply that it has already been paid. If so, then the money already taken is unlikely to be a deposit.

**Deposits and Renewals**

*Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669 considered deposits taken before the start of the deposit protection legislation came into force. However, it has effects that stretch far beyond this scenario and potentially impact on almost every AST.

The facts in this case are simple. Rodrigues obtained a tenancy from Superstrike which began in January 2007 with a term of 12 months. A deposit equivalent to one month’s rent) was paid in January 2007. In January 2008, the tenancy became a statutory periodic tenancy. Superstrike eventually served a s21 notice and sought possession. The case worked its way up to the Court of Appeal where there was one main ground of appeal.

On the statutory periodic tenancy arising in January 2008, a deposit was received in respect of a tenancy, which fell under the requirements of s.213 HA 2004, thus failure to protect meant s.215 applied and the s.21 Notice was invalid.

There were two questions argued before the Court. First, did the statutory periodic tenancy constitute a new tenancy? Second, had the deposit been ‘received’ by the landlord in respect of that tenancy under the meaning of section 213, Housing Act 2004.

The Court of Appeal dealt with the first question very quickly as a different Court had held in *N & D (London) Ltd v Gadson* (1991) 24 HLR 64 that a statutory periodic tenancy was a new tenancy.

This left the second issue, of whether the deposit had been ‘received’ in January 2008 at the start of the new statutory periodic tenancy. The landlord argued that the meaning of receipt in s213 was

“physically received”. By physical receipt he meant payment by cash, cheque, bank transfer or in some other comparable way from the tenant to the landlord or through their agents. The Court did not agree and followed the tenant's line of argument that each new tenancy constituted a new contract. Therefore the deposit had to move between contracts. If it did not then the deposit would only be held in respect of the first tenancy and the landlord would not be able to make use of it in respect of the most recent tenancy, making it effectively useless. In other words there had to be a mechanism to transfer the effect of the deposit between tenancies and this is what had been agreed even if it was not expressly referred to.

As s.212(8) referred to money in the form of cash or otherwise, it was clear that it didn’t have to be physical currency, payment by cheque or bank transfer could amount to payment and receipt. This provision should be construed broadly. Payment had been held to cover situations other than cash, cheque or bank transfer in White v Elmdene Estates Ltd [1960] 1 QB 1, [1960] AC 528, where an obligation to give a £500 discount on a sale associated with a tenancy letting had been found to be payment of a premium. This had been approved in *Hanoman v Southwark London Borough Council (No 2)* [[2009] UKHL 29](http://www.bailii.org/uk/cases/UKHL/2009/29.html).

Therefore the landlord was theoretically supposed to have returned the deposit at each renewal and the tenant was meant to have paid the same amount in respect of the renewed tenancy. The two payments had been set off against one another with the landlord continuing to hold the deposit. Therefore the deposit for the new tenancy was not protected and the s21 notice was invalid.

***Superstrike* Issues**

The *Superstrike* case raises issues for an unknown number of landlords who took deposits before April 2007. DCLG estimates that this may affect around 10,000 landlords but is totally uncertain. In fact those landlord may have been caught by the legislation anyway. This is because the commencement order for the Localism Act 2011 amendments to Housing Act 2004 stated that the amended scheme applies to all deposits held for ASTs in effect on or after the commencement date, with no exemption for pre April 2007 deposits.

However there is a wider issue. If a statutory periodic tenancy is a new tenancy then so is a fixed term renewal. Further, if there is a new receipt for each periodic tenancy then there must be the same for a fixed-term renewal. The obligations on receipt are two-fold, as discussed in *Ayannuga*. Not just to protect but also to serve the prescribed information. This creates a potential issue. The two obligations actually required of landlords are:

1. To comply with the initial requirements of a scheme; and

2. To serve the prescribed information.

Both are to be done within 30 days. Failure to do so raises the spectre of the financial penalties. Compliance with the initial requirements is not so hard if the deposit has been with a scheme from the start. However, if a tenancy is renewed, as a fixed term or statutory periodic tenancy then there appears to be a requirement to serve the PI again. If this has not happened, and in many cases that will be the case, then the landlord will only have 30 days from that renewal to solve their problem at which point the financial penalties will apply. This is an issue that will capture a much wider, and ever increasing number of landlords. There are landlords continuing to fall foul of this decision constantly.

**Fixing *Superstrike***

In a letter to the RLA, Mark Prisk had stated that this was not the intention of the legislation when it was drafted. The Welsh assembly had suggested that it would use its Housing Bill to correct this issue for Wales alone. Stung by this the Government inserted amendments into the Deregulation Bill which is currently in committee stage in the Lords. Committee stage will last through October after which there is Lord’s Third Reading before parliamentary ping-pong and then Royal Assent. Therefore it is likely that the provisions will be in force in April 2015. The Conservative Party is fairly keen on the Bill as it is part of a manifesto commitment to reduce regulatory burned and they are likely to want to be able to raise it as an accomplishment at then next general election.

The bill as introduced in the Lords makes changes to the Housing Act 2004 in s31. This adds new sections 215A to 215D to the Housing At 2004. There is a fair bit as the legislation is to some extent retrospective and also has transitional and sweeping up provisions. The new provisions apply differently to different scenarios:

1. Deposits taken before 6 April 2007- The new section 215A deals with these deposits. This is for situations where the initial tenancy has commenced prior to the original introduction of the deposit legislation in April 2007 and the tenancy has continued by becoming statutory periodic after 6 April (the *Superstrike* situation). S215A states that provided the deposit is either returned or placed into a protection scheme within 90 days of the commencement date of s31 then the requirements of s213 to register and serve prescribed information will have been fully complied with. This also operates as a ‘sweep up’ provision that requires that all existing periodic tenancy deposits will be required to be registered with a scheme in that same time period. This should mean that there will be no unregistered AST deposits in existence at all 3 months after these provisions come into force.
2. Statutory periodic tenancies with deposits received after 6 April 2007- The new section 215B deals with situations where a deposit was taken on or after 6 April 2007 and the deposit was properly protected and the deposit registered in the proper time period (14 days or 30 days). In that case the provisions are deemed to have been complied with at all times going forward and so there is no ongoing requirement to re-register a deposit and serve prescribed information as a fixed term tenancy becomes statutory periodic.
3. Contractual periodic tenancies and renewals- The new s215C deals with tenancies where a deposit was taken after April 2007 and the tenancy has been renewed or continued as a contractual periodic tenancy after that date. Provided the deposit was originally registered and the prescribed information served properly within the original timescales prevailing at that time then those requirements are again deemed to be met going forward. Therefore there will again be no ongoing need to re-register the deposit and serve the prescribed information on a renewal. Although this is also set up and titled to protect contractual periodic tenancies these did not in fact require the protection of the Deregulation Bill as a contractual periodic tenancy is usually phrased as a continuation tenancy.

This will protect most landlords from situations like those set out in Superstrike. However, it will not in any way rescue a landlord that has previously been in default by failing to protect a deposit, even if they later got it right on renewal. It is also worth noting that the phrasing means that protection will only be extended to landlords with deposits taken prior to Localism Act amendments if they protected the deposit within 14 days. At that time there was no penalty for late protection and it occurred routinely. Likewise, the Prescribed Information will have to be served promptly and correctly for the Deregulation Bill protection to arise.

**Current Claims**

The new sections also have provisions dealing with claims currently before the Court. These are found in the new s215D. This first in subsection 1 creates the retrospective element of the legislation by stating that s215A-C are to be treated as having been in effect since 6 April 2007. This retrospective effect is specifically disapplied in subsection 2 in respect of any proceedings relating to a claim for deposit penalties under s214 or relating to a claim for possession under s21 which has been finally determined. So there is no power to re-open this issue if you are a landlord who has previously lost out. However, the changes do apply to any proceedings that have yet to be finally determined. Subsections 3, 4, and 5 ensure that the change, which will of course lead to a tenant’s defence or claim being struck out do not have the effect of penalising the tenant as they preclude the Court from landlord’s costs where those costs reasonably relate to a s214 or s21 claim. So the Court could order the tenant to pay the landlord’s costs in relation to ancillary disrepair claim or a procedural matter. There is nothing in the provisions about tenant’s costs so, in principle, the landlord could be ordered to pay the tenant’s costs but as the tenant would, in effect, be losing the case this would be an unusual set of facts.

**Effects of the Deregulation Bill**

The most important effect is of course the overriding of *Superstrike*. However, there are some other aspects that may arise.

In the shorter term it is likely that landlords will seek to delay the final conclusion of matters in order to take advantage of the changes made by the Deregulation Bill. S215D encourages this as the effects of the changes kick in unless the matter is finally disposed of which will not occur until all appeals or the time limits for them have been exhausted. Therefore there is a perverse incentive for landlord’s to keep appealing cases in the hope that the legislation will be brought into force before their appeal rights are exhausted.

Given that the effects of the Deregulation Bill only apply to deposits that were properly protected in the first place there may be a change in tactics for tenants and a move toward looking more at issues such as prescribed information.

**Receipts**

One of the interesting side issues with the *Superstrike* case is that it focused on the issue of receipt. This has other side effects. For example, there has often been a question as to what occurs if the deposit is transferred from one landlord to another. For the purposes of the Act this would count as a fresh receipt of the deposit and hence the obligation to protect and serve the prescribed information.

**The Additional *Superstrike* Issue**

There are rumours of a further Court of Appeal case on tenancy deposit protection. This is allegedly based on the argument raised at the end of the *Superstrike* case and alluded to by the Court. This is based on an error in s215. S215 states that a s21 notice cannot be given where s213(3) has not been complied with. S213(3) requires that the ‘initial requirements’ of an authorised scheme must be complied with. This is still something that is not clear but presumably cannot be complied with of a deposit is served outside the 30 day window. This argument was mentioned in *Superstrike* but not utilised there as it was presented too late and was not required for the Court to reach its decision.

**Another Odd Decision**

*R (on the application of Tummond) v Reading County Court & Anor* is another odd decision. In this case a judicial review was taken out by a tenant in order to protest against a refusal of permission to appeal. Oddly, the Court as well as refusing permission on procedural grounds also looked at the deposit legislation. There has always been a degree of uncertainty as to whether an s21 notice can be served before the deposit has initially been protected. The High Court appeard to suggest that it could be. The Court identified that s215(1)(a) appeared to help the case for T on the basis that at the time the s21 notice was served the deposit was not held within an authorised scheme. However, the Court took the view that the wording of the title to s215 was important. This section is titled “Sanctions for non-compliance”. As the Court pointed out there was no time during which the landlord was not compliant with the requirements of the law. The deposit was protected and the prescribed information served within 30 days. Therefore the landlord had complied with the requirements and so it appeared that this section was not directed at her. If the Court was to take the view that it was then that would suggest that the penalties including the financial ones would apply to any landlord during the period between taking the deposit and protecting it.

The Court also made much of the clause in the agreement that said that the landlord would protect the deposit within the set period with an approved scheme. The Court held that this showed she intended to be bound by the schemes and that she was contractually obliged then to protect the deposit. She was therefore holding the deposit within the rules of an authorised scheme and this was sufficient to comply with the legislation. T argued that to deal with it this way meant that there was a form of intent being added to the test which the Court did not accept.

This issue of intent and clauses is a really serious issue and a flaw in the Court’s reasoning. First, if one is relying on the clause in the lease as creating a contractual obligation to protect then the landlord may have breached it. The clause was an older one which pre-dated the Localism Act changes and it required protection within 14 days. This had not occurred if the deposit was in fact paid on the 18th as the tenant asserted. Secondly it does, as T said, add a sort of intent element to the situation which is wholly inappropriate to a non-criminal penalty. Getting round this issue, as the Court did, by saying that the contract created a holding within a scheme is artificial. The entire position is now one of intent. If a landlord takes a deposit and protects it outside the 30 days can they say that an exchange of emails which said they would protect it is sufficient to amount to a holding and therefore avoid the penalty? Or does the protection provided only amount to a mirror of the statutory position. It also leaves open the issue of s21 notices at the start of a tenancy in a truly odd manner. From the judgement that one can only serve an s21 notice prior to protection if there is a clause in the agreement which states that the deposit will be protected. But if the landlord then fails to protect the notice will still have been served. The service would be retroactively invalidated by that later contractual breach.

This reasoning is technically *obiter* and so could be ignored but it may be that this case will now be used in the County Courts.

David Smith

Anthony Gold Solicitors

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