



## Key Documents



### Who should read this?



Tenants



Agents



Landlords

Insured

Custodial

# TDS and the late protection of deposits

## **Recent Court cases about the late protection of deposits**

Since the introduction of the Tenancy Deposit Protection legislation in 2007, a number of court cases have interpreted its practical effect. In particular, some court decisions determined that a tenant cannot bring a case for breach of the deposit protection legislation once a tenancy has ceased to exist, nor may they sue where monies are protected prior to the court hearing. The defences raised in these cases have now been superseded by the Localism Act 2011, which made important changes to tenancy deposit protection under the Housing Act 2004. In addition the Court of Appeal decision in Superstrike vs. Rodrigues in June 2013 clarified some aspects of the law in relation to deposits and statutory periodic tenancies.

## **When did the Localism Act changes come into effect?**

The Localism Act came into effect on 6th April 2012. This means that:

- New tenancies created on or after 6th April 2012 will be covered by the new requirements.
- Tenancies already in existence on 6th April 2012 will have 30 days to comply with the new requirements, if they have not already done so.
- The new requirements will only apply to Court proceedings for a breach of the Housing Act requirements, where these are started on or after 6th April 2012.

## **How do the Localism Act changes affect the late registration of deposits?**

The effects of the changes are, in summary, that:

- The deposit must be protected and the Prescribed Information provided within 30 days (increased from 14 days). For TDS members this will mean that the tenant must have received the Prescribed Information (including the explanatory leaflet What is the Tenancy Deposit Scheme?) and the TDS deposit protection certificate, and the deposit must have been registered on the TDS tenancy database within the new 30 day limit.

- This is an absolute time limit and a tenant will be able to make a claim from 31 days after deposit payment if the requirements relating to protection and prescribed information have not been met. The claim will be for the return of the full sum of the deposit along with a penalty of between one and three times the sum of the deposit, to be awarded at the discretion of the Court.
- The claim can still be made even if the deposit has been protected, or the Prescribed Information provided, after 30 days, although the courts will then take the fact that protection has occurred into account when deciding what level of penalty to impose.
- If a landlord fails to meet the initial requirement to protect the deposit within 30 days, no Section 21 Notice can be served until either the landlord returns the deposit to the tenant in full or with such deductions as the tenant agrees; or if the tenant has taken proceedings against the landlord for non-protection and those proceedings have been concluded, withdrawn or settled (for example, by the court awarding damages being the return of the deposit or a fine not more than three times the value of the deposit).
- If a landlord fails to serve Prescribed Information, (s)he cannot serve a Section 21 Notice until the Prescribed Information has been served - but this can be more than 30 days after receiving the deposit. This will not prevent a tenant from issuing proceedings for late provision of the prescribed information and seeking a penalty award.
- Tenants can make an application to a county court for a penalty award even where the tenancy has ended – so the penalty does apply to former tenants.

## How does the Superstrike decision affect the late registration of deposits?

- In this case a deposit was taken on an assured shorthold tenancy before 6 April 2007 and did not need to be protected. However the tenancy became a statutory periodic tenancy after the 6 April 2007 and the Court of Appeal has decided that this was a new tenancy and the deposit should have been protected and Prescribed Information served within 30 days of the statutory periodic tenancy being created.
- Landlords holding deposits in these circumstances should ensure that the deposit is protected and serve Prescribed Information within 30 days of the statutory periodic tenancy being created.
- The Superstrike decision also has implications for renewals of tenancies (either through a new fixed term assured shorthold tenancy or a statutory period tenancy) where the deposit has already been protected. In these cases landlords should re-issue the Prescribed Information (including the Scheme leaflet) within 30 days of the renewal of the tenancy or of it becoming a statutory periodic tenancy.

## So should I still protect deposits?

Landlords still need to protect deposits – if they don't they won't be able to use section 21 of the Housing Act 1988 to evict tenants as the notice will not be valid if the deposit is unprotected at the time the notice is served. When claiming possession using the accelerated procedure, landlords will have to certify on the claim form that they have complied with the tenancy deposit regulations and provide evidence of that compliance.

Landlords who fail to protect deposits are also missing out one of the key benefits of the Tenancy Deposit Scheme – access to quick, free, and fair dispute resolution. If a landlord has not protected the deposit and the tenant disputes proposed deposit deductions, a landlord's only option may be to go to court – a costly and time consuming exercise.

So remember that protecting deposits means that deposit holders:

- comply with the law – the requirement to protect deposits and serve Prescribed Information is still there!
- can rely on Section 21 of the Housing Act;
- have access to free dispute resolution.

## So what are the requirements for the protection of deposits?

These are set out in Section 6 of both the Tenancy Deposit Scheme for Landlords Membership Rules, and the Tenancy Deposit Scheme for Lettings Agents and Corporate Landlords Membership Rules:

- For the purposes of TDS' Scheme Rules the initial requirements referred to in the Housing Act 2004 mean the Member registering the deposit on the TDS tenancy database within the Statutory Time Limit when it is first received.
- In addition, the law requires a landlord to give the Tenant Prescribed Information, including any leaflet published by the applicable tenancy deposit protection scheme, within the Statutory Time Limit.
- The Statutory Time Limit is 30 days, beginning on the day the Member receives the Deposit from the Tenant (whether or not in cleared funds) or, if later, the date a non-AST becomes an AST.
- For a deposit that was taken on an AST before 6 April 2007 but which becomes a renewed AST or a new statutory periodic tenancy after 6 April 2007 the Member is required to protect the deposit and serve the Prescribed Information within 30 days, beginning on the day the tenancy was renewed or became a statutory periodic tenancy.
- For a deposit that is currently protected but is renewed or becomes a statutory periodic tenancy the Prescribed Information, including a copy of the scheme leaflet must be given to the tenant within 30 days of the day that an AST becomes a statutory periodic tenancy or a renewed AST.
- The Tenancy Deposit Protection Certificate

shows the date the deposit was stated to have been received by the Member and the date that the initial requirements of the Scheme were met. If the initial requirements are not met, or if Prescribed Information is not given, within the Statutory Time Limit, the tenant or a relevant person may be entitled to bring court proceedings against the Landlord for failure to comply with the 2004 Act.

- TDS may at its own discretion allow a Member to protect a deposit outside the Statutory Time Limit, but not where a tenancy has already ended. Guidance on the factors TDS takes into account can be found below. The fact that TDS has permitted late registration will not in itself prevent a tenant or relevant person from taking legal proceedings against a landlord for failure to comply with the 2004 Act.

### **What will TDS do if I miss the deadline?**

We may award a disputed deposit to the tenant without adjudication where there is a breach of these initial requirements (see paragraph 5.33 of our Rules for the Independent resolution of Tenancy Deposit Disputes). In practice however we take a sensible view. We look at each case on its merits so that we do not prejudice the tenant or deposit holder. To deal with a dispute where the deposit has been registered late we need to be satisfied that:

- the deposit has been registered before the period of the tenancy ends; and
- there is no detriment to the tenant; and
- the deposit holder intended to protect the deposit; and
- due to an honest mistake they did not meet the 30 day deadline.

### **So does the change in the law make any difference to how TDS works?**

We accept that a member who has missed the deadline through a genuine omission, and who has not attempted to avoid compliance with the law, should not be unfairly penalised. We note that the courts make a similar distinction assessing the amount of penalty that should be imposed in any given case.

As members of TDS, you agree to follow our Scheme rules. We are not bound to offer membership or protect a deposit if we have reason to believe the applicant is seeking to avoid their obligations either to the Scheme or under the law. Our Rules are consistent with the tenancy deposit protection legislation and are fair and reasonable.

### **How will the late registration of deposits affect members?**

We record all instances where members protect deposits some time after the deposit has been received and outside the 30 day deadline in our Rules. Where this is not simply down to an honest mistake we will discuss this with the member concerned. The continued late registration of deposits could ultimately affect their membership of TDS.



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[www.tenancydepositscheme.com](http://www.tenancydepositscheme.com)



[deposits@tenancydepositscheme.com](mailto:deposits@tenancydepositscheme.com)



0300 037 1000