Landlord Law Services

Support, training & legal resources for property professionals in the private rented sector

Landlord Law Essentials – Part 8: Deposits & Data Protection

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If I suddenly disappear …

- Please wait
- I will be back
- But I may have to re-boot my computer first

About Me

- Tessa Shepperson – Solicitor, BA LLB
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- Runs Landlord Law online service, &
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- Author and speaker

Program

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Introduction

What is a deposit?

- Money paid at the start of the tenancy/contract as security for
  - Breaches of the tenancy agreement/contract which have caused L financial loss
  - Normally, this is for damage done to property or its contents, and sometimes
  - Non-payment of rent
- Provided the tenancy agreement has suitable clauses
- The deposit is the tenant/contract holder's money so if there is no claim it must be returned to them.

Deposit or Rent?

- Johnson v. Old [2013]
- Here rent payments had been made in advance
- T claimed that they were not rent but a deposit which had not been protected (and claimed the penalty)
- Tenancy agreement terms were confusing
- However, the Judge held that the payments were not security for payment of rent but were the actual rent payments
- Common sense decision – but still make sure your tenancy agreements are clear

Deposit or Rent?

Deposit:

- Money belongs to T
- It is held as security to cover loss
- It is returned to them at the end of the contract/tenancy, less deductions

Rent

- Money paid is intended for rent
- Rent paid in advance is not a deposit
- Common sense approach

Holding Deposits

Holding Deposits

- A fee paid by tenant to landlord to reserve the property
- Limited to one weeks’ rent
- Landlord must refund after 15 days unless the parties agree to extend the time in writing
- Landlord can keep the deposit if:
  - Applicant fails a right to rent check, and/or
  - Provides false or misleading information (see this video) and/or
  - Fails to respond to reasonable requests, or
  - Decides not to proceed
- After day 15, Landlord must write to T either refunding the money or saying why it has been withheld.

Find out more on Landlord Law:

- Use our calculator to check the amount – find in the deposit topic and elsewhere
- Holding deposits information and forms page – find via the Documents and Forms page
- Contains a receipt form and
- Standard Letters you can use
- Use for both England and Wales

Deposits -background

Before 1 April 2007

- No special rules (apart from contractual)
- Many landlords made unjustified deductions
- Tenants had to issue court proceedings to recover money unjustly withheld
- Some voluntary schemes for agents
- Intense pressure built up for deposits to be regulated
- Introduced in the Housing Act 2004 as a late amendment but only came into force in 2007.

The Initial Schemes

- **Custodial** – free but money paid to the scheme to hold
- **Insurance based** – landlord pays a fee but can hold the money

- **Deposit Protection Service (DPS)** – this was the free custodial scheme
- **TDS** – this was the scheme aimed at letting agents and large landlords
- **My Deposits** – this was the scheme aimed at landlords

- However now all 3 schemes offer custodial and insurance-based service.

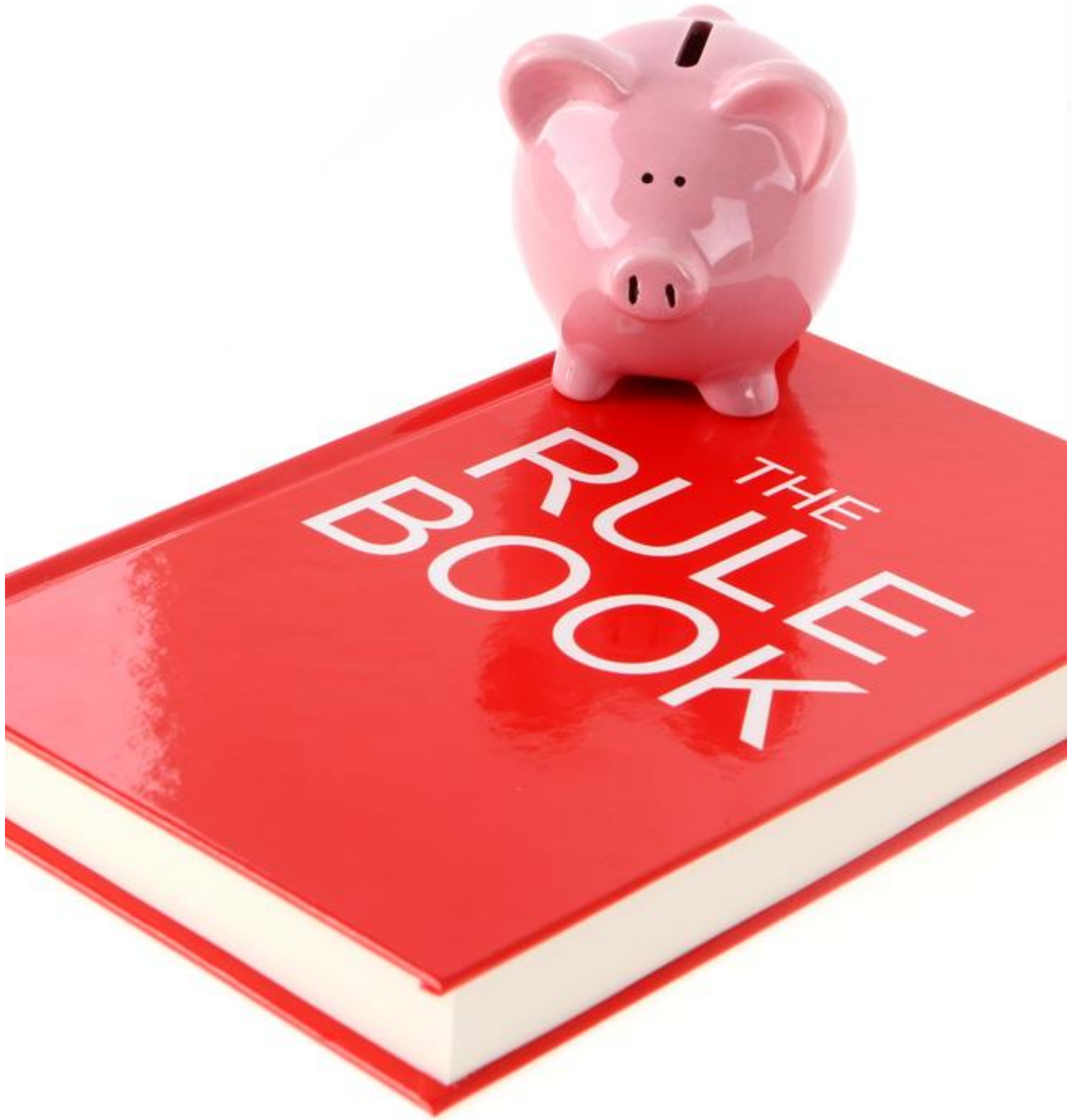
The Superstrike Case (2013)

- Landlord took a deposit for a fixed-term tenancy before April 2007, so assumed he did not need to protect
- However, as the periodic tenancy started after April 2007, the Court Held that this was caught by the rules as a statutory periodic tenancy is a new tenancy
- This ruling caused enormous problems with landlords who had assumed they were compliant being sued by tenants for the penalty for non compliance
- The issues were resolved in the Deregulation Act 2015

The Rules

Dealing with Deposits – the Rules

- The deposit rules ONLY apply to assured shorthold tenancies or Occupation Contracts in Wales - so no need to protect for licensees, lodgers, and unregulated tenancies such as company lets.
- You can only take a money deposit
- Deposit money must be protected
- With a government authorized tenancy deposit scheme
- And prescribed information must be served
- Both within 30 days of receipt of the money



Deposit sum – England only

- Under the 2019 Tenant Fees legislation in England deposits are now limited to
  - 5 weeks rent where the annual rent is £50,000 or less
  - 6 weeks rent where the annual rent is over £50,000
- Free deposit calculator forms are available eg the Landlord Law form here.

If you take more than this

- It must be refunded or (with the tenant's agreement – keep proof) used towards money owned by the tenant, and
- You can be prosecuted and fined, or
- Councils can impose a financial penalty up to £30K

Time limit for protecting the deposit

- Time limit is within 30 days of receiving the money
- Not 30 days from the start of the tenancy

- If tenants pay the deposit a long time before the tenancy starts:
- Always protect immediately otherwise, you will be in default when the tenancy starts

Older deposits

After the Superstrike case, the rules are now as follows:

- Deposit taken before April 2007 for a tenancy which became periodic after that date – deposit must have been protected (and PI served) before 23 June 2015
- Deposit taken before April 2007 for a tenancy which became periodic before that date – no need to protect until you want to serve a s21 notice
- Deposits taken after April 2007 which were protected and PI served will be treated as if the prescribed information had been served on every renewal or whenever a statutory periodic tenancy arose.

Serving Prescribed Information

- It's the information which is prescribed – not the form (there is no prescribed form)
- Requirements are set out in the Housing (Tenancy Deposits) (Prescribed Information) Order 2007/797 s.2 (1) (a) – (g). (Similar rules apply in Wales)
- Note - (g) (vi) "the circumstances when all or part of the deposit may be retained by the landlord, by reference to the terms of the tenancy"
- This may not be satisfied by serving the deposit certificate and the scheme leaflet
- So, you need to serve a proper form – some schemes provide this. The form is available for my Landlord Law members.

Signature of the PI form

- Landlords must sign, or
- Their letting agent (e.g., if the letting agent took the money)
- Companies & the Northwood Solihull case – Court of Appeal held that the PI form can be signed by a validly authorized individual on behalf of a corporate landlord or agent. Strict compliance with s44 Companies Act 2006 not necessary
- Tenants do not need to sign, the rules provide that tenant must be given the opportunity to sign. But it will not invalidate the form if they don't

Ayannuga v Swindells [2012]

- A landlord had protected the deposit and served most but not all of the prescribed information
- He did not think it necessary to serve all of it as the information is available on the internet
- Tenant claimed in possession proceedings that his section 21 notice was invalid because of this
- **The Court held** that the prescribed information WAS of real importance, as it told tenants how they could seek to recover their money and how they could dispute deductions, without having to go to court.
- So, the landlord lost his case and had to pay the penalty

Letting Agents

- Letting agents are jointly liable with landlords for the penalties if they take the money
- Which is why agents prefer to deal with protecting the deposit rather than leave it to the landlord
- The Deregulation Act (s30) provides for the agents details to be given on the PI form and for them to be able to sign it

Find out more on Landlord Law:

- Use our calculator to check the amount – find in the deposit topic and elsewhere
- Tenancy Deposit Compliance Checker
- Articles & FAQ

Penalties for non compliance

Penalties for non-compliance – no fault notices

- You will not be able to serve a valid section 21 notice if the deposit is protected late
- Or serve a ‘no fault’ eviction notice in Wales
- Unless you have refunded the money to the tenants (keep proof of receipt)
- Money can be offset against rent arrears ONLY with the tenants’ written permission
- If the tenants have already bought a claim for the financial penalty, which has been resolved, then this penalty does not apply

Methods of refunding the money:

- Payment into the tenant's bank account (if known)
- Payment in cash – have a witness present
- Cheque – could be problematic if tenants fail to cash the cheque as the case law is confusing. Best to avoid this.

If you have not protected and want to use section 21/no fault eviction

- Don’t protect the deposit out of time in a custodial scheme
- You will not be able to get the money paid out to the tenants for at least 1 month
- Which will delay the issue of your notice
- Just refund the money directly to the tenants
- Make sure you can prove this

Penalties for non-compliance - financial penalty

- If you have not protected the deposit and/or served the prescribed information within 30 days of receipt of the money
- The tenant/contract holder can apply to the court for a penalty payment of up to 3x the deposit money
- There is no defence, and no discretion save as to the amount of the award
- Liability falls due on 31st day after payment – its as if T has a fund of at least 1x the deposit, which he just needs to bring court proceedings to claim

About the penalty

- Only payable on Court Order
- Part 8 procedure
- Limitation rules apply (6 years)
- Award is up to 3x the deposit sum
- Khuja v Chowdhury in 2015:
  - 1x – if landlord has a genuine reason
  - 2x – if landlord 'should have known'
  - 3x – if landlord deliberately flouting the law or behaving dishonestly
- Commonly claimed by tenants in rent arrears eviction claims – so if you are in breach, rent arrears should be at least 5 months worth to be sure of success

Inventories

Are they required?

- Not in England, although they are strongly recommended
- In Wales they are now a prescribed term – this is term 53 for fixed term tenancies or 81 for periodic tenancies

Why they are necessary

- You need to be able to prove the condition of the property at the start of the tenancy/contract
- Otherwise, you will not be able to prove that the condition has deteriorated by the end of the tenancy/contract
- Proof is essential if you are to succeed in a claim for loss or damage at adjudication or in Court
- Your inventory and check out report are your main evidence to prove this

Creating an inventory

- If you use agents, they should do this for you
- Otherwise, we recommend using a professional inventory clerk
- You can do it yourself but if the tenants do not agree with it, it will carry less evidential weight.
- There are apps which you can use to create an inventory with your phone including pictures
- There is also a Landlord Law form and article but best to use a third party

Procedures

- You or your inventory clerk should check the property with the tenants when they go in and get them to sign to confirm agreement
- This is better than just leaving the inventory with them for them to check
- The property should be checked against the agreed inventory at the end of the tenancy ideally with the tenants present
- Do not delay, or tenants can claim that damage was done after they moved out
- Check carefully and thoroughly, as money refunded may be difficult to recover if you discover damage later

Adjudication

Availability

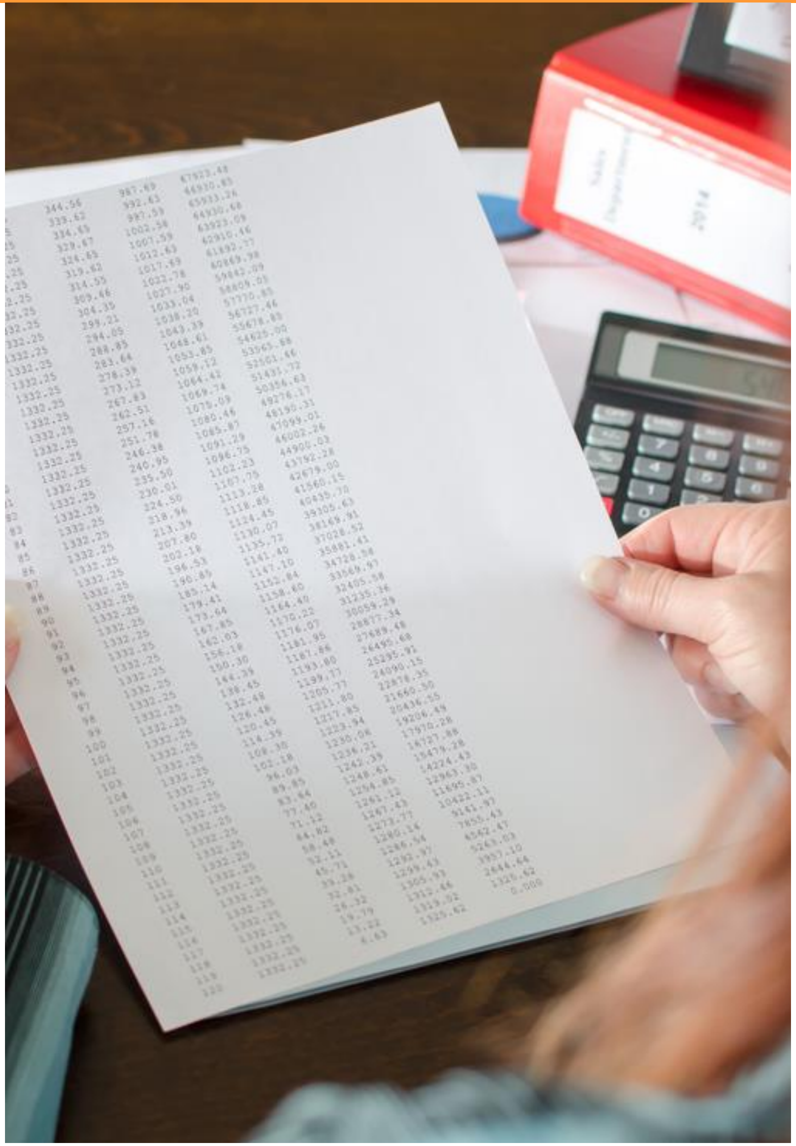
- All 3 schemes offer a free adjudication service
- Details are available on the scheme websites
- Time limits will apply so need to act promptly

About the adjudication service

- Adjudicators do not visit the property – adjudication is based on the evidence provided
- Can send photographs and videos but not other material
- Note that adjudicators cannot take into account tenant claims so e.g. if tenants have applied setoff, they should opt for court claims if there is a dispute
- The Adjudicators decision is binding

What landlords will need to win

- Burden of proof is on the landlord (as it’s the tenant’s money) – they will need:
- A tenancy agreement with relevant clauses
- Proof of liability – normally a signed inventory and checkout report, sometimes other reports are helpful
- Proof of quantum – normally receipts and invoices
- Liability and quantum evidence needs to be given for each item claimed.



Betterment:

- Cannot have ‘new lamps for old’
- Formula:

(Replacement cost / Expected use) x (Expected use – Actual use) = Value of claim.

Eg – 2 year old carpet which should have lasted 5 years, £1,000 to replace:

(£1000 / 5) = £200 x (5-2)3 = £600

Fair wear & tear

- Cannot claim for deterioration due to normal use as a home by the tenant and family
- Landlord cannot expect the property to be left in the same pristine condition as it was let after several years wear and tear
- W&T will vary depending on the tenants – eg less if tenant is elderly widow living alone.
- Wear and tear is not the same as cleaning – if you can prove the property was clean at the start you can claim for cleaning if it is left dirty.

Alternative schemes

What are they?

- Also known as Deposit Replacement Schemes
- They are not insurance or a deposit
- **They are a guarantee** – the scheme promises to pay a certain amount (up to 12x the weekly rent) to the Landlord for damage or rent arrears after the tenant has vacated
- If the scheme pay out, they will then claim this money back from the tenants

Condition for use

- Landlords must offer tenants a choice between the replacement scheme and a traditional deposit scheme
- Failure to do this will be a breach of the tenant fees rules and carry penalties

Landlords:

Pro's

- May encourage tenants
- May be able to claim more than the current 5x weekly rent for damage

Cons

- Company may not be good for the guarantee payout when the tenancy ends (check to see if they are regulated)
- There may be fees, e.g. for the adjudicatio – who should pay?

Tenants

Pro's

- Considerably less upfront cost then for a traditional deposit

Cons

- The fee cannot be offset against damage
- If they leave with damage/arrears they may end up paying more than they would under a traditional scheme
- Schemes are more likely to chase them for payment than landlords

Data protection

What is data?

- Information about an individual such as their name and address, ethnicity, age, payment history, etc
- Some data is classed as sensitive, e.g. criminal offences and conviction, and medical data. This can only be processed (used) in limited circumstances
- NB the persons whose data you hold are **data subjects**.

Data controllers and processors

- **Data controllers** – those who collect and hold the data for a purpose and who determine how it is used. They are in overall control. E.g. the landlord or letting agent
- **Data processors** – these are following instructions from the data controller to use the data that is provided to them. E.g., a mailing company you use to send out mailings. Or Landlord Law if you use our document generator service.

Why is data use regulated?

- Inappropriate use of data can cause annoyance or harm to data subjects
- This ranges from
  - annoyance about multiple telephone calls and mailings where no consent was given, to
  - identify theft
- This is why we have legislation which regulates how people’s data can be used and which provides penalties for those who misuse it

Registration with the ICO

- Practically all landlords must register with the ICO
- This involves going on the register and paying an annual fee of £35-40
- Landlords who only have one property are NOT exempt
- You are unlikely to be exempt if you hold data electronically, including email
- If you do not want your home address to go on the directory, you can use a PO Box Office
- The ICO can advise via their website or telephone or live chat – www.ico.org.uk

Your duties re Data (1)

You must keep data safe

- Protect data by strong passwords
- And also keep devices such as laptops safe
- Do not publish it unlawfully – eg on facebook
- Or send in an open email – and be careful about disclosing email addresses when sending to multiple people, use BCC
- If appropriate, consider using a secure site where people (e.g. landlords or tenants) can log in and download documents etc
- Make sure the services you use are compliant with the rules

Your duties re Data (2)

You must not keep data too long

- Data should be retained only as long as you need it
- But landlords should retain tenants' data while they are in occupation and up to 7 years afterwards – in case they are required to produce it by HMRC or the tenant brings a claim
- In England, you also need to keep the right to rent check data for the Home Office
- If tenants ask you to delete data during this time you should refuse. Otherwise, you should delete it.

Your duties re Data (3)

You must only use it for proper purposes

- You can use it for dealing with tenants pursuant to the tenancy agreement or contract – eg arranging inspection visits and instructing tradespeople for repair works
- But not for contacting them for other purposes (e.g. to sell something)
- You can send marketing messages to non-customers if they have consented
- Or if you have reason to think that they have a legitimate interest in receiving it
- But you should stop if they ask you to

Your duties re Data (4)

You may be required to provide information to the authorities.

For example

- HMRC as part of a tax investigation
- Local Authorities if they are carrying out an investigation e.g. under a HHSRS inspection
- The Home Office in connection with the right-to-rent rules
- You must cooperate in these situations and not withhold information

Agents' disclosure to landlords

Can letting agents withhold data from their landlords? E.g. credit referencing details.

- Agents are employees of the landlord and are also bound by agency law. They should provide landlords with referencing material. Otherwise, how can landlords be sure they have done it?
- However, if they have not informed T or third parties, there may be a data issue. This arguably puts agents in breach of their agency duties.
- Note that in legal proceedings L would be able to force A to hand this over during 'discovery'

What you should do:

- Register with the ICO
- Make sure any data you hold is protected
- Check that all services you use are GDPR compliant
- Check that you have permission to use your data subjects' data where this is needed
- Do a privacy page on your website and/or create a Data Information Notice to serve
- Appoint a Data Protection Officer
- Keep a data protection diary or record of actions taken.

Further information and help:

- There is a huge amount of information on the ICO website at www.ico.org.uk
- Follow the action plan on the Landlord Law article on Data Protection
- Find Landlord Law draft Data Protection Notices via the Consumer Topic
- View David Smiths training webinar

Any Questions?

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THANK YOU