

# ARE YOU COMPLIANT WITH THE LAW? ONE THING TO CHECK THIS MONTH ...

By **Tessa Shepperson** of **Landlord Law**

**M**uch of the content of this magazine is about the business of investing and developing property to rent. However, sometimes people overlook the legal rules and regulations which landlords need to comply with.

Renting property to tenants is heavily regulated. Many of these regulations carry substantial penalties for non-compliance. So, your earnings as an investor are dependent not only on your savvy investment skills but also on legal compliance to avoid fines and penalties.

Every month, we will be looking at one issue where, if you fail to comply, could cause you financial loss.

This month's topic is:

## Tenancy deposits

Last month we took a look at holding deposits – deposits taken before a tenancy is granted to 'hold' the property for the applicant.

Today, we are looking at tenancy deposits – deposits taken by a landlord or his agent to give the landlord a fund to cover any damage or rent arrears outstanding when the tenant vacates at the end of the tenancy.

Mostly, the law is the same in England and Wales, but there are some differences.

## Differences between England and Wales

The main difference is that the tenant fees legislation in England provides that deposits should be for no more than five weeks' worth of rent (or six weeks' worth if the annual rent is over £15,000).

If more is taken, tenants can claim the excess back and, until it is repaid, landlords cannot use Section 21 (while this is still with us).

There is no such limit in Wales, although the government guidance indicates that a deposit of one month's worth of rent would be appropriate.

The other difference is that in England, deposits taken in respect of residential licences do not need to be protected, whereas in Wales, residential licences are (with a few exceptions) treated the same as tenancies – both being referred to as 'occupation contracts'.

The main exception to this rule is lodger agreements. So, neither in England nor in Wales (unless, in Wales, the landlord serves a notice to the contrary) do deposits for lodger agreements need to be protected.

But this begs the question, what is tenancy deposit protection?

## Tenancy Deposit Protection

This was introduced by the Housing Act 2004, which, in this respect, came into force in April 2007.

All deposits for (in England) Assured Shorthold Tenancies (ASTs) or (in Wales) Occupation Contracts must be protected with a government-authorised tenancy deposit scheme.

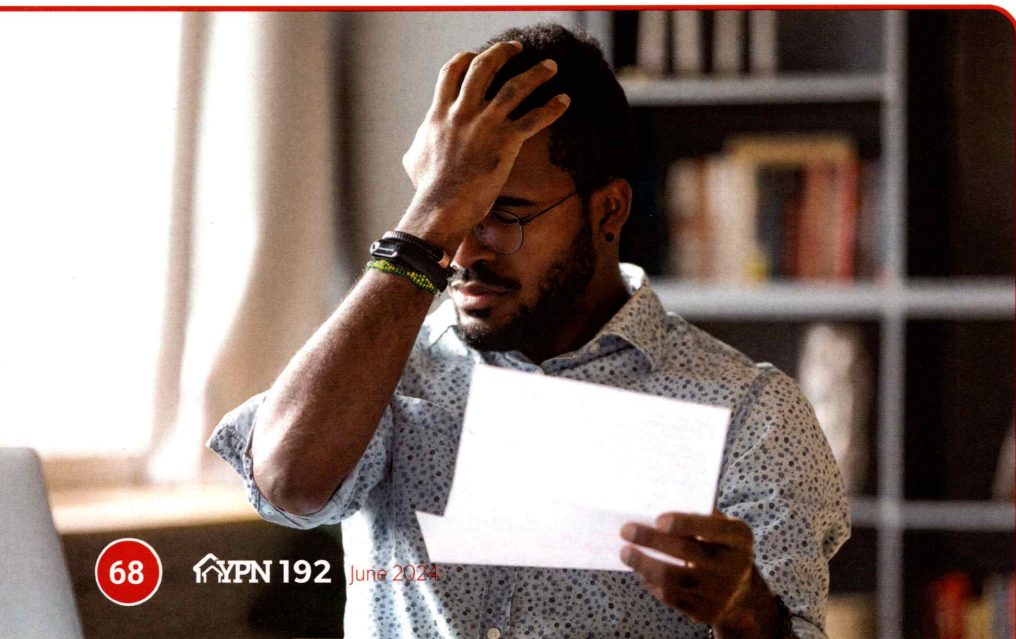
There are two types of scheme:

- **Custodial** – where the money is paid over to the scheme to hold, but which is free to use, or
- **Insured-based** – where the landlord or agent holds the money in their own bank account and pays a fee.

There are three authorised companies running the schemes:

- **The Deposit Protection Service (DPS)**  
<https://www.depositprotection.com/>
- **Tenancy Deposit Scheme (TDS)**  
<https://www.tenancydepositscheme.com/>
- **My Deposits**  
<https://www.mydeposits.co.uk/>

The deposit protection regulation was introduced because many landlords were, prior to 2007, failing to refund deposits to tenants. This meant they were forced to go to the Small Claims Court to recover their



money – an unfamiliar and intimidating process for most, which was felt to be unfair.

It is important to realise that the deposit is the tenants' money and can only be passed to the landlord if the landlord has a justified claim.

## The tenancy deposit rules

All deposits taken in respect of ASTs, or Welsh Occupation Contracts, must be protected in a government-authorised scheme within 30 days of payment of the money to either the landlord or the agent.

Landlords and agents must also provide 'prescribed information' to tenants/contract holders or anyone else who paid the deposit on their behalf, also within 30 days of payment of the money.

I say 'payment of the money' as sometimes landlords or agents misunderstand this and think it is within 30 days of the start of the tenancy. However, not all tenancies are created at the same time as the payment of the deposit money, and if the money is not protected within the 30-day deadline, the landlord/agent could already be in default and subject to penalties when the tenancy starts.

## What is the prescribed information?

This is information about the deposit, the tenancy parties, and the tenancy deposit scheme used. Note that there is no prescribed form; it is the INFORMATION which is prescribed. The relevant information can be found in the Housing (Tenancy Deposits) (Prescribed Information) Order 2007.

Most of this is contained either in the certificate provided by the schemes or in the schemes' information leaflet. But not all!

The schemes all provide forms for landlords, and you are strongly advised to use them. Or another professionally drafted prescribed information form (such as the Landlord Law form).

The prescribed information is almost as important as the protection of the deposit money itself, and failure to serve it will also make you liable for the penalties.

For example, in the case of *Ayannuga v Swindells* in 2012, a landlord tried to argue that much of the prescribed information did not need to be served as it was freely available on the internet and elsewhere. However, this view was not upheld by the Court, and the landlord lost his case.

So, make sure that YOU serve the prescribed information (all of it) to your tenants or contract holders within the 30-day deadline.

## What are the penalties?

There are two types of penalty:

- An inability to use the 'no fault' eviction procedure, and
- The right for tenants (or Welsh contract holders) to claim a penalty.

### No-fault eviction prohibition

So far as the inability to use no-fault eviction is concerned, this applies in both England and Wales (in England, this is section 21; in Wales, it is mostly section 173).

If the landlord is in breach, any no-fault eviction notice served will be invalid unless, prior to the service of the notice, the deposit money has been refunded. Or, if the breach is failure to serve the prescribed information, this can be served late – so long as it is served before your no-fault eviction notice.

### The penalty payment

Unlike the no-fault eviction penalty, this cannot be rectified if the deposit is protected, or the prescribed information is served, late.

However, it will only be payable if tenants or contract holders apply to the Court. The Judge has no option but to make an order for payment of an award but has discretion as to the amount awarded. This can be between 1x and 3x the deposit sum.

Guidance on the appropriate level of award was given in the case of *Khuja v Chowdhury* in 2015:

**The 1x award** – this is generally awarded when the failure to protect is not really the landlord's fault. For example, if the landlord was ill during the 30 days (or has some other genuine reason for the late protection) and protected as soon as he could.

**The 2x award** – this is where the landlord does not really have any excuse and 'should have known' about the duty to protect.

**The 3x award** – this is for cases where the landlord obviously knew he should have protected but deliberately chose not to, or if he has been dishonest in some way – for example, if he pretended that he had protected the deposit when he had not.

If the deposit has remained unprotected through multiple fixed terms, separate awards can be made for each. So where that has happened, the total award can be very high.

Note that if the tenant has vacated, leaving extensive damage to the property, you are entitled to defend on this basis. My understanding is that this can be offset against the claim for the return of the deposit, although the Judge may not allow it against the penalty itself.

It is important to realise that once the 30-day time limit has passed without the deposit being protected, there is **no defence available** (other than as to the sum awarded), and if tenants bring a claim, they are certain to receive at least 1x the deposit sum.

That is until six years have passed when the 'Statute of Limitations' will kick in, and the claim will become 'statute barred'.

## Non-compliance and the penalties

Although these rules have been in force for 17 years, a surprising number of landlords are still unaware of them. It is quite common for possession claims to be thrown out of court because the deposit was not properly protected or the prescribed information was not served.

It is less common for tenants to bring claims for the penalty payment as the court procedure needed is complex and expensive to bring.

However, there are now several firms of solicitors who will act for tenants on a 'no win, no fee' basis. So, make sure that all deposits paid to YOU are dealt with correctly.

## Looking to the future

The law is unlikely to change in Wales, but in England future law is uncertain.

However, if the Renters (Reform) Bill becomes law, note that this does provide for possession orders (save for those based on grounds 7A and 14) to be conditional upon compliance with the tenancy deposit rules.

So, the rules are unlikely to change for landlords and agents who take deposits from tenants or contract holders.



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