

## **Briefing Note**

### **Tenancy Deposit Schemes and Sanctions for Non-compliance**

The purpose of this briefing note is to set out a short summary of the rules in relation to deposits taken by landlords under a residential Assured Shorthold Tenancy (AST) in England and Wales.

Since 6<sup>th</sup> April 2007, all deposits taken by landlords under an AST **must** be protected by a tenancy deposit protection scheme (TDS) under the Housing Act 2004 (HA 2004). This is to prevent landlords failing to return tenants' deposits and also to ensure that landlords are not left out of pocket when a tenancy comes to an end.

#### **DEFINITION OF A TENANCY DEPOSIT SCHEME (TDS)**

This is defined in s. 212(2) HA 2004 as a scheme which:

- is made for the purpose of safeguarding tenancy deposits paid in connection with assured shorthold tenancies and facilitates the resolution of disputes arising in connection with tenancy deposits;
- complies with the requirements of Schedule 10 HA 2004 (outlined below).

#### **TYPES OF TDS**

Landlords may choose between 2 types of scheme:-

##### **1. Custodial TDS:**

- The tenant pays the deposit to the landlord;
- The landlord then pays the deposit into a separate designated account in the name of the scheme administrator;

- Within 14 days of receiving a deposit, the landlord must give the tenant the prescribed information (detailed below) about the scheme being used (s. 213(3) HA 2004);
- At the end of the tenancy, if the landlord and tenant agree how the deposit should be divided, they will tell the scheme which returns the deposit, divided in the way agreed by both parties within 10 days from (and including) the date of receipt of the notification from the parties;
- If there is a dispute, the scheme will hold the disputed amount until the dispute resolution service or the court decides what is fair (the same 10 day rule applies here);
- Some or all of the interest accrued by deposits in the scheme may either be retained by the scheme administrator to pay for the running of the scheme (Para. 3(4), Schedule 10, HA 2004), or it may be paid to the tenant or landlord.

## **2. Insurance-based TDS:**

- The tenant pays the deposit to the landlord;
- The landlord retains the deposit but pays a premium to the insurer as well as payment of an administration fee to the scheme administrator;
- Within 14 days of receiving the deposit, the landlord must give the tenant prescribed information (detailed below) about the scheme being used;
- An insurance TDS ensures that at the end of the tenancy, the tenant will always get an amount paid to them equal to the deposit that should be returned (i.e. less any legitimate deductions). The scheme administrator ensures the landlord does not misappropriate the funds;

- At the end of the tenancy, if the landlord and tenant agree how the deposit should be divided, the landlord returns all or some of the deposit;
- If there is a dispute, the landlord must hand over the disputed amount to the scheme for safekeeping until the dispute is resolved (the scheme administrator will check the landlord prior to accepting them on the TDS to ensure the landlord has funds for this purpose);
- If for any reason the landlord fails to comply, the insurance arrangements will ensure the return of the deposit to the tenant if they are entitled to it.

Para. 5 of Schedule 10 HA 2004 sets out various requirements that an insurance TDS must comply with. They are long and detailed, but in brief an insurance TDS must ensure:

- The landlord gives the scheme administrator an undertaking to pay any amount of the deposit as directed by the scheme administrator;
- The scheme administrator effects and maintains adequate insurance in respect of failures by landlords to make payments of deposits as directed;
- That if the TDS provides for participating landlords to be members of the TDS, that membership may be terminated by the scheme administrator in the event of any failure on the part of the landlord;
- Participating landlords pay fees for the administration of the insurance TDS and contributions towards the cost of the scheme administrator's insurance;
- What will happen if a landlord wishes to retain/release a deposit held under the TDS;
- The scheme administrator can require a deposit to cease to be held under the insurance TDS, even though the tenancy is not at an end. There are no

express provisions for what should happen in this case, but presumably the landlord would have to join an alternative custodial scheme immediately.

**It is for the landlord to choose which scheme to use, not the tenant.**

### **WHAT IS THE PRESCRIBED INFORMATION?**

Under s. 213 HA 2004, a landlord must give certain prescribed information to the tenant and any relevant person (this is someone who pays the deposit on behalf of the tenant, e.g. a parent).

The prescribed information is as follows:-

- The name, address and contact numbers, email and fax of the authorised TDS administrator;
- Any information contained in a leaflet supplied by the administrator to the landlord that explains the provisions in sections 212-215/Schedule 10 HA 2004;
- The procedure that applies under a TDS by which a deposit may be paid/repaid to the tenant at the end of the tenancy;
- The procedure that applies where the landlord or tenant cannot be contacted at the end of the tenancy;
- The procedure that applies under a TDS where the landlord and tenant dispute the deposit amount to be paid/repaid to the tenant;
- The facilities available under a TDS for enabling a dispute to be resolved without recourse to litigation;
- Other general information in respect of the deposit held under the TDS:
  - amount of the deposit paid
  - address of the property to which the tenancy relates

- contact details of landlord (including name, address, telephone number, email and fax)
- contact details of the tenant (as above, but also including forwarding contact details for when the tenancy expires)
- contact details for any relevant person (as above)
- the circumstances when all or part of the deposit may be retained by the landlord, according to the terms of the tenancy agreement.

The landlord is also required to sign a certificate confirming the information provided is accurate to the best of the landlord's knowledge and belief; and that the landlord has given the tenant an opportunity to sign any document containing the prescribed information provided by the landlord confirming the information is accurate (s. 2(1)(g)(vii)(bb), Prescribed Information order 2007).

The TDS scheme administrator is also required to provide prescribed information to the landlord.

### **SCHEME ADMINISTRATORS**

Some scheme administrators have specific wording which must be included in an AST for it to be valid under their TDS. The landlord must check the specific requirements of the provider.

The Government has awarded contracts to three companies to run slightly different types of TDS. These are:-

#### **A. The Deposit Protection Service (The DPS)**

- This is the only custodial TDS and it is free to use and open to all landlords and letting agents. The service is funded entirely from

the interest earned from the deposit held. Landlords and letting agents can register and make transactions online. Paper forms are also available should internet access be an issue. The scheme is supported by a dedicated call centre and an independent dispute resolution service. See: [www.depositprotection.com](http://www.depositprotection.com).

**B. Tenancy Deposit Solutions Ltd (TDSL)**

- This is a partnership between the National Landlords Association and Hamilton Fraser Insurance. The insurance-based TDS is designed primarily to enable letting agents to continue holding deposits. Agents can also join the scheme. The landlord will pay a one off joining fee and then an additional fee for each deposit it places into a TDS, and a subsequent annual renewal fee. See: [www.mydeposits.co.uk](http://www.mydeposits.co.uk).

**C. The Tenancy Deposit Scheme (TDS)**

- This is an insurance-based TDS and dispute resolution scheme run by Dispute Service Ltd. It was established to provide dispute resolution and complaints handling for the lettings industry, including a voluntary deposit scheme for regulated agents. It is designed primarily to enable lettings agents to continue holding deposits, but landlords can also join the scheme. From 6 April 2009, it will no longer be available to unregulated letting agents as a result of a requirement imposed by its insurer. There is a dedicated call centre. An annual fee will be paid which will enable a letting agent to register as many tenancies as it wishes under a TDS. This scheme stipulates that certain provisions must appear in the AST. See: [www.tds.gb.com](http://www.tds.gb.com).

## **SANCTIONS FOR LANDLORDS**

If the deposit was not paid into one of the 2 types of TDS there are general and specific sanctions:-

### **1. General Sanctions which apply to both types of TDS:**

- The landlord may be prevented from recovering possession of the property. Under s. 215 HA 2004, a landlord will not be permitted to serve a valid section 21 notice on its tenant if the deposit is not being held in accordance with an authorised TDS, the initial requirements of a TDS have not been complied with (i.e. the 14 day rule), the prescribed information has not been complied with, or the deposit given by the tenant includes property other than money – in breach of s. 213(7) HA 2004.
- The landlord may be ordered to pay a significant fine. If tenant makes an application to the county court on either of the following grounds:-
  - The initial requirements of an authorised scheme have not been complied with by the landlord in relation to the deposit or the prescribed information required from the landlord was not given to the tenant (*s. 214(1)(a) HA 2004*).
  - The tenant/relevant person has been notified by the landlord that a particular authorised TDS applies to the deposit paid to the landlord, but the tenant/relevant person has been unable to get confirmation from the scheme administrator that the deposit is indeed held in accordance with that scheme (*s. 214(1)(b) HA 2004*).
- If the court is satisfied that the situations are as alleged by the tenant, the court can make either of the following orders:
  - That, within 14 days from the date of the order, the person who holds the deposit pay it back to the tenant/relevant person (*s. 214(3(a) HA 2004*).

- That, within 14 days from the date of the order, the person who holds the deposit pay it into a designated account held by the scheme administrator under an authorised custodial TDS (*s. 214(3(b) HA 2004*).

The court **must** also order the landlord to **pay** the tenant, **within 14 days of the order**, a sum equal to **three times the amount of the deposit** (*s. 214(4) HA 2004*). However, recent case law suggests that the '14 day' rule is not that strict: see *Harvey v Bamforth [2008]*, in which the court ruled that the landlord was not in breach and was not liable to pay a fine even though he gave the prescribed information to the tenant after the 14 days had lapsed.

## **2. Sanctions specific to an insurance TDS:**

The scheme administrator may:

- require that the landlord pays the deposit as directed by the scheme administrator;
- direct that the deposit will no longer be held under an insurance TDS;
- direct that the landlord cannot continue to be a member of the insurance TDS;
- pay the tenant the deposit that is properly due to be returned and sue the landlord for that amount if necessary.

See Schedule 10 HA 2004 for full details.

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