

Deposits and other obstacles to obtaining possession

Pitfalls for landlords, and how to avoid them!

**Tom Morris
Landmark Chambers
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Introduction



- (1) Deposit protection legislation
 - (2) Prescribed information under Deregulation Act 2015
 - (3) Gas certificates and energy performance certificates
 - (4) Unlicensed Houses in Multiple Occupation
 - (5) Retaliatory eviction
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Deposit Protection



Housing Act 2004 Chapter 4: In force since 6th April 2007

Section 212(2):

“A tenancy deposit scheme” is a scheme which... is made for the purpose of safeguarding tenancy deposits... and facilitating the resolution of disputes arising in connection with such deposits...

- One “custodial scheme”
- Two “insurance based schemes”

The basic structure of the scheme



- (1) Deposits relating to Assured Shorthold Tenancies must be dealt with in accordance with an *Authorised Scheme*.
- (2) The *Initial Requirements* of each scheme must be complied with within a time limit.
- (3) The *Prescribed Information* must be supplied.

Restrictions on serving section 21 notice



Section 215

(1) Subject to subsection (2A), if (whether before, on or after 6 April 2007) a tenancy deposit has been paid in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy at a time when the deposit is not being held in accordance with an authorised scheme.

(1A) Subject to subsection (2A), if a tenancy deposit has been paid in connection with a shorthold tenancy on or after 6 April 2007, no section 21 notice may be given in relation to the tenancy at a time when section 213(3) has not been complied with in relation to the deposit.

Restrictions continued



Section 213

(2) Subject to subsection (2A), if section 213(6) [prescribed information] is not complied with in relation to a deposit given in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy until such time as section 213(6)(a) is complied with.

(3) If any deposit given in connection with a shorthold tenancy could not be lawfully required as a result of section 213(7), no section 21 notice may be given in relation to the tenancy until such time as the property in question is returned to the person by whom it was given as a deposit.

(1) Deposit to be dealt with in accordance with *Authorised Scheme*



Section 213:

(1) Any deposit paid to a person in connection with a shorthold tenancy must, as from the time when it is received, be dealt with in accordance with an authorised scheme.

(2) No person may require the payment of a tenancy deposit in connection with a shorthold tenancy which is not to be subject to the requirement in subsection (1).

NOTE: even those paid before the scheme came into force.

What is a deposit?



Section 213:

(7) No person may, in connection with a shorthold tenancy, require a deposit which consists of property other than money.

(8) "Deposit" means a transfer of property 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.

Does not include payment of rent in advance: *Johnson v Old* [2013] EWCA Civ 415.

(2) Initial Requirements



Section 213:

(3) Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of 30 days beginning with the date on which it is received.

Check requirements of the scheme in question!

(2) Initial requirements: time for compliance



- Deposits taken between 6th April 2007 and 5th April 2012:
 - **14 Days**
- Deposits taken after 5th April 2012:
 - **30 Days**
- NOTE: not possible to remedy default once time for compliance has passed.
- **If you fail to comply in time, no section 21 notice until deposit returned in full / deductions agreed with tenant / application to court (s.215: see below).**

(2) Initial requirements: statutory PTs



- Section 215B:
 - Where deposit received in connection with shorthold tenancy, and the initial requirements were then complied with (and prescribed information given)
 - And a new shorthold tenancy comes into being which replaces the original tenancy
 - And when the new tenancy comes into being, the deposit continues to be held in accordance with the same authorised scheme
 - Then the initial requirements are deemed complied with.
- (Reverses *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669.)

(3) Prescribed Information



Section 213:

(5) A landlord who has received such a tenancy deposit must give the tenant and any relevant person such information relating to

(a) The authorised scheme applying to the deposit,

(b) Compliance by the landlord with the initial requirements of the scheme in relation to the deposit, and

(c) The operation of provisions of this chapter in relation to the deposit

As may be prescribed.

(3) Prescribed information: time for compliance



Section 213:

(6) The information required by subsection (5) must be given to the tenant and any relevant person

(a) In the prescribed form or in a form substantially to the same effect, and

(b) Within the period of 30 days beginning with the date on which the deposit is received by the landlord.

(3) Prescribed Information: if in default



NOTE: section 215(2) provides that if section 213(6) is not complied with, no section 21 notice may be given until such time as section 213(6)(a) is complied with.

Accordingly, default can be remedied by providing the prescribed information – no need to repay the deposit.

See also Lloyd LJ in *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669 at [42].

Sanctions: how to get around them



Section 215:

(2A) Subsections (1), (1A) and (2) do not apply in a case where –

- (a) The deposit has been returned to the tenant in full or with such deductions as are agreed between the landlord and tenant, or
- (b) An application to the county court has been made under section 214(1) and has been determined by the court, withdrawn or settled by agreement between the parties.

(3) If any deposit given in connection with a shorthold tenancy could not be lawfully required a result of section 213(7), no section 21 notice may be given in relation to the tenancy until such time as the property in question is returned...

Other traps: Prescribed Information



- Section 21B Housing Act 1988 (inserted by Deregulation Act 2015) provides that the Secretary of State may make regulations requiring landlords to give tenants “*information about the rights and responsibilities of a landlord and tenant under an assured shorthold tenancy.*”
- Section 21B(3) provides that no section 21 notice may be served while the landlord is in breach of a requirement imposed by the regulations.
- Required information = *How to Rent: The checklist for renting in England* (published MHCLG) required by regulation 3 of the Assured Shorthold Tenancy Notice and Prescribed Requirements (England) Regulations 2015.



Prescribed information: cont.

- No need to supply each version of document published *during* the tenancy: reg.3(4).
- Where tenancy is “replacement tenancy”, landlord *must provide tenant with fresh booklet if new version since previous tenancy*: reg.3(5)(b).
- Requirements do not apply to private registered supplier of social housing: reg.3(5)(a).

Other traps: Gas safety certificates and energy performance certificates



- Section 21A Housing Act 1988 sets out “prescribed requirements” which must be complied with. Section 21A(1) provides that no section 21 notice may be given *at a time when the landlord is in breach of a prescribed requirement*.
- Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 reg.2 provides that the prescribed requirements are:
 - Energy performance certificate (reg.6(5) Energy Performance of Buildings (England and Wales) Regulations 2012)
 - Gas safety record (reg.36(6) and (7) Gas Safety (Installation and Use Regulations 1998).

Tenancies to which these requirements apply



NOTE: requirements for prescribed information and gas and energy performance certificates only apply to ASTs granted on or after 1st October 2015 – do not apply to AST that came into being as a statutory PST on or after 1st October 2015 on the coming to an end of AST granted before that date: reg.1(3) and (4).

Apply to all ASTs from 1st October 2018: s.41 Deregulation Act.

Other traps: Houses in Multiple Occupation



- Section 75 Housing Act 2004 provides that no section 21 notice can be served in respect of any AST of an unlicensed House in Multiple Occupation.
- Section 72(1) also makes this a criminal offence.
- HMO defined by section 254.

NOTE: HMO if one or more units of living accommodation not consisting of self-contained flat(s); occupied by persons who do not form a single household; two or more households who occupy the living accommodation share one or more basic amenities/living accommodation lacking one or more basic amenities (= toilet, personal washing facilities, cooking facilities).

HMO Licensing and Exemptions



- Local authority may designate an area as requiring additional licensing (section 55 and 56 Housing Act 2004) – either blanket requirement or only specified types.
- Check local authority requirements!
- Section 73(1): unlicensed HMO if: (a) required to be licensed and is not, AND (b) neither of conditions in subsection (2) satisfied. Those conditions are:
 - notification given under s.62(1) of landlord's intention to take steps to secure that house no longer required to be licensed.
 - an application for a licence has been duly made in respect of the HMO under section 63.

HMO Exemptions (Cont.)



- Accordingly, section 21 notice can be served if:
 - Landlord has applied under s.63 for license
 - Or notification under section 62(1) is given
 AND IN BOTH CASES the notification/application has not been determined or, if refused, the period for making an appeal is live, or if an appeal has been brought, it has not been determined.



Other Traps: Retaliatory Eviction

- Deregulation Act 2015 section 33(2): s.21 notice invalid if:
 - (a) Tenant previously complained in writing about condition and landlord (i) did not provide adequate response in 14 days (=description of the action proposed to address complaint + reasonable timescale for action) (ii) provided inadequate response, (iii) gave s.21 notice following complaint
 - (b) Tenant then complained to local authority about same or substantially same subject matter as complaint to landlord + Local authority served relevant notice
 - (c) S.21 notice given before service of relevant notice (as opposed to prior to tenant's complaint to local auth)
- Relevant notice = improvement notice under s.11/s.12 /s.40(7) Housing Act 2004.



Retaliatory eviction: further restrictions and exceptions

- Where local authority serves relevant notice, landlord cannot serve a section 21 notice for six months (s.33(1)).
- But if no relevant notice served, since tenant's complaint not upheld, then the s.21 notice served by the landlord is effective.
- Section 34 sets out exemptions:
 - Condition of property due to tenant's breach (34(1)).
 - Where property is "genuinely on the market for sale" (34(2)).
 - Landlord private registered provider of social housing (34(6)).
 - Mortgagee of mortgage pre-tenancy requires vacant possession for exercise of power of sale (ss.34(7) and (8)).

Tom Morris
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Tmorris@landmarkchambers.co.uk
