

STOP PRESS!!! October 2009

Recent County Court Decision Regarding Tenancy Deposits and the Housing Act 2004

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The Law

The Housing Act 2004 ('the Act') introduced Tenancy Deposit Schemes which apply to all Assured Shorthold Tenancies ('AST') entered into on or after 6th April 2007. If a Landlord takes a deposit from a tenant at the beginning of an AST, the Landlord must, within 14 days, protect the monies with a scheme provider and send to the tenant the information prescribed by the Act. The sanctions for failing to carry out these obligations under the Act are severe: -

1. The tenant can make an application to the County Court for an Order that the landlord, or his agent, should pay the deposit back to the tenant, or pay it into one of the schemes.
2. The Court must also order the landlord, or his agent, to pay to the tenant compensation equal to 3 times the deposit monies. This is a strict liability penalty imposed on the landlord for failing to comply with the statutory provisions. The Court has no discretion.

Further, all the time the deposit monies are unprotected (or the prescribed information has not been supplied to the tenant) the landlord is precluded from serving a section 21 notice. Any notice served on the tenant will be invalid until the statutory requirements have been complied with.

Rent in Advance ...?

'Tenancy Deposit' is defined under the Act as: -

"... any money intended to be held (by the landlord or otherwise) as security for

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- a) the performance of any obligations of the tenant, or*
 - b) the discharge of any liability of his,*
- arising in or in connection with the tenancy."*

In order to circumvent the requirements of the Act it has become popular for landlords to take from the tenant 'two months' rent in advance,' specifying in the AST that no deposit is required. It was thought that, by specifying the monies as 'rent in advance', they cannot be deemed to be 'deposit monies' and therefore do not need to be protected. Taking one month's rent in advance is fairly typical in standard AST's. Therefore, it doesn't make a difference if two months are taken instead right?

WRONG!

Decision of the County Court

We recently acted for a landlord who had taken, on the advice of a landlord's organisation, 2 months' rent in advance and specified in the AST that there was 'no deposit'. The tenant sued the landlord for failing to comply with the Act and the tenant WON.

The Court held that, although the first month's rent is typical and is paid by the tenant for the exclusive use and occupation of the property for one month, the second months rent was held for the duration of the tenancy and could only be described as a 'deposit'. Although we argued that 'rent' has a specific meaning in law, namely a specific payment for the exclusive use of the property and not payment to the landlord as security for the performance of the obligations under the AST, this was rejected by the Court. It was held that taking two months rent in advance was a 'fiction' and was a way in which landlords were seeking to avoid the obligations imposed on them by the Act.

BEWARE!

The facts in this case were unusual in that the rent was specified by the landlord to be the first and last months' rent (as opposed to the first two months' rent), and therefore the second month's 'rent in advance' was held by the landlord for the duration of the AST. The decision of the Court may have been different had the monies been used as the first two months rent. However, it is clear that landlords must exercise caution when deciding whether to take monies, other than the first months rent in advance, from their tenant at the start of the AST without protecting them in a scheme.

The recent decision of the County Court is not a binding precedent but is certainly an indication that the Act has been drafted so broadly that almost any monies taken from a tenant at the beginning of a tenancy, no matter what description or name they are given in the AST, can be encompassed within the definition of 'deposit'.

Please contact our Landlord and Tenant Department if you would like to discuss your AST and how the above may affect you.