TDS – THREE YEARS ON

The Tenancy Deposit Schemes ("TDS") described in sections 213-215 and Schedule 10 of the Housing Act 2004 have now been in force for nearly three years, and those who deal regularly with the Assured Shorthold Tenancies to which they relate will now be familiar with the basic requirements and somewhat draconian sanctions imposed on landlords who fail properly to comply with them. However, since the first imposition of the TDS a number of issues have arisen in practice in relation to the interpretation of the provisions of the statute, but there is a dearth of reported authority to assist practitioners. In the last month, however, the first High Court decision on the proper interpretation of the TDS has been published.

Outline of the Legislation

The essential effect of Part 4 of the Housing Act 2004 is to impose upon landlords an obligation to deal with any deposit taken in relation to an assured shorthold tenancy in accordance with an authorised scheme (s.213(1)). The landlord must comply with the requirements of one of three authorised schemes within 14 days of receipt of the deposit, and supply specified information to the tenants within the same period (s.213(3) and (5)). Failure to do so results in the imposition of financial sanctions and restrictions on the landlord's ability to deal with the property (s.214(3) and (4); s.215).

A 'deposit', for these purposes, is a transfer of property intended to be held as security for the performance of any obligations of the tenant or the discharge of any liability of his arising under or in connection with the tenancy (s.213(8)).

The scheme therefore applies to all deposits in the ordinary sense, and the provisions seem superficially straightforward. But a number of ingenious arguments have become common currency in the County Courts to which the task of dealing with these cases ordinarily falls. This article considers the authorities which have emerged to date and some further arguments which are often raised but are yet to be the subject of binding authority.

Harvey v Bamforth

The first authority to be made widely available in relation to the TDS was *Harvey v Bamforth* (2008) 46 EG 119, a decision of His Honour Judge Bullimore in the Sheffield County Court.

In that case, the defendant tenant had in June 2007 entered into an assured shorthold tenancy pursuant to which the claimant was landlord. The provisions of the 2004 Act relating to the TDS applied thereto. The defendant paid a deposit on grant in the sum of £525 and the landlord lodged the deposit in an insurance-based scheme within the 14-day period prescribed by section 213(3) of the Act. She subsequently issued proceedings including a claim for for the payment of substantial arrears of rent.

It was agreed between the parties that the prescribed information referred to in section 213(5) and (6) of the 2004 Act was not provided to the defendant within the required period of 14 days, though that information was given by a letter sent some 8 months into the period of the tenancy, after the proceedings had been issued. On the basis that that information had been received late, the tenant brought counter-claims based on section 214(3) and (4) seeking repayment of the deposit and a sum equivalent to three times the amount of that deposit respectively.

Section 214(2) provides that those claims are only available where at the time of an application for them, either the deposit is not held within an authorised scheme or the 'initial requirements' of the scheme or section 213(6)(a) has not been complied with. In this case, the deposit was eventually held properly so the claim could only relate to the latter. That sub-section only requires that information be provided in the prescribed form – the 14-day time limit is set out separately in section 213(6) (b).

The learned Judge found, clearly correctly, that there had been no breach of section 213(6)(a), and accordingly that the repayment provisions in section 214 were not available. The possibility that the 'initial requirements' of the scheme might themselves require the provision of information to the tenant within a specified period was not, apparently, considered. Moreover, the Judge refused to make comment on whether or not his conclusion would have been altered had the information been provided *after* the making of an application by the tenant. Consequently the authority is of narrow

application and does little more than spell out the obvious meaning of the language of the statute. Ultimately, then, it is of some but little assistance to parties to TDS claims.

Draycott v Hennells Letting Ltd

More useful guidance has, thankfully, been provided by *Draycott v Hennells Letting Ltd (T/A Hannells Letting Agents)* [2010] EWHC 217 (QB), a decision of Mr. Justice Tugendhat which deals with matters of significantly broader application and removes a great deal of uncertainty for users of the scheme.

In that case, the claimant tenants had entered into an assured shorthold tenancy in February 2008. The claimants paid a deposit of some £2,700 to the defendant at the outset of the tenancy, which was required to be protected pursuant to the TDS scheme set out in the 2004 Act.[i]

The deposit was not in fact lodged with the landlord's chosen scheme until May 2008, some two and a half months after payment, and accordingly the information required by section 213(5) was also given late. Proceedings in relation to these failures were not begun until November 2008, by which time the deposit was protected and the information had been supplied (also late). The main issue was therefore the effect of the delay. The learned Judge was therefore asked to consider both whether the agent was the correct defendant to the proceedings and whether or not an order under section 214 could properly be made. For the purposes of this article, I deal only with his findings on the latter point.

The proper meaning of section 213(3) of the 2004 Act was considered in some detail in the judgment. That sub-section requires that the initial requirements of an authorized scheme should be complied with in relation to a deposit within 14 days of receipt thereof. At first instance, the Circuit Judge had found that this had been breached because the deposit was not transferred into the chosen custodial scheme within the said 14 days, but did so without identifying the scheme's initial requirements expressly.

In his decision, Tugendhat J rightly considered the terms of the relevant scheme – in this case the Deposit Protection Service. He found that, although there was no direct reference to 'initial

requirements' in the terms of that scheme it was possible to identify some, and that the relevant clause did state that the deposit should be, 'submitted for protection' and that should be done 'within 14 days of the date of receipt by the landlord'.

Importantly, however, the Judge found that:

> *"…the requirement that there be payment into the Scheme is the initial requirement of the Scheme, and not the requirement that that be done within 14 days. The time limit of 14 days is a requirement of s.213(3). That requirement is repeated in the scheme, but so are a number of other provisions of the 2004 Act. The fact that the time limit is repeated in the terms of the Scheme does not make it an initial requirement of the Scheme."*

Accordingly, there had been a breach of section 213(3) and, until but only until such time as the deposit was paid into the scheme, a breach of section 213(4).

Crucially, therefore, the Judge found that, at least in relation to the requirements of the DPS scheme, it was effectively open to the landlord to wait until proceedings had been brought against him to pay the deposit into the scheme. Upon doing so, although he would be likely to be found liable for costs, the Court's jurisdiction to make an order pursuant to section 214(3) (for the deposit to be paid back or paid into the scheme) or 214(4) (for payment of three times the value of the deposit) would fall away.

That this was the Judge's conclusion will be of significant comfort to landlords. Had it been found that the 'initial requirements' included the 14-day time limit, the landlord in this case would have been faced with the harsh consequence that, once that time limit had passed, it would have been impossible to remedy the breach at any future date, and orders pursuant to section 214 would be inevitable. This would be a harsh result in the ordinary case, but even more so in circumstances where, for instance, a tenancy came within the provisions during its term (perhaps because of the death of a resident landlord or a change in the rent payable). Moreover, it would also presumably entail that the sanction imposed by section 215 – that no notice terminating the tenancy pursuant to section 21 of the Housing Act 1988 can be served – would never be removed. Such a conclusion would render the tenancy effectively an assured tenancy, since it could not be terminated on the assured shorthold ground.

By contrast, the existence of that sanction, and of the financial punishment set out in section 214(4) provide significant incentives for a landlord to behave properly in relation to a deposit. The aim of the TDS provisions is, after all, to prevent unscrupulous landlords from retaining deposits improperly. The interpretation favoured by Tugendhat J ensures that the result of an application by a tenant will be, one way or another, to ensure that the deposit is properly protected, without unduly punishing the landlord. It is therefore to be welcomed.

Further Queries

Helpful as the decision in *Draycott* is, however, it serves further to highlight the difficulties faced by parties endeavouring to understand and comply with the TDS provisions. Importantly, identifying a breach in any given case will depend on the extent of the 'initial requirements' and these are not straightforward to identify: the 14-day requirement was set out in the relevant scheme in *Draycott*, but not found to be a requirement of the scheme.

The result is that there are some bold claims made in the County Courts which, although apparently without merit, are not obviously wrong. In one recent example, for instance, tenants argued that the initial requirements of the relevant scheme included the provision of the tenants' contact details *to the tenants*. Although such a failure cannot possibly have been prejudicial, the matter is proceeding to trial.

Other arguments are more common in the County Courts. The most usual is an argument by landlords that because section 214(4) says that an order under that section must 'also' be made by the Court, such an order can only be sought *together with* an order pursuant to section 214(3) (that the deposit must either be paid back into the scheme or to the tenant). If that is correct, then on any application being made under section 214, the landlord can always avoid the financial sanction under section 214(4) by taking one of the steps required under section 214(3), before or after proceedings are issued.

It might be said, therefore, that section 214(4) lacks any force, since only in the rarest cases will the landlord fail to protect itself. But equally, it might be said that the point of the TDS is to protect

deposits and if the existence of a *potential* sanction achieves that, it is unimportant that the sanction will rarely, if ever, actually be imposed. Certainly it will be difficult to reconcile an alternative approach with any meaningful interpretation of the word, 'also' in section 214. In light of *Draycott*, perhaps this conclusion is to be preferred.

Ultimately, these arguments will continue to run until properly dealt with by authority, and it will remain difficult to advise clients meaningfully until that occurs. The decisions to date are therefore to be welcomed, but it is to be hoped that more will follow soon.

[i] Though, for reasons not explored here, the defendant to the claim was the landlord's agent.