

GUIDANCE TO TENANTS OF LETTING AGENTS

This document contains guidance on the following:

- **Holding Deposits**
- **Failure to register tenants' deposits under an approved scheme as required by Law**
- **Illegal deductions from deposits**
- **Lack of Information and clarity on Fees and Charges to tenants**
- **Standard terms of business**
- **Professional Associations/Trade Associations**

We believe that all letting agents in the borough are subject to the following relevant legal requirements. We also wish to highlight those practices which we believe contravene the requirements of "professional diligence" contained in the Consumer Protection from Unfair Trading Regulations 2008.

"PROFESSIONAL DILIGENCE" means the standard of special skill and care which a trader is reasonably expected to exercise towards consumers, that is:

- (a) Honest market practice in the trader's field of activity, or
- (b) The general principle of good faith in the trader's field of activity.

It is our interpretation that in the case of Letting Agents, this could mean compliance with any relevant legislation, the "Guidance on Unfair Terms in Tenancy Agreements" Office of Fair Trading September 2005, and the Codes of Practice of the relevant professional associations.

HOLDING DEPOSIT

It is perfectly acceptable for the Letting Agent to take such a payment from an applicant / prospect tenant.

However before doing so they must:

- Make it clear to prospective Tenants that taking an offer does not guarantee that the tenancy will go ahead.
- Use the words "Subject to Contract" in all documentation or correspondence with the applicant.
- Ensure that - All documentation including standard terms (see below) between an applicant and the agent should be fair , clearly presented , and written in plain and intelligible language in order comply with The Consumer Rights Act 2015.
- Provide prospective Tenants with a reasonable opportunity to see and study the tenancy agreement before an applicant becomes liable for fees or charges associated with the rental of the property. The same applies to any Guarantor should one be required.
- Provide the prospective Tenant with a written receipt.

What happens to the Holding Deposit if the Tenancy does not proceed?

- If the Landlord has accepted an offer from the prospective Tenant, but later declines the tenancy for a reason other than because the Tenant fails the referencing, the Landlord should be advised that the Letting Agent must return the Holding Deposit to the prospective Tenant in full, and that the Landlord will be liable for the costs incurred by the Letting Agent in obtaining the references. **The Letting Agent cannot penalise the prospective Tenant, who is not liable for any expenses.**

To protect Agents from becoming liable for the Tenants' expenses should the Landlord withdraw the Letting Agent must highlight the potential liability in their Terms & Conditions for Landlords.

- If the Tenant later withdraws from the proposed tenancy, or fails the referencing, the Letting Agent may make such reasonable deductions necessary to cover any expenses. **However, such deductions must reflect the actual value of such expenses.** Any deductions must also take into account the circumstances of the situation; for example where the Tenant decides not to proceed and notifies the Letting Agent promptly after paying the holding deposit, expenses incurred are going to be less than if there was a delay.

NON REGISTRATION OF A TENANT'S DEPOSIT - TENANCY DEPOSIT SCHEMES

The Housing Act 2004 s 212-5 makes it clear that deposits remain the property of the tenant throughout the tenancy and must be registered under one of the three approved protection schemes which are My Deposits) Deposit Protection Service (Custodial and Insured), and Tenancy Deposit Scheme, and the tenant must be informed of the details of this:

The legislation allows either the Landlord or the Letting Agent to register the deposit. However The Housing Act states:

S212(9)(a) references to a landlord or landlords in relation to any shorthold tenancy or tenancies include references to a person or persons acting on his or their behalf in relation to the tenancy or tenancies.

S213 (1) Any tenancy deposit paid to a person in connection with a shorthold tenancy must, as from the time it is received, be dealt with in accordance with an authorised scheme

- The deposit must be registered within 30 days from the date when it was received from the Tenant.
- The Landlord must provide the tenant with all the information the law requires within 30 days of receiving the deposit: the landlord's name and contact details, the amount of deposit paid and the address of the tenancy, details of the tenancy deposit scheme used, a copy of the deposit protection certificate signed by the landlord, information about the purpose of the tenancy deposit scheme, how to get the deposit back at the end of the tenancy and what to do if there is a dispute about the deposit.

- Failure to comply with the 30 day rule will mean no section 21 notice can be served until either the deposit has been returned to the tenant or, if court proceedings have been taken against the landlord, proceedings have concluded. **The penalty which a court can award is between one and three times the amount of the deposit.**

A Letting Agent who holds the Deposit must hold the Deposit as Stakeholder as determined under the Code of Practice of all professional associations, e.g. ARLA, Ombudsman for Lettings, NALS.

Inventories

Under the same Code of Practice, unless the Agent has instructions to the contrary they must ensure at the start of the tenancy that an inventory and or/schedule of condition is prepared for the client by them, or an appointed sub – contractor.

Agents must ensure that all deposits are legally protected

Tower Hamlets Trading Standards believe that Letting Agents who fail to ensure the Landlord registers the deposit claiming that it is not their responsibility are failing the requirement for “professional diligence”, and their common law “duty of care.”

ILLEGAL DEDUCTIONS FROM DEPOSITS

Cases have arisen where Letting Agents have deducted their Letting Fees and associated charges from the deposit before passing it on to a Landlord. This is illegal.

IMPORTANT: Should the amount of advanced rent paid to the Agent by the Tenant before they move in be insufficient to cover the cost of all fees and charges to be levied on the Landlord, Letting Agents cannot deduct monies from the deposit. The deposit must remain untouched, and the Landlord should pay any shortfall personally.

Deductions from the deposit at the end of the tenancy

- **No deductions whatsoever can be made from a deposit without the mutual agreement of the Tenant and Landlord.**
- Any proposed deductions must allow for “normal wear and tear”.
- The cost of any proposed deductions must be supported by documentary evidence.
- If both parties cannot agree on some or all of the proposed deductions, the Tenant, Landlord or Agent must refer the dispute to the deposit Scheme protecting the deposit, as all the deposit registration schemes offer dispute resolution, which either party can use.
- Any part of the deposit which is not disputed must be returned to the Tenant in accordance with timescales detailed in the Tenancy Agreement. E.g. the deposit is £1000, the Landlord seeks £500 for cleaning/ missing items, the Tenant does not agree, the remaining balance of the deposit (£500) must be returned to the Tenant.

STANDARD TERMS

Standard terms must:

- Clearly detail all charges and / or fees the applicant is liable to pay .e.g. administration, referencing, inventory / check in costs prior to moving in.
- Clearly set out the agreed calendar monthly rent, the amount of rent in advance, and the amount of deposit required prior to move in.
- Clearly set out the details of the applicants offer including any extra requirements, proposed move in date etc.
- Clearly detail any future fees or charges, e.g. to extend, renew or terminate the proposed tenancy including, inventory check- out charges.
- Set out any significant pre-conditions for the letting. Including the circumstances in which the applicant may incur penalties. For example the withdrawal at any stage of their application for the Tenancy or the Landlords rejection of it.
- The amount paid as holding deposit – Must be deducted from the monies required prior to move in (including rent in advance, deposit, reference and other detailed charges).

FEES

Letting Agents charge a range of fees and charges to both Landlord & Tenant. In all cases they must be clearly stated in the terms and conditions, and the client or Tenant must be given sufficient time to read the contract and terms of business before signing.

Letting agents are required by law to display all fees in their offices and on their web sites.

REDRESS SCHEMES

All letting agents in England and Wales to were required to join a redress scheme by 1st October 2014. Failure to join an approved scheme can result in a fixed penalty notice of £5000.

The Department for Communities and Local Government has approved three redress schemes:

Ombudsman Services Property,

The Property Ombudsman Scheme, and

The Property Redress Scheme

To provide a free and independent redress service to landlords and tenants.

Membership of one the main professional associations for letting agents will normally also include membership of one of the recognised redress schemes.

PROFESSIONAL ASSOCIATIONS/TRADE ASSOCIATIONS

We would encourage all agents to join a recognised professional association such as:

- ARLA (the Association of Renting and Letting Agents)
- NAEA (the National Association of Estate Agents)
- NALS (the National Approved Letting Scheme)
- UKALA (the UK Association of Letting Agents)

This will ensure that proprietors and staff remain well informed of changes in regulations and practices within the industry, and are therefore able to protect their client (the Landlord) and the consumer (the Tenant). Membership of these associations should be publicised on their literature and web site, and the relevant Codes of Practice made available to clients.

So if you are a member of one of these professional associations, you are complying with the legislation. You will also have client protection and indemnity insurance which protects your clients from loss in the event of your business failing.

NB .It is a criminal offence for a Letting Agent to falsely claim to be members of a deposit scheme or professional association.

THE LAW

Legislation that governs the topics featured in this guidance includes:

Sections 212-215 of The Housing Act 2004 makes it clear that the deposit remains the property of the tenant throughout the tenancy and must be registered under one of the three approved protection schemes which are My Deposits (MD), Tenancy Protection Scheme (TPS) and Tenancy Deposit Scheme (TDS) and the tenant must be informed of the details of this.

Clause (i) Schedule 2 of The Unfair Terms in Consumer Contracts Regulations 1999 provides that a contract term shall be deemed to be unfair where it binds the consumer to terms with which they had no way of knowing about before the conclusion of the contract

Regulation 3 of The Consumer Protection from Unfair Trading Regulations 2008 requires traders to exercise “professional diligence”. It also prohibits other unfair commercial practices such as misleading actions, misleading omissions, aggressive practices and those which are specifically listed in Schedule 1 of the Regulations.

Regulations 5 The Consumer Protection from Unfair Trading Regulations 2008 defines misleading actions such as the making of false statements and the provision of factually incorrect information.

Regulations 6 The Consumer Protection from Unfair Trading Regulations 2008 defines misleading omissions e.g. the failure to give any consumer all relevant material information to enable them to make an informed choice.

Schedule 1 (6) (1) The Consumer Protection from Unfair Trading Regulations 2008 makes it a criminal offence to falsely claim to be a member of a professional or trade association.

Section 1 of The Fraud Act 2006 makes it a criminal offence to dishonestly make a false representation (S.2), dishonestly fail to disclose information which he has a legal duty to disclose (S.3) or occupies a position where he has a legal duty to safeguard the financial interests of another person and dishonestly abuses that position(S.4), with a view to gain for themselves or to cause loss to another.

The Provision of Services Regulations 2009, states that price information must be provided and it must be provided before the service is provided. Reg 11 (b)

The Consumer Rights Act 2015 Part 3 Duty of Letting Agents to publicize fees

The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc)(England) Order 2014 (SI 2014 No. 2359)

Copies of the above legislation can be viewed at the following website:

<http://www.legislation.gov.uk/>