

A guide to deposits, disputes and damages



Introduction

For many years, residential landlords have taken a financial deposit from a prospective tenant to protect against breaches of the tenancy agreement. These breaches could be for things like cleaning, damage/loss of property, unpaid rent or bills.

The starting point for any issue regarding a deposit is that the deposit remains the property of the tenant at all times. As such the deposit cannot be used to subsidise the outgoings or expenditure of the landlord or their agent. It is held by the landlord or his agent until the end of the tenancy and should be returned to the tenant at the end of the tenancy, if they have honoured the terms of the tenancy agreement.

The Scottish Government introduced new legislation in March 2011 to protect tenancy deposits in Scotland. This will impact on all Scottish landlords or agents who take a deposit from their tenants for a "relevant tenancy" (as defined in the regulations). Deposits received on or after 2 October 2012 must be protected within 30 days of the beginning of the tenancy. This means that, rather than holding the deposit, landlords have to pay deposits into an approved tenancy deposit protection scheme.

At the end of the tenancy the landlord and tenant should agree on the return of the deposit and any deductions from it. If the tenant is unhappy with the amount the landlord wishes to deduct from the deposit, or the landlord/agent refuses to engage in the deposit return process, the tenant is entitled to raise their dispute with the relevant tenancy deposit protection scheme. There are currently three protection schemes licensed by the Scottish Government, so the tenant will need to check which scheme protects their deposit.

This document is designed to provide guidance to landlords, tenants and agents when a dispute arises, regardless as to which scheme protects the deposit. It should, however, be noted that dispute resolution, by its very nature, is unique to each and every case. Unlike the formal legal system, schemes are not governed by 'precedent' in the same way as the Courts. Decisions are made by the schemes using the principle of 'balance of probability' and based on the submission of evidence from both parties.

All three deposit protection providers have signed up to the guidelines in this document and will continue to operate their dispute resolution services using these principles. They will be reviewed and updated as necessary to reflect current methodology and practice.

What is Alternative Dispute Resolution (ADR)?

ADR is an alternative way of resolving disputes, other than by using the traditional route of the Courts. It is an evidence-based process, where the outcome is decided by an impartial and qualified adjudicator. It is not a process of mediation, arbitration, or counselling and the parties will never be required to meet with the adjudicator. Nor will the adjudicator visit the property subject to the tenancy agreement or dispute. All tenancy deposit protection schemes use the 'adjudication' method to deal with deposit disputes.

The parties in dispute are required to submit their evidence to the adjudicator. They will need to do this within specified timescales laid down by the individual deposit protection scheme. You should check the processes you are required to follow with your particular scheme. The adjudicator will analyse and consider the evidence and make a binding decision as to how the disputed amount of the deposit should be distributed.

Remember that the tenant has no obligation to prove his argument because the deposit remains his property until successfully claimed for by the landlord. A landlord must prove that they have, on the 'balance of probability', a legitimate claim to retain all or part of the deposit. If they can't, the adjudicator must return the disputed amount to the tenant.

The final decision of the adjudicator is binding on both the landlord and tenant. However, either party has a right to request a Review of the adjudicator's decision. There are only two grounds for requesting a Review. These are that the adjudicator made an error of fact, or an error of law. The request must be made within 10 working days of the date when the original decision was issued.

In extreme circumstances adjudicators may ask for further evidence or clarification on a particular matter from either party. In some cases, the adjudicator may decide that the case would be better dealt with through a formal court process. However, in the majority of cases the adjudicator will make a decision based on the evidence they have in front of them, so:

- Make sure you submit the evidence you want taken into account, and;
- Make sure you send it to the scheme within the specified timescales.

Who are the adjudicators?

All three tenancy deposit protection schemes use adjudicators to make binding decisions on the return of the disputed deposit amount. These adjudicators are sometimes employed directly by the scheme or are independent individuals under contract to the scheme. Regardless of their employment status, the schemes ensure that adjudicators are appropriately trained and have the skills necessary to make fair and reasoned decisions. It is not compulsory for a scheme to state the name of a particular adjudicator or to disclose their identity to either the landlord or tenant.



Avoiding disputes

All schemes have found that most disputes are resolved simply by the landlord and tenant getting involved in a discussion about the deposit at the end of the tenancy, whether this is through their agent or otherwise. Disputes can be minimised by both parties - but especially the landlord - having a realistic expectation about what condition the property should be returned in at the end of the tenancy. The most common causes of deposit disputes are, unsurprisingly, cleaning charges and wear and tear.

Adjudicators use established legal principles when considering disputes. Sometimes, these principles do not meet the parties' expectations. And of course, many disputes are unavoidable simply because the tenancy agreement or pre-tenancy procedures were not set up or followed correctly to begin with.

We recommend that in the first instance, landlords and agents take these steps at the end of the tenancy:

- › Remind the tenant of their obligations under the tenancy agreement before it ends, preferably in writing. Many tenants stay in the property for a considerable amount of time and may not be familiar with the terms of their original agreement. A gentle reminder about what is expected of them can make discussions over deductions from the deposit easier to bear.
- › Wherever possible, ensure that the tenant(s) attend the 'check-out' process. Ensure that their comments are noted if they disagree with anything during the process, and make reference to these comments when responding over deductions.
- › The landlord should take into account betterment and fair wear and tear; this will help manage their expectations of what they can claim from the deposit.
- › The landlord should talk to the tenant about whether they want to claim anything from the deposit. Communication at an early stage is important when trying to resolve issues.

At the end of the tenancy, the landlord and tenant should confirm the amount of the deposit which is agreed, and the amount of the deposit which is not agreed. Any proportion of the deposit which is not in dispute will be returned to the tenant. The disputed sum will remain protected by the scheme pending the outcome of the adjudication.

What evidence will an adjudicator be looking for when considering a dispute?

A common misconception is that the tenancy deposit protection schemes are biased toward either the landlord or the tenant. When a dispute reaches adjudication, an adjudicator's starting position mirrors that of the Courts. The deposit is first and foremost the tenant's money; this remains the case until the landlord can justify their claim to it. The onus is on the landlord to show why they are entitled to claim money from the deposit.

The adjudicator must make a binding decision on the basis of the information provided by both tenant and landlord. This process is evidence based. The landlord must support their claim with evidence to show that the tenant has broken the tenancy agreement, and that the landlord has suffered, or is likely to suffer, a loss as a result. The landlord needs to act realistically when assessing the amount they want to claim.

The adjudicator cannot make any assumptions, or construct a claim on behalf of the landlord or tenant. The adjudicator's decision will be based on the evidence presented. The evidence provided should be both robust and reliable in order to support a claim. If a landlord makes submissions which are not supported by evidence, the adjudicator may have no option but to disregard them. As a result, when the deposit is returned to the tenant in deposit disputes this is primarily because the landlord has not provided a strong enough case to keep it.

You only need to submit evidence in support of a dispute where you consider it is directly relevant to the dispute. For example, evidence of unpaid utility bills is not required where the dispute concerns the cleanliness of the property at the end of the tenancy. Similarly, where the dispute is in relation to damaged contents, photographic evidence is only needed if it shows the contents affected.

An adjudicator will take into account any admissions of liability by the tenant; however evidence should still be provided to show how the tenant has broken the tenancy agreement, and the loss suffered as a result. Evidence which shows that the landlord tried to reach a compromise, or to keep the amount of their claim to a minimum, is helpful too.

Types of evidence

1. The Tenancy Agreement

This is a necessity for all disputes. The adjudicator needs to establish the contractual obligations that apply to the landlord and tenant. If this document is not provided it is likely that the landlord's claim will fail because the adjudicator will be unable to establish the obligations agreed between the parties.

2. Inventory Reports and Check-in/Check-out Inspections

The importance of a properly completed inventory cannot be underestimated. It must be robust and defensible if it is to be held up as a proper indicator of the facts and therefore viewed as acceptable by an adjudicator or court.

Tenancy deposit protection schemes **do not** disregard, out of hand, inventories that are not prepared by independent companies or individuals. However, they are likely to place less weight on their contents. It may also be necessary for a landlord to provide more corroborating evidence to show the condition of the property than would normally be required if the process was carried out by qualified and independent inventory clerks. For example, dated photographic evidence is useful to show any change in the property's condition. This is also true of any check-in/check-out documents and processes.

Many landlords use their agents to conduct their check-in and check-out inspections; again, these will not be disregarded. However there is an added need to show that the process, and the person undertaking the inspection, was impartial. Adjudicators will take into consideration the general circumstances and relationship between the parties in determining what weight to put on the evidence.

Some agents provide 'in-house' services to remedy the potential breach (for example cleaning or repairs). Again, care needs to be taken to show that this process is open and transparent and that the costs incurred are justified.

If these documents have not been independently completed a tenant may be sceptical about them; it is beneficial therefore for the tenant to have been offered the opportunity to view, amend, and sign the documents. If they are not signed by the tenant you should explain why. The tenant does not have to be present at the check-out inspection, and mostly they do not attend. However they are entitled to attend if they want to; if they ask to attend the landlord/agent should take reasonable steps to meet this request. It may be helpful to provide evidence to show that the tenant was provided with details of the check-out appointment and invited to attend, but that they did not do so.

Note that where a landlord puts the onus on the tenant to complete their own check-in inspection, this type of check-in is far less robust than a 'full' check-in. Just providing an inventory to the tenant and expecting them to note any discrepancies, or relying on a document that has not been signed, will not be sufficient to convince an adjudicator; the landlord will need to provide other evidence to show that their expectations and the tenant's obligations were fully explained to the tenant.

Where a check-in is challenged by the tenant, a full audit trail of what remedial action has occurred should be provided and a revised check-in agreed and signed.

It is preferable if check-in and check-out inspections are produced in a similar format – where possible by the same person. To enable meaningful comparisons to be made, it is also important that the same measurements of the property's condition are used in both reports.

Many check-out clerks hand write amendments on a copy of the check-in report. This often shows that the check-out was conducted in conjunction with the original. It is however always sensible to provide a separate typed report in addition to the handwritten notes. Remember that handwriting varies and that the adjudicator may not be aware of abbreviations, annotations and acronyms.

The onus is on you to ensure that the adjudicator can establish by whom and when the handwritten notes were added.

If standard descriptions and grades are used, these should be clearly explained. These should be consistent and concise. Terms such as 'fair' and 'OK' should be avoided and any term used to denote condition qualified and defined.

Avoid relying on standard clauses such as if an item is not mentioned or its condition not commented on then it is assumed to be in good condition. Whilst it need not be possible to note and comment on every item in a property it will be very difficult for an adjudicator to determine between subjective statements by the parties.

It is sensible to carry out periodic inspections of the property during the tenancy. Please note however that these may not be as detailed as check-in and check-out inspections at the start and end of the tenancy.

3. Photographic/Video Evidence

Photographic evidence can be used to support or defend a claim against a deposit. Only photos that are relevant should be submitted. Ideally, 'before and after' photos should be submitted with a clear narrative as to what the photo is showing e.g. colours, item description, marks on surfaces etc. Do not assume that the adjudicator is seeing the same image as you – draw the adjudicator to the part of the photo you want him to focus on. Photos should, ideally, be dated and signed by both parties, or alternatively digitally dated (preferably visible on the photograph). Photographs need to be of a good quality to show clearly the condition of the property at any given time. Photographs are useful as supporting evidence in addition to a check-out inspection.

Photographs which are not dated or where the date cannot be verified may still be submitted, however their evidential value will be reduced where the date on which they were taken is not clear to the adjudicator.

Video evidence can also be useful where photographic evidence is unclear or unavailable. Again, only submit the relevant part of the video, or direct the adjudicator to view a certain point in the video itself. Support the video with a written explanation to ensure that the adjudicator is drawn to the important points. There is nothing worse for an adjudicator than

to have to sit through hours of video to get to the problem area or to miss the issue entirely. Again, the date on which the video was taken should be confirmed.

4. Invoices/Receipts/Estimates/Quotations

These are necessary to illustrate any costs incurred in respect of repair/replacement work being carried out. This evidence should be itemised fully, to enable an accurate breakdown of the costs being charged for each type of work undertaken. Only receipts or invoices corresponding to claims being made against the deposit are necessary. If these cannot be provided, an explanation should be provided indicating why this evidence is not available. Estimates and quotations will not be afforded the same weight as invoices or receipts as they do not demonstrate a cost actually incurred; however they are useful in providing an indication of the extent of charges necessary to rectify any damage or deterioration.

In rare cases, a breach of the contract by the tenant may lead to loss that may be difficult or impossible to rectify by pure replacement or repair. In such cases an adjudicator can assess a compensatory sum, if they are provided with the correct supporting evidence.

It is not usually supportable to claim for the landlord's time and inconvenience; however a reasonable claim can be considered if proportionate and supported by comparable examples.

5. Cleaning Charges

Deductions made by landlords in relation to cleaning charges are regularly disputed by tenants. Many claim that the cleanliness of the property at the start of the tenancy was not clear, or that the tenancy agreement did not make clear what was expected of them. Where landlords wish to make deductions for cleaning costs, they will need to be careful to record the cleanliness of the property in sufficient detail at the start and end of the tenancy. They will also need to ensure any charges they claim are a fair reflection of the property's condition at the start of the tenancy.

The type and size of the property is an important factor when deciding whether cleaning costs are reasonable. For example, a five bedroom house would take longer to clean than a one bedroom flat. Similarly, the cleaning of a bathroom mirror would not require an equal amount of cleaning as a bath or shower. For this reason 'Standard Charges' are often considered unreasonable by an adjudicator, unless these are specifically explained to the tenant in writing at the start of the tenancy and agreed to by the tenant in writing.

A landlord can also support their claim by producing invoices or receipts for work carried out by a professional cleaning contractor, as costs are usually balanced against market rates and geographical location. Where landlords charge an hourly rate to clean the property themselves, this can be more problematic for adjudicators because it is harder to justify the rate against the time spent cleaning. Tenants also complain that regardless of their efforts to clean the property themselves deductions are made no matter what the state of the property at the end of the tenancy. It is important to remember that the tenant is only obliged to return the property in the same state of cleanliness as at the start of the tenancy, after allowing for fair wear and tear.

6. Rent Account Statements

Where the dispute concerns rent arrears, account statements and/or bank statements which show arrears outstanding are important; without this sort of evidence the adjudicator will struggle to confirm whether there were any arrears. These should clearly show the property and person to whom the account relates. Where arrears have arisen, it is also useful for the adjudicator to see evidence that the tenant has been told about them, and has been given the chance to comment on them.

7. Agency Charges

While it has been common for agents to insert fees into their Terms of Business and/or leases, the Scottish Government has announced that all charges other than rent and the security deposit are unlawful. Amendments were made to legislation, which came into effect on 30 November 2012. Landlords and agents should be aware that the deposit should only be retained for breaches of the tenancy agreement causing a financial loss and not a failure to pay such charges.

8. Utility Bills/Council Tax

Tenancy agreements often require the tenant to pay the charges they incur when they live in the property. For example, tenants are often required to register their details with the local authority or utility provider, and bills are therefore issued in the tenant's name. Where these bills are unpaid at the end of the tenancy, the adjudicator is likely to take the view that the liability for the outstanding accounts is between the tenant and the local authority/utility provider, rather than with the landlord. Therefore, unless the landlord can show that the bills were not transferred into the tenant's name, or that the landlord has been required to pay any outstanding accounts, the adjudicator is unlikely to make an award to the landlord.

It is acknowledged that some utility companies do attempt to pursue landlords for 'outstanding' bills and those clauses are written into many leases to 'protect' the landlord. However there is no liability on the landlord, especially if they can ensure that they have informed the utility provider that the tenant has vacated the property; they have provided the company with the final meter reading and a forwarding address for the tenant has been supplied.

9. Witness Statements/Other Evidence

Sometimes the parties to a dispute feel that there are other witnesses to the case who may have useful information for the adjudicator to consider (such as neighbours, friends/associates who visited the property or independent contractors). Witness statements, or letters in support, can be obtained from those individuals and provided for the adjudicator's consideration. The adjudicator will not contact such potential witnesses to obtain further evidence. The adjudicator will not cross-examine witnesses, or take evidence under oath. Similarly, submissions such as, "I have other evidence which I can provide if it is needed," are not helpful to the adjudicator. The parties must themselves submit all evidence which they wish to be considered by the adjudicator.

Wear and tear

Many landlords believe that the property should be returned to them in the same condition as at the start of the tenancy. Deductions are often claimed from the deposit for minor damage that should be expected in any normal use of the property. Similarly, some landlords seize the opportunity to 'replace' items in the property which are coming to the end of their natural life e.g. redecorating an entire room when minor scuff marks have been caused by the tenant.

The House of Lords defined fair wear and tear as, "reasonable use of the premises by the tenant and the ordinary operation of natural forces." The word 'reasonable' can be interpreted differently, depending on the type of property and who occupies it. In addition, it is an established legal principle that a landlord is not entitled to charge his tenants the full cost for having any part of his property, or any fixture or fitting, "put back to the condition it was at the start of the tenancy." Landlords should therefore keep in mind that the tenant's deposit is not to be used like an insurance policy where you might get 'full replacement value' or 'new for old'.

The landlord also has a duty to act reasonably and not claim more than is necessary to make good any loss. For example:

- Replacement of a damaged item may be justified where it is either severely and extensively damaged beyond economic repair or its condition makes it unusable;
- Repair or cleaning is a more likely award where replacement cannot be justified;
- In cases where an item has had its value reduced or its lifespan shortened, for example by damage, an award of compensation may be appropriate.

In addition to seeking the most appropriate remedy, the landlord should not end up, either financially or materially, in a better position than he was at start of the tenancy, or than he would have otherwise been at the end of the tenancy after having allowed for fair wear and tear.

In order to avoid allegations of betterment by the tenant, any award for damage must take into account fair wear and tear, the most appropriate remedy, and that the landlord should not end up either financially or materially in a better position than he was at commencement of the tenancy or as he would expect to be at the end of the tenancy having allowed for fair wear and tear.

It is very difficult for tenancy deposit protection schemes to provide guidance on the levels of deductions landlords and agents expect to be able to claim from the deposit. The nature of adjudication is that each case is considered on its own merits and no two cases are ever the same. However, adjudicators will consider the following factors when coming to a particular decision:

- **Length of tenancy** - the longer the tenancy, the more natural wear. Common sense, but think, for example, how much wear a carpet in your own home shows after one, two or three years. Also consider what the item's condition was when the tenancy started; was it brand new or has it already seen a few tenancies come and go?
- **Number and age of occupiers** - the more bedrooms and occupants, the higher the wear and tear that should be expected in all the common parts e.g. sitting room, passages, stairs, bathrooms and kitchen. If you are letting to a family with children, factor that in too. Scuffs and scrapes are unavoidable in normal family life. A property occupied by a single person should see far less wear than a family of four, so bear this in mind when it's time for tenants to check out.
- **Wear and tear vs. actual damage** - when is it no longer normal wear? Damage, i.e. breaking something, is not wear and tear - meaning either replacement or repair. Light marks on a carpet might have to be viewed as unavoidable. On the other hand, damage such as nail varnish spills on the floor or iron burns that have occurred due to negligence could see the tenant liable for repair. Consider whether the item has been damaged or worn out through natural use versus negligence when making a judgement call.
- **Quality and condition** - consider the original quality of the item at the start of the tenancy and what it originally cost to provide. It would be unreasonable for a landlord to provide a cheap and flimsy set of bedroom furniture and then blame the tenant if the items are damaged through normal usage. Adjudicators may expect to see receipts or other evidence to confirm an item's age, or its cost and quality when new. Another consideration is the quality or fabric of the property itself. Many new builds tend not to be quite as robust as older properties or conversions. Walls, partitions and internal painted surfaces tend to be thinner and therefore likely to suffer more stress, particularly in higher footfall areas of the property. This inevitably means that there is a greater need for redecoration at the end of the tenancy period. An adjudicator may therefore consider more than a simple contribution to the cost of redecoration from the tenant to be unreasonable.

Landlord's responsibilities - it should be noted at all times that the landlord has an obligation to ensure that the property meets the Repairing Standard in terms of the Housing (Scotland) Act 2006 at the beginning and throughout the duration of the tenancy.

In considering whether cleaning/repair is necessary versus complete replacement at the end of the tenancy, an adjudicator will examine the check-in/out reports, any statements of condition and any photos/videos in order to compare the condition of the property at the start and end of the tenancy. In some cases, the damage may not be so extensive as to require the complete replacement of an item at the tenant's expense (such as a kitchen worktop or carpet); however the adjudicator will award sums in recognition of any damage which has occurred. Whilst the landlord may wish to replace a damaged item, it is not always the case, even where the damage is admitted by the tenant, that the extent of the damage is such that the tenant should automatically bear the full replacement cost.

In the rare circumstances where damage (to the worktop/carpet/mattress/item etc.) is so extensive or severe as to affect the achievable rent level or market quality of the property, the most appropriate remedy might be replacement and to apportion costs according to the age and useful lifespan of the item. An example of how this might be calculated is set out below:

- a) Cost of similar replacement carpet/item - £500.00
- b) Actual age of existing carpet/item - 2 years
- c) Average useful lifespan of that type of carpet/item - 10 years
- d) Residual lifespan of carpet/item calculated as c) less b) - 8 years
- e) Depreciation of value rate calculated as a) divided by c) - £50 per year
- f) Reasonable apportionment cost to tenant calculated as d) times e) - £400.00



In Summary

It is impossible for any guide to guarantee what the outcome to a tenancy deposit dispute might be. By their very nature, disputes are contentious and one party is likely to feel aggrieved at the end of the process. Adjudicators are looking for a fair and reasonable outcome.

Follow this simple step by step guide:

- When taking a deposit, landlords should protect it within 30 working days from the beginning of the tenancy.
- Landlords need to consider carefully any deductions they wish to make from the deposit and ask themselves, "is this fair?" or, "how would I feel if I were the tenant?" Landlords should discuss their concerns with the tenant. Open communication prevents a large number of potential disputes.
- When dealing with a tenancy deposit scheme, familiarise yourself with their processes and follow them. Schemes are allowed to make awards to tenants where landlords break their scheme rules.
- Try to view the evidence you are submitting from the point of view of an independent third party who does not know the property. Will your evidence convince them of your case?
- If you agree to adjudication then remember that, after any request for a Review, you cannot appeal against the final decision unless you challenge it through the courts.



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