Tenant Fees Act comes into force

The Tenant Fees Act 2019 ('the Act') comes into force in England on Saturday 1st June 2019, and is designed to regulate what payments a landlord can and cannot charge a residential tenant, along with penalties for non-compliance with the new statutory regime. The Act is likely to have wide ranging effects for landlords and their agents.

Broadly speaking, the Act is split into three main parts: i) deposits, ii) tenants' fees, and iii) breach and enforcement.

For the sake of simplicity, references in this article to 'landlords' include agents and references to 'tenants' include guarantors.

Scope

The Act applies only in England and only to residential tenants in respect of their principal home. The Act is limited to assured shorthold tenancies, licences, and student lettings within the meaning of Schedule 1 to the Housing Act 1988. The Act does not apply to commercial tenancies, tenancies for social housing or licenses for holiday lets.

In Scotland, fees have been unlawful since the Private Rented Housing (Scotland) Act 2011 came into force in 2012.

In Wales, a similar piece of legislation called the Renting Homes (Fees etc.) (Wales) Act 2019 is due to come into force later this year.

The position is more cloudy in Northern Ireland: the Belfast County Court recently found, in the case of *Paul Loughran v Piney Rentals Ltd and F5 Property Ltd* (2018, unreported), that such fees are unlawful under the Commission on the Disposal of Lands (Northern Ireland) Order 1986; however this decision does not provide a binding precedent. Housing is a devolved matter in Northern Ireland and without a sitting Assembly, it is unlikely that this issue will see resolution in the immediate future.

Permitted and prohibited payments

Simply put, any payment not expressly permitted by the Act is considered to be prohibited. Parliament has listed the permitted payments in Schedule 1 to the Act, namely:

- Rent;
- Tenancy deposits, limited to 5 weeks' rent where the tenancy has a value of less than £50,000, or 6 weeks' rent where the tenancy has a value of £50,000 or more;
- Holding deposits, limited to 1 week's rent;
- Default fees in respect of lost keys (or similar security devices), capped at the landlord's reasonably incurred costs which must be supported by evidence;
- Default fees for failure to pay rent before the end of 14 days following a specified due date, subject to an interest cap set at 3% above base rate;
- Payments for variation, assignment or novation of the tenancy, limited to the greater of £50 or the landlord's reasonably incurred costs;
- Payments for termination of the tenancy, limited to the loss suffered by the landlord; and
- Payments in respect of council tax, communication charges and utilities, limited to the amount that the landlord himself is charged.

Residual power is left with the Secretary of State to add, modify or remove permitted payments from Schedule 1 by way of statutory instrument, save that the Secretary of State cannot remove 'rent' from that list.

Prohibited arrangements

In addition to the prohibited payments above, the Act bars landlords from requiring tenants:

- to enter into a contract with a third party for the provision of services or a contract of insurance; and
- lending money to any person,

save that it does not apply to contracts regarding utilities or communication services.

The logic behind these two prohibitions is clear. If a landlord required their tenant from using a specified cleaning company (for example), which was itself owned wholly by the landlord, the landlord may be able to overcharge the tenant for those services and generate a higher profit.

Rules in respect of holding deposits

Schedule 2 sets down strict rules in respect of what can be charged to hold a property, how long it can be held for and in what circumstances a landlord can retain a holding deposit.

A holding deposit can be required by the landlord, but must not exceed one week's rent (calculated as the total annual rent divided by 52).

A landlord can only hold one holding deposit at a time, meaning that he cannot take deposits from multiple prospective tenants. A new holding deposit can only be taken when the first one has been returned to the respective payer.

An agreement must be reached within 15 days from the date the holding deposit is received, although this can be lengthened or shorted by agreement with the prospective tenant.

When a holding deposit must be repaid to the payer (who may not necessarily be the prospective tenant) depends on the situation:

- If the landlord and tenant enter into a tenancy agreement, the holding deposit must be returned within 7 days of the date of the tenancy agreement. The payer may consent to the holding deposit being applied to the tenancy deposit or towards the first month's rent.
- If the landlord and tenant decide not to enter into an agreement, the holding deposit must be returned within 7 days of that decision.
- If the landlord and tenant fail to come to an agreement, the holding deposit must be returned within 7 days of the 15-day deadline to agree.

A landlord is only entitled to retain the holding deposit under limited circumstances. These are:

- Where the tenant fails a Right to Rent check under section 22 of the Immigration Act 2014 and the landlord did not know and could not reasonably have been expected to know that the section 22 prohibition would bite.
- If the tenant provides false or misleading information. In this case, the landlord is reasonably entitled to take into account the difference between the information provided by the tenant and the correct information, or to take the tenant's action in providing false or misleading information into account, in deciding whether to grant such

a tenancy.

- The tenant decides not to enter into a tenancy agreement or fails to take all reasonable steps to enter into a tenancy agreement, except where the landlord has sought to impose a prohibited payment or the landlord acts in such a way as is unreasonable to expect the tenant to enter into an agreement.

If the landlord seeks to retain the holding deposit, he is required to provide a notice in writing outlining the reasons for this within 7 days. If he fails to do so, he is no longer permitted to retain the holding deposit and it must be returned to the payer.

Transitional arrangements

It is important to be clear that these changes do not sweep through and immediately alter all residential landlord and tenant relationships. Certain transitional provisions apply between 1st June 2019 and 31st May 2020 in respect of relevant tenancies entered into before 1st June 2019.

If a tenancy was granted before 1st June 2019, tenants may still be charged fees already included in any relevant tenancy agreement (for example, renewal of tenancy fees or check out inventory fees) up to and including 31st May 2020.

From 1st June 2020, all contractual clauses in respect of prohibited tenants' fees cease to be binding against tenants.

Enforcement

Enforcement is delegated under the Act to each local weights and measures authority (i.e. the local Trading Standards department, or a District Council where there is no Trading Standards department within the local authority).

Tenants can also directly apply to the First-Tier Tribunal for an order requiring the return of prohibited payments together with interest, however the Tribunal is not empowered to award damages to the tenant.

Penalties for non-compliance

Landlords are required to repay prohibited payments to tenants, and restrictions in respect of giving notice to terminate are put in place if prohibited payments are not returned by landlords.

It is a civil offence to charge a prohibited payment and landlords may be found liable for a fine of up to £5,000 for a first offence.

If a landlord commits a second offence within five years of the first offence, this will be a criminal offence triable in the Magistrates' Court and if found guilty, the landlord could be liable for a fine not exceeding £30,000.

Any financial penalty is enforceable as if it were an order of the County Court, so can act as the basis for an application for orders such as a charging order or an attachment of earnings order.

A second offence is also considered a 'banning order offence' for the purposes of the Housing and Planning Act 2016 and the Local Authority may apply to the First-tier Tribunal for an order preventing the landlord from letting residential property or an agent from acting as an agent.

These orders must last for a minimum of 12 months.

Further, if a prohibited payment is charged or unlawfully retained, the landlord will not be able to serve a section 21 notice to terminate the tenancy until the prohibited payment is returned to the tenant and seek possession of the property thereafter, even if the tenancy has expired in the meantime.

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