Abstract

Purpose – The purpose of this paper is to examine empirically the operation of tenancy deposit protection within England and Wales. The paper consciously focuses solely on the views and perspectives of letting agents operating in the various schemes.

Design/methodology/approach – The paper is based on a series of semi-structured qualitative interviews with lettings agents in two distinct geographical urban areas, Birmingham and South Wales. Participants were selected for their market presence within a given area and the fact that they were all members of approved regulatory schemes.

Findings – Overall, most agents were broadly happy with the process and considered adjudication to be an appropriate form of resolution for tenancy deposit disputes given the often small monetary value of the disputes and the large volume of cases. Concerns were raised, however, regarding the heavy bureaucratic burden placed on agents and on the perceived evidential burden on the landlord. There being a widely held view that a landlord could rarely “win” outright.

Research limitations/implications – The qualitative data are based on a relatively small although representative sample of lettings agents’ active within the UK residential property sector.

Originality/value – The paper provides original data on the attitudes and perspectives of agents who manage deposit disputes. This is an area of current interest that has yet to receive sustained attention. Although concerned with legislation in England and Wales, its findings and discussion are relevant in other jurisdictions facing similar issues.

Keywords Property management, Agent perspectives, Deposit protection, Housing act 2004, Housing law, Private rented sector

Paper type Research paper

1. Introduction

1.1 The Legislative context

The Housing Act 2004, Pt 6, Ch.4, (Sections 212-215) introduced tenancy deposit protection for deposits paid by assured shorthold tenants. These provisions came into force in England on 6 April 2007. Any deposit or bond taken by a landlord in connection...
with a qualifying tenancy must be protected in one of the three approved schemes and the tenant must be provided with the prescribed information. Failure to comply can result in two particular sanctions for the landlord. The usual “no-fault” remedy for evicting a tenant, a so-called “Section 21 notice” from Section 21 of the Housing Act 1988 would not be valid in such circumstances[1]. Further, the tenant can make an application to the court for a financial award of up to three times the amount of deposit against the non-complying landlord[2]. This, apparently, simple legislation has however found the higher courts needing to provide further guidance on its application. This is despite the amendments made by Section 184 of the Localism Act 2011, that removed anomalies regarding the operation and enforcement of the legislation (Sidoli del Ceno, 2011b). The Deregulation Act 2015 further clarified this legislation, confirming that a landlord who had received a tenancy deposit prior to 6 April 2007, would only be able to serve a valid Section 21 notice if the deposit was protected in an authorised scheme, thus reversing the decision in Superstrike Ltd v. Marino Rodrigues [2013] EWCA Civ 669 and codifying the position in Charalambous and Karali v. Ng and Ng [2014] EWCA Civ 1604 (Sidoli del Ceno, 2013b; Sidoli del Ceno and Johns, 2014).

The rationale for the tenancy deposit regulations was that previously there was some evidence that some landlords viewed tenants’ deposits as a “golden goodbye”. The National Association of Citizens Advice Bureaux (NACAB, 1998) found that “48 per cent of tenants […] reported having had a deposit unreasonably withheld and only one in six of these had been successful in getting their money back”. In addition, Rooker (2004) stated that 20 per cent of tenants claimed that their deposit had been unreasonably withheld or not returned in full. A further problem was that a remedy through the small claims court involved an average waiting time of 21 weeks (Wilson, 2012). This can be coupled with widespread and familiar concerns with civil justice with regard to cost and accessibility.

1.2 Aim and rationale
A number of years have now elapsed as the legislation came into force. It is now an appropriate time to consider the reality of tenancy deposit adjudication under the Housing Act 2004. This paper seeks to explore the use of adjudication in tenancy deposit disputes through an investigation of the experiences and perspectives of the letting agents. By doing so, it will seek to examine the reality of the adjudication process and assess its appropriateness and sustainability. This may further give an insight into the dispute culture of today and identify any possible disadvantages with the process as it stands.

1.3 The ADR landscape
ADR has been an increasingly visible feature of the legal landscape within the UK. Woolf (1996) noted the “spiralling rate of disputing […][that places] a crippling burden on our Civil Justice System, which already can no longer provide “access to justice” without excessive expense, delay and complexity.” The introduction of the Civil Procedure Rules in 1998, sought to address these problems and introduced cost penalties for those who fail to approach litigation reasonably and at least consider ADR in the first instance. This has been strengthened by numerous judicial pronouncements such as in Halsey, where Dyson LJ commented, “all members of the legal profession who conduct
litigation should now routinely consider with their clients whether the disputes are suitable for alternative dispute resolution (Halsey v. Milton Keynes NHS Trust [2004] EWCA Civ 576).” Thus, parties to litigation and their lawyers may legitimately be called upon to give an account of how they attempted to resolve the dispute without litigation. If the steps taken are deemed to be inadequate or a party’s behaviour unreasonable, then the court has the option of applying cost-sanctions against the offending party[3].

Alongside this has been the growth of tribunals, construction adjudication and other non-traditional forms of dispute resolution. A prominent addition to this is the use of adjudication for tenancy deposit disputes under the Housing Act 2004[4].

1.4 Criticism of ADR

Critics have then expressed concerns that ADR will bring about the loss of “publicly accountable lawmaker” (Malin and Ladenson, 1993, p. 1,208) through the privatisation of what are ultimately matters of public importance. Genn (2012, p. 397), for example, argues that “the civil justice system is a public good that serves more than private interests […] in publishing their decisions; the courts communicate and reinforce civic values and norms.” Further, Fiss (1984, 2009) has argued that without the presence of a legal authority then justice cannot be done. This is because ADR assumes that there is both a sufficient power and financial balance between parties, when often there is no such equilibrium. Accordingly, there is some suggestion that ADR may further disadvantage parties that are already disadvantaged, leaving the process open to the influences of social prejudice (Economides, 1980).

Adjudication is not, however, merely bargaining and negotiation, neither is it mediation. There is a neutral third party who makes an essentially binding decision. Cummins and Hart (2009) have suggested that “the rules of natural justice do apply to adjudication, but in a limited way” thus, making the process a “rough and ready” approach. Arguably, this is appropriate for the type and nature of disputes that emerge through the schemes. Whether this process has sufficient authority and is public enough for critics is a moot point. Certainly, given the raft of tribunals, ombudsman schemes, online dispute resolution (ODR) and the like along with more informal processes like mediation, this is not a minor or insignificant trend. It is also true that adjudication in tenancy deposit disputes has a statutory basis. Further, parties not willing to submit their dispute to adjudication retain the option of utilising the civil courts.

1.5 Tenancy deposit adjudication in practice

Tenancy deposit adjudication is a paper-based only form of adjudication where tenants and landlords – who frequently employ their agents to prepare their case – submit their claim supported by various documents including, ideally, the check-in and checkout report. Disputes can be raised over a number of issues including: damage, cleaning, unpaid rent, unpaid bills and decoration. According to RICS (2012), over half of tenancy deposit disputes relate to cleaning as there are different perceptions of what a tenant, landlord or agent deems to be clean. Likewise, there is ambiguity over what constitutes “fair wear and tear.” Such factors can often lead to disputes over the amount of the deposit that should be returned to the tenant.

Inventories, receipts, photographs and videos can help to provide evidence of the condition of a property before and after occupation. Independent check-in and check-out reports are considered the most robust form of evidence. Yet issues arise when the
documentation is not sufficiently comprehensive or when the obligations of the landlord and the tenant are not clearly defined in the tenancy agreement. There has been little sustained academic analysis of the workings of the tenancy deposit schemes. Jones (2010) identified that landlords typically consider adjudication working on the basis that the landlord will be responsible for any damage unless he can prove otherwise. In any event, as the deposit belongs to the tenant, the burden of proof is on the landlord to demonstrate that he is entitled to retain the funds. As such, this perhaps distorts landlords’ perception of the neutrality of adjudicators’ decisions.

There is also some evidence that tenants are not fully informed of the existence and operation of the schemes. For example, 85 per cent of the students interviewed had not been informed by their agents or landlords about the free adjudication service (Jones, 2011). Some landlords attempt to avoid joining a tenancy deposit protection scheme (TDPS) by taking rent in advance in lieu of a deposit or by increasing rent to above market rent “to compensate for any issues” (Jones, 2010). The recent decision of Johnson v. Old [2013] 2 P. & C.R. DG6 has also clarified that rent in advance is not a tenancy deposit, thereby, giving landlords who opt for this route a legitimate way of avoiding the scheme and its implications (Sidoli del Ceno, 2013a; Superstrike Ltd v. Marino Rodrigues [2013] EWCA CIV 415).

As noted above, it is agents who frequently prepare the case and supporting materials for the landlord. The vast majority of parties do not seek legal advice: not only partly because they cannot afford to do so but also because the sums involved are often fairly small. This supports observations made by many critics of ADR in general that processes such as this lack sufficient safeguards for the legal rights of individuals. The whole system might be seen as operating in “the shadow of the law” (Mnookin and Kornhauser, 1979).

2. The research process
The study is attitudinal. Attitudinal research is used to “subjectively evaluate the opinion, view or perception of a person towards a particular [issue]” (Naoum, 1998, p. 17). The rationale here is that the views and perspectives of professionals must be given weight. This is not only because of their expertise in dealing with these matters on a day-to-day basis but also because their resistance or relative enthusiasm will have a clear impact on the success of the process. The views of these housing professionals can inform our understanding as to whether the adjudication procedure is working well in practice or whether it needs to be reformed. In addition, this study can provide an insight into the type of reforms of adjudication that may prove most effective. The methodology chosen for gaining the primary material is qualitative and that choice was dictated by the nature of the project. Exploring the attitudes and approach of a small number of professionals to a particular practice requires the use of interviews and the like. For example, the numbers of disputes undertaken are of less value to this study than knowing the agents’ perspectives about the dispute resolution process.

The research consisted of twelve interviews carried out between March and July 2014. The semi-structured interviews were conducted face to face, allowing for natural and spontaneous responses on the part of the letting agents. In addition, the interviews were recorded and transcribed. The semi-structured interview allows the professional practice of the letting agent to be probed and for an exploration of the subject’s underlying assumptions. The interviewees were selected for a mixture of research-led
reasons in that they provided a suitable matrix of different levels and type of experience, as well as their willingness to participate. The interviewees shared a range of particular expertise within the field, as well as a range of experience – from newly qualified to those with over 20 years in practice. Half of the interviewees were female. All agents chosen were regulated by relevant professional organisations such as the Association of Residential Lettings Agents (ARLA) and the Property Ombudsman, thus providing a certain minimum professional standard. Agents in two areas were interviewed, Birmingham and South Wales. This was because of the accessibility to suitable subjects. The interviewees are referred to throughout by a letter.

3. Findings and analysis
3.1 Subjectivity and the principal causes of dispute
As noted above (RICS, 2012), over half of tenancy deposit disputes are concerned with the issue of cleanliness. That was confirmed by this study. Agent E stated that “everyone has their own standards” and Agent H noted “how impossible it is to get people agreed on what is clean and what is not.” The same issue of the lack of objective standards was also commented upon by numerous respondents in relation to redecoration. Disputes over redecoration centred on two main areas – what the tenant and the landlord deem to be fair wear and tear, and cases where tenants had altered the property without returning it back to its original condition at the end of the tenancy. Agent B gave an example of such a case where the tenant was even able to retain the entirety of the deposit. This is because the TDFS found that the tenant had a verbal agreement with the landlord to carry out the works and there was no written evidence available to the adjudicator to the contrary. Each agent identified that landlords and tenants had a subjective perception of what constitutes fair wear and tear. This is largely in relation to the condition of carpets and flooring, dilapidation of soft furnishings and the maintenance of kitchen and bathroom appliances. Agents felt that it is this subjectivity that makes these claims so hard to adjudicate, although most commented that any subjectivity was interpreted in favour of the tenant.

In dealing with subjective-type issues Agent D, for example, stated that to effectively avoid such disputes it is essential to manage the expectations of both the tenant and the landlord. She described that it is equally important to make tenants aware of the small issues “such as the replacement of light-bulbs.” Tenants may expect a deduction of a few pounds, when she stated that the reality is “a contractor is sent out to fit these new bulbs which incurs a call out charge which is likely to exceed £40.” Agent B reinforced the idea that landlord and tenant education is important when she stated that “we meet all of our tenants personally to move them in and move them out and they are provided with information about what is expected of them at the start of their tenancy.” This is the same at the end of the tenancy when “detailed documents describing what needs to be cleaned and the expected level of cleanliness are sent to the tenants at least a month before they vacate.” Five other agents made statements to that effect. As such, this approach helps to mitigate any potential disputes as far as possible.

3.2 The burden of proof and pro-tenant bias
The issue of the burden of proof has created a suggestion that tenancy deposit adjudications are biased against landlords and in favour of tenants. A reason for this perception is that a landlord may not appreciate that a deposit actually belongs to the
tenant. As such, the landlord or his agent is required to prove the claim. This means that comprehensive paperwork is necessary for a landlord to make a successful claim. Otherwise deposits will be returned at least in part to tenants on the basis that the written evidence is insufficient. In that regard, the overwhelming opinion of all the agents surveyed is that adjudications favoured tenants. Agent D described that during a TDS course she attended, it was explained:

[that] because the deposit is the tenant’s, the landlord has to prove a claim as to why he or she should get the tenant’s money […]. It is does not work on the basis of the tenant proving why the landlord should release the money back to them.

Absence of check-in reports and lack of initial receipts proving, for example, the high quality of the sofas (whereas check-in reports will often merely state "cream sofa – good condition") are typical examples of how this works in practice. As a result, agents felt that they must improve the clarity of their communication with landlords, so that landlords had a better understanding as to what evidence was required to successfully retain a tenant’s deposit. Yet, more integrally, agents must themselves ensure that the tenancies and the condition of the properties are properly documented so that landlords have a better chance of fulfilling the evidential requirements in the future.

According to the participants, many landlords are increasingly aware that they are unlikely to be able to retain all of the deposit. Agent D, for example, stated, “if landlords have a justified claim they do not get the full costing that they are owed.” This is because paperwork is not thorough enough, inventories are not detailed enough and there are an insufficient number of photographs of the initial condition of the property. Agent D further described how in the last two disputes, she has seen a strategic shift in the way in which landlords submit their claims. She stated that on one occasion “a landlord went for a higher figure because he knew that he wouldn’t get it and that he would receive a fairer price once the TDP had bartered down the amount.” Other agents noted some of their landlords using similar strategies. This may then be the start of a new breed of landlords who are beginning to understand the adjudication system better and are starting to manipulate it to achieve what they deem, fair and proper treatment.

Conversely, it was felt that tenants were aware that the burden of proof fell on the landlord to prove that they were entitled to retain the deposit. This had led to tenants adjusting their behaviour. Agent H noted that many tenants had now been through 3 or 4 adjudication processes and had picked up from the final reports, for example, “that the check-in report didn’t mention the garden so they know they can’t be liable for it or that the landlord can’t claim the full value of a new carpet when there is merely a stain on it.” Agent E has claimed that “because of the internet, information is now more freely available to tenants and they are much more aware of their rights.” This, she suggests, has introduced a new breed of tenant who have, what Agent B described as a “nothing to lose attitude.” Most of the agents noted that tenants appear to be more willing to dispute the amount of the deposit that the landlord is proposing to retain if they feel that the initial offer is unreasonable. As Agent D described, as the legislation came into force in 2007, it “is more difficult to negotiate because tenants think they can get it all.” Furthermore, she identifies that “as it is free the tenants are happy because it [the adjudication scheme] doesn’t affect them [financially].”

It was claimed that the amount of detail required by the landlord to justify their claim was high and arguably excessive. In-depth inventories, photo inventories and signed
checklists are now a prerequisite. Without these documents agents thought that tenants were very likely to have their deposit returned in full. Yet Agent B described that “in the summer months we have between 40 and 50 new tenancies per month, and it is not feasible to carry out this level of service for each tenancy.” She suggested that there are professional inventory clerks that could be outsourced; however, this comes at a much greater cost to the agency. Agent B described that there is a “human touch” that is involved when agents move tenants in and out of properties and this would be lost if a clerk was employed. This first-hand contact of the agents with the tenants allows them to negotiate more effectively to try and resolve any issues before they reach the dispute stage. All participants identified this as the best method to resolve disputes with adjudication being the method of last resort.

3.3 Practical concerns

Major themes that emerged from the research concerned the administrative burden on the agents, as well as the user-friendliness of the process from the perspective of the landlords and tenants. Although the majority of agents emphatically stated that the adjudication process itself was not biased per se, they did identify that the evidential threshold required from landlords is great, often exceeding the capacity of the agent. This has improved in the last few years as a result of online portals for evidence submission. Yet there was still a sense that the volume of evidence required, particularly on behalf of the landlord, is excessive. Furthermore, as the cause of disputes is largely cleaning and wear and tear, the subjective nature of these categories ensures that this will always be a catalyst for argument. It has been suggested that these could be mitigated by agents through expectation management. This will not however always be successful. It is perhaps inevitable that disputes will still arise. Yet the findings from this present study showed that actual disputes that required adjudication were still relatively uncommon. The agents surveyed only having dealt with approximately three to five in the last five years. This concurs with the TDS (2014) report that found that 0.88 per cent of deposits protected resulted in adjudication.

Many agents reported that the tenancy protection bodies do not always operate within the promised 28-day period and, further, that the process is unnecessarily drawn out. As Agent B stated the 28-day period only commences “from the point when the evidence is submitted in full” and it does not take into account how long it takes to gather the necessary evidence in the first place. Agent B describes that even when the claim has been submitted by a let-only landlord, she, as an agent, is still involved in “compiling all of the necessary information to hand over to the landlord so that they can submit the claim.” This can often lead to financial complications for landlords and agents, particularly, when money is needed to return the property to a habitable state following the termination of a disruptive tenancy. Agent B describes that the tenancy deposit protection bodies keep you updated “albeit slowly” as to the progress of your claim. It was commonly felt that while the process is simple it is “time consuming” and “labour intensive” because of the large amount of information required. The use of online portals for the submission of evidence was, however, identified as a positive practical step in dealing with a part of the problem.
3.4 Trends in tenants contesting deposits

Each of the agents identified that it is tenants who submit the most claims for adjudication. In their experience, landlords tend to act on the advice of the agents who typically will seek a negotiated agreement, even though this may sometimes result in adjudication because of the intransigence of one party. Although most of the agents claimed that they have not noticed any significant patterns in the tenants who dispute, a number noticed that many tend to be “young professionals, such as solicitors” who they suggest “have a point to prove” (Agent E). As Agent E further explained, a young solicitor went to adjudication over £20 worth of cleaning, simply because he would not admit to the cost and was prepared to submit his case to adjudication. In contrast, several agents with a substantial student clientele have noticed more that there is a trend towards tenants not contesting the retention of the deposit. Agent D describes that this can be seen with “foreign students who are usually Chinese in origin” and this, she suggests, is because “they do not seem to expect to see their deposit again.” Furthermore, Agent E has identified that because of this, they do not take care of the properties and often the “entirety of the deposit is needed to clean the property once they leave.” Respondent G noted the same with non-European students in Cardiff - “the deposit is a fee, often paid by someone else. There is no awareness or interest from them that they might get it back.” Similarly, Agent D has described that “many leave without giving us notice and without closing any of their utility accounts” and because many are leaving the UK “a lot of their unwanted belongings are also left in the property.” This consequently can result in a delay in the landlord’s or agent’s ability to swiftly re-let the property that could leave the landlord out of pocket.

4. Conclusions

Overall, it seems that adjudication in tenancy deposit disputes has generally yielded many encouraging outcomes. The fact that the schemes have in combination dealt with such significant volumes of disputes – over 116,000 disputes from 2007 to 2014 – is strong evidence of their basic utility (TDS, 2014). Such a volume of cases would otherwise have crippled the small claims courts. The evidence-based approach taken in adjudications places greater emphasis upon the administrative diligence and well-documented tenancies. This has brought about fairer treatment of tenants while similarly protecting landlords’ financial interests, provided that they properly manage and record their tenancies. An increased professionalism seems to have occurred among letting agents as a result of this. Despite worries about sustainability, most agents were actually broadly happy with the process. They considered adjudication to be an appropriate form of dispute resolution for tenancy deposit disputes, primarily because of the small monetary value of the disputes and the large volume of cases.

However, it remains the case that many parties – in particular tenants – remain relatively uninformed of the process and what is required of them. This indicates to the need for still greater dissemination. Although the tenancy protection schemes have all made attempts at outreach, it is perhaps the agents who are best placed to do this. This is because it is the agents themselves who actually come into direct contact with the schemes. In other contexts, lawyers must be seen to take an active role in disseminating and promoting ADR so that their clients are aware of the best options available to them. In tenancy deposit disputes, it is the agent who is the de facto professional “gatekeeper.” Thus, it is perhaps important that agents educate tenants on how to use the service...
effectively so that they only use it as a last resort and not as an automatic first instant response if a dispute arises. If this conciliatory role is not fulfilled by the agents, it is possible that the adjudication service may see ever-increasing volumes of disputes. There is however a problem with this. In law, the agent works for the landlord and represents their best interests. This is contrary to the view of many tenants who perceive agents to be neutral “middle men.” This confusion increases with tenants frequently paying fees to the agent. It is arguable that all parties being well informed should result though in a better managed process and disputes being avoided even though some landlords might oppose this approach.

The perception of a heavy administrative burden being placed on agents was noted above. In turn, this raises questions concerning the sustainability of the tenancy deposit schemes. It can be said to be functioning effectively today but if more pressure is placed upon the private rented sector in the future, then changes may need to be made to ensure that it still produces effective and fair dispute resolution. The burden placed upon landlords and agents to produce evidence to support a landlord’s claim was widely considered in this study to be excessive and may become more unsustainable if greater pressure is put upon existing agencies. Furthermore, there is concern that younger, well-educated professionals are increasingly likely to dispute a claim. This may bring about a greater number of disputes in the future as tenants who are not satisfied with the deposit that is being returned to them may enter adjudication as a way to “see what we can get.”

Perceptions were strong that a landlord could rarely win outright whatever the merits of the case. This is not supported however by statistics produced by the TDS (2014); for example, where circa 13 per cent of disputed deposits are not returned at all. Owing to this, the importance of managing expectations was considered to be an important issue for agents. Issues such as what is considered fair wear and tear, the standard of cleanliness and the typical lifespan of household items are frequent areas where landlord expectations need tailoring to the new reality. This should imply that negotiation and compromise, coupled with realism regarding the evidential strengths of your case, ought to be the best form of dispute resolution. In this way, adjudication can be seen to link to wider trends in ADR.

If adjudication is to continue as an effective medium through which to settle tenancy deposit disputes, it is essential that there are sufficient resources to meet demand. Currently, it has been noted that many disputes exceed the designated time period for resolution. This is a problem that seemed likely to increase in light of the recent decisions in Superstrike Ltd v. Marino Rodrigues [2013] EWCA Civ 669 and Gardner v. McCusker [2014] 3BM70525 (unreported) that required the reregistering of deposits that continued on a statutory periodic basis (Sidoli del Ceno, 2013b; Sidoli del Ceno and Johns, 2014). The amendments made by the Deregulation Act have sought to address this problem. What is certain is that the numerous statutory amendments and the significant body of case law have only sought to confuse landlords and their agents.

Could ADR be used more widely in residential property disputes? It is possible that issues such as rent arrears and disrepair could benefit from this approach. Is an adjudicative approach, however, necessarily the best? It is, of course, adversarial necessarily pitting one party against another. Could mediation, therefore, be used working alongside adjudication? Mediation is a bottom up technique that allows the parties to reach their own settlement. Mediation aims at generating well thought-out and rational outcomes while additionally helping to preserve future relationships. This may be particularly beneficial if a landlord and
tenant have a working relationship to maintain. It does not however guarantee a settlement nor necessarily provide finality. It cannot then be a replacement for adjudication. It could however be a useful and constructive option for many. Although we persist with short assured shorthold tenancies of six months or a year, this might not matter greatly. If, however, as some argue, tenants ought to have longer tenancies of three years and upwards; this aspect may achieve greater significance.

Notes
3. CPR 44.

References
Charalambous and Karali v. Ng and Ng [2014], EWCA CIV 1604.
Gardner v. McCusker [2014], 3BM70525 (unreported).
Rooker, L. (2004), Minister of State, Office of the Deputy Prime Minister, col 87, Hansard HL Debates.


Superstrike Ltd v. Marino Rodrigues [2013], EWCA Civ 669.

Superstrike Ltd v. Marino Rodrigues [2013], EWCA Civ 415.


Further reading


NFRL (2002), “The last of the triple whammies is in some ways the worst”, Residential Renting.


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