

The Guild of Residential Landlords

Article on the differences between the New Zealand tenancy deposit scheme and the scheme to be operational from 6 April 2007 in England and Wales

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During the current debate on Tenancy Deposit Schemes, I have had a few emails from people who have heard about the New Zealand bond scheme and how efficient and fair it is. Indeed the Guild after a visit to New Zealand some years ago would agree entirely with this opinion. However, I thought it might be interesting to show how residential tenancies have many key differences to the ones in England and Wales.

After reading this article, you will hopefully be armed with a few points that show comparing the two systems is not really a fair comparison, and in our opinion, just because the system works well in New Zealand, does not necessarily mean it will work well in England and Wales. Of course it all maybe a lot of fuss over nothing and the scheme might work just fine here.

Landlords are not generally against the principle of the tenancy deposit scheme. They are against the fact that all the legislation is against the landlord, with no fair balance of obligations placed on tenants.

The key difference with the schemes here is the lack of appeal. It is very difficult to have consistency in decisions without the power of a higher tribunal handing down decisions that allow a landlord or tenant to then use those decisions as precedents. Thus over time, the picture becomes clear as to what is and what isn't fair wear and tear for example.

In New Zealand, all residential tenancies and the duties of landlords and tenants are governed by the Residential Tenancies Act 1986. (Unlike here where we have numerous Acts of Parliament to contend with). One department, The Department of Building and Housing, governs all residential tenancies, this department also controls all tenancy deposits.

Also, in New Zealand, instead of using the courts for residential tenancy disputes, you may start with mediation but then there are special "tenancy

tribunals" that deal with everything from possession, rent arrears, damage and tenancy deposits. In New Zealand, the government as will be shown later simply does not tolerate non-payment of rent or damage to property by a tenant. Indeed it is a criminal offence not to pay the rent!

The first thing to consider is the culture. It is an incomparable culture in New Zealand; *"Ownership in the private rental market is highly fragmented. 'Mum and dad' landlords with one or two rental properties and full-time jobs in other fields are most common, while large professional landlords are rare... Because of the low density single dwelling form of housing in New Zealand, the benefits of investing in the affordable segment of the rental market are less attractive for institutional investors than in many countries, especially when yields are low. Compared with North American and European cities, the efficiencies of investing in and managing higher density housing have been unavailable until quite recently with the growth of an apartment sub-market. It also appears that many tenants and landlords regard renting as a second-best housing option, while homeownership is seen as an indication of success. Overcoming such beliefs may require lifting housing quality and improving security of tenure in the rental"* [source: Housing New Zealand Corporation].

Having a close look at the Residential Tenancies Act 1986, which is the equivalent to our Housing Acts 1988, 1996 and 2004, shows that though like here there are many obligations on a landlord, there is an equally fair balance of obligations for the tenant to follow (unlike here). If landlords in this country were given the option of having similar fair obligations on a tenant, I am sure there would be fewer complaints about the tenancy deposit scheme being introduced.

I will now show you a quick run through of some key features of the Residential Tenancies Act 1986, including how contained in the act is the duty of the

tenant to pay the rent. There is no such duty in the Housing Acts here! And that the tenant only needs be 21 days in arrears and the landlord make seek a possession order from the tribunal without first giving the tenant notice!

Section 40 Tenant's responsibilities

(1) *The tenant shall—*

(a) *pay the rent as and when it is due and payable under the tenancy agreement*; and

(b) ensure that the premises are occupied principally for residential purposes; and

(c) *keep the premises reasonably clean and reasonably tidy*; and

(d) notify the landlord, as soon as possible after discovery, of any damage to the premises, or of the need for any repairs; and

(e) *on the termination of the tenancy,—*

(i) *quit the premises*; and

(ii) *remove all his or her goods from the premises*; and

(iii) *leave the premises in a reasonably clean and reasonably tidy condition, and remove or arrange for the removal from the premises of all rubbish*; and

(iv) *return to the landlord all keys, and security or pass cards or other such devices, provided by the landlord for the use of the tenant*; and

(v) leave in or at the premises all other chattels provided by the landlord for the use of the tenant.

(2) *The tenant shall not—*

(a) *intentionally or carelessly damage, or permit any other person to damage, the premises*; or

(b) use the premises, or permit the premises to be used, for any unlawful purpose; or

(c) cause or permit any interference with the reasonable peace, comfort, or privacy of any of the landlord's other tenants in the use of the premises occupied by those other tenants, or with the reasonable peace, comfort, or privacy of any other person residing in the neighbourhood.

(3) *Where the tenancy agreement specifies a maximum number of persons that may reside in the premises during the tenancy, the tenant shall ensure that no more than that number reside in the premises at any time during the tenancy.*

(4) Where any damage to the premises is proved to have occurred during any tenancy to which this Act applies, *it shall be for the tenant to prove that the damage did not occur in circumstances constituting a breach of subsection (2)(a).*

(5) In this section, unless the context otherwise requires, premises includes facilities.

Section 41 Tenant's responsibility for actions of others

(1) *The tenant shall be responsible for anything done or omitted to be done by any person (other than the landlord or any person acting on the landlord's behalf or with the landlord's authority) who is in the premises with the tenant's permission if the act or omission would have constituted a breach of the tenancy agreement had it been the act or omission of the tenant.*

(2) *Where any person (other than the landlord or any person acting on the landlord's behalf or with the landlord's authority) intentionally or carelessly damages the premises while the tenant is in the premises, it shall be presumed that the tenant permitted that person to be in the premises unless the tenant proves that he or she took all reasonable steps to prevent that person from entering the premises or (as the case may require) to eject that person from the premises.*

Section 42 Tenant's fixtures

(1) The tenant shall not affix any fixture to the premises, or make any renovation, alteration, or addition of or to the premises, except—

(a) in accordance with the tenancy agreement; or

(b) with the prior written consent of the landlord.

(2) The landlord shall not withhold that consent unreasonably.

(3) The tenant may, at any time before the expiry of the tenancy, remove any fixture that the tenant has affixed to the premises during the term of the tenancy, unless the removal would cause irreparable damage to the premises.

(4) If, on removing such a fixture, the tenant causes any damage to the premises, the tenant shall inform the landlord forthwith and, *at the landlord's option, either repair the damage or compensate the landlord for any reasonable expenses incurred by the landlord in repairing the damage.*

46 Locks

(1) The landlord shall provide and maintain such locks and other similar devices as are necessary to ensure that the premises are reasonably secure.

(2) Neither the landlord *nor the tenant shall alter any existing lock or similar device*, or add to or remove from the premises any lock or similar device, without the consent of the other given at the time that, or a reasonable time before, the alteration, removal, or addition is carried out.

(3) Failure to comply with subsection (1), and

contravention of subsection (2), without reasonable excuse, is each hereby declared to be an unlawful act.

55 Termination on non-payment of rent, damage, or assault

(1) Subject to subsection (2), on any application made to it under this section by the landlord, *the Tribunal shall make an order terminating the tenancy* if the Tribunal is satisfied that—

(a) *the rent was, at the date on which the application was filed under section 86, at least 21 days in arrear;*

or

(b) *the tenant has caused, or has permitted any other person to cause, or has threatened to cause, substantial damage to the premises;* or

(c) *the tenant has assaulted, or has threatened to assault, the landlord or any member of the landlord's family, or any agent of the landlord, or any occupier of any building of which the premises constitute a part, or any neighbour of the premises or of any such building.*

(1A) ...

(1B) ...

(2) *The Tribunal may refuse to make an order* under subsection (1) *if, but only if,* it is satisfied that *the breach has been remedied (where it is capable of remedy), the landlord has been compensated for any loss arising from the breach, and it is unlikely that the tenant will commit any further breach* of a kind to which this section applies.

(3) *It shall not be necessary for the landlord to give to the tenant notice of the landlord's intention to apply under this section for an order terminating the tenancy.*

56 Termination for other breach

(1) *On an application* made to it under this section *by the landlord or the tenant,* the Tribunal *may make an order terminating the tenancy* if the Tribunal is satisfied that—

(a) *the other party has committed a breach of any of the provisions of the tenancy agreement or of this Act;* and

(b) in the case of a breach capable of remedy,—

(i) *the applicant gave to the other party a notice specifying the nature of the breach complained of and requiring the other party to remedy the breach within a reasonable period, being not less than 10 working days commencing with the day on which the notice was given;* and

(ii) *the other party failed to remedy the default within the required period;* and

(c) that the breach is of such a nature or of such an extent that it would be inequitable to refuse to make an order terminating the tenancy.

(2) *Where an application is made by a landlord under this section and the Tribunal is satisfied that at the time of determining the matter the landlord could have made an application under section 55, the Tribunal shall determine the matter as if an application had been made under that section.*

60 Tenant remaining in possession after termination of tenancy

(1) *Where a tenant remains in occupation of the premises after the tenancy has terminated or has been terminated, all the obligations of the tenant shall continue in force as if the tenancy were still subsisting until such time as the tenant ceases to occupy the premises.*

(2) If the landlord permits the tenant to remain in the premises for more than 90 days after the tenancy has terminated or has been terminated, without obtaining a possession order, or for more than 90 days after obtaining a possession order, the landlord shall be deemed to have granted, and the tenant shall be deemed to have accepted, as from the date on which that period of 90 days expired, a periodic tenancy of the premises on the same terms and conditions as pertained to the original tenancy immediately before its termination.

(3) *The landlord shall not be taken to have permitted the tenant to remain in possession, or to have given up the right to proceed under this Act in respect of any breach of the tenant's obligations, merely because the landlord accepts payment of rent in respect of any period after the tenancy has been terminated.*

61 Abandonment of premises

(1) *On the application of the landlord, the Tribunal may make an order terminating a tenancy where it is satisfied that the tenant has abandoned the premises and the rent is in arrear.*

(2) Where the Tribunal makes an order under subsection (1) in respect of a periodic tenancy, *it shall determine, as best it can on the evidence before it, the date on which the landlord first became aware, or ought reasonably to have become aware, that the tenant had abandoned the premises,* and shall specify that date in the order.

(3) *A tenant who abandons the premises shall, notwithstanding any rule of law to the contrary, be liable to pay the rent* for any period up to and including, but not after, the following date:

(a) in the case of a periodic tenancy,—

- (i) the date of the expiry of the period of 21 days after the date specified by the Tribunal under subsection (2); or
- (ii) the date of commencement of a new tenancy of the premises,—
- whichever is the earlier:
- (b) in the case of a fixed-term tenancy,—
- (i) the date of the expiry of the term; or
- (ii) the date of commencement of a new tenancy of the premises,—
- whichever is the earlier.
- (4) *Nothing in section 49 shall impose upon the landlord any obligation, on finding that the tenant has abandoned the premises, to make an application under this section or to grant a new tenancy of the premises.*

62 Abandoned goods

- (1) *Where, on the termination of the tenancy, the tenant leaves any of his or her goods on the premises, the following provisions shall apply:*
- (a) *in the case of foodstuffs and other perishable goods, the landlord may, forthwith after taking possession of the premises, dispose of the goods in such manner as the landlord thinks fit:*
- (b) *in the case of other goods, the landlord shall, forthwith after taking possession of the goods,—*
- (i) *secure the goods in safe storage;* and
- (ii) *apply to the Tribunal for an order for the disposal of the goods:*
- (c) *in any case to which paragraph (b) applies, the Tribunal shall make an order—*
- (i) *for the return of the goods to the tenant;* or
- (ii) *where that is not practicable, for the sale or other disposition of the goods:*
- (d) *neither the landlord nor any other person shall be liable in any way for any disposition of any goods made pursuant to paragraph (a) or to an order of the Tribunal made under paragraph (c):*
- (e) *the landlord shall be entitled to recover, out of any bond held in the Residential Tenancies Trust Account in respect of the tenancy, all costs and expenses reasonably incurred by the landlord in respect of the storage or disposition of any goods pursuant to paragraph (a) or paragraph (b) or to an order of the Tribunal made under paragraph (c).*
- (f) Repealed.
- (1A) *Where the Tribunal makes an order for the sale or other disposition of goods under this section, the order shall state the amount (if any) owing to the landlord out of the proceeds of sale.*
- (1B) *That amount shall be the amount payable to the landlord by the tenant in excess of any bond held in*

the Residential Tenancies Trust Account in respect of the tenancy.

(2) ...

138 Offences triable summarily

(1) *Every offence against any of the provisions of this Act, except section 111, or against any regulations made under this Act, shall be punishable on summary conviction. [Authors note: This means all the obligations of a tenant detailed above are criminal offences if they are not performed. For example it is a criminal offence not to pay the rent etc.]*

The landlords obligations are very similar to those here except in the interests of fairness and balance I will summarise a few points, including a few things that are much better than our legal requirements for both landlords and tenants.

- The equivalent of a landlords 2 months notice is allowed in New Zealand but it is 90 days notice instead (42 days if you intend to move into the property or sell the property). [s51].
- A tenant only need give 21 days notice to vacate. [s51].
- No special tenancy period date needs to be given by a landlord or tenant when serving a notice, avoiding the complications of the notice expiring on the “last day of a period” [s51].
- It is a criminal offence for a tenant not to allow a landlord entry (after serving appropriate 48 hour notice) [s48].
- A landlord may only ask for 2 weeks rent in advance [s23]
- A landlord may not ask for a deposit of greater than 4 weeks rent [s18].
- Tenancy agreements must be in writing [s13]
- The tenant shall be given a receipt for every payment of rent within 72 hours (except bank transfer or cheque) [s29].
- When rent is increased, the tenant shall pay (if requested by landlord) an additional amount to top up the deposit to make it equivalent to the new four weeks rent [s18(2)].

Lets now compare the tenancy deposit schemes operated by both countries.

Detailed summaries of the obligations are detailed in guidance note 29, which is still in draft form, however a brief comparison table is provided below. References in the table below to England & Wales include either

custodial or insured based schemes, whereas in New Zealand there is only one custodial scheme.

Provision	England & Wales	New Zealand
Length of time to hand over / insure deposit from when it has been received by the landlord	14 days	23 days
Who notifies tenant where deposit is held	Landlord	The scheme operator (Chief Executive)
Can tenant pay directly into the scheme	No	Yes
How long for tenant to raise dispute	Not yet known	10 days
Is a hearing held	No	Yes
If landlord or tenant are dissatisfied with the decision can they appeal	No	Yes
Can a landlord or tenant cross examine the other party	No	Yes
Are decisions public or private	Private	Public
Is there a telephone mediation helpline or somewhere informal to attend if there is a dispute, before formal proceedings begin	No	Yes

As most are aware, in the event of a dispute under our schemes, a form is completed, which along with papers, inventories, photographs etc. is sent to the alternative dispute resolution for them to consider who is entitled to the disputed deposit. However in New Zealand, it is different. There, there is a twofold system. First there is the option of mediation, then the tenancy tribunal (although a landlord or tenant may go straight to the tenancy tribunal).

Mediation

“Many disputes between tenants and landlords can be resolved at the mediation stage.

*Mediation is a time organised by the Department of Building and Housing to help landlords and tenants talk about and solve their problems. A mediator helps you both discuss the problem, identify the issues, and come up with a workable solution. **Mediators know a lot about tenancy issues, but they don’t decide anything for you.***

It’s a way to get things sorted out quickly – A mediation appointment can be set up more quickly than a Tribunal hearing.

It’s less formal than going to Court – Mediated agreements are made with both tenant and landlord being fully informed of all their rights and responsibilities, and there is a clear understanding

of what the agreement means. Tribunal hearings are conducted by the Ministry of Justice and are more formal than mediation.

*You decide between you what will happen – **You don’t get told what to do. When people contribute to the decision themselves, they are likely to be more committed to making it work than to a decision imposed by someone else.***

It’s confidential – No one else has to know what you said in mediation.

The result is still legally binding and enforceable through the Court system if necessary. [Source: Department of Building and Housing]

Tenancy Tribunal

“The Tenancy Tribunal is a special Court for making decisions about problems that landlords and tenants have been unable to settle themselves. It is a part of the Justice system.

Who can go to the Tribunal hearing?

It is a public hearing and either party may take support people with them. Parties normally represent themselves and it is unusual for parties to be represented by lawyers.

What happens at the hearing?

A tenancy adjudicator listens to each person, hears any witnesses and evidence either side wants

considered, and then makes a decision according to the Residential Tenancies Act." [Source: Department of Building and Housing]

Summary

I hope by showing the different ways the system is operated in New Zealand to here that a more fair and balanced approach can be seen between the two. Not wishing to repeat but there is actually no real issue with the tenancy deposit schemes in principle. It is that everything is against the landlord with no balance on the tenant. In New Zealand it is a criminal offence not to pay rent and possession can be sought without notice after 21 days of arrears. Here, a tenant must be two months in arrears, then 14 days notice, then an application to court may be made where a hearing can not be heard less than four weeks or greater than 8 weeks from the time the court forms were issued. This usually means the tenant is at least 3 or 4 months in arrears before a court hearing has even taken place, let alone before the property is vacated and given back.

For anyone interested, you can see the full text of the Residential Tenancies Act 1986 here:

<http://www.dbh.govt.nz/UserFiles/File/Tenancy/what-we-do/rta/pdf/residential-tenancies-act.pdf>

I hope this article was of interest.

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