



**WHO SHOULD READ THIS?**

- Tenants
- Agents
- Landlords

# **GUIDE TO DEPOSITS, DISPUTES AND DAMAGES**

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Tenancy deposit protection legislation was introduced in April 2007. It required residential landlords in England and Wales who took a financial deposit from tenants in an assured shorthold tenancy to protect it with one of three government approved providers of deposit protection. Since the introduction of the legislation, millions of deposits totalling billions of pounds have been protected with the providers.

As part of their ongoing commitment to maintaining the highest possible standards, the three deposit protection providers have come together to develop this joint guidance. It provides a transparent, consistent approach to the resolution of deposit disputes, ensuring that all tenants and landlords are treated fairly and equally, regardless as to which provider protects the deposit or the type of protection in place.

The Tenant Fees Act came into force on 1 June 2019 and applies to all new or renewed tenancies entered into from that date. The effect of the Act is to prohibit agents and landlords from charging tenants a number of fees traditionally associated with residential lettings and provides clear guidance on the amount of the security deposits and fees which are permitted. The legislation provides for a transitional period up to 31 May 2020, during which time prohibited fees in tenancy agreements entered into before 1 June 2019 can still be enforced.

The legislation also places restrictions on the value of security and holding deposits which can be taken from 1 June 2019. For security deposits, where the annual rent is less than £50,000 per annum, the deposit will be capped at a maximum of 5 weeks' rent. Where the annual rent is £50,000 or above, the cap is six weeks' rent. For tenancies entered into before 1 June 2019 with higher levels of deposits, the excess element of the deposit will only need to be released at the end of the tenancy, either at the end of the fixed term or end of any subsequent statutory or contractual periodic tenancy.

Each deposit protection scheme provides information on how to release any excess deposits. As far as dispute resolution is concerned, agents and landlords will still be able to recover damages for breach of contract through the security deposit.

## A brief overview of deposit protection

**When agreeing a new tenancy, residential landlords will usually take a financial deposit from the tenants to cover costs that may be incurred as a result of breaches of the tenancy agreement**

There are two types of deposit protection – Custodial and Insured – we'll explain the differences between these.



### Custodial

The landlord pays the deposit to the deposit protection provider who looks after the deposit for the duration of the tenancy, until the landlord and tenant confirm how it should be repaid.

In the event the landlord and tenant can't agree how the deposit should be repaid, the provider will continue to hold the deposit until an adjudicator makes a decision through the dispute resolution process, or they receive a court order instructing how the deposit should be repaid.



### Insurance backed

The landlord holds the deposit and pays a small fee to the deposit protection provider to insure the deposit. At the end of the tenancy the landlord and tenant agree how it should be repaid and the landlord pays the agreed amount to the tenant.

In the event the landlord and tenant can't agree how the deposit should be repaid, the landlord should submit the disputed amount to the provider who will hold the deposit until an adjudicator makes a decision through the dispute resolution process, or they receive a court order instructing how the deposit should be repaid.

If the landlord doesn't pay the money to the provider, the dispute resolution process can still go ahead and the landlord will be expected to abide by the adjudicator's decision at the end of the process.

## What happens at the end of a tenancy

At the end of a tenancy, the tenant and the landlord, or a representative such as an independent check-out clerk, should attend the property and create a check-out report to confirm the condition of the property, agreeing how the deposit should be divided between them before starting the repayment process.

In most cases, they reach agreement on how the deposit should be returned and it's repaid without any problem. However, if they can't agree then all deposit protection providers operate a free Dispute Resolution Service to decide how the deposit should be divided between them.

## What is dispute resolution?

Dispute resolution is a free service for resolving deposit disputes between landlords and tenants at the end of the tenancy. All three deposit protection providers provide a dispute resolution service for their customers, as an alternative to using the courts.

The dispute resolution process is straightforward. Landlords submit their evidence in support of their claim and tenants provide their own evidence supporting their position in response. It's then sent to an independent, impartial adjudicator, who reviews the evidence and decides how the deposit will be repaid.

In some cases, the adjudicator may decide that the case would be better dealt with through a formal court process. For example, a case involving police or alleged criminal activity, where the dispute involves allegations of fraud relating to the evidence, or highly complex disputes. The adjudicator has limited jurisdiction and does not have the same powers as a County Court Judge. It is sometimes more appropriate for the matter to be referred to court for a full hearing where spoken evidence can be considered.

## The burden of proof

Many landlords don't realise that the onus is on them to prove they have a legitimate claim to a share of the deposit, whilst the tenant has no obligation to prove their position. This is because the deposit remains the tenant's money until the landlord has successfully proven their claim.

It's worth noting that it isn't mediation, arbitration, or counselling, and neither the landlord nor the tenant will ever be required to meet with the adjudicator. Nor will the adjudicator visit the property involved in the deposit dispute.

## How long does the dispute resolution process take?

Each deposit protection provider has their own timescales for the process, and you should check those of your provider to make sure you meet the deadlines required for evidence submission and response. In rare circumstances adjudicators may ask for further evidence or clarification on a particular matter from either party outside these deadlines, but this is unusual.

### What are adjudicators?

Adjudicators are independent, impartial experts, with the skills necessary to make fair and reasoned decisions based on case evidence. They're either employed directly by the deposit protection provider or an independent individual working under contract. The deposit protection provider is contractually bound to ensure the adjudicators they employ, directly or under contract, are appropriately qualified for the role.

## How an adjudicator will decide on an award

Adjudicators make their decisions based on evidence received from both parties, judging how much should be awarded to both parties by calculating the cost of any breach of the tenancy agreement.

Claims made against a deposit are civil claims, and the adjudicator must be persuaded "on a balance of probabilities" that the tenant has breached their obligations, and that the Landlord has suffered, or is likely to suffer, a loss as a result.

Adjudicators by necessity are completely unbiased and will only take into account evidence submitted during the dispute resolution process. An adjudicator will take into account any admissions of liability by the tenant, although evidence should still be provided to show how the tenant has broken the tenancy agreement, and the loss suffered as a result.

After analysing the evidence they've received from both parties, the adjudicator will provide the decision to the scheme, and the scheme will send the decision to the landlord and tenant.

## **What if you're unhappy with the adjudicator's decision?**

At the start of the process, both landlord and tenant have to consent to use their provider's dispute resolution service, and part of this consent requires acknowledgement that the decision the adjudicator arrives at is final and legally binding, unless there is an error of fact or law by the adjudicator. The only way it can be challenged is through a Court of Law. Parties are recommended to take their own legal advice in respect of potential court proceedings.

## **Preparing for a dispute**

### **Is the claim reasonable?**

Many landlords claim for the full amount of the deposit, instead of asking for a deduction that is fair to both themselves and the tenant. Adjudicators will only award what they think is a reasonable amount to landlords.

### **Have the landlord and tenant discussed the dispute?**

Many disputes could be resolved before reaching adjudication by landlords and tenants simply talking to each other and discussing their differences, to see if they can reach an agreement.

And it doesn't matter what stage the dispute resolution process has reached, landlords and tenants can still negotiate an agreement before the adjudicator has made their decision so it can be worth keeping the communication going.

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## Evidence to support a claim

Claims made for deductions from a deposit are civil claims, and therefore the adjudicator must be persuaded “on a balance of probabilities” that the tenant breached their obligations, and that the landlord has suffered, or is likely to suffer, a loss as a result. In simple terms, landlords must provide evidence that will support the claims they’ve submitted to have a chance of success.

As previously mentioned, the deposit remains the property of the tenant until the adjudicator is shown sufficient evidence to prove the landlord has a justifiable claim. Adjudicators are impartial and the onus is on the landlord to convince them that the claim is valid.

## Some important types of evidence

Different types of evidence can be submitted depending on what the claim is for. These are some of the most important examples.

### Signed tenancy agreement

As a bare minimum when making a claim, a landlord should provide a signed copy of the tenancy agreement with their evidence for the adjudication to proceed. This is essential for virtually all disputes and without it, a landlord’s claim is almost certain to be rejected as the adjudicator won’t be able to establish the contractual obligations that apply.

## Signed check-in and check-out inventory reports

In most cases, this is another required piece of evidence. The adjudicator will use the inventories to compare the property condition at the beginning and end of the tenancy and without it, they're highly likely to reject the landlord's claim. They'll need to judge how reliable the inventory is.

Those considered to be the best evidence will usually:

- Have been prepared by a third party such as a professional inventory clerk
- Contain dated photo
- Have been signed by the tenant

Without these comparative documents, the landlord's claim for damages etc is likely to fail. Those compiled by agents or landlords (rather than an independent third party) will require supporting evidence that the tenant has seen the inventory and had an opportunity to agree the contents or comment on it. It's wise for anyone who completes inventories for their own properties to make sure that there are clear photographs included with the inventory that confirm the validity of the recorded comments.

Inventories can be the deciding factor in a dispute (and can even prevent them occurring) so it's really important they're clear and detailed. There's no set layout to inventories but information should be clear and methodical. The check-in report will need to be as comprehensive as possible. If you're explaining the condition of an item, be descriptive! Words like 'fair' and 'ok' can be interpreted in many different ways, and might not help your case.

It's important to say if an item is brand new.

Check-out evidence should be completed as soon as possible after the tenant returns the keys.

The tenant doesn't have to attend the check-in or check-out inspection, but they should be encouraged as it will be easier for you both to agree the results.

Tenants should be invited to check-out and given the opportunity to discuss the findings and sign the report. If either party doesn't attend the check-in or check-out, it may undermine confidence in the report's veracity, and records of communication about check-in or check-out, including invitations to attend may be useful evidence in the event of a dispute.

## **Signed reports of periodic inspections of the property**

It's sensible for the landlord to carry out periodic inspections of the property as an opportunity to ensure the property is being maintained, and to identify any potential issues that could cause friction between the tenant and landlord, or result in a dispute. These reports don't need to be as detailed as the check-in and check-out reports but can add useful evidence in the event of a dispute. Make sure any required follow-up is communicated in writing to the tenant.

## **A statement of the rent account**

Where the dispute concerns rent arrears, rent account statements are important as these show the outstanding arrears. These should clearly show the property and person to whom the account relates, and provide a breakdown of how rent arrears are calculated.

## **Invoices/receipts/estimates/quotes**

These are necessary to illustrate costs for many types of claim, including, repairs or restoration, redecoration, replacement of damaged goods, gardening, cleaning and waste disposal that has been required. Receipts should be itemised with a breakdown of the costs being charged for each type of work undertaken.

Estimates and quotes aren't as strong evidence as invoices or receipts because they're not showing a cost that's actually been incurred. However the adjudicator will still take them into account as they show the extent of charges necessary to rectify any damage or deterioration, as the landlord doesn't need to have completed remedial work in order to make a claim.

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 which case an adjudicator can assess a claim for compensation, if the evidence supports this.

Generally, landlords can't claim for their time and inconvenience; although a reasonable claim may be considered if proportionate and supported by comparable examples.

## **Date stamped photographs or video recordings**

'Before and after' photographs allow adjudicators to see the reason for the claim. They should be submitted with an explanation of what the photograph is showing e.g. colours, item description, marks on surfaces etc. Photos must be good quality, and clearly show the alleged damage or defect. If they have been photocopied, they can be unclear and the adjudicator may not be able to make out any damage. Electronic versions of the photos are much easier for our adjudicators to judge.

If submitting photos or videos, it's helpful for the adjudicator if you highlight the relevant part of the image or recording where the evidence can be found. Best practice suggests the photographs should be clearly dated.

## **Copies of any correspondence between the landlord and tenant**

These can be very helpful to the adjudicator, for example to establish dates when repairs were reported, when they were carried out, exactly what was agreed could or couldn't be done (for example where the tenant has asked to redecorate), or any admissions of liability made in the correspondence. "Correspondence" can include letters, emails, text messages, social media messaging or other methods of communication which record correspondence between both parties.

## **Witness statements**

Sometimes there may be witnesses who may have useful information for the adjudicator to consider regarding a claim, such as independent contractors, surveyors' reports or third party agencies. Landlords and tenants can both submit witness statements, or letters in support from individuals for the adjudicator's consideration. The adjudicator won't contact witnesses to obtain further evidence, cross-examine them, or take evidence under oath.

## Types of claims that are commonly made

|  | <b>What evidence must be provided</b>                                  | <b>What evidence may support the claim</b>   |
|--|--|--|
| <b>Non-payment of rent</b>   | Tenancy agreement;<br>Statement of the rent account.                   | Bank statements are often produced to support claims for rent arrears, but alone these aren't as compelling to an adjudicator as a full statement of the rent account. It's also useful to provide evidence that the tenant has been told about the arrears (ideally with a statement of account provided), and given the chance to comment on them. |
| <b>Cleaning</b>  | Tenancy agreement;<br>Signed check-in and check-out inventory reports. | Signed reports of periodic inspections of the property; Invoices/receipts/estimates/quotes; Date stamped photographs or video recordings; Copies of any correspondence between the landlord and tenant.  |
| <b>Damage to property or items (redecorating/repair/replacement/restoration)</b> | Tenancy agreement;<br>Signed check-in and check-out inventory reports. | Signed reports of periodic inspections of the property; Invoices/receipts/estimates/quotes; Date stamped photographs or video recordings; Copies of any correspondence between the landlord and tenant; Witness statements.  |
| <b>Gardening</b>   | Tenancy agreement;<br>Signed check-in and check-out inventory reports. | Signed reports of periodic inspections of the property; Invoices/receipts/estimates/quotes; Date stamped photographs or video recordings; Copies of any correspondence between the landlord and tenant; Witness statements.  |

## Types of claims that are commonly made

| Notes   |
|---|
|   |
| <p>The adjudicator will look at the size and type of the property, or the amount of cleaning that the evidence shows the tenant is liable for. For this reason, 'Standard Charges' in relation to cleaning will be considered on the basis of how proportionate they are to the cleaning required.</p> <p>A landlord can carry out the cleaning themselves and claim their own costs. They can support their claim by producing quotes for the cleaning from a contractor, to show that the costs are not greater than if they hired professional help. It's important to remember that the tenant is only obliged to return the property cleaned to the same standard as at the start of the tenancy.</p> <p>For this reason, 'Standard Charges' in relation to cleaning will be considered on the basis of how proportionate they are to the cleaning required.</p> |
| <p>See above regarding landlords claiming their own costs for work they have carried out themselves.</p>  |
|   |

## Types of claims that are commonly made

|   | <b>What evidence must be provided</b>                   | <b>What evidence may support the claim</b>  |
|---|---|---|
| <b>Outstanding utility bills</b>                                  | Tenancy agreement;<br>Copy of the utility bill.         |   |
| <b>Contractors fees for maintenance or repair of the property</b> | Tenancy agreement,<br>copy of the contractor's invoice. | The adjudicator may also need to see any correspondence that shows why the landlord considers the tenant liable for the contractor's invoice. |
| <b>Agency fees</b>  |   |   |
| <b>Wear and tear</b>  |   |   |

## Types of claims that are commonly made

### Notes

If utility bills are in the tenant's name then it's unlikely an award will be made to the landlord as the debt is owed by the tenant to the service provider and should not affect the landlord or new tenant's ability to obtain services.

If the tenant is paying for utilities as part of their rent payment, this would normally be considered as rent arrears.

Remember that the landlord is always liable for the structure, maintenance and repair of the property under statute. The adjudicator will therefore need to understand why the contractor's fee did not relate to this statutory responsibility in order to make an award for the tenant to pay it.

While it is accepted that agents can insert standard fees into their Terms of Business or tenancy agreements, they can be challenged by a tenant. If the adjudicator considers them to be unreasonable, they have the potential to be unenforceable.

Landlords can only claim for excessive wear and tear – which would be considered damage and fall under that claim type.

## How does the adjudicator calculate an award?

**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 might want to 'replace' items in the property which are coming to the end of their natural life, such as an old washing machine where the door handle has broken during the tenancy.

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 their tenants the full cost for having any part of their 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. So, 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 they were at start of the tenancy, or than they would have otherwise been at the end of the tenancy after having allowed for fair wear and tear. Put in simple terms, if a carpet was brand new at the start of the tenancy, and the tenancy lasted for 2 years, it would be a 2 year old carpet at the end of the tenancy. If it was damaged beyond repair and the landlord was claiming the full cost of replacing the carpet, this would lead to betterment.

In order to avoid allegations of betterment by the tenant, when making any award for damages, the adjudicator must take into account:

- Fair wear and tear
- The most appropriate remedy (i.e. repair, replacement, cleaning, compensatory award)
- Betterment

It's very difficult for tenancy deposit protection schemes to provide strict guidance on the value of deductions landlords and agents should claim from the deposit. Because there are so many varying factors for each dispute, such as the size of the property, the number of occupants, the quality and lifespan of the property and contents, each case must be considered on its own merits and no two cases are ever the same.

However, adjudicators are likely to consider the following common factors when coming to a particular decision:

- 1 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?
- 2 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.
- 3 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.
- 4 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.

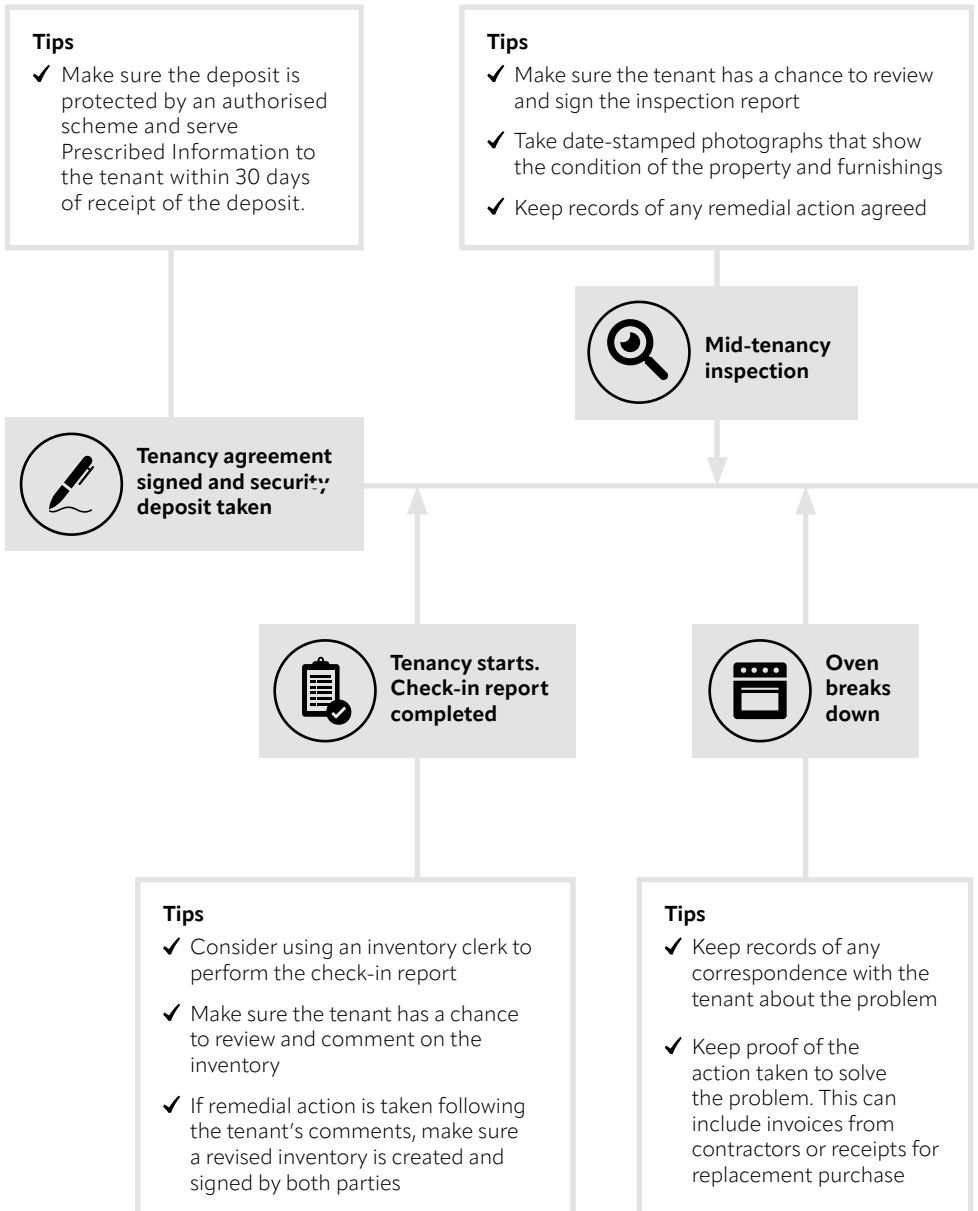
In considering whether cleaning/repair is necessary versus complete replacement at the end of the tenancy, an adjudicator will examine the check-in/out reports, any statements of condition and any photographs or videos in order to compare the condition of the property at the start and end of the tenancy. 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 circumstances where damage to the property is so extensive or severe as to affect the achievable rent level or market quality, 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:

- Cost of similar replacement carpet/item – £500.00
- Actual age of existing carpet/item – 2 years
- Average useful lifespan of that type of carpet/item – 5 years
- Residual lifespan of carpet/item calculated as c) less b) – 3 years
- Depreciation of value rate calculated as a) divided by c) – £100 per year
- Reasonable apportionment cost to tenant calculated as d) times e) – £300.00

However, the adjudicator must make a decision that is reasonable in view of the evidence that is presented to them by the parties in that particular dispute. Therefore, it may not always be appropriate to apply this approach.

## Examples tenancy timeline



**Tips**

- ✓ In the event a tenant moves out, perform a check-out report and update the inventory with the remaining and new tenants' agreement

**Tips**

- ✓ Consider using an inventory clerk to perform the check-out report
- ✓ Hold the check-out as soon as possible after the tenant has left the property
- ✓ Invite the tenant to attend the check-out
- ✓ Discuss any differences between the inventory and check-in and if necessary agree any deposit deductions required
- ✓ Take date-stamped photographs that show the condition of the property and furnishings



**One tenant leaves property and is replaced by another**



**Tenancy ends. Check-out report completed**



**Deposit enters dispute resolution process**

**Landlord and tenant provide evidence**


**Adjudicator reviews evidence and makes decision**

**Landlord and tenant notified and deposit paid as per adjudicators decision**

**Tips**

- ✓ Make sure your claim is reasonable and fair to both parties
- ✓ Make sure you submit your evidence within the adjudicators timescales
- ✓ Don't forget to factor in delivery time if sending by post
- ✓ Be sure to include any evidence relevant to your claim as the adjudicator won't normally allow additional evidence to be submitted after the deadline
- ✓ Remember: the deposit belongs to the tenant and the onus is on the landlord to prove they deserve a share
- ✓ The adjudicators decision is final and binding on both parties
- ✓ Keep talking to your tenant. You can end a dispute at any time if you reach an agreement on how the deposit should be shared



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