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Tenancy deposit protection

Superstrike Ltd vs. Marino Rodrigues

Guidance on the implications of the Court of Appeal judgment

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Tenancy Deposit Scheme (TDS)

Deposit Protection Service (DPS)

Capita

July 2013

Introduction

This guidance has been jointly produced by the authorised tenancy deposit schemes:

- **my|deposits**
- Tenancy Deposit Scheme (TDS)
- Deposit Protection Service (DPS)
- Capita

The Department for Communities and Local Government has met with the tenancy deposit schemes and has received a copy of this guidance note.

We are aware that the industry bodies are publishing additional guidance on the *Superstrike* judgment. These bodies have identified other options for landlords and agents such as returning the deposit or creating new fixed term tenancies.

Our guidance to members is limited to situations where the member wishes to continue to have a deposit and wants to consider the options available post *Superstrike*.

None of the tenancy deposit schemes can offer legal advice to landlords or lettings agents. This guidance is not intended to give legal advice and cannot be relied on as such. If you have concerns you should get your own legal advice based on your own individual circumstances. However we have set out our shared understanding of the position and the options we think are available to landlords and lettings agents in the future.

Summary of the Superstrike vs. Rodrigues case

The recent Court of Appeal case of Superstrike vs. Rodrigues concerns an assured shorthold tenancy which was created in January 2007 prior to the introduction of mandatory tenancy deposit protection on 6 April 2007. The tenancy continued on a statutory periodic basis from January 2008 and the deposit remained unprotected. In 2011 a Section 21 notice was served to end the tenancy.

The Court of Appeal has ruled that when the tenancy continued on a statutory periodic basis in 2008 a new tenancy was made and a new deposit was deemed to have been received, and therefore fell under the requirements of tenancy deposit protection legislation. Having not met those requirements (to protect the deposit and serve Prescribed Information, including serving the scheme leaflet) the landlord was not entitled to serve a s21 notice.

Why this Guidance?

The decision has undoubtedly caused some confusion about the legal position on some aspects of deposit protection. Until there are further cases decided in the higher Courts or a change in the law made then there will continue to be some uncertainty about the legal position.

This document contains guidance from the tenancy deposit schemes on protecting deposits and serving prescribed information in the follow circumstances:

1. Deposits taken on assured shorthold tenancies before 6 April 2007 where these tenancies became statutory periodic tenancies or fixed term tenancies after 6 April 2007
Guidance on page 4
2. Existing statutory periodic tenancies and renewals of fixed term assured shorthold tenancies where the deposit is already protected in an authorised scheme
Guidance on page 5
3. New statutory periodic tenancies or renewals on a new fixed term where the deposit is already protected in an authorised scheme
Guidance on page 7

Deposits taken on assured shorthold tenancies before 6 April 2007 where these tenancies became statutory periodic tenancies or fixed term tenancies after 6 April 2007

The decision in the Court of Appeal has clarified that, in this scenario, the deposit should be protected and the Prescribed Information served at the time the tenancy became periodic or was renewed. This is a **change** to the way in which it was understood the legislation was meant to operate but nonetheless is now the legal position.

Our Position

If you hold a deposit taken on an assured shorthold tenancy before 6 April 2007 and it remains in place and unprotected when a statutory periodic tenancy arises you should:

- protect this deposit with an authorised scheme now;
- issue Prescribed Information now; and
- retain records to demonstrate how and when you did this.

This could help show that you are complying with the legislation as now interpreted by the Court of Appeal.

However, it is the case that you will have protected the deposit late and will also have served the Prescribed Information late. In these circumstances you can only issue a section 21 notice if you return the deposit to the tenant in full, or with agreed deductions.

A Court may also issue you with a penalty in respect of the late protection but your action in protecting the deposit late, and keeping records to demonstrate that you did this because of *Superstrike*, may help to mitigate this.

Where a deposit is already protected and the tenancy has been renewed (either a statutory periodic tenancy or with a new fixed term)

There is significant speculation about the impact of the *Superstrike* decision on:

- deposits relating to statutory periodic tenancies which were created when an assured shorthold tenancy with a protected deposit expired; and
- deposits relating to a renewal of an assured shorthold tenancy with a protected deposit.

The decision in *Superstrike* confirms that a statutory periodic tenancy is a new tenancy.

This begs the question whether the deposit that has already been protected, needs to be re-protected, and PI re-served. It should be stressed that these issues were not directly addressed in *Superstrike* but we would suggest that this could be an argument made for a tenant in any future case.

In these circumstances, if a Court was persuaded by these arguments then a landlord who had either not re-protected the deposit or with a protected deposit who had not served the Prescribed Information on the renewal of the tenancy or the creation of a statutory periodic tenancy, might be unable to serve a section 21 notice. They might also be subject to a financial penalty of between one and three times the deposit (plus the return of the deposit itself).

Our Position

Confirm that the deposit is protected by an authorised scheme

Where a deposit was protected in relation to a tenancy, which has now become a statutory periodic tenancy or been renewed for a further fixed term, you should check that it remains protected by the scheme.

Prescribed Information, including supplying a copy of the scheme leaflet

If you have not served the Prescribed Information at renewal of the tenancy or it becoming a statutory periodic tenancy there is a **risk** that a Court might find that you have not complied with the legislation and not allow you to use the section 21 procedure. In addition you **may** find that you are subject to a financial penalty for not serving the Prescribed Information.

Following *Superstrike* there are now three options available for serving Prescribed Information:

Option 1: Do nothing

Do nothing and if challenged, rely on the fact that the Prescribed Information was served when the deposit was first received and that *Superstrike* did not deal with the issue of Prescribed Information.

However, the risk is that a Court, applying the *Superstrike* reasoning, will find that the Prescribed Information has not been served, refuse a section 21 Notice and issue a financial penalty. You would then need to re-serve the Prescribed Information and serve a new section 21 Notice. This will lead to a delay in obtaining possession.

Remember that in the absence of a s21 hearing tenants could still claim the statutory penalty for non-service of the PI.

Option 2: Issue the Prescribed Information now

You may decide to re-issue the Prescribed Information now to ensure that you can rely on the section 21 Notice. In these circumstances the Court may decide that the Prescribed Information was served late and issue you with a financial penalty for this.

Remember that in the absence of a s21 hearing tenants could still claim the statutory penalty for late service of the PI.

Option 3: Issue the Prescribed Information before you serve a Section 21 notice

You may decide not to issue the Prescribed Information now for all affected tenancies on the grounds that most tenancies end by agreement and without dispute. You may however decide to re-serve the Prescribed Information when you feel that you need to issue a section 21 Notice. If you do so the Court may decide that the Prescribed Information has been served late and issue you with a financial penalty for this.

Remember that in the absence of a s21 hearing tenants could still claim the statutory penalty for non-service of the PI or for late service (where applicable).

Because of the uncertainty on the legal position you should seek your own legal advice before deciding whether any of these options works for you. We will continue to monitor the position and issue updated guidance as further decisions are made by the courts or government.

New statutory periodic tenancies or renewals on a new fixed term where the deposit is currently protected

Our Position

- We recommend that in order to ensure full compliance with the implications of the *Superstrike* decision, you should re-serve the Prescribed Information within 30 days of each renewal or the creation of a statutory periodic tenancy.

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