Superstrike Ltd v Marino Rodrigues[1]
Tenancy Deposit Schemes

Payment of a deposit by an assured shorthold tenant as security for performance of the obligations of the tenancy is the norm. It is now well-known amongst landlords that they are required to deal with those deposits in accordance with the requirements of one of two types of government-approved deposit protection schemes.[2] Those schemes are intended to safeguard those deposits and facilitate the resolution of disputes arising in connection with such deposits.[3] Substantial changes to the operation of the tenancy deposit provisions were introduced by the Localism Act 2011, following a number of substantial criticisms by landlords in respect of the original requirements.[4] Nonetheless, the courts are still grappling with both the old and the new requirements. The recent case of *Superstrike Ltd v Marino Rodrigues* [2013] EWCA Civ 669 represents yet another attempt by the Court of Appeal to determine the effect of the provisions in practice.

The Basic Facts

The facts of Superstrike are straightforward. The defendant took an assured shorthold tenancy of the relevant premises from the claimant dated 8 January 2007 for a fixed term of one year less one day, at a monthly rent of £606.66, and paid a deposit of that amount under the terms of the tenancy agreement at that time. By reason of s.5 of the Housing Act 1988, he became entitled to a statutory periodic tenancy (on the equivalent terms) at the expiry of the fixed term. On the 22 June 2011 the claimant served a notice under s.21 of the 1988 Act requiring possession. The claimant was granted a possession order in the county court under the accelerated procedure, but that was then set aside on the grounds of non-compliance with the provisions relating to tenants' deposits. HHJ Winstanley allowed the claimant's appeal and made the possession order once more. The defendant appealed to the Court of Appeal from that order.

The Submissions of the Parties

The issue on the appeal turned directly on s.215 of the 2004 Act which, as it was originally enacted (the events in the case took place before the amendments made by the Localism Act 2011 came into effect), provided that:

> *"(1) If a tenancy deposit has been paid in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy at any time when –*
>
> *(a) The deposit is not being held in accordance with an authorised scheme, or*
> *(b) The initial requirements of such a scheme (see section 213(4)) have not been complied with in relation to the deposit.*
>
> *(2) if section 213(6) is not complied with in relation to a deposit given in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy until such time as section 213(6)(a) is complied with.*
>
> *(3) If any deposit given in connection with a shorthold tenancy could not be lawfully required as a result of section 213(7), no section 21 notice may be given in relation to the tenancy until such time as the property in question is returned to the person by whom it was given as a deposit.*

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[2] With effect from April 6, 2007.
[3] See s.212 of the Housing Act 2004
[4] Introduced with effect from 6 April 2012.

(4) In subsection (3) "deposit" has the meaning given by section 213(8)

(5) In this section a "section 21 notice" means a notice under section 21(1)(b) or (4)(a) of the Housing Act 1988 (recovery of possession on termination of shorthold tenancy)."

The section is intended to provide a further sanction for non-compliance by a landlord through the fetter on his ability to apply for possession (once the fixed term has expired) by serving a s21 notice on the tenant (the Act does not prevent the landlord from proceeding under s.8).

The claimant sought to argue before the Court of Appeal (Lloyd, Lewison and Gloster LJJ)[5] that as the deposit had been paid and received before the legislation came into force (the initial fixed term tenancy commenced on 8 January 2007) there was nothing in the legislation that indicated that it was to apply to a deposit which had already been paid before the commencement date. The wording of s.213 – "as from the time it is received", "where a landlord receives a tenancy deposit", "beginning with the date on which it is received" etc – referred to a time contemporaneous with the receipt of the money ie. it could not apply retrospectively to deposits already paid and received under tenancies already in existence. Nonetheless, in dismissing that argument and allowing the appeal, Lloyd LJ (with whom the others agreed) stated that:

"It is clear from the 1988 Act that what happens at the end of the fixed period tenancy is the creation of a new and distinct statutory tenancy, rather than, for example, the continuation of the tenant's previous status...That being so, the new tenancy contained an equivalent provision as to a deposit, in replacement for the provision under the express tenancy."[6]

In dealing with the assertion by the claimant that s.213 only applies where the deposit is "physically received" after 6 April 2007, His Lordship went on to find that:

"Once the new statutory periodic tenancy had come into being after the commencement date, a tenant's deposit being already held, it would be necessary to consider whether and if so how the 2004 Act applied. As I have said already, it must have been the landlord's position, by then, that it held the sum of £606.66 as a deposit as security for the performance of the tenant's obligations, or for the discharge of any liability of the tenant, arising under or in connection with the new tenancy. That could only be the correct legal position if that sum of money was to be treated as having been paid pursuant to the tenant's obligation under the periodic tenancy to provide a deposit. That obligation only arose on the expiry of the fixed term tenancy, so the payment at the beginning of that fixed term cannot have given rise to the position which obtained once the fixed term had expired. Something must have happened in January 2008 which led to the result that the deposit was held in relation to the new tenancy. That something could have been either an actual (or, as Mr Bhose put it, physical) payment (but none took place in this instance) or something which amounted to payment. If there was an actual payment or something treated as a payment there must also have been a corresponding receipt."[7]

Accordingly, on Lloyd LJ's analysis, the defendant did pay, and the claimant did receive, the sum of £606.66 by way of a deposit in respect of the new periodic tenancy in January 2008, and so the obligations under s.213 applied to the deposit so received. It was common ground that those obligations had not been performed and therefore the claimant could not validly give notice under s.21 of the 1988 Act.

Discussion

Despite the concern expressed by some landlords in light of the Court of Appeal's decision to, in effect, extend the protection of the tenancy deposit provisions, the practical implications of Superstrike are, for

[5] As Judge Winstanley had decided below.
[6] At [27] – [28]
[7] At [36]

the time being at least, likely to be minimal. Strictly speaking the principles are only likely to apply to those historic ASTs in which the initial fixed term period commenced prior to 6 April 2007, but the statutory periodic tenancy commenced after that date. The number of qualifying ASTs is likely to be small, bearing in mind that it is now a number of years since the provisions came into effect. In any event, the provisions of s.215 merely fetter the landlord's ability to serve a s.21 notice. Whilst s.21 notices serve a useful purpose (where none of the grounds in Schedule 2 of the 1988 Act apply), in my experience s.8 notices remain a popular choice amongst landlords. Such notices are not subject to the provisions of s.215.

The more interesting point perhaps is in respect of the potentially wide-ranging consequences of some of the reasoning employed by the Court of Appeal in Superstrike. Some landlords (including some of the bodies representing landlords' interests) have suggested that Suprestrike could mean that: (a) every deposit taken after 6 April 2007 will need to be re-protected (within the new 30 day period) once the new statutory periodic tenancy commences at the end of the fixed term (and the tenant has not either given up possession or entered into a new express tenancy agreement); and (b) proscribed information will need to be re-provided at the same time (once more within the 30 day period). The following passages from Lloyd LJ's judgment do seem to lend support to those concerns:

> *"[by reference to the defendant's submissions] If the landlord is, therefore, treated as holding the deposit in relation to the new tenancy, it must be treated as having received it for that purpose...if that were so, he argued, the respondent then came under the obligation to comply with section 213(3),(4) and (5) within 14 days therefore, which it undoubtedly had not done..."*
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> *...on my analysis, the tenant did pay, and the landlord did receive, the sum of £606.66 by way of a deposit in respect of the new periodic tenancy in January 2008, and so the obligations under section 213 applied to the deposit so received. As is common ground, they were not performed."*
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> If the Court of Appeal is right and a deposit is "paid" and "received" at the beginning of the new periodic tenancy (even if not physically received) so that the obligations under s.213 apply to the deposit so received, that does not necessarily mean, in my view, that the already protected deposit will need to be "re-protected". On this issue, s.213 demands that: *"where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of 30 days beginning on the date on which it is received."* Accordingly, so long as the initial requirements are neutral in their wording, it may be possible to argue that those requirements were in fact complied with at the beginning of the initial fixed term tenancy, long before the commencement of the new periodic tenancy. That is admittedly an awkward construction of the provisions in question. As such, it may in time be necessary (if Superstrike is relied upon more generally) for Parliament to intervene and clarify the position.

Similarly, the wording of s.213(6) in respect of the provision of relevant information provides that: "The information required by subsection (5) must be given to the tenant and any relevant person...within the period of 30 days beginning with the date on which the deposit is received by the landlord." So long as the courts are willing to accept that, despite the grant of a new periodic tenancy, the deposit remains protected under the same scheme, it may be possible to argue that the information was, once more, provided long before the commencement of that new tenancy.

Unfortunately it is too soon to determine whether the courts will view Superstrike as an authority confined to a diminishing number of historic ASTs, or, one applicable more generally. If the latter proves to be true, then Superstrike could have significant consequences for this area of law. Ultimately it is hoped that the courts are guided by practical considerations as opposed to a literal and technical reading of the tenancy deposit provisions.

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