



Superstrike Ltd vs. Marino Rodrigues

Guidance on the implications of
the Court of Appeal judgment





Introduction

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

- The Deposit Protection Service (The DPS)
- Tenancy Deposit Scheme (TDS)
- MyDeposits
- 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 letting 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 that 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 (PI), including serving the scheme leaflet, or equivalent) 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, 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 following 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
2. Existing statutory periodic tenancies and renewals of fixed-term assured shorthold tenancies, where the deposit is already protected in an authorised scheme
3. New statutory periodic tenancies or renewals on a new fixed term where the deposit is already protected in an authorised scheme.

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

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.



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.

www.thedpsblog.com

www.twitter.com/the_dps

www.depositprotection.com



The home of deposit protection