

The Superstrike judgment and its impact in Northern Ireland

Chris McGrath, Solicitor at Housing Rights Service has provided a comprehensive analysis of the Superstrike judgment and its impact in Northern Ireland.

Protecting tenants' deposits

The UK Court of Appeal recently considered the legislation concerning the protection of private rented tenants' deposits.

In the case of *Superstrike Ltd v Marion Rodrigues* [2013] EWCA Civ 669, Mr Rodrigues was an assured shorthold tenant of Superstrike. Assured shorthold tenancies do not exist in NI.

The 12 month fixed term tenancy commenced in January 2007. Mr Rodrigues paid a tenancy deposit of £606.66. The requirement to protect tenancy deposits was not introduced in England until April 2007 and so the deposit was held by the landlord. Mr Rodrigues remained on in the property after January 2008 and the tenancy became a statutory periodic tenancy. The deposit continued to be held by the landlord with no reference made to it by either the landlord or tenant.

In June 2011, Superstrike served Mr Rodrigues with a notice to quit under Section 21 of the Housing Act 1988. Superstrike applied to the county court for possession. In May 2012, the possession claim was dismissed, for reasons not at issue in the current appeal. However, on appeal the possession order was granted. His Honour Judge Winstanley granted a possession order on the basis that the deposit had been taken before April 2007.

Mr Rodrigues further appealed the granting of the possession order on the grounds that a new tenancy arose out of the statutory tenancy and the landlord's failure to comply with deposit protection legislation in January 2008 rendered the Section 21 notice invalid.

Legal background

- In respect of assured shorthold tenancies in England and Wales, a landlord has the right to apply for possession, once the fixed term has expired, subject only to the requirement to give not less than two months' notice under section 21 of Housing Act 1988. *Importantly, as long as the landlord has provided adequate notice and the fixed term has come to an end, there is no discretion in the court to refuse to make a possession order.* This contrasts with section 8 of 1988 Act, which the landlord can also use to give notice for possession, under which the court must be satisfied that it is reasonable to make an order for possession. As such, a landlord shall generally prefer to rely on section 21 of 1988 Act.
- The Housing Act 2004 put in place the necessity of a tenancy deposit scheme and section 213 of 2004 Act set out the requirements relating to the tenancy deposits. Importantly section 215 sets out the 'sanctions for non-compliance' with s.213 requirements, which states, 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 if the deposit is not being held in accordance with an authorised scheme.
- The provisions dealing with tenancy deposit schemes came into force in April 2007.

Ground for appeal

Mr Rodrigues appealed the granting of the possession order on the basis that when the statutory periodic tenancy arose in January 2008, this meant that a deposit was received in respect of the new tenancy, falling under the requirements of s.213 of 2004 Act. He argued that the landlord's failure to protect the tenancy meant that s.215 applied and that the s.21 Notice was invalid.

This appeal required the court to consider two issues:

1. Was a new tenancy created by the statutory periodic tenancy that commenced in January 2008?

2. Had the deposit been 'received' by the landlord in respect of that tenancy as per section 213?

Court of Appeal Decision

Firstly, Lord Justice Lloyd unequivocally affirmed that a new tenancy was created in January 2008. He stated, "*... 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. I do not see there can be any doubt as to that.*"

Therefore the second issue, as to whether the deposit had been 'received', was the key point of contest in the appeal.

As a new tenancy was created in January 2008, the court noted that, "*in theory the landlord could have exercised its right to use the original deposit to obtain compensation for any breach of the tenancy agreement as regards the condition of the property during the period of the fixed term tenancy, and could have required the deposit to be topped up if necessary.*"

On this basis Mr Rodrigues argued that;

"... even though no money changed hands and no book entries were made at that stage, nevertheless the landlord had to be treated as having received the amount of the deposit, referable to the new tenancy, on 8 January 2008. Otherwise the deposit would only have been held as security for obligations and liabilities under the original fixed period tenancy, which would make no sense, at least for the landlord. 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. The receipt must have occurred on or about 8 January 2008."

In response Superstrike argued:

"that section 213 only applies when the deposit is "physically received" after 6 April 2007. By physical receipt he meant cash, cheque, bank transfer or in some comparable way, such as occurred in the present case in January 2007. He supported this argument by a submission that, if the appellant's contention were correct, many private landlords would have been caught, and caught unawares, by the need to comply with section 213 on the expiry, after the commencement date, of a fixed term assured shorthold tenancy created before that date, if the

tenant remains in possession, no new tenancy agreement being entered into, and the deposit, which had previously been paid and was still held, simply staying where it was with nothing said about it. He pointed to the absence of any transitional provision in the Act or in the commencement order. If so he argued, the landlord would have to go to the otherwise unnecessary and pointless trouble and expense of arranging for the deposit to be held in accordance with an authorised scheme, simply in order to be able to recover possession of the premises by serving a section 21 notice.”

The Court was not persuaded by Superstrike’s argument and found in favour of Rodrigues:

“The tenant should be treated as having paid the amount of the deposit to the landlord in respect of the new tenancy, by way of set-off against the landlord’s obligation to account to the tenant for the deposit in respect of the previous tenancy, given that the landlord did not seek payment out of the prior deposit for the consequences of any prior breach of the tenancy agreement.

It follows that, on my analysis, the tenant did pay, and the landlord did receive, the sum of £606.66 by way of 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. Section 215 (1) therefore applied so that the landlord could not validly give notice under section 21 of the 1988 Act. The notice purportedly given on 22 June 2011 was thus ineffective and the grounds for possession were not made out.”

Implications of decision in England and Northern Ireland

Firstly, and importantly, the case has provided confirmation by the Court of Appeal that a statutory periodic tenancy is a new tenancy.

Furthermore, the ruling has clarified that when a new statutory periodic tenancy commences the tenancy deposit protection legislation must be applied. If the Prescribed Information required is not served by the landlord within 30 days of the commencement of statutory periodic tenancy then:

- Section 21 notices for possession shall not be valid.
- Penalties may be awarded to the tenant.

The consequence in finding a s.21 notice invalid makes the possession process more difficult for landlords.

Although it has been stated that this is a change in the way the deposit protection legislation was originally understood, Lord Justice Lloyd states: *"The imposition of this requirement in these circumstances does not seem to me in any way anomalous, futile or pointless. To the contrary, it is entirely consistent with the policy and aim of the relevant provisions."*

This decision by the English Court of Appeal shall be followed by the lower courts in N.I and although the Court of Appeal in N.I is not strictly bound by decisions of the English Court of Appeal, it shall be followed unless there are very strong reasons in not doing so.

The consequence of this decision initially seems to have much wider implications in England and Wales than in Northern Ireland due to the fact that Northern Ireland does not have comparable legislation in respect of section 21 notices and statutory periodic tenancies.

The impact in N.I will likely be dependent on whether the court interprets that the commencement of a periodic tenancy, as opposed to a statutory periodic tenancy, is also to be viewed as a new tenancy. If the rationale of Lord Justice Lloyd is adopted it does not seem an infeasible step to take.

Northern Ireland's own tenancy deposit legislation came into force in April 2013.

Under the NI tenancy deposit scheme, a landlord must secure a deposit in an approved scheme within 14 days and a tenant must be served with Prescribed Information, including specifics of the scheme with which their deposit has been secured, within 28 days.

It seems accurate to state that it would not originally have been perceived that landlords would be required to protect old deposits when a tenancy became periodic post April 2013. However, following the judgement in Superstrike this may indeed be the case.

The consequence of this would mean that once a fixed term tenancy is renewed or becomes periodic the landlord would be required to protect the deposit within 14 days and serve Prescribed Information within 28 days. Otherwise the landlord may be found guilty of an offence. A landlord could face a fixed penalty fine equal to three times the value of the deposit or be prosecuted in court, where they could be fined up to £20,000.00.

It could be argued that requiring landlords to act in this way will ensure that tenants whose tenancies began before April 13 are ultimately afforded the same protection as those whose tenancies began after 1 April 2013. This application would be consistent with the stated purpose of the legislation; encouraging a more professional approach to tenancy deposit practice.