

A lightning bolt out of the blue for landlords

AST tenancy deposit protection in the light of *Superstrike v Rodrigues*

*In February 2013, we posted a [summary of the law](#) relating to tenancy deposit protection. The recent Court of Appeal decision in *Superstrike v Rodrigues* has caused quite a stir. Ed Cracknell and Stephen Small summarise the consequences for landlords in light of both the case and subsequent guidance that has been jointly published by the deposit scheme providers.*

The important date

All deposits received in relation to an Assured Shorthold Tenancy (AST) after **6 April 2007** must be protected in a tenancy deposit scheme.

Statutory periodic tenancies

In order to understand *Superstrike*, one needs to know that when the fixed term of an AST comes to an end, if the tenant continues to live in the property, a new tenancy (called a Statutory Periodic Tenancy or SPT) will automatically come into existence on the same terms as the fixed term AST. The SPT is a new tenancy, just as if a renewal has been entered into. The SPT is not for a fixed term, but continues on a rolling basis from month to month or week to week as the case may be.

The Superstrike decision

The landlord in the *Superstrike* took an AST deposit before 6 April 2007, and an SPT arose after 6 April 2007. The court decided that the landlord should have protected the deposit and served the prescribed information on the tenant within the relevant period (then 14 days, now 30 days) after the SPT started.

The reasoning was that the deposit should be treated as having notionally been returned to the tenant and then taken back by the landlord on the commencement of the SPT. That notional taking of the deposit after 6 April 2007 triggered the obligation to protect the deposit.

Should landlords be concerned?

Whilst there will be limited cases with the same facts as *Superstrike*, there has been inevitable speculation about whether the decision can be applied to other situations. The deposit schemes have jointly issued a guidance note which can be found on any of the deposit scheme websites. The National Landlords Association has also issued a note which can be read on their website.

What if the deposit was protected when the tenant first moved in, and the tenancy has since become an SPT or has since been renewed with a new fixed term tenancy?

Superstrike did not deal with this situation but, by extension, it is possible that courts in the future will decide that some additional steps need to be taken upon the commencement of the SPT or new fixed term.

Our view is as follows.

Landlords should contact their chosen deposit protection scheme to ensure the deposit remains protected, and take any administrative steps that the scheme requires. This might, for example, involve paying another fee.

Landlords should also send the prescribed information to the tenant again, including any scheme information leaflet, keeping evidence that this was done.

All of this should take place within 30 days of the SPT or new fixed term tenancy commencing.

If that 30-day period has already expired, the safest course of action is to return the deposit to the tenant in full, or get the tenant's written agreement to any proposed deductions. That might not be an attractive option for many landlords, especially if the landlord is content to allow the current tenant to remain in the property and has not pressing need to recover possession. An alternative would be to seek formally to renew the tenancy and to ensure the deposit is protected and prescribed information given within 30 days of that renewal having commenced. Neither option would necessarily prevent the tenant bringing a claim for failure to protect within 30 days of their previous SPT or renewal tenancy commencing, but at least the landlord will have the reassurance that the requirements relating to the current tenancy have been complied with and this may also mitigate any penalty awarded by a court (which can be the payment by the landlord to the tenant of a sum up to three times the amount of the deposit).

If the court extends the *Superstrike* principle to this situation, taking these steps (returning the deposit or entering into a new agreement and then complying with the protection requirements within 30 days) will allow landlords to serve a section 21 notice seeking possession.

Concluding thoughts

When the deposit protection rules came into effect in 2007, the draftsmen of the Act probably did not anticipate the uncertainty and confusion it would cause. Various reported cases caused the legislature to make one set of amendments to the law and there may now need to be more in the light of *Superstrike*. In the absence of changes to the law, there will undoubtedly be more unnecessary litigation.

Tenancy deposit protection is an important safeguard for tenants, but its implementation has become unduly complicated for landlords. Since the law is constantly developing, the best advice we can give to landlords is to stay in touch with your deposit scheme, and ensure that you are compliant. Check now that you have done everything you ought to have done, and check regularly for changes to the law and the scheme rules.

For more information please contact:

Ed Cracknell

Solicitor

+44 (0)20 7440 4818

Ed.Cracknell@russell-cooke.co.uk

Stephen Small

Solicitor

+44 (0)20 7440 4845

Stephen.Small@russell-cooke.co.uk

This material does not give a full statement of the law. It is intended for guidance only and is not a substitute for professional advice.
No responsibility for loss occasioned as a result of any person acting or refraining from acting can be accepted by Russell-Cooke LLP.
© Russell-Cooke LLP August 2013

www.russell-cooke.co.uk