**Residential Landlord & Tenant: Tenancy Deposits Received Before 6 April 2007**

The Case of *Superstrike Ltd –v- Marino Rodrigues* [2013] EWCA Civ 669

The Facts

On 8 January 2007, Superstrike Ltd ('the Landlord') granted an assured shorthold tenancy to Mr Rodrigues ('the Tenant') for a fixed term expiring on 7 January 2008. The Tenant paid a tenancy deposit which was held by the Landlord because, at that time, it was entitled to do so.

However, on 6 April 2007, the Housing Act 2004 came into force.

Section 213 of the Housing Act 2004 (Requirements relating to tenancy deposits) introduced a requirement for a landlord who received a deposit in respect of a shorthold tenancy to:

1. Comply the requirements of an authorised deposit protection scheme; and

2. Give the tenant (and any person who paid the deposit on behalf of the tenant) prescribed information relating to the authorised scheme and the landlord's compliance with its requirements.

The landlord had to comply with these obligations within 14 days beginning with the date on which the deposit was received. (The time limit was extended to 30 days on 6 April 2012 by virtue of an amendment made by the Localism Act 2011).

Section 214 (Proceedings relating to tenancy deposits) introduced a right for a tenant to apply to the County Court if his / her landlord failed to satisfy the obligations referred to in paragraphs (1) and (2) above and, if the tenant was successful, section 214 stated the Court must order the landlord to either repay the deposit to the tenant or to pay it into an authorised scheme. Furthermore, section 214 also stated that the Court must order the landlord to pay a sum of money to the tenant *equal to* three times the amount of the deposit. (On 6 April 2012, the sum of money to be paid by the landlord was changed to *up to* three times the amount of the deposit by virtue of an amendment made by the Localism Act 2011).

Section 215 (Sanctions for non-compliance) stated that a landlord could not give a tenant notice requiring possession of the property pursuant to section 21 of the Housing Act 1988 at any time the landlord was not complying with the obligation referred to in paragraph (1) above and until such time as the landlord complies with the obligation referred to in paragraph (2) above.

On 7 January 2008, the fixed term of the tenancy expired and it automatically converted into a statutory periodic tenancy having the same terms as the fixed term tenancy.

On 22 June 2011, the Landlord served a notice on the Tenant requiring possession of the property pursuant to section 21 of the Housing Act 1988.

The Landlord commenced accelerated possession proceedings and, on 17 September 2012, His Honour Judge Winstanley granted an order for possession. However, the Tenant appealed against HHJ Winstanley's order on the ground that the Landlord had not complied with the legislation relating to tenancy deposits.

The Court of Appeal's Decision

Lord Justice Lloyd gave the Court of Appeal's decision on 14 June 2013 to which Lord Justices Lewison and Gloster agreed.

The Landlord had argued that the Tenant's deposit was paid before the legislation came into force and there was nothing in the legislation which indicated that it was to apply to a deposit which had been paid before the legislation came into force on 6 April 2007.

However, the Court held that, when the fixed term tenancy expired on 7 January 2008, the automatic periodic tenancy that immediately followed was a new and distinct statutory tenancy that contained a duplicate provision regarding the deposit that replaced the express provision contained in the fixed term tenancy.

Despite the Court expressed the view that the Landlord could have used the deposit on 7 January 2008 as compensation for any breach of the tenancy that had occurred during its fixed term, the Court went on to state that, as at the beginning of the statutory periodic tenancy on 8 January 2008, the Landlord held the deposit in respect of the new and distinct statutory periodic tenancy.

The Court sought to justify this by stating that, unless the Landlord used the deposit on 7 January 2008 as compensation for any breach of the tenancy that had occurred during its fixed term, then it should have been returned to the Tenant and the Tenant should have paid a fresh deposit in respect the statutory periodic tenancy.

Even though absolutely no money changed hands between the Landlord and Tenant, the Court believed that the Landlord should be treated as having returned one deposit to the Tenant on 7 January 2008 and that the Tenant should be treated as having *paid* a second deposit to the Landlord on 8 January 2008.

The Court of Appeal relied on the following cases to create the fiction that the Tenant *paid* a second deposit to the Landlord:

1. *White v Elmdene Estates Ltd* [1960] 1 QB 1 (a fine of £500 was '*paid*' when monies were actually received less a deduction of £500); and

2. *Hanoman v Southwark London Borough Council (No.2)* [2009] UKHL 29 (rent was '*paid*' by a tenant when the local authority actually paid housing benefit direct to the tenant's landlord).

Taking into consideration the Housing Act 2004 was in force on 8 January 2008 when the Tenant was treated as having *paid* a second deposit to the Landlord, the Court held that the Landlord should have protected the deposit in an authorised scheme, and given the Tenant the prescribed tenancy deposit information, by 22 January 2008.

As the Landlord had not carried out these tasks by 22 January 2008 or at all, section 215 of the Housing Act 2004 prohibited the Landlord from giving the tenant a section 21 notice and so the Landlord's attempt to do so on 22 June 2011 was ineffective. The Court of Appeal allowed the Tenant's appeal and set aside HHJ Winstanley's order for possession.

Finally, the Court expressed an opinion that, whilst a landlord could give his / her tenant the prescribed tenancy deposit information out-of-time and then serve a section 21 notice, the landlord could not protect the tenancy deposit in an authorised scheme out-of-time and then serve a section 21 notice. The Court believed the only option for the landlord would be to return the deposit to his / her tenant and then serve a section 21 notice.

<u>The Message</u>

It is the writer's opinion that this is a poor decision of the Court of Appeal.

The Court sought to identify the will and intention of Parliament when it enacted the Housing Act 2004 and the Landlord was certainly correct to assert that there was nothing in that legislation which indicated it was to apply to a deposit paid before the Act came into force on 6 April 2007. Parliament had a second chance to confirm its will and intention when it enacted the Localism Act 2011. Likewise, there was nothing in that legislation which indicated the Housing Act 2004 was to apply to a deposit paid before it came into force on 6 April 2007.

The decision is based entirely on a legal fiction that the Tenant *paid* a second deposit to the Landlord on 8 January 2008. Whilst legal fictions are not novel (most notably there is the legal fiction of the '*lost modern grant*' used to establish an easement by prescription / a proprietary right by long-user), the legal fiction in this case:

1. Is based on two cases which are distinguishable because they both involved an actual / physical payment being received whereas no actual / physical payment was received by the Landlord in this case; and

2. Stretches the imagination beyond the range of reasonableness.

It is also notable that of the 46-paragraph Judgment, only three paragraphs address the Landlord's argument (paragraphs 25, 35 and 36 (and part of paragraph 36 is far from clear)). This results in an unbalanced Judgment that does not appear to give proper consideration to the Landlord's arguments which were presented by both Queen's Counsel and junior Counsel.

The decision, overall, lacks commercial merit and common-sense. Many private landlords must now go to the trouble and expense of arranging for deposits to be protected in an authorised scheme simply to recover possession of the property by serving a section 21 notice.

Following the Court of Appeal's decision in this case, we understand that numerous bodies including the Royal Institution of Chartered Surveyors and the Residential Landlords' Association have invited the Government to clarify the position. However, as matters currently stand, the decision was reached by a unanimous Court of Appeal and we have not found any evidence to suggest that it is being appealed to the Supreme Court and, therefore, it should be treated as good law.

In the circumstances, the message for residential landlords is as simple as it is regretful – if (a) you were paid a tenancy deposit prior to 6 April 2007 in respect of an assured shorthold tenancy (b) the fixed term of the tenancy expired after 6 April 2007 and (c) you still hold that deposit because the tenant continues to remain in possession of your property under a statutory periodic tenancy, you should place the deposit in an authorised scheme, and give the tenant (and any person who paid the deposit on behalf of the tenant) prescribed tenancy deposit information, to cover the possibility that you may need to take steps in the future to evict the tenant by serving a section 21 notice.

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