[TENANCY DEPOSITS] - FAILURE TO GIVE PRESCRIBED INFORMATION COULD SEE CLAIMS OF UP TO 3X / 6X / 9X / 12X VALUE OF DEPOSIT

Most landlords, letting agents and property solicitors alike are nowadays well aware of the need to protect deposits within 30 days of their receipt; such a requirement being imposed by S.213(3) of the Housing Act 2004. It is also widely known that a failure to do so gives rise to claims being brought by tenants for i) the return of the deposit (S.214(3)), and ii) a penalty award of up to 3x the value of the deposit (S.214(4)).

As most will also know, not only does the deposit need to be protected within 30 days but prescribed information must also be given to the tenant(s) within the same 30-day period. Failure to do the latter also engages S.214(4) and thereby entitles tenants to make a likewise claim for a penalty award of up to 3x the value of the deposit.

Bizarrely, whilst such mandatory requirements in relation to the provision of prescribed information have been in place for over 10 years, in my experience landlords and property professionals alike seem to regard its importance as somewhat less significant than the protection of the deposit into a recognised scheme.

Subsequent failures

The case of *Superstrike Ltd v Rodrigues* in 2013[1], found that any statutory periodic tenancy automatically arising upon the expiry of any fixed-term AST (by virtue of S.5 of the 1988 Act), is in effect a new tenancy, and thus any deposit having been given for its predecessor is found to have been also given in respect of the new periodic tenancy. Accordingly, any non-protection of the deposit after the first 30 days of either the fixed-term tenancy or the new statutory periodic tenancy will entitle the tenant to make a double claim for a penalty award (i.e. in respect of each failure).

[1] *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669

This therefore allows tenants to be able to make multiple claims for penalty awards under S.214 corresponding with each subsequent failure of the landlord to protect the deposit. This, as you might rightly understand, has the potential to be astronomical!

To put this into context, it is very possible for an original 6 month fixed-term tenancy (Tenancy 1) to be followed by a statutory periodic tenancy (Tenancy 2), and thereafter for a subsequent fixed-term tenancy (Tenancy 3) to be duly entered into by the parties, which itself is thereafter replaced by a statutory periodic tenancy (Tenancy 4) upon its expiry. If a deposit was given for Tenancy 1 and was never protected, this then gives rise (following *Superstrike*) to 4 separate breaches of S.213, which would entitle the tenant under S.214 to make a claim for a penalty award of up to 12x the value of the deposit (i.e. 4 claims of up to 3x the deposit). If the original deposit was say £2000, the claim could be worth up to £24,000.00. To top it off, the tenant could also legitimately claim for the return of the deposit, which would increase such a claim to £26,000.00.

It goes without saying that claims could easily be north of 4x depending on how many subsequent tenancies had been entered into since the original failure to protect the deposit.

It is hard to see what defences would be available to landlords in such a situation. I would have thought that the most one can do is argue that each claim should be around 1-2x the value of the deposit, in an attempt to reduce the overall size of the eventual award to the tenant. The Courts have tended to only award the maximum (3x) when it is somewhat of a serious breach. This, of course, is somewhat subjective depending on both the Judge presiding over the matter and the merits of each individual case.

However, the question is whether or not the decision in *Superstrike,* and the way in which its decision has been applied to S.214 claims, can be extended to cover for a failure to provide prescribed information.

It must be stated, by way of caveat, that since S.32 of the Deregulation Act 2015 came into force, the scope of *Superstrike* has been limited to the extent that if a deposit has been protected in respect of an original fixed-term tenancy, but was not so re-registered with an authorised scheme in respect of any subsequent tenancies, then so long as the deposit remains protected the landlord is deemed to have complied with the requirements under S.213 of the Housing Act 2004 in respect of all subsequent tenancies. So too does this limit a tenant's claim to only those periods of non-compliance - [for example, using the Tenancy 1,2,3,4 scenario above, if the landlord failed to protect the deposit in relation to Tenancies 1 and 2 but protected the deposit within 30 days of Tenancy 3 coming into existence, then a tenant would only be able to claim in respect of 2 failures to protect the deposit in respect of Tenancy 1 and Tenancy 2.]

This, however, does not prevent a tenant from making a claim for multiple failures (i.e. claims for up to 3x value of deposit in respect of each subsequent tenancy) when a landlord has completely failed throughout the tenant's entire occupation to protect the deposit.

Prescribed Information

As mentioned above, a failure to provide prescribed information equally entitles a tenant to make a claim of up to 3x the value of the deposit. However, did the Court of Appeal upon passing Judgment in *Superstrike* intend for a failure to provide prescribed information to have as wide reaching sanctions as that of a failure to protect the deposit?

The case of *Suupere v Nice*[2] in 2011, found that the failure to provide prescribed information is of equal importance to the duty to safeguard a tenant's deposit. Whilst it is to be acknowledged that *Suupere* was ultimately decided in the High Court, unlike *Superstrike* which reached the Court of Appeal, the decision in *Suupere* has not as yet been overturned, and so would currently be regarded as good law.

I therefore cannot see a court disputing the legitimacy of a tenant's claim for a penalty award, which itself has been multiplied by the number of subsequent tenancies that saw the continual failure of the landlord to provide such information. It may seem harsh in the extreme to hold a landlord liable to numerous multiplied claims for merely a failure to provide the tenant with information, when in fact the deposit was indeed protected, however S.214 (4) is mandatory and therefore the court's hands are tied. The court does however have a discretion to decide the size of a tenant's claim, which undoubtedly (as mentioned above) would be influenced by the severity such transgressions, which of course depends on the merits of any given case.

I suspect that courts will not find that a landlord's failure to provide prescribed information is quite as serious as a failure to protect the deposit itself. This, therefore, may afford the landlord with more scope to argue that the court should only award the tenant, in respect of each transgression, with a sum no more than 1x the value of the deposit, as opposed to either 2x or 3x as the case may be.

As yet, these arguments do not seem to have been decided by the higher courts, and so time will tell whether the decision in *Superstrike* has the capability of much wider application.

[2] *Suupere v Nice* [2011] EWHC 2003

Michael has assisted hundreds of solicitors, landlords, letting agents, and property managers over the years, and is able to provide advice, drafting and/or representation in court as and when required.

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