Defending Section 21 Housing Act 1988

Introduction

Section 21 is a supplemental route to possession for Assured Shorthold Tenancies. It exists to undermine the effects of s5 in relation to ASTs and allow landlords to have their properties back at the end of a fixed term tenancy or at any stage during a periodic tenancy.

No fault eviction

Section 21 does not require a landlord to give any specific reason for recovery of the property. It can be used as an alternative to service of a section 8 notice in any AST which is no longer in a fixed term so it removes the discretion of the Court in relation to parts of the section 7 eviction process.

This was accepted by the government at the time it was introduced and the debates from that period show that the government considered it acceptable that a tenant would be aware that once a s21 notice had been served they were living at hazard. Of course, they had not considered the landlord's market in many parts of the country and the drive toward relatively short tenancies that has ultimately occurred. This has led to new restrictions being imposed in the Deregulation Act 2015.

Separation from the Notice to Quit

A section 21 notice is categorically not a notice to quit. See *McDonald v Fernandez* [2003] EWCA Civ 1219. In fact, under s5(1) of the 1988 Act a notice to quit is described as "of no effect in relation to a periodic assured tenancy". This has some key effects. First the section 21 notice does not, in itself, end the tenancy as a notice to quit does. In fact, a 1988 Act tenancy can only be brought to an end by the giving up of possession by the tenant or the execution of a possession order (see s5(1) and 5(1A)). The s21 notice simply gives the tenant notice that the landlord intends to seek possession of the property through the Courts. Second, because the tenancy has not ended, a landlord can continue to demand rent and behave in every manner as though the tenancy continues (because it does) without in any way invalidating the notice. Third, and consequent on the second point, it is perfectly possible to serve multiple section 21 notices and rely on any one of them irrespective of the later

service of other ones.

Deregulation Act 2015 and section 21: England

Prescribed form

There is a standard form of section 21 notice. This must be used for all ASTs that started on or after 1st October 2015 and can be used for older tenancies. The previous need for two types of notice has gone. This sets out the tenant's rights, the time limits, and their ability to complain about the condition. See the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) (Amendment) Regulations 2015 SI 2015 number 1725 .

Section 21 Timing

There is a restriction on serving section 21 notices early. This applies no matter when the tenancy started. It is not now be permissible to serve a s21 notice in the first four months of an initial tenancy. This creates an odd situation for a 6 month tenancy. The notice cannot be served in the first 4 months and is must give at least two months' notice. Time must also be allowed for service of the notice. In practice that means that many 6 month tenancies will now become tenancies for 6 months and a few days.

In addition to the restriction on early service there is a further "use it or lose it" aspect to s21 notices in that they cannot be used at all more than 6 months after the date they were first given to the tenant. Once again this applies to all English tenancies, whenever they started. If they are two month notices, this means that the notice must be made use of within four months after it has required the tenant to leave. Where the periods of the tenancy are longer than 2 months, such that the notice has to be for a longer period then it can be used within 4 months of the date the tenant was being asked to leave.

The Deregulation Act 2015 has altered s21(4)(a) (contractual periodic tenancies) to exclude the need for a s21(4)(a) notice to expire on the last day of a period of the

tenancy. There is an apportionment provision at new section 21C to allow a judge to order repayment of rent from the date the tenant moves out.

The restriction in s21(4)(a) that the notice for a contractual periodic tenancy must be at least one period of a tenancy remains. So, if the rent under a contractual periodic tenancy is taken for six months in advance, then the landlord will be trapped into having to give a very long notice period. However, it should be noted that this cuts both ways and the tenant is required to give the same extended notice. Some landlords engineer round this change, by simply granting a fixed term tenancy for six months plus one week, six months payable in advance then the last week payable separately. Then the period will be those for which rent was last paid, which will be one week.

There is no reason why a landlord cannot use the new prescribed form for a periodic tenancy that began before 1st October 2015 and most of them are doing so.

Other Required Information and Limitations

There are other limitations for post October 2015 tenancies:

A landlord is required to give a tenant information about their rights in the form of a government publication entitled "how to rent- the checklist for renting in England". There is no time limit for the giving of the information in the Act but no s21 notice will be permitted to be served until it has been given. Confusingly a new booklet has to be given each time the tenancy is replaced or renewed but only if there has been a revision of the publication since the tenancy was last renewed. A new version of the leaflet was released on 6 July 2018.

Gas and Energy Performance certificates

See:

The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015
Compliance with prescribed legal requirements

2.—(1) Subject to paragraph (2), the requirements prescribed for the purposes of section 21A of the Act are the requirements contained in—

(a) regulation 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 (requirement to provide an energy performance certificate to a tenant or buyer free of charge); and

(b) paragraph (6) or (as the case may be) paragraph (7) of regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 (requirement to provide tenant with a gas safety certificate).

(2) For the purposes of section 21A of the Act, the requirement prescribed by paragraph (1)(b) is limited to the requirement on a landlord to give a copy of the relevant record to the tenant and the 28 day period for compliance with that requirement does not apply.

So, a landlord cannot serve a section 21 notice unless he has complied with paragraph (6) or (as the case may be) paragraph (7) of regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 (requirement to provide tenant with a gas safety certificate):

> "(5) The record referred to in paragraph (3)(c) above, or a copy thereof, shall be made available upon request and upon reasonable notice for the inspection of any person in lawful occupation of relevant premises who may be affected by the use or operation of any appliance to which the record relates.
>
> (6) Notwithstanding paragraph (5) above, every landlord shall ensure that—
>
> (a) a copy of the record made pursuant to the requirements of paragraph (3)(c) above is given to each existing tenant of premises to which the record relates within 28 days of the date of the check; and
> (b) a copy of the last record made in respect of each appliance or flue is given to any new tenant of premises to which the record relates before that tenant occupies those premises save that, in respect of a tenant whose right to occupy those premises is for a period not exceeding 28 days, a copy of the record may instead be prominently displayed within those premises.
>
> (7) Where there is no relevant gas appliance in any room occupied or to be occupied by the tenant in relevant premises, the landlord may, instead of ensuring that a copy of the record referred to in paragraph (6) above is given to the tenant, ensure that there is displayed in a prominent position in the premises (from such time as a copy would have been required to have been given to the tenant under that paragraph), a copy of the record with a statement endorsed on it that the tenant is entitled to have his own copy of the record on request to the landlord at an address specified in the statement; and on any such request being made, the landlord shall give to the tenant a copy of the record as soon as is practicable."

The county court case of *Caridon v Shooltz* reported in Nearly Legal on 11.2.18 held that relaxation of the 28 day period set out in paragraph 2(2) of the AST regulations 2015 (see page 3 above) only applied to existing tenants. If a *new* tenant is not given a certificate *before* taking up occupation, no valid section 21 certificate can ever be served. Effectively the letting becomes an Assured tenancy.

The second requirement is to prohibit the service of an s21 notice unless an energy performance certificate has been given to the tenant. As with gas certificates, there have been arguments as to whether this breach can be remedied. However, a careful reading of the relevant regulations suggests that as long as the certificate is provided before service of the section 21 notice, that notice will be valid

> **The Energy Performance of Buildings (England and Wales) Regulations 2012**
>
> 6.—(5) The relevant person must ensure that a valid energy performance certificate has been given free of charge to the person who ultimately becomes the buyer or tenant.

It is not clear whether the EPC regulations apply to a room in a House in Multiple Occupation, this is an area that awaits clarification from the courts.

Houses in Multiple Occupation

On 1st October 2018 the definition of a mandatory licensable HMO widened to include any rented property with five or more occupants living in two or more households. It has also brought in minimum bedroom sizes for HMOs.

Where a property is an HMO subject to licensing under s55 Housing Act 2004 then a s21 notice cannot be given in relation to part of the HMO while it remains unlicensed (s75, Housing Act 2004).

Note that the provision only affects giving or service of the notice and not its intrinsic validity. Therefore, if a notice has been served before the property became an HMO, that notice will be valid. Equally, a notice that was served when the property was unlicensed will have been improperly served and a retrospective licensing application will not fix that issue. There is a loophole in that the definition of an unlicensed HMO (in s73) specifically excludes any situation where an HMO application has been made and is being dealt with by the local authority. This means that an application could be made, s21 notice served, and then the application disallowed or even withdrawn without affecting the validity of the notice.

Deregulation Act and Retaliatory Eviction

These provisions are set out in sections 33 and 34 of the Deregulation Act 2015. They apply to all English tenancies, even if granted before 1st October 2015.

Landlords faced with complaints about property condition from their tenants cannot now simply remove the tenant using s21 and substituting a more submissive person. To prevent this, s21 notices will not be validly served if:

- the tenant has made a written complaint to the landlord about the condition of the property prior to its being served; and
- the landlord has not provided an adequate written response within 14 days; and
- The tenant has then complained to the relevant local authority who have decided to serve an Improvement Notice in respect of the property or have carried out emergency remedial action themselves using their powers under the Housing Health and Safety Rating System in the Housing Act 2004.

An adequate response is defined as a response which defines the actions the landlord is proposing to take to deal with the complaint and sets out a reasonable timescale for doing so.

In addition, where an Improvement Notice has been served or emergency remedial action has been carried out at any time the landlord is precluded from serving a notice under s21 for a period of 6 months from the date of that notice being served. Where the landlord asserts that the tenant's actions are what has caused the conditions to arise, then these restrictions will not apply. There is also an exemption which allows for the section 21 notice to be valid if the property is genuinely on the market for sale but this must be the open market and with no intention to sell it to some connected party.

Consequences

Landlords need to and act promptly to deal with tenant complaints. They need to think more carefully about the condition of their properties, as opposed to its state of repair. The Renting Homes (Fitness for Human Habitation) Act 2018 requires this anyway.

It will also put great pressure on local authorities to carry out HHSRS Improvement Notice inspections promptly. The government asserted when the provisions were introduced in the Lords that they would effectively have four months to do this, being the two months of the notice and the further two months or so it will take for the matter to come before a Court. Even if this timing is correct, there is a real risk of some authorities being totally overwhelmed. This may also lead to applications for adjournment on behalf of tenants. Technically there is no power to grant this but it is likely that District Judges may use general case management powers to do so.

The accelerated possession proceedings process may effectively collapse in a great many cases as many more such actions will lead to hearings where the tenant asserts that section 21 is not available to the landlord. This will also likely cause a slowdown in other county court cases, particularly possession matters, due to the increase in hearings of AST cases.

It is also worth noting that these changes may lead to renewed interest in some of the other grounds for possession provided by Schedule II, Housing Act 1988 which are used with a section 8 notice. If a landlord has resided in the property before for example they may wish to consider use of Ground 1 as an alternative to section 21.

Commencement of Deregulation Act changes

The limit on serving section 21 notices in the first four months, the expiry after six months and the retaliatory eviction provisions came into force on 1 October 2015 and from 1 October 2018 have been applicable to all English ASTs, even ones that started before 2015. Restrictions upon serving a section 21 notice without an EPC, How to Rent leaflet and Gas Certificate only apply to tenancies granted or replaced since 1 October 2015. The position regarding the *prescribed* section 21 form is unclear; it is mandatory for any tenancy that has been renewed or become statutory since 2015. It is likely that it is not required for a pre-2015 tenancy, given that there are no regulations currently in force requiring it to be used for older tenancies.

There is a useful flow chart in Nearly Legal https://nearlylegal.co.uk/section-21-flowchart/.

Identity of Landlord

In *Barrow and Anor v Kazim & Ors* (2018) EWCA Civ 2414 a superior landlord gave notice to quit to the intermediate landlord. Under section 18 HA1988 (see above) this meant that the superior landlord became the subtenant's immediate landlord upon expiry of that notice. At the same time as serving the notice to quit the superior landlord served two months' notice under s21(1)b on the sub tenants of the intermediate landlord. It was held that the notice could not be a valid section 21 notice, the key words of section 21 of the 1988 Act are:

> "a court shall make an order for possession of the dwelling-house if it is satisfied … *the landlord* or, in the case of joint landlords, at least one of them has given to the tenant not less than two months' notice in writing stating that he requires possession of the dwelling-house".

So the only person who could serve a valid section 21 notice on the sub tenants was

their *landlord* or his agent. The superior landlord was not acting as agent for the intermediate landlord at the time they served their purported section 21 notice and until their notice to quit to the intermediate landlord expired they had no right to serve notice on the sub tenants.

Tenancy Deposits

Rent in Advance and Deposits

There has long been debate about what exactly constitutes a deposit. Housing Act 2004, s212 defines a deposit as:

" any money intended to be held (by the landlord or otherwise) as security for—

(a) the performance of any obligations of the tenant, or

(b) the discharge of any liability of his, arising under or in connection with the tenancy.

One area that has caused concern is where the rent is taken substantially in advance. This arose in *Johnson & Ors v Old* [2013] EWCA Civ 415. Ms Old took a tenancy of a property. She had a good credit history but no immediate income and so she was offered a 6 month tenancy with the rent payable six monthly in advance. The tenancy was very poorly worded and there was also a separate tenancy deposit which had been properly protected. Ms Old's case was that the 6 monthly payment for the most recent tenancy was a further deposit which also required protection.

The Court of Appeal made clear that the agreement had to be considered as a whole and no single clause could be used to demonstrate that there was a deposit without looking at the whole agreement and its overall effect. This is an important point and it is often overlooked by landlords who think that a simple change of wording or a clause which does not reflect the reality will solve all their problems. With deposits, as with tenancies in general, it is the actual relationship as opposed to fancy footwork in the contracts which will interest the courts.

The Court approached the main issue, whether rent in advance was security, by making two points. First, that there is a crucial difference between an obligation or liability and the security for that obligation or liability. A payment as security is not intended to discharge the obligation or liability. It is intended as an assurance that the obligation or liability is to be discharged at some future time. A payment which is intended to discharge the obligation or liability is just that. The fact of making the

payment discharges the liability; it cannot simultaneously act as a security for an obligation that has already been discharged. Having made this first point clear, the Court applied a devastating analysis by asking itself how the tenant would have responded were she asked to make a payment of the monthly rent having already paid the six months in advance. It concluded that she would have responded that she had already paid the rent. That being the case the money already paid could not possibly be a security for the discharge of the obligation but rather a discharge of the obligation to pay rent.

It should be remembered that this is not a final answer. There are some systems operated by landlord that masquerade as rent in advance but are, in reality, deposits. The test applied in this case is a very good guide though. If the tenant is asked to pay rent for a specified period can they legitimately reply that it has already been paid. If so, then the money already taken is unlikely to be a deposit.

Maximum amounts

The Tenant Fees Bill is currently before parliament and is set to become law later in 2019. Amongst other matters, it prohibits landlords from taking deposits of more than five weeks' rent. Breach of this provision will be a criminal offence enforceable by trading standards authorities. Similar restrictions are being enacted in Wales.

Tenancy deposit protection

Tenancy Deposit Protection (TDP) is a system whereby Assured Shorthold Tenancies (ASTs) have their deposit protected (physically or by way of an insurance policy) by a third party organisation which also supplies dispute resolution services. Deposits are required to be registered with the relevant scheme within a specified time from the date of receipt and a set of prescribed information must be given to the tenant. These must both occur within 30 days of the receipt of the deposit, not the start of the tenancy. There are penalties for a failure to register or give the prescribed information on application to the court by the tenant or a relevant person (someone who pays the deposit on behalf of the tenant). These are:

- the court ordering that the deposit is returned to the applicant or paid into the custodial scheme;
- the court ordering that the landlord pays the applicant a further sum of one to three times the value of the deposit;

- the landlord is unable to give a notice under s21, Housing Act 1988 *at any time when* the deposit is unprotected or the prescribed information has not been given.

There is a very limited discretion for the Court when applying these penalties.

The prescriptive nature of the penalties and the very limited discretion available to the Courts made TDP unpopular and some judges sought to find a way around the provisions in deserving cases. However, once the routes were marked out they become a highway for travellers of all types, notwithstanding the merits of their case. Those highways were ultimately upgraded to motorway status by two decisions of the Court of Appeal, in *Tiensia v Vision Enterprises Ltd (t/a Universal Estates)* and *Gladehurst Properties Ltd v Hashemi*. They were overturned as decisions by changes to the legislation provided for by section 184 of the Localism Act 2011.

Prescribed Information

It is worth noting that deposit protection is a two-part obligation. Mere protection without the information is simply not enough to discharge the landlord's obligations. They must also supply the required information.

The Housing (Tenancy Deposits) (Prescribed Information) Order 2007 sets out the prescribed information that must be given to the tenant. This is required to be given within 30 days of receipt of the deposit under s213(6).

In *Ayannuga v Swindells* [2012] EWCA Civ 1789 the precise requirement was considered by the Court of Appeal.

In this case the landlord sought possession for rent arrears. The tenant counter-claimed on the basis that the PI Order had not been complied with. While the landlord accepted that he had not complied in full with the order he argued that the requirement was largely procedural, that the purpose of the legislation was to protect deposits (which had been done) and that the tenant could have found out all he wanted to know from the scheme administrator. The Court of Appeal held that the information requirements were not merely a minor matter of procedure. They were of real importance as they told tenants how they could seek to recover their money and how they could dispute deductions without litigation. The Court of Appeal upheld the decision of the High Court on this issue in *Suurpere v Nice & Anor* [2011] EWHC 2003 (QB). The landlord was clearly in violation of the order and the penalties of

s214, Housing Act 2004 applied. Therefore the landlord was ordered to return the deposit plus a penalty equivalent to three times the deposit.

Where there is argument about whether the information the landlord has provided is sufficient then *Ayannuga* confirms that the test is as set out by the Court of Appeal in *Ravenseft Properties Ltd v Hall*. That is (with paraphrasing):

whether, notwithstanding any errors and omissions, the notice is "substantially to the same effect" in accomplishing the statutory purpose of telling the proposed tenant of their rights and the procedures operated by the relevant tenancy deposit scheme for recovering their money and contesting deductions.

The upshot is that the Prescribed Information really does matter and landlords need to ensure they have it right. In addition, landlords must supply that information themselves and not leave tenants to go on a hunt or work it out for themselves.

In *Ayannuga* it was less the prescribed information that was missing and what was actually not provided was a leaflet produced by the scheme itself which set out the procedures for disputing deposit deductions. All the schemes provide some variant of this and it is often forgotten. This is an area of real weakness for a lot of landlords.

Unintended consequences

By 2014 it was clear that the wording of Housing Act 2004 was causing problems. Landlords who had received deposits before the Act came into force were held to be in breach if their tenancies had been renewed or became periodic after the commencement date (*Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669).

The problems of *Superstrike* were compounded in *Charalambous & Anor v Maureen Rosairie Ng & Anor* [2014] EWCA Civ 1604. It was held that the obligation to protect a deposit applied even where a fixed term tenancy had become periodic before the protection rules came into force.

Deregulation Act and Deposits

Superstrike and *Charalambous* were resolved to some degree in the Deregulation Act 2015 the relevant parts came into force on 26 March 2015. These changes have effect in both England and Wales.

Deemed Compliance

Sections s215A was added to the Housing Act 2004 by s32 of the Deregulation Act.

This says that if a deposit was taken before the legislation came into force for a fixed term tenancy which then became periodic after the deposit legislation came into force (ie. deposit taken *before* 6 April 2007 and tenancy becomes periodic *after* 6 April 2007) then all would be forgiven provided that the deposit was protected and the relevant Prescribed Information served by 23 June 2015. After that date, landlords in breach are fully liable to the decision in *Superstrike* which remains good law.

Secondly s215B deals with deposits taken after 6 April 2007 which have since renewed or become periodic. Provided the deposit was protected and the Prescribed Information served at some stage in the initial tenancy then on any renewal it will be *assumed* that the Prescribed Information was properly served.

These two provisions are effectively retroactive. Court proceedings relating to these situations were terminated but costs were not be payable to landlords for that. Closed cases where the time for appeal had passed could not be reopened due to these changes. This is all covered in a new s215C.

Sweeping Up

Taken in tandem with the other amendments and the case law it is now the case that no tenancy deposit for an AST should be held outside a scheme and there are consequences if they are. There is no protection for landlords who never protected the deposit during the initial tenancy but there is a degree of forgiveness for landlord who were late in their protection but got it right by June 2015.

This has brought to an end the uncertainty and questions as to whether older deposits should, or should not, be protected.

Prescribed Information

The government also responded to complaints from the tenancy deposit protection schemes stemming from some County Court decisions about the prescribed information. Section 30 of the Act amended the Prescribed Information Order so that it is now clear that where the PI says the landlord's information must be given, then giving the details of an agent who protected the deposit for the landlord at the outset is also acceptable; the agent can sign the PI certificate. This removed an area of concern which had been highlighted. In relation to current or ongoing claims these

changes also had an element of retroactivity in that they accepted that previous provision of an agent's details is acceptable and those proceedings will be stopped.

(these notes are updated and adapted from material written by David Smith, of Anthony Gold, to whom I am indebted)

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March 2019

Appendix

Section 21 defences

Advisers' checklist

Potential defence:	✓
The s21 notice was not in the prescribed form (may only apply to tenancies granted after 1st October 2015)	
The s 21 notice was served by a person who is neither the landlord nor the landlord's agent (eg a head landlord not yet in possession of the headlease)	
The s.21 doesn't give at least 2 months' notice	
The tenancy was periodic from the start and rent was payable at more than monthly intervals and the notice is less than allowed by common law.	
The notice hadn't expired when the claim was issued.	
The notice was served within the first four months of the tenancy.	
The notice expired within the fixed term.	
The notice was more than six months' old when the proceedings were issued	
No energy performance certificate was given **on viewing**	
The landlord had not served Gas safety certificate **before tenant took up occupation**	
The landlord has not served the most recent 'How to rent' guide when the tenancy was granted or a new fixed term agreed.	
The property is an unlicensed HMO	
This is a 'retaliatory eviction' within the meaning of the Deregulation Act 2015.	
Tenancy deposit not protected and not returned	
Correct prescribed information not served on tenant and person who paid deposit	
Something missing from prescribed information or not signed correctly	
Court papers	
The landlord had returned the deposit but checked the wrong box/not made that clear in the Accelerated possession claim form.	
The client's instructions don't *exactly match* the claim form.	
The statement of truth on the claim form is not signed by the landlord or their solicitor.	
Equality Act Defence	
Estoppel Defence	

This is adapted from a checklist prepared by Nick Bano of 1 MCB chambers but any errors are mine, not his.

Also see Giles' Peaker's flowchart at https://nearlylegal.co.uk/section-21-flowchart/ -any errors are his not mine (!)