A NUTS AND BOLTS GUIDE TO SECTION 21 NOTICES

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Introduction

1. A tenant who occupies property under a periodic assured shorthold tenancy (AST) can have their tenancy terminated by their landlord using the colloquially termed "no-fault" eviction procedure under s.21 of the Housing Act 1988 (the s.21 Procedure).

2. The aim of this seminar is to provide tenant advisors with a nuts and bolts guide to notices served pursuant to s. 21 of the 1988 Act (the s.21 Notice).

3. The following three areas are discussed in greater detail below:
   (a) Section 21 Notices
   (b) Prohibitions on the service of a s.21 Notice
   (c) The future of no-fault evictions

A. Section 21 notices

4. When a landlord brings possession proceedings against a tenant under s.8 of the 1988 Act, they must prove that one of the mandatory or discretionary grounds for possession contained in schedule 2 to the 1988 Act is made out. A landlord using the s.21 Procedure has no such obligation.

5. The s.21 Procedure is colloquially termed a "no-fault" eviction because a landlord does not require a reason to terminate the tenancy. Although a landlord who uses the s.21 Procedure can obtain possession without needing a reason for doing so, they must still serve their tenant with a valid notice under s.21(1) or 21(4) of the 1988. The notice is commonly referred to as a "s.21 Notice".

6. A court does not have the power to dispense with service of a s.21 Notice by a landlord. If a landlord simply fails to serve a section 21 Notice before issuing a claim for possession, the claim will fail.

<u>s.21(1)</u>

7. Section 21(1) of the 1988 Act provides:

> "…on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy, a court shall make an order for possession of the dwelling-house if it is satisfied—

(a) that the assured shorthold tenancy has come to an end and no further assured tenancy (whether shorthold or not) is for the time being in existence, other than [an assured shorthold periodic tenancy (whether statutory or not)]; and

(b) 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."

8. In short, in order to terminate an AST under s.21(1) of the 1988 Act, the fixed term period of the AST must have come to an end and no further AST or assured tenancy can be in existence except for a periodic AST.

Further, the landlord (or if there are two or more landlords, at least one of them) must give the tenant not less than two months' notice, in writing, requesting possession of the Property.

s.21(4)

9. When a fixed term AST expires, the AST automatically becomes a periodic AST rolling on from week to week (if rent is paid weekly) or month to month (if rent is paid monthly).

10. To terminate a periodic AST section 21(4) of the 1988 Act provides:

"…a court shall make an order for possession of a dwelling-house let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied—

(a) that the landlord or, in the case of joint landlords, at least one of them has given to the tenant a notice [in writing] stating that, after a date specified in the notice, being the last day of a period of the tenancy and not earlier than two months after the date the notice was given, possession of the dwelling-house is required by virtue of this section; and

(b) that the date specified in the notice under paragraph (a) above is not earlier than the earliest day on which, apart from section 5(1) above, the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice under paragraph (a) above."

11. In precis, a landlord can terminate a periodic AST by serving a notice in writing, giving the tenant not less than two months' notice.

12. The requirement that the notice must expire on the last day of the period of the tenant's periodic tenancy has been tempered in England by the insertion of s.21(4ZA) of the 1988 Act by s.35 of the Deregulation Act 2015 (the 2015 Act), which came into force on 1 October 2015.

13. Section 21(4ZA) of the 1988 Act provides that "...in the case of a dwelling-house in England, subsection [21(4)(a) of the 1988 Act] has effect with the omission of the requirement for the date specified in the notice to be the last day of a period of the tenancy."

14. Accordingly, a landlord can now terminate a periodic tenancy by serving a s.21 Notice pursuant to s.21(4) of the 1988 Act without specifying an expiry date that falls on the last day of the period of the tenancy.

s.21(1A) & (1B)

15. Sub-sections 21(1A) and (1B) of the 1988 Act were inserted by s.164 of the Localism Act 2011 (the 2011 Act). Those subsections apply only to registered social providers who grant fixed term ASTs, where the fixed term period granted is not less than two years.[1]

16. In respect of ASTs that meet the criteria set out in s.21(1A) of the 1988 Act, s.21(1B) provides that:

> "…the court may not make an order for possession of the dwelling-house let on the tenancy unless the landlord has given to the tenant not less than six months' notice in writing—
>
> (a) stating that the landlord does not propose to grant another tenancy on the expiry of the fixed term tenancy, and
>
> (b) informing the tenant of how to obtain help or advice about the notice and, in particular, of any obligation of the landlord to provide help or advice."

The prescribed form

17. Prior to 1 October 2015 a prescribed form for s.21 Notices did not exist. Such a form was introduced by s.21(8) of the 1988 Act as amended by s.37 of the 2015 Act. The

[1] S.21(1A) of the 1988 Act.

only requirement as to form, prior to this time was that a s.21 Notice had to be in writing.[2]

18. The prescribed form can be used for s.21 Notices that are given pursuant to either s.21(1) and s.21(4) of the 1988 Act.

19. The most up-to-date version of the prescribed form for s.21 Notices was introduced on 1 June 2019 by the Assured Tenancies and Agricultural Occupancies (Forms) (England) (Amendment) Regulations 2019 (SI 2019/915), Form 6A.

20. Since 1 October 2018, it has become mandatory for a landlord to use the prescribed form when serving a s.21 Notice to end an AST regardless of when the tenancy began.

21. An error on the face of the prescribed form, such as an error in the date will not necessarily render the notice defective if the reasonable recipient reading it in context would have understood what the notice was meant to convey and it complied with the statutory requirements or was substantially to the same effect.[3]

Moratorium on the service of a s.21 Notice

22. Since 1 October 2015, pursuant to s.21(4B)(a) of the 1988 Act a landlord cannot give a tenant a s.21 Notice served pursuant to s.21(1) or s.21(4) of the 1988 Act "within the period of four months beginning with the day on which the tenancy began."[4]

23. If the tenancy is a replacement tenancy, pursuant to s.21(4B)(b) of the 1988 Act the four months' prohibition on the service of a s.21 Notice commences from the day on which the original tenancy began. A replacement tenancy arises when a fixed term AST comes to an end and the parties to the new agreement and the property are the same.[5]

24. By virtue of s.21(4C) of the 1988 Act, the four months' moratorium does not apply to statutory periodic tenancies.

[2] s.21(4B)(a) of the 1988 Act inserted by s.36(2) of the 2015 Act.
[3] *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 747; *Pease v Carter and another* [2020] EWCA Civ 175 at [39].
[4] Inserted by s.36(2) of the 2015 Act.
[5] s.21(7) 1988 Act.

Period of validity of a s.21 Notice

25. Before 1 October 2015, a s.21 Notice that was served by a landlord did not have a defined period of validity. As there was no time-limit placed on the validity of a s.21 Notice, landlords were not under any time pressures to commence possession proceedings following service of a s.21 Notice on a tenant. The absence of time-limits led to some landlords engaging in the bad practice of serving s.21 Notice on tenants without subsequently commencing possession proceedings.

26. The 2015 Act amended the 1988 Act by introducing time-limits on the validity of a s.21 Notice.[6] In relation to all ASTs granted or renewed on or after 1 October 2015, possession proceedings must be issued within six months of the service of a s.21 Notice on the tenant. In relation to periodic tenancies, possession proceedings must be issued within four months of the expiry date of the s.21 Notice, where the period of the tenancy is greater than two months.

27. Since the 1 October 2018, the above time limits now apply to all ASTs regardless of whether they were granted or renewed on or before 1 October 2015.[7]

B. Prohibitions on the service of a s.21 Notice

28. In recent years, Parliament has introduced a number of fetters on a landlord's right to use the s.21 Procedure. The bars were enacted to sanction landlords who failed to comply with statutory requirements enacted to safeguard tenants' interests.

29. These statutory safeguards are hazardous trip-wires to the unwary landlord and present tenants with an opportunity to defeat or delay their landlord's claim for possession.

30. In summary, a landlord (or their agent) must comply with the following statutory provisions:

- tenancy deposit scheme under the Housing Act 2004 (the 2004 Act)
- retaliatory eviction requirements under s.33 and s.34 of the 2015 Act.
- licensing scheme for houses in multiple occupation (HMO) or subject to selective licensing

[6] s.21(4D) – (4E) of the 1988 Act, which was inserted by s.36 of the 2015 Act.
[7] s.41(3)of the 2015 Act.

- gas safety and energy performance certificates
- "How to rent" booklet
- Tenant Fees Act 2019 (the 2019 Act)

31. Each of these requirements are looked at in greater detail.

Tenancy deposits

32. The tenancy deposit protection scheme for tenants occupying properties under an AST is set out in ss.212 – 215B of the 2004 Act. The scheme came into force on 6 April 2007. It was envisaged that the scheme would protect tenants from unscrupulous landlords who retained or made unlawful deductions from deposits.

33. Under the terms of the scheme, when a landlord receives a tenancy deposit from a tenant, the landlord is required to:
    - protect the monetary deposit by registering it with an authorised scheme[8]
    - comply with the initial requirements of the authorised scheme within 30 days of receipt of the deposit[9]
    - serve on the tenant the prescribed information[10] within 30 days of receipt of the deposit.[11]

34. If a landlord fails to comply with any of the above requirements they are prohibited from serving a s.21 Notice.[12]

35. A landlord who fails to protect a tenancy deposit or comply with the initial requirements of the scheme is barred from serving a s.21 Notice until:
    - the deposit is returned to the tenant in full or minus any agreed deductions
    - any claim made by the tenant to the county court in respect of their landlord's non-compliance has been determined by the court, settled between the parties or withdrawn. [13]

36. A landlord who fails to serve the prescribed information on a tenant is barred from serving a s.21 Notice until:

8 s.213(1) of the 2004 Act. The available schemes are currently: (a) Deposit Protection Service (DPS), (b) My Deposits and (c) The Dispute Service (TDS).
9 s.213(3) of the 2004 Act.
[10] para.2 of the Housing (Tenancy Deposits) Prescribed Information Order 2007, SI 2007/797.
[11] s.213(5) & (6) of the 2004 Act.
[12] .s.215 of the 2004 Act, as amended by s.184 of the 2011 Act; *Khuja v Chowdhury* [2015] EW Misc B18 (CC).
[13] s.215(2A) of the 2004 Act, as inserted by s.184 of the 2011 Act and amended by s.31 of the 2015 Act.

- the prescribed information is given to the tenant (or any relevant person)
- the deposit is returned to the tenant in full or minus any agreed deductions
- any claim made by the tenant to the county court in respect of their landlord's non-compliance has been determined by the court, settled between the parties or withdrawn.[14]

Retaliatory eviction

37. If a landlord seeks to evict a tenant upon receipt of a complaint about disrepair, instead of undertaking the repairs, they are guilty of committing a retaliatory eviction.

38. Sections 33 and 34 of the 2015 Act aims to restrict a landlord's ability to serve a s.21 Notice when a tenant has made a written complaint to either their landlord or the local authority.

39. If a tenant's property suffers from disrepair, for which the landlord is liable to repair, the tenant can complain about the condition of the property to their relevant local authority department such as the Environmental Health Department. If the local authority upholds the complaint, it can serve a "relevant notice" on the landlord; namely, an improvement notice (in relation to category 1 and category 2 hazards) or an emergency remedial action notice.

40. A landlord who is served with a relevant notice is prohibited from serving a s.21 Notice on their tenant for a period of six months beginning on the day of service of the relevant notice. If the notice is suspended by the local authority, the landlord is prohibited from serving a s.21 Notice for a period of six months from the day the suspension ends.

41. A landlord is only able to serve a s.21 Notice if they successfully challenge the decision of the local authority to serve the relevant notice.[15]

42. Alternatively, s.33(2) of the 2015 Act provides a tenant with an alternative mechanism to prevent a landlord from serving a s.21 Notice if they have complained about disrepair.

[14] ss.215(2) and (2A) of the 2004 Act.
[15] S.33(8) of the 2015 Act.

43. Before a s.21 Notice is served, a tenant can make a written complaint about the condition of the property to either their landlord or their landlord's managing agent.[16]

44. The landlord must provide the tenant with an "adequate response" to the complaint. An "adequate response" is defined in s.33(3) of the 2015 Act as a response in writing which:

- provides a description of the action that the landlord proposes to take to address the complaint; and
- sets out a reasonable timescale within which that action will be taken.

45. If a landlord completely fails to respond to their tenant's complaint, fails to provide an adequate response; namely, one that complies with s.33(3) of the 2015 Act or responds by serving a s.21 Notice on the tenant, the tenant will be able to escalate their complaint to their relevant local authority department.

46. If the local authority upholds the tenant's complaint it can serve a "relevant notice" i.e. an improvement notice or an emergency remedial action notice. Once a relevant notice is served on the landlord they are debarred from serving a s.21 Notice on their tenant for a period of six months.[17] Further, any s.21 Notice that has already been served on receipt of a written complaint from the tenant or before receipt of a relevant notice from the local authority will become invalid.[18]

47. Any possession proceedings that have been commenced utilising the s.21 Procedure must be struck out by the court if a relevant notice is subsequently received before the court makes an order for possession. Proceedings must be struck out because they will be based upon an invalid s.21 Notice.[19] If, however, the court has already granted the landlord an order for possession, the order cannot be set aside on the basis that a relevant notice was subsequently served on the landlord after the order for possession was made.[20]

[16] s.33(12) of the 2015 Act.
[17] s.33(1) of the 2015 Act.
[18] s.33(2)(b)(iii) and s.33(2)(e) of the 2015 Act.
[19] s.33(2)(6) of the 2015 Act.
[20] s.33(8) of the 2015 Act.

Licensing

48. A landlord cannot serve a s.21 Notice on a tenant who occupies property under an AST when the property is an HMO that is subject to mandatory or additional licensing and the property remains unlicensed.[21]

49. An "unlicensed HMO" is defined in s.73 of the 2004 Act. It provides:

> *(1) For the purposes of this section an HMO is an "unlicensed HMO" if—*
> *(a) it is required to be licensed under this Part but is not so licensed, and*
> *(b) neither of the conditions in subsection (2) is satisfied.*
> *(2) The conditions are—*
> *(a) that a notification has been duly given in respect of the HMO under section 62(1) and that notification is still effective (as defined by section 72(8));*
> *(b) that an application for a licence has been duly made in respect of the HMO under section 63 and that application is still effective (as so defined).*

50. An HMO can be exempted from the requirement to be licensed if either of the following two requirements are satisfied. First, a valid application has been made to a local housing authority under s.63 of the 2004 Act. Second, a landlord or a landlord's managing agent notifies the local housing authority that it intends to take particular steps to ensure that the property is no longer required to be licensed and the local housing authority issues a temporary exemption notice under s.62(1) and (2) of the 2004 Act.

51. An application or notification is effective if it has not been withdrawn and the local housing authority has not served a temporary exemption notice or granted a license. Further, an application or notice will be effective if the time limit for appealing has either not expired or an appeal made has yet to be determined or withdrawn.[22]

52. If a landlord's property is subject to mandatory or additional licensing, they can serve a s.21 Notice in relation to that Property if they have applied for a licence at the time they serve the s.21 Notice.

[21] s.75(1) of the 2004 Act.
[22] ss.72(8) and (9) of the 2004 Act.

53. A landlord cannot serve a s.21 Notice on an assured shorthold tenant who resides in the whole or part of a house that is subject to selective licensing that remains unlicensed.[23]

54. An "unlicensed house" is defined in s.96 of the 2004 Act. It provides:

> *(1) For the purposes of this section a house is an "unlicensed house" if—*
> *(a) it is required to be licensed under this Part but is not so licensed, and*
> *(b) neither of the conditions in subsection (2) is satisfied.*
> *(2) The conditions are—*
> *(a) that a notification has been duly given in respect of the house under section 62(1) or 86(1) and that notification is still effective (as defined by section 95(7));*
> *(b) that an application for a licence has been duly made in respect of the house under section 87 and that application is still effective (as so defined).*

55. A house can be exempted from the requirement to be licensed if either of the following two requirements are satisfied. First, a valid application has been made to a local housing authority under s.87 of the 2004 Act. Second, a landlord or a landlord's managing agent notifies the local housing authority that it intends to take particular steps to ensure that the property is no longer required to be licensed and the local housing authority issues a temporary exemption notice under s.62(1) and (2) of the 2004 Act.

56. An application or notification is effective if it has not been withdrawn and the local housing authority has not served a temporary exemption notice or granted a licence. Further, an application or notice will be effective if the time limit for appealing has either not expired or an appeal made has yet to be determined or withdrawn.[24]

57. A landlord can avoid the prohibition on serving a s.21 Notice in relation to a house that is subject to selective licensing if they have applied for a licence by the time the s.21 Notice is served.

<u>Gas safety and energy performance certificates</u>

58. In respect of ASTs granted or renewed on or after 1 October 2015, landlords are statutorily obliged to provide their tenants with copies of a current gas safety certificate relating to the property and an energy performance certificate. Failure to

[23] Pursuant to s.98(1) of the 2004 Act.
[24] s.95(7) and (8) of the HA 2004.

comply with these "prescribed requirements" prohibits a landlord from serving a s.21 Notice on their tenant.[25]

59. Pursuant to reg. 36(6) of the Gas Safety (Installation and Use) Regulations 1998, a landlord must give a copy of the last gas safety record:
    (a) to each existing tenant of premises to which the record relates within 28 days of the date of the [gas safety] check; and
    (b) made in respect of each appliance or flue… to any new tenant of premises to which the record relates before that tenant occupies those premises.

60. The time-limit of twenty-eight days for a landlord to provide a tenant with a copy of the gas safety certificate does not carry the sanction imposed by s.21A of the HA 1988, prohibiting a landlord from serving a s.21 Notice on their tenant.

61. What is unclear is whether the failure to provide a copy of the gas safety certificate before the tenant goes into occupation of the property will invalidate a s.21 Notice subsequently served by the landlord in respect of the tenancy.

62. In *Caridon Property Ltd v Monty Shooltz*, unreported; 2 February 2018 (Central London County Court; HHJ Luba QC), the court held that where a landlord had admitted to not serving a gas safety certificate prior to their new tenant's occupation of the property, the landlord was in breach of reg.36(6) of the Gas Safety (Installation and Use) Regulations 1998 and as such was prohibited from serving a s.21 Notice on their tenant by virtue of reg.2(1)(b) of the Assured Shorthold Tenancies and Prescribed Requirements (England) Regulations 2015.

63. *Caridon* has been followed in a number of subsequent county court decisions. The most recent is *Trecarrel House Limited v Rouncefield,* Exeter CC, 13 February 2019 (Unreported). *Trecarrel* has been appealed to the Court of Appeal and the judgment is pending. Unless the decision in *Trecarrel* is reversed on appeal or the Assured Shorthold Tenancies and Prescribed Requirements (England) Regulations 2015 are amended, landlords will be deprived of the opportunity to use the s.21 Procedure where they have failed give the tenant a copy of the most current gas safety certificate before the tenant goes into occupation of the property.

[25] s.21A Housing 1988 Act, as inserted by s.38 Deregulation 2015 Act; reg. 2 Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 SI 2015/1646

How to rent booklet

64. For all ASTs granted on after 1 October 2015,[26] private landlords have been required to provide their tenants with a copy of the "How to Rent: The checklist for renting in England" (the How to Rent Booklet).[27]

65. A landlord cannot serve a s.21 Notice on their tenant if they have failed to provide them with the How to Rent Booklet.[28] If a landlord commences possession proceedings using the s.21 Procedure when they are in breach of this requirement their claim will fail as the s.21 Notice will be invalid.

Unlawful tenant fees

66. Since the commencement of the Tenant Fees Act 2019 on 1 June 2019, a private sector landlord is prohibited from serving a s.21 Notice on a tenant to end their AST if a prohibited fee or unlawfully retained holding deposit has not been returned to the tenant or credited towards their tenancy deposit or rent.[29]

67. The only permitted fees that can be charged by a landlord under the 2019 Act are:
    - rent
    - tenancy deposit (up to maximum of five or six weeks' rent)
    - holding deposit (up to maximum of one week's rent)
    - a fee in the event of a 'relevant default'
    - damages for breach of agreement
    - fees in connection with a tenant's request for a variation, assignment, or surrender of the tenancy
    - payments in respect of council tax, utilities, communication services and TV licence.[30]

68. If the AST was signed or agreed to before the 1 June 2019 or a statutory periodic tenancy arises after 1 June 2019, a landlord will still be able to serve a s.21 Notice in respect of that tenancy. From 1 June 2020 the ban on unpermitted fees will apply to all ASTs regardless of their commencement date.[31]

[26] Save for statutory periodic tenancy that arose on the expiry of a fixed-term tenancy that was granted before 1 October 2015 – s.41(2) of the 2015 Act.
[27] The How to Rent Booklet is currently published by the Department for Communities and Local Government.
[28] Pursuant to s.21B(3) of the 1988 Act
[29] s.17 of the 2019 Act.
[30] s.3 and schedule 3 of the 2019 Act.
[31] s.6(4) of the 2019 Act.

C. The future of no-fault evictions

69. On 15 April 2019, the Secretary of State for Housing, Communities and Local Government, James Brokenshire, announced that the government intended to abolish evictions under s.21 of the 1988 Act.

70. In his announcement the Secretary of State stated that the intended aim of the abolition of the s.21 Procedure was to:
"*…bring an end to private landlords uprooting tenants from their homes with as little as 8 weeks' notice after the fixed-term contract has come to an end.*

This will effectively create open-ended tenancies, bringing greater peace of mind to millions of families who live in rented accommodation. Many tenants live with the worry of being evicted at short notice or continue to live in poor accommodation for fear they will be asked to leave if they complain about problems with their home.

It will give them the reassurance that they will not be suddenly turfed out of their home and reduces the risk of being faced with having nowhere else to go. And evidence shows that the end of tenancies through the Section 21 process is one of the biggest causes of family homelessness."

71. There has been no definitive date given for when the s.21 Procedure will be scrapped. At present there is an open consultation. The proposal is truly seismic and will dramatically alter the housing landscape.

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