



# Defences to s21 possession claims: Recent developments

Kevin Gannon, Garden Court Chambers

25 November 2021



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## S21 defences

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- the notice itself (timing, prescribed form, signing formalities, service): Housing Act 1988 s21;
- deposit protection and prescribed information: Housing Act 2004 s212 - 215;
- compliance with prescribed requirements (gas safety certificate, EPC, How to Rent leaflet): Housing Act 1988 s21A, s21B and the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015;
- HMO licensing and local authority selective licensing: Housing Act 2004 ss75, 98;
- retaliatory eviction re: housing conditions: Deregulation Act 2015 s33, 34;
- Tenant Fees Act 2019.



# S21 defences

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- (1) The s21 notice itself;
- (2) Deposit Protection;
- (3) Compliance with Prescribed Requirements.



## (1) The s21 notice itself

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(a) *Northwood Solihull Ltd v Fearn and others* [2020] EWHC 3538 (QB); [2021] 1 WLR 1937

(b) *Majiyagbe v Singh and Sandhu*, County Court at Central London, 30 August 2019, Nearly Legal note 6 October 2019



(1) *The s21 notice itself: Northwood Solihull Ltd v Fearn and others*

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- Where landlord and/or agent are companies, do notices have to be executed in accordance with s44 Companies Act 2006?
- Reference to the decision in *Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd* [2010] 1 WLR 2750;
- Para 60 Northwood:

*The broader principle underlying the decision is, however, on the following lines: if the legislation in issue and context expressly requires a signature by the relevant person itself, there is no other way of a corporate person satisfying this requirement other than by way of the general law (which requires execution under section 36A or its successor).*

[i.e. s44 Companies Act 2006]).

- s8 notice not defective; DPC was defective;



*(1) The s21 notice itself: Northwood Solihull Ltd v Fearn and others*

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- Note s21 case of Bali v Manaquel Co Ltd (NL note 18.4.2016)
- DPC had been signed with the name 'Manaquel' then pp with illegible initials. Based on Hilmi, HHJ Hand QC held that the DPC was required to comply with s44 Companies Act 2006, the signing did not do so, the DPC was therefore invalid and so the landlord could not rely on it. The possession claim was dismissed.
- Note amendment to the Prescribed Information order by the Deregulation Act. Allows the initial agent to sign the DPC if it was the agent who protected the deposit.



## (1) The s21 notice itself: *Majiyagbe v Singh and Sandhu*

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- s21(4D) Subject to subsection (4E), proceedings for an order for possession under this section in relation to a dwelling- house in England may not be begun after the end of the period of six months beginning with the date on which the notice was given under subsection (1) or (4)
- AST granted 20.6.2011. S21 notice served the same day. Tenancy became statutory periodic after six months. Possession proceedings commenced 6 February 2019.
- On appeal, held that s41(3) Deregulation Act 2015 applied straightforwardly (the amendment bringing in s21(4D) was in force for all ASTs from 1 October 2018). Proceedings cannot be begun more than 6 months from the date of service of the s.21 notice, or four months after expiry of notice period. Possession claim dismissed.





## (2) Deposit Protection

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(a) *Sturgiss & Gupta v Boddy*, County Court at Central London, HHJ Luba QC, 19.7.2021

(b) *Howard v Dalton*, County Court at Dartford, 7 May 2019, Nearly Legal note 3 June 2019

(c) *Liaw v Sohal*, County Court at Central London 10 January 2019, Nearly Legal note 11 January 2020

(d) *Gul v Bilal*, Stratford Hearing Centre, 18 October 2021, Nearly Legal note 2 November 2021



## (2) Deposit Protection: *Sturgiss & Gupta v Boddy*

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- The ‘churn’ case.
- A, B, C and D pay the deposit but then change to A, B, C and E first of all. When each occupier leaves in turn, they arrange that the incoming occupier will reimburse them for their personal share of the original deposit. Ultimately the occupiers change to M, N, O and P.
- On appeal HHJ Luba QC found that each churn did amount to a surrender and re-grant.
- The Cs still had to demonstrate that they either paid or are to be treating as having paid a deposit to the landlord. Para 80:

It seems to me that where the landlord has entered into a construct by which, at his own design, there is a single initial payment of a deposit and thereafter a churning in the identities of tenants, he must be treated as having been ‘paid’, by each new cohort, the amount held in respect of the original cohort and each subsequent cohort.

- Obligation on L was to protect the deposit on each churn.



## (2) Deposit Protection: Multiple breach cases

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- **Howard v Dalton:** Renewal contractual tenancies. Held: s213 envisaged a penalty for either failure to protect the deposit or provide the prescribed information, but not both. However this penalty could be imposed for each tenancy.
- **Liaw v Sohal:** Deposit protected, but PI not provided on original tenancy or two subsequent renewals. Penalty: 2x deposit on three occasions.
- **N.B. s215A and s215B HA 2004:** if same L and same T, once deposit protected and PI served properly, don't need to do it again on each renewal. But must be same L and same T.



## (2) Deposit protection: Return of deposit

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- s215(2A) Housing Act 2004.
- What is return?
- *Gul v Bilal*: L had left a cheque for the deposit amount at the premises but the tenant did not want the deposit returned, had not accepted the cheque and had never cashed it. Held: In these circumstances the deposit had not been returned.



## (3) Compliance with Prescribed Requirements

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(a) *Trecarrel v Rouncefield* [2020] EWCA Civ 760; [2020] 1 WLR 4712

(b) *Minister v Hathaway & Hathaway* [2021] EWCA Civ 936



### (3) Compliance with Prescribed Requirements: Trecarrel v Rouncefield

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- Gas Safety Certificates
- Interaction between reg 2(2) of the Prescribed Requirements regulations and reg 36 of the Gas Safety Regulations
- HHJ Luba QC in in Caridon Property Ltd v Shooltz (unreported) 2 February 2018 not upheld
- LJ Patten para 30:

As a matter of construction, I therefore prefer the view that as a result of regulation 2(2) the time when the landlord ‘is in breach’ of paragraph (6)(b) ends for the purposes of section 21A once the GSR is provided.
- Further argument in relation to more than 12 months between gas safety inspections also rejected.



### (3) Compliance with Prescribed Requirements: Minister v Hathaway & Hathaway

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- With effect from 19.3.2008 L (H&H) grants T (M) an AST fixed term for 1 year which thereafter continues by virtue of a statutory periodic tenancy. On 6.12.2018 s21 served. It was not in dispute that no EPC had been served prior to that date.
- s21A inserted by Deregulation Act 2015: applies to all tenancies from 1.10.2018?
- But s21A refers to breach of ‘prescribed requirements’
- Prescribed Requirements regs sets out requirements only to tenancies that began on or after 1.10.2015
- No subsequent amendment to PR regs



# Defences to s21 possession claims: Tenant Fees 2019 Act and Notice Periods

Angharad Monk, Garden Court Chambers

25 November 2021



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# Content

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- Defences under the Tenant Fees Act 2019
- Notice periods, Covid-19 and beyond
- Form 6A
- Abolition of section 21



# Section 21 defences under the Tenant Fees Act 2019

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Applicable to all private assured shorthold tenancies from 1 June 2020.

Prohibits landlords and letting agents from charging any fees other than:

- Rent
- A tenancy deposit (up to maximum of five or six weeks' rent)
- A holding deposit (up to maximum of one week's rent)
- A fee in the event of a 'relevant default' (loss of a key, or penalty for failure to pay rent within 14 days of the due date)
- Damages for breach of tenancy agreement
- Reasonable costs in connection with tenant's request for a variation, assignment, or novation of a tenancy
- Losses suffered as a result of termination of the tenancy at the tenant's request before the end of the term or without the required notice
- Payments in respect of council tax, utilities, communication services and TV licence

*(sections 1-3 and Schedule 1 Tenant Fees Act 2019)*

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Cont.

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## **Section 17 Tenant Fees Act 2019**

Section 21 notice may not be served where:

The landlord has required a relevant person to make a prohibited payment and as a result that person makes a prohibited payment

OR

The landlord fails to comply with the holding deposit and breaches the requirements in Schedule 2 of the Act

UNLESS ...



# Cont.

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UNLESS ...

- The payment or deposit has been repaid to the relevant person

OR

- The payment or deposit has either been applied towards (1) rent, (2) the tenancy deposit, or (3) a combination of both towards **with the relevant person's consent.**

**Relevant person: a tenant, a person acting on behalf of a tenant or a guarantor, but NOT a local authority** (section 1(9)-(10) Tenant Fees Act 2019)



# Notice requirements

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## **Notice requirements under section 21 Housing Act 1988**

Section 21(1) applies to ASTs which were at any point fixed term (including subsequent statutory periodic tenancies) and requires that the fixed term has ended and that a minimum period of notice has been given.

Section 21(4) applies to ASTs which were periodic from the start and requires that a minimum notice period has been given ending on the last day of a period of the tenancy.

Notices under both sections 21(1) and (4) are valid only a specified period as defined in sections 21(D) and (E) respectively. In the case of notices under section 21(4) the expiry date is calculated with reference to the end date specified in the notice as opposed to the date of service, however the overall minimum period will usually be the same in both instances.



# Cont.

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## Mechanism for Covid-19 changes:

Paragraph 7 of Schedule 29 to the Coronavirus Act 2020 amends certain time periods specified in section 21 Housing Act 1988, during the “relevant period”.

The relevant period began on 26 March 2020.

Both the end date of the relevant period and the notice periods specified are capable of amendment by statutory instrument – this is how changes have been made during the past 18 months.



# Cont.

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Relevant legislation (England):

Section 17 Coronavirus Act 2020 (**applicable unamended to notices served between 26 March 2020 and 28 August 2020 to 31 May 2021**)

Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020/914 (**amendments applicable to notices served between 29 August 2020 to 31 May 2021**)

Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) (No. 2) Regulations 2021/564 (**amendments applicable to notices served between 1 June 2021 – 30 September 2021**)

The Coronavirus Act 2020 (Residential Tenancies and Notices) (Amendment and Suspension) (England) Regulations 2021/994 (**amendments applicable to notices served from 1 October 2021**)



# Cont.

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| Section 21 Notice served                  | Required notice period | Notice expires (from service) |
|---|------------------------|-------------------------------|
| On or before 25 March 2021                | 2 months               | After 6 months                |
| Between 26 March 2021 and 28 August 2021  | 3 months               | After 6 months                |
| Between 29 August 2020 and 31 May 2021    | 6 months               | After 10 months               |
| Between 1 June 2021 and 30 September 2021 | 4 months               | After 8 months                |
| On or after 1 October 2021                | 2 months               | After 6 months                |





# Form 6A

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Prescribed form 6A has been updated on:

- 26 March 2020
- 2 September 2020
- 1 June 2021
- 1 October 2021

Use of an incorrect form is a defence to possession action under section 21 (section 21(8) Housing Act 1988).



## Cont.

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- The prescribed form 6A has been updated from 1 October 2021.
- Different format to previous form 6As – information about minimum notice periods and expiry dates removed.
- There is an accompanying guidance note but this is not required to be served.



# Cont.

## NOTICE REQUIRING POSSESSION OF A PROPERTY IN ENGLAND LET ON AN ASSURED SHORTHOLD TENANCY

### FORM NO. 6A

Housing Act 1988 section 21(1) and (4) (as amended)

#### INFORMATION FOR THE TENANT

This notice tells you that your landlord requires possession of your home. You should read it carefully and seek advice about your circumstances as quickly as possible.

You are entitled to at least two months' notice before being required to give up possession of your home. In some circumstances a longer notice period may be required.

If you do not leave your home by the date given in section 2, your landlord may apply to the court for an order under Section 21(1) or (4) of the Housing Act 1988 requiring you to give up possession.

If you are worried about this notice, and what you should do about it, take it immediately to Citizens Advice, a housing advice centre, a law centre or a solicitor.

If you are a debtor and you are in a 'breathing space', you should inform your debt advisor.

If you believe you are at risk of homelessness as a result of receiving this notice, you should contact your local authority for support.

Free independent advice is also available from Shelterline on 0808 800 4444 or via the Shelter website at: <https://www.shelter.org.uk>

Further information about this notice and the possession process can be found at: <https://www.gov.uk/government/publications/understanding-the-possession-action-process-guidance-for-landlords-and-tenants>

1. To: (insert full name(s) of tenant(s))  
.....

2. You are required to leave the below address after: (insert calendar date)  
.....  
.....

If you do not leave, your landlord may apply to the court for an order under Section 21(1) or (4) of the Housing Act 1988 requiring you to give up possession of: (insert address of the property)  
.....  
.....

3. If your landlord does not apply to the court within a given timeframe this notice will lapse. If you are entitled to more than 2 months' notice your landlord can rely on this notice to apply to the court during the period of 4 months commencing from the date specified in section 2 above. In all other cases, your landlord can rely on this notice to apply to the court during the period of 6 months commencing from the date this notice is given to you.

4. Name and address of landlord or landlord's agent:  
(To be completed in full by the landlord, or, in the case of joint landlords, at least one of the joint landlords, or by someone authorised to give notice on the landlord's behalf.)

Signed .....

Name .....

Address .....

Telephone number .....

Signed .....

Name .....

Address .....

Telephone number .....

Capacity (please tick):      landlord  
   joint landlord(s)  
   landlord's agent

Date .....

# Abolition of section 21

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- Theresa May announcement on 15 April 2019
- Conservative manifesto commitment 2019
- Consultation process from 21 July 2019 to 12 October 2019
- Queen's speech December 2019 – commitment to Renter's Reform Bill
- Queen's speech May 2021 – announcement that a white paper on private rented sector would be published in 2021 including response to consultation on section 21
- October 2021 – the government announced that the white paper would be pushed back to 2022.

*(See Commons Library Research Briefing 08658, 29 July 2021:*

*<https://researchbriefings.files.parliament.uk/documents/CBP-8658/CBP-8658.pdf> )*



# Thank you

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