Section 21 after *Spencer v Taylor*: getting notices for possession right

Adam Boyle, St John's Chambers

Published on 18th August 2015

St John's barrister Adam Boyle discusses the correct approach to *Spencer v Taylor* following his recent case *W v T*

In a recent possession hearing, *W v T*, in which I represented the landlord, there arose an interesting question concerning the service of a notice pursuant to section 21 of the Housing Act 1988.

Section 21 of the 1988 Act deals with the recovery of possession on the expiry or termination of an assured shorthold tenancy. The tenants in this particular matter had been granted a 13 month assured shorthold tenancy. That tenancy came to an end in January 2015. Following the expiry of the fixed term the tenancy became a statutory periodic tenancy. A little while after the periodic tenancy began the landlord decided that she wanted to terminate the tenancy. Her solicitors then served a notice on the tenants. The possession hearing which eventually resulted centred on the content of that notice, the question which the judge had to ask himself was as follows: was the notice that was served valid?

The notice which had been served on the tenants did not (in line with the commonly held belief amongst solicitors following the case of *Spencer v Taylor* [2013] EWCA Civ 1600) specify that possession was required on a day which was the last day of a period of the tenancy. The commonly held belief being that it is no longer necessary to specify the last day. The notice did, however, specify a period of over two months which gave the tenants ample warning that they were required to leave the property. The most interesting part of the notice was that it purported, *prima facie*, to be giving notice pursuant to 21(4) of the 1988 Act. The question which that raised for the judge was this: how does stating that a notice is given pursuant to section 21(4) affect the validity of a notice which does not comply with 21(4), and, in order to be effective, must be thought of as operating pursuant to section 21(1)?

Perhaps a reminder as to the requirements of sections 21(1) and 21(4) would be useful at this stage.

*Since Adam wrote this article it is his understanding that section 21 has been amended and that, put more generally, the law in this area has changed. Thus this article should be read for background only – and not relied upon as a statement of the current law.

Section 21(1) states the following:

"Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling-house let on the tenancy in accordance with Chapter 1 above, 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."

Whereas section 21(4) states:

"Without prejudice to any such right as is referred to in subsection (1) above, 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."

In essence: in relation to a fixed term tenancy, the tenancy may be ended by a notice of at least two months in writing; however, if a tenancy is a periodic tenancy, a date 'being the last day of a period of the tenancy' must be specified, in addition to notice of at least two months (in writing) being given (and 21(4)(b) being complied with).

Section 21(2) is also relevant:

"A notice under paragraph (b) of subsection (1) above may be given before or on the day on which the tenancy comes to an end; and that subsection shall have effect notwithstanding that on the coming to an end of the fixed term tenancy a statutory periodic tenancy arises."

It had been thought, prior to *Spencer v Taylor*, that the statutory scheme in section 21 provided a method of termination for fixed term tenancies that could only be used 'before or on the [last] day' of a fixed term tenancy, pursuant to sections 21(1) & 21(2). It was also thought that once a periodic tenancy began the correct method of termination was prescribed by 21(4). The reasoning behind that was no doubt that section 21(2) appears to limit the operation of the fixed term 21(1) method of termination.

However, the Court of Appeal case of *Spencer v Taylor* clarified this issue. Lord Justice Lewison found that the language in 21(2) was permissive not constrictive, with the effect that a tenancy which starts off as fixed and then becomes periodic may be terminated using 21(1). Lewison LJ stated expressly that 21(1) 'also encompasses cases in which a fixed term assured tenancy is followed by a periodic tenancy' and decided that it is not correct to read sections 21(1) and 21(4) as mutually exclusive (para 20). In addition, he made it clear that there is no prescribed form of notice for the purposes of section 21 (para 7).

The key effect of the decision in *Spencer v Taylor* is that fixed term assured shorthold tenancies, even once they end and become periodic, may be terminated pursuant to the 21(1) provision. Thus, applying *Spencer v Taylor*, the landlord in the case of *W v T* was entitled to terminate the tenancy in the way specified in section 21(1).

That being so, the judge in the case of *W v T* had to decide how the fact that the notice stated that it was being given pursuant to 21(4) affected its functional effect under 21(1).

On the landlord's behalf the following submissions were made:

1) The notice was valid because it is impossible to make an error of form when there is no prescribed form for a notice. Further, the requirements of section 21(1) were met and the reference to section 21(4) was, if anything, an error of form.
2) In the event that it is possible to make an error where no form of notice is prescribed, the error in the notice falls under the *de minimis non curat lex* principle.

3) It cannot be right that providing additional, albeit superfluous information, regardless of its correctness, invalidates a notice which would have been valid if the additional information had not been provided.

The judge, deciding the matter in the Claimant's favour, granted possession of the property and ordered that the Defendants pay costs.

In his judgment, though not giving his analysis in any great detail, the judge stated that it "would be a nonsense" to find in the Defendants' favour owing to what was stated concerning 21(4) in the notice, given that the Claimant could have served a perfectly valid notice without referring to section 21 at all. The judge also stated, echoing an additional argument made by the Claimant, that one of the aims of the *Spencer v Taylor* judgment was to bring clarity to this area of law, with the effect that giving over two months' written notice (provided that the section 21(1) conditions were satisfied) is all that is required for a notice under 21(1) to be valid.

The Claimant did not, however, escape the effects of its questionable notice completely. The judge found that the Claimant deserved some criticism for providing what was, at best, confusing information in the notice. As a consequence of that, the judge reduced the Claimant's costs by one third.

What can be learnt from this case, and what should solicitors do in respect of the notices they give going forward? It seems to me that the courts are steadfast in the view that a periodic tenancy, which follows an assured shorthold fixed term tenancy, may be terminated pursuant to 21(1). It is also clear from the decision in *W v T* that the courts will uphold notices which incorrectly seek to rely on section 21(4), even where the statutory criteria specified in 21(4) are not validly complied with. This should be of some relief to both landlords and the solicitors who represent them.

It is, however, perhaps important to note that when one seeks to terminate a periodic tenancy which has followed a fixed term assured shorthold tenancy, relying on section 21(1) is the preferable option. It is, in my view, correct to say that one cannot properly seek to rely on section 21(4) while at the same time failing to comply with section 21(4) in the notice given. When a landlord seeks to rely on the ratio set in *Spencer v Taylor* they are in fact relying on 21(1) and not on 21(4). Therefore when terminating a periodic tenancy which follows a fixed term assured shorthold tenancy without specifying 'the last day of a period of the tenancy' it is, strictly speaking, incorrect to attempt to rely on 21(4), and, while I believe that this is still common practice, that common practice is incorrect.

The safest course of action when terminating a periodic tenancy which follows a fixed term assured shorthold tenancy is, in my view, simply not to specify a subsection at all; to do so is surplus to requirements. Further the case of *W v T* shows that there can be negative costs consequences for claimant landlords who get the notice wrong.

Lastly, it is perhaps open for discussion whether Lewison LJ's interpretation of section 21, and particularly 21(2), reads too much into the actual wording of the statute, and goes against the grain of what had been thought to be a relatively straightforward two-option statutory scheme for termination. However that discussion is a matter for another court, and, unless and until this issue is addressed again, the law, as it stands, is clear.

Adam Boyle
St John's Chambers

Adam.Boyle@stjohnschambers.co.uk

*Since Adam wrote this article it is his understanding that section 21 has been amended and that, put more generally, the law in this area has changed. Thus this article should be read for background only – and not relied upon as a statement of the current law.