Infosheet | Tenant Fee Act. Historic Fees

In this infosheet, we examine how the Tenant Fees Act applies to earlier tenancies, by examining a case which was considered by the Court of Appeal earlier this year. The tenant's challenge centred on a check-out fee which was paid at the start of a previous tenancy, that the tenant believed invalidated the Section 21 served.

In Switaj v McClenaghan, the Court of Appeal considered whether a payment made by a tenant under an earlier tenancy agreement, which began before the Tenant Fees Act 2019 came into force, could retrospectively invalidate a Section 21 notice served under a subsequent tenancy.

The landlord had previously received fees, including check-out fees, which were lawful at the time. However, the tenant believed the landlord should be barred from serving a Section 21 Notice under a subsequent tenancy if those same fees would now be considered "prohibited payments" under the Tenant Fees Act 2019.

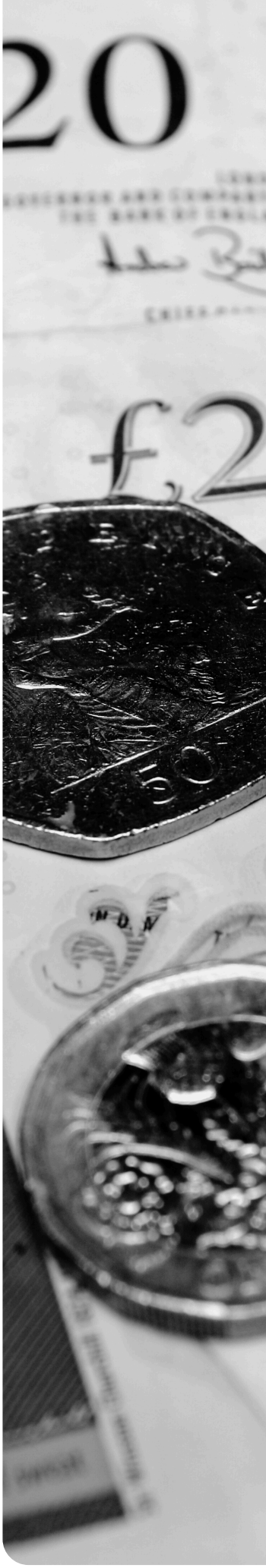
In short, the case considered:

Can a previously lawful fee, charged upfront but tied to the end of the tenancy, undermine a Section 21 notice served years later?

Case Background

- The tenant, Ms Martyna Switaj, originally signed an AST in April 2018, before the Tenant Fees Act 2019 came into force.
- Under that tenancy, she paid several fees that were common at the time, including an administration fee for renewal and a check-out fee for the end-of-tenancy inventory.
- A new tenancy was granted in 2019, after the Tenant Fees Act had started to apply, meaning those kinds of fees were now considered prohibited payments under the new law.
- Later, the landlord, Mr Adrian McClenaghan, served a Section 21 notice to regain possession.
- The tenant challenged the Section 21 Notice, arguing that because the landlord never refunded the check-out fee paid under the previous tenancy, he was now in breach of the Act.

She pointed to Section 17 of the Tenant Fees Act, which says a Section 21 notice cannot be served if a prohibited payment has been made and not repaid.



SECTION 17(3), TENANT FEES ACT 2019

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No section 21 notice may be given in relation to the tenancy so long as all or part of the prohibited payment or holding deposit paid in breach of section 1 or 3 has not been repaid to the relevant person

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Although, Section 17(3) doesn't explicitly state that the rules only refer to payments made after the Tenant Fee Act was passed into law, the judges made it clear that this is the only legally sound interpretation; they decided that the old fee didn't make the new notice invalid.



However, Ms Switaj maintained that the retention of the check-out fee still broke the rules, and so she took the case to the Court of Appeal.

What Did The Court Of Appeal Decide?

The tenant argued that by keeping the check-out fee, which is now a prohibited payment, this breached the Tenant Fees Act 2019 and should block the use of a Section 21 notice. However, the Court of Appeal sided with the landlord, confirming that the check-out fee paid under the earlier tenancy did not make the Section 21 notice under the new tenancy invalid.



This is what the judges clarified:

- The check-out fee was lawful when it was paid in 2018, so it wasn't a breach of the Act.
- The Act only applies from June 2019 onwards - it doesn't work backwards to rewrite the rules for tenancies that existed before then – even when the nature of these fees are to be applied at the end of the tenancy.

Lord Justice Lewison noted that applying the Act retrospectively would be legally unsound and would create confusion for both landlords and tenants.

The Section 21 notice remained valid.

Why The Case Matters

- Historic payments won't come back to bite | This case gives reassurance to landlords and agents who operated within the law before June 2019, when the Tenant Fees Act came into force. So long as fees were charged lawfully at the time, they cannot later be used to disqualify a Section 21 notice.
- Clarity around renewals and tenancy cycles | Many tenancies have been renewed multiple times, and agents often act for long-standing landlords. This case confirms that each tenancy must be assessed on its own terms - and that the Act doesn't apply retroactively.
- Tenant Fee Act enforcement still matters | While this case ruled in favour of the landlord, it underscores the importance of compliance.

Any prohibited payment taken after June 1, 2019, must be repaid in full before a valid Section 21 notice can be served.



What Should Agents Do?

1. **DOUBLE-CHECK RECORDS**

   While this case removes concerns about historic lawful fees, it's still important to ensure no prohibited payments were made under current tenancies.

2. **AUDIT RENEWAL PRACTICES**

   If you're involved in renewals or tenancy extensions, make sure no legacy charges are being carried forward into newer agreements.

3. **ADVISE LANDLORDS CAREFULLY**

   Help your landlords understand that although this case works in their favour, any misstep under current law can still invalidate future Section 21 notices.

Switaj v McClenaghan may seem like a technical case, but it is a very important reminder about how precise legal interpretation can make or break possession proceedings.

It also highlights how important it is to understand the timeline of legislative change when navigating ASTs and Section 21 notices.

BOX

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