Running out of gas…

Housing Update - Section 21 Notices

Introduction

In a long-awaited judgment handed down on 18th June 2020, the Court of Appeal held (2:1) in *Trecarrell House Limited v. Patricia Rouncefield* [2020] EWCA Civ 760 *("Rouncefield")* that a failure to provide a gas safety certificate to a new tenant prior to them taking up occupation can be rectified by later service so as to enable the landlord to serve a section 21 notice.

This issue has troubled landlords for some time and has been the subject of a high-profile County Court decision[1] which had, until now, suggested that the opposite was the case and that this failure could not be remedied meaning that a 'no fault' section 21 notice could never be relied on. In essence, this had the effect of converting an assured shorthold tenancy ("AST") to an assured tenancy as the landlord could only recover possession if it could establish one of the grounds for possession set out in Schedule 2 to the Housing Act 1988.

Although the Court of Appeal decision brings welcome clarity, it leaves unanswered a number of questions. It is therefore unlikely to be the end of the matter in this technical area of law.

The Facts

In February 2017, Trecarrell House Limited granted Patricia Rouncefield an assured shorthold tenancy of a flat which was heated by a gas boiler located elsewhere in the building. The landlord failed to provide a gas safety certificate prior to the tenant going into occupation. The landlord subsequently (in November 2017) provided a gas safety certificate dated 31st January 2017 and proceeded to serve a section 21 notice and then issued possession proceedings. The tenant defended the claim on the basis that the section 21 notice was invalid because no gas safety certificate had been provided prior to her taking up occupation.

[1] *Caridon Property Ltd v Shooltz*, Central London County Court (2nd February 2018)

Statutory Framework

As the outcome of the case rested on the interpretation of various inter-related statutory provisions, it is helpful to set them out in order to put the decision of the Court into context:

Section 21 Housing Act 1988

Under section 21 of the Housing Act 1988 (as is currently in force), a landlord may obtain possession of premises let on an assured shorthold tenancy simply by giving to the tenant the relevant period of notice in writing stating that he requires possession. Where a valid section 21 notice has been served, no ground for possession need to be established by the landlord. Nor does the Court have to be satisfied that it is reasonable to make the possession order.

However, over the years Parliament has been incrementally introducing various statutory qualifications which restrict the ability of a landlord to serve a section 21 notice. These include:

(a) Section 21(1A) and (1B) which prevent the Court from making a possession order unless the landlord has given its tenant at least six months' notice in writing.

(b) Section 212-215 of the Housing Act 2004 which prevent the service of a section 21 notice where a deposit is not being held in accordance with an authorised tenancy deposit scheme or the landlord has failed to comply with prescribed requirements; and

(c) Section 38 and 39 of the Deregulation Act 2015 which inserted a new section 21A and 21B into Housing Act 1988. It is section 21A which this decision was concerned with.

Section 21A Housing Act 1988

Section 21A of the Housing Act 1988 provides:

21A Compliance with prescribed legal requirements

(1) A notice under subsection (1) or (4) of section 21 may not be given in relation to an assured shorthold tenancy of a dwelling-house in England at a time when the landlord is in breach of a prescribed requirement.

(2) The requirements that may be prescribed are requirements imposed on landlords by any enactment and which relate to—

(a) the condition of dwelling-houses or their common parts,

(b) the health and safety of occupiers of dwelling-houses, or

(c) the energy performance of dwelling-houses.

(3) In subsection (2) "enactment" includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978.

(4) For the purposes of subsection (2)(a) "common parts" has the same meaning as in Ground 13 in Part 2 of Schedule 2.

Pursuant to section 21A(2)(b), the Secretary of State has made regulations that specify which regulations are to be treated as prescribed requirements for the purposes of section 21A. In particular, Regulation 2 of the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 ("the 2015 AST Regulations") stipulates that:

(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(2) (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.*** [Emphasis added]

<u>Gas Safety (Installation and Use) Regulations</u>

The Gas Safety (Installation and Use) Regulations 1998 ("the Gas Safety Regulations") is a comprehensive code governing the installation and maintenance of gas appliances and pipework in residential buildings. Failure to comply with the Gas Safety Regulations may give rise to a criminal offence. It is therefore imperative that a landlord complies with the same and ensures, in particular, that the gas installations are routinely checked and kept safe.

Regulation 36 imposes obligations on the landlords of residential premises to take a number of steps to ensure that the appliances are maintained in a safe condition and are regularly inspected. Regulation 36(3) places a statutory obligation on a landlord to complete annual gas safety inspections. Regulation 36(6) and (7), which are specified to be prescribed requirements for section 21A by Regulation 2 of the 2015 AST Regulations, state as follows:

> *(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.* [Emphasis added]
>
> *(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.*

Possession Hearing

At the hearing of the possession claim in the Truro County Court on 13th September 2018, District Judge Rutherford held that Regulation 36 of the Gas Safety Regulations had no application either because there was no gas appliance in the flat which Ms Rouncefield occupied or because the time limit prescribed in Regulation 36(6)(b) for the provision of the certificate *("before the tenant begins to occupy"*) was not a bar to late compliance.

As the landlord had served the gas safety certificate late (in November 2017) but prior to the section 21 notice (in May 2018), the District Judge concluded that the section 21 notice was valid. Accordingly, the District Judge made a possession order. Ms Rouncefield appealed.

County Court Appeal

At the hearing of Ms Rouncefield's appeal before His Honour Judge Carr on 13th February 2019, it was common ground that Regulation 36(7) applied where no gas pipe or installation is situated within the flat but the flat is supplied with hot water by means of an external gas boiler. The landlord therefore accepted that Regulation 36(6) and (7) were in fact engaged.

On the question of whether late compliance in relation to Regulation 36(6)(b) and (7) enabled the landlord to serve a section 21 notice, Judge Carr concluded that it did not and that the failure to provide the gas safety certificate prior to the tenant's occupation was a fatal breach. In reaching this conclusion he adopted the reasoning of the well-regarded housing specialist, His Honour Judge Luba QC, in *Caridon Property Limited v Shooltz* (2nd February 2018).

The facts in *Caridon Property Limited v Shooltz* were strikingly similar to *Rouncefield.* Mr Shooltz was an assured shorthold tenant. His landlord failed to serve him with a gas safety certificate until 11 months after the tenancy started. The landlord then served a section 21 notice and issued possession proceedings. The claim was dismissed by District Judge Bloom on the basis that a prescribed requirement of the 2015 AST Regulations had not been compiled with and therefore the section 21 notice was invalid. The landlord appealed. Rejecting the landlord's appeal, Judge Luba QC concluded that:

(i) Regulation 36(6)(b) of the Gas Safety Regulations must be compiled with at the start of the tenancy prior to the tenant taking up occupation of the property;

(ii) This was a 'once and for all' chance for the landlord to get it right. The failure to serve the gas safety certificate at the outset thus rendered the section 21 notice invalid. Furthermore, no section 21 notice could be served at any time;

(iii) Any other interpretation could allow landlords to let dangerous and unchecked premises which had not compiled with regulations in place to protect tenants.

Both Judge Luba and Judge Carr therefore concluded that the requirement for the gas safety certificate to be provided to the tenant prior to taking up occupation should be strictly applied and that the later service or display of the relevant gas safety certificate is insufficient to free the landlord from the embargo on the service of a section 21 notice imposed by section 21A.

Both of those decisions were routinely cited by tenants in defence to possession proceedings where landlords had fallen into the same trap as Caridon Property Limited and Trecarrell House Limited and led to the dismissal of possession claims were the gas safety certificate had not been served prior to the tenant's occupation, even where it had been served late.

A number of other possession claims were stayed when it came to light that the landlord in *Rouncefield* was granted permission to appeal to the Court of Appeal. The Court of Appeal hearing was listed in January 2020 but judgment was not handed down until June 2020.

Court of Appeal Judgment

In a two-to-one majority decision, the Court of Appeal overturned the decision of Judge Carr in the Court below (and the decision of Judge Luba QC in *Caridon Property Limited v. Shooltz)* and held that the landlord could in fact rectify the situation by late service of the certificate.

The issue going to the heart of the appeal concerned the interpretation of Regulation 2(2) of the 2015 AST Regulations and its interplay with the Gas Safety Regulations. It is clear from the fact that this was a split decision that the Court of Appeal did not find this an easy task.

Giving the leading judgment, Molston LJ concluded that *"although the point was not straightforward"* the obligation to provide the gas safety certificate to a new tenant prior to them taking up occupation can be complied with late. As he pointed out at paragraph 30: *"Late delivery of the document does provide the tenant with the information he needs"*.

On the other hand, if a breach has the consequence for which the tenant contended then that must apply in every case of late delivery even if the delay is only minimal. He considered this was unlikely to have been Parliament's intention. The time when the landlord *"is <u>in</u> breach"* of paragraph (6)(b) thus ends for the purposes of section 21A once the certificate is provided.

Agreeing with Molston LJ's interpretation of Regulation 2(2), King LJ further highlighted that:

i. All the other prescribed requirements are capable of being remedied including in relation to the provisions in respect of the protection of a tenant's deposit.

ii. The bar to the service of a section 21 notice is collateral to the criminal sanctions and therefore section 21A is not the primary sanction for non-compliance.

iii. The landlord has no obligation to provide the gas safety certificate prior to the granting of the tenancy, the right to see the certificate arises only once a person has become a tenant. The reference in Regulation 2(2) to the *"obligation on a landlord to give a copy of the relevant record to the tenant"* thus applies equally to Regulation 36(6)(b) (new tenant) as to Regulation 36(6)(a) (existing tenant).

iv. Whilst the words *"at a time when"* in section 21A(1) give no clear guidance as to what the landlord must do in order to cease to be in breach of the requirement in question, what it does do is anticipate that a landlord may do something which will enable him to cease to be in breach of the requirement.

v. That 'something' in relation to gas safety certificates is found in Regulation 2(2) and is to *"give a copy of the relevant record to the tenant"* and applies by its specific reference to Regulation 2(1)(b), to both Regulation 36(6)(a) and (b).

It is apparent from her judgment that King LJ was particularly persuaded by the disparity of sanction between the failure to serve a gas safety certificate prior to occupation and the implications for a landlord being unable to ever serve a section 21 notice. As she said at paragraph 40: *"If the proper interpretation of regulation 2(2) of the 2015 Regulations means that a landlord cannot put right his omission to comply with regulation 36(6)(b) then, notwithstanding that all proper gas safety checks may have been completed and the failure be the result only of an administrative oversight, the consequence of that error is that that landlord, can no longer rely on the "no fault/notice only" ground for possession under s21 Housing Act 1988, a procedure which goes hand in hand with the form of shorthold tenancy agreed and entered into between the tenant and landlord. Instead, the tenant's assured shorthold tenancy becomes a fully assured tenancy with accompanying security of tenure."*

By a majority (Moylan LJ dissenting), the Court of Appeal therefore concluded that a section 21 notice could be given so long as the landlord had, at any time before service of the section 21 notice, given the tenant a copy of the certificate which was in force before they entered into occupation, and a copy of any further certificate which related to a subsequent inspection. It was thus immaterial that the January 2017 certificate had not been given to the tenant until November 2017. There was, however, a factual dispute as to whether the 2018 certificate had been provided and that was remitted for consideration by the County Court.

The line of defence which has previously open to tenants in a similar situation to Ms Rouncefield and Mr Shooltz has therefore just run out of gas. As noted at the outset, however, the Court of Appeal's judgment still leaves a number of questions unanswered.

<u>Unanswered Questions</u>

The first immediate question left unanswered by the Court of Appeal's decision in *Rouncefield* concerns what happens when no gas safety check was undertaken by the landlord prior to the commencement of the tenancy. In both *Rouncefield* and *Shooltz*, a gas safety check had been undertaken but the landlord had simply failed to provide it to the tenant until later.

However, there are likely to be a number of cases where a landlord was unaware of the obligation to undertake a check, or simply failed to arrange one, and only becomes aware later when they wish to serve a section 21 notice. In that case, the question which arises is whether the landlord can simply undertake the check late and then provide the certificate?

If the landlord can, it means that a landlord could potentially let a dangerous property which has not been checked from a gas safety perspective but then undertake a check subsequently and serve a late certificate simply to enable them to serve a section 21 notice. This appears to be stretching the interpretation of the 2015 AST Regulations too far in the writer's view.

It would therefore be a risky course of action for a landlord to adopt and it is advisable for all landlords to ensure that a gas safety check is undertaken prior to the start of a tenancy as well as at 12 monthly intervals as required by Regulation 36 of the Gas Safety Regulations.

In other cases, the landlord may have undertaken the gas safety check prior to the start of the tenancy but has no longer retained a copy and therefore is unable to provide it. Does that mean that the landlord is unable to comply with Regulation 36(6)(b) even though the check was undertaken? On a strict interpretation, it would seem to be the case as the landlord is not in a position to provide the tenant with the gas safety certificate, even late.

However, that does not seem to sit well with the fact that the landlord is only required by statute to retain a copy of the gas safety record for a period of 2 years (Regulation 36(3)(c)) whereas the assured shorthold tenancy may have been running for a number of years by the time that the landlord comes to serve a section 21 notice. A landlord may therefore be forgiven for destroying gas safety records after 2 years upon reading Regulation 36(3)(c) but then find themselves unable to comply with Regulation 2(1)(b) of the 2015 AST Regulations.

The other question which arises concerns what happens if the landlord simply fails to complete the annual gas safety inspection so that there is no certificate to provide. Notably, the duty to actually undertake an annual safety inspection (Regulation 36(3)) is not a prescribed requirement for the purposes of section 21A, as was recognised in *Rouncefield*.

A landlord could therefore potentially not undertake an annual gas safety inspection and then argue that they have not failed to "give" the gas safety certificate as no check has been undertaken, and therefore there has been no actual breach of a prescribed requirement.

Such an argument is likely to be met with little sympathy and one would expect the Court to give it short shift given that it would involve the landlord seeking to rely upon its own wrongdoing. Such a course of action is therefore strongly advised against. The scope for a potential argument does, however, highlight again how the various regulations are open to interpretation. In reality, they would benefit from amendment to make the position clearer.

Whatever the potential impact on the landlord's ability to serve a section 21 notice, it must be remembered that the failure to comply with the Gas Safety Regulations may be met with criminal sanctions, as well as putting the tenant, any other occupants and neighbours at risk.

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