A Licence to be Loose? Consequences of the Court of Appeal's decision on gaps in gas safety certificates in Trecarrell House Ltd v Patricia Rouncefield [2020] EWCA Civ 760

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1. It was the Court of Appeal's turn to consider the somewhat gnomic provisions governing the effect of failing to provide gas safety certificates to tenants upon a landlord's ability to make use of the s21 possession procedure.

2. The central issue in question was whether, in order to make use of the s21 procedure, it was a requirement that a gas safety certificate be provided to the tenant before they came into occupation, or whether a failure to do so could be remedied by service of the certificate prior to the s21 notice being served.

3. The issue had fairly recently been considered on appeal by HHJ Luba QC in Caridon Property Ltd v Schooltz, who had concluded that the failure to provide a certificate before the tenant came into occupation was irremediable and that, in those circumstances, a landlord is limited to the use of the s8 procedure and making out a relevant ground for possession.

4. In this case, Ms Rouncefield ("the Tenant") had succeeded in her appeal to HHJ Carr, with reliance placed in that judgment upon the decision in Caridon. Trecarrell House ("the Landlord") now appealed that decision.

Factual Background

5. The relevant facts can be briefly put. The Tenant had entered into an assured shorthold tenancy with the Landlord commencing on 20 February 2017. The relevant gas safety checks had in fact been carried out on 20 January 2017, but the record of the check was only provided to the Tenant in November 2017. On the Landlord's case, a further check

was carried out on 3 February 2018, although erroneously dated 3 April, and provided to the Tenant shortly after that date.

6. On 1 May 2018 the Landlord served a s21 notice on the Tenant.

Legal Background

7. s21(1) of the Housing Act 1988 provides for a possession order to be made upon a valid notice having been served on a tenant of an assured shorthold tenancy. s21A and 21B of that Act provide for circumstances in which a such a notice may not be given. Notably, the language used is that a notice may not be given "at a time when" the landlord is in breach of one of the requirements set out in those sections.

8. Those requirements include those in the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 ("the AST Notices Regulations"), regulation 2 of which includes that:

> *2 (1) Subject to paragraph (2), the requirements prescribed for the purposes of section 21A of the Act are the requirements contained in—*
>
> *[…]*
>
> *(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.*

9. Paragraph 6 of regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 ("the Gas Regulations") reads 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.

10. The record "made pursuant to the requirements of paragraph (3)(c)" is the record of each check of a gas appliance or flue, which is required by paragraph 3(a)) to be carried out every 12 months.

11. Paragraph 7 of the regulations, which applied in this case, relates to situations where there is no gas appliance in the room(s) being let but where there are in the premises as a whole (a gas boiler in an HMO, for instance). It relies upon paragraph 6 for determining when records must be displayed in the premises (with a copy provided on request) rather than, as per paragraph 6, provided to the tenant.

12. The difficulty faced by the Court of Appeal is that the AST Notices Regulations (at regulation 2(2)) appears to disapply a 28 day time limit which does not in fact exist for new tenants, who under the Gas Regulations need to be given a copy of the most recent record *before they have taken occupancy*.

13. The interpretation of the two sets of regulations which had been taken in Caridon and in this case on its first appeal is that in order for a valid s21 notice to be served there is a requirement for new tenants to have been provided a copy of the current record before taking up occupancy, but any subsequent records may be provided at any time prior to the service of the s21 notice.

The Court of Appeal's Reasoning

14. LJ Patton, with whom LJ King agreed, diverged from this reading in allowing the landlord's appeal. The result of regulation 2(2) of the AST Notices Regulations is to disapply the 28 day limit in paragraph 6(a) and *also* disapply the requirement in paragraph 6(b) that the record be provided before the tenant commences occupancy.

15. The majority was particularly exercised by the apparent discrepancy created between the sanction on a landlord who fails to provide a record prior to occupancy and one who fails to provide a record in relation to a later check once occupancy has commenced. The former can never remedy their situation, while the latter can simply serve the

relevant record. It was difficult to see, Patton LJ suggested, what the policy purpose could be for such a discrepancy.

16. A further issue was the wording of s21A that notices may not be served "at a time when" the landlord was in breach of the relevant requirement, which suggests the possibility of remedying any breach (and indeed breaches of other requirements explicitly allow for remedy such that a valid notice can then be served).

17. Also relevant was the way in which the s21A and the AST Notices Regulations "piggy back" upon the pre-existing requirement on landlords to comply with the Gas Regulations. The inability to serve a s21 notice was, in the view of both Patton LJ and King LJ, merely a "collateral" sanction to those already existing for breach of health and safety regulations, and (on the evidence of at least the 28-day time limit being disapplied) not one intended to be applied with the same vigour as those primary obligations.

18. In coming to its conclusion, the court rejected a further argument proposed by the Landlord that regulation 2(2) of the AST Notices Regulations, for its own purposes, not only disapplied a time limit in respect of paragraph 6(b) but obviated it entirely. The Court's reasoning, set out at paragraph 19, relies (in part) upon the unlikelihood of that effect being intended given the actual wording of regulation 2(2) when far clearer provision could have been made if that had been the intention.

Moylan LJ's Dissenting Opinion and Commentary

19. On the central issue of this appeal the dissenting opinion of Moylan LJ, the crux of which appears at paragraph 61, seems a powerful one. Regulation 2(2) specifically disapplies a 28 day time limit, not time limits in a more general sense. The use of the phrase "that requirement" in regulation 2(2) seems to limit the scope of the words that precede it to provisions to which the 28 day time limit would otherwise apply, which can only refer to paragraph 6(a). Just as with the majority's treatment of the Landlord's further argument (outlined in the paragraph above), it seems difficult to see why parliament would have chosen to specifically refer to a 28 day time limit when it intended to refer to any time limits whatsoever.

20. Moylan LJ acknowledged the apparent inconsistency in the sanctions created by this reading, but preferred this to what he saw as being the alternative result: that the regulations do not create much of a sanction at all.

An Unprincipled Discrepancy in Sanctions?

21. It does not seem, however, that the inconsistency of sanction, if intended, would necessarily be altogether unprincipled. Both the majority and dissenting judgments considered the relative benefits received by the tenant of receiving the relevant records (a) prior to taking up occupancy and (b) while in occupancy, and appeared to consider those benefits to be broadly similar.

22. Patten LJ observed that one potential basis for the difference in approach, that potential tenants be given the relevant information prior to entering into the tenancy, is undermined by the fact that paragraph 6(b) requires that the record be provided to the tenant prior to occupation but not prior to the tenancy actually being entered into. Still, however, 6(b) might serve a particular purpose of putting new tenants on notice of a potential breach of the Gas Regulations before they actually occupy the premises and expose themselves to any potential risk.

23. A breach of this requirement might be considered more serious given that new tenants, unless provided with previous records, have no way of knowing when (if at all) the property was last checked for safety. By comparison a tenant not provided with updating records within a tenancy can draw some security from the records which they do have. They are also generally in a better position to remedy the situation, given that:

    a. they have already received at least one relevant record stating the date by which a further check must be carried out (a point made by counsel for the Tenant in this case);

    b. In most cases, are likely to be aware of any such checks having been carried out (or not) given the need for the landlord to give them notice to allow for the relevant check to take place.

24. In addition, any sanctions attached to a system of regulation can (and arguably should) also consider the burden upon the person who is regulated. By disapplying the strict approach to time limits for ongoing tenancies, parliament might simply have been acknowledging that minor breaches (such as a failure of service) might more readily occur in the middle of a tenancy than at its outset when the landlord's mind might reasonably be expected to be particularly focussed upon such matters.

25. It is far from clear that such principles were in fact in the mind of the drafter of the AST Notices Regulations, and it is not the purpose of this article to argue either that the

disparity in sanction that existed before this case was justified on a policy basis. However, the court seems too quickly to have adopted a construction of the regulations which is highly strained in light of apparent inconsistency in sanction which may in fact have a principled basis.

Further Issue Decided: Gaps in Compliance with Gas Regulations

26. The Court also determined a matter raised by the Tenant, that the gap between the two gas safety checks carried out (even on the landlord's case) was greater than the 12 month period required by the Gas Regulations and this in itself resulted in paragraph 6(a) being breached.

27. This argument relied upon the wording of paragraphs 3(a) and (c) of the Gas Safety Regulations, set out below:

> *(3) Without prejudice to the generality of paragraph (2) above, a landlord shall—*
>
> *(a) ensure that each appliance and flue to which that duty extends is checked for safety within 12 months of being installed and at intervals of not more than 12 months since it was last checked for safety (whether such check was made pursuant to these Regulations or not);*
>
> *(b) […]*
>
> *(c)ensure that a record in respect of any appliance or flue so checked is made and retained for a period of 2 years from the date of that check […]"*

28. It is records made "pursuant to **the requirements of 3(c)**" that must be served on tenants by paragraph 6. The requirements of 3(c) are that appliances or flues be "so checked" (i.e. in accordance with paragraph 3(a)). Paragraph 3(a) requires a check within 12 months of the last.

29. On the interpretation advanced by the Tenant, the requirement of paragraph 6(a) would become impossible to fulfil once the 12 month limit had been breached: there are no records satisfying the relevant description, being of appliances that have been "so checked", that *could* be served.

30. The court rejected this argument. "So checked" simply meant checked for safety, not within 12 months of the previous check. Otherwise, the court reasoned, if the 12 month limit were breached, the obligation to make and retain the records created by paragraph

3(c) would itself fall away – there again (on this interpretation) being no records meeting the relevant description.

31. The AST Notices Regulations specify only that the requirements of paragraphs 6 (or 7) of the Gas Safety Regulations are met. This involves providing records meeting the requirements of 3(c), but the requirements of 3(a) are not imported into them. A failure to meet the requirements of paragraph 3(a) may be subject to its own sanctions but will not in itself prevent the serving of a valid s21 notice.

32. Although the court's reasoning on this point is difficult to impeach on a natural reading of the provisions, it risks driving a coach and horses through their purpose. Although the gap in this case was minor (the check being carried out sometime between February and April 2018 rather than by January 20th of the same year), the reasoning would apply equally to a much larger infraction.

Unintended Consequences?

33. To return to the wording of the Gas Regulations, the requirements in paragraph 6 itself is only that, for new tenants, the *last* (i.e. latest) record is provided, and for any updating check, that the record of that check is provided to tenants.

34. In the case before the court, there was a record relating to check made within 12 months of the beginning of occupancy and a (different) record of a check within the 12 months prior to the s21 notice being served. However, it seems far from clear that, based upon the interpretation given to the legislation, a landlord would be prevented from serving a s21 notice even if these records did not exist.

35. Let us take the scenario where the landlord had provided to a tenant a copy of the latest check before the tenant occupied the property, carried out shortly beforehand, but then simply failed to carry out checks over a period longer than 12 months. They then serve a s21 notice. Which limb of paragraph 6 has been breached? Not 6(b), clearly. But nor, it seems, 6(a) as there is no further record pursuant to the requirements of 3(c) which can be served and the breach of 3(a) is not relevant.

36. The only way, I suggest, to read paragraph 6(a) as requiring not only the service of records which happen to exist, but also actually requiring those records to exist at all, is to interpret that paragraph in exactly the way suggested by the Tenant in this case and rejected by the court.

37. Similarly, let us take us the scenario where, at the point of occupancy for a new tenant, the last check was made more than 12 months ago. The record for this check remains the *last* record for the property (as per paragraph 6(b)), and on a literal reading paragraph 6(b) would appear to be satisfied upon this out-of-date notice being provided before occupancy – and for the purposes of the AST Notices Regulations, at any point prior to the s21 notice being served.

38. The net effect would appear to be that, so long as tenants are provided with records of any checks actually carried out, a subsequent s21 notice will be valid. A failure to actually carry out those checks (whether in accordance with paragraph 3(a) or at all) is irrelevant for the purpose of the validity of that notice.

39. Of course, as the court was at pains to explain, the AST Notice Regulations are not the only or even principal sanction for non-compliance with the Gas Regulations. A landlord is in breach of the Gas Regulations *in themselves* if the checks are not carried out within 12 months of the last. It is simply the further sanction of being unable to make use of s21 to seek possession which does not bite in these circumstances.

40. However, the purpose of Parliament in attaching this additional sanction to non-compliance was, I suggest, as a further "stick" to ensure substantive compliance with the relevant gas safety regulations and not a merely procedural requirement to provide whatever documentation happens to exist. s21A(2) refers to requirements imposed on landlords which "relate to […] the health and safety of occupiers of dwelling-houses", and not those which relate to the *provision of information* about their health and safety. This approach is consistent with that taken in relation to deposit protection schemes, which have their own enforcement regime but also prevent the use of s21 when there is an unremedied breach of the substantive provisions.

41. The only way of construing regulation 2 of the AST Notices Regulations while preserving this purpose is, as suggested by the Tenant in this case, to interpret the requirement that paragraphs 6 and 7 be complied with as *also* involving substantive compliance with the requirements attaching to the processes by which those records were produced (i.e. those in paragraph 3).

42. This is, perhaps, a stretch from the natural reading of the AST Notices Regulations, which refer specifically to paragraphs 6 and 7 alone. It would have been open to the parliament to explicitly link the use of s21 to compliance with other paragraphs of the Gas Safety Regulations, which it did not do. It does not seem, however, any more of a

stretch than that adopted by the majority in its interpretation of those same regulations in respect of the principle issue in this appeal.

43. The result of the decisions on these two issues mean that we appear to have moved from a situation where even a procedural failure on the landlord's part can prevent a s21 notice being served, to one where even significant (and even ongoing) substantive failures do not.

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