The Court of Appeal on gas safety and s21: *Trecarrell House Limited v Patricia Rouncefield* [2020] EWCA Civ 760

Yesterday the Court of Appeal handed down judgment in *Trecarrell House Limited v Patricia Rouncefield* [2020] EWCA Civ 760, having been asked to rule on the much-debated issue of whether a landlord's failure to provide a gas safety record ("GSR") prior to a tenant commencing occupation is a 'once and for all' breach of the prescribed requirements which bars the landlord from serving a s21 notice (and thereby bringing about a no-fault eviction) indefinitely.

By a 2-1 majority (Patten and King LJJ, Moylan LJ dissenting) the Court held that where a landlord has previously obtained a GSR which is still in-date when the tenant moves in, but only provides a copy to the tenant after the tenant has commenced occupation - thereby committing a breach of the Gas Safety (Installation and Use) Regulations 1998 - it is possible for the landlord to cure its breach (by providing the GSR late), insofar as his ability to serve a s21 notice is concerned.

Gas safety and s21: the legislative regime

As was acknowledged by the Court of Appeal, the legislative scheme which establishes the giving of a GSR as a precondition to service of a s21 notice is "*awkward*".

The relevant primary legislative provision is s21A of the Housing Act 1988 (inserted by ss38 and 39 of the Deregulation Act 2015). S21A(1) provides that a s21 notice "*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*". Provision is made by s21B for the Secretary of State to specify which regulations are to be treated as prescribed requirements.

The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 ("the AST Regs") is one such set of regulations, and provides as follows:

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

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(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.*

Paragraph 6 of regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 ("the Gas Safety Regs") requires every landlord to ensure that:

(a) *a copy of the record made pursuant to the requirements of paragraph 3(c) above* [para 3(c) requires the landlord to ensure that a record in respect of any appliance/flue checked for gas safety, which is supposed to take place every 12 months, (i) is made and retained for 2 years and (ii) contains specific information, including the date of the check] *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*

Paragraph 7 applies where there is no relevant gas appliance in any room occupied by the tenant (in which case the landlord can, rather than giving the GSR to the tenant, ensure that a copy is displayed in a prominent position in the premises).

Trecarrell House Ltd v Rouncefield: the facts

In *Trecarrell* itself, the landlord had obtained a GSR dated 31 January 2017. The tenant was granted an AST of the premises on 20 February 2017 and had moved into the flat but was not given a copy of the GSR (nor was a copy displayed in a prominent position on the premises) beforehand.

A copy of the January GSR was given to the tenant months later, in November 2017.

A further gas safety check was carried out and a further GSR, dated 3 April 2018, was provided to the tenant in early April 2018. However, it then transpired that that more recent check had actually been undertaken on 2 February 2018, not 3 April, and that as a result the April GSR bore the wrong date.

The landlord then gave the tenant a further GSR, bearing the correct date of 2 February 2018, but there was a dispute as to whether this new GSR had been given before or after service of the s21 notice on 1 May 2018.

The main issue

The main conundrum for the Court of Appeal to consider (namely whether the landlord's initial failure to provide the GSR before the tenant commenced occupation meant that it was forever barred from serving a s21 notice) has long vexed practitioners who frequent possession lists.

It arises because whilst regulation 2 of the AST Regs expressly disapplies the 28-day period for compliance with the requirement for a landlord to provide a copy of any new GSR to an existing tenant (so it will suffice for the GSR to be given late), no equivalent saving provision is made in respect of the requirement to provide a GSR to a new tenant before he/she/they commences occupation.

As such, on the face of the regulations, it is arguable (and has been accepted by various County Court judges, including HHJ Luba QC in *Caridion Property Limitd v Shooltz*) that a failure to provide a new tenant with a GSR before occupation commenced will - forever more - render the landlord in breach of a prescribed requirement and unable to serve a s21 notice.

However, that appears to be such a drastic sanction (effectively converting the AST which both parties had intended into a full-blown assured tenancy) that many have queried and/or rejected the correctness of such an interpretation of the regime. Such severity seems particularly disproportionate when compared to the leniency expressly afforded by the AST Regs to landlords in breach of the requirement to provide updated GSRs to existing tenants.

The decision of the majority

Patten LJ ultimately rooted his decision that the landlord's breach was remediable firmly in the wording of the statutory regime (identifying the "*correct source of the remediable nature of a*

breach of paragraph 6(b)" of the Gas Safety Regs as Reg 2(2) of the AST Regs, and not, as the landlord had suggested, s21A of the 1988 Act), but it seems clear from his judgment that the drastic consequences which would arise were the Court to decide otherwise were powerful driving forces towards that conclusion.

King LJ, who gave a short concurring judgment, provided a helpful list of the factors which had ultimately persuaded her to agree with Patten LJ that the landlord's breach ought to be considered remediable. These were as follows:

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 whereby by virtue of section 215(2A)(a) Housing Act 2004, if the landlord returns the deposit to the tenant he may then serve a s.21 notice.*

ii) *The bar to the service of a s21 notice is collateral to the criminal sanctions under s.33 Health and Safety at Work etc. Act 1974 and therefore s21AHA 1988 is not the primary sanction for non-compliance.*

iii) *The landlord has no obligation to provide the GSR prior to the granting of the tenancy, the right to see the GSR 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" therefore applies equally to regulation 36(6)(b) (new tenant) as to regulation 36(6)(a) (existing tenant)* [thereby negating one proffered explanation of the distinction which would otherwise arise between new and existing tenants: that the gas safety or otherwise of the premises might be a factor in a prospective tenant's decision to enter into a tenancy agreement]

iv) *Whilst the words "at a time when" in s21A(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 GSRs 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) of the 2015 regulations, to both regulation 36(6)(a) and (b)."*

Moylan LJ's dissenting judgment

By contrast, Moylan LJ was ultimately unpersuaded that these considerations justified a departure from what he considered to be a "*plain reading*" of the legislation.

Further issues

There were two further issues the Court was required to consider, which were raised by way of respondent's notice.

First was the tenant's argument that the fact that the 2 February 2018 check took place more than 12 months after the 31 January 2018 check invalidated the s21 notice. This was rejected by the majority (Moylan LJ said that he would prefer to wait until it had been properly raised and argued fully before deciding the point). The requirement to carry out checks every 12 months was contained within regulation 36(3), not 36(6) or (7) and was not a prescribed requirement. As long as there was an in-date GSR at the time the notice was served, that was sufficient.

Second, the Court did however agree that the fact that the April GSR gave the wrong date for the inspection meant that the landlord was not entitled to rely on it. Instead, it would be necessary to rely on the final GSR given (which had the correct inspection date in February). However, there was a dispute as to whether that final GSR had in fact been given prior to service of the s21 notice. The Court was not in a position to decide that issue, and as such remitted the question for determination by the County Court.

Comment

It is not hugely surprising that the 'main' issue resulted in a split Court of Appeal. As noted by Moylan LJ, the intended interaction between the two sets of regulations is "*not as clear as it might be*". Given the dissenting judgment, and the prevalence of ASTs, it is possible there could yet be a further appeal to the Supreme Court.

Ultimately, it does seem that the majority view that the landlord's breach must be capable of remedy boils down to 'negative' arguments about why the contrary view has to be wrong. Whether the Supreme Court would consider those arguments (and there are likely further instances where the consequences for a landlord if the breach were not remediable appear particularly severe, e.g. successor landlords or former superior but now immediate landlords

who were unable to ensure compliance prior to the tenant commencing occupation) sufficient to justify departing from what is probably a more natural reading of the legislation remains to be seen.

Moreover, and even if no permission for a further appeal is sought, the Court's judgment arguably leaves open the question of whether a landlord who has failed to obtain a GSR (within the past 12 months) prior to the tenant commencing occupation can remedy that breach. The landlord in ***Trecarrell*** had obtained a GSR at the relevant point in time; its breach was failing to provide a copy to the tenant. Some commentators[1] have argued that ***Trecarrell*** will not avail landlords whose breach goes beyond a failure to give an existing GSR to a tenant prior to occupation, because the basis on which the case was decided by the majority was simply to disapply the time limit ('*before that tenant occupies those premises*') in regulation 36(6)(b). That time limit applies to the giving of the GSR, not the carrying out of the gas safety check and the record being obtained.

Arguably however, the comment of King LJ that "*so long as the GSR has been provided to either a new or existing tenant before service, a landlord retains his right to use the s21 procedure notwithstanding his or her earlier breach of the s36(6) or (7) requirements*" suggests that the Court was intending to go further than that. This would also be consistent with the Court's rejection of the argument by the tenant that the s21 is invalid if checks are not carried out every 12 months. In any event, where a tenancy was not granted on or after 1 October 2015, the landlord might be able to rely on the additional argument that the AST Regs do not apply at all.

Nonetheless, and even more so in other instances, landlords should continue to ensure compliance with their gas safety obligations, not least because, as was emphasised by the Court, whatever the position as regards ability to serve a s21 notice (in any event of arguable utility at present, given the PD51Z-imposed stay), failure to comply with the Gas Safety Regs is punishable as a criminal offence.

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[1] https://nearlylegal.co.uk/2020/06/the-trecarrell-conundrum/