Case No: H00HF202

IN THE COUNTY COURT at LUTON

Date: 21/06/2022

Before :

HHJ BLOOM

- -

Between :

DEAN BYRNE
Claimant/Respondent

- and -
THOMAS JOHN HARWOOD-DELGADO
Defendant/Appellant

- -
- -

Ms Bullen-Manson (instructed by **MB Lawyers**) for the **Claimant/Respondent**
Ms Sergides (instructed by **Edwards Duthie Shamash**) for the **Defendant/Appellant**

Hearing dates: 26th May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ BLOOM

HHJ BLOOM :

1. This is a reserved judgment in respect of a decision of DDJ Wright. She ordered possession on 5th January 2022 and gave permission to appeal. The sole issue is a legal issue regarding service of a section 21 notice in respect of an Assured Shorthold Tenancy (AST). The defendant, Mr Delgado, appeals against the decision on a point of law.

2. Counsel Ms Sergides and Ms Bullen-Manson were eloquent before me and of huge assistance.

3. The issue on this appeal was whether the failure to obtain a gas safety record (GSR) before the tenant took up occupation was fatal to use of section 21 of the Housing Act 1988 (HA 1988). In other words, was the landlord, Mr Byrne, prevented from using the "no fault" procedure to end the AST? I pause there to say some may have considered this matter was resolved by the case of *Trecarrell House Ltd v Rouncefield* [2020] HLR 39. However, that case was materially different to the facts of this case. In *Trecarrell House* there was a GSR but it was served late. In this case, the issue is what happens if there is no GSR until after the tenant moves into occupation.

4. The background to this case is that Mr Delgado took up occupation of 2 Bayfordbury Mansion, Lower Hatfield Road, Hertford, SG13 8RE (the premises) pursuant to an AST on 23rd August 2019. The AST was dated 19th August 2019. It is accepted that when Mr Delgado signed the paperwork prior to commencement of the tenancy he signed a check list which included that he had a GSR. There is a factual dispute as to whether in fact this was served on him and no copy of it has been produced by either side. This factual issue was not resolved before the DDJ as the case proceeded on the basis that Mr Byrne was entitled to possession, in any event, as he had served a GSR in November 2019 dated 16th September 2019 ie after Mr Delgado moved into the premises. At the same time as Mr Delgado was sent the GSR in November 2019, he was sent the EPC dated 23rd September 2013 and the "How To Rent" leaflet. The factual issue is not before me to resolve. It is agreed that if I find for the tenant, the matter will be remitted and this factual issue will have to be resolved. If I find for the landlord, it was suggested by Ms Bullen-Manson that I should remit the matter in any event. However, that is not realistic in my view as I will have found on the law that the claimant is entitled to possession and there is no good reason to remit the case for a factual matter to be resolved that is academic.

5. A further GSR was obtained in October 2020 and sent to Mr Delgado by email on 2nd November 2020.

6. On 7th November 2020 the section 21 notice was served. The effect of the section 21 notice, if valid, was to permit the landlord to obtain possession without proof of default by the tenant.

7. Particulars of Claim were issued and a defence filed in which the issue of whether Mr Delgado had received a valid GSR at the time the tenancy commenced was raised. The DDJ heard the Counsel for the Claimant and Ms Camp for the Defendant and concluded that she could not distinguish the Court of Appeal judgment in *Trecarrell House* from the current situation. The fact that Mr Delgado had received a GSR that

was obtained after the tenancy commenced did not mean the section 21 was invalid. The DDJ ordered possession. She did however give permission to appeal.

The Law

8. The legal framework is complex and it is clear that some of the legislative provisions are not as clearly written as they might be. There is the HA 1988 and the regulations made thereunder to consider. But, in addition, I have to also consider the Gas Safety (Installation and Use) Regulations 1998 and how they interplay with the HA 1988 and the regulations made thereunder.

9. Sections 21A and 21B of the HA 1988 were brought into effect in October 2015. These sections provide qualifications to the ability of the landlord to serve a section 21 notice. One important qualification that I shall refer to below relates to the requirement that the landlord must have complied with the sections 213 -214 of the Housing Act 2004 relating to protection of a deposit in an authorised tenancy deposit scheme before serving a s21 notice.

10. Section 21A provides as follows

S21A Compliance with prescribed legal requirement

(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 landlord by an enactment and relate to-

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

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

(c) the energy performance of dwelling houses

11. Pursuant to Section 21A(2) the Secretary of State has made the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 (the 2015 Regulations). These provide as follows

(1) Subject to paragraph 2, the requirements prescribed for the purposes of section 21A are the requirements contained in

(a) regulation 6(5) of the Energy Performance of Buildings England and Wales Regulations 2012 (requirement to provide an EPC 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 1988 (requirement to provide tenant with as gas safety certificate)

(2) For the purposes of section 21A 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".

12. The Gas Safety (Installation and Use) Regulations (the 1998 Regulations) impose a code regarding installing and use of gas appliances and pipes. The focus of this appeal

is Regulation 36 which sets out the duties of landlords. A "landlord" means (a) in England and Wales—(i) where the relevant premises are occupied under a lease, the person for the time being entitled to the reversion expectant on that lease or who, apart from any statutory tenancy, would be entitled to possession of the premises; and (ii)where the relevant premises are occupied under a licence, the licensor, save that where the licensor is himself a tenant in respect of those premises, it means the person referred to in paragraph (i) above;

A tenant means a person who occupies relevant premises being—(a)in England and Wales—(i)where the relevant premises are so occupied under a lease, the person for the time being entitled to the term of that lease; and(ii)where the relevant premises are so occupied under a licence, the licensee

Regulation 36(3)-(6) provide as follows:

(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)in the case of a lease commencing after the coming into force of these Regulations, ensure that each appliance and flue to which the duty extends has been checked for safety within a period of 12 months before the lease commences or has been or is so checked within 12 months after the appliance or flue has been installed, whichever is later; and

(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, which record shall include the following information—

(i)the date on which the appliance or flue was checked;

(ii)the address of the premises at which the appliance or flue is installed;

(iii)the name and address of the landlord of the premises (or, where appropriate, his agent) at which the appliance or flue is installed;

(iv)a description of and the location of each appliance or flue checked;

(v)any defect identified;

(vi)any remedial action taken;

(vii)confirmation that the check undertaken complies with the requirements of paragraph (9) below;

(viii)the name and signature of the individual carrying out the check; and

(ix)the registration number with which that individual, or his employer, is registered with a body approved by the Executive for the purposes of regulation 3(3) of these Regulations.

(4) Every landlord shall ensure that any work in relation to a relevant gas fitting or any check of a gas appliance or flue carried out pursuant to paragraphs (2) or (3) above is carried out by, or by an employee of, a member of a class of persons approved for the time being by the Health and Safety Executive for the purposes of regulation 3(3) of these Regulations.

(5) The record referred to in paragraph (3)(c) above, or a copy thereof, shall be made available upon request and upon reasonable notice for the inspection of any person in lawful occupation of relevant premises who may be affected by the use or operation of any appliance to which the record relates.

(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.

13. Having set out above the relevant enactments and regulations, I turn to the leading case in this field *Trecarrel House*. This was a majority decision of the Court of Appeal addressing whether late compliance of service of a GSR on a new tenant complied with the prescribed requirements or was fatal. It was accepted by both sides before me that the decision was not binding as the facts in that case related to late service of a GSR that was obtained before the tenant moved in whereas here the issue was the failure to obtain a GSR before the tenant occupied. However, both Counsel accepted that the approach taken by the majority was persuasive and highly relevant to this case.

14. I start by referring to the head notes as set out in the WLR and the HLR both of which confirm the ratio as relating to late compliance with a GSR obtained before the tenancy commenced. The HLR states the ratio as being " A landlord may comply with reg 2(1)(b) [2015 regulations] so as to be able to serve a s21 notice by giving the tenant a copy of the certificate **which was in force** before the tenant moved into the property and copies of any subsequent certificates at any time before service of the notice; the fact that the January 2017 certificate had not been given to the tenant until November 2017 did not invalidate the s21 notice" (my emphasis).

15. The WLR headnote says the following "that although it was a "prescribed requirement" for a landlord to give a new or existing tenant a copy of the relevant gas safety record, as required by regulation 36(6)(a) or (b) of the Gas Safety (Installation and Use) Regulations 1998 , it was not a "prescribed requirement" that the gas safety record be given to a new tenant prior to the tenant taking up occupation or to an existing tenant within 28 days of the relevant safety check being carried out; that, therefore, where a **landlord failed to give a new tenant a copy of the relevant gas safety record at the beginning of the tenancy** or failed to give an existing tenant a copy of the record within the 28-day period **it would at that point be "in breach of a prescribed requirement" within section 21A(1) of the Housing Act 1988 , but such breach would cease if the landlord made good that failure by giving the tenant a copy of the gas safety record at a later date**; that it followed that, **if a landlord failed to give a new tenant a copy of the latest gas safety record before the tenant took up occupation** or failed to give an existing tenant a copy of a new gas safety record within 28 days of the relevant safety check, the landlord would nevertheless be entitled to serve notice on a tenant under section 21 of the 1988 Act so long as it gave the tenant a copy of **that** gas safety record before serving the section 21 notice; that since the landlord in the present case had made good its failure to give the tenant a copy of the gas safety record made before she took up occupation of the flat, it had not been prevented by that failure from serving the section 21 notice on the tenant"(my emphasis).

16. Whilst this court is not considering the same factual scenario, it is considering the same provisions and their meaning and effect. I set out below those parts of the judgments that I have been asked to particularly consider and the arguments raised by Counsel.

17. At paragraph 6 Patten LJ said this "Paragraphs (6) and (7) of regulation 36 are clearly intended to ensure that a prospective tenant either receives or has access to a copy of the last record of inspection before taking up occupation and that each existing tenant is either furnished with or can see and obtain records of subsequent inspections carried out during the subsistence of his or her tenancy. The

frequency of these inspections is prescribed by regulation 36(3) and, if adhered to, will mean that the installations are checked for safety every 12 months beginning no more than 12 months from the installation of the equipment. But regulation 36(3) is not itself a prescribed requirement, although non-compliance is punishable as a criminal offence.

7. The provisions of section 21A and the 2015 Regulations place additional pressure upon and provide encouragement for landlords to comply with the regulation 36 code of inspection by removing from the landlord his ability to terminate the tenancy using a section 21(1) notice and the accelerated procedure devised to accommodate it. The consequence is that so long as section 21A continues to apply the landlord will be restricted to relying on one of the statutory grounds for possession as if the tenancy were an assured tenancy to which section 7 HA 1988 applies."

18. At paragraph 19 Patten LJ considered the argument that Mr Bates had made for the landlord, that the effect of Regulation (2)(2) was to exclude Regulation 36(6)(b) in its entirety. Hence there was no need to comply with regulation 36(6)(b) at all. Patten LJ rejected that argument and explained his reasons in Paragraph 19 "The first is that such a construction of regulation 2(2) makes no obvious sense in terms of the policy behind regulation 2(2) . It is difficult to see any reason why Parliament should have chosen to require compliance with paragraph (6)(a) for existing tenants but to have deliberately excluded as a prescribed requirement the equivalent protection for new tenants provided for by paragraph (6)(b). The second objection to this construction of regulation 2(2) is that it is an unlikely way of drafting the regulation if the intention was to include only paragraph (6)(a) in a modified form. One would have expected regulation 2(1)(b) to have identified only paragraph (6)(a) and (7) rather than to have included the whole of both paragraphs and then left the somewhat cryptic provisions of regulation 2(2) to be read as excluding paragraph (6)(b) in its entirety. It seems to me that the more obvious construction of regulation 2(2) is that it relates back to regulation 2(1)(b) which specifies paragraph (6) as a composite provision without distinguishing between sub-paragraphs (a) and (b). The reference in to "the requirements prescribed by paragraph (1)(b)" is therefore one to paragraph (6) as a whole and so when it says that the prescribed requirement is "limited to the requirement on a landlord to give a copy of the relevant record to the tenant" it is referring to that obligation as it appears both in paragraph (6)(a) and in paragraph (6)(b) but to that obligation alone. The effect therefore of regulation 2(2) is to remove the 28-day time limit in paragraph (6)(a) and arguably also the requirement in paragraph (6)(b) that a new tenant should be supplied with a copy of the current GSR prior to taking up occupation. The obligation uplifted by regulation 2(1)(b) is (as the words in parenthesis indicate) no more than the obligation to provide the tenant with the relevant GSR. I will return to that point in a moment. But, in my view, for the purposes of section 21A , the prescribed requirement applies to both types of tenant. I do not accept that paragraph (6)(b) is excluded in its entirety"

19. Ms Sergides says that this paragraph is relevant as it highlights that Regulation 36(6) has two separate paragraphs and cannot be read as one paragraph. The intention of Parliament was compliance with both paragraphs. If the landlord can provide <u>any</u> GSR (ie not the last one before the tenant moves in as a new tenant) that is obtained during the tenancy, paragraph 6(b) is otiose. Further it is clear that the reference is to the "current GSR prior to taking up occupation" not to any GSR. Further Patten LJ refers to the "relevant" GSR which cannot simply mean **any** GSR. Ms Bullen- Manson says this paragraph is not relevant to the issues that this court needs to consider. The relevant issues are considered later in his judgment and that of King LJ.

20. Patten LJ then went on to consider paragraph 6(b) and the time limits in that paragraph. At paragraph 21 he was concerned as to the fact that were the late compliance with paragraph 6(b) to exclude the landlord from service of s21 notice for the whole tenancy, the effect would be to place a far more onerous sanction on the landlord in respect of the new tenant as opposed to the existing tenant. As Patten LJ said "late production to a new tenant of the most recent GSR will, on the authority of *Caridon (unreported) 2 February 2018* , restrict the landlord's rights to obtain possession to those it would enjoy under an assured tenancy which was not what it granted." He was not persuaded by the

reasoning of HHJ Luba QC in *Caridon Property Ltd v Shooltz* unreported 2.2.18 (I should declare my own interest as the DJ whose decision was upheld by HHJ Luba QC). HHJ Luba QC had pointed to policy reasons why a new tenant should have the assurance of seeing the relevant GSR before deciding whether to take a tenancy. But, said Patten LJ, the regulations do not permit the new tenant to see the GSR until they have become a tenant. There is no requirement to provide the GSR prior to the tenancy. He went on to say, at paragraph 22, that it was important to consider, when looking at the intended effect of regulations 36(6) and (7) as prescribed requirements that section 21A was not the primary sanction for non-compliance. There were criminal sanctions. He said this at paragraph 24 which Ms Bullen-Manson relies on in her submissions "The imposition by section 21A of a bar to the service of a section 21 notice is therefore only collateral to these sanctions and, at best, a spur to compliance. It has, in my view, to be read and interpreted in that context. The clear exclusion of the 28-day requirement from paragraph (6)(a) confirms that Parliament did not intend regulation 36(6) and (7) as prescribed requirements to be applied with the same vigour as the regulations themselves". Ms Bullen-Manson says that it is important when this court comes to interpret the same regime on slightly different facts to bear in mind the words and approach of the Court of Appeal. I agree that I must do so. Ms Sergides says of course this is relevant but the Court of Appeal were accepting in this case that primary compliance ie the obtaining of the GSR had occurred and were looking at procedural compliance. The regulations are intended to have some meat on their bones and are not to be rendered meaningless.

21. Patten LJ then considered the wording in s21A and the phrase "at a time when". He had previously considered in paragraph 15 whether these words had the effect of "permitting late compliance with an obligation which under the prescribed requirement has (as in this case) to be performed by a particular time." Patten LJ referred to the requirement to comply with the tenancy deposit regime HA 2004. He noted that section 215 provides that no s21 notice may be given "at a time when the deposit is not being held in accordance with an authorised scheme". The scheme made clear, however, that s21 notice may be given if the prescribed information is given or deposit returned. Hence the provision made clear how to end the embargo. However, s21A had not set out how to end the embargo. Patten LJ concluded that the source of the remediable nature of the breach of regulation 36(6)(b) was in Regulation 2(2). As he had already explained in paragraph 19 above, one had to read that Regulation as limiting the prescribed requirement to one that the landlord give a "copy of the relevant record to the tenant" without any time requirement. The crux of his reasoning lies in paragraph 30 which say as follows: "Although the point is not straightforward, I am not therefore persuaded that for the purposes of section 21A the obligation to provide the GSR to a new tenant prior to the tenant taking up occupation cannot be complied with by late delivery of the GSR. Late delivery of the document does provide the tenant with the information he needs. If a breach has the consequence for which Mr Cherry contends then that must apply in every case of late delivery even if the delay is only minimal. This seems to me an unlikely result for Parliament to have intended particularly in the light of the express rejection of the 28-day deadline under paragraph (6)(a). Many ASTs are granted for fixed periods of one year or less so that in practice the landlord's inability to rely upon section 21 will provide a strong incentive for the timely compliance with paragraph (6)(b). As a matter of construction, I therefore prefer the view that as a result of regulation 2(2) the time when the landlord " *is* in breach" of paragraph (6)(b) ends for the purposes of section 21A once the GSR is provided."

22. Ms Bullen-Manson says that from the above paragraphs, it is plain that the Court of Appeal considered that a reading of Section 21A suggests that it is a temporal sanction not intended to be permanent. Further that minimal failure by the landlord ie obtaining the GSR a day late would prevent the parties from relying on section 21 at

all and turn the tenancy into something that was not what was bargained for. This approach, says Ms Bullen-Manson, is binding on me as I consider the same provisions. Ms Sergides says that the focus of the court was on "late delivery" not failure to obtain the relevant GSR at all so it is not binding and in any event is explicable. The landlord had obtained the relevant GSR in *Trecarrell House* but simply failed to provide it in time. Once the landlord provided it, the tenant knows that the landlord has complied with the prescribed requirements and that is why the court held that no sanction should apply. She also says that Patten LJ frequently refers to the "relevant" GSR not just "a" GSR. The relevant record is the "last record" before the "new" tenant took up occupation. Ms Sergides says that reliance on the tenancy deposit scheme as remediable is wrong. Some breaches of the tenancy deposit scheme are irremediable. If the landlord is unable to return the deposit for financial reasons then the breach is irremediable.

23. A further point arose in *Trecarrell House* which was whether the failure to carry out inspections every 12 months was fatal. Counsel for the tenant argued that the failure to carry out an inspection every 12 months breached Regulation 36(3)(c) and meant that there was a breach of Regulation 36(6)(a) as it imposes a requirement to provide a "copy of the record made pursuant to the requirements of paragraph 3(c) above". Counsel argued that as Paragraph 3(c) required the landlord to ensure that a record of the appliance was "so checked"; those words referred back to (3)(a) where it refers to be the duty extending to the appliances being "checked for safety within 12 months". Patten LJ rejected this argument that failure to carry out the next check within 12 months of the last one meant that the landlord had failed to comply with paragraph 6(a). The prescribed requirement was not compliance with paragraph 3(a). The words "so checked" only refer back to the phrase "checked for safety". Patten LJ stated at paragraph 36 : "The obligation imposed on the landlord by paragraph (6)(a) is to give the existing tenants a copy of a GSR which contains all the information specified in paragraph (3)(c). The April 2018 GSR was not such a document because it did not give the correct date of the safety check. It cannot therefore be relied upon by the claimant as evidence of compliance with paragraph (6)(a) as a prescribed requirement. The GSR relating to the February 2018 safety check does contain all the information required under paragraph (3)(c) but there is an issue as to when it was served on Ms Rouncefield. If it was not served on her until after she had received the section 21 notice then the claimant is prevented by Section 21A from relying upon that notice."

24. Ms Bullen-Manson initially sought to argue that this supported her argument that even if the check is done late, it is a valid check and can be relied on. She later resiled from that as when one reads the argument of Mr Cherry and the reasoning of the judge, it is clear that the point was rather different. What the court held was that the requirement under paragraph 6(a) was to provide a copy of the record made pursuant to the requirement of paragraph 3(c) but that did not include a requirement to do so within 12 months. That was a requirement of the 1998 regulations but the prescribed requirement was merely to provide a record that complied with paragraph 3(c) and the temporal requirements were not part of Regulation 2(2).

25. Ms Sergides says that reference back to the earlier paragraphs is important in construing regulation 6(b). The regulation refers specifically to a copy of the "last record" being given to the "new tenant of premises to which the record related before the tenant occupied those premises." She says that paragraph 3(b) says it must be a record made in the 12 months before the tenancy commenced. But in any event on a natural reading the word "last" as set against "new" must mean one that is created before the tenancy comes into being. Otherwise, paragraph 6(b) is otiose and there is no distinction

between being a new tenant or an existing tenant. All that would be required is service of any GSR prior to the section 21 being served.

26. Turning now to King LJ's judgment she identified the issue at paragraph 38 in these terms "whether a landlord who has omitted to provide his new tenant with a copy of a valid GSR…can make good that omission by providing the GSR at a later date and in so doing, satisfy the requirement of section 21A" of the Housing Act 1988… the landlord being "at the time" of the service of the notice, no longer in breach of a prescribed requirement." At paragraph 40, she said that if the landlord cannot put right their omission to comply with the 1998 regulations 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 the landlord can no longer rely on the "no fault/notice only grounds for possession under section 21 HA 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." She too was concerned that there would be disparity of outcome for new and existing tenants as the same failure namely to provide a copy of the certificate would lead to wildly differing outcomes. In paragraph 42 she agreed with Patten LJ that "such disparity of outcome does not seem to me to fit with the legislative scheme as a whole". She says this "the features he has identified in his judgment serve to support an interpretation that failure to provide a GSR by a landlord, either at the beginning of a tenancy or following a subsequent annual safety inspection, is not fatal to his ability to give notice under section 21 providing that the relevant certificate has been provided before service of the notice".

27. King LJ summarised her reasoning in paragraph 43 .

> "In particular in agreeing with his conclusion I note 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 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 section 21 notice.
>
> (ii) The bar to the service of a section 21 notice is collateral to the criminal sanctions under section 33 of the Health and Safety at Work etc Act 1974 and therefore section 21A HA 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 "requirement 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).
>
> (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 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) .

28. Ms Sergides says this is not an irredeemable breach as the landlord only has to ensure that he has checked his gas appliances prior to the tenancy commencing. The landlord can serve that GSR late but must serve that GSR that existed before the tenant took up occupation. That is the "relevant" GSR not any GSR obtained later in the tenancy. The s21 notice cannot be served if, as in this case, no GSR exists prior to the occupation of the tenant. That is not contrary to anything that the Court of Appeal said

which was looking at the policy considerations of late compliance not of a failure to comply at all. She also says that whilst there are criminal sanctions, the importance of the prescribed requirements is not that the tenant knows before they move in that the appliances are safe but as a matter of fact the inspections have occurred regardless of whether the reports are provided or displayed. The court should read the policy considerations in that light.

29. Ms Bullen- Manson says that what is critical is that the Court of Appeal stress the importance of the breach being remedial. That, if the court adopted the approach of the tenant, then this breach would not be remediable and the tenancy would become assured. She says that when I consider the words "last record" in paragraph 6(b) they mean what they say ie the last in time before service on the tenant. In other words, the "most recent" is the same as the "last" record. She argues that, as the Court of Appeal did in *Trecarrell House,* I should use a degree of artistic licence in interpreting the statute and if I do that and apply the dicta in *Trecarrell House*, the interpretation must be that the most recent GSR would be sufficient to comply with Section 21A and Regulation 2. She says that on Mrs Sergides' argument the good landlord who makes an error as they do not have a GSR until after the tenant moves in or loses their copy is shut out from the section 21 regime. The "relevant record" in Regulation 2(2) should be read to include a GSR obtained at any time in the tenancy provided it is given or displayed prior to service of the s21 notice.

30. Ms Sergides responded to say that the approach of the landlord would elide any difference between paragraph 6(a) and 6(b). The word "last" must have some meaning when in juxtaposition to the word "new". The Court of Appeal were considering whether the prescribed requirement to comply with the 1998 regulations was met by late service. Compliance with paragraph 6 of the 1998 regulations is prescribed. There must some point to the reference to the words in the regulations of the "relevant" record not "any" record.

Conclusions

31. Neither argument is without difficulties as Ms Bullen-Manson rightly pointed out. In terms of outcome, if the landlord succeeds the effect is that they can comply with the prescribed requirements by serving a GSR obtained at any time during the tenancy before service of the s21 notice. Indeed, they could never have a GSR until the day they seek to terminate the tenancy by serving a s21 notice. As against that, a failure to obtain a GSR prior to the tenant entering into occupation renders the "no fault" tenancy a tenancy which can only be terminated with reason which was not what the parties contracted for. That applies whether the failure is by a day or two or a year or two. Having listened carefully to both sides and considered the decision of *Trecarrell House*, I am satisfied that that the appeal should be allowed.

32. The starting point must be to look at the actual wording of the relevant provisions. S21A is headed "compliance with prescribed legal requirement". The section then provides that the requirements that may be prescribed include those that relate to the "health and safety of occupiers of dwelling houses". Hence before we get to the Regulations, we can see that the purpose of section 21A was to protect the "health and safety" of occupiers. The legislature provided additional requirements to ensure that tenants had greater protection in various ways. In this context the issue relates to protecting health and safety of occupiers. That is an important protection for tenants.

33. Turning next to Regulation 2(2) of the 2015 Regulations it is clear that the requirement prescribed is on the landlord to give a copy of the "relevant record" to the tenant. What does "relevant record" mean in this context. The relevant record must be read by considering Regulation 36(6) of the 1998 Regulations.

34. Regulation 36(6)(b) provides that the "last" record must be provided to a "new" tenant. We now know that for the purposes of S21 the prescribed requirement does not mean that the landlord needs to serve that record before the tenant occupies the premises as late delivery of that record will suffice (see *Trecarrell House*). Of course, in the context of the 1998 Regulations as those words do exist it is plain that the "last" record must refer to a record that existed before the tenant occupied. The court now has to interpret the meaning of "last record" where the prescribed requirement is only service of the relevant record which is in turn the last record served on the new tenant.

35. Regulation 36(6)(a) refers to "existing" tenants and the requirement to provide a record to them in accordance with paragraph 3(c). From the wording of paragraph 6, it is clear that there are different requirements envisaged in relation to new and existing tenants. Lord Patten at paragraph 19 clearly considered that there was a difference in the two types of tenant and the legislature did not provide that the prescribed requirement was **only** to apply to existing tenants. In reading and interpreting regulation 6(b), the court has to have in mind that there is intended to be a differential between the obligations towards "new" and "existing" tenants. "New" must mean that the tenancy has recently commenced. It cannot be that the prescribed requirement is met by serving a GSR on a tenant 5 years later as surely that would fall in paragraph 6(a).

36. The only logical meaning of the prescribed requirement in relation to paragraph 6(b) is that the GSR must be the last one before the tenant moved into occupation. The words "last" and "new" read with the word "relevant" in Regulation 2(2) on their natural meaning lead to the inevitable conclusion that what is intended is a GSR that existed when the tenant went into occupation. If one adopts the argument of the landlord that all that is required is to provide the most recent record to the tenant, then the word "new" is lost in paragraph 6(b). All that one is required to provide is the "last" record to the tenant. In addition, it is clear that the Court of Appeal saw a difference between the two parts of Regulation 36(6). Parliament intended that the prescribed requirements covered both types of tenant. The approach of the landlord means that the two paragraphs are indistinguishable. Both tenants whether new or existing would comply with the prescribed requirements if served with <u>any</u> GSR provided it was served before the section 21 notice. It is very difficult to see how that was the intention of the legislature given the two different routes provided . Indeed, the Court of Appeal was clear that 36(6)(b) was not to be excluded (see para 19 of *Trecarrell House*).

37. Ms Bullen-Manson says to construe the clauses in this way is contrary to the authority of *Trecarrell House* which is very persuasive authority. I now turn to consider the reasoning of the Court of Appeal and whether what appears to be the plain meaning of the words is wrong in the light of their reasoning and whether I should, as she suggests, adopt artistic licence to ensure that the prescribed requirements read as the landlord seeks.

38. Firstly, the disparity in treatment of the existing and new tenant does not exist as it did in *Trecarrell House*. On the facts in *Trecarrell House* if the tenant's argument had succeeded, the existing tenant could be served with a s21 notice provided they received a GSR that complied with paragraph 36 (3)(c) at any time before the s21 notice was served. Whereas the new tenant became an assured tenant even if there was a GSR prior to occupation but they had not received the same. On the current facts, if the tenant's argument is correct, the existing tenant who had never received a valid GSR (ie one that existed **before** they moved in) would be in the same position as the new tenant. Neither could be served with a section 21 notice. Hence there is no disparity of position. That is not eliding the two paragraphs as once the new tenant has received a valid GSR predating their occupation, there are ongoing obligations under paragraph 36(6)(a).

39. Secondly the Court of Appeal said that the sanction was too draconian. Further the words "at any time" meant that there was a remediable position. Further all other prescribed requirements were capable of remedy. I note that at paragraph 40 King L said this " if the proper interpretation of regulation (2) of the 2015 regulations means that a landlord cannot put right his omission then, **notwithstanding that all proper gas safety checks may have been completed and the failure be administrative oversight**, the consequence of that error is that that the landlord can no longer rely on the "no fault/notice only ground for possession." (emphasis mine). Hence, she appeared to view it as an administrative rather than substantive oversight. Ms Bullen-Manson says the word "may" is not limiting consideration to the situation where there is a late check. That could be so but what is clear is her Ladyship is differentiating between procedural and substantive failures.

40. The sanction for failure to comply at all is draconian. However, this sanction appears to only apply where there is no GSR at all prior to moving in. By reference to *Trecarrell House* and Patten LJ's views at paragraph 35 it would not appear that to meet the prescribed requirements, the GSR under paragraph 6(b) would have to be completed 12 months before the letting or within 12 months of installation as the issue is rather that there is a record created that is the last one before the new tenancy. The important factor is that a GSR has been created prior to the tenancy commencing. Why should there not be a draconian sanction where there is no GSR at all prior to the tenant moving in? That is not an administrative oversight but a serious failure to comply with substantive requirements that have a criminal sanction but also exist to ensure as a matter of fact that properties are safe. I agree with Ms Sergides that, as was said in *Trecarrell House*, one can distinguish between the situation where the landlord has made a trivial error and failed to serve a document and the situation where the landlord has failed to obtain any safety checks for the gas installations. It is not whether the tenant knows the property is safe but whether objectively the checks have been done so that it is safe. The prescribed requirements must have some meaning. The purpose of them is to provide tenants with protection as regards their health and safety whilst in occupation. How does S21A and Regulation 2 have any force if the GSR can be obtained at any time in the tenancy?

41. If one looks at the comments made by Patten LJ regarding criminal sanctions in paragraph 24, he made the valid point that S21A is collateral to the criminal sanctions and has to be read and interpreted in that context. He then referred to the fact that the legislature excluded the 28 days and plainly did not consider that the 1998 regulations were to be applied with the same vigour as the regulations themselves. None of that is disputed in reaching the conclusion I have. However, in reading and interpreting s21A

and Regulation 2, the court has to have in mind that there is a prescribed requirement to provide the last record to the new tenant. It was intended to ensure that basic checks had been done before tenants took up occupation. Parliament may not have intended that the prescribed requirement had the force of the 1998 regulations as regards late delivery but it did envisage a basic minimum that there were checks before occupation. I have considered the collateral nature of this legislation and understand why the Court of Appeal considered a mere procedural error should not undermine the tenancy. None of the comments by Patten LJ and King LJ suggest that they considered that a failure to carry out any checks before occupation was not a breach of the prescribed requirements. I take account of all that was said in *Trecarrell House* about the primary sanction being the criminal sanctions. However, that was said in the context of a procedural failure rather than a substantive failure.

42. Finally, the Court of Appeal said that the regulations envisaged the defect being remediable. Firstly, if the GSR record is obtained before the tenancy, it is remediable as it can be provided late. The breach of the requirements ie failure to serve the relevant GSR is remediable by late delivery. Regulation 2(2) provides the remedy for the breach namely provision of the relevant record (paras 29 and 43 of *Trecarrell House*). The Court of Appeal addressed remedy in this context. No consideration was given to a total failure to comply with the prescribed requirements prior to occupation. Secondly, the Court of Appeal assumed that a deposit could be returned but that is not always feasible and hence in those situations, the breach is not remediable. This court cannot rewrite the prescribed requirements to make the breach remediable. If the interpretation of the wording in context leads to a particular meaning which does not provide a remedy, that is for Parliament to resolve. Why is a serious sanction not appropriate where there is no GSR at all prior to letting? Landlords are obliged to know their legal responsibilities. Parliament has said that they are not to obtain possession on a "no fault" basis where they failed to get a GSR prior to letting. It is plainly an important requirement that gas appliances are safety checked. If what was intended was that as a landlord you can remedy your breach by getting a record later, that would drive a coach and horses through the legislative intention to protect occupiers' health and safety.

43. I agree with Ms Bullen-Manson that the failure to obtain a GSR prior to occupation turns the tenancy into something that the parties did not envisage but the remedy is to comply with the Regulation 2(2) and obtain the relevant record before the tenant moves in. If the court interprets this Regulation as the Landlord seeks the result is that Section 21A(2)(b) has no meaning. There are no meaningful prescribed requirements regarding health and safety as the landlord can serve the relevant GSR immediately before he serves the s21 notice. That would render the purpose of the prescribed requirements without any force at all and remove any protection for the tenant. The criminal sanctions are not enough where there is a substantive as opposed to procedural breach. If the legislature failed to provide a remedy that does not permit this court to rewrite the regulations so as to provide a meaning that is not available on the wording of the Act and Regulations even when read in context.

44. I am bolstered in my conclusions by the fact that the Court of Appeal plainly envisage that there will be a valid GSR in existence before the tenancy commences. In paragraph 30 of Patten LJ judgment is clearly referring to a GSR that exists at the date the tenant moves into occupation. He states that he is not persuaded that "the **obligation** to provide the GSR to the **new** tenant prior to the tenant taking up occupation cannot be complied with

by late delivery of the GSR. Late delivery of the document does provide the tenant with the information he needs" (my emphasis). Patten LJ recognised that there is an "obligation" to give the "new" tenant a GSR before moving in but that for the purposes of s21A late delivery was good delivery. He did not suggest that there was no obligation to give a GSR to the new tenant. He was also not suggesting that delivery of a GSR at any time is enough. What satisfied the obligation was "late" delivery ie delivery of an existing GSR after the due date. It can only be late if it was in existence at the date of occupation but not delivered until later.

45. For all the above reasons the appeal is allowed. The decision of DDJ Wright will be set aside and the matter remitted to be heard by a different DJ or DDJ on the factual issue as to whether in fact there was a GSR in place which had been provided prior to the s21 notice being served.

HHJ BLOOM