



## **Court of Appeal rules on provision of gas safety certificate and section 21 notice**

**By Reanne MacKenzie**

**In judgment handed down (remotely) on 18 June 2020 the Court of Appeal has confirmed that a landlord's failure to provide a gas safety certificate prior to occupation by a tenant does not prevent a landlord later serving a section 21 notice to gain possession provided the relevant certificate has been given to the tenant before service of the notice.**

### **Background**

1. Section 21 of the Housing Act 1988 allows a landlord to regain possession of her property (let on an assured shorthold tenancy) by serving a section 21 notice and thereby giving her tenants 2 months' notice to leave the property. As long as the notice is valid and the landlord has provided the requisite 2 months' notice then the court must make an order for possession. It is not necessary for the landlord to rely on and establish one of the grounds for possession set out in Schedule 2 of the Housing Act 1988 nor does the court have to be satisfied that it is reasonable to make the order.
2. However, a landlord cannot use a section 21 notice if she is in breach on any of the prescribed requirements (section 21A). The prescribed requirements include complying with regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 namely to: carry out an annual gas safety inspection (regulation 36(3)); to give a tenant a copy of a gas safety certificate within 28 days of any such inspection (regulation 36(6)(a)); and, to give the current certificate to any tenant prior to occupation (regulation 36(6)(b)).

3. The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 (“the Regulations”) state that the prescribed requirement of regulation 36(6) and/or 36(7) 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” (regulation 2(2)).
4. Questions have arisen as to the correct meaning of these provisions. Obviously if a gas safety certificate has not been sent at all to the tenant then section 21 cannot be used. However, issues remained over the interaction between the various regulations and section 21. Did the carve out of regulation 2(2) apply to regulation 36(a) and (b) or only 36(a). In other words: did the failure of a landlord to provide the gas safety certificate prior to occupation by the prevent the landlord from later serving a section 21 notice to gain possession?

#### Previous decisions

5. In the 2018 case of *Caridon Property Limited v Shootz* [2018] WL 05822845 HHJ Luba QC, circuit judge on appeal, held that on the correct construction of the various regulations the gas safety certificate had to be served on the tenants before they occupied the property in order for the landlord to later take advantage of section 21: landlords had one opportunity to serve the gas safety certificate or they lost the ability to use section 21.
6. Whilst this was decision was a county court appeal to the circuit judge, and thus not technically binding, HHJ Luba QC is an eminent and respected housing practitioner and his decision was extremely persuasive, even if not binding.

#### Trecarrell House Ltd v Rouncefield

7. However, the Court of Appeal has now ruled on this point and on 18 June 2020 handed down judgment which categorically overruled HHJ Luba QC in *Caridon*.

8. The facts of *Trecarrell* can be stated briefly. In February 2017 Ms Rouncefield (“the tenant”) became the tenant of a flat pursuant to an assured shorthold tenancy. The flat was in St Ives, Cornwall and was one of a number of self-contained flats in a block owned by Trecarrell House Limited (“the landlord”). The tenant’s flat was provided with central heating and hot water by means of a gas boiler located in another part of the building. There were no gas pipes or gas appliances within the flat itself. 2. The tenant did not received a gas safety certificate before she moved in, but was provided with a copy (dated January 2017) in November 2017. There was a further gas safety inspection carried out in February 2018. There was a factual dispute between the parties as to whether this certificate was provided to the tenant.
9. In May 2018 the landlord served notice under section 21 and commenced possession proceedings. The tenant defended the possession claim on the basis that she had not been served with a gas safety certificate prior to her occupation of the flat. The district judge dismissed this defence and granted possession.
10. The tenant appealed. HHJ Carr, on appeal, granted the tenant’s appeal adopting the reasoning of HHJ Luba QC in *Caridon*. The Court of Appeal granted the landlord permission to appeal.
11. By a majority decision (Patten LJ and King LJ, Moylan LJ dissenting) the Court of Appeal held that on the correct construction and reading of section 21A and the 2015 regulations the time limit is disapplied for both gas regulations 36(6)(a) and (b). In other words so long as a landlord provides the tenant with a copy of the gas safety certificate that was in force before the tenant entered into occupation and a copy of any further certificate that related to a subsequent inspection prior to serving the section 21 notice, this will cure any breach of the prescribed requirements barring the use of section 21. Landlords do not have only one opportunity to provide the gas safety certificate.

12. The Court of Appeal also held that it was not fatal to the section 21 notice that a gas safety inspection had taken place more than 12 months after the last inspection, providing that the inspection was carried out and the gas safety certificate provided before the section 21 notice was served.

### Impact

13. This is a welcome outcome for landlords who were faced with an inability to use section 21 where innocent mistakes had been at the outset of a new tenancy. As the Court of Appeal noted, section 21 being embargoed unless and until the prescribed requirements are satisfied is not to sanction the landlord, but acts as “spur to compliance” (see paragraph 24).
14. Whilst the Court of Appeal noted that the gas safety certificate should be served “before or with section 21 notice” (see paragraph 37) best practice remains to ensure that the gas safety certificate in force is provided before or as a tenant takes occupation: it should be sent as standard with all the other paperwork. Tenants should also always be provided with any further gas safety certificates that relate to any subsequent inspections.
15. This decision provides some much needed certainty for landlords. It will also be welcome decision given that many annual gas safety inspections will have been missed due to the Covid-19 pandemic and subsequent lockdown and social distancing rules. Whilst possession proceedings are currently stayed, section 21 (and sections 8) notices can still be served. Tenants should remain vigilant to checking whether they have received the gas safety certificate either before or with the section 21 notice as if not this will still be a grounds to defend any possession claim. Similarly, if landlords need their properties back they should make sure the most recent gas safety certificate has been sent to the tenants (and retaining evidence of receipt) before serving a section 21 notice. Given the blanket stay on possession proceedings there is likely to be a huge back log once the stay

is lifted. It is worth getting the section 21 notice right the first time to avoid any further unnecessary delay.

16. It should be noted this judgment does leave some questions unanswered. Notably, uncertainty remains regarding what the position is if a landlord has not done a gas safety check (and thus does not have a certificate) for the period prior to the tenant taking up occupation. It is not clear how this is to be remedied, if at all. The Court of Appeal did not rule on this point, but it appears that section 21 will still be unavailable in this situation.

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