Neutral Citation Number: [2020] EWCA Civ 760

Case No: B5/2019/0499

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT TRURO
HH JUDGE CARR
E00TR230

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 June 2020

Before :

LORD JUSTICE PATTEN
LADY JUSTICE KING
and
LORD JUSTICE MOYLAN

- -

Between :

TRECARRELL HOUSE LIMITED	**Claimant/ Appellant**
- and -	
PATRICIA ROUNCEFIELD	**Defendant/ Respondent**

- -
- -

Justin Bates and **Brooke Lyne** (instructed by **Anthony Gold Solicitors**) for the **Appellant**
Richard Cherry (instructed by **Oliver Fisher Solicitors**) for the **Respondent**

Hearing date : 29 January 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on Thursday 18th June 2020 at 10.30 a.m.

Lord Justice Patten :

1. The defendant, Ms. Rouncefield, is the tenant of Flat 2, Trecarrell House, Carthew Terrace, St Ives in Cornwall ("the Flat"). This is one of a number of self-contained flats in a block of flats owned by the claimant, Trecarrell House Limited. The Flat is provided with central heating and hot water by means of a gas boiler which is housed elsewhere in the building. There are no gas pipes or gas appliances within the Flat itself.

2. The Flat was let to Ms. Rouncefield under an agreement dated 20 February 2017 for a period of six months. It is common ground that it created an assured shorthold tenancy ("AST") to which the provisions of s.21 of the Housing Act 1988 ("HA 1988") apply. Under s.21(1) the landlord may obtain possession of premises let on an AST simply by giving to the tenant at least two months' notice in writing stating that he requires possession. When that is done 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 to HA 1988 nor does the Court have to be satisfied that it is reasonable to make the order.

3. In recent years Parliament has introduced various statutory qualifications to these provisions which restrict the right and ability of the landlord to serve a s.21 notice. These include ss.21(1A) and (1B) which (in the case of a fixed term tenancy of not less than 2 years granted by a registered provider of social housing) prevent the Court from making a possession order unless the landlord has given its tenant at least six months' notice in writing; ss.212-215 HA 2004 which prevent the service of a s.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 certain requirements; and ss. 38 and 39 of the Deregulation Act 2015 ("DA 2015") which inserted ss.21A and 21B into HA 1988. They provide as follows:

> "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.

> …
>
> 21B Requirement for landlord to provide prescribed information
>
> (1) The Secretary of State may by regulations require information about the rights and responsibilities of a landlord and a tenant under an assured shorthold tenancy of a dwelling-house in England (or any related matters) to be given by a landlord under such a tenancy, or a person acting on behalf of such a landlord, to the tenant under such a tenancy.
>
> (2) Regulations under subsection (1) may—
>
> (a) require the information to be given in the form of a document produced by the Secretary of State or another person,
>
> (b) provide that the document to be given is the version that has effect at the time the requirement applies, and
>
> (c) specify cases where the requirement does not apply.
>
> (3) 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 requirement imposed by regulations under subsection (1).
>
> …"

4. In this case we are concerned with the effect of s.21A. Pursuant to s.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 s.21A. Regulation 2 of the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 ("the 2015 Regulations") provides:

> "2.—(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(3) (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."

5. The 1998 Gas Safety (Installation and Use) Regulations ("the 1998 Regulations") is a comprehensive code of regulations governing every aspect of the installation and maintenance of gas appliances and pipework in residential buildings. 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. For the purposes of this appeal, the following provisions are relevant:

> "36.—(1) In this regulation—
>
> "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;
>
> …
>
> "relevant gas fitting" means—
>
> (a) any gas appliance (other than an appliance which the tenant is entitled to remove from the relevant premises) or any installation pipework installed in any relevant premises; and
>
> (b) any gas appliance or installation pipework which, directly or indirectly, serves the relevant premises and which either—
>
> (i) is installed in any part of premises in which the landlord has an estate or interest; or
>
> (ii) is owned by the landlord or is under his control,
>
> except that it shall not include any gas appliance or installation pipework exclusively used in a part of premises occupied for non-residential purposes.
>
> "relevant premises" means premises or any part of premises occupied, whether exclusively or not, for residential purposes

(such occupation being in consideration of money or money's worth) under—

(a) a lease; or

(b) a licence;

…

"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;

(b) in Scotland, the person for the time being entitled to the tenant's interest under a lease.

(2) Every landlord shall ensure that there is maintained in a safe condition—

(a) any relevant gas fitting; and

(b) any flue which serves any relevant gas fitting,

so as to prevent the risk of injury to any person in lawful occupation or relevant premises.

(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.
>
> (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."

6. 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 s.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 s.21(1) notice and the accelerated procedure devised to accommodate it. The consequence is that so long as s.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 s.7 HA 1988 applies.

8. In the present case, the claimant served a s.21 notice on Ms. Rouncefield on 1 May 2018. At the time when the tenancy was granted in February 2017 Ms. Rouncefield was not provided with a copy of the relevant gas safety record ("GSR") nor had the claimant taken advantage of regulation 36(7) by displaying a copy of the GSR in some prominent position in the premises. But the claimant had provided Ms. Rouncefield with a copy of the GSR on 9 November 2017. This was a GSR dated 31 January 2017. Although it was the current GSR at the date of the grant and commencement of the tenancy, it was obviously out of date by the time that the s.21 notice came to be served. The trial was conducted under the accelerated procedure for claims made under s.21 HA 1988. As a result, there were no formal pleadings as such but in her defence form Ms. Rouncefield took a number of points including that the 2017 GSR had not been provided prior to her taking up occupation of the Flat as required under regulation 36(6)(b). Reference is also made to a further GSR dated 3 April 2018 (stating that the

check had been carried out on that date) which was provided to Ms. Rouncefield shortly after that date. On that basis, there was a period of over 14 months between inspections rather than the 12 months specified by regulation 36(3)(a). The landlord now contends that the second GSR gave the wrong date for the check and that it was carried out on 2 February 2018. There was no check carried out on 3 April 2018 and the GSR provided which bears that date was simply a document generated in error by the claimant's computer system. The claimant has produced a GSR relating to the inspection on 2 February 2018, although there is an issue as to whether this was provided to Ms. Rouncefield prior to the service of the s.21 notice on 1 May 2018. On this version of events:

(1) there was still more than the 12 months between inspections permitted by regulation 36(3)(a);

(2) the GSR dated 3 April 2018 did not comply with regulation 36(3)(c)(i) because it did not give the correct date for the safety check; and

(3) the February 2018 GSR gives the correct date for the safety check but there is an issue as to whether it was served on the tenant or displayed at any time prior to the service of the s.21 notice on 1 May 2018.

9. Ms. Rouncefield defended the claim for possession on the basis that the claimant had failed to comply with either regulation 36(6)(b) or 36(7) at the time when it granted her the tenancy and before she began to occupy the Flat. The court was not asked to consider the effect (if any) of the claimant's failure to comply with regulation 36(3)(a) and (c). At the hearing of the claim in the Truro County Court on 13 September 2018 District Judge Rutherford held that regulation 36 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; in this case on 9 November 2017.

10. Ms. Rouncefield appealed and at the hearing of her appeal before HH Judge Carr on 13 February 2019 it was common ground that regulation 36(7) applied in a case such as the present 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. In such circumstances, the Flat is served directly or indirectly by the gas boiler so as to make the boiler a "relevant gas fitting" for the purpose of regulation 36(2) and therefore subject to the obligation to carry out and make a record of an annual inspection under regulation 36(3). The GSR did therefore relate to the premises let to Ms. Rouncefield and regulation 36(6) and (7) was engaged. This is not in issue on this appeal.

11. On the question whether late compliance in relation to regulation 36(6)(b) and (7) enabled the claimant to serve and rely on its s.21 notice, Judge Carr held that it did not. In reaching this conclusion he relied on and adopted the reasoning of HH Judge Luba QC in *Caridon Property Limited v Shooltz* (2 February 2018: 2018 WL 05822845).

12. Judge Luba's view in that case was that the purpose of regulation 36(6) and (7) is to ensure that the obligations imposed on landlords of residential property by the 1998 Regulations are carried out and to give tenants and prospective tenants the assurance that the gas appliances serving their premises have been inspected and found to be safe.

Regulation 2(1) of the 2015 Regulations clearly identifies both paragraph (6) and paragraph (7) of regulation 36 as prescribed requirements for the purposes of s.21A HA 1988. But the scope of regulation 2(2) is more controversial and has given rise to a number of issues of interpretation. In this case the landlord has contended that the effect of regulation 2(2) is not merely to remove the 28 day period in regulation 36(6)(a) for the purpose of its treatment as a prescribed requirement but also to make compliance with regulation 36(6)(b) not dependent on the GSR being provided to the tenant or displayed prior to occupation. In the course of his submissions on this appeal Mr Bates developed an alternative argument that regulation 2(2) had the effect of excluding paragraph (6)(b) in its entirety. The reference to the requirement prescribed by paragraph 1(b) (of the 2015 Regulations) being "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" (my emphasis) means, he said, that it includes only regulation 36(6)(a) (minus the 28 days) as a prescribed requirement because paragraph (6)(b) does not contain a requirement to provide the GSR within 28 days.

13. In *Caridon* Judge Luba rejected both these interpretations of regulation 2(2). He considered that the words I have quoted did no more than to remove from regulation 36(6)(a) the requirement to provide the GSR to an existing tenant within 28 days but that it left intact both paragraph (6)(b) and (7) as prescribed requirements for the purposes of s.21A. His view was that the exclusion of paragraph (6)(b) as a prescribed requirement was both inconsistent with the purpose of ensuring that all tenants, both existing and prospective, should have the assurance of living in a safe environment and was too drastic a construction of the words used given the blanket inclusion in regulation 2(1) of the whole of both paragraph (6) and paragraph (7) of regulation 36. If the intention had been to exclude paragraph (6)(b) in its entirety one would have expected to see that expressed by its omission from regulation 2(1). As it is, regulation 2(2) can be read simply as the identification of the 28 day requirement in paragraph (6)(a) and the exclusion of that alone from the general effect of regulation 2(1).

14. Based on this construction of the 2015 Regulations both Judge Luba and Judge Carr have held that the requirement in regulation 36(6)(b) for the GSR 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 GSR is insufficient to free the landlord from the embargo on the service of a s.21 notice imposed by s.21A. In *Caridon* Judge Luba said:

> "39. In my judgment, my interpretation, as indeed that of DJ Bloom, who I uphold on this point, gives effect to those regulations. It controls the landlord's ability to give notice under Section 21 to those circumstances in which assurance has been given to the occupier that premises are safe. It will be recalled that the Gas Safety Regulations require such assurance, not only to tenants, but also to prospective tenants. My reading of regulation 2(2) gives effect to the purpose of the 2015 Regulations, in that it ensures, consistently with the intention of the (earlier) Gas Safety Regulations, that landlords must give the requisite assurance to tenants before they take up their tenancies and that once such assurance has been given, they must repeat such assurance on a recurrent basis, by giving later copies of

> certificates, or records. The tenant in the latter case, that is to say, in relation to a post-tenancy inspection check, need only be given such assurance at some time before the service of the notice.
>
> 40. Any other interpretation of the regulations would leave it open to a landlord to give a Section 21 notice, even where that landlord has let what may at the time have been dangerous and unchecked premises, which would have fallen foul of the Gas Safety Regulations. Accordingly, I hold that there is nothing in grounds two or three of the grounds of appeal to drive me to any different interpretation."

15. On this appeal Mr Bates for the claimant takes issue with the judgment of Judge Carr on the first appeal so far as it endorsed Judge Luba's interpretation of the meaning and effect of regulation 2(2) of the 2015 Regulations. He also submits that the conclusion in both *Caridon* and this case that a failure to comply strictly with regulation 36(b)(b) and (7) excludes the service of a s.21 notice for all time cannot be justified by or based simply on a consideration of the meaning and effect of the 1998 and the 2015 Regulations. The scheme of the legislation introduced by ss. 38 and 39 of the DA 2015 is, he says, to qualify by primary legislation the ability of the landlord to terminate an AST by the service of a s.21 notice. The 2015 Regulations perform the function of identifying which provisions of other primary and subordinate legislation constitute prescribed requirements for the purposes of s.21A but they do not contain any provisions which determine the consequences of a breach of a prescribed requirement. That depends upon reading and applying the provisions of the designated legislation in accordance with the provisions of s.21A itself. A landlord may not serve and rely on a s.21 notice "at a time when .. [he] .. is in breach of a prescribed requirement". The issue therefore in every case is whether a breach of the prescribed requirement continues and in the case of an historic breach whether the words "at a time when" in s.21A have 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.

16. This remains the main issue on the claimant's appeal. But the defendant has served a Respondent's Notice seeking to uphold the decision of Judge Carr on other or additional grounds. These are that the claimant took more than the 12 months permitted by regulation 36(3)(a) between inspections and was therefore in breach of regulation 36(6)(a) at the time of the service of the s.21 notice because in the case of the second GSR it had not served a copy of the record "made pursuant to the requirements of paragraph 3(c)". I shall come to the detail of this a little later.

17. Now that the landlord has confirmed that the April 2018 GSR was inaccurate and has produced the February 2018 GSR, Ms. Rouncefield also wishes to contend that the February 2018 GSR was not provided to her prior to the service of the s.21 notice so that a breach of regulation 36(6)(a) continued unremedied up to that date.

The issues on the appeal

(1) The effect of regulation 2(2) of the 2015 Regulations

18. I agree with the view expressed in *Caridon* that regulation 2(2) does not have the effect of excluding regulation 36(6)(b) in its entirety. The effect of regulation 2(1)(b) is to

make the whole of paragraphs (6) and (7) prescribed requirements for the purposes of s.21A HA 1988. Regulation 2(2) is a qualification of that provision and clearly excludes the 28 day period mandated under paragraph 6(a). Late compliance with the landlord's obligation to provide or display a GSR after each annual check is not therefore a bar in itself to a subsequent s.21 notice. However, the argument that regulation 2(2) also obviates any requirement for the landlord to comply with paragraph (6)(b) as a prescribed requirement faces at least two obvious difficulties.

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 regulation 2(2) 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 s.21A, the prescribed requirement applies to both types of tenant. I do not accept that paragraph (6)(b) is excluded in its entirety.

(2) The time limits in paragraph (6)(b)

20. As I have explained, the first appeal was concerned only with whether the claimant's failure to provide Ms. Rouncefield with or to display a copy of the most recent GSR prior to her taking up occupation of the Flat was fatal to its ability to serve the s.21 notice on 1 May 2018. I propose to deal with that question before turning to the other issues of non-compliance raised by the Respondent's Notice.

21. If the failure by the landlord to provide a new tenant with a copy of the latest GSR prior to the tenant going into occupation means that the landlord is forever precluded from serving a s.21 notice then it must follow that the adoption of paragraph (6)(b) as a prescribed requirement imposes a far greater sanction on the landlord than is the case under paragraph (6)(a) where the 28 day requirement is expressly disapplied by regulation 2(2). So if the landlord fails to give to an existing tenant a copy of the new GSR until long after the 28 days allowed for under paragraph (6)(a) has passed he will still be able to take advantage of s.21 HA 1988. But late production to a new tenant of the most recent GSR will, on the authority of *Caridon*, restrict the landlord's rights to

obtain possession to those it would enjoy under an assured tenancy which was not what it granted.

22. Although as Judge Luba explained in *Caridon* there are obvious policy reasons for ensuring that tenants know that they are taking up occupation of premises where they can safely live, it is not easy to see why the same reasons should not apply with equal force to those tenants who continue in occupation from year to year. But Parliament has not imposed that sanction on landlords who fail to comply with paragraph (6)(a).

23. One justification for this disparity in treatment might perhaps have been that the new tenant should have the assurance of seeing the relevant GSR before deciding whether to take a tenancy of the premises. But that is not what paragraph (6)(b) secures. The landlord has no obligation to provide the GSR prior to granting the tenancy. The right of the tenant to see the GSR arises only once he or she has become a tenant of the premises.

24. It is important, I think, when considering the intended effect of regulations 36(6) and (7) as prescribed requirements to keep well in mind that s.21A HA 1988 is not the primary sanction for non-compliance. As with any other health and safety regulations, a breach of the 1998 Regulations is punishable as a criminal offence under s.33 of the Health and Safety at Work etc. Act 1974 and a landlord whose breach of the regulations results in the death of a tenant may also have a potential criminal liability for manslaughter. The imposition by s.21A of a bar to the service of a s.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. That also supports, in my view, the construction of regulation 2(2) as excluding from regulation 36(6) not only the 28 day provision in paragraph (6)(a) but also the requirement in paragraph (6)(b) that the GSR should be provided to a new tenant or displayed prior to the tenant going into occupation.

25. This brings me to s.21A itself. The phrase "at a time when" in s.21A(1) is commonly used in housing legislation as part of a statutory inhibition of the landlord's right to serve a s.21 notice. I mentioned some examples earlier in this judgment, although the precise nature and duration of the embargo will depend upon the other statutory provisions whose breach or non-compliance has brought the embargo into operation. The purpose and intended effect of the embargo will therefore vary from case to case depending upon the provisions of the legislation in question. So, for example, in a case where a landlord takes a deposit from a tenant without giving the tenant the prescribed information as defined within the 30 day period allowed or without arranging for the deposit to be held in accordance with an authorised tenancy deposit scheme no s.21 notice may be given until the prescribed information is provided or the deposit is returned: see Housing Act 2004 ss.213(5), 215(1), (2) and (2A). Section 215(1) provides in terms that no s.21 notice may be given "at a time when the deposit is not being held in accordance with an authorised scheme". The provision therefore makes clear what must be done to bring the embargo to an end.

26. Section 21A(1) is more general. It refers only to the time "when the landlord is in breach of a prescribed requirement". The lack of specificity is explained by the range of regulatory provisions which could potentially be made prescribed requirements

under the powers contained in the DA 2015 but it means that s.21A(1) gives no clear guidance as to what the landlord must do in order to cease to be in breach of the requirement in question.

27. As part of his submissions Mr Bates contended that the words of s.21A(1) themselves are sufficient to make what would otherwise be late compliance with paragraph (6)(b) irrelevant. In other words, that s.21A(1) modifies regulation 36(6)(b) as a prescribed requirement by imposing the embargo on the use of s.21 only so long as the landlord has not provided the new tenant with the current GSR.

28. To support this submission he drew our attention to various parliamentary materials including ministerial statements made during the committee stage of the bill but I was not much assisted by this. The statements made are very general in nature as are the explanatory notes relating to what became s.21A which state that:

> "the landlord is prevented from giving a section 21 notice until the landlord has complied with the relevant legal obligations."

29. The most that can be said is that this seems to confirm that the restriction imposed by s.21A was seen as temporary in nature and capable of being cured by eventual compliance. However, I am not convinced that this can be achieved by the words of s.21A(1) alone. The correct source of the remediable nature of a breach of paragraph 6(b) is in my view regulation 2(2) for the reasons which I have explained and if that is right then s.21A(1) can be given its ordinary and obvious meaning in relation to the limited prescribed requirement which is uplifted from paragraph (6)(b) by regulation 2(2).

30. Although the point is not straightforward, I am not therefore persuaded that for the purposes of s.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 s.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 "<u>is</u> in breach" of paragraph (6)(b) ends for the purposes of s.21A once the GSR is provided.

<u>(3) The Respondent's Notice</u>

31. The respondent seeks to uphold the decision of Judge Carr on two additional and alternative grounds, both of which relate to the second GSR. Mr Cherry contends that even if the breach of regulation 36(6)(b) ceased with the provision of the January 2017 GSR to Ms. Rouncefield in November 2017 the claimant remained in breach of paragraph (6)(a) at the time when it served its s.21 notice on 1 May 2018.

32. This argument is put on two bases. The first is that the next gas safety inspection due after 31 January 2017 took place more than 12 months after the previous inspection.

The claimant originally contended that it took place on 3 April 2018 but now says that this was an error and that the inspection in fact took place on 2 February 2018. Even on that basis there was a breach of regulation 36(3)(a) which requires safety checks to be carried out at intervals of not more than 12 months. The provision of a GSR based on a late inspection means, says Mr Cherry, that as at 1 May 2018 there was also a breach of paragraph (6)(a) and (7) because the second GSR was not a copy of the record "made pursuant to the requirements of paragraph 3(c) above". This is because paragraph 3(c) imposes on the landlord an obligation to ensure that a record in respect of any gas appliance "so checked" is made and retained and the words "so checked" must refer back to paragraph 3(a) which requires each appliance to be checked for safety at least every 12 months. In this way, it is said, the requirement for 12 monthly checks is imported as part of paragraph (6)(a).

33. On the facts as they were understood to be at the time when the Respondent's Notice was served no further issue about timing was relied upon. In early April 2018 Ms. Rouncefield was supplied with a copy of a GSR which purported to relate to a gas safety check carried out on 3 April. It had therefore been supplied within the 28 days provided for under paragraph (6)(a). But the claimant now accepts that this GSR was materially inaccurate and that the only safety check carried out in 2018 took place on 2 February 2018.

34. On this basis the point about the safety check having been carried out more than 12 months after the previous check remains. But Mr Cherry also contends that the April 2018 GSR (if still relied on) did not comply with regulation 36(3)(c)(i) because it gave the wrong date for the safety check and that the GSR relating to the 2 February safety check was not provided to Ms. Rouncefield (as required by paragraph (6)(a)) prior to the service of the s.21 notice.

35. I am not persuaded that a failure to carry out the next safety check within 12 months of the last one means that the landlord cannot comply with paragraph (6)(a) as a prescribed requirement if he serves the tenant with a copy of the record once the check has been carried out. As Mr Bates submitted, paragraph (3)(a) is not itself a prescribed requirement and if the words "so checked" in paragraph (3)(c) are read in the sense for which Mr Cherry contends then the landlord would have no obligation under paragraph (3)(c) to make and retain a copy of any late inspection nor would regulation 36(5) be workable. That seems to me to be absurd.

36. In my view the words "so checked" in paragraph (c) refer back to the phrase "checked for safety" in paragraph (3)(a) and cover every safety check which is carried out. 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 s.21 notice then the claimant is prevented by s.21A from relying upon that notice.

37. The outcome of the appeal therefore depends, in my view, on whether the February 2018 GSR was given to Ms. Rouncefield later than when she was served with the s.21

notice. If she received it before or with the s.21 notice then the claimant's appeal must be allowed. If she received it after service of the s.21 notice then the appeal must be dismissed for that reason alone. This Court is not in the position to determine this issue of service. If the other members of the Court are in agreement, I would therefore remit that issue for determination by the County Court under CPR 52.20(2)(b). Once the County Court has decided when Ms. Rouncefield first received the February 2018 GSR we will make an order disposing of the appeal in whatever way is appropriate.

Lady Justice King :

38. As identified by Patten LJ at para.[15] above, the issue is whether a landlord who has omitted to provide his new tenant with a copy of a valid GSR (or alternatively appropriately to display such a certificate in a prominent position in the premises) can make good that omission by providing the GSR at a later date and in so doing, satisfy the requirements of s21A, the landlord being "at the time" of the service of the notice, no longer in breach of a prescribed requirement.

39. The answer depends on the interpretation of regulation 2(2) of the 2015 Regulations. Having had the opportunity of reading the draft judgments of both Patten LJ and Moylan LJ, I am in agreement with the analysis of Patten LJ and I too would therefore allow the appeal.

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.

41. Further, such a serious sanction for the breach of the prescribed requirement, it is agreed by both Patten LJ and Moylan LJ would pursuant to regulation 2(2), apply only to the landlord who failed to give his new tenant a copy of the GSR under regulation 36(6)(b) and not to that same landlord, who as a result of the same error in relation to a flat in the same block, failed pursuant to regulation 36(6)(a), to provide a copy of the certificate to an existing tenant following the annual safety inspection.

42. Such a disparity of outcome does not seem to me to fit with the legislative scheme as a whole. For my part I agree with Patten LJ that 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 s21 providing that the relevant certificate has been provided before service of the notice.

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 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).

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).

44. For ease of reference I set out again regulation 2(2):

> "(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"

45. In my judgment the legislative scheme and interrelation of the Act and the regulations should not be undermined by the awkward drafting and the use of the word "that" in regulation 2(2). A proper interpretation of regulation 2(2) should in my judgment recognise that rather than the "escape clause" for a landlord applying only to regulation 36(6)(a)(existing tenants), resulting in a gross disparity of outcome as between regulation 36(6)(a) and (b), regulation 2(2) sets out to disapply the 28 day time for compliance in relation to existing tenants in order to achieve an <u>equal</u> outcome in relation to an earlier failure to provide a GSR whether to new or to existing tenants. As a consequence, in my view, 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.

46. It follows that for the reasons set out in the judgment of Patten LJ I would allow the appeal subject to the issues raised by the respondents. On that I agree that we should make the order described in [37] of Patten LJ's judgment for the reasons which he gives.

Lord Justice Moylan :

47. I have not found the principal issue raised by the claimant's appeal, namely the effect of regulation 2(2) of the 2015 Regulations, easy to resolve. Ultimately, for reasons set out below, I have come to a different conclusion to that reached by Patten LJ on the key

question of whether regulation 2(2) enables a landlord, notwithstanding the failure to comply in time with the requirements of paragraph (6)(b), or alternatively paragraph (7), of regulation 36 of the 1998 Regulations, to give a copy of a GSR to the tenant at a later date and thereby entitle the landlord to take advantage of the accelerated possession procedure by giving a s.21 notice.

48. It is regrettable, given the prevalence of ASTs and the importance that gas appliances are checked for safety, that the combined effect of regulation 36 and regulation 2(2) is not as clear as it might be. As Patten LJ sets out in paragraph 24, there are other, criminal, sanctions for breaches of the 1998 Regulations. However, the sanction imposed by s.21A in respect of the "safety of occupiers of dwelling-houses", of depriving a landlord of the ability to take advantage of the accelerated possession procedure, might be expected, in my view, to impose a substantive sanction rather than simply a procedural requirement to give a GSR to a tenant at any time prior to the provision of a s.21 notice. In saying this, I recognise that I have to address the effect of regulation 2(2) on paragraph (6)(a) of regulation 36 (which I deal with below). I also recognise that, as set out in an Agreed Note provided by counsel after the conclusion of the hearing, it appears that all the other prescribed requirements are capable of being remedied at any time save for that set out in s.213(3) HA 2004 (in respect of which there is an express statutory alternative remedy, as set out below). However, this is largely because many of them have no date for compliance and, significantly, none of them are directly addressing the safety of occupiers of the property.

49. The legislative framework is set out in Patten LJ's judgment. As he notes in paragraph 7, the provisions of s.21A and the 2015 Regulations place additional pressure upon and provide encouragement for landlords to comply with regulation 36 by imposing the sanction of being unable to rely on the accelerated possession procedure provided by s.21 "at a time when the landlord is in breach of a prescribed requirement".

50. The only additional provisions which I would set out are from s.213 and s.215 HA 2004 which are among the provisions which deal with the landlord's obligations in respect of a tenancy deposit and are touched on by Patten LJ in paragraph 28. These and other provisions in HA 2004 and the Deregulation Act 2015 were not referred to by counsel in their written arguments. However, during the course of the hearing they were asked to provide an agreed note of other provisions which restrict a landlord's right to serve a notice under s.21 HA 1988. In their Agreed Note, as I understand it, counsel agree that the combined effect of s.213(3) and s.215(1A) HA 2004 is that no s.21 notice can be served if the landlord has failed to comply in time with the requirements in respect of a deposit set out in s.213(3).

51. The relevant provisions in s.213 are as follows:

> "(3) Where a landlord receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme must be complied with by the landlord in relation to the deposit within the period of 30 days beginning with the date on which it is received.
>
> (4) For the purposes of this section "the initial requirements" of an authorised scheme are such

> requirements imposed by the scheme as fall to be complied with by a landlord on receiving such a tenancy deposit"

Section 215 contains sanctions for non-compliance:

> "(1) Subject to subsection (2A), if (whether before, on or after 6 April 2007) a tenancy deposit has been paid in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy at a time when the deposit is not being held in accordance with an authorised scheme.
>
> (1A) Subject to subsection (2A), if a tenancy deposit has been paid in connection with a shorthold tenancy on or after 6 April 2007, no section 21 notice may be given in relation to the tenancy at a time when section 213(3) has not been complied with in relation to the deposit.
>
> …
>
> (2A) Subsections (1), (1A) and (2) do not apply in a case where –
>
> (a) the deposit has been returned to the tenant in full or with such deductions as are agreed between the landlord and tenant, or
>
> (b) an application to the county court has been made under section 214(1) and has been determined by the court, withdrawn or settled by agreement between the parties."

52. Counsel agree that the effect of the above provisions, in particular s.215(1A), is that, for the purposes of s.21A HA 1988, (quoting from the Agreed Note) a landlord who "has failed to comply with the requirement to protect the deposit within the 30 day timeframe [is] unable thereafter to comply by protecting the deposit at any later time". In other words, a breach of s.213(3) HA 2004 is in itself irremediable.

53. This is not the end of the matter because s.215(2A) expressly disapplies s.215(1A) if either of the conditions set out in (a) or (b) are satisfied. There is, therefore, an express statutory route by which the consequences of the otherwise irremediable effect of non-compliance with s.213(3) can be avoided.

54. I have spent some time dealing with these provisions because, in my view, they support Patten LJ's conclusion in paragraph 29, with which I agree, that s.21A does not mean that all the prescribed requirements must be remediable. They show that the words, "at a time when", in s.21A are not limited to breaches which are remediable but can also refer to a breach which is, in itself, irremediable. I agree with Patten LJ that the words "at a time when", on which Mr Bates has based his submission, do not mean, let alone require, that the underlying requirements must be interpreted so as to have the

"ambulatory" effect for which Mr Bates contends, namely that the prescribed requirements are to be interpreted as being remediable. As Patten LJ says, the question of whether a breach of one of the prescribed requirements is or is not remediable must be determined principally by reference to the terms of the requirement itself, although also having regard to the legislative scheme as a whole.

55. I also agree with Patten LJ in rejecting the claimant's submission that regulation 2(2) excludes the provisions of paragraph (6)(b) of the 1998 Regulations as a prescribed requirement for the purposes of s.21A. Regulation 2(1)(b) refers to paragraphs (6) and (7) and I can see no reason for interpreting this as meaning only paragraph 6(a). Further, as Patten LJ say, in paragraph 19, if the intention had been to include only paragraph 6(a), and not (6)(b), there would have been a more direct and obvious way of drafting this provision to make that clear than by including it in regulation 2(1)(b) only to exclude it in regulation 2(2).

56. I also agree, because this is what regulation 2(2) expressly states, that it removes the 28 day time limit in paragraph (6)(a) and permits a copy of the GSR to be given to an existing tenant at any time prior to the service of a s.21 notice. This clearly has the effect of turning the provisions of paragraph (6)(a) into what I have called a procedural rather than a substantive hurdle and limiting their effect as a sanction.

57. Where I differ is whether regulation 2(2) also applies to the provisions of paragraph (6)(b). Patten LJ concludes that it applies also to paragraph 6(b) for the reasons he gives in paragraphs 20 to 24 and 30. The conundrum in this case arises, in my view, from the fact that regulation 36(6) contains two separate obligations in (a) and (b), only one of which has a "28 day period for compliance" as referred to in regulation 2(2).

58. I would first note that, during the course of his oral submissions, Mr Bates accepted that, if the provisions of paragraph 6(b) are not excluded as a prescribed requirement by regulation 2(2), it would make it difficult to argue for late compliance being permissible.

59. I acknowledge the force of the points made by Patten LJ. Why, as he asks, should there be a disparity of treatment between the provisions of paragraph 6(a) and (b) for the purposes of s.21A? Mr Cherry suggested that it could be because of the need to ensure that the safety of a new tenant was protected from the commencement of his occupation and so that the tenant was aware of the next date when the next safety check was due. These are possible reasons for differentiating between a tenant going into occupation and a tenant in occupation. It is not very satisfactory to come up with no clear answer but, in my view, putting it the other way round, no reasons have been identified, either by reference to principles of statutory interpretation or otherwise why, what I regard to be, the effect of regulation 2(2) on a plain reading should not be applied.

60. The difficulty I have with interpreting regulation 2(2) as also applying to paragraph 6(b) is that it expressly refers *only* to the "28 day period for compliance" and uses the words "*that* requirement" (my emphasis). In addition, the two elements, the provision of the GSR and the reference to the 28 day period, are connected by the word "and". The reference only to the 28 day period, and not to the time stipulated in paragraph (6)(b) (namely, "before that tenant occupies"), and the use of the words "and" and "that" make it clear, in my view, that regulation 2(2) is only referring to the requirement in paragraph (6)(a).

61. I recognise that, as Patten LJ says in paragraph 21, that this "imposes a far greater sanction" in respect of a breach of paragraph (6)(b) than that applied to paragraph (6)(a). But that, in my view, is the combined effect of paragraph (6)(b) and regulation 2(2) and nothing in the wording of s.21A or the scheme of the legislation require or provide a sound basis for reaching a different conclusion. Indeed, if the time requirements in both paragraphs (6)(a) and (6)(b) were lifted, then I do not see these provisions as imposing much of a sanction at all. Finally, although this is a somewhat circular argument, I would add to what HHJ Luba QC said in *Caridon*, at [43], and note that, as an alternative, the legislation could have provided a means by which a landlord could avoid the effect of having failed to comply with paragraph (6)(b), as was done in s.215(2A) HA 2004, but it does not.

62. I would, therefore, dismiss the claimant's challenge to the judge's determination of the consequences of the failure to give the tenant a GSR prior to her entering into occupation of the premises.

63. On the issues raised in the respondent's notice, I agree with Patten LJ's conclusion (as set out in paragraph 37) that the question of when the February 2018 GSR was given to Ms. Rouncefield must be remitted for determination.

64. The other issue was also, as I understand it, a new argument which was not advanced below. It is a pure question of law, namely whether a landlord can only comply with paragraphs (6) and (7) of regulation 36 if the GSR provided to the tenant or displayed is a GSR in respect of a safety check which has been carried out within the time limits stipulated in regulation 36, namely within 12 months of installation or the previous check (as amended by regulation 36A inserted on 6 April 2018). For the reasons set out by Patten LJ (in paragraph 35), it is difficult to see how regulation 36 would be workable if this argument was right. However, as this was not raised below and was, with respect to counsel, argued as a subsidiary point, and given its importance I would prefer to wait until it is properly and substantively raised and argued before finally deciding the point.