Property: Trecarrell House Ltd v Rouncefield [2020] EWCA Civ 760

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The world of residential property was thrown into one of its periodic bouts of panic after HHJ Luba QC decided, in **Caridon Properties v Monty Shooltz** (2 February 2018; 2018 WL 05822845 Central London County Court), that a landlord who failed to give a new tenant a copy of the gas safety certificate ("GSC") for his new property before he moved in was forever unable thereafter to serve a section 21 notice to terminate the tenancy.

As the landlord in ***Caridon*** chose not to appeal that decision, the "not – strictly – binding – but – always – followed – because – it's Jan Luba" judgment presented a major and unforeseen obstacle to landlords who found the point being run against them in county courts up and down the land. Thus it was that when HHJ Carr in Truro County Court adopted HHJ Luba QC's reasoning on a similar set of facts, the landlord in **Trecarrell House Ltd v Rouncefield**, advised by our friends at Anthony Gold solicitors, decided to run an appeal.

After thinking about it for 5 months following the appeal hearing, the Court of Appeal has finally given us an answer. However what we now have is a leading judgment from Patten LJ that does require the application of a cold towel to the forehead in order to follow the reasoning, and a dissent from Moylan LJ to offer hope to those advising tenants.

In short, the law now is that, provided the landlord gives the tenant a copy of the relevant GSC before or at the same time as the section 21 notice is served, then the provisions of s.21A Housing Act 1988 (compliance with prescribed requirements) will have been satisfied.

In ***Trecarrell***, Mrs Rouncefield (the tenant under an AST agreement commencing on 20 February 2017) was not given the GSC (dated 31 January 2017) until some 9 months after she had taken up occupation of her rented home. A notice pursuant to s.21 Housing Act 1988 ("HA 1988") was then served on 1 May 2018. A claim was issued and a possession order made by a district judge. HHJ Carr, allowing the tenant's appeal against the ruling of a district judge, applied HHJ Luba QC's ruling in **Caridon v Monty Shooltz** to the effect that paragraph 6 of regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 was that the failure to supply an incoming tenant with a copy of the GSC *before they took up occupation* was a breach which could not later be rectified.

Arriving at the opposite view, Patten LJ (with whom King LJ agreed) was much impressed by two considerations. The first was that all other bars on serving a s.21 notice (such as failure properly to protect the tenant's security deposit) were suspensory. In other words, the bar on serving the notice only remained in place until the required action was carried out (or in the case of failure to protect the tenant's security deposit, the deposit was repaid). The wording of section 21A(1) which stated

that a section 21 notice could not be served "at a time when" (there had been a failure to comply with a prescribed requirement) clearly implied (according to Patten LJ) that the sanction falls away once the requirement has been complied with. The second consideration was that Parliament had already provided a separate penalty for the landlord who fails to comply with his gas safety obligations: a criminal prosecution under section 33 of the Health & Safety at Work Act 1974. The provisions of s.21A of the HA 1988 were collateral to that tougher sanction and were merely "a spur to compliance."

However this may not be the end of the matter. Moylan LJ's dissenting judgment upholding the conclusions of HHJ Luba QC in ***Caridon*** may form the basis of a further appeal, either in the present case or in a future dispute involving similar facts. Further, there remains the question whether a failure to carry out a gas safety inspection *at all* before a new tenant takes up occupation, rather than failing to provide the resultant GSC before the tenant moves in, would lead to a different conclusion. It is noted that Patten LJ agreed with HHJ Luba QC that one of the aims of the legislation was to ensure that no tenant moved into a property which was unsafe.

Further, there remains the question whether a landlord may in any event save the position by giving the tenant a GSC whilst the original fixed term is in force. After the fixed term expires the tenancy becomes a statutory periodic assured tenancy. Such a tenancy is a "new" tenancy (s5(3) HA 1988) and therefore the GSC given during the original fixed term would have been in the tenant's possession before he took up occupation under the new tenancy. That argument awaits its day in court.

Of course, all of this may prove academic if and when the Government carries out its promised abolition of the section 21 procedure.

Finally for Trecarrell House Limited, the case is not over. The eagle-eyed reader of this note will have appreciated that, by no later than the end of January 2018, the landlord should have carried out a further annual inspection of the gas equipment and provide a new certificate. There was an unresolved factual dispute about whether this had happened or not. The Court of Appeal remitted that issue back to the County Court for determination.