Upsetting the apple cart

Sarah Heatley looks at a decision which adds a further layer to the process of repossession when serving a section 21 notice

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'Even if *Caridon* is not appealed, it is thought that the government may step in to resolve the issue, as it did following the *Superstrike* fallout, and could opt to amend the wording of the relevant legislation if this decision does not reflect Parliament's intention.'

Any landlord or agent worth their salt will be only too aware of potential pitfalls when serving section 21 notices to end assured shorthold tenancies (ASTs) in a post-Deregulation Act age.

A recent case has muddied these murky waters further by indicating that landlords will not be able to regain possession of premises if they did not serve new tenants with valid gas safety certificates before the tenant took up occupation.

ASTs

First, a spot of revision. A residential tenancy created after 28 February 1997 will automatically be an AST unless the landlord has served a notice on the tenant stating that it will not be. Section 1(1) of the Housing Act 1988 lists the following requirements for an AST:

- the tenant must be an individual (and not a company);
- the property must be occupied as the tenant's only or principal home; and
- the tenancy must be one that cannot be an assured tenancy, so a business tenancy to which Part II of the Landlord and Tenant Act 1954 applies, for example, or the tenancy of agricultural holdings or farm business tenancies.

An AST created after 28 February 1997 will either be for the fixed term specified in the agreement, or a contractual periodic tenancy that will run indefinitely from one rental period to another. If an AST is granted for an initial fixed term the parties can agree a new, replacement tenancy for a further fixed term or let the tenancy continue to run on as a statutory periodic tenancy at the end of that fixed term.

There is no minimum fixed term but an order for possession will not take effect earlier than six months after the beginning of the original tenancy. Legally, there is also no maximum length of fixed term that can be granted by an AST, although in practice they are usually granted for one or two years and there may be practical issues to consider if a longer term is granted.

In most cases an AST does not have to be in writing. However, a tenant of an oral AST that started on or after 28 February 1997 is entitled to ask for a written statement of the terms of the tenancy.

Once the fixed term of an AST has expired a landlord may use the procedure in s21 of the Housing Act 1988 to terminate the tenancy and reclaim possession of the premises. They do not need to prove any grounds for possession when using this method of termination and, if certain criteria are met, a possession order may be granted without the need for a hearing if the accelerated possession procedure is utilised.

The Deregulation Act 2015

The Deregulation Act introduced various changes to the rules dictating how ASTs in England can be terminated. As an aside, this legislation does not make any changes to ASTs of properties in

Caridon Property Ltd v Shooltz (2018) unreported, Central London County Court, HHJ Luba QC, 2 February

Superstrike Ltd v Rodrigues [2013] EWCA Civ 669

Wales, as the Renting Homes (Wales) Act 2016 is intended to reform the legal basis for renting homes in Wales when its main provisions come into force in the future.

The Deregulation Act affects all ASTs granted after 1 October 2015 but from 1 October 2018 will apply to any AST, whenever it began.

Some of the main changes affecting a landlord's ability to serve a section 21 notice precipitated by the Deregulation Act are as follows:

- Possession proceedings must now be started within six months from when the section 21 notice was served, or, in the case of a section 21(4) notice giving more than two months' notice, within four months from the date specified in the notice.

- A section 21 notice may not be served if the landlord is the manager or controller of an HMO or other premises that are required to be licensed under the Housing Act 2004 and the premises are not licensed.

- Protection from retaliatory eviction where tenants have raised a legitimate complaint about the condition of the particular premises or a 'relevant notice', namely an improvement notice in relation to a category 1 or 2 hazard or an emergency remedial action notice, has been served upon the landlord by the local authority (see box below). Where a relevant notice has been served, the landlord cannot serve a valid section 21 notice during the six-month period following the date of service of the notice, or the date on which any suspension of the relevant notice ended. A notice may be suspended at the local authority's discretion but may happen when enforcement action can be safely postponed as a landlord has arranged the necessary remedial works, for example.

- A landlord no longer has to specify the last day of a tenancy period when serving a section 21(4) notice, which relates to periodic tenancies, as the date on which the tenancy ends.

- A prescribed section 21 notice (Form No 6A) was introduced. It should be used under both s21(1) and (4) and was brought in to try to reduce the likelihood of mistakes being made when compiling a section 21 notice.

- Finally, and crucially for this article at least, a section 21 notice may not now be served until a landlord has served the tenant with a valid gas safety certificate, a valid energy performance certificate and information about the rights and responsibilities of both the landlord and tenant by way of the current *MHCLG: How to Rent: The checklist for renting in England pamphlet.*

The timing of service of these documents has been relatively uncontroversial until now, and it had been considered among many practitioners that even if a landlord had not served them at the outset of an AST then a valid section 21 notice could still be served later on, provided that everything was given to the tenant before service of the notice, even if only a day previously.

However, HHJ Jan Luba QC's recent decision in *Caridon Property Ltd v Shooltz* [2018] has upset the apple cart and it appears that a valid section 21 notice may not be served if a tenant was not provided with a valid gas safety certificate before they moved in at the start of an AST granted after 1 October 2015, when the Deregulation Act came into force.

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Legal requirements

Section 21A of the Housing Act 1988 (as amended by the Deregulation Act) states that a section 21 notice cannot validly be served in relation to tenancies granted after 1 October 2015 if the landlord is in breach of a 'prescribed requirement':

> 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.

These 'prescribed requirements' are set out in the Assured Shorthold

When will a section 21 notice be invalid?

Where the tenant has complained to the landlord, any section 21 notice will be invalid where:

- prior to the service of the notice the tenant complained in writing to the landlord or their agent about the condition of the premises;

- the landlord failed to respond adequately to that complaint within 14 days or they served the tenant with a section 21 notice as a response – an adequate response for these purposes must be in writing and set out the action to be taken and the timescale for doing so; and

- the tenant then took their complaint to the local authority which, as a result, issued a relevant notice upon the landlord.

Tenancy Notices and Prescribed Requirements (England) Regulations 2015. Paragraph 2(1)(b) provides that the relevant requirements relating to the provision of a gas safety certificate are those contained in the Gas Safety (Installation and Use) Regulations 1998.

HHJ Luba QC considered that if the government had intended to give landlords the ability to rectify the position later then they could have simply made express provision for this in the Regulations.

Section 36(3)(c) of the Gas Safety (Installation and Use) Regulations 1998 states that:

> ... a landlord shall –
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> [...]
>
> (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—
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> (i) the date on which the appliance or flue was checked;
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> (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;
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> (iv) a description of and the location of each appliance or flue checked;
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> (v) any defect identified;
>
> (vi) any remedial action taken;
>
> (vii) confirmation that the check undertaken complies with the requirements of paragraph (9) below;
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> (viii) the name and signature of the individual carrying out the check; and
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> (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.

Section 36(6)(b) goes on to require that a landlord should provide a copy of a gas safety certificate to any new tenant of a premises before occupation is taken up (emphasis added):

> ... every landlord shall ensure that –
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> [...]
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> (b) a copy of the last record made in respect of each appliance or flue is given *to any new tenant of premises* to which the record relates *before that tenant occupies those premises* save that, in respect of a tenant whose right to occupy those premises is for a period not exceeding 28 days, a copy of the record may instead be prominently displayed within those premises.

Paragraph 2(2) of the Regulations states that:

> 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.

The facts in *Caridon*

Mr Shooltz began renting a premises under an AST which began after 1 October 2015 but he was not served with a copy of a valid gas safety certificate until 11 months into that tenancy. The landlord, Caridon Property Ltd, subsequently served Mr Shooltz with a section 21 notice and possession proceedings were later issued.

At first instance District Judge Bloom refused to grant a possession order on the basis that the section 21 notice was invalid because the landlord had not complied with para 2 of the Regulations – it had not served Mr Shooltz with a valid gas safety

certificate before he had taken up occupation of the premises. It was therefore in breach of s21A of the Housing Act 1988 and could not serve a section 21 notice.

The landlord's appeal was dismissed. In his judgment, HHJ Luba QC held the following:

- Section 2(2) of the Regulations related to existing tenants only and did not disapply time limits concerning gas safety certificates in general. A gas safety certificate therefore needed to have been served upon Mr Shooltz at the commencement of his tenancy.

- 'This is a "once and for all" obligation on a prospective landlord in relation to a prospective tenant' – a breach cannot be remedied by serving a gas safety certificate later on. HHJ Luba QC considered that if the government had intended to give landlords the ability to rectify the position later then they could have simply made express provision for this in the Regulations.

Implications of the judgment

Although this judgment is not binding, it is likely that well-represented tenants will routinely raise this defence and, until it is appealed, landlords are unlikely to be able to serve valid section 21 notices if they have failed to give new tenants a valid gas safety certificate at the start of a new Deregulation Act tenancy. Even if not appealed, it is thought that the government may step in to resolve the issue, as it did following the *Superstrike* fallout, and could opt to amend the wording of the relevant legislation if this decision does not reflect Parliament's intention.

For the uninitiated, in *Superstrike Ltd v Rodrigues* [2013], the court held that the tenancy deposit compliance rules must be re-complied with by a landlord where a fixed-term tenancy had ended and become statutory periodic and that a valid section 21 notice could not be served if they were not. This was clearly not Parliament's intention and so it took the opportunity to make provision in the Deregulation Act that if the tenancy deposit compliance rules have been complied with, the tenant, landlord and premises are the same and the deposit is held in the same deposit scheme, then a landlord does not need to re-protect the deposit and re-serve the prescribed information once a statutory periodic tenancy arises or every time the tenancy is renewed.

Until a successful appeal, or Parliament's intervention, a landlord may be able to get around the issue by granting a new, replacement tenancy to the tenant and serving the gas safety certificate then, or by serving a certificate at the start of a new period of tenancy if the AST is a statutory periodic one. Even then there is a risk that a judge may find against a landlord where this defence has been raised, given that the tenant would already be in occupation of the premises.

Landlords with ASTs granted before 1 October 2015 would be particularly wise to think about the position now, before the Deregulation Act starts to apply to all ASTs, whenever granted, from 1 October 2018 onwards. If a landlord did not serve a tenant with a gas safety certificate before they moved in, the fixed term has expired or will do so within two months and possession is required, then a section 21 notice could be served now in order to try to circumvent the 1 October 2018 deadline. Given how busy possession lists are, particularly in London, the earlier notices are served, the better.

With regard to the other documents that need to be served before a section 21 notice, mentioned earlier in this article, since the requirements for a valid energy performance certificate or *MHCLG: How to Rent: The checklist for renting in England* booklet are slightly different from those relating to gas safety certificates, it may be possible to argue that this ruling will not apply to the late service of these documents. In respect of energy performance certificates, for example, landlords have to ensure that a valid energy performance certificate has been given, free, to the person who becomes the tenant – there is no requirement for it to be provided before the letting starts. Despite this, it would clearly be good practice to serve all of the necessary documentation at the outset of a tenancy at the same time to avoid this argument being raised by the tenant later on. ■

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What you need to do

I recommend that landlords and agents take the following action when dealing with a new AST:

- Make sure that the tenant/s are provided with a gas safety certificate before the start of the tenancy and before the tenant moves in.

- Make a note of when this was done and ask the tenant/s to sign a receipt confirming that this information has been received.

- Make sure that all staff who deal with lettings are aware of these requirements and that it is added to pre-tenancy checklists.

- If the gas safety certificate has not been served in line with the requirements then make sure a valid gas safety certificate is served before any replacement tenancy is entered into, or before a statutory periodic tenancy begins at the end of the fixed term.