COURT OF APPEAL DECISION IN *MINISTER v HATHAWAY & HATHAWAY* [2021] EWCA CIV 936

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1. In a judgment handed down on 23 June 2021, the Court of Appeal has concluded that Regulation 2 of The Assured Shorthold Tenancy Notices and Prescribed Information (England) Regulations 2015 does not apply to tenancies granted before 1 October 2015. This means that landlords with properties let under such tenancies do not have to serve an Energy Performance Certificate or comply with requirements in the Gas Safety (Installation and Use) Regulations 1998 in order to be able to rely upon a s.21 notice.

2. The idea of using the carrot of retaining a no-fault ground for possession by way of s.21 of Housing Act 1988 as a means of persuading landlords to comply with other regulatory requirements is not a new one. Landlords who fail to comply with HMO licensing provisions and/or fail to protect a deposit are precluded from using s.21 to oust a tenant. The (not very aptly named) Deregulation Act 2015 brought in further requirements that a landlord who had granted an assured shorthold tenancy commencing on or after 1 October 2015 needed to comply with if he wanted to rely upon a s.21 notice.

3. Section 37 of the 2015 Act provides for a new prescribed form to be used and s.39 inserted new s.21B into the Housing Act 1988, which gave the Secretary of State power to prescribe information that had to be provided to tenants before a s.21 notice could be given. Section 38 of the 2015 Act introduced new s.21A. Section 21A(2) conferred power upon the Secretary of State to prescribe requirements under any enactment with which a landlord must comply if he wishes to rely on s.21.

4. The enabling provisions in s.21A(2) and s.21B(1) came into force on 1 July 2015, giving the Secretary of State time to make regulations which would bite at the same time as the substantive provisions of ss.21A and 21B if he wished to do so. He chose to exercise these powers and made The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 ("the 2015 Regulations"). Regulation 2 sets out the requirements which – pursuant to s.21A(1) – must be complied with if a landlord wishes to rely upon a s.21 notice, *viz*: paragraphs 6 or 7 of reg.36 of the Gas Safety (Installation and Use) Regulations 1998 and reg.6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 – which requires landlords to provide tenants with an energy performance certificate ("EPC").

5. There has been considerable argument as to the effect of reg. 2 (see the litigation in *Caridon Property Ltd v Monty Shooltz* and *Trecarrell House v Rouncefield* [2020] EWCA Civ 760) but until 1 October 2018, it was clear that the 2015 Regulations applied only to tenancies granted on or after 1 October 2015 when the substantive provisions of s.21A and s.21B came into force. This was the effect of s.41(1) and s.41(2) of the 2015 Act, which limited the application of provisions introduced by s.38 (and ss.37 and 39) to tenancies granted on or after the date on which the relevant provision came into force. Those provisions included the enabling provisions, significantly for present purposes, s.21A(2).

6. Section 41(3) of the 2015 Act provides that, after a period of three years from the coming into force of a given provision, that provision applies to all assured shorthold tenancies, whensoever granted. Commentators were divided as to the effect of this for the use of s.21 in respect of tenancies granted before 1 October 2015 although the split was not on wholly predictable lines. *Defending Possession Proceedings* – stereotypically at least, the go-to publication for tenant advisors – was

clear that the 2015 Regulations applied to all tenancies from this date; the Guild of Residential Landlords agreed. Arden & Partington on Housing Law took the view that only tenancies granted on or after 1 October 2015 were affected; so did Shelter.

7. Mr and Mrs Hathaway granted Mr Minister a tenancy of Flat 6, Dalmore Court, Marina, Bexhill on Sea which commenced on 19 March 2008 and was for a fixed term of 12 months. On 19 March 2009, a statutory periodic tenancy arose. In December 2018, the Hathaways served Mr Minister with a s.21 notice. It was common ground that no EPC was served prior to the service of the notice. Mr Minister defended the claim on a number of bases but the only one of significance at the trial was his contention that the 2015 Regulations applied to his tenancy so that the Hathaways could not rely upon the s.21 notice they had served, since they had not given him an EPC before serving it.

8. The district judge found in Mr Minister's favour. HH Judge Simpkiss reversed that decision agreeing with the landlords that it was the power to make regulations, and not the 2015 Regulations themselves, that applied to all assured shorthold tenancies pursuant to s.41(3). Since 2018, the Secretary of State had had power to make regulations which applied to all tenancies, but had not chosen to do so.

9. Giving judgment, with which Henderson and Baker LJJ agreed, Arnold LJ held that, at the time that the Secretary of State made the 2015 Regulations, his power was limited to tenancies granted on or after 1 October 2015. The inclusion of reg.1(3), which Mr Minister had argued unlawfully limited the scope of the 2015 Regulations, made sure that the reach of reg.2 did not extend beyond the statutory power as it then was (limited by ss.41(1) and 41(2)). Whilst the Secretary of State had had power to extend the application of reg.2 to any assured shorthold tenancy from 1 October 2018, he had not exercised that power and was not obliged to do so. The appeal was, accordingly, dismissed.

10. The judgment is significant in clarifying the tenancies to which reg.2 applies and confirming that regs.1(3) and 1(4) of the 2015 Regulations are not *ultra vires*. It may be that, going forward, the Secretary of State decides to exercise his power pursuant to s.21A(2) and s.41(3) to prescribe requirements that bind landlords of all tenancies including those

granted before s.21A and the 2015 Regulations were in force. If he does, he will need to keep in mind that such requirements may place a considerable burden upon landlords who may have had a much more unfettered right to possession under s.21 at the time they granted such tenancies. At the time Mr and Mrs Hathaway granted Mr Minister a tenancy (in 2008), the Energy Performance Regulations 2012 had not been passed into law and, whilst they were obliged to comply with the Gas Safety Regulations, were they not to do so, any redress would be by way of the scheme of those regulations, not by way of a fetter on their ability to regain possession of their property.

11. The point before the Court of Appeal was a short one but it is likely to punch above its weight. The Government has promised that s.21 will be abolished, but has not said when this will happen, whether s.21 will be replaced and, if so, by what. Bearing in mind the proposition that a statute should not be held to take away private rights of property unless the intention to do so is expressed in clear and unambiguous terms (*per* Lord Warrington in *Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust Commissioners* [1927] A.C. 343) any such change will have to be considered very carefully. In the meantime, there are enough pre-1 October 2015 assured shorthold tenancies still existing for the decision to make a real difference in the private rented sector.

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