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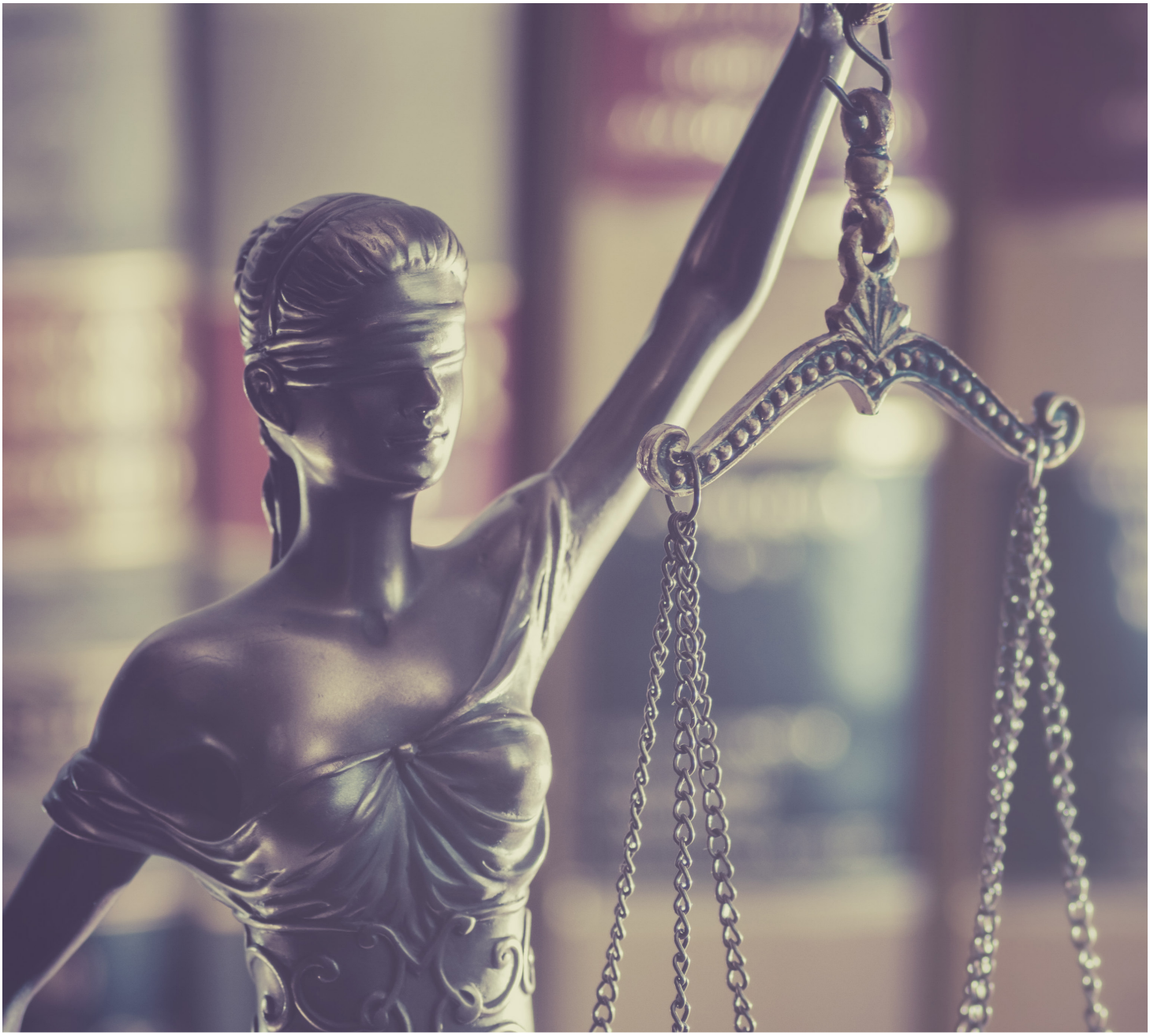

Publications —— Spring 2018

Housing Litigation Update

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Foreword

Welcome to the spring 2018 edition of Housing Litigation Update.

We begin with looking at the problems which can inadvertently arise due to court delays when landlords seek to recover possession of properties let on assured shorthold tenancies.

We then move on to look at the Supreme Court decision relating to Zambrano Carers before moving on to consider a county court appeal decision relating to a landlord's need to comply with certain requirements introduced by the Deregulation Act 2015 in relation to periodic tenancies.

Our focus then shifts to whether an agent can sign a tenancy agreement on behalf of a tenant then we move on to providing a helpful reminder of what creditors need to do before embarking on debt recovery action in order to comply with the Pre-action Protocol for Debt Claims.

We end with a look the county court appeal decision of His Honour Judge Jan Luba QC in respect of the requirement for landlords to serve a tenant with a gas safety certificate in order to be able to rely upon Section 21 of the Housing Act 1988 when seeking possession.

We hope that you find this edition of interest and value. We always welcome any feedback and suggestions for future articles, so please feel free to email us at hlu@trowers.com with any comments or observations.

Yetunde Dania
Partner —— Property Litigation

t +44 (0)121 214 8822
e ydania@trowers.com

Assured shorthold tenancies and the six month requirement

As a result of section 36 of the Deregulation Act 2015, if a periodic assured shorthold tenancy (AST) commenced after 1 October 2015, there is a requirement to begin possession proceedings within six months of serving notice on an assured shorthold tenant pursuant to section 21 of the Housing Act 1988.

On the assumption that a gas safety certificate, energy performance certificate and the How to Rent Checklist have been served in the appropriate circumstances, the process a landlord has to follow and the issues a landlord should be aware of are detailed below:

- Notice pursuant to section 21 of the Housing Act 1988 can be served after an AST has been in existence for four months. If a landlord wants to serve notice within four months of a periodic AST commencing they would have to serve notice pursuant to section 8 of the Housing Act 1988 as possession based on no fault of the tenant is not possible in such circumstances.
- The prescribed wording of a section 21 notice is contained in Form 6A which is also called "Notice seeking possession of a property let on an Assured Shorthold Tenancy" (Notice).
- The Notice must give a tenant two clear calendar months' notice (not eight weeks' which is a common error made). Landlords should remember to allow additional time if the Notice is being served by post. Under the Civil Procedure Rules, if a document is served by first class post, for example, it is deemed served the second business day after posting (if second class post is used a longer period should be allowed). If delivered to a property/personally served before 4.30 pm on a business day the Notice will be deemed served the same day and if after this time it will be deemed served the following business day. A business day is any day with the exception of a Saturday, Sunday or a bank holiday, Good Friday or Christmas Day.
- Section 21(4D) of the Housing Act 1988 provides that, after the four calendar months' notice has expired, a landlord then only has two months to ensure possession proceedings are begun as the legislation states possession proceedings must be begun within six months beginning with the date Notice was served. Failing this the Notice will no longer be valid and a fresh one will have to be served. It should be noted that the court has no power to dispense with the service of this type of Notice.
- For the purposes of section 21(1) or 21(4) of the Housing Act 1988 proceedings are begun when they are issued not when the possession claim is received by the court.

Whilst four months sounds like plenty of time, once a possession claim has been sent to the court, a landlord has no ability to control when the proceedings are begun as clearly, this is down to how the court deals with its day to day work.

The pressure on courts as a result of cutbacks is increasing and in some courts there are serious delays in dealing with day to day matters such as the issuing of proceedings. Court users are often advised not to contact the court within 10 working days of sending correspondence and on occasions this has extended to 42 working days (i.e. seven weeks).

Landlords need to bear this in mind as they may easily find that, through no fault of their own, proceedings have not begun within six months of Notice being served. In such circumstances their claim for possession will automatically fail, they will have to start the process again from scratch resulting in delay and additional expense as the court issue fee will have to be paid again.

In order to reduce the possibility of such a situation arising when landlords are issuing such proceedings they should consider:

- Sending the possession claim to the court as soon as possible after the Notice period has expired;
- Stating the day by which the proceedings are to be begun in bold in the covering letter to the court;
- Diarising to chase the court if nothing is heard within a timely manner;
- If the deadline is fast approaching, consider telephoning the court or making an appointment with it to obtain guidance on how best to deal with the matter.

Whilst landlords are still able to give the old form of notice pursuant to sections 21(1) or 21(4) in respect of periodic ASTs which commenced before 1 October 2015 this ability will cease from 1 October 2018. As from this date the Form 6A form of section 21 notice will have to be used to recover possession, on a no fault basis going forward, for all periodic ASTs which are in existence at that time.

Yetunde Dania
Partner —— Property Litigation

t +44 (0)121 214 8822
e ydania@trowers.com

Zambrano Carers: Supreme Court rejects argument that denial of benefits was unlawful

In *Zambrano v Office nationale de l'emploi (Case C-34/09) [2012] QB 265* the Court of Justice of the European Union held that a non-EU citizen has a right to reside and work in the UK if they are the primary carer ('Zambrano carer') of a UK citizen child who would otherwise have to leave the EU with them, losing their EU citizenship rights, if they were not able to reside in the UK.

In response to this decision the UK government introduced regulations preventing Zambrano carers from claiming social assistance, i.e. non-contributory welfare benefits.

The Claimant in *R (on the application of HC) v Secretary of State for Work and Pensions and others [2017] UKSC 73* was a Zambrano carer. This was not disputed. Her appeal involved the question of whether Zambrano carers are entitled to non-contributory welfare benefits on the same basis as lawfully resident EU citizens.

As background to the case, the Claimant was an Algerian national who moved to the UK in 2009 with leave and then overstayed. She married a British national in 2010 and they had two children, both of whom were British nationals. The relationship ended, the Claimant was provided with temporary accommodation and £80.50 per week for subsistence and utilities under Section 17 of the Children Act 1989. The Claimant challenged, by way of judicial review, the legality of the regulations preventing Zambrano carers from claiming non-contributory welfare benefits.

The Supreme Court unanimously held that Zambrano carers are not entitled to social assistance on the same basis as lawfully resident EU citizens. They held that the discrimination between Zambrano carers and other claimants is indirect discrimination on immigration status, rather than direct discrimination on the grounds of nationality. EU law does not require social assistance on a comparable level, but rather just the practical support needed in order for the children to remain in the EU. The limited assistance provided to the Claimant and her children under the Children Act was sufficient for them to remain, and so the Claimant could not rely on EU law to claim further assistance.

It has yet to be clarified whether the rights of Zambrano carers will be protected in Brexit negotiations, but assuming that they are it seems pretty certain that their entitlement to social security will not be increased.

Natalie Thomas
Associate —— Property Litigation

t +44 (0)1392 612351
e nthomas@trowers.com

Periodic tenancies and the Deregulation Act 2015

In the case of Walcott v Jones & Jones, the County Court considered on appeal whether a periodic tenancy had been repeatedly renewed and whether the landlord therefore had to comply with certain requirements introduced by the Deregulation Act 2015.

The landlord, Mrs Walcott, granted an assured shorthold tenancy to Mr and Mrs Jones in August 2007, which was let under an oral monthly tenancy.

In June 2016, the landlord served a notice under section 21 of the Housing Act 1988 ("the Notice"). The tenants asserted that the Notice was invalid as the landlord had not complied with the provisions introduced by the Deregulation Act 2015, namely that the landlord had not obtained a gas safety certificate or an EPC (section 21A Housing Act 1988), nor provided the information booklet regarding the rights and responsibilities of the landlord and tenant under an assured shorthold tenancy (section 21B Housing Act 1988).

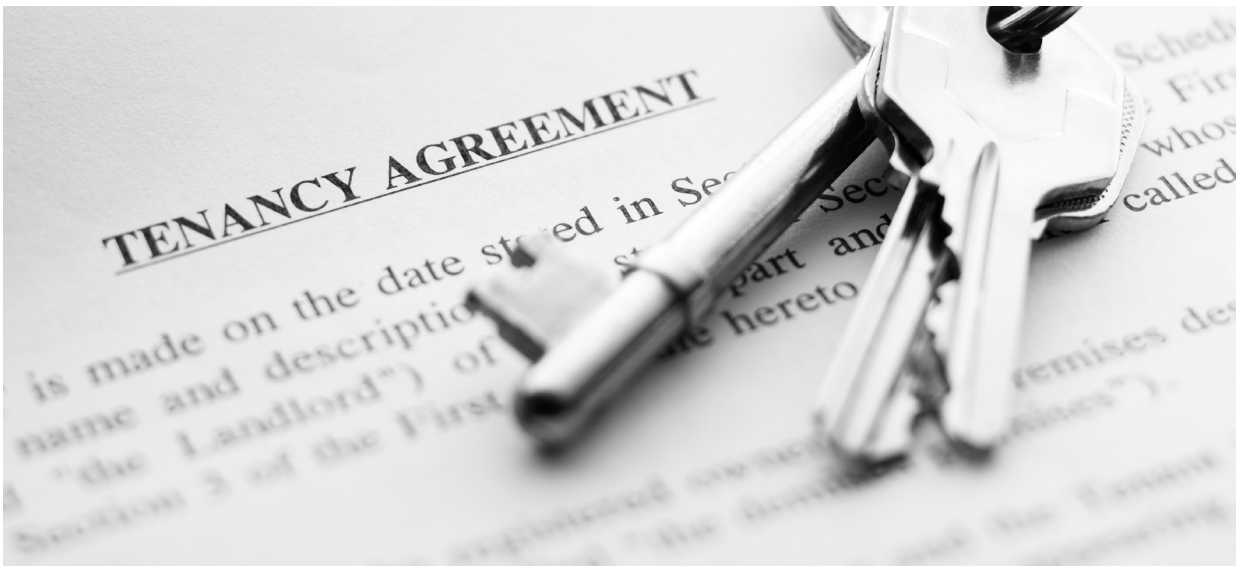
At first instance, the Judge held that the Notice was invalid. Whilst the original tenancy had been granted before October 2015 (the date these new requirements under the Deregulation Act 2015 came into effect), they found that there had been a re-grant of it at the end of each period of the tenancy. Therefore, the landlord was subject to the requirements under section 21A and 21B.

The landlord appealed against this decision and the appeal was allowed. The Court held that a "new" tenancy had not been granted at the end of each period of the tenancy and Parliament did not intend there to be a re-grant of a tenancy in those circumstances. Consequently, the tenancy was held to have been granted in August 2007 and therefore the landlord was not required to comply with sections 21A and 21B.

Whilst this was a welcome decision for private landlords in terms of on-going tenancies that were granted prior to October 215, as can be seen from other articles in this edition, landlords need to ensure they comply with the requirements to serve statutory documents on their tenants.

Subhana Anhu
Paralegal —— Property Litigation

t +44 (0)121 214 8858
e sanhu@trowers.com



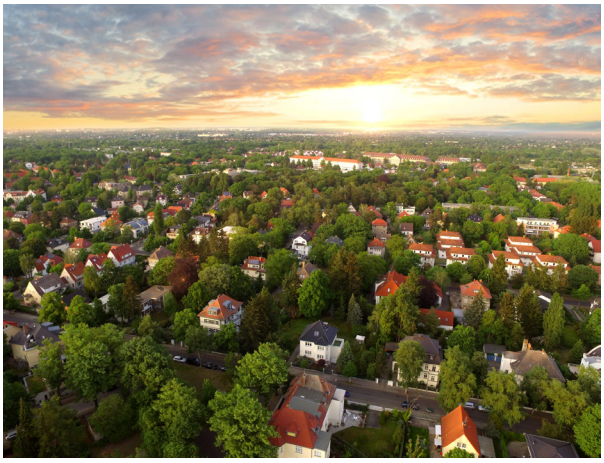
Can a tenancy agreement be signed as an agent on behalf of a tenant?

In *London Borough of Haringey v Ahmed and Another [2017]* EWCA Civ 1861 the London Borough of Haringey (the Authority) appealed against the decision not to grant it possession of a property.

Mr Ahmed was a successful homeless applicant as a result of which three different tenancy agreements were signed:

- The first, although drafted as a joint tenancy with his wife ("A") was signed by Mr Ahmed alone.
- 9 days later, an agreement was signed by Mr Ahmed and his mother, Mrs Ahmed. Mr Ahmed left the property in 2002 and he and Mrs Ahmed asked the Authority for the Tenancy to be transferred to Mrs Ahmed and A. This was never done.
- In 2006 a further Tenancy Agreement was signed by Mrs Ahmed alone.

Mrs Ahmed left the property in 2010 initially requesting that the tenancy be transferred to A. She then changed her mind. As Mrs Ahmed was not living at the property as her only principle home, the Authority served a Notice to Quit and subsequently began possession proceedings.



In the High Court it was found that:

- Mr Ahmed had acted as an agent for A in signing the first tenancy agreement, therefore a joint tenancy existed that had never been terminated. A therefore remained a tenant.
- If a possession order had been made it would not have interfered with A's Article 8 Human Rights.

The Authority appealed and the Court of Appeal found that there was no agency agreement. For this argument to have succeeded there must have been a course of conduct from which this could be implied. It was found that on the facts, rather than A accepting Mr Ahmed could so act and trusting him to do so, Mr Ahmed had in fact never informed A about any accommodation decisions and she was totally unaware of his actions. He was therefore the sole tenant.

Therefore, when Mr Ahmed signed a second tenancy agreement he had surrendered the first one and entered into a joint tenancy with Mrs Ahmed.

A's cross appeal that it was not proportionate to make a possession order was dismissed and the Court of Appeal upheld the principle that the test in deciding whether or not the making of a possession order was proportionate is whether an eviction is "necessary in a democratic society".

This is an example of a rare case where the Court of Appeal has interfered with the discretion of the Trial Jugde where, in essence, the judge has made an error of law in finding that Mr Ahmed had acted as an agent for his wife.

Dorota Pawlowski

Senior Associate —— Property Litigation

t +44 (0)121 214 8826
e dpawlowski@trowers.com

What is the Pre-Action Protocol for Debt Claims?

The Pre-Action Protocol for Debt Claims (the Protocol) came into force on 1 October 2017 and prescribes a course of conduct which the Court will expect parties to follow prior to issuing proceedings. The Protocol applies to any business that is pursuing legal action for the recovery of a debt from an individual. Where another Pre-Action Protocol applies (such as for mortgage arrears), the Protocol will not apply.

The Protocol follows the spirit of the overriding objectives set out in the Civil Procedure Rules. It aims, for example, to encourage early communication and disclosure between the parties to narrow the issues, engagement with ADR and it encourages parties to focus on acting in a reasonable and proportionate manner.

The Protocol, introduces a number of key requirements which a creditor will need to follow. Any Letter of Claim should contain:

- The amount of the debt;
- whether interest or other charges are continuing;

- where the debt arises from an oral agreement, the basis of that agreement;
- where the debt arises from a written agreement, the date, parties to it and confirmation that a copy of the agreement can be requested;
- where the debt has been assigned, the details of the original debt and creditor, together with when it was assigned and to whom;
- if instalments are being offered, why that is not acceptable;
- details of how the debt can be paid (and payment options);
- the address to which the completed reply form should be sent.

A number of documents must also be included with the Letter of Claim including an up-to-date statement of account and a form of response. The debtor has 30 days in which to respond or request a further reasonable period of time to obtain debt advice. Proceedings should not be commenced less than 30 days from receipt of the completed reply form or 30 days from the creditor providing any requested documents, whichever is later.

It is clear that the process of recovering debts will be more onerous, with an increased scope for delaying collection. Creditors will need to take a more pro-active approach to recovering debts and ensure time periods are met as required.

In addition, compliance is key and costs sanctions can be imposed for any failure to comply. These could include a creditor not being able to recover their legal costs or the recovery of interest being limited to a reduced rate.

Charlotte Brasher
Paralegal —— Property Litigation

t +44 (0)1392 612432
e cbrasher@trowers.com

Caridon Property Limited v Monty Shooltz: Gas Safety Certificates – a "once and for all" opportunity

This was an appeal of a District Judge's decision to His Honour Judge Jan Luba QC.

District Judge Bloom had dismissed a possession claim brought by Caridon Property Limited ("Caridon") on the basis that when Caridon served a Section 21 Notice on Mr Shooltz, they had not complied with the requirements of Regulation 2 of the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 (the Regulations) because they had not given Mr Shooltz a gas safety certificate until 11 months after his tenancy started but before he was served with the Section 21 Notice.

Section 21A of the Housing Act 1988 (the Act) states notice under this section cannot be given "…at a time when the landlord is in breach of the prescribed requirement."

Paragraphs (6) and (7) of Regulation 36 of The Gas Safety (Installation and Use) Regulations 1998 (Gas Safety Regulations 1998) contain the prescribed requirements which require a landlord to:

- provide a copy of the gas safety certificate to an existing tenant of the premises within 28 days of the gas safety check;
- provide a copy of the last gas safety certificate to a new tenant of the premises before the tenant occupies the premises, except where the tenant is occupying for less than 28 days, in which case the gas safety certificate must be prominently displayed in those premises.

Finally, Regulation 2(2) of the Regulations states that:

"for the purposes of Section 21A [of the Act] the requirement in Regulation 36 is limited to the requirement on the landlord to provide the tenant with a copy of the gas safety certificate and the 28 day period for compliance with the requirement does not apply".

The wording of the Act, the Gas Safety Regulations and the Regulations causes a confusing situation between the legislation in terms of what a landlord is required to do in respect of the service of gas safety certificates, should they wish to use the no fault basis for possession.

The case therefore raised the following questions:

- Does Regulation 2(2) of the Regulations dis-apply the time limits for providing tenants with gas safety certificates in general?
- Do the Regulations contradict the Act?
- Should a positive reading of the Regulations be applied to avoid a complete bar on service of a Section 21 Notice if a new tenant was no given a copy of a gas safety certificate when their tenancy commenced?

Did Regulation 2(2) of the Regulations dis-apply time limits for providing tenants with gas safety certificates in general?

In interpreting Regulation 2(2) the Court held that:

- Regulation 2(2) dis-applies the 28 day time limit in Regulation 36(6)(a) of the Gas Safety Regulations 1998 in relation to providing a copy of the gas safety certificate to an existing tenant where the landlord argues that he has complied with paragraphs 6 or 7 of Regulation 36; and
- Regulation 36(6)(b) of the Gas Safety Regulations has to be complied with before the tenant takes up occupation of the premises.

Therefore, landlords must provide gas safety certificates to new tenants before they take up occupation of the premises.

Do the Regulations contradict the Act?

The Court did not feel it was appropriate to interpret the Regulations made in 2015 by reference to legislation passed in 1988. In the Court's view the Regulations control "the landlord's ability to give notice under Section 21 to those circumstances in which assurance has been given to the occupier that the premises are safe".

The Court felt that "any other interpretation of the Regulations would leave it open to the landlord to give a Section 21 notice even where the landlord has let what at the time may have been dangerous and unchecked premises that may have fallen foul of the GS Regs."

Should a positive reading of the Regulations be applied to avoid a complete bar on service of a Section 21 Notice?

The explanatory notes to the Regulations suggest that as long as the landlord has given the tenant a copy of the gas safety certificate even if it is later than 28 days, the landlord would be permitted to serve a Section 21 notice.

However, the Court found that this could not sit appropriately with the obligation in the Gas Safety Regulations for notifications to either be given or displayed prior to the taking up of a tenancy by an incoming tenant. It seemed to the Court to have been a "once and for all" obligation and once the opportunity had been missed, it could not be rectified.

The appeal was therefore dismissed.

Comment

Whilst this is only a County Court appeal, and as such not binding, it is persuasive. This is a case that may go to the Court of Appeal or may result in a change in the Regulations. It will be interesting to see how this dilemma is dealt with. In the interim, it does mean that if a landlord fails to serve a gas safety certificate before a tenancy commences they may find their only options to recover possession is based on one of the grounds in Schedule 2 to the Act, many of which are discretionary and do not guarantee a landlord possession, or serve a gas safety certificate and invite the current tenant to enter into a tenancy agreement.

Melanie Dodd
Senior Paralegal —— Property Litigation

t +44 (0)121 214 8828
e mdodd@trowers.com

trowers & hamlins

For futher information please contact our offices
or visit our website at **www.trowers.com**

Contact

London

3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

Birmingham

10 Colmore Row
Birmingham
B3 2QD

t +44 (0)121 214 8800
f +44 (0)121 214 8801

Exeter

The Senate
Southernhay Gardens
Exeter
EX1 1UG

t +44 (0)1392 612600
f +44 (0)1392 612601

Manchester

55 Princess Street
Manchester
M2 4EW

t +44 (0)161 838 2000
f +44 (0)161 838 2001

London — Birmingham — Exeter — Manchester — Abu Dhabi — Bahrain — Dubai — Malaysia — Oman

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