GAS SAFETY CERTIFICATES

(ARGUMENTS AGAINST CARIDON AND AMENDING LEGISLATION)

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INTRODUCTION

As most reading this will be aware, the first instance appeal decision in the case of *Caridon Property Limited v Monty Shooltz* gave landlords, letting agents and even some property practitioners a minor coronary thrombosis.

Until this case, the position had been (*or rather, was mostly understood to be)* that, notwithstanding the regulatory requirement to provide a tenant with a relevant Gas Safety Certificate ("GSC") i) prior to moving into a property or ii) within 28 days of the date of any check to any existing tenant pursuant to Reg. 36(6)(a) & (b) of the Gas Safety (Installation and Use) Regulations 1998 ("Gas Safety Regulations"), as long as a relevant GSC was given to the tenant prior to the service of a S.21 notice then this should suffice for the purposes of S.21A of the Housing Act 1988.

Following *Caridon*, however, the position seems to have changed (or rather, *reclarified*), which decision forecasts stormy weather ahead for landlords intending to recover possession under S.21 of the Housing Act 1988.

This article intends to offer numerous arguments landlords could use in an attempt to resist a *Caridon* defence if ever raised by tenants moving forward.

RELEVANT LEGISLATION

The relevant legislation is listed as follows: -

i) S.21A of the Housing Act 1988 ("**the HA**") (which was brought in by S.38 of the Deregulation Act 2015);

ii) Regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 ("**the Gas Safety Regulations**"); and

iii) Regulation 2 of the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015/1646 ("**the AST Regulations**").

The relevant legislation, listed above, is set out in full below, and I have highlighted and/or underlined certain elements for emphasis where appropriate –

i) S.21A of the Housing Act 1988 (as inserted by S.38 of the Deregulation Act 2015)

(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.

ii) Reg. 36 (6) of the Gas Safety Regulations

(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.

iii) Reg. 2 (1) & (2) of the AST Regulations

(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 (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 (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.

CARIDON PROPERTY LIMITED v MONTY SHOOLTZ (2018)

Facts of the Case

The Claimant landlord (CPL) let a property to the Defendant (MS) on a 12-month fixed term Assured Shorthold Tenancy (AST). Before the fixed term expired, CPL served on MS a notice pursuant to section 21 of the HA giving 2 months' notice.

Upon expiry of the S.21 notice, the landlord commenced possession proceedings and a defence was raised on the basis that CPL could not rely on the S.21 notice, because a gas safety certificate (GSC) had not been given to MS prior to having entered originally the premises, in contravention of paragraph (6)(b) of regulation 36 of the Gas Safety Regulations.

At first instance an order was made dismissing the possession claim for reason that the S.21 notice was invalid for reason that the prescribed requirement to serve a gas safety certificate before the tenancy commenced was not complied with and was not disapplied by regulation 2(2) of the AST Regulations.

CPL appealed.

The Appeal

HHJ Luba QC upheld the decision of the court of first instance, dismissing CPL's appeal. It was held that a landlord's obligation to give a GSC to a new tenant prior to entering into the premises was a 'once and for all' obligation and incapable of rectification if the opportunity had been missed. The import of

this being, that a landlord would be prevented forever after from being able to recover possession of the property under S.21 of the Housing Act 1988.

Prior to *Caridon*, it was commonly understood by landlords, specialist property practitioners and even judges, that the time limits imposed by the Gas Safety Regulations were limited by Reg. 2(2) of the AST Regulations to the mere requirement that a GSC need simply be given to a tenant prior to service of a S.21 notice.

HHJ Luba QC was concerned with three main questions: -

i) Does Reg. 2(2) of the AST Regulations only disapply time limits for Reg.36(6)(a) and not Reg.36(6)(b)?

ii) Does the secondary legislation (the AST Regulations) contradict the primary legislation (the Housing Act 1988)?

iii) Should a purposive reading of the regulations be applied to avoid an absolute bar on service of a section 21 notice?

In answer to the **first question**, HHJ Luba QC held –

> *"In my judgment, therefore, those words do not limit the impact of paragraphs 6 and 7 of Regulation 36 only to the scenario in which parliament is concerned with notice in relation to gas safety being given to existing tenants. Nor, in my judgment, is that understanding of Regulation 2(2) changed by the additional words "and the 28 day period…". In my judgment, what those words mean is that where a landlord is seeking to say he or she has complied with the variant of paragraph 6 or 7 relating to an existing tenant then the 28-day period for compliance with the requirement to give notice to an existing tenant does not apply."*

In other words, HHJ Luba QC suggested that the wording within Reg. 2(2) only seeks to limit the impact of paragraph 6 and 7 to the extent that it relates to existing tenants, and went on to explain that this interpretation is not inconsistent with the existence of the additional words "and the 28 day period…".

In relation to the **second question**, HHJ Luba QC held –

> *"It is not legitimate to construe Regulations made in September 2015 pursuant to devolved powers in place as a result of legislation passed in July 2015 by reference to the purpose of primary legislation passed in 1988. That is not in my judgment permissible under any medium of statutory instruction or interpretation. I do not consider it necessary to engage further with the matter other than to see whether the construction I have given to Regulation 2(2) is inconsistent with the primary function of the AST Regs themselves. In my judgment, my interpretation as indeed that of DJ Bloom, 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 the premises are safe (…)

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."

In other words, HHJ Luba QC refused to take into consideration the original purpose of the HA in order to construe the meaning of the AST Regulations (made in September 2015) which were introduced as a result of S.38 of the Deregulation Act 2015 (which itself was passed in July 2015), for reasons that "*it is not legitimate*" to do so and "*not permissible under any medium of statutory instruction or interpretation*".

In relation to the **third question**, after having looked into the Explanatory Notes to the AST Regulations as well as the Explanatory Notes to the Deregulation Act 2015, HHJ Luba QC held –

"…in my judgment, that cannot sit appropriately with the obligation in the GS Regs for notifications to either be given or displayed prior to the taking up of a tenancy by an incoming tenant. That seems to me to have been a 'once and for all' obligation on a prospective landlord in relation to a prospective tenant. Once opportunity has been missed, there is in my judgment no sense in which it can be rectified. If the Minister believed that that 'once and for all' cut off should not debar a landlord from serving a Section 21 notice, it was open to the SoS to simply disapply those parts of Paragraphs 6 and 7 of Regulation 36 in express terms in what has become Regulation 2(2)."

Therefore, as one can see, the interpretation given to Reg. 2(2) is a very literal one and not out of keeping with that which one might see advanced on behalf of a tenant in an attempt to dissuade a court from granting possession. For to apply a literal translation to Reg. 2(2) would certainly ensure that a landlord could <u>never</u> be compliant with S.21A of the HA once there had been a breach of Reg. 36(6)(b) of the Gas Safety Regulations, and hence any possession claim brought under S.21 must irrevocably fail.

Whilst it is appreciated that Caridon, having only reached appeal at the County Court stage, is not generally binding on other courts, it is hard to envisage many District Judges in the land dissenting from such a decision when taking into account HHJ Luba QC's prominence in the world of housing law.

It must be said, however, that *Caridon* only marks the latest in a succession of recently unreported County Court cases where courts have been applying a very strict and narrow interpretation of Reg.

2(2), the result of which not only borders on the draconian but (in my view) the *absurd*, and, more importantly, against the spirit of the legislation.

It is understood that *Caridon* is not being appealed further to the Court of Appeal, and so, where does this leave us?

In my view, it makes sense to amend Reg. 2(2) of the AST Regulations, particularly in light of the fact that come 1 October 2018, all ASTs (no matter when they commenced) will have to comply with S.21A of the HA, by virtue of S.41 of the Deregulation Act 2015.

I have, towards the end of this article drafted a suggested amendment to Reg. 2(2), which I have submitted to the Ministry of Housing Communities and Local Government in attempt to amend the legislation in line with (what I can tell) was Parliamentary intention.

However, before setting out my suggested amendment, it is important in the first instance to explain why in my view (and the view of thousands of landlords, property solicitors and barristers across the country) the interpretation given by the court in *Caridon* is not in keeping with the spirit of the legislation, nor is it in line with Parliament's original intention.

WHY THE INTERPRETATION GIVEN IN *CARIDON* OF REG. 2(2) CANNOT BE CORRECT

1) **"At a time when"**

- The words within S.21A (1) of the HA, that "*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*", are not synonymous with the interpretation given by the Court in *Caridon*.

- HHJ Luba QC suggested that the failure to comply with Reg. 36(6)(b) of the Gas Safety Regulations is a "*once and for all*" breach and that "*once opportunity has been missed, there is… no sense in which it can be rectified*". However, such reasoning must surely be incompatible with a literal reading of S.21A, as the phrase "*at a time when*" clearly allows for a landlord the opportunity to subsequently comply (*in the event the landlord is not yet in compliance*) with the requirement to provide such information as prescribed under S.21A (2) prior to service of any S.21 notice.

- It would be somewhat illogical to suggest that primary legislation brought into effect in October 2015 (i.e., S.38 of the Deregulation Act 2015 introducing S.21A into the Housing Act 1988) containing the words "*at a time when*" would be overridden by the wording within secondary legislation passed in 1998 (i.e., Reg. 36(6)(b) of the Gas Safety Regulations) inferring an otherwise "once and for all" obligation which, if the opportunity for compliance had since been missed, would be incapable of rectification.

- Furthermore, S.21A (along with the AST Regulations) came into force in 2015. which clearly gives a much more recent indication as to Parliament's intention, reflecting the more immediate social and economic needs of the country. By contrast, the Gas Safety Regulations were passed in 1998, some 17 years earlier.

- Hence, it is clear that the purpose of S.21A was to allow landlords the opportunity of subsequent compliance with their existing regulatory obligations prior to service of any notice under S.21, and thus, any such failure to have provided a tenant with a relevant GSC before the tenant had occupied the premises cannot (for the purposes of S.21A) be a "*once and for all breach*".

2) **Explanatory Notes for S.38 of the Deregulation Act 2015 and Reg. 2(2) of the AST Regulations**

- It is clear that HHJ Luba QC did indeed consider the Explanatory Notes as a point of reference, and, in doing so, decided to dismiss them as not being able to sit appropriately with the obligation under paragraph (6)(b) of regulation 36 of the Gas Safety Regulations, such an obligation (according to HHJ Luba QC) being a "once and for all" obligation.

- Before setting out the wording as stated within the Explanatory Notes, all things being equal, it is important to acknowledge that Explanatory Notes i) are not legislation, ii) do not form part of any Bill or Act, iii) are not amendable by Parliament, and iv) are not endorsed by Parliament. This position has been made clear by the document titled "Guide to Making Legislation" as published in July 2017 by the Cabinet Office. The guidance also explains that Explanatory Notes are "*not designed to resolve ambiguities in the text of a Bill or Act nor must they purport to give authoritative rulings on the interpretation of the proposed legislation, as only the courts can give these*".

- Notwithstanding the above general position, the House of Lords in Regina (Westminster City Council) v National Asylum Support Service [2002] 1 W.L.R. 2956 decided upon the

question of whether, in aid of the interpretation of a statute or other such legislation, the court may take into account Explanatory Notes and, if so, to what extent. It was decided that the court must identify and consider the context of legal texts either before the process of construction or during it, and that it is wrong to say that the court may resort to evidence of the contextual scene only when an ambiguity arises. The court went on to explain the following –

> " In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see *Cross, Statutory Interpretation,* 3rd ed (1995), pp 160-161."

- Therefore, Explanatory Notes are always to be used as aids for construction, whether or not an ambiguity exists. It so happens that in relation to Reg. 2(2) of the AST Regulations an ambiguity very much does exist, which therefore doubly calls on the need for consideration of the Explanatory Notes in any event. Furthermore, where a court is faced with a legislative ambiguity, and the Explanatory Notes clear up such an ambiguity, it should surely be the case that the Explanatory Notes would be given sufficient weight when deciding upon such interpretation, and not dismissed as being contrary to either the purpose of the legislation or Parliamentary intention.

- The Explanatory Notes for the Deregulation Act 2015 reflect Parliament's intention behind the implementation of S.21A of the Housing Act 1988, which notes are set out verbatim below (and both highlighted and underlined for emphasis where appropriate):

> "Section 38: Compliance with prescribed legal requirements
>
> 195. This section provides the Secretary of State with the power to prescribe legal requirements imposed on landlords by any enactment, so that if a landlord fails to comply with those requirements, the landlord is prevented from giving a section 21 notice **until the landlord has complied with the relevant legal obligation.** These requirements include those requirements in relation to the condition of dwellings or their common parts, the health and safety of occupiers of dwellings, and the energy performance of dwellings.

Section 39: Requirement for landlord to provide prescribed information

196. This section provides the Secretary of State with the power to make regulations requiring a landlord, or a person acting on a landlord's behalf, under an assured shorthold tenancy, to provide a tenant with such information as may be prescribed, regarding the rights and responsibilities of a landlord and tenant. **No section 21 notice may be given where a landlord has failed to comply with this requirement, until such time as the prescribed information is provided to the tenant**."

- Accordingly, in relation to S.21A of the Housing Act 1988, Parliament's intention could not in my view be clearer; the words within the Explanatory Notes being "until the landlord has complied with the relevant legal obligation" as well as "until such time as the prescribed information is provided to the tenant" not only indicate but expressly state the purpose of the legislation. They further resolve the question as to why the words "at a time when" were written within S.21A. Accordingly, by virtue of S.21A, landlords are clearly entitled to pursue the S.21 possession route so long as such information is given to a tenant prior to service of a S.21 notice (i.e., once a GSC, an EPC and the document titled "How to rent: the checklist for renting in England" have been given to a tenant).

- Secondly, the Explanatory Notes attached to the AST Regulations again reflect Parliament's intention behind Reg. 2(2), which notes are set out below (and are both highlighted and underlined for emphasis where appropriate):

"Regulation 2 prescribes certain requirements for the purposes of section 21A of the Act (compliance with prescribed legal requirements): these are the requirement to provide tenants with an energy performance certificate under regulation 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 and the requirement to provide tenants with a gas safety certificate under regulation 36 of the Gas Safety (Installation and Use) Regulations 1998. **However, the requirement to provide tenants with a gas safety certificate 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 "no fault" eviction procedure for assured shorthold tenancies is not available to landlords **at a time when** either of the requirements has not been complied with."

- Thirdly, the AST Regulations also come with an Explanatory Memorandum drafted by the Department for Communities and Local Government, which was laid before Parliament by Command of Her Majesty. This Memorandum gives more explanation as to the reasons for

the implementation of Reg. 2(2), which comments are set out below (and, as before, are both highlighted and underlined where appropriate):

"4.3 Section 21A of the Act (as inserted by section 38 of the Deregulation Act 2015) provides the Secretary of State with the power to prescribe legal requirements imposed on landlords by any enactment, so that if a landlord fails to comply with those requirements, the landlord shall be prevented from giving a section 21 notice **until the landlord has complied with the relevant legal obligation**. These requirements include those requirements in relation to the condition of dwellings or their common parts, the health and safety of occupiers of dwellings, and the energy performance of dwellings.

4.4 The requirements prescribed for the purpose of section 21A of the Act are the requirement to provide tenants with an energy performance certificate under regulation 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 and the requirement to provide tenants with a gas safety certificate under regulation 36 of the Gas Safety (Installation and Use) Regulations 1998. Under regulation 36, landlords are required to provide the certificate to tenants within 28 days of carrying out a safety check. This time period has been dis-applied in relation to the use of the no fault eviction procedure in the regulations. **Therefore as long as the landlord has carried out a safety check and provided a certificate, they are not prohibited from using the no fault eviction procedure** (although they may be subject to sanction under the 1998 Regulations for failure to comply with them). No section 21 notice may be given where a landlord has failed to comply with either of these requirements.

4.5 Section 21B of the Act (as inserted by section 39 of the Deregulation Act 2015) provides the Secretary of State with the power to make regulations requiring a landlord, or a person acting on a landlord's behalf, under an assured shorthold tenancy, to provide a tenant with such information as may be prescribed, regarding the rights and responsibilities of a landlord and tenant. **No section 21 notice may be given where a landlord has failed to comply with this requirement, until such time as the prescribed information is provided to the tenant**."

- Para 4.4 above makes it clear that (provided of course a GSC and an EPC are provided to a tenant) the prohibition from using the no fault eviction procedure under S.21 is lifted once the landlord merely carries out a safety check and provides a certificate to the tenant. Also,

the sanctions referred to within para 4.4 for failure to comply with the Gas Safety Regulations are clearly those pertaining towards criminal liability, as alluded to within regulation 39 of the Gas Safety Regulations.

- The Explanatory Memorandum goes on to explain the policy background and the main purpose behind the creation of the AST Regulations, which comments are set out below (again I have highlighted in bold and underlined the most pertinent points):

  7.2 **The Government is concerned about the unnecessary expenditure for landlords and the burden on the courts** created by the lack of a standard section 21 notice. The Government wishes to improve this process. Currently where a landlord wishes to serve a tenant with a section 21 notice, there is no standard form for this notice. Lack of certainty over notice periods has led to a large number of notices being deemed to be defective and treated as invalid by the courts. **As a result, landlords have to spend additional time and resources serving new notices and seeking legal advice.**

  7.3 Non-regulatory alternatives are not considered feasible in relation to the requirement to provide an energy performance certificate, gas safety certificate and the "How to rent" checklist because the landlords which are being targeted often may have little concern for the well-being of their tenants and are unlikely to be receptive to self regulatory policy solutions. **The intention is to adopt the least regulatory approach to encourage landlords to comply with existing obligations** – a mechanism which we have found to be effective in a different context.

- It is therefore, in my view, abundantly clear that the reason behind the passing of this secondary legislation was to attempt to minimise the unnecessary expenditure landlords otherwise have had to incur in having to spend additional time and resources in serving new notices, and seeking legal advice. Furthermore, in relation to a landlord's obligations under the Gas Safety Regulations, Parliament's intention is to adopt the least regulatory approach to encourage landlords to comply with existing obligations. If, for instance, the intention was (as Caridon suggests) to reinforce a "once and for all" obligation under Reg. 36(6)(b) of the Gas Safety Regulations, this would undoubtedly conflict with the very clear intention to adopt the "least regulatory approach" possible. The decision in Caridon surely pertains towards adopting the most regulatory approach possible, which undoubtedly is contrary to the wording within paragraph 7.3 of the Explanatory Memorandum above.

- Hence, for all the reasons given above, Reg. 2(2) cannot be restricted to only disapplying the 28 day time limit imposed by Reg. 36(6)(a) of the Gas Safety Regulations while keeping in place a "once and for all" obligation imposed by Reg. 36(6)(b), for this would go against not only the spirit of the Deregulation Act 2015 (having inserted S.21A into the Housing Act 1988) but the spirit of the AST Regulations as well.

- As an aside, the House of Lords in Regina (Westminster City Council) v National Asylum Support Service (as discussed above) also decided that where in exceptional circumstances such Explanatory Notes contain an assurance by the Executive to Parliament about the meaning of a clause, or the extent of and circumstances surrounding the use of a power, such an assurance may in principle be admitted as evidence against the Executive in proceedings. The Lords further explained that it is impermissible to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament:

  > "The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."

- Accordingly, therefore, the best approach as to how to treat construction of legislation is through both a consideration of the Explanatory Notes as well as Parliamentary debates about such legislation across both Houses of Parliament. (Such Parliamentary debates are explored below.)

3) **Parliamentary Intention**

- The important piece of legislation at the heart of this issue (i.e., the AST Regulations) did not go to debate before either House prior to being passed, which is not uncommon with the passing of secondary legislation. However, regulation 2 of the AST Regulations are specifically referring to S.21A of the HA, the latter of which was brought into the HA by S.38 of the Deregulation Act 2015.

- S.21A of the HA, as seen above, imposes a restriction on a landlord from being able to recover possession of a property under section 21 of the HA, in the event that basic prescribed requirements have not been met. As already discussed, the use of the words "at a time when" within S.21A implies that the any such regulatory breach was capable of

rectification and thus the prohibition of possession would be lifted once such prescribed requirements are met. The question is, what was Parliament's intention behind S.38 of the Deregulation Act 2015?

- The wording, as latterly seen within S.21A of the HA, was originally introduced to Parliament within the Tenancies (Reform) Bill, as presented by the (then) MP for Brent Central, Sarah Teather in 2014. It is clear, that the Tenancies (Reform) Bill sought to readdress the balance of power between landlords and tenants by imposing restrictions on seeking possession where a tenant had made a complaint as to the condition of a property (commonly referred to as retaliatory evictions). (*See both Sarah Teather MP's and Stephen Gilbert MP's comments in the House of Commons debate dated Friday 28 November 2014* – See http://bit.ly/2IonwpG)

- Also, within the same sitting, Stephen Williams MP, on behalf of the Coalition Government (as it was then) and in support of the Bill, described the aims of the Tenancies (Reform) Bill, and in doing so mentioned about a landlord's obligation to comply with prescribed requirements prior to seeking possession (See http://bit.ly/2KpVUwG):

> "Secondly, there will be compliance with certain legal requirements. Landlords are currently required to ensure that any property they rent out has an annual gas safety certificate and a valid energy performance certificate. The Bill provides order-making powers, and the intention is that regulations will be made specifying that a tenant may not be evicted where the landlord has failed to comply with these basic legal requirements. The restriction would be lifted as soon as the landlord obtained those documents.
>
> (…)
>
> …In conclusion, the Government support the Bill in principle. We want the Bill to be balanced. We do not want tenants to be able to make vexatious complaints and we do not want to bring in excessive regulation. We wish to give the Bill a Second Reading and for it to proceed to Committee, where some issues will need to be addressed. I commend the Bill to the House."

- This above is clear indication of the Government's intention i) not to bring in excessive regulation, ii) not to enable tenants to make vexatious complaints, and more importantly iii) not to prevent a landlord from ever recovering possession under section 21 of the Act. This can only mean therefore, as described by Stephen Williams MP on behalf of the Government, that "*the restriction would be lifted as soon as the landlord obtained those documents*", and so paragraph (6)(b) of Regulation 36 of the Gas Safety Regulations was

not to have the effect of being a "once and for all" obligation thereby preventing any non-compliant landlord from recovering possession under section 21 of the HA.

- The Tenancies (Reform) Bill debate was due to be reconvened in the House of Commons on Friday 5 December 2014, however it was decided that the contents of the Bill were to be incorporated within the Deregulation Bill, which was due for Royal Assent the following year in 2015.

- On 11 February 2015, Lord Ahmad in the House of Lords spoke about suggested amendments (see http://bit.ly/2rJEofY), and when referring to a landlord's duty to comply with prescribed requirements, he said as follows:

> "The fourth element is to provide that, where a landlord has failed to comply with certain legal obligations, the tenant cannot be evicted using the Section 21 procedure. We envisage that this will apply to existing legal obligations such as the requirement to provide a new tenant with an energy performance certificate and to obtain an annual gas safety certificate. **This restriction on the service of an eviction notice would be lifted as soon as these documents were provided**."

- On 4 March 2015, Explanatory Notes were made relating to the Lords Amendments to the Deregulation Bill (found at http://bit.ly/2L03Wxn) which clearly intended for any such restriction to recover possession to be lifted once a landlord achieves compliance. One will note, that the following amendments were clearly adopted, such wording being almost identical to the eventual Explanatory Notes attached to the Deregulation Act 2015 (as set out above on page 10 of this article):

> "**Lords Amendment 23 (Compliance with prescribed legal requirements)**
>
> 44. This clause would provide the Secretary of State with the power to prescribe legal requirements imposed on landlords by any enactment, so that if a landlord fails to comply with those requirements, the landlord shall be prevented from giving a section 21 notice until the landlord has complied with the relevant legal obligation. These requirements would include those requirements in relation to the condition of dwellings or their common parts, the health and safety of occupiers of dwellings, and the energy performance of dwellings.
>
> **Lords Amendment 24 (Requirement for landlord to provide prescribed information)**
>
> 45. This clause would provide the Secretary of State with the power to make regulations requiring a landlord, or a person acting on a landlord's behalf, under an assured shorthold tenancy, to provide a tenant with such information as may be prescribed, regarding the

rights and responsibilities of a landlord and tenant. No section 21 notice may be given where a landlord has failed to comply with this requirement, until such time as the prescribed information is provided to the tenant."

4) Reg. 2(2) applies to the entirety of Para 6 of Reg. 36 of the Gas Safety Regulations

- Reg. 2(2) states that "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". Paragraph (1)(b) relates to both paragraphs 6 and 7 of Reg. 36 of the Gas Safety Regulations. Therefore, in my view, the mere requirement to simply 'give a copy of the relevant record to the tenant' must be overriding the timescales otherwise imposed by both Reg. 36(6)(a) and 36(6)(b). Furthermore, the AST Regulations do not in any way seek to do away altogether with the obligation to give a GSC to a tenant before he/she occupies those premises, it simply relaxes the "once and for all" requirement otherwise imposed on a landlord purely for the purposes of seeking possession under S.21. One must not forget, the AST Regulations relate specifically and only to the issue of seeking possession under S.21 of the HA, and do not dispense with any criminal sanctions imposed by the Gas Safety Regulations for non-compliance.

- If one is to apply a literal approach as to the interpretation of Reg. 2(2), much like the approach seen in *Caridon*; based upon the wording of Reg. 2(2) it must be the case that it encompasses both Reg. 36(6)(a) and Reg. 36(6)(b), for it fails to discriminate one subparagraph from the other just as it fails to discriminate paragraph 6 from paragraph 7 – In other words, it lumps both the entirety of paragraphs 6 and 7 under the blanket of its limiting effect.

5) The disapplication of the 28 day time limit (under Reg. 36 (6)(a)) but not the disapplication of the more onerous "once and for all" obligation (under Reg. 36 (6)(b)) does not make sense

- In view of the spirit of the legislation, as clearly stated within the Explanatory Notes discussed above, and within Parliamentary debates across both Houses, the reason behind the implementation of the AST Regulations was to ensure that the S.21 process is less cumbersome, less costly and more expedient for a landlord, as well as ensuring the right balance between: -

a) seeking to protect the well-being of tenants in the private rental sector by reinforcing the need for landlords to comply with certain existing regulations, and

b) ensuring that a landlord's regulatory compliance is brought about by the *least regulatory* approach possible.

- Therefore, a strict interpretation of Reg. 2(2) as seen in *Caridon*, fails in my view to take into account the spirit of the legislation, and hence to apply such a narrow interpretation so as to restrict its limiting effect to only Reg. 36(6)(a) but not (b) is somewhat illogical.

6) If the decision in *Caridon* is to be followed, then it fails to take into account varying degrees of non-compliance

- It is understood that the landlord in *Caridon* had only given the GSC for the first time to the tenant some 11 months after the tenancy had commenced (and it is presumed that the GSC was given shortly before service of the S.21 notice). If the interpretation given in *Caridon* is to be adopted by the Courts moving forward, do the Courts really suggest that non-compliance with a sub-paragraph within secondary legislation (i.e. Reg. 36(6)(b) of the Gas Safety Regulations) would override S.21A of the Housing Act 1988?

- Furthermore, if the Courts intend to adopt its reasoning moving forward, then where is the cut off line? Surely, in the realms of common sense, there must be varying degrees of non-compliance for the courts to consider upholding a prohibition from eviction under S.21. It would, in my view, be unconscionable for a court to disallow a landlord from recovering possession where (despite the premises in fact being safe for occupation) the landlord (instead of providing a GSC prior to the tenant entering into the premises) had provided the tenant with a relevant GSC either i) immediately upon moving in to the premises, ii) immediately after moving in, iii) hours after moving in, or even iv) days after moving in.

- It cannot be the case that a prohibition from using the no fault eviction procedure under Section 21, as a result of such minor transgressions identified above, is something which fits comfortably within both the spirit of the Deregulation Act 2015 and the AST Regulations combined.

- It is acknowledged that HHJ Luba QC refused to take into consideration the original purpose of the Housing Act 1988 in order to construe the meaning of the AST Regulations (made in

September 2015) which were introduced as a result of S.38 of the Deregulation Act 2015, for reasons that "*it is not legitimate*" to do so and "*not permissible under any medium of statutory instruction or interpretation*". My initial thoughts on this were, *why should it not be legitimate or permissible*? – the AST Regulations are to accompany the 1988 Act and so the Government (at the time) must have, upon passing the AST Regulations, kept firmly in mind the purpose of the primary 1988 legislation.

- If, however, HHJ Luba QC is correct on this point, then whilst it perhaps may not be legitimate nor permissible (a point which I do not fully agree with) to consider the purpose of primary legislation from 1988 in order to construe the meaning of secondary legislation passed some 27 years later, it surely *is* legitimate and permissible to consider the purpose of primary legislation passed in 2015 (i.e., the Deregulation Act 2015) which through S.38 of the 2015 Act introduced S.21A into the HA. As explained above, the purpose of S.38 of the Deregulation Act 2015 (and therefore the purpose of S.21A of the HA), as stated within the Explanatory Notes attached to the legislation, was to ensure that landlords could not use the no fault possession procedure under S.21 "until" they comply with the relevant legal obligations. The use of the word "**until**" is not synonymous with a "once and for all" obligation.

It is for all of the reasons advanced above, that Reg. 2(2) of the AST Regulations cannot have been drafted with the purpose of only disapplying the 28 day time period in para (6)(a) of regulation 36 of the Gas Safety Regulations while retaining the once and for all breach under para (6)(b).

FINAL THOUGHTS

It is of course undeniable that a tenant's safety is (and should be) of paramount importance, not only to the courts but to landlords across the country, which is the reason why Parliament attempted to re-stress the need for a landlord to have to comply with his prescribed requirements at the beginning of a tenancy, by ensuring that a landlord i) maintains a good condition of dwelling houses or their common parts, ii) ensures the health and safety of occupiers of dwelling-houses, and/or iii) ensures he complies with his duties in relation to the energy performance of dwelling-houses.

It is clear that Reg. 2(2) of the AST Regulations has been poorly drafted and is in desperate need of amendment.

Moreover, one would have thought that such legislation needs to be amended as soon as possible in any event, in order to coincide with the 1st October 2018 deadline imposed by S.41 of the Deregulation Act 2015, which provides (in essence) that S.21A of the HA will apply to all tenancies no matter when they commenced – [NB – S.21A currently only applies to tenancies that commenced post 1st October 2015].

I have therefore urged the Ministry to consider amending Reg. 2(2) in line with my suggested amendment as set out below in bold:

(2) For the purposes of section 21A of the Act, the requirement prescribed by paragraph (1)(b) above is limited to the requirement on a landlord to give a copy of the relevant record to the tenant prior to service of a notice under section 21 of the Act, and the time periods specified for compliance within paragraphs 6(a) and 6(b) of regulation 36 of the Gas Safety (Installation and Use) Regulations 1998 do not apply for the purposes of recovering possession under section 21 of the Act.

I have expressed to the Ministry that in my view only Reg. 2(2) need be amended in order to fall in line with Parliamentary intention. However, if it is the view of the Ministry that the above amendment would cause unfair prejudice to a tenant so as to almost dismiss the importance of ensuring a tenant's safety within premises containing gas appliances and flues, then I have included an additional [2A] and [2B] for further consideration:

[2A

Notwithstanding paragraph (2) above, if at any time during the tenant's period of occupation in the premises the landlord has failed to check each appliance and flue for safety at intervals of not more than 12 months since they were last checked for safety, a notice under section 21 of the Act may not be given until –

- **i) each appliance and flue within the premises that is in need of a safety check is so checked for safety by a Gas Safe registered engineer;**
- **ii) the landlord gives to the tenant a copy of the relevant record as referred to within paragraph (2) above in respect of each appliance and flue; and**
- **iii) after a date not less than 6 months since the landlord has complied with paragraph ii).]**

[2B

A tenant must not interfere with a landlord's ability to comply with paragraph [2A] by either refusing, preventing or otherwise obstructing a Gas Safe registered engineer from gaining access to the premises. In the event a tenant causes such interference, provided the landlord is able to show that all reasonable steps were taken to attempt to comply with paragraph [2A], the failure to comply with paragraphs (2) and [2A] shall not under the circumstances constitute a breach of section 21A(2)(b) of the Act, and the 6 month restriction under [2A] iii) will not apply.]

Whilst I am reluctant to suggest even further mines within an already overcrowded minefield, as one can see above, such additions seek only to affect the most non-compliant landlords, who would expose tenants to a risk of harm in failing to have arranged for appliances and flues to be checked once their certified 12 month period of safety had expired. In my experience, landlords are not so non-compliant so as to leave appliances and flues unchecked for prolonged periods of time, and so the majority of landlords would not be caught by the proposed 6 month restriction.

Furthermore, as one can see, my suggested [2B] seeks to provide landlords with a bit of wiggle room should tenants decide to take advantage of [2A] and restrict a landlord's ability to comply with it. As to what constitutes "reasonable steps" would depend upon the facts of any given case, and it is to be noted that this is only parroting the wording within reg. 39 of the Gas Safety Regulations. One would assume that if [2B] were relied upon and a landlord sought to recover possession under S.21 of the HA, then it may be more sensible not to engage the accelerated procedure route if there is a likelihood of contention by the tenant.

As I trust has been clearly set out throughout this article, it would appear that it was absolutely not Parliament's intention to bar landlords from forever recovering possession under S.21 of the HA for a mere failure to have provided a GSC prior to a tenant having entered into the premises at the commencement of a tenancy.

Whilst of course a landlord is entitled, as an alternative, to recover possession under S.8 of the HA, such a route can only really be engaged where a tenant is in breach of the tenancy. Therefore, to

interpret the legislation in line with the decision in Caridon, would restrict landlords from being able to sell properties with vacant possession in the event that their tenants were contractually compliant.

Therefore, before either *Caridon* is successfully appealed or the AST Regulations are amended, it is highly likely that County Courts across the country will be more inclined now to interpret Reg. 2(2) in line with *Caridon*.

So, in the meantime, it goes without saying that landlords should ensure that all GSCs are duly given to new tenants prior to them entering into occupation, so as to avoid dealing with any *Caridon* defence being raised in due course (and of course, in order to comply with their existing obligations under the Gas Safety Regulations).

Whether or not the *Caridon* decision will be appealed further to the Court of Appeal is currently unclear, however one thing we can all be certain of is that such defences will be raised more frequently by tenants hereon in.

The question is – will landlords concede once such a defence is raised, or will those with a bit more nerve put up a decent fight?

Time will tell.

Michael has assisted hundreds of solicitors, landlords, letting agents, and property managers over the years, and is able to provide advice, drafting and/or representation in court as and when required.

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