Case Commentary

Validity of Landlord's Section 21 Notice – Failure to Serve Energy Performance Certificate

Minister v Hathaway [2021[EWCA Civ 936

A notice seeking possession of a flat under s.21 of the Housing Act 1988 was not invalidated by the landlord's failure to serve an energy performance certificate on the tenant. The requirement on the landlord under s.21A and s.21B to provide prescribed information to the tenant, including information about energy performance, only applied to assured shorthold tenancies in existence on or after 1 October 2015 and the tenant's tenancy predated that by six years.

Facts

The landlords granted the tenant an assured shorthold tenancy of Flat 6, Dalmore Court, Marina, Bexhill on Sea, for a fixed term of one year from 19 March 2008. From 19 March 2009 onwards, the tenant occupied the flat by virtue of a statutory periodic tenancy, which arose by virtue of s.5(2) of the Housing Act 1988. On 6 December 2018, the landlords served a s.21 notice on the tenant. It was common ground that they had not served an Energy Performance Certificate (EPC) on the tenant at any time prior to the s.21 notice.

On 20 February 2019, the landlords began proceedings for possession of the flat, but their claim was dismissed by the district judge on the basis that the failure to serve the EPC rendered the s.21 notice invalid. A High Court judge subsequently concluded that service of an EPC was not required and that the s.21 notice was valid. The tenant appealed.

The relevant legislation

Sections 38 and 39 of the Deregulation Act 2015 inserted a new s.21A and s.21B into the Housing Act 1988. Section 21A provides that a s.21 notice cannot be given at a time when the landlord is in breach of prescribed requirements relating to: (1) the condition of dwelling-houses or their common parts; (2) the health and safety of occupiers; and (3) the energy performance of dwelling-houses. Section 21B, on the other hand, requires landlords to provide prescribed information to tenants under an assured shorthold tenancy. This information is set out in the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015, which includes a requirement to provide an EPC to a tenant free of charge, under the Energy Performance of Buildings (England and Wales) Regulations 2012.

The relevant dates

The parts of s.38 and s.39 of the 2015 Act, which introduced s.21A and s.21B into the 1988 Act, came into force on 1 July 2015. That enabled the 2015 Regulations to be made pursuant to those powers at the same time as the new s.21A and s.21B came into force on 1 October 2015. Section 41 of the 2015 Act, which governed the application of ss.33 to 40, also came into force on 1 October 2015. That section provided that ss.38-39 and the requirement to comply with the new provisions of ss.21A and B, only applied to assured shorthold tenancies granted on or after 1 October 2015.

Section 38 (but not s.39) also applies to any assured shorthold tenancy which was in existence on 1 October 2018. Thus, s.21A required compliance with the 2015 Regulations in the case of any assured shorthold tenancy which was in existence at that time. Regulations 1(3) and 1(4) provide that the 2015 Regulations do not apply to an assured shorthold tenancy that came into being under s.5(2) of the 1988 Act on or after 1 October 2015 on the coming to an end of an earlier assured shorthold tenancy.

Decision

The Court of Appeal, dismissing the tenant's appeal, held that the relevant requirements did not apply because the tenancy was not "an assured shorthold tenancy of a dwelling-house in England granted on or after 1st October 2015" within Regulation 1(3) of the 2015 Regulations. That was because:

- By virtue of s.5(2) of the 1988 Act, the tenant's statutory periodic tenancy was deemed to have been granted on 19 March 2009 and to continue from month to month. It was, therefore, not granted after 1 October 2015, let alone after 1 October 2018;

- The tenant's reliance on the fact that s.41(3) of the 2015 Act provides that s.38, inserting s.21A into the 1988 Act, applies to any assured shorthold tenancy which was in existence on 1 October 2018, was misplaced. Section 21(A)(1) would only bite on such a tenancy if and to the extent that the Secretary of State exercised the power conferred by s.21(A)(2) to prescribe requirements;

- The Secretary of State had exercised the power conferred by s.21A(2) by making Regulation 2 of the 2015 Regulations. Regulation 1(3) provided that those requirements only applied to assured shorthold tenancies granted on or after 1 October 2015. Nothing in the 2015 Act obliged the Secretary of State to exercise the power conferred by s.21A(2) to the fullest extent permitted.

Commentary

Interestingly, it was argued on behalf of tenant that a distinction should be drawn between the wording of ss.21(8) and 21B(1) of the 1988 Act, inserted by sections 37 and 39 of the 2015 Act, both of which refer to “an assured shorthold tenancy of a dwelling house”, on the one hand, and s.21A(2), inserted by s.38, which refers to “requirements imposed on landlords by any enactment”, on the other hand. It was suggested that the former wording empowered the

Secretary of State to specify which tenancies the requirements applied to, whereas the latter wording did not.

Not surprisingly, Arnold LJ, with whom Baker and Henderson LJJ agreed, rejected this approach. According to his Lordship, there was no significance in the difference in wording, which simply reflected the different purposes of the respective provisions. In his words, at [29]:

> "There is nothing in the wording of section 21A(2) which prevents the Secretary of State from deciding which tenancies to prescribe requirements for. For example, the Secretary of State could decide to impose requirements under section 21A(2)(b) which only applied to dwelling-houses of more than three storeys, and hence tenancies of such dwelling-houses. In any event, as explained above, the restriction contained in regulation 1(3) is one which, at the time the 2015 Regulations were made, precisely reflected the extent of the statutory power."

From 1 October 2018, the Secretary of State had the power, by virtue of s.41(3), to extend the reach of Regulation 2 to any assured shorthold tenancy in existence on that date. Significantly, however, and fatal to the tenant' appeal, the Secretary of State had not exercised that power. On this point, Arnold LJ observed, at [27]:

> "If the Secretary of State failed at least to consider whether or not to exercise that power, then there might come a point where that failure could become susceptible to a public law challenge, but it is not suggested that such a situation has yet arisen. Moreover, it would be understandable if the Secretary of State, when considering whether to exercise that power, decided not to do so on the ground that that would place an undue burden on landlords seeking to exercise their s.21 rights in respect of tenancies which were not subject to the requirements imposed by Regulation 2 when granted."

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