Neutral Citation Number: [2021] EWCA Civ 936

Case No: B5/2020/0791

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT BRIGHTON
His Honour Judge Simpkiss

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2021

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE BAKER
and
LORD JUSTICE ARNOLD

- -

Between :

GEORGE BRIAN MINISTER	**Appellant**
- and -	
(1) DARRAN CHRISTOPHER HATHAWAY **(2) SUSAN ANGELA HATHAWAY**	**Respondent**

- -
- -

Robert Denman (of **Holden & Co**) for the **Appellant**
Sally Anne Blackmore (instructed by **Edward Hart Solicitors**) for the **Respondents**

Hearing date : 16 June 2021

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Approved Judgment

Lord Justice Arnold:

Introduction

1. The issue on this appeal is whether a notice served by the Respondents ("the Landlords") on the Appellant ("the Tenant") under section 21 of the Housing Act 1988 ("the 1988 Act") was invalid because no energy performance certificate ("EPC") had been served by the Landlords on the Tenant prior to the service of the section 21 notice. That depends on whether service of an EPC was required at the relevant time by virtue of the 1988 Act, the Deregulation Act 2015 ("the 2015 Act") and the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 ("the 2015 Regulations"). District Judge K. Harper held that service of an EPC was required and therefore the section 21 notice was invalid, whereas His Honour Judge Simpkiss held that service of an EPC was not required and therefore the section 21 notice was valid. Nugee LJ granted permission for a second appeal because the issue is one which has divided judges and commentators.

The facts

2. There is no dispute as to the relevant facts, which are as follows. The Landlords granted the Tenant an assured shorthold tenancy of Flat 6, Dalmore Court, Marina, Bexhill on Sea ("the Flat") for a fixed term of one year commencing on 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 section 5(2) of the Housing Act 1988. On 6 December 2018 the Landlords served a section 21 notice on the Tenant. It is common ground that no EPC had been served prior to that date. On 20 February 2019 the Landlords commenced proceedings for possession of the Flat in the County Court at Brighton. On 29 October 2019 DJ Harper dismissed the claim for possession for the reason stated above. On 1 April 2020 HHJ Simpkiss allowed the Landlords' appeal. The Tenant now appeals to this Court.

Assured shorthold tenancies

3. Part 1 of the 1988 Act makes provision for assured and assured shorthold tenancies. Subject to certain exceptions which do not apply here, an assured tenancy which is entered into on or after 28 February 1997 is an assured shorthold tenancy: section 19A.

4. On the expiry of a fixed term assured tenancy, the tenant is entitled to remain in possession under a periodic tenancy arising under section 5(2), which takes effect immediately on expiry of the term (section 5(3)(a)) and is "deemed to have been granted by the person who was the landlord under the fixed term tenancy immediately before it came to an end to the person who was then the tenant under that tenancy" (section 5(3)(b)). If the fixed term tenancy was an assured shorthold tenancy, the statutory periodic tenancy will also be shorthold: section 20(4). Subject to certain exceptions, the terms of the statutory periodic tenancy are the same as those of the fixed term tenancy: section 5(3)(d), (e).

5. In principle, a landlord under an assured shorthold tenancy may obtain an order for possession of the property in question after the end of any fixed term provided that a

notice under section 21 has been served on the tenant (commonly referred to as the "no-fault" procedure).

The 2015 Act

6. The 2015 Act made a number of amendments to the 1988 Act. Section 37 of the 2015 Act inserted two new subsections into section 21 of the 1988 Act as follows:

> "(8) The Secretary of State may by regulations made by statutory instrument prescribe the form of a notice under subsection (1) or (4) given in relation to an assured shorthold tenancy of a dwelling-house in England.
>
> (9) A statutory instrument containing regulations made under subsection (8) is subject to annulment in pursuance of a resolution of either House of Parliament."

7. Sections 38 and 39 respectively of the 2015 Act inserted new sections 21A and 21B into the 1988 Act as follows:

> **"21A Compliance with prescribed legal requirements**
>
> (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.
>
> (3) In subsection (2) *"enactment"* includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978.
>
> (4) For the purposes of subsection (2)(a) *"common parts"* has the same meaning as in Ground 13 in Part 2 of Schedule 2.
>
> (5) A statutory instrument containing regulations made under this section is subject to annulment in pursuance of a resolution of either House of Parliament.
>
> **21B Requirement for landlord to provide prescribed information**

(1) The Secretary of State may by regulations require information about the rights and responsibilities of a landlord and a tenant under an assured shorthold tenancy of a dwelling-house in England (or any related matters) to be given by a landlord under such a tenancy, or a person acting on behalf of such a landlord, to the tenant under such a tenancy.

(2) Regulations under subsection (1) may—

(a) require the information to be given in the form of a document produced by the Secretary of State or another person,

(b) provide that the document to be given is the version that has effect at the time the requirement applies, and

(c) specify cases where the requirement does not apply.

(3) 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 requirement imposed by regulations under subsection (1).

(4) A statutory instrument containing regulations made under subsection (1) is subject to annulment in pursuance of a resolution of either House of Parliament."

8. In Part I of the 1988 Act "prescribed" means prescribed by regulations made by the Secretary of State by statutory instrument: section 45(1).

9. Section 41 of the 2015 Act provides:

"**Application of sections 33 to 40**

(1) Subject to subsections (2) and (3), a provision of sections 33 to 40 applies only to an assured shorthold tenancy of a dwelling-house in England granted on or after the day on which the provision comes into force.

(2) Subject to subsection (3), a provision of sections 33 to 40 does not apply to an assured shorthold tenancy that came into being under section 5(2) of the Housing Act 1988 after the commencement of that provision and on the coming to an end of an assured shorthold tenancy that was granted before the commencement of that provision.

(3) At the end of the period of three years beginning with the coming into force of a provision of sections 33 to 38 or section 40, that provision also applies to any assured shorthold tenancy of a dwelling-house in England—

(a) which is in existence at that time, and

> (b) to which that provision does not otherwise apply by virtue of subsection (1) or (2)."

Commencement of the 2015 Act

10. The provisions of the 2015 Act were brought into force at various times by the Deregulation Act 2015 (Commencement No. 1 and Transitional and Saving Provisions) Order 2015/994 ("the Commencement Order"), which itself came into force on 27 March 2015.

11. By article 10 of the Commencement Order, sections 37, 38 and 39 of the 2015 Act came into force on 1 July 2015, in the case of sections 38 and 39 so far as necessary for enabling the exercise of any power to make provision by regulations made by statutory instrument. Accordingly, the parts of sections 38 and 39 which introduced sections 21A(2) and 21B(2), which gave the Secretary of State such powers, came into force on 1 July 2015. This enabled regulations to be made pursuant to those powers, namely the relevant parts of the 2015 Regulations, that came into force at the same time as the parts of sections 38 and 39 that introduced the substantive provisions of sections 21A and 21B, which came into force on 1 October 2015: Commencement Order, article 11(k) and (l).

12. Section 41 of the 2015 Act also came into force on 1 October 2015: Commencement Order, article 11(n).

13. Accordingly, by virtue of section 41(1) and (2), sections 38 and 39 only apply to assured shorthold tenancies granted on or after 1 October 2015. It follows that, ignoring section 41(3) for the moment, sections 21A(1) and 21B(1) of the 1988 Act inserted by sections 38 and 39 could only require compliance (in the case of section 21A(1), for the purposes of section 21) with any regulations made pursuant to the enabling powers contained in sections 21A(2) and 21B(2) in the case of assured shorthold tenancies granted on or after 1 October 2015. By virtue of section 41(3), however, section 38 (but not section 39) also applies to any assured shorthold tenancy which is in existence on 1 October 2018. Thus section 21A(1) of the 1988 Act can now require compliance with any regulations made pursuant to the enabling powers contained in sections 21A(2) in the case of any assured shorthold tenancy which was in existence then.

The 2015 Regulations

14. The Secretary of State made the 2015 Regulations in exercise of the powers conferred by sections 21(8), 21A(2) and 21B(2) of the 1988 Act (and another provision which is not relevant for present purposes). As noted above, the 2015 Regulations came into force on 1 October 2015. Regulation 1(3) and (4) provide:

> "(3) Subject to paragraph (4), these Regulations apply in relation to an assured shorthold tenancy of a dwelling-house in England granted on or after 1st October 2015.
>
> (4) These Regulations do not apply to an assured shorthold tenancy that came into being under section 5(2) of the Housing Act 1988 on or after 1st October 2015 on the coming to an end

of an assured shorthold tenancy that was granted before that date."

15. Regulation 2 provides, so far as relevant:

"**Compliance with prescribed legal requirements**

(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); …"

16. Regulation 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 ("the 2012 Regulations") provides:

"The relevant person must ensure that a valid energy performance certificate has been given free of charge to the person who ultimately becomes the buyer or tenant."

17. No further regulations have been made by the Secretary of State in exercise of the power conferred by section 21A(2) of the 1988 Act since 1 October 2015, nor have the 2015 Regulations been amended.

The issue

18. The issue which arises from the statutory provisions set out above is whether the requirement contained in regulation 6(5) of the 2012 Regulations, compliance with which is required by regulation 2(1)(a) of the 2015 Regulations for the purposes of section 21A of the 1988 Act, applied to the Tenant's tenancy of the Flat on 6 December 2018.

19. The Landlords contend that this requirement did not apply because the Tenant's tenancy of the Flat 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. (Although the Landlords also rely upon regulation 1(4) of the 2015 Regulations, this does not seem to me to add anything to the argument.)

20. The Tenant contends that the requirement did apply by virtue of section 41(3) of the 2015 Act, since his tenancy of the Flat was an assured shorthold tenancy of a dwelling-house in England which was in existence on 1 October 2018.

Analysis

21. I agree with HHJ Simpkiss that the Landlords are correct. My reasons are as follows.

22. The starting point is that, by virtue of section 5(2) and (3)(b) of the 1988 Act, the Tenant's statutory periodic tenancy of the Flat is deemed to have been granted on 19 March 2009. Thereafter it continued from month to month (because rent was payable

monthly under the fixed term tenancy): section 5(3)(d). Thus it was not granted after 1 October 2015, let alone after 1 October 2018. This is common ground.

23. The Tenant relies upon the fact that section 41(3) of the 2015 Act provides that section 38 of the 2015 Act inserting section 21A of the 1988 Act applies to any assured shorthold tenancy which is in existence on 1 October 2018, but in my judgment this reliance is misplaced. The consequence of this for present purposes is simply that section 21A can apply to a tenancy which is in existence at that time. Section 21A(1) only bites on such a tenancy if and to the extent that the Secretary of State exercises the power conferred by section 21A(2) to prescribe requirements.

24. Section 21A(2) does not oblige the Secretary of State to prescribe any requirements at all, and if the Secretary of State did not prescribe any requirements section 21A(1) would not bite on any tenancies. Equally, it would be open to the Secretary of State to exercise the power to prescribe requirements falling within section 21A(2)(a) and/or (b), but not (c), in which case section 21A(1) would bite on tenancies affected by those requirements and not on tenancies only affected by the absence of an EPC.

25. If the Secretary of State exercised the power conferred by section 21A(2) in an irrational manner, then that could be challenged on public law grounds. No such challenge is advanced in the present case, however.

26. The absence of such a challenge is not surprising even if procedural considerations are ignored. The Secretary of State exercised the power conferred by section 21A(2) of the 1988 Act by making regulation 2 of the 2015 Regulations. Regulation 1(3) of the 2015 Regulations provides that those requirements only apply to assured shorthold tenancies granted on or after 1 October 2015. At the time that the Secretary of State made the 2015 Regulations, the Secretary of State had no power to go further by virtue of section 41(1) and (2) of the 2015 Act. The inclusion of regulation 1(3) made sure that the reach of regulation 2 did not extend beyond the statutory power as it then was.

27. From 1 October 2018 the Secretary of State had the power by virtue of section 41(3) to extend the reach of regulation 2 to any assured shorthold tenancy in existence on that date. As noted above, however, the Secretary of State has not exercised that power. 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 section 21 rights in respect of tenancies which were not subject to the requirements imposed by regulation 2 when granted.

28. The Tenant argues that, if regulation 1(3) were to be interpreted as applying to regulation 2 in a case such as the present, it would be *ultra vires*, and so it should not be interpreted in that way. I do not accept this argument. Regulation 1(3) is not *ultra vires*. It limits the application of regulation 2 of the 2015 Regulations, but regulation 2 as so limited is squarely within the power conferred by section 21A(2), and, as explained above, nothing in the 2015 Act obliges the Secretary of State to exercise

that power to the fullest extent permitted by section 21A(2) of the 1988 Act and section 41(3) of the 2015 Act.

29. Counsel for the Tenant sought to draw a distinction between the wording of sections 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 section 21A(2) inserted by section 38, which refers to "requirements imposed on landlords by any enactment", on the other hand. Counsel argued that the former wording empowered the Secretary of State to specify which tenancies the requirements applied to, whereas the latter wording did not. I do not accept this. I see no significance in the difference in wording, which seems to me simply to reflect the different purposes of the respective provisions. 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.

Conclusion

30. For the reasons given above I would dismiss this appeal.

Baker LJ:

31. I agree.

Henderson LJ:

32. I also agree.