Neutral Citation Number: [2026] EWCA Civ 515

Case Nos: CA-2026-000017 and CA-2026-000408

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT ROMFORD AND CLERKENWELL & SHOREDITCH
His Honour Judge Richard Roberts and His Honour Judge Hellman
Case Nos M01RM108 and L00CL635

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2026

Before:

LORD JUSTICE NEWEY
LORD JUSTICE SINGH
and
LADY JUSTICE FALK

- -

Between:

MAKSIM MUCA	**Claimant/ Respondent**
- and -	
RACHIDA RECHIA EL AMRANI	**Defendant/ Appellant**

And between:

(1) HELEN HARKER **(2) HYMER POWELL** **(3) JULIANA FRANCISCA BENJAMIN**	**Claimants/ Appellants**
- and -	
(1) HUGUES HUBERT **(2) RADIA HAMDAOUI**	**Defendants/ Respondents**

- -
- -

Tom Morris (instructed by **Duncan Lewis Solicitors**) for **Ms El Amrani, Mr Hubert and Ms Hamdaoui**
Luke Decker (instructed by **LR Solicitors**) for **Mr Muca**
Rupert Cohen (instructed by **Jury O'Shea LLP**) for **Mrs Harker, Ms Powell and Mrs Benjamin**

Hearing date: 15 April 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 30 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. There are two appeals before us. The issue raised by them is whether section 21A of the Housing Act 1988 ("the 1988 Act") prevents a landlord from serving a valid notice under section 21 of that Act where the tenant has not been given a gas safety certificate (or "record" - the words "certificate" and "record" have been used interchangeably in this context) in respect of a check carried out before the tenant first went into occupation even if (a) the tenant has been supplied with later gas safety certificates, (b) the tenant's original tenancy pre-dated section 21A's insertion into the 1988 Act and (c) the tenant is now in occupation under a different tenancy.

2. The Judges whose decisions are under appeal have arrived at conflicting conclusions on the question. The point has previously divided Her Honour Judge Bloom and Her Honour Judge Melissa Clarke. In *Byrne v Harwood-Delgado* (21 June 2022, County Court at Luton), Judge Bloom considered that failure to comply with regulation 36(6)(b) of the Gas Safety (Installation and Use) Regulations 1998 ("the Gas Safety Regulations") (which requires a landlord to ensure that a "new tenant" is given a copy of a gas safety certificate before occupying the premises) precludes service of a section 21 notice, but Judge Clarke declined to follow that decision in *Cassell v Sidhu* (9 October 2025, County Court at Reading).

Basic facts: *Muca v El Amrani*

3. On 5 February 2014, Mr Maksim Muca granted Ms Rachida El Amrani an assured shorthold tenancy of 137 Harts Lane, Barking, Essex at a rent of £1,200 a month for a term of 12 months. On the expiry of that period, a periodic tenancy arose pursuant to section 5 of the 1988 Act. That came to an end in 2017 when, on 5 February, Mr Muca granted Ms El Amrani an assured shorthold tenancy at a rent of £1,400 a month for a term of six months. Thereafter, Ms El Amrani once again became a periodic tenant in accordance with section 5 of the 1988 Act.

4. Ms El Amrani was not given a copy of any gas safety certificate before she went into occupation of 137 Harts Lane under the 2014 assured shorthold tenancy. However, gas safety certificates were issued in respect of 137 Harts Lane each year between 2015 and 2024 and copies of all of these were provided to Ms El Amrani under cover of a letter dated 10 January 2025.

5. Ms El Amrani was subsequently served with a notice dated 28 January 2025 requiring her to leave 137 Harts Lane after 31 March and explaining that, if she did not do so, Mr Muca could apply for a possession order under section 21 of the 1988 Act.

6. Ms El Amrani not having vacated 137 Harts Lane, on 6 May 2025 Mr Muca issued possession proceedings. These came before Deputy District Judge Goodchild in the County Court at Romford on 30 July 2025. She struck the claim out on the basis that Ms El Amrani had not been given gas safety certificates fully satisfying the requirements of the Gas Safety Regulations.

7. Mr Muca appealed against that decision and, on 11 December 2025, His Honour Judge Richard Roberts allowed the appeal and made a possession order. Among other things, Judge Roberts rejected the submission made on Ms El Amrani's behalf that it was fatal to Mr Muca's claim that Ms El Amrani had not been given a copy of a gas

safety certificate relating to the position before she went into occupation of 137 Harts Lane in 2014. Judge Roberts concluded that Mr Muca had not needed to serve a gas safety certificate on Ms El Amrani before she occupied the property and that, if he were wrong about that, Mr Muca would have had to give Ms El Amrani such a certificate before she occupied the property under the assured shorthold tenancy granted in 2017, when section 21A of the 1988 Act had come into force: see paragraphs 55 and 56 of the judgment. He did not accept that it had been incumbent on Mr Muca to provide Ms El Amrani with a gas safety certificate before she was granted the first assured shorthold tenancy in 2014: see paragraph 56 of the judgment.

8. Ms El Amrani now appeals against Judge Roberts' decision in this Court.

Basic facts: *Harker v Hubert*

9. Mrs Helen Harker, Ms Hymer Powell and Mrs Juliana Benjamin ("the Trustees") are the present trustees of the JBA Powell Trust.

10. On 9 November 2007, the then trustees of the JBA Powell Trust granted Mr Hugues Hubert and Ms Radia Hamdaoui an assured shorthold tenancy of Top Floor Flat, 65 Chippenham Road, London W9 ("the Flat") at a rent of £1,430 a month for a term of one year. The tenancy agreement incorporated conditions which stated, among other things, that "[t]he provisions for recovery of possession of the premises, by the Landlord, contained in Section 21 of the Housing Act 1988 as amended by Sections 98 and 99 of the 1996 Housing Act apply".

11. On the expiry of that tenancy, it was succeeded by another one-year assured shorthold tenancy. 11 further such tenancies were granted. The last such tenancy, for a one-year term and at a rent of £1,460 a month, was granted on 9 November 2019. When that tenancy came to an end, it was replaced by a periodic tenancy under section 5 of the 1988 Act.

12. On 26 October 2023, the gas safety certificates in respect of the Flat which were available to the Trustees were re-served on Mr Hubert and Ms Hamdaoui. Shortly afterwards, Mr Hubert and Ms Hamdaoui were served with a notice dated 31 October 2023 requiring them to leave the Flat after 5 January 2024 and explaining that, if they did not do so, the Trustees could apply for a possession order under section 21 of the 1988 Act.

13. Mr Hubert and Ms Hamdaoui not having vacated the Flat, on 19 February 2024 the Trustees issued possession proceedings. Mr Hubert and Ms Hamdaoui served a defence in which, among other things, they alleged that the section 21 notice was invalid because there had been non-compliance with prescribed requirements in relation to gas safety. It was said that, where no gas safety certificate is given to a tenant at the start of a tenancy, "a landlord may not ever rely on a section 21 notice and/or this is not redeemed by giving subsequent gas safety records after the tenancy has commenced".

14. The matter came before Deputy District Judge Reissner in the County Court at Central London on 13 February 2025. In a reserved written judgment handed down on 27 February, he concluded that the Trustees were entitled to possession. In paragraph 50 of that judgment, this was said:

> "I am satisfied by Mrs Harker's evidence that on the balance of probabilities there was a standing arrangement in place with British Gas, and that British Gas carried out an inspection each year, even in those years for which no gas safety certificate has been located …. The probable explanation for the certificates that the claimants have not been able to locate is that, through the passage of time, some have gone astray. I bear in mind here that, as Mrs Harker pointed out and as is stated on each of the gas safety certificates that are in evidence, the GSR [i.e. gas safety records] require retention for two years, so it would not be unreasonable for certificates to be disposed of after two years had passed."

Earlier in his judgment, in paragraph 22, the Deputy District Judge had explained that Mrs Harker had said in cross-examination that "she was aware that British Gas had been dealing with the gas servicing since 2004" but that "she could not say whether a gas safety certificate had been served in 2007" and that, when it was put to her that Mr Hubert and Ms Hamdaoui had not been given such a certificate in 2007, Mrs Harker had said that she was unable to comment. In paragraph 53, the Deputy District Judge said that, while there was "no evidence that a gas safety certificate was provided" before Mr Hubert and Ms Hamdaoui first went into occupation of the Flat, that did "not mean that a certificate had not been obtained", and the Deputy District Judge found that a certificate "had probably been obtained".

15. Mr Hubert and Ms Hamdaoui appealed. The appeal came before His Honour Judge Hellman in the County Court at Clerkenwell & Shoreditch on 4 December 2025 and, in a judgment given on 3 February 2026, Judge Hellman allowed the appeal. Judge Hellman said in paragraph 71 of his judgment:

> "I am satisfied that the respondent [i.e. the Trustees] was required by regulation 2 of the 2015 Regulations [i.e. the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015] to give a copy of the last pre-occupation gas safety record to the tenant as a condition of serving a section 21 notice. I accept that this construction of regulation 2 had adverse consequences for landlords which, although reasonably foreseeable, amount to unintended collateral damage incidental to the legislative purpose. Nonetheless, I am unable to interpret regulation 2 in any other way …. My task is to interpret the regulation, not to re-write it."

16. The Trustees now appeal against that decision in this Court.

The legislative framework

Gas safety legislation

17. The Gas Safety Regulations, made under the Health and Safety at Work etc. Act 1974, regulate the installation, maintenance and use of gas fittings and appliances. Regulation 36 imposes duties on landlords.

18. Regulation 36(1) defines various terms. So far as relevant, it reads as follows:

> "'landlord' means—
>
> (a) in England and Wales—
>
> (i) where the relevant premises are occupied under a lease, the person for the time being entitled to the reversion expectant on that lease or who, apart from any statutory tenancy, would be entitled to possession of the premises; and
>
> (ii) where the relevant premises are occupied under a licence, the licensor, save that where the licensor is himself a tenant in respect of those premises, it means the person referred to in paragraph (i) above;
>
> … 'lease' means—
>
> (a) a lease for a term of less than 7 years; and
>
> (b) a tenancy for a periodic term; and
>
> (c) any statutory tenancy arising out of a lease or tenancy referred to in sub-paragraphs (a) or (b) above … ;
>
> 'relevant premises' means premises or any part of premises occupied, whether exclusively or not, for residential purposes (such occupation being in consideration of money or money's worth) under—
>
> (a) a lease; or
>
> (b) a licence;
>
> 'statutory tenancy' means—
>
> (a) in England and Wales, a statutory tenancy within the meaning of the Rent Act 1977 and the Rent (Agriculture) Act 1976;
>
> … 'tenant' means a person who occupies relevant premises being—
>
> (a) in England and Wales—
>
> (i) where the relevant premises are so occupied under a lease, the person for the time being entitled to the term of that lease; and

(ii) where the relevant premises are so occupied under a licence, the licensee ….”

19. Regulation 36 then provides so far as material as follows:

> “(2) Every landlord shall ensure that there is maintained in a safe condition—
>
> (a) any relevant gas fitting; and
>
> (b) any flue which serves any relevant gas fitting,
>
> so as to prevent the risk of injury to any person in lawful occupation [of] relevant premises.
>
> (3) Without prejudice to the generality of paragraph (2) above, a landlord shall—
>
> (a) ensure that each appliance and flue to which that duty extends is checked for safety within 12 months of being installed and at intervals of not more than 12 months since it was last checked for safety (whether such check was made pursuant to these Regulations or not; and see regulation 36A);
>
> (b) in the case of a lease commencing after the coming into force of these Regulations, ensure that each appliance and flue to which the duty extends has been checked for safety within a period of 12 months before the lease commences or has been or is so checked within 12 months after the appliance or flue has been installed, whichever is later (and see regulation 36A); and
>
> (c) ensure that a record in respect of any appliance or flue so checked is made and retained until there have been two further checks of the appliance or flue under this paragraph or, in respect of an appliance or flue that is removed from the premises, for a period of 2 years from the date of the last check of that appliance or flue, which record shall include the following information—
>
> (i) the date on which the appliance or flue was checked;
>
> (ii) the address of the premises at which the appliance or flue is installed;
>
> (iii) the name and address of the landlord of the premises (or, where appropriate, his agent) at which the appliance or flue is installed;

(iv) a description of and the location of each appliance or flue checked;

(v) any safety defect identified;

(vi) any remedial action taken;

(vii) confirmation that the check undertaken complies with the requirements of paragraph (9) below;

(viii) the name and signature of the individual carrying out the check; and

(ix) the registration number with which that individual, or his employer, is registered with a body approved by the Executive for the purposes of regulation 3(3) of these Regulations.

…

(5) The record referred to in paragraph (3)(c) above, or a copy thereof, shall be made available upon request and upon reasonable notice for the inspection of any person in lawful occupation of relevant premises who may be affected by the use or operation of any appliance to which the record relates.

(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.

(7) Where there is no relevant gas appliance in any room occupied or to be occupied by the tenant in relevant premises, the landlord may, instead of ensuring that a copy of the record referred to in paragraph (6) above is given to the tenant, ensure that there is displayed in a prominent position in the premises (from such time as

> a copy would have been required to have been given to the tenant under that paragraph), a copy of the record with a statement endorsed on it that the tenant is entitled to have his own copy of the record on request to the landlord at an address specified in the statement; and on any such request being made, the landlord shall give to the tenant a copy of the record as soon as is practicable."

20. Until amended in 2018, regulation 36(3)(c) simply provided for a certificate to be retained "for a period of 2 years from the date of that check" rather than (as now) "until there have been two further checks of the appliance or flue under this paragraph or, in respect of an appliance or flue that is removed from the premises, for a period of 2 years from the date of the last check of that appliance or flue".

21. By section 33 of the Health and Safety at Work etc. Act 1974, it is an offence for a person "to contravene any health and safety regulations or any requirement or prohibition imposed under any such regulations". The Gas Safety Regulations are "health and safety regulations" within the meaning of this provision.

The 1988 Act

22. Part 1 of the 1988 Act introduced a new species of residential tenancy, the "assured tenancy", with a sub-species, the "assured shorthold tenancy". By virtue of section 1(1) of the 1988 Act, a tenancy under which a dwelling-house is let as a separate dwelling to one or more individuals at least one of whom occupies it as their only or principal home is, in general, an "assured tenancy". A tenancy granted following the passing of the Housing Act 1996 is automatically an "assured shorthold tenancy" unless a specified exception applies (see section 19A of the 1988 Act). "Assured shorthold tenancies" are the subject of chapter 2 of part 1 of the 1988 Act, comprising sections 19A to 23.

23. For the most part, an assured tenancy cannot be brought to an end by a landlord except by obtaining and executing an order for possession under section 7 or section 21 of the 1988 Act. Section 7 provides for an order for possession to be made on one or more of the grounds set out in schedule 2 to the Act. Some of those grounds are mandatory and others discretionary. In general, the Court is bound to make a possession order if satisfied that any of the grounds in part I of schedule 2 (viz. grounds 1-8) is established, while the Court "may make an order for possession if it considers it reasonable to do so" if any of the grounds in part II of schedule 2 (viz. grounds 9-17) is established.

24. The grounds specified in part I of schedule 2 relate to, among other things, situations where a landlord formerly occupied the premises as his only or principal home, where a landlord wishes to occupy the premises as his only or principal home, where the premises were previously used for holiday letting, where the landlord intends to carry out major works at the premises, where a tenant has died, and where sizable amounts of rent are unpaid. The discretionary grounds in part II of schedule 2 concern, among others, cases where some rent has been outstanding, where the tenant has persistently delayed paying rent, where the tenant has breached another obligation of the tenancy,

and where the condition of the premises or furniture has deteriorated owing to ill-treatment.

25. In the case of an assured shorthold tenancy, a landlord has also been able to recover possession pursuant to section 21 of the 1988 Act. Section 21(1) provides:

> "Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling-house let on the tenancy in accordance with Chapter I above, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy, a court shall make an order for possession of the dwelling-house if it is satisfied—
>
> (a) that the assured shorthold tenancy has come to an end and no further assured tenancy (whether shorthold or not) is for the time being in existence, other than an assured shorthold periodic tenancy (whether statutory or not); and
>
> (b) the landlord or, in the case of joint landlords, at least one of them has given to the tenant not less than two months' notice in writing stating that he requires possession of the dwelling-house."

26. Lord Neuberger and Baroness Hale summarised the upshot in these terms in *McDonald v McDonald* [2016] UKSC 28, [2017] AC 273, at paragraph 26:

> "a landlord under an AST [i.e. assured shorthold tenancy] can obtain an order for possession from a court against the tenant either (i) under section 21, after giving two months' notice once the AST has come to an end, or (ii) under section 7, where the AST is a periodic tenancy or has come to an end or could be brought to an end, and one of the specified grounds is made out by the landlord. In practice, the majority of possession proceedings issued against tenants who have been granted ASTs are brought under section 21 rather than section 7."

27. The circumstances in which landlords are entitled to serve section 21 notices are, however, limited by section 21A of the 1988 Act. So far as material, that is in these terms:

> "(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."

The impact of the Deregulation Act 2015

28. Section 21A was inserted into the 1988 Act by section 38 of the Deregulation Act 2015 ("the 2015 Act"). Section 41 of the 2015 Act, headed "Application of sections 33 to 40", provides:

> "(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)."

For relevant purposes, sections 38 and 41 of the 2015 Act both came into force on 1 October 2015.

29. The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 ("the 2015 Regulations"), made under the 1988 Act, also came into force on 1 October 2015. Regulation 1 states the following as regards their application:

> "(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."

30. Regulation 2, which is central to these appeals, is in these terms:

> "(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."

31. There was also reference in submissions to regulation 5. That states:

> "5.—(1) The Secretary of State must from time to time—
>
> (a) carry out a review of regulations 2 and 3,
>
> (b) set out the conclusions of the review in a report, and
>
> (c) publish the report.
>
> (2) The report must in particular—
>
> (a) set out the objectives intended to be achieved by the regulatory system established by those regulations,
>
> (b) assess the extent to which those objectives are achieved, and
>
> (c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.

> (3) The first report under this regulation must be published before the end of the period of five years beginning with the day on which regulations 2 and 3 come into force.
>
> (4) Reports under this regulation are afterwards to be published at intervals not exceeding five years."

32. The explanatory note in respect of the 2015 Regulations include this:

> "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."

The Renters' Rights Act

33. Section 2 of the Renters' Rights Act 2025 provides for the omission from the 1988 Act of the whole of chapter 2 of part 1 and, hence, for the abolition of assured shorthold tenancies. With the coming into force of the 2025 Act, it will not be possible for any landlord to serve a section 21 notice.

The landlords' position

34. Mr Rupert Cohen, who appeared for the Trustees, argued that Judge Hellman's decision visits on the Trustees a penalty (viz. denial of the right to serve a section 21 notice) for an omission which happened eight years before that penalty was introduced (by the 2015 Regulations) and in circumstances where (a) the check required by regulation 36(3)(b) of the Gas Safety Regulations was carried out in advance of the grant of Mr Hubert's and Ms Hamdaoui's first assured shorthold tenancy, (b) while the failure to give Mr Hubert and Ms Hamdaoui the certificate in respect of that check would have been remediable if it had still been available, it has now been lost, (c) that is unsurprising when regulation 36(3)(c) required a landlord to retain a gas safety certificate for just two years and (d) the effect of the penalty is to alter radically the rights and obligations of the parties in relation to a contract (viz. the 2019 assured shorthold tenancy) entered into 12 years after the omission. Mr Cohen advanced three interpretations of the legislation which, he argued, would better reflect what Parliament will have intended and pay due regard to the presumptions against interference with property rights, doubtful penalisation and retrospectivity. These interpretations are as follows:

i) Only the most recent gas safety certificate in respect of a check complying with regulation 36(3) of the Gas Safety Regulations need have been given to the tenant for the landlord to be able to rely on a section 21 notice ("Interpretation 1");

ii) The duty imposed by regulation 36(6)(b) of the Gas Safety Regulations relates to the last record made before the tenant occupies the premises pursuant to that specific tenancy ("Interpretation 2"); and

iii) A landlord need only have given the tenant certificates in respect of the two most recent checks to be able to rely on section 21 of the 1988 Act ("Interpretation 3").

35. Mr Luke Decker, who appeared for Mr Muca, supported Mr Cohen's submissions. Among other things, he stressed how other restrictions on the service of section 21 notices are remediable. The tenants' construction of the legislation, Mr Decker said, would make the giving of a compliant pre-occupation gas safety certificate the only restriction on the use of section 21 of the 1988 Act which would be wholly irremediable.

36. I shall consider the interpretations of the legislation put forward by Mr Cohen in turn. Before doing so, however, it is convenient to refer to two decisions of the Court of Appeal in which the implications of the 2015 Act have been considered: *Trecarrell House Ltd v Rouncefield* [2020] EWCA Civ 760, [2020] 1 WLR 4712 ("*Trecarrell*") and *Hathaway v Minister* [2021] EWCA Civ 936, [2021] 1 WLR 6005 ("*Hathaway*"); to address the applicability of section 21A of the 1988 Act in the circumstances of these cases; and to identify relevant principles of statutory interpretation.

Previous authorities

Trecarrell

37. In *Trecarrell*, a flat was let to Ms Rouncefield under an assured shorthold tenancy dated 20 February 2017 for a period of six months. Ms Rouncefield was not given any gas safety certificate before going into occupation, but on 9 November 2017 she was provided with one dated 31 January 2017 (i.e. pre-dating the start of her tenancy). In early April 2018, Ms Rouncefield was supplied with a further gas safety certificate referring to a check carried out on 3 April 2018, but no check had in fact been carried out on that date. There had been an inspection on 2 February 2018, but Ms Rouncefield did not accept that the gas safety certificate relating to that had been given to her until after she had been served with a section 21 notice on 1 May 2018.

38. The Court of Appeal held by a majority (Moylan LJ dissenting) that the issue whether Ms Rouncefield had received the February 2018 gas safety certificate before or with the section 21 notice should be remitted for determination by the County Court. If (and only if) that question was answered in the affirmative, the landlord would be entitled to a possession order.

39. The majority of the Court (Patten and King LJJ) appears to me to have arrived at its decision on the following basis:

i) Regulation 2(2) of the 2015 Regulations does not have the effect of excluding regulation 36(6)(b) of the Gas Safety Regulations from the requirements prescribed for the purposes of section 21A of the 1988 Act. As Patten LJ explained, "[t]he effect of regulation 2(1)(b) [of the 2015 Regulations] is to make the whole of paragraphs (6) and (7) [of regulation 36 of the Gas Safety Regulations] prescribed requirements for the purposes of section 21A" and regulation 2(2) does not mean that regulation 36(6)(b) is excluded in its entirety: see *Trecarrell*, at paragraphs 18 and 19;

ii) Regulation 2(2) of the 2015 Regulations "clearly excludes the 28-day period mandated under paragraph (6)(a) [of regulation 36 of the Gas Safety Regulations]" and so "[l]ate compliance with the landlord's obligation to provide or display a [gas safety certificate] after each annual check is not … a bar in itself to a subsequent section 21 notice": see paragraph 18 of *Trecarrell*;

iii) Regulation 2(2) of the 2015 Regulations also has the consequence that the time when a landlord "is in breach" of regulation 36(6)(b) of the Gas Safety Regulations ends for the purposes of section 21A of the 1988 Act once the requisite gas safety certificate is given to the tenant. Patten LJ explained in paragraph 30 that he was "not ... persuaded that for the purposes of section 21A the obligation to provide the [gas safety certificate] to a new tenant prior to the tenant taking up occupation cannot be complied with by later delivery of the [gas safety certificate]". In paragraph 45, King LJ said that "so long as the [gas safety certificate] has been provided to either a new or existing tenant before service, a landlord retains his right to use the section 21 procedure notwithstanding his or her earlier breach of the [regulation] 36(6) or (7) requirements";

iv) A gas safety certificate which does not contain the information specified in regulation 36(3)(c) of the Gas Safety Regulations cannot be relied on by a landlord as evidence of compliance with regulation 36(6): see paragraph 36 of *Trecarrell*; and

v) A failure to carry out the next safety check within 12 months of the last one does not mean that the landlord cannot comply with regulation 36(6)(a) of the Gas Safety Regulations as a prescribed requirement if he serves the tenant with a copy of the record once the check has been carried out: see paragraph 35 of *Trecarrell*.

40. In the light of these propositions, the majority of the Court of Appeal concluded that:

i) The fact that, contrary to regulation 36(6)(b), the gas safety certificate dated 31 January 2017 was not given to Ms Rouncefield until some months after she had gone into occupation did not matter;

ii) Neither did the fact that, contrary to regulation 36(6)(a) of the Gas Safety Regulations, there was an interval of more than 12 months between the inspection of 31 January 2017 and that of 2 February 2018;

iii) However, the landlord was not assisted by the gas safety certificate dated 3 April 2018 since it did not give the correct date of the safety check;

iv) The outcome of the appeal thus depended on whether the gas safety certificate in respect of the inspection on 2 February 2018 was served before or with the section 21 notice.

Hathaway

41. In *Hathaway*, Mr Minister had been granted an assured shorthold tenancy for a term of one year in 2008 and had remained in occupation as a statutory periodic tenant. In December 2018, he was served with a section 21 notice, but he denied its validity on the basis that he had not been given an energy performance certificate in accordance with regulation 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012.

42. The Court of Appeal held that that did not matter. It explained that, although regulation 2(1) of the 2015 Regulations provided for the requirement contained in regulation 6(5) of the 2012 Regulations to be a prescribed requirement for the purposes of section 21A of the 1988 Act, section 21A only applied to tenancies pre-dating the 2015 Act if and to the extent that the Secretary of State had chosen to prescribe requirements extending to such tenancies, and the Secretary of State had not done so.

43. Mr Minister relied on the fact that section 41(3) of the 2015 Act provided for section 38 of that Act to apply to any assured shorthold tenancy in existence at three years after it had come into force, but Arnold LJ, with whom Henderson and Baker LJJ agreed, observed that that reliance was misplaced. He explained in paragraph 23:

> "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."

44. Arnold LJ went on in paragraph 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 [of the 2015 Regulations] 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."

The applicability of section 21A of the 1988 Act

45. Section 41(1) of the 2015 Act provides for a provision of sections 33 to 40 of that Act (and, hence, section 21A of the 1988 Act, which was inserted into that Act by section 38 of the 2015 Act) to apply "only to an assured shorthold tenancy … granted on or after the day on which the provision comes into force". Further, section 41(2) states that such a provision "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".

46. The 2015 Regulations reflect section 41 of the 2015 Act. Regulation 1(3) explains that the Regulations "apply in relation to an assured shorthold tenancy of a dwelling-house in England granted on or after 1st October 2015" and regulation 1(4) specifies that the 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".

47. By section 41(3) of the 2015 Act, section 38 of that Act (and therefore section 21A of the 1988 Act) applied to *any* assured shorthold tenancy of a dwelling-house in England which was in existence more than three years after section 38 came into force, but, as is apparent from *Hathaway*, section 41(3) merely *empowered* the Secretary of State to make regulations extending to assured shorthold tenancies to which section 21A of the 1988 Act had not previously applied. In the event, that power has not been exercised. Section 21A does not, therefore, have operative effect in relation to any assured shorthold tenancy granted before 1 October 2015 or any periodic tenancy arising under section 5(2) of the 1988 Act on the coming to an end of an assured shorthold tenancy that was granted before 1 October 2015.

48. The result is that section 21A of the 1988 Act would not have been applicable in either of the cases with which we are concerned if the tenants had not been granted new tenancies by agreement after 1 October 2015. However, Ms El Amrani was granted a six-month assured shorthold tenancy on 5 February 2017 and Ms Hubert and Ms Hamdaoui were granted one-year assured shorthold tenancies on 9 November 2015 and annually thereafter for four years. It follows that section 21A applied in relation to the tenancies at issue before us.

Principles of statutory interpretation

49. When interpreting legislation, the Courts "are seeking to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision": see *Darwall v Dartmoor National Park Authority* [2025] UKSC 20, [2025] AC 1292, at paragraph 15, per Lords Sales and Stephens.

50. In undertaking the exercise, "[t]he court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature", and " the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief": see *Bennion, Bailey and Norbury on Statutory Interpretation* ("*Bennion*"), 8th. ed., at section 13.01. On the other hand, "[t]he court's

function is of course to ascertain the legislative intention" and, "[g]iven the weight to be attached to the grammatical meaning, where the meaning of a provision is otherwise clear, the existence of anomalies may not be sufficient to displace that meaning": see *Bennion*, at section 13.5. Further, "[t]he introduction of a new statutory scheme may … give rise to anomalies as regards what is, and is not, dealt with under the new law": see *Bennion*, at section 13.5. In *Alexander v Mercouris* [1979] 1 WLR 1270, Buckley LJ said at 1273:

> "Whenever new rights or obligations are created by statute, anomalies will inevitably arise initially. Whatever date is found to be the earliest date at which the new duties, rights or obligations can arise, it will be possible to suggest instances in which one man will escape liability by a day and another, who has followed an exactly similar course of action but 24 hours later, will find himself liable. In such a case an argument by reference to anomalies is, in my opinion, unlikely to be helpful, and I think the question is purely one of interpretation of the statute."

51. There are also presumptions against doubtful penalisation, interference with property rights and retrospectivity. With respect to the first of these, *Bennion* explains in section 26.4 that, when interpreting legislation, the Court should take into account the "principle of legal policy that a person should not be penalised except under clear law" and that the "presumption against doubtful penalisation is not limited to the imposition of criminal liabilities" but "applies whenever a particular construction of an enactment can be described as inflicting a detriment of any kind, whether criminal or civil". As regards interference with property rights, *Bennion* states in section 27.6 that "[i]t is a principle of legal policy that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law"; that "[e]ven in cases where some degree of interference with a person's proprietary rights is clearly intended, legislation will be construed as interfering with those rights no more than the statutory language and purpose require"; and that "[t]he principle against expropriation or other interference with the enjoyment of property rights is likely to carry particular weight in cases where no compensation is available".

52. Turning to the presumption against retrospectivity, I cited various authorities bearing on this in *Adriatic Land 5 Ltd v Long Leaseholders at Hippersley Point* [2025] EWCA Civ 856, [2026] 1 All ER 514, at paragraphs 53 to 59. The principle was the subject of discussion in the House of Lords in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816. In that case, Lord Rodger observed in paragraph 187 that:

> "[s]o far as matters of substance are concerned, the essence of the common law rule is conveniently stated by Sir Owen Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261, 267:
>
> > 'The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer

> or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.'"

In paragraph 98, Lord Hope said that "[t]he concepts of fairness and legal certainty carry much greater weight when it is being suggested that rights or obligations which were acquired or entered into before 2 October 2000 [i.e. the date on which the legislation at issue came into force] should be altered retrospectively". In paragraph 161, Lord Scott drew this comparison:

> "If a lease is granted for, say, 99 years, there might well be intervening legislation capable of affecting the ability of the landlord to forfeit the lease, to operate a rent review clause, to claim damages for dilapidations or to recover possession on the expiry of the term. But it would be unusual for the legislation to alter the rights and obligations of the parties resulting from events that had already taken place, such as a forfeiture notice already served, a damages claim already instituted, rent review machinery already in train, and so on."

53. In a similar vein, Patten LJ, giving the judgment of the Court of Appeal, said in *Granada UK Rental & Retail Ltd v Pensions Regulator* [2019] EWCA Civ 1032, [2020] ICR 747 at paragraph 56:

> "No one can expect the law to stand still: it must react to changing circumstances and problems as they unfold. Clearly, legislation which removes or alters already-accrued rights is likely to be more objectionable, and therefore unfair, than legislation which imposes a new liability based on past conduct."

Discussion

Interpretation 1

54. Interpretation 1 focuses on the 2015 Regulations. Regulation 2(1)(b) refers to "requirement to provide tenant with a gas safety certificate" and regulation 2(2) explains that the requirement prescribed by regulation 2(1)(b) is "limited to the requirement on a landlord to give a copy of the relevant record". Mr Cohen argued that the use of the singular in each case ("a … certificate" and "record") indicates that, for the purposes of section 21A of the 1988 Act, it suffices that the landlord has given the tenant a copy of the certificate in respect of the most recent check (whether under regulation 36(3)(a) or regulation 36(3)(b)). That interpretation, Mr Cohen submitted, is not only supported by the terms of the 2015 Regulations but consistent with their purpose. What matters, Mr Cohen said, is that tenants know that the premises which they are occupying *are* safe and, that being so, the fact that the tenant has not been given a record of an earlier check is not significant. After all, as Patten LJ said in *Trecarrell* at paragraph 24, section 21A "is not the primary sanction for non-compliance [with regulations 36(6) and (7) of the Gas Regulations]" and "[t]he imposition by section 21A of a bar to the service of a section 21 notice is … only collateral to [the criminal sanctions] and, at best, a spur to compliance".

55. For his part, Mr Decker cited the explanatory memorandum to the 2015 Regulations which the Department for Communities and Local Government prepared for the Joint Committee of Statutory Instruments. Paragraph 4.4 of that stated:

> "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".

Mr Decker relied on the memorandum's use of the singular in "a safety certificate" and "a certificate".

56. Mr Tom Morris, who appeared for the tenants, submitted that we are bound by *Trecarrell* to reject Interpretation 1. It is part of the ratio decidendi of *Trecarrell*, Mr Morris argued, that a landlord can serve a valid section 21 notice only if he has first given the tenant *both* a pre-occupation gas safety certificate *and*, where regulation 36(6)(a) of the Gas Regulations required one, a gas safety certificate under that provision. Had the 2015 Regulations required a landlord to do no more than provide the tenant with a record of the most recent check, so Mr Morris said, the Court of Appeal would not have needed to consider the position in relation to the pre-occupation certificate of 31 January 2017.

57. Leggatt LJ discussed how the ratio decidendi of a case is to be determined in *R (Youngsam) v Parole Board* [2019] EWCA Civ 229, [2020] QB 387 ("*Youngsam*"), in a passage to which the Court of Appeal referred approvingly in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, [2024] 1 WLR 3827. As Leggatt LJ explained in paragraph 48 of *Youngsam*, quoting *Cross & Harris*, *Precedent in English Law*, the ratio decidendi of a case has been said to be any ruling on a point of law "expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him". Leggatt LJ went on in paragraph 51:

> "It therefore seems to me that, when the ratio decidendi is described as a ruling or reason which is treated as 'necessary' for the decision, this cannot mean logically or causally necessary. Rather, such statements must, I think, be understood more broadly as indicating that the ratio is (or is regarded by the judge as being) part of the best or preferred justification for

> the conclusion reached: it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were adopted."

58. A passage from the judgment of Singh LJ in *Jazztel v Revenue and Customs Commissioners* [2022] Ch 403 is also relevant. Singh LJ said in paragraph 139:

> "In my view, there is an important distinction in principle between a case in which an argument was not advanced on the earlier occasion and a case in which the legal issue was entirely different: see, by way of example, *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213. In that case, there had been an earlier decision of the Court of Appeal in which a challenge to the very same scheme now under challenge had been rejected: see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397. That did not prevent the Court of Appeal from reconsidering the matter (and indeed deciding it in favour of the claimant) because there was an entirely new legal issue and a different ground of challenge advanced in *Elias*, which had not been raised in the earlier case. In the earlier case, the grounds of challenge were the conventional public law grounds of irrationality and breach of legitimate expectations; whereas, in *Elias*, the grounds arose under the Race Relations Act 1976. This was not therefore simply a case where different arguments were advanced which had not been made in the earlier case; the legal issues were themselves different."

59. In *Trecarrell*, there was no issue as to whether a landlord need do no more than give the tenant the record in respect of the most recent check to satisfy section 21A of the 1988 Act. It was not suggested by counsel for the landlord that that was the case and so the Court of Appeal did not address the question and it did not form any part of the basis on which it reached its decision. While the appeal *could* have raised the point that Mr Cohen and Mr Decker take, it did not in fact do so and the Court of Appeal cannot be said to have treated any ruling on the matter as "a necessary step in reaching [its] conclusion". The Court decided that late service of a pre-occupation gas safety certificate would do, not that service of such a certificate was unnecessary.

60. In the circumstances, I do not accept that *Trecarrell* binds us to reject Interpretation 1. However, Mr Morris also maintained that we should reject Interpretation 1 even if not bound to do so by *Trecarrell*.

61. Regulation 2(1) of the 2015 Regulations provides for the requirements prescribed for the purposes of section 21A of the 1988 Act to be "the requirements contained in (a) regulation 6(5) of the Energy Performance of Buildings (England and Wales) Regulations 2012 … ; and (b) paragraph (6) or (as the case may be) paragraph (7) of regulation 36 of the [Gas Safety Regulations] (requirement to provide tenant with a gas safety certificate)". One thing that does emerge from *Trecarrell* is that regulation 2(2) of the 2015 Regulations does not serve to exclude regulation 36(6)(b) from the requirements prescribed for the purposes of section 21A of the 1988 Act. On that

basis, the "requirements contained in … paragraph (6) … of the Gas safety Regulations" are, on the face of it, the requirement under regulation 36(6)(b) to give the tenant a pre-occupation certificate *and* (where another check has become necessary under regulation 36(3)(a)) the requirement under regulation 36(6)(a) to give the tenant a further certificate. Given that regulation 2(1) relates to the whole of regulation 36(6) and not just regulation 36(6)(a) (as the landlord had contended in *Trecarrell*), compliance with both regulation 36(6)(a) and regulation 36(6)(b) would seem to be demanded.

62. With regard to the reference in regulation 2(1)(b) to "requirement to provide … a gas safety certificate", the words form part of a description in brackets of regulations 36(6) and (7) of the Gas Safety Regulations. That would be an odd way to limit the requirements that were being prescribed for the purposes of section 21A of the 1988 Act. A much less oblique approach could have been expected if that had been intended.

63. Nor does regulation 2(2)'s reference to "requirement … to give a copy of the relevant record" obviously evince an intention to require a landlord to provide just the most recent gas safety certificate. Read naturally in the context, the preferable reading of regulation 2(2) appears to me to be that, where regulation 36(6) of the Gas Safety Regulations provides for a tenant to be given any record, it is enough for the purposes of section 21A of the 1988 Act that the document in question is provided, whether late or not.

64. In any event, as Mr Morris reminded us, by section 6 of the Interpretation Act 1978, "In any Act, unless the contrary appears, … words in the singular include the plural". If, therefore, a contrary intention is not apparent, the references in regulation 2 of the 2015 Regulations to "a gas safety certificate" and "the relevant record" are to be understood as encompassing multiple certificates and records.

65. In my view, no contrary intention can be discerned. Nor, as it seems to me, is there any other sufficient reason to conclude that a landlord need have done no more than give the tenant a copy of the record in respect of the most recent check when the language of regulation 2 of the 2015 Regulations indicates otherwise.

66. It is to be remembered that Interpretation 1, if correct, would not apply only in relation to cases such as that involving the Trustees, Mr Hubert and Ms Hamdaoui, where a check was duly carried out before Mr Hubert and Ms Hamdaoui were first granted a tenancy and it is understandable that the Trustees no longer have a copy of the certificate in respect of it when they were not obliged to retain it for more than two years and the 2015 Act lay eight years or so in the future. If Interpretation 1 were right, it would also be applicable where, say, a landlord had knowingly failed to undertake any check before granting an assured shorthold tenancy on 1 January 2024 and was proposing to serve a section 21 notice in the following year. Arguably, a landlord need not undertake any check at all until on the point of serving a section 21 notice regardless of when the tenancy in question was granted. It is far from apparent that section 21A was not meant to bite in such a situation and, were it not to, the "spur to compliance" which (in Patten LJ's words in *Trecarrell*) section 21A was supposed to supply would be significantly attenuated. Nor, as it seems to me, can there be any question of it being "absurd" for Parliament to have intended a landlord's ability to

serve a section 21 notice to depend on his having given the tenant records pursuant to both regulation 36(6)(a) and regulation 36(6)(b).

67. With regard to the various presumptions mentioned in paragraphs 50 to 53 above:

i) The 2015 Act and Regulations make it clear that 21A was not to affect any assured shorthold tenancy which was already in being when they came into force. Section 21A was to bite only if (as happened in the present cases) a landlord agreed to enter into a new assured shorthold tenancy. On the tenants' case, events occurring prior to the 2015 Act and Regulations taking effect are capable of bearing on a landlord's ability to terminate a *later* tenancy, but the legislation did not impair landlords' rights in relation to existing tenancies. They did not, therefore, denigrate from current rights of landlords;

ii) Even had the legislation affected tenancies which were in existence at the date of the 2015 legislation, the observation of Lord Scott quoted in paragraph 52 above would have been relevant. It need not be objectionable for Parliament to legislate during the currency of a tenancy in a way that restricts the landlord's ability to recover possession;

iii) In the present case, the Gas Safety Regulations were in force even when Mr Hubert and Ms Hamdaoui were granted their first assured shorthold tenancy in 2007, and it was already a criminal offence to fail to comply with regulation 36(6)(b). That makes it the more likely that Parliament intended to make use of section 21 of the 1988 Act conditional on a pre-occupation certificate having been given to a tenant even where the tenant had been given a certificate under regulation 36(6)(a); and

iv) If adopted, Interpretation 1 would affect cases where no relevant event had taken place before the introduction of the 2015 Act and Regulations.

68. In all the circumstances, I do not accept Interpretation 1.

Interpretation 2

69. Interpretation 2 focuses on the Gas Safety Regulations and, specifically, on the wording of regulation 36(6)(b). That requires a landlord to ensure that "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". Mr Cohen and Mr Decker argued that the words "before that tenant occupies those premises" are to be understood as referring to the tenant occupying the premises "pursuant to the new lease which renders the person a new tenant". Given, it was argued, the definition of "tenant" (viz. the "person for the time being entitled to the term of [the] lease"), the "tenant" and the "lease" which gives rise to the "occupation" are inextricably linked. Support for Interpretation 2 was also said to be found in the fact that regulation 36(3)(b) refers to the "commencement of the lease" rather than "occupies for the first time". It was submitted, too, that regulation 36(6)(b) would generate absurdity if "occupies the premises" were not taken to have the meaning for which the landlords contend. The examples which Mr Cohen put forward in this respect included situations in which, first, a person occupied a property under a lease for more than seven years (and so not pursuant to a "lease" within the meaning of

regulation 36(1)) and was subsequently granted a lease for a shorter term (so that he became a "tenant" for the purposes of regulation 36) and, secondly, a person who was a "tenant" of a property left it for a few years before returning and being granted a new "lease". Were Interpretation 2 rejected, Mr Cohen said, the former scenario would require the landlord to have produced before the tenant went into occupation under the lease for more than seven years the "last record" made before the tenant *later* became a "new tenant" (which, as Mr Cohen noted, would be impossible). With regard to the latter scenario, Mr Cohen submitted that the same impossibility would arise if the individual were deemed a "new tenant" or, alternatively, no notice at all would be required.

70. For his part, Mr Morris again contended that *Trecarrell* provides binding authority. By the time the section 21 notice was served on Ms Rouncefield, Mr Morris pointed out, she would either have been granted a second fixed-term tenancy or be deemed to have been granted a periodic tenancy under section 5 of the 1988 Act. Either way, she was occupying under a different "lease" from that under which she first went into occupation. Yet the Court of Appeal proceeded on the basis that the relevant "occupation" was referable to her original tenancy.

71. Whether or not, however, Interpretation 2 could usefully have been ventilated in *Trecarrell*, it was not. The Court of Appeal was not asked to consider Interpretation 2 and did not do so. There is no question of a ruling on the point having been treated by the Court as "a necessary step in reaching [its] decision" and so the decision cannot be regarded as providing binding authority against Interpretation 2.

72. Turning to the merits of Interpretation 2, Mr Morris submitted that regulation 36 of the Gas Safety Regulations works straightforwardly. Regulation 36(6)(b) imposes a duty on a landlord to give a *new* tenant the latest gas safety certificate before he goes into occupation. Thereafter, Mr Morris said, regulation 36(6)(a) takes over, imposing a recurring duty on landlords to provide *existing* tenants with each later gas safety certificate within 28 days. A tenant is thus assured of the safety of the appliances before first entering into occupation and annually thereafter. A person does not cease to be an "existing tenant" within the meaning of regulation 36(6)(a), or become a "new" one, when, say, a fixed-term tenancy is followed by a periodic tenancy under section 5 of the 1988 Act: he remains a "tenant" and his factual status as an occupier is unaffected. Mr Morris noted in this connection that Patten LJ saw regulation 36(6)(a) as applying to "tenants who continue in occupation from year to year": see *Trecarrell*, at paragraph 22.

73. Mr Morris sought to explain away the examples of supposed absurdity propounded by Mr Cohen. Regulation 36(6)(b) of the Gas Safety Regulations requires a record to be given to "any new tenant of premises … before that tenant occupies those premises". That signifies, Mr Morris argued, occupying for the first time as a "tenant" within the meaning of regulation 36. No difficulty therefore arises if a person has previously occupied under a lease for more than seven years: the landlord will not have to give him any record until he occupies as a "tenant" as defined in regulation 36. Nor, so Mr Morris said, is there a problem where someone goes into occupation, leaves and then resumes occupation under a new tenancy. Given the discontinuity, the individual will be a "new tenant" and his occupation under that tenancy will be what counts.

74. Mr Morris put forward an example of his own in support of his submissions. Suppose, he said, that a check were carried out a few days before the end of a fixed-term tenancy, the 12-month period allowed for the check expiring no earlier. Under regulation 36(6)(a), the landlord would have 28 days in which to give the tenant the resulting gas safety certificate. In contrast, Interpretation 2 would mean that the certificate had to be supplied before the end of the term. Mr Morris argued that that could occasion real practical difficulties and that there is no obvious reason why the 28-day period for which regulation 36(6)(a) provides should be curtailed because of the earlier expiry of the fixed-term tenancy.

75. When assessing the rival submissions, I do not think that the presumptions against doubtful penalisation, interference with property rights and retrospectivity are of any real help to the landlords. What is at issue in this context is the construction of the Gas Safety Regulations, which have been in force since 1998. There is obviously no suggestion that any event relevant to these appeals occurred before then or of the debate as to the correct interpretation of the Gas Safety Regulations bearing on any property rights which any party to the appeals had at that date. In any event, the Gas Safety Regulations did not themselves affect the ability of landlords to serve section 21 notices. There was no linkage between the Gas Safety Regulations and section 21 notices until 2015, and the correct interpretation of the Gas Safety Regulations will not have changed with the arrival of the 2015 Act and Regulations. In one respect, the presumption against doubtful penalisation favours the tenants. As mentioned in paragraph 74 above, Interpretation 2 would have the consequence of bringing forward the date by which tenants must be given gas safety certificates where there are successive tenancies even though the Gas Safety Regulations do not on any view make that plain.

76. Nor, in my view, does the presumption against "absurdity" provide the landlords with significant assistance. It seems to me that Mr Morris satisfactorily explained why the absurdities suggested by Mr Cohen do not arise on the tenants' case.

77. The key question, I think, is what "existing tenant" and "new tenant" mean in, respectively, regulation 36(6)(a) and regulation 36(6)(b) of the Gas Safety Regulations. More specifically, where (as in the cases before us) a person has occupied premises under successive tenancies, is he a "new tenant" only when he goes into occupation under the original tenancy and an "existing tenant" as that tenancy is replaced? Or is he a "new tenant" whenever a fresh tenancy (whether by agreement or under section 5 of the 1988 Act) comes into being?

78. On balance, I agree with Mr Morris that, where a person remains in occupation of premises under a second or subsequent "lease" within the meaning of regulation 36 of the Gas Safety Regulations, he is an "existing tenant" to whom regulation 36(6)(a) applies, not a "new tenant" within regulation 36(6)(b). That view seems to me to accord with the natural meaning of regulation 36 in its context. A person is plainly a "new tenant" when he is originally granted a "lease". While he continues to fall within the definition of "tenant" and to be in uninterrupted occupation, albeit under one or more further "leases", my own feeling is that he is appropriately viewed as an "existing tenant" rather than a "new tenant". As Mr Morris said, the terms of regulation 36(6) suggest that what was envisaged was that regulation 36(6)(b) would be applicable when a person first goes into occupation as a "tenant" and that regulation 36(6)(a) should then take over. It would, I think, be surprising if the idea

had been that regulation 36(6)(b) should be in point on multiple occasions, as one "lease" superseded another. It is much more likely that paragraph 36(6)(a) was supposed to become the relevant one. That the ordinary meaning of regulation 36(6) is to that effect is, perhaps, reflected in the fact that Patten LJ understood regulation 36(6)(a) to apply to "tenants who continue in occupation from year to year".

79. Additional support for that conclusion is, as it seems to me, to be found in the following considerations:

i) As mentioned in paragraph 74 above, Interpretation 2 would truncate the period within which landlords must provide gas safety certificates in a way which is anything but clear from regulation 36(6) of the Gas Safety Regulations;

ii) As Mr Cohen accepted, Interpretation 2 would involve reading into regulation 36(6)(b) after "occupies those premises" words such as "pursuant to the new lease which renders that person a new tenant" when the draftsman did not choose to include them; and

iii) There is no compelling policy reason for considering that the draftsman would have wished regulation 36(6)(b) to apply in relation to successive tenancies. Tenants are entitled to gas safety certificates on an annual basis whether it is regulation 36(6)(b) or regulation 36(6)(a) which is applicable in such a case.

80. In all the circumstances, I have not been persuaded that Interpretation 2 is correct.

Interpretation 3

81. Interpretation 3 reflects the careful and detailed judgment of Her Honour Judge Melissa Clarke in *Cassell v Sidhu.* Judge Clarke arrived at the following conclusion in paragraph 67 of her judgment:

> "In my judgment, it seems to me that, properly construed, Parliament intended compliance with the prescribed requirements allowing a s.21 notice to be served to be compliance with the prescribed requirements in relation to, at most, the two most recent checks before service of the s.21 notice, as those are the only gas safety records it required to be retained by the landlord and made available for inspection. Whether that involves the prescribed requirements under regulation 36(6)(a) and/or regulation 36(6)(b) [of the Gas Safety Regulations] depends on the facts at the time of service of the s.21 notice."

82. Judge Clarke's conclusion was informed by the fact that regulation 36(3)(c) of the Gas Safety Regulations requires a landlord to retain a record only until two further checks have been carried out or two years have passed. She said this on the subject in paragraph 65 of her judgment:

> "i. Pursuant to the statutory scheme, a landlord is obliged only to retain a gas safety record (regulation 36(3)(6)) and make it

> available for inspection by the tenants (regulation 36(3)(5)) 'until there have been two further checks', such that it appears that Parliament did not intend that a landlord be required to evidence a gas safety record at all, once two further checks had been made;
>
> …
>
> iii. It is difficult to see any reason why Parliament would have intended 'the relevant record' to encompass records which it had provided by statute the landlord was no longer obliged either to retain or make available for inspection once it had carried out two further checks …."

83. With respect, however, I do not think it is possible to circumscribe the 2015 Regulations in this way. Regulation 2(1) provides in general terms for "the requirements contained in … paragraph (6) … of regulation 36 of the [Gas Safety Regulations]" to be prescribed requirements for the purposes of section 21A of the 1988 Act. Neither the 2015 Regulations nor regulation 36 of the Gas Safety Regulations mentions regulation 36(3)(c) of the Gas Safety Regulations. Nor, in my view, is there any other basis for restricting the 2015 Regulations by reference to regulation 36(3)(c) of the Gas Safety Regulations.

84. I do not therefore accept Interpretation 3.

Conclusion

85. In the cases before us, the tenants were not provided with gas safety certificates in respect of checks carried out in advance of their first going into occupation, albeit under predecessor tenancies. In my view, that is fatal to the validity of the section 21 notices which the landlords served on them. It may be that, as Judge Hellman said, regulation 2 of the 2015 Regulations has had "adverse consequences for landlords which … amount to unintended collateral damage incidental to the legislative purpose", but I think he was right to rule in favour of Mr Hubert and Ms Hamdaoui. I would therefore dismiss the Trustees' appeal against that decision and allow Ms El Amrani's appeal.

Lord Justice Singh:

86. I agree.

Lady Justice Falk:

87. I am grateful to Newey LJ for his lucid explanation and analysis of the issues, with which I agree. I am adding some brief comments because the result on the facts of these particular cases may seem surprising, and because (as Mr Decker pointed out) the consequence appears to be that a failure to supply a pre-occupation gas safety certificate is the only restriction on the use of section 21 of the 1988 Act which is wholly irremediable.

88. Of the three interpretations put forward by Mr Cohen, I was initially attracted most by Interpretation 2. However, I agree with Newey LJ that what is at issue in relation to

that interpretation is a construction of the Gas Safety Regulations, which when introduced had no link to section 21. Construing those regulations, the requirement to provide a certificate before a tenant first (factually) goes into occupation and thereafter following each annual check not only fits with the natural meaning of the words but makes practical sense. In contrast, treating each tenancy renewal as involving a fresh occupation would give rise to the difficulties referred to in paragraph 74 above. It should be borne in mind that the Gas Safety Regulations apply only to relatively short-term leases. The draftsman must be taken to have had in mind that such tenancies may well be renewed.

89. This point is well illustrated by the contrast between regulation 36(3)(b) and regulation 36(6)(b). The former refers to an obligation to conduct a check "within a period of 12 months before the lease commences" (or within 12 months of installation if later), whereas the latter refers to a copy of the record being given to "any new tenant … before that tenant occupies those premises". In effect, Interpretation 2 seeks to ignore this distinction in wording in a renewal context and would require them to be read in the same way. But the difference in wording in fact provides further support for the argument that the reference to going into occupation was intentional. Indeed, it was common ground that, outside a renewal context and in the usual situation where occupation occurs at some point after the grant of a lease, the effect of regulation 36(6)(b) is that there is no requirement to provide a copy of the record prior to the grant, even though regulation 36(3)(b) will ordinarily already have required the check to have been carried out.

90. Mr Cohen submitted that the tenants' own interpretation of the Gas Safety Regulations required some interpolation of words, by reading in a concept of occupying for the first time "as a tenant" (see paragraph 73 above). He submitted that, for consistency, if such words were read in they should refer to the defined term "tenant" in regulation 36(1), which relates to the lease in question, thus pointing in favour of Interpretation 2.

91. I am not persuaded by this. In my view the definition of "tenant" refers to a person with particular qualities, namely someone who is entitled to the term of a lease (or licence) under which the relevant premises are occupied. Where one lease of a kind that falls within the definition of "lease" in the Gas Safety Regulations is replaced by another such lease granted to the same person, the "tenant" remains the same.

92. A further point, discussed at the hearing, was the potential significance of the commencement provision in regulation 1(3) of the 2015 Regulations, which has the effect that those regulations only apply in relation to an assured shorthold tenancy granted on or after 1 October 2015. It might be argued that, to give full effect to that commencement provision, what did or did not happen under the Gas Safety Regulations in relation to tenancies granted before that date should be disregarded.

93. However, this places a weight on regulation 1(3) that it will not bear. As Newey LJ has explained, on the facts of both appeals an assured shorthold tenancy was in fact granted after 1 October 2015, so the 2015 Regulations did apply. The effect was to make compliance with regulation 36(6) or (7) of the Gas Safety Regulations a prescribed requirement, subject only to the timing-related modifications discussed in *Trecarrell*. There was no further modification that, for example, required events that occurred before 1 October 2015 to be ignored.

94. It is true that there is a marked contrast between a case where an assured shorthold tenancy is granted on or after 1 October 2015 to replace another tenancy, and one where the only tenancy created on or after that date was a periodic tenancy pursuant to section 5 of the 1988 Act. But that distinction is expressly provided for by regulation 1(4) of the 2015 Regulations, and as discussed in *Hathaway* the power in section 41(3) of the 2015 Act to extend the reach of the regulations has not been exercised. The existence of regulation 1(4) indicates that the distinction was intentional. It is clear from that provision, as well as from another provision of the 2015 Regulations to which we were referred (regulation 3(5)(b)), that the draftsman had in mind that the replacement of one tenancy by another is commonplace. Indeed the concept of "replacement tenancy" is one that is built into the structure of section 21 of the 1988 Act (see regulation 3(6), referring to section 21(7)).

95. I therefore agree with Newey LJ that the Trustees' appeal must be dismissed and Ms El Amrani's appeal allowed.