Upper Tribunal for Scotland

[2019] UT 34
UTS/AP/18/0009 & UTS/AP/18/0023

DECISION NOTICE OF SHERIFF NIGEL ROSS

in the case of

JOSEPHINE MARSHALL TRUST, 204 Ashley Gardens, Emery Hill Street, London, SW1P 1PA, per LINDSAYS, Caledonian Exchange, 19A Canning Street, Edinburgh, EH3 8HE

Appellant

and

MR NICHOLAS CHARLTON, Barr Bheag, Barguillean, Taynuilt, Argyll, PA35 1HY per THORNTONS LAW LLP, 204 Ashley Gardens, Emery Hill Street, London, SW1P 1PA

and

FIRST-TIER TRIBUNAL FOR SCOTLAND (HOUSING AND PROPERTY CHAMBER)

Respondents

FTT Case Reference FTS/HPC/EV/18/0045 and PRHP/RP/16/0351

28 May 2019

Decision

The tribunal:

(a) determines that the repairing standard enforcement order ("RSEO") dated 14 March 2017 does not prevent the Trust having the requisite intention to demolish the property in terms of ground 6 of schedule 5 to the Housing (Scotland) Act 1988;

(b) finds that the appellant has the requisite intention to demolish the property for the purposes of schedule 5 to that Act and that ground 6 is satisfied;

(c) quashes the First-tier Tribunal decision of 23 March 2018 to refuse repossession of the property;

(d) orders repossession of the property in terms of section 18(3) of the Housing (Scotland) Act 1988;

(e) adheres to the repair decision of the Tribunal dated 9 July 2018 not to revoke the RSEO.

Reasons for Decision

[1] The appellant (the "Trust") has owned a domestic dwelling house at Barr Bheag, Barguillean, Taynuilt, Argyll (the "property") since 1999. It is a detached timber-framed cottage with a corrugated sheet external finish, with two brick-built extensions. On 1 January 2005 the Trust entered into an assured tenancy with Mr Charlton, who resides there. There was no written lease. The property thereafter deteriorated and by 2016 was in a state of considerable disrepair.

[2] Mr Charlton and his partner complained in about 2015 about the requirement for repairs. After unsuccessful discussions, involving allegations of obstruction by both sides, the Trust applied in September 2016 to the Private Rented Housing Panel for access to carry out repairs, and Mr Charlton made a repairing standard complaint. After sundry procedure, on 14 March 2017 the First-tier Tribunal issued a Repairing Standard Enforcement Order ("RSEO") in terms of section 24 of the Housing (Scotland) Act 2006.

[3] The RSEO as drafted reads, in part:-

> "the tribunal now requires the landlords to carry out such work as is necessary for the purposes of ensuring that the house concerned meets the repairing standard…In particular the tribunal requires the landlords to:-
> 1. Obtain a specialist report from a suitably qualified surveyor, engineer or architect to address the requirements for a property of this form of construction to make the

> property wind and watertight…The property should also address the issue of the roof of the property…
>
> 2. Carry out such work as is recommended in terms of the report.
>
> 3. Replace or repair the downpipe…"

[4] The requirement at point 2, namely to "carry out such work as is recommended in terms of the report" is unfortunate. The effect was to delegate control and authority to an unknown professional, and place an absolute requirement on the Trust to follow that person's recommendations. What the Tribunal may have intended as an information-gathering exercise appears to have been expressed as a delegation of its own authority, the legal competency of which is at least open to doubt. The practical effect is to require obedience to a third party unknown to the Tribunal, irrespective of identity, independence or (subject to basic qualifications) ability. That third party may, in their unrestricted discretion, reasonably require works on a spectrum ranging from the minimalist to the extravagant. In pronouncing an RSEO in those terms, the Tribunal removed its own oversight of the process, relinquished control of any works to be carried out, and delegated that power to an unknown third party. The requirement to obey is, on the face of the wording, absolute. If the Trust wished to challenge that expert's recommendations as unreasonable or mistaken, there is no mechanism for doing so. This situation may have been avoided if the Tribunal had required any report, and the works recommended, to be approved by the Tribunal before any order to comply was made.

[5] In fact, such a problem arose. In August 2017 the Trust followed the Tribunal's direction and appointed an architect, who concluded after inspection that the building had reached the end of its useful life. He had no recommendations to make, because in his professional view:-

> "the main issue I have is that we could do the works as outlined above at considerable cost and really not improve the situation significantly…by carrying out the works suggested I cannot say on the balance of probabilities that the building will be wind and watertight…I suggest a new dwellinghouse should be constructed which would be fully compliant with current building regulations…".

[6] Accordingly, the report contained no recommendations about repair. That meant the Trust was faced with an RSEO requirement which it could not meet, while the RSEO continued to require works which, according to the architect, would be little more than a waste of resources. The architect's professional judgment is not challenged.

[7] Upon receipt of the architect's report, the Trust resolved to demolish the property. It applied on 17 October 2017 to Argyll and Bute Council for a building warrant for demolition, and warrant was granted on 27 November 2017. It served a notice to quit, dated 18 October 2017, on Mr Charlton. On 20 October 2017 it applied to the Tribunal for an extension of time under the RSEO, which the Tribunal refused on 29 November 2017 (although a subsequent application on 26 February 2018 was granted). In November 2017 the council intimated that planning permission for demolition would be required. The Trust submitted such an application on 24 November 2017.

[8] The Trust applied to the Tribunal on 2 January 2018 for an order for repossession. The ground of repossession was stated to be ground 6 of Schedule 5 to the Housing (Scotland) Act 1998, namely that:-

> "The landlord who is seeking possession…intends to demolish or reconstruct the whole or a substantial part of the house…and (b) the relevant landlord cannot reasonably carry out the intended work without the tenant giving up possession of the house…"

[9] That notice was served when the RSEO was still outstanding.

[10] There are accordingly two application processes to the Tribunal, namely the application by Mr Charlton relating to the RSEO (the "repairing application") and

separately, the application by the Trust seeking an order for repossession (the "repossession application").

The decisions appealed against

[11] In the repairing application, the Trust carried out some repairs but these did not meet the requirements of the RSEO. After sundry procedure, the Trust applied to the Tribunal on 29 May 2018 to revoke the RSEO, on the grounds that they intended to demolish the property. By decision dated 9 July 2018 the Tribunal refused to revoke the RSEO and issued a notice of failure to comply, stating:-

> "Until the tenancy has been lawfully terminated the landlord's duty is to ensure that that property meets the repairing standards at all times during the tenancy".

It ordered that the rent be restricted by 85 per cent until the RSEO was complied with. The Trust appeals that decision (the "repairing appeal").

[12] In the repossession application, the Trust submitted an application on 3 January 2018 for an order for repossession. Such an order is mandatory under ground 6 of schedule 5 of the 2006 Act where the landlord intends to demolish the property. The (differently constituted) Tribunal refused that motion. The Tribunal was not satisfied that the Trust "intended", as that term is used in the 2006 Act, to demolish the building. Noting that there was no planning permission to do so (a situation now resolved because planning permission was granted on 14 February 2019), the Tribunal decided to refuse on the basis that a landlord could not, as a matter of law, "intend" to demolish a building where an RSEO was in place. It stated:-

> "The RSEO therefore requires the [Trust] to maintain the house in existence to complete the repairs and the [Trust] cannot demolish until the RSEO is revoked".

The Trust appeals that decision (the "repossession appeal"). The two appeals are conjoined, as they are interdependent. This decision addresses both appeals.

The repairing appeal

[13] The 2006 Act requires landlords to maintain rented properties to the "repairing standard" set out in section 13, which provides that the repairing standard is met if the house is wind and watertight, in a reasonable state of repair, and other criteria as set out in that section. Section 14 provides:-

> "(1) The Landlord in a tenancy must ensure that the house meets the repairing standard –
> …(b) at all times during the tenancy."

[14] The tenant may apply to the Tribunal for determination of whether this standard is met (sec 22) and the Tribunal must decide whether the landlord has complied with the duty (sec 24). If it decides that the landlord has so failed, it may make a RSEO, which may specify particular steps to be taken.

[15] Once the Tribunal has so decided, an RSEO must be made. The RSEO remains in place even if the tenancy subsequently ends. The clear statutory purpose is to compel landlords to meet minimum repair standards and to prevent any mechanism by which those repair standards can be avoided. A landlord cannot relet a property until an RSEO has been carried out. A tenant can seek a rent relief order of up to 90 per cent until the RSEO has been carried out.

[16] Following the issuing of the RSEO on 14 March 2017, the Trust obtained the architect's report already referred to. The clear import of the report was that the property was beyond economic repair. It suggested, but stopped short of "recommendation" of, demolition and rebuilding. The Trust carried out some works to the property. Following the

expiry of the time limit within the RSEO, the Tribunal arranged a re-inspection, upon which the parties were invited to comment. Mr Charlton claimed that the Trust had not met the repairing standard as required. The Trust claimed it had done so, at least so far as practicable, and applied for revocation of the RSEO on the grounds that demolition was required. It offered an undertaking that it would demolish the property.

[17] The Tribunal decision of 9 July 2018 (the "repairs decision") sets out the issues. It determined that the issue was whether the Trust had complied with the RSEO so that the property now met the repairing standard. It concluded that the RSEO had not been complied with and made a rent relief order. In considering the issue of demolition it stated:-

> "Until the tenancy has been lawfully terminated the landlord's duty is to ensure that the property meets the repairing standard at all times during the tenancy. For these purposes the intentions of the landlord, which are, in turn, contingent upon them recovering possession of the property, are immaterial to that duty. Even if the landlords are successful in recovering possession of the property the RSEO will remain in force for so long as the property exists. The tribunal notes the undertaking given by the landlords but such an undertaking is unenforceable at the instance of the tribunal in the event that the landlords change their minds, or they sell the property to a third party."

That statement includes an accurate statement of the law, and neither party challenged it.

[18] The Trust appeals the repairs decision on the basis that the Tribunal erred in its interpretation of the specialist report, failed to apply its conclusions, applied the wrong test for compliance with the RSEO, failed properly to consider variation or revocation of the RSEO and discounted the undertakings offered.

[19] In my view these grounds are misdirected. The architect's report was obtained in obedience to the RSEO, but did not make the clear recommendations which the RSEO appears to have anticipated. This would not have mattered if the Tribunal had retained control over what works were and were not required. The Trust was left in the difficult position of trying to work out whether a recommendation had been made, and what works

were required as a result. At appeal, the Trust's submissions analyse this process as one of remit to an expert, discussion of the expert findings, and how to address the errors of law which appear to arise. These submissions are understandable in the light of the novel, and presumably unanticipated, nexus between matters of fact and law created by the RSEO requirements 1 and 2. The matter turns, however, on recognising the status of the RSEO requirements.

[20] The Tribunal, in making an RSEO, was only permitted to exercise the powers under the 2006 Act. There is no power to remit to an expert. They did not make such a remit. They required the Trust to obtain an expert report and follow its recommendations. That exercise has become unnecessarily complicated, not to say unworkable, but that does not detract from the basic purpose of the 2006 Act, which is to require the landlord to meet the repairing standard at all times. An RSEO is a means of enforcing that standard. It does not replace that standard. Consequently, the Trust's approach of challenging the RSEO and its consequences tends to obscure the overall point. The RSEO does not set the repairing standard. It is only a means to an end. The true focus remains whether the property meets the section 13 repairing standard.

[21] The 2006 Act is clear. The landlord must ensure that the property meets the repairing standard at all times during the tenancy. It is an absolute requirement. The property still does not meet that standard. The Tribunal cannot therefore be faulted for finding that the Trust is in breach of its duty. The RSEO procedure has been unsuccessful because of the shortcomings of the mechanism adopted, but that does not detract from the duty. That is sufficient to meet the Trust's submissions relating to the application and interpretation of the specialist report.

[22] The Trust also submits that the Tribunal erred in failing to consider revocation or variation of the RSEO. The Trust further submits that the Tribunal erred in failing to consider their undertaking to demolish the property. In my view that is not a fair reading of the Tribunal's decision. The Tribunal discussed the undertaking, and the Trust's application to revoke, against the proper test, which was to ensure compliance with the repairing standard. It decided, as set out above, that the undertaking would not meet that test. That is a logical position, which it explained fully. It decided that the RSEO should remain in place until the property is demolished. Demolition was neither guaranteed nor, as matters stood, possible (in the absence of planning permission). The central characteristic of an RSEO is that it is not to be circumvented by any action on the part of a landlord. As matters stood, the tenant's position was vulnerable to a change of mind by the Trust, a sale to a third party, or the Trust failing to obtain (or withdrawing the application for) planning permission to demolish. If the RSEO were revoked, Mr Charlton would lose the very protection that the RSEO existed to provide.

[23] Before the Tribunal, the Trust made an undertaking that the property would be demolished. The Tribunal refused to act on the undertaking for the reason that they had no means of enforcing it in the event of default. I cannot view that decision as unreasonable or unjustified. The undertaking was simply one factor to be taken into account in deciding whether to vary the RSEO. The Tribunal was correct in identifying there is no express specific statutory power to enforce such an undertaking. Whether there is any other common law power to do so is at least open to doubt. Whether that view is correct in law is immaterial, as it might take lengthy court proceedings to establish, against a background where the tenant had lost the protection of an RSEO. The tenant might have a private law remedy, but that would require time, resources and a patient tolerance of defective living

conditions. Such considerations weigh heavily against revoking the RSEO, and the Tribunal cannot be faulted for rejecting this as any form of adequate substitute.

[24] In my view the Tribunal kept in mind at all times the proper test, which is the landlord's section 14 duty under the 2006 Act. They acted in order to enforce that duty. The RSEO was not, as drafted, the perfect tool to achieve that, and served to create some difficulty. Their focus, however, was correctly not on the specific requirements of the RSEO but on the overall 2006 Act test. They could only revoke the RSEO "where it considers that the work required by the order is no longer necessary". While Mr Charlton was in residence they acted rationally and within their powers in deciding they could not reach that conclusion. I will refuse the repairing appeal.

The repossession appeal

[25] The tenancy is one to which section 18(3) of the Housing (Scotland) Act 1988 applies. The Tribunal, if satisfied that any of the grounds in Part 1 of Schedule 5 to the 1988 Act, must make an order for repossession. Ground 6 of Schedule 5 covers the present situation, where the landlord intends to demolish the property. By decision dated 23 March 2018 (the "repossession decision") the Tribunal considered and refused the Trust's application for an order for repossession on that ground. This appeal turns on whether the existence of an RSEO prevents the landlord forming an "intention" to demolish.

[26] The Tribunal required to be satisfied about "intent" before an order became mandatory. The Trust points to certain factual indicators to show that it had reached such an intention. These indicators include applying for and obtaining a building warrant for demolition, and applying for and (subsequent to the repossession decision) obtaining planning permission for demolition. They have exhibited a formal board resolution to

demolish and construct a new building on the site, and have instructed contractors to provide quotations.

[27] What amounts to intention for repossession purposes has been judicially discussed, most recently by the Supreme Court in *S.Franses Ltd* v *The Cavendish Hotel (London) Ltd* [2018] UKSC 62. Although *Franses* discussed equivalent English legislation, parties did not dispute that the discussion was relevant to section 18 of the 1988 Act.

[28] Whether a landlord has the requisite "intention" to trigger an order is a mixed question of fact and law. An intention can be changed in an instant, and accordingly it cannot be enough that the landlord evinces such an intention at the time of the hearing. For intention to be established, the landlord requires to show that it has a firm and settled intention to demolish, and that it would practically be able to do so (*Cunliffe* v *Goodman* 1950 2 KB 237). In the present case, the second part of that test is met, the Trust having obtained both legal and practical means of demolishing the property.

[29] In assessing firm and settled intention, the motives of the landlord are irrelevant, as is any question of reasonableness of that intention. It is the nature or quality of the intention which is relevant. For example, if the intention were only to get rid of the tenant, and demolition would not occur if the tenant departed, then that is properly regarded as a conditional intention, and not the firm and settled intention which the legislation requires (*Franses*).

[30] On the facts, there is no reason for the Tribunal to doubt (and the Tribunal did not do so) that the intention of the Trust is to demolish the property, irrespective of Mr Charlton's status as tenant. The Trust rely on the report dated August 2017 in which an architect identifies that the property is at the end of its life. There is nothing on the facts which prevents "intention" being found to have been established.

[31] The repossession decision refused permission solely on the basis that the Trust could not intend to demolish where:-

> "the fact nonetheless remains that an effective RSEO is in place requiring repairs and that these repairs self-evidently cannot be carried out on a building that no longer exists".

The question is therefore the legal effect of an outstanding RSEO. In my view the Tribunal was in error in considering that an RSEO acted as a legal barrier to any intention to demolish.

[32] The 1988 Act was not amended by the 2006 Act. There is no requirement or justification in principle for adjusting a plain reading the latter for the purpose of satisfying the former. They are two separate statutes. Chapter 4 of the 2006 Act introduced a repairing standard which was to be met at all times. It introduced a specific mechanism for identifying and ordering repairing works. It introduced specific sanctions, namely a reduction in rent and prohibition on reletting, which did not include a prohibition on demolition. An RSEO operates independently of any one tenant, and continues even when that tenant departs. It is a specific statutory creation within a specific statutory regime, quite independent of the aim and intention of the 1988 Act. If the RSEO had the effect which the Tribunal anticipated, it would amount to a significant restriction on the right of the landlord to demolish a property. That was a right which the Supreme Court in *Franses* recognised:-

> "Certain interests of the landlord override whatever security it was intended to confer on the tenant, and one of them is the right to demolish or reconstruct his property"

and therefore required that the protection conferred by statute:-

> "should be carried no further than the statutory language and purpose require." (Lord Sumption at [16]).

[33] There is no requirement in logic or principle that such a fundamental right, awarded by the 1988 Act, should by implication be removed by Chapter 4 of the 2006 Act. In any event, these two statutes can operate in harmony. An RSEO will remain in place until the property is demolished, thereby guarding against any wiles on the part of the landlord, and then is apt to be revoked on application.

[34] Separately, if a statute expressly provides sanctions for breach (here including creation of an offence; rent relief; carrying out works by the local authority, all under sections 27 and 28) there is no basis in principle for inferring further, implied, sanctions (removal of ground 6 rights under the 1988 Act).

[35] Further, the Tribunal is a creation of statute, and has no powers beyond those awarded by statute. The RSEO is part of a statutory regime, and is therefore subject to the strictures of that regime. If no general power of enforcement exists, that is because the legislature has seen fit not to award such. There is no implication that the Tribunal has a wider duty to protect the observation or enforcement of the tenancy regime than the underlying statutes create. Accordingly, there is no implication that the Tribunal, in operating the mechanism under the 2006 Act, thereby acts to prevent the operation of ground 6 of the 1988 Act. While an RSEO might be defeated or frustrated by demolition, that is a matter to address under the 2006 Act application, not the 1988 Act application. In fact, there is nothing inconsistent with demolition of a property subject to an RSEO – demolition will simply mean that an RSEO is superfluous, and the tenant has no further need of legal protection from a defective property. The tenant may have other rights following demolition, but they are not to be found in the RSEO regime.

[36] The Trust submits that any other situation might lead to an absurd situation where a property could not be repossessed for demolition until after it had been fully repaired. That

situation would indeed be absurd, because it would require wasted expense while not protecting any interest of the tenant. I agree that cannot be what the legislature intended. I will allow the repossession appeal.

Disposal

[37] The Tribunal did not err in making the repairing decision refusing to revoke the RSEO. That remains a protection for Mr Charlton in the event that repossession never progresses. However, for the reasons discussed, there is no inconsistency between the RSEO remaining in place and an order for repossession under the 1988 Act. In my view the Tribunal erred in regarding the RSEO as defeating the necessary intention for repossession under ground 6.

[38] It remains to identify the appropriate disposal in this case. It is not disputed that the property is in significant need of repair, such as to lead to a justified decision to demolish rather than repair. As the architect stated:-

> "…we could do the works as outlined above at considerable cost and really not improve the situation significantly. We will still have a fairly basic building…the main issues such as poor detailing, inappropriate construction materials, condensation etc would still be a constant problem. ".

In these circumstances, it is a situation where Lord Denning stated:-

> "In considering whether the court should be satisfied of the landlord's intention, I think that it may readily be satisfied where the premises are old and worn out or are ripe for redevelopment, the proposed work is obviously desirable, plans and arrangements are well in hand, and the landlord has the present means and ability to carry out the work…" (Roehorn v Barry Corporation [1956] 1 WLR 845)

[39] Although there are no formal findings in fact, it is not disputed that (i) the Trust has formally resolved to demolish the property; (ii) it has obtained the necessary legal permissions, namely building warrant and planning permission; (iii) it has obtained an

expert report which states that the property has reached the end of its life; and moreover (iv) at the appeal hearing the landlord gave a unilateral undertaking in these terms:

> "that if an order for repossession is granted the landlord will demolish the property within 6 months of obtaining vacant possession".

It is not submitted on behalf of Mr Charlton that there is any evidence to the contrary, or persuasive reason to think that the Trust has a genuine interest in obtaining vacant possession of a dilapidated property which is subject to an RSEO and from which they can derive no rent. Even if the Trust were, contrary to their own report, to resolve to repair the property after repossession, no RSEO would protect against such an outcome. There would also remain the unresolved legal liability and consequences arising from breach of their own undertaking.

[40] It is open for this tribunal to remit the matter to the Tribunal for reconsideration. However, there appears no barrier to granting the ground 6 application, or benefit in remitting. A remit would therefore represent an unnecessary duplication of effort and a further delay.

[41] Accordingly, there being no evident benefit in remitting the matter to the Tribunal, I will allow the repossession appeal, grant the repossession order, and refuse the repairs appeal, all as set out above.