FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 11
XA99/19

Lord President
Lord Malcolm
Lord Glennie

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal by

NICHOLAS CHARLTON

Appellant

against

THE JOSEPHINE MARSHALL TRUST

Respondent

in respect of a decision of the Upper Tribunal of 28 May 2019

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Appellant: Stalker; Thorntons Law LLP
Respondent: Burnet; Lindsays

9 April 2020

[1] The background to this appeal is complex, but the issue of law at its heart is relatively straightforward. It concerns the interplay between orders for possession of a house let on an assured tenancy under section 18 of the Housing (Scotland) Act 1988 and a Repairing Standards Enforcement Order (RSEO) granted under sections 22/24 of the Housing (Scotland) Act 2006. In particular, if an RSEO is granted and remains

unimplemented, does this prevent the landlord from forming a lawful intention to demolish or reconstruct the property, which, in terms of section 18(3) and ground 6 in part 1 of schedule 5 to the 1988 Act, would require that an order for possession in favour of the landlord be made? The First-tier Tribunal held that it did. The Upper Tribunal came to the opposite conclusion. With leave of the UT, Mr Nicholas Charlton (the tenant) has appealed to this court and invited it to quash the decision to grant the repossession order.

The background circumstances

[2] The Josephine Marshall Trust (the landlord) has owned a cottage in Taynuilt, Argyll, since 1999. The parties entered into an assured tenancy in terms of the 1988 Act in 2005. Since then the cottage has deteriorated to a state of considerable disrepair. In March 2017 the FtT granted the tenant's application for an RSEO. This required the landlord to obtain a specialist report and carry out such work as it recommended. (Subsequently this delegation of its function was heavily criticised by the UT.) The landlord instructed an architect who concluded that, since the building was at the end of its useful life, he could make no recommendations as to its repair. Works could be carried out at considerable cost but fail to improve the situation. He suggested that a new house be constructed in that it was clear that the property "was beyond economic repair".

[3] The trustees resolved that the cottage be demolished as soon as the necessary permissions were obtained. They applied to Argyll & Bute Council for a demolition warrant, which was granted. They applied to the FtT for an extension of time under the RSEO. Initially this was refused, but a subsequent similar application was granted. Meantime the landlord applied for planning permission to demolish the cottage. The tenant obtained a market valuation report, something which did not involve an inspection of the

cottage. It was said to be worth £100,000, and that if essential repairs were carried out, it could be worth £125,000. The author recommended a more detailed inspection and report.

[4] In January 2018 the landlord applied to recover possession on the ground that it intended to demolish the subjects. It served a notice to quit, arranged for the funds necessary to execute the work, and provisionally instructed contractors. At a case management discussion the FtT concluded that ground 6 was not satisfied. Planning permission was yet to be obtained. Furthermore there remained the obligation to repair as set out in the RSEO. That was inconsistent with demolition of the building. The extended time limit for the RSEO expired on 4 April 2018. The landlord applied for the RSEO to be revoked. This was refused. The FtT issued a notice of failure to comply and reduced the rent by 85%.

The decision of the Upper Tribunal

[5] In due course the whole matter came before the UT on appeal by the landlord. It criticised the terms of the RSEO on the basis that it conferred control and authority on an unknown professional person. It was doubtful that it was competent to order the landlord to carry out such work as was recommended in the report. There was no mechanism for a challenge to the terms of the report. The appeal against the decision not to revoke the RSEO was refused, in that even if the landlord obtained an order for possession, it should remain in force for so long as the cottage stood. The landlord had given an undertaking that the cottage would be demolished, but that could not be enforced by the tribunal should the landlord's intention change or the property be sold to a third party.

[6] In respect of the appeal against the refusal of an order for possession, the UT explained the issue as being whether the existence of the RSEO prevented the landlord from

forming the necessary "intention" to demolish. (By the time the matter was before the UT, planning permission for demolition had been granted.) A number of factors pointed to such an intention, including a formal board resolution to construct a new building on the site and an undertaking by the landlord to demolish within six months. The case law indicated that the necessary "intention" was a mixed question of fact and law. There had to be a firm and settled intention to demolish, and a practical ability to do so. In the view of the UT there was no reason to doubt that the landlord would demolish the subjects if the repossession order was granted.

[7] The UT concluded that an RSEO was not a legal barrier to a landlord forming an intention to demolish. The 1988 Act had not been amended by the 2006 Act in this regard. Both statutory regimes could operate side by side in harmony. The RSEO remained in place until the subjects were demolished. Thereafter, if need be, it could be revoked. There was no necessary contradiction between an RSEO and an order to repossess for the purpose of demolition. The tenant would have rights on demolition, but they are not found in the RSEO provisions. The 2006 Act contains sanctions for non-compliance with an RESO, but they do not include a prohibition on demolition. The FtT's decision was an unwarranted interference with a fundamental property right. It led to the absurd result that a property beyond economic repair could not be demolished until expenditure was wasted on its "repair".

The appeal to this court

[8] With leave of the UT, the tenant has appealed to this court against the grant of the possession order. (There was no appeal by the landlord in respect of the maintenance of the RSEO pending demolition.) The only issue concerns the UT's decision that the RSEO is not a

barrier to a possession order based on an intention to demolish. Relying on *Cunliffe* v *Goodman* [1950] 2 KB 237, which provides that the landlord must have the practical ability to demolish, it was submitted on behalf of the tenant that the position here is similar, in that the landlord is without the legal ability to demolish. It was accepted that an order could be granted if it was shown that remaining hurdles were likely to be overcome (see Woodfall, *Landlord and Tenant*, paragraph 22.109). However the UT had denuded the RSEO of its practical and legal effect. The requirements in it, which were based on the landlord's statutory duty to keep the property in repair, cannot be executed if the property is demolished. Failure to comply with an RSEO without reasonable excuse is a criminal offence. The exceptions to compliance with an RSEO are set out in section 16 of the 2006 Act. There is no mention of an intention to demolish the subjects. By renting a property, an owner accepts a restriction on his ability to do as he pleases with it.

[9] It was submitted by the tenant that the UT contradicted itself by both granting the repossession order and maintaining the RSEO. The former circumvented the latter, and allowed the landlord to avoid the repairing obligation. There was no legal significance in the fact that the 2006 Act did not amend the 1988 Act regarding such orders. If the RSEO was an impediment to demolition, this was not an additional sanction for non-compliance. It was simply the legal effect of the RSEO. There was no absurdity in the tenant's proposition. The property should be repaired to the necessary standard, and then there would be no need for demolition. There was no merit in the criticisms of the terms of the RSEO. The FtT retained oversight of the process. The landlord could apply for a variation of its terms. The tenant disputed that the cottage was beyond economic repair. The undertaking of the landlord to demolish had no significance beyond suggesting that there

was a genuine, firm and settled intention to demolish the property, but this did not take away the impediment presented by the RSEO.

[10] For the landlord it was submitted that the UT was entitled to find that there was the requisite intention to demolish. It correctly applied the guidance in the case law. The intention to demolish was not motivated by a desire to evict the tenant. The architect's advice was the governing factor. The decision was to erect a new building rather than spend money which would fail to raise the cottage to the necessary standard. The undertaking to demolish given to the UT was repeated in this court.

[11] The landlord submitted that the RSEO did not create a barrier to the requisite intention to demolish. Once the intention was demonstrated, an order for possession was mandatory, thereby overriding the provisions concerning security of tenancy and the repairing standards duty. The intention to demolish, allied to a possession order under the 1988 Act, ended the tenant's right to occupation and the repairing obligation incumbent upon the landlord. The powers of the FtT were limited to those set out in the 2006 Act. An RSEO did not prohibit termination of a tenancy. The 2006 Act was designed to ensure that tenanted property was in a proper state of repair, not that it be forever kept in that state and available for let. If a property subject to an RSEO was demolished following a lawful termination of a tenancy and recovery of possession, it ceased to be within the scope of the 2006 Act. The work required by the RSEO would no longer be necessary. The order would fall to be revoked and the relative entry in the Land Register removed.

Decision

[12] In *Cunliffe* v *Goodman* [1950] 2 KB 237 the question was whether, in the context of section 18(1) of the Landlord and Tenant Act 1927, the defendant had proved that the

plaintiff "intended" to pull down the premises concerned. Asquith LJ stated that this was a matter of fact (page 253):

> "An 'intention' to my mind connotes a state of affairs which the party 'intending' ... does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect to being able to bring about, by his own act of volition".

His Lordship continued that, not only must achievement of the intention be within the person's reasonable control, if it is conditional or qualified pending receipt of further information or advice as to whether the project is worthwhile, it remains in the realm of contemplation, not intention within the meaning of the statute.

[13] In *Fisher* v *Taylors Furnishing Stores Ltd* [1956] 2 WLR 985, Denning LJ (at page 988) observed that there must be "a firm and settled intention, not likely to be changed." In *Reohorn* v *Barry Corporation* [1956] 1 WLR 845, the same judge said (page 849) that the court may readily be satisfied of the landlord's intention when the premises are old and worn out, the work is obviously desirable, plans and arrangements are well in hand, and the landlord has the means and ability to carry out the work.

[14] In *S Franses Ltd* v *Cavendish Hotel (London) Ltd* [2019] AC 249, the landlord's stark position was that the proposed works were intended because they were a way of evicting the tenant and obtaining possession. It was argued that nonetheless there was a genuine intention and an ability to carry it into effect. The motives of the landlord were of no relevance. Lord Sumption (paragraph 16) accepted that the landlord's purpose or motive are irrelevant save as material for testing whether there is a firm and settled intention. He continued:

> "... as a statutory interference with the landlord's proprietary rights, the protection conferred by the Act should be carried no further than the statutory language and purpose require. It confers no more than a qualified security on the tenant. 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 in whatever way he chooses at the expiry of the term."

However, none of this availed the landlord. The UK Supreme Court decided the matter in favour of the tenant by reference to the "nature or quality" of the landlord's intention (paragraph 17). The landlord's only purpose was to secure vacant possession. There was no independent reason for the proposed works. The intention was conditional, in the sense that the works would be carried out only if necessary to get the tenant out. If he left voluntarily, they would not be executed. There was no intention which was being obstructed by the tenant's occupation.

> "The landlord's intention to carry out the works cannot ... be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim. The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily". (paragraph 19)

[15] The above discussion of the case law demonstrates that, if one leaves the RSEO out of account, there is no obstacle to granting the landlord's application for an order for possession on the basis of an intention to demolish the cottage. In agreement with the UT, it is clear that the landlord has formed the necessary genuine and settled intention to demolish, and that there is the practical ability to bring it about. There is no good reason to think that the trustees will change their mind, not least given that the condition of the cottage makes the proposed work obviously desirable.

[16] The foundation for the tenant's resistance and the FtT's refusal to grant the order is the proposition that, standing the unrevoked RSEO, the landlord cannot form the necessary intention, in that it would be unlawful to demolish the subjects before compliance with the RSEO. An analogy is drawn with the inability of a landlord to satisfy the test if he does not have planning permission for the proposed works. The analogy is not entirely helpful to the

tenant, in that it is sufficient for the landlord if he can show that there is a reasonable prospect that permission will be forthcoming: see Woodfall, *Landlord and Tenant*, paragraphs 22.109/110 and the cases cited.

[17] The 1988 Act affords security of tenure to assured tenancies, but that is subject to the right of the landlord to apply for, and where appropriate obtain, an order for possession under section 18. That right is not qualified by the obligation on the landlord to comply with the repairing standard set down in chapter 4 of the 2006 Act. If a landlord, in breach of the statutory duty, allows a tenanted property to deteriorate to such an extent that it must be demolished, in itself that will not prevent him from forming the necessary intention to demolish for the purposes of an application under section 18(3) of the 1988 Act. The tenant submitted that everything changes if the tenant obtains an RSEO in respect of the condition of the premises before the landlord is granted a possession order. Any such "race" seems artificial and is unattractive. Nonetheless the submission for the tenant is that once the tribunal has made an order requiring certain works to raise the building to the necessary standard, demolition becomes incompatible with that determination. Failure to comply without reasonable excuse is a criminal offence, and to demolish the subjects, it is said, would be a flagrant breach of the RSEO.

[18] With regard to these submissions it is important to notice at least two things. First, the landlord has not simply said that the subjects will be demolished, come what may. The trust has applied to the tribunal for an order for possession to allow it to execute the necessary works. If demolition occurs, it will be because the same tribunal system which imposed the RSEO has granted the section 18 order. The landlord's intention, and its legality, should be viewed in that context. Secondly, an RSEO, once granted is not set in stone until it is obeyed. Section 25(1)(b) of the 2006 Act allows the FtT to revoke an RSEO if

it considers that the work required by the order is no longer necessary. If a section 18 order has been granted allowing possession for the purpose of demolition, it would follow that, if and when that is done, the RSEO is no longer necessary and should be revoked. The tribunal granting the possession order will do so in the knowledge that after demolition the RSEO can be revoked. This will also be the backdrop for the formation of the intention in the first place.

[19] Given these considerations, it is difficult to categorise an RSEO as an insurmountable obstacle to a landlord forming a lawful intention to demolish. And, contrary to the tenant's submission, demolition is not circumventing the RSEO; it is the end point of a different process under the 1988 Act, which can and does operate in harmony with the repairing standard regime. Once it is appreciated that an RSEO is not fixed and immutable, the tenant's objection falls away. The appropriate intention can be formed on the basis that the tribunal can grant the possession order, either contemporaneously with a revocation of the RSEO, or on the anticipation that this will be done after demolition has occurred.

[20] It is relevant to consider the legislative intention behind chapter 4 of the 2006 Act. For the purposes of the present discussion, it was to ensure that tenanted properties are in, or are put in, a proper condition. Thus, although the tribunal has no power to enforce its orders, an offence is committed if a landlord enters into a tenancy or an occupancy arrangement when an RSEO is in force over the property concerned (section 28(5) of the 2006 Act). In itself this demonstrates that an RSEO does not prevent a tenancy from coming to an end. There is nothing in either piece of legislation to suggest that termination for demolition or reconstruction is an exception. The legislative purpose behind chapter 4 of the 2006 Act does not require, nor even suggest that a tenanted property, if in disrepair, cannot be demolished. As observed by Lord Sumption in *S Franses Ltd* at paragraph 16, such would

be a considerable interference with property rights, something not usually left to implication.

[21] The circumstances of the present case are perhaps unusual. In compliance with the RSEO the landlord instructed an architect's report which resulted in information which caused the resolution to demolish the cottage and rebuild on site. The existing case law, not least the recent decision of the UK Supreme Court, might provide protection for a tenant whose landlord is simply seeking to avoid reasonable and legitimate steps imposed by an RSEO. In the present case, the key concern is the professional advice that the property is beyond economic repair. It is that which prompted the intention to demolish, an intention which the UT has concluded is genuine and firm.

[22] It was suggested that there is an inconsistency in the UT maintaining the RSEO meantime while granting the order for possession for the purposes of demolition. No doubt it would have been open to the UT to revoke the RSEO; however it was entitled to insist on protection against a change of mind on the part of the landlord. The situation of an order for possession running alongside an extant RSEO is the result of two separate regimes being operated to their respective end points according to their own rules and processes.

[23] For these reasons, which broadly echo those of the UT, the tenant's appeal will be refused.