



DECISION NOTICE OF SHERIFF NIGEL ROSS

in the case of

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

Appellant

and

MR NICHOLAS CHARLTON, Barr Bheag, By Taynuilt, Argyll, PA35 1HY

Respondent

FTT Case Reference FTS/HPC/RP/16/0351

21 October 2020

Decision

The Tribunal, having heard parties, and in respect of a material change in circumstances, allows the appeal; re-makes the said decision by granting the appellant's motion to vary the Repairing Standard Enforcement Order dated 8 March 2017, as varied on 12 June 2017, by extending the deadline for compliance with the said order until 20 February 2021; conditionally revokes the said Repairing Standard Enforcement Order, said condition being that the revocation will only have effect upon the obtaining by the appellant of a certificate by an independent chartered surveyor certifying that the property at Barr Bheag, Taynuilt,

Argyll has been fully demolished; expressly reserving to the respondent any claim he may have against the appellant arising prior to the date hereof; makes no further order.

Note:

[1] The present appeal is one of a number of disputes arising from the respondent's tenancy of the property at Barr Bheag, Taynuilt, Argyll. There have been previous appeals to the Upper Tribunal ("UT") and to the Court of Session. As a result of procedure to date, the appellant has undertaken to the Court of Session to demolish the property within 6 months of obtaining vacant possession. That undertaking reflects earlier statements of intention.

[2] The related appeals were heard by the UT and led to a conjoined judgment dated 28 May 2019. The respondent appealed that decision to the Court of Session. In the meantime, the appellant applied to the First-tier Tribunal (the "FtT") for variation of the deadline to comply with the outstanding RSEO, such variation to have effect until the conclusion of the proceedings before the Court of Session. The FtT, by decision dated 11 July 2019, refused that application, primarily on the grounds that the RSEO remained in place to protect the tenant, the respondent, who was then in occupancy of the property. It is against that decision that the current appeal is taken, with a motion to vary the deadline instead to 20 February 2021.

[3] There has been a material change in circumstances, which had it been before the FtT would necessarily have had material relevance to their decision-making. That change of circumstances is that the tenancy has come to an end. The respondent vacated the property on 20 August 2020. As a result, the RSEO now has no substantive effect on the tenant's wellbeing, because the tenant is not in residence and has no continuing requirement for its

protection. That is not to say that the RSEO has no relevance at all, as it serves to compel the appellant to continue in their stated desire to demolish the property. For that reason, the appellant does not seek to revoke the RSEO.

[4] What the appellant now seeks is a period of 6 months from the date of vacant possession on 20 August, to allow demolition to take place. That leaves just over 4 months from now. The appellant's agent informed me that demolition is presently blocked by the requirement for utilities such as electricity to be removed, and delay on the part of the utilities companies. Once resolved, demolition would be carried out relatively quickly. In the event that operations were not completed by 20 February 2021, the repairing obligation under the RSEO could once again be enforced.

[5] The respondent was concerned that any existing rights he may have against the appellant may be thwarted by the present order. It was explained that, if he had any pre-existing rights, they would not be so affected. All that is changing is the ability of any party, including third parties such as the police and the local authority, to enforce the terms of the RSEO, until the new deadline of 20 February 2021. The wording of the decision expressly preserves any such, presently hypothetical, rights against the appellant, in order to give some reassurance.

[6] In terms of section 47 of the Tribunals (Scotland) Act 2014 (the "2014 Act") the UT can uphold or quash the decision on the point of law in question, being the point of law referred to in section 46(2). The original point of law raised was an ancillary one, as to whether the conjoining of the two related appeals had the effect of suspending the RSEO until the decision of the Court of Session was issued on 9 April 2020. That point is now superseded and does not require decision. In the appeal as presented, the appellant raised the further legal challenge that the decision of the FtT dated 11 July 2019 was an error in law,

in that it failed to take into account material considerations, namely the (then) likely departure of the tenant, and the likelihood of early demolition. It was further submitted that the decision was irrational in requiring the continued and extensive repair of a building which was about to be demolished. To the extent those grounds exceeded the permission to appeal granted by the FtT, I permitted those grounds to be advanced.

[7] During oral submissions, those grounds were advanced but were not subject to full submission on the authorities. I therefore do not discuss the merits of the legal propositions. However, the grounds are nonetheless before this tribunal for decision. Following discussion, it was not disputed that there was real benefit in dealing with matters arising rather than remitting the matter to the FtT to address anew. It was not disputed, and in any event it is evident, that the end of the tenancy was a material change in circumstances, and a further decision by the UT, which upheld the original decision, in the knowledge of that change of circumstances, may itself be irrational and amount to an error of law. In any event, while section 47 allows the UT to uphold or quash the decision, it does not limit that power to decisions made in error of law, but more generally refers to “the point of law in question”. It expressly permits the UT to re-make the decision.

[8] The just and practical disposal of this case requires the application to be granted. Since the decision of 11 July 2019 the factual position has materially changed. There is no longer a tenant who requires the protection of the original RSEO. To permit the enforcement of the RSEO (and I was told that steps were underway to encourage enforcement), to compel a large amount of renovation work (the details of which are discussed in the associated appeals) to be carried out on a property which is in course of demolition, where no tenant has any practical interest in the state of repair, is so clearly irrational as to require a remedy. The RSEO remains in place, and thereby the interests of any future (hypothetical) tenant,

and of the community, are protected in the event that the appellant does not make good on its promises. Suspension of enforcement does not remove that protection.

[9] In exercise of the power under section 47(1) and (2) of the 2014 Act, I will therefore quash the FtT decision of 11 July 2019, and re-make the decision by allowing the RSEO to be varied by extending the deadline for compliance until 20 February 2021. Further, to avoid the expense of further procedure, and as discussed with the parties, provision will be made that the RSEO will be revoked, without need for further procedure, upon the obtaining of a certificate by an independent chartered surveyor that the property has been demolished. It will be for the appellant to ensure that the qualification is met.