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Judgment: approved by the Court for handing down | *Delivered:* **13/02/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

NORTHERN IRELAND HOUSING EXECUTIVE

v

MADELINE JOHNSON

Morgan LCJ, Girvan LJ and Horner J

GIRVAN LJ (delivering judgment)

Introduction

[1] This is an appeal by the Northern Ireland Housing Executive ("the Executive") arising from a decision of Mr Curry, the Member of the Lands Tribunal, on 4 October 2012 in which he found in favour of the respondent Madeline Johnson ("the claimant") in respect of the question of costs in relation to the proceedings in the Tribunal which related to a disturbance claim which had been made following advance purchase by the Executive of her home.

[2] In July 2010 the claimant's home was purchased by the Executive under the Advance Purchase Scheme. The Scheme treated the purchase as being on compulsory purchase terms and provided for disputes to be referred to the Tribunal. The market value of the house was agreed and it was accepted that the claimant was entitled to a claim for disturbance. Much of the claim was agreed between the chartered surveyors acting as agents for the claimant and the Executive respectively. However, they had not reached agreement on a claim relating to a solid wooden floor and in December 2010 Mr Allen lodged a Notice of Reference to the Tribunal on the issue of compensation for that item.

[3] In May 2011 the parties' respective valuers, Mr Allen and Miss Stewart of the District Valuer's Office, had discussions in relation to trying to reach agreement in relation to the quantification of the claim in respect of the floor. Miss Stewart on behalf of the District Valuer telephoned Mr Allen and offered £500 in respect of the

floor. A note of the telephone call as made by Miss Stewart indicated that future cases should avoid double counting in respect of items which might be fixtures. She did not make any admission of liability. Mr Allen appears to have accepted the offer to settle at £500 in respect of the floor. There were no specific discussions in relation to the question of the costs of the Tribunal proceedings.

[4] On 11 May Mr Allen wrote a letter to Miss Stewart confirming agreement on the quantification to cover the heads of claim and advising that he had applied to the Tribunal for a withdrawal of the application. He also enclosed his fee account and said that he would be grateful if that could be forwarded to the Executive. This was his fee for £462 which according to Miss Stewart's witness statement was his usual fee account. On the same day Mr Allen wrote to the Registrar of the Tribunal stating:

> "I am writing to apply for a withdrawal of the application as this matter has now been settled subject to costs."

[5] His letter was forwarded to the Executive's solicitors and it is stamped 13 May which indicates the date of receipt. A letter consenting to the withdrawal of claim was received from the Executive dated 18 May. On 16 May 2011 Miss Stewart wrote to Miss Coulter in the Executive stating that following negotiations in the matter:

> "agreement has now been reached subject to your approval, at the sum of £3,650 in full and final settlement under all heads of claim."

It concluded:

> "This agreement is recommended for approval."

[6] This letter clearly indicates that Miss Stewart did not have authority to commit the Executive to a final and binding agreement. The understanding reached on 11 May 2011 between Miss Stewart and Mr Allen was clearly conditional on final approval by the Executive to be subsequently given.

[7] As a valuer in the District Valuer's office charged with valuing claims and the valuation of property Miss Stewart would not normally be assumed to have ostensible authority to conclude a settlement of legal proceedings. The letter of 16 May 2011 shows that she had neither actual nor ostensible authority to bind the Executive since any settlement was dependent on the Executive's final approval. By 16 May 2011 the Executive knew from Mr Allen's letter to the Lands Tribunal that the claimant was pursuing a costs claim in relation to the Tribunal proceedings. On 29 June 2011 Mr Allen wrote to the Tribunal to apply for costs. On 25 August solicitors for the appellant wrote to the Registrar stating that there was a settlement

but that had not been made subject to costs and that it was silent on costs and as a matter of settled procedure and practice each side should bear their own costs.

[8] The Executive then applied for a stay of proceedings on the grounds that the case had been settled. The application was listed for hearing and when it was about to commence the Executive raised the question whether the Tribunal retained any jurisdiction of the matter. The Executive asserted that the Tribunal had no jurisdiction because the matter was settled, that proceedings were an abuse of process and that the Tribunal had no jurisdiction to enquire into the terms agreed between the parties. It was not suggested that the Tribunal lacked power to stay proceedings. In order to decide whether to stay the proceedings the Tribunal determined that it must examine the extent of the agreement and it considered that it inevitably followed that it had jurisdiction to do so. In a further hearing the Tribunal dealt with the appellant's application for a stay of the proceedings during which the appellant suggested that the claim had been settled between the parties and that the rule to be applied was for each side to bear their own costs.

[9] The claimant suggested that either there was no agreement between the parties or, if there was an agreement and a term was to be implied, it should be that the appellant should pay the respondent's costs. Consideration was given to the case of Somerset v Ley [1964] 1 WLR 640. The Tribunal considered that the circumstances in that case differed from the present case in that costs had been discussed and all relevant specific provisions were included in the consent order which had already been made in that case.

[10] The Tribunal considered whether, if the agreement was to be treated as an incomplete contract, terms may be implied as a matter of custom. In the Tribunal's view this was an application pursuant to Rule 34 of the Lands Tribunal Rules to withdraw a matter settled subject to costs. The contract could be made complete by an application under Rule 34(2) which provided a mechanism for dealing with the allocation of costs where they had not been agreed. If there was an incomplete contract the Tribunal retained jurisdiction. The same outcome would be achieved by considering that it would have been a step too far to imply any term as to costs. The substantive issue had been settled but, as has often happened in the past, the issue of costs fell to be determined by the Tribunal as part of the application to withdraw. The Tribunal refused the Executive's application to stay the proceedings.

[11] The Tribunal made a third decision in relation to the quantification of costs. A hearing on that issue took place without prejudice to the question whether the Tribunal was correct in the second decision it had reached.

[12] The Case Stated raised by the Tribunal sets out the question whether, on his findings and conclusions of fact, the Tribunal Member was wrong in law in determining that the Tribunal retained jurisdiction to adjudicate on an application for the costs incurred by the respondent prior to the agreement.

[13] An analysis of the evidence and of the documentation established that the Member reached the correct conclusion. In determining whether the parties were ad idem as to the terms of a binding contract it is necessary to bear in mind that by the time Miss Stewart put up for approval a settlement on the terms of an all-in figure of £3,650 together with Mr Allen's fee note the Executive knew or ought reasonably to have known that that was not Mr Allen's understanding of the agreement. Mr Allen was proceeding on the basis, as must have been obvious, that the claimant was seeking costs in the Tribunal. Costs in this context must have been intended to mean something other than just his fee note. In any event, as Mr Potter accepted, it was at best ambiguous and required clarification. This would support the conclusion that at that stage the parties were not ad idem.

[14] The Member in his decision concluded that the valuers had agreed figures in relation to the disturbance claim and had not addressed the separate and additional claim for costs incurred in connection with the claim in the Tribunal. We agree with the Member's analysis in this regard. As is borne out by the letter to Miss Coulter, Miss Stewart on behalf of the District Valuer when negotiating figures in relation to the assessment of a compensation figure in respect of the claim was, as would usually be the case, negotiating that aspect of the case and other aspects of the case, such as liability for legal costs and quantum thereof, would be dealt with as a separate item. In this case the Member was entitled to reach the conclusion which he did that the consensus between the valuers related to the monetary quantification of the physical disturbance claim in respect of the property and did not address the separate question of costs.

[15] In view of our conclusion that the Member reached the correct decision on that point it is not necessary to consider further the question whether, if Mr Potter's primary contention were correct, Mr Allen was operating under a mistake of which Miss Stewart was or ought to have been aware. Certainly it is clear that by the time authority was sought for the settlement the Executive was aware that Mr Allen was proceeding on the basis that the claimant was looking for costs. If, as we conclude, there was no agreement binding on the Executive prior to 16 May 2011 by that date it must have been clear that the parties were not ad idem. As a result we answer the question posed in the Case Stated "No".