LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964

LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982

IN THE MATTER OF A REFERENCE

R/48/2010

BETWEEN

MADELINE JOHNSTON - CLAIMANT

AND

NORTHERN IRELAND HOUSING EXECUTIVE – RESPONDENT

PART 2

Re: 3 Stanhope Drive, Belfast

Lands Tribunal - Mr M R Curry FRICS Hon.Dip.Rating

Introduction

1. The claimant lodged a Notice of Reference with the Lands Tribunal in December 2010. In May 2011, the surveyor for the Claimant wrote to the Registrar of the Tribunal to say that the matter had been settled subject to costs and applied for withdrawal. The correspondence was forwarded to the solicitors for the Respondent who consented to withdrawal. However after they had received a note of the Claimant's costs, they wrote, in August 2011, to the Registrar stating that there was a settlement, but it was silent as to costs.

2. The Respondent then applied for a stay of proceedings, to bring them to an end on grounds that the case had been settled.

3. That application was listed for hearing but, when it was about to commence, the Respondent raised the question of whether the Tribunal retained any jurisdiction in the matter. Following a preliminary hearing, the Tribunal concluded that it did. (See R/48/2010 Part 1)

4. This Decision (Part 2) now deals with the Respondent's application for a stay.

Procedural Matters

5. The Tribunal received:

- written and oral evidence from Ms Nicola Stewart, an experienced chartered surveyor employed by Land and Property Services who had been acting as agent for the respondent;
- oral evidence from Mr Alistair Ferguson, a chartered surveyor employed by Land and Property Services, with long experience of compulsory purchase;
- oral evidence from Mr Joe Allen, a chartered surveyor with long experience of compulsory purchase, who had been acting as agent for the claimant; and
- written submissions from Keith Gibson BL and Michael Potter BL.

6. The Tribunal invited counsel to comment in their submissions on the helpfulness or otherwise of the evidence of what was in the minds of those who were negotiating.

Background

7. The Claimant was the owner of a house at 3 Stanhope Drive, Belfast. The property was purchased by the respondent from the claimant, on compulsory purchase terms, under an advance purchase scheme, in July 2010. By the time Mr Allen had been instructed the house had been demolished.

8. The market value of the house had been agreed. In addition it appears that the Claimant received a home loss payment. It was accepted that she also was entitled to claim for disturbance. Much of that claim was agreed, between Mr Allen and Ms Stewart, but one item was controversial. That item was a claim for £815 relating to a solid Canadian red oak wooden floor in the living room. The issue was whether that floor was a part of the house or was something that could have been removed by the owner. If it was the former, its presence was or should have been reflected in the market value of the house; if it was the later, its loss or adaptation costs to fit a replacement house were potentially part of the disturbance claim.

9. Without warning, it appears, Mr Allen referred the dispute to the Lands Tribunal. When the case was mentioned before the Tribunal, in January 2011, in light of the likely focus of the arguments, it declined to permit Mr Allen to appear. Using Direct Professional Access, he briefed counsel, Mr Gibson. The Respondent instructed solicitors who also briefed counsel, Mr Potter.

10. At a subsequent mention in February 2011, the Tribunal suggested that it would be helpful to receive a report, from a suitably qualified person, on the consequences, for both the house and the floor, of its removal.

11. Mr Allen arranged for the Tribunal to receive, in March 2011, a report from a flooring supplier. The house had been demolished but he had been told that the room had a concrete sub-floor. On that basis he assumed that the floor would have been installed as a floating construction. If so, the tongue and groove boards could have been lifted without damage to the fabric of the house. However it was likely that the tongues of the boards would have been so damaged in the process that it would have been impractical to reuse them.

12. After consultation with her line manager, client and legal advisors, in March 2011, Ms Stewart telephoned Mr Allen offering £500, bringing the total amount for disturbance up to £3,650. She made it clear that in all future cases, to avoid double counting, care would be taken to establish whether similar floors were being treated as part of the house or not. She did not make any admission of liability nor make the offer conditional as to costs. Mr Allen accepted on behalf of his client. There was no discussion between them on costs.

13. On the same day, as outlined earlier, Mr Allen wrote to the Registrar of the Tribunal applying for a withdrawal of the application as the matter had been settled subject to costs. Contemporaneously he wrote to Ms Stewart confirming agreement at £3,650 and advising that he had applied to the Tribunal for a withdrawal. He later claimed costs.

Positions

14. Mr Potter BL suggested that:
    - the claim was settled between the parties; and
    - the rule to be applied was that both sides bear their own costs.

15. Mr Gibson BL suggested that either there was no agreement reached between the parties; or
    - if a term were to be implied it should be that the respondent should pay the applicant's costs.

Discussion

16. The Tribunal was referred to:
    - Valentine: *Civil Proceedings – The Supreme Court* ;
    - Foskett: *The Law and Practice of Compromise* 5th Ed;
    - *Chitty on Contracts* 26th Ed;
    - *Halsburys Laws of England* 4th Ed;
    - Roots et al: *The Law of Compulsory Purchase 2nd Ed;*
    - The Lands Tribunal Rules (NI) 1976
    - Somerset and Another v Ley & Another [1964] 1 WLR 640;
    - Oxfam v Earl and Others [1996] BT/3/1995;

- Purfleet Farms v Secretary of State for Transport [2002] EWCA Civ 1430, [2003] 1 EGLR 9;
- Brooks v Northern Ireland Housing Executive [2009] R/27/2007;
- O'Neill v Northern Ireland Housing Executive [2011] R/49/2009 (Part 2); and
- Hanna v Commissioner of Valuation [2012] VR/12/2010.

17. On behalf of the Claimant, Mr Allen had made an application to this Tribunal for withdrawal. Rule 34 of The Lands Tribunal Rules (NI) 1976 provides for the withdrawal of references etc

    > " 34.-(1) A reference instituting proceedings or any application, notice or counter notice under these rules may be withdrawn by sending to the registrar a written notice of withdrawal signed by all the parties to the proceedings or by their solicitors or agents.
    >
    > (2) In the absence of consent to a proposed withdrawal by all the parties to the proceedings, a party wishing to withdraw his notice of reference or application, notice or counter notice under these rules shall apply in writing to the registrar under the provisions of rule 12 and the registrar, or the President on appeal from the registrar, may permit such withdrawal on such terms as to costs or otherwise as he may think fit."

    So if, contrary to the application of the Respondent, the Tribunal retains jurisdiction, it may permit this application to be withdrawn on such terms as to costs as it may think fit.

18. Mr Potter's BL approach was to consider whether what was agreed was a complete or incomplete contract and, if it was the latter, what terms may be implied.

Complete Contract

19. The Tribunal was referred to Somerset v Ley [1964] - where the court held it had no jurisdiction in a later application to amend its original order in regard to costs - and also to the related discussion in Foskett: *The Law and Practice of Compromise.* But the Tribunal considers the circumstances in this case to be entirely different. In that case, costs had been discussed and relevant specific provisions included in the order; in this case they had not been discussed at all. In that case, a consent order had already been made and there was an attempt to amend the order; in this case, no order has been made.

20. In regard to whether this claim was completely settled, the evidence clearly shows that an open offer to settle the disturbance claim, without condition as to costs, was made and accepted. It was also agreed that the claim be withdrawn. The position in regard to costs was entirely different. There was no offer; no acceptance.

21. Evidence was given about what was in the minds of the parties to the negotiations but the Tribunal prefers a more objective approach and considers their evidence only helpful in so far

as it related to general experience or custom. Mr Allen said that in his experience where there was an outcome such as this, a Claimant could expect to recover his or her costs. Mr Ferguson said that in his experience he or she could not. It goes without saying that costs are an important consideration in any litigation. In this case, as in others, they far outweigh the amount of the claim. The evidence identified two entirely opposing views of what assumptions may be made by parties in regard to costs where agreement is reached in a compulsory purchase case in the Lands Tribunal. In consequence of this divergence the Tribunal concludes that the parties cannot be assumed to have reached any consensus on the allocation of costs.

22. The Tribunal does not accept that, in these circumstances, the agreement was a complete settlement of the claim.

Incomplete Contract & Implied Terms

23. If the agreement is to be treated as an incomplete contract the next step is to consider what terms may be implied as a matter of custom or of rule. As outlined above, there was evidence of conflicting views on what might be expected as a matter of custom. Also Mr Gibson BL suggested, as a matter of rule, there may be a presumption that the costs of a reference to determine compensation fall on the acquiring authority without whose resort to the use of compulsory powers there would have been no need for the owner to be compensated (see Purfleet Farms v Secretary of State [2002]; O'Neill v Northern Ireland Housing Executive [2011]; and the discussion in Roots et al: *The Law of Compulsory Purchase*). However, in the Tribunal's view, as there was an application to withdraw, the relevant rule is that the contract may be made complete by application of Rule 34(2) of the Lands Tribunal Rules, as this provides a mechanism for dealing with the allocation of costs where it has not been agreed. Thus, if there was an incomplete contract and implied terms, the Tribunal retains jurisdiction.

Conclusion

24. The Tribunal concludes that it retains jurisdiction, specifically jurisdiction in regard to costs on the application to withdraw.

25. The same outcome is achieved by concluding that it simply would be a step too far to imply any term as to costs. The parties have settled the substantive issue between them but that does not settle the case, the issue of costs remains unresolved and, as has happened often in the past, that issue falls to be determined by the Tribunal as part of the application to withdraw.

26. The Tribunal notes that one consequence is that any relevant argument on the allocation of costs, including any special reasons, may be considered.

27. The Respondent's application for a stay is refused.

ORDERS ACCORDINGLY

4th October 2012 **Michael R Curry FRICS Hon.Dip.Rating**
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances

Claimant: Keith Gibson BL instructed by J Allen, Chartered Surveyor.

Respondent: Michael Potter BL instructed by Geo L Maclaine & Son, Solicitors.