LANDS TRIBUNAL FOR NORTHERN IRELAND
WATER AND SEWERAGE SERVICES (NORTHERN IRELAND) ORDER 1973
THE MINERAL DEVELOPMENT ACT (NORTHERN IRELAND) 1969
LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982

IN THE MATTER OF A REFERENCE

R/43/2011

Between

LIAM CHIVERS AND BRENDA CHIVERS

Claimants

and

NORTHERN IRELAND WATER LIMITED

Respondent

RE: LANDS AT DRUMSURN ROAD, LIMAVADY

LANDS TRIBUNAL – THE RIGHT HONOURABLE LORD JUSTICE COGHLIN AND HENRY M SPENCE MRICS Dip.Rating IRRV (Hons)

Introduction

[1] The claimants seek compensation in accordance with Article 55 of the Water and Sewerage Services (Northern Ireland) Order 1973 ("the 1973 Order"), Article 8(1)-(3) and/or Article 18 of the Land Compensation (Northern Ireland) Order 1982 ("the 1982 Order") for depreciation alleged to have occurred in the value of their land as a consequence of Northern Ireland Water Limited ("the respondent"), successor to the Water Service, laying a foul sewer pipe on their land. The claimants allege that, as a result of the laying of the foul sewer pipe, some .657 acres of their land with development potential has become 'sterilised' with the consequential loss of at least 6 building sites.

[2] Following an exchange of correspondence in August 2013 it was agreed that the following matters should be referred to the Tribunal as Preliminary Issues:

(i) Did the respondent execute works at the claimant's lands at any material time?

  (a) within the provisions of Article 55 of the 1973 Order; and/or

  (b) within Article 18 of the 1982 Order?

(ii) If so, what were those "works" and

(a) when; and

(b) where were they executed?

(iii) Did the claimants sustain "damage" caused by or in consequence of any such works?

(iv) If so, what was the nature of that loss or damage?

(v) In the circumstances, what heads of compensation (if any) are awardable to the claimants pursuant to:

(a) the 1973 Order; and/or

(b) the 1982 Order?

For the purpose of the determination of these preliminary points the claimants were represented by Mr Patrick Good QC and Ms Joan Haddick, while Mr David Scoffield QC appeared on behalf of the respondent. The Tribunal wishes to acknowledge the considerable assistance that it derived from the carefully prepared and attractively delivered written and oral submissions from the respective legal representatives.

The Background Facts

[3] In 2003 the claimants were the owners of lands fronting onto the Drumsurn Road, Dungiven, Limavady, Co Londonderry. For development purposes the lands were divided into a number of Phases, namely, Phase 1, Phase 2, Phase 3A and Phase 3B as delineated in red on the map annexed to this judgment.

[4] In or about May 2004 the claimants conveyed land in Phase 1 to J G Bradley Ltd for housing development at a time when it was envisaged that a pumping station would be located on the lands purchased which would connect into a public sewer on Drumsurn Road for use by the land retained by the claimants. In or about October 2004 the claimants' conveyed lands in Phase 3B to Brian Devine Homes Limited for the same purpose. The claimants' retained lands in Phase 2 and Phase 3A with the intention that such lands were also to be developed for residential housing.

[5] In or about 2004 the claimants submitted an application for outline planning permission in respect of development of the Phase 2 land followed by submission of a Concept Plan on 28 January 2005. Outline planning permission was granted on 13 May 2005 and a Reserved Matters application for 40 residential units was approved on 17 December 2009.

[6] On 29 January 2006 Mr Chivers was informed by Mr Lecky from the respondent that the respondent intended to lay a foul sewer across his lands. Mr Chivers was presented with a map indicating the location of the proposed foul sewer and advised to instruct a valuer. On or about 1 February 2006 the respondent served a Notice under Article 13(2) of the 1973 Order advising the claimants of the intention of the respondent to enter the relevant lands at Drumsurn for the purpose of carrying out works, namely, the installation of the foul sewer pipe. The claimants reside at 275 Drumsurn Road but they also operate a post office at 260 Drumsurn Road. It appears that receipt of the notice may have been acknowledged by a member of staff at the post office but it is accepted that neither of the claimants was personally served either at the post office or at their home address. Unfortunately, it appears that the member of staff at the post office did not draw the attention of either of the claimants to service of the Notice. However the claimants did not lodge any formal objection to the proposed works on the basis that the Department would resort to its compulsory statutory powers.

[7] The works were commenced by the respondent on 3 August 2006 and involved entering the subject lands, excavating a trench for the pipe, laying the pipe and re-instating the ground, the strip and the ground adjacent to the excavation. The works were completed on 5 October 2007. The sewer pipe runs along the western boundary of Phase 2 and Phase 3A of the claimants' lands between the JG Bradley development to the south and the Devine Homes development to the north and it is that area, some 266 metres in length by 10 metres in width, that the claimants allege has been sterilised for development purposes. The respondent subsequently registered the notice, maps and associated forms notifying its intention to carry out the works in accordance with Article 13(2) of the 1973 Order as a Wayleave Notice in the Register of Statutory Charges in accordance with section 87 (1) and paragraph 28(a) of Schedule 11 to the Land Registration Act (Northern Ireland) 1970. The position of the sewer pipe has been delineated in red on the map annexed to this judgment.

The Relevant Statutory Framework

[8] The following statutory provisions are relevant:

Article 10(1)(a) of the 1973 Order provides as follows:

> *Acquisition of land*
> 10 – (1) The Department may, for any purpose in connection with the performance of any of its functions under this Order-
> (a) By agreement acquire or take on lease any land or acquire land compulsorily;

Article 55(1) of the 1973 Order provides as follows:

"**Compensation etc in respect of execution of works**

55-(1) In executing any works under this Order, the Department shall –

(*a*) cause as little detriment and inconvenience and do as little damage as possible;

(*b*) make good, or pay compensation for, any damage to the property of any person caused by, or in consequence of, the execution of the works in relation to a matter as to which he has not himself been in default.

(2) Sub-sections (2)-(6) of Section 38 of the Mineral Development Act (Northern Ireland) 1969 shall have effect for the purposes of any claim for compensation under this Article as if, in those sub-sections, any reference to that section, that Act or the Department of Enterprise, Trade and Development were a reference to, respectively, this Article, this Order or the Department."

Article 38 of the Mineral Development Act (Northern Ireland) 1969 ("the 1969 Act") provides as follows:

"38. **Compensation for damage caused in working minerals etc**

(1) Subject to the succeeding provisions of this section, where damage is caused, directly or indirectly, either –

(*a*) by working, or doing anything incidental to the working of, mines and minerals vested in the Ministry, or

(*b*) by exercising a right of entry or user of land conferred by or under this Act or the Act of 1959, the person suffering the damage shall be entitled to recover compensation for the damage from the person causing the damage.

(2) Any question arising as to –

(*a*) the entitlement of any person to compensation under this section, or

(*b*) the amount payable by way of that compensation, shall, in default of agreement, be referred to and determined by the Lands Tribunal.

(3) Compensation under this section in respect of damage to lands shall not be payable to any person from whom any land has, or ancillary rights over any land have, been acquired by the Ministry under this Act and to whom any compensation is payable under Article 8(1)-(3) of the Land Compensation (Northern Ireland) Order 1982 by the Ministry in respect of injurious affection of the first-mentioned land."

Article 8 of the 1982 Order provides as follows:

"**Compensation for severance or injurious affection where part of claimants' lands is acquired**

8(1) In assessing compensation to be paid to any person in respect of the compulsory acquisition of any land, regard shall be had not only to the value of the land acquired but also to the damage, if any, sustained or which may be sustained by that person by reason of the severing of the land from other lands of that person held with that land, or otherwise injuriously affecting such other lands by the exercise of powers conferred on the acquiring authority by any transferred provision.

(2) Where land is acquired or taken from any person for the purposes of works which are to be situated partly on that land and partly elsewhere, compensation payable under paragraph (1) for injurious affecting of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him."

Article 18 of the 1982 Order provides as follows:

"**Compensation for injurious affection caused by execution of works**

18(1) Where, by reason of the execution of works on land acquired (whether compulsorily or otherwise) by an authority possessing compulsory acquisition powers, and other land is injuriously affected, the authority shall, subject to any provision to the contrary in any transfer provision and subject to and in accordance with the following provisions of this Article, pay compensation in respect of the injurious affection.

(2) Compensation in respect of injurious affection shall not be paid under this Article to any person from whom any land has been acquired by the acquiring authority for the purpose of executing the works and to whom any compensation is payable under Article 8 by the authority in respect of that injurious affection.

(3) Compensation shall be paid under this Article only in respect of injurious affection which would, but for the provisions of the transferred provision authorising the execution of the works, have given rise to a right of action for damages against any person causing the injurious affection."

The Submissions of the Parties

[9] On behalf of the respondent Mr Scoffield submitted that the key issue for the Tribunal was one of statutory construction, namely, whether the relevant statute/statutes, properly interpreted, permitted the claimants to recover the form of compensation that they sought, namely, compensation in respect of depreciation in the development value of their land. He relied on the decisions in Logan v Scottish Water [2005] CSIH 73 and Crossan v Department of the Environment for Northern Ireland R/5/1992 as strictly limiting compensation to that permitted by the relevant statutory provision/provisions. Mr Scoffield focused upon Article 3 of the 1973 Order as being the most important statutory provision which placed the general duty on the Department to supply and distribute water and to provide and effectively maintain sewers for domestic sewage, trade effluent and surface water. He emphasised the importance of distinguishing between the execution of works on land and the acquisition by the Department of land or an interest in land. Article 55 dealt with compensation in respect of the execution of works on land and, in his submission, Article 55(1)(*b*) was the key provision which he submitted, given the ordinary, natural meaning of the words, was clearly limited to direct physical

damage. Mr Scoffield argued that neither Article 8 nor Article 18 of the 1982 Order was relevant since both were concerned with compensation in situations in which land or an interest in land had been acquired by the relevant authority. In his submission section 38 of the 1969 Act was of no assistance since the "ancillary rights" referred to therein related to damage caused directly or indirectly by the working of mines or the extraction of minerals vested in the Ministry.

[10] On behalf of the claimants Mr Good founded his case upon the general proposition that failure to provide compensation for land sterilised as a consequence of works executed by the actions of a government department was, per se, unusual and unfair and he argued that there were at least three routes by which the claimants were entitled to be awarded compensation for such damage. He also asked the Tribunal to concentrate on the specific wording of Article 55 of the 1973 Order emphasising, in particular, that the provision provided for compensation in respect of damage not only caused by but also *in consequence of* the execution of works by the Department. In this case he argued that the claimants had sustained clear interference with their rights of property which had been a direct consequence of the works. Mr Good argued that a second route that was open to the Tribunal was provided by Article 55(2) of the 1973 Order incorporating Article 38(1)-(6) of the 1969 Act and, in particular, the concept of "ancillary rights". Mr Good argued that Article 55 should be read in conjunction with Article 10(*a*) of the 1973 Order and that, on such a construction, the respondent had 'acquired' ancillary rights by agreement for which compensation was payable to the claimants in accordance with Articles 8(1)-(3) of the 1982 Order. In Mr Good's submission by execution of the works, the respondent had acquired a "statutory easement" over the claimants' land. Mr Good drew the attention of the court to previous custom and practice in this jurisdiction to award compensation for the laying of pipes across agricultural land referring to the principles set out in St John's College Oxford v Thames Water Authority [1990] 1 EGLR 229. He also drew attention to the Practice Note relating to Wayleave compensation issued on 17 May 2004 by the Department for Regional Development and in particular, to paragraphs 4.2 and 4.4.3 thereof. In support of route 3 Mr Good submitted that "injurious affection" clearly came within the provisions of Article 18 of the 1982 Order.

Discussion

[11] The Tribunal accepts the submission advanced by Mr Scoffield that, in a case of this nature, it is of fundamental importance to concentrate on the specific statutory provisions. In such circumstances, the Tribunal must scrutinise with great care the relevance of different legislative provisions in other jurisdictions and/or authorities relating thereto.

[12] In this case, unlike the case of Logan, outline planning permission was in existence in respect of the Phase 2 land prior to the execution of the work by the respondent. The Reserved Matters application in respect of that permission for 40 residential units was approved on 17 September 2009 subject to the area allegedly

"sterilised" by the work. Outline planning permission was also approved in respect of the Phase 3 lands on 27 February 2004. However, since no reserved matters were submitted on the Phase 3A part of the site, it is accepted that the outline permission on that portion of the land can no longer be implemented. On 16 September 1996 the respondent wrote to the claimants' valuer a letter headed "Water Service requirements regarding public sewers in development land". That letter made it quite clear that:

> "The developer (and successors in title) must ensure that the erection of buildings and/or permanent structures does not take place over and/or within (i) six metres of either side of existing or proposed Main Drainage Lines (foul and storm); two metres of either side of existing or proposed Branch Drainage Lines (foul and storm); six metres of either side of existing or proposed trunk and minor water supply lines; or such distances as may be determined in writing by the Water Service."

In such circumstances, it seems apparent that the execution of the work by the Department on the claimants' land did result in restriction of the ability of the claimants to develop the subject land to the full extent of the planning permission granted. That restriction has been registered by the Department in the Land Registry as a Wayleave Notice. The instant case is to be contrasted with Crossan in which the agreed facts confirmed that "…no physical damage of any kind was caused to the Applicant's property nor was there any interference with any private right of the property of the Applicant."

[13] The Tribunal considers that the ordinary meaning of the words "in consequence of" the execution of the works in Article 55 of the 1973 Order encompasses damage *following as a result or effect of* the execution of the works. Mr Scoffield's submission was that any such consequential damage should be limited to physical damage e.g. further excavations necessary for future repairs and/or maintenance of the sewer. However there is nothing in the statute to confirm that the words are so limited and such direct physical damage would be adequately covered by the words *caused by* the execution of works. In this context the Tribunal notes the opinion of the President of this Tribunal in Carney v Department of Environment R/14/1992 of the incorporation of sections 38(2) – (6) of the 1969 Act:

> "The thin red line running through Section 38(2) to (6) of that Act is that the Tribunal may decide the entitlement of and the quantum of compensation to be paid to a person suffering damage caused directly *or indirectly* (our emphasis) by 'works'."

In our view the right reserved by the Department to return to the lands in order to inspect and maintain the works coupled with the diminution of the development

value of the land as a consequence of the sterilisation of a portion thereof, as detailed in the letter of the 16 September 2006, falls within the meaning of damage following as a result of, or effect of, the execution of the works. The Department has registered the statutory rights that it has acquired over this portion of the claimants land with the Land Registry as a Wayleave.

[14] As an alternative route Mr Good submitted that the importation of subsections (2) to (6) of section 38 of the 1969 Act including the reference to compensation for the acquisition by the Department of *ancillary rights over any land* opened the door to compensation for 'injurious affection' in accordance with Articles 8(1)–(3) of the 1982 Order. However compensation under Article 8 of the 1982 Order is dealt with under the sub-heading "**Compensation for severance or injurious affection where part of claimant's land is acquired"** and the subsections refer to "compulsory acquisition of land" being land that is "acquired or taken from any person for the purpose of works." Article 10(1)(a) of the 1973 Order gives the Department power to acquire land by agreement, on lease or by compulsory purchase for any purpose in connection with the performance of any of its functions under the Order but there is no suggestion that the Department has acquired any actual interest in the claimants' land in this case.

[15] Section 38(3) of the 1969 Act excludes compensation payable for 'injurious affection' of land by virtue of Article 8(1)-(3) of the 1982 Order where land has been acquired by the Department on a compulsory basis. However the mechanism by means of which Article 55(2) of the 1973 Order imported Article 38(3) of the 1969 Act, any relevant references to the 1969 Act having effect as references to the 1973 Order, clearly carried with it the implication that compensation under the 1973 Order could extend to 'ancillary rights' over land acquired under that Order. The 1973 Order itself does not contain any definition of ancillary rights nor is it concerned in any way with the working of mines or minerals. On the other hand there is a clear presumption that words included in Parliamentary legislation are intended to have some meaning and the Tribunal considers that, in context, the meaning extends to the ancillary rights acquired by the Department to install and maintain the sewer and, thereby, sterilise a portion of the claimants' land effectively preventing development thereof.

[16] Both parties were afforded an opportunity to submit written submissions with regard to the potential relevance of Article 1 of the 1st Protocol to the ECHR ("A1P1"). Article 1 of the first Protocol to the European Human Rights Convention provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

[17] We are grateful to both parties for their supplemental submissions. In a well-constructed and carefully analysed skeleton Mr Scoffield has correctly identified the three rules contained in A1P1. The Tribunal also accepts that this case is concerned with control of as opposed to the taking of property. The third rule in A1P1 recognises that contracting states are entitled, amongst other things, to enforce such laws as it deems necessary to control the use of property in accordance with the general interest and the relevant Convention jurisprudence confirms that the state enjoys a wide 'margin of appreciation'.

[18] However this case concerns the correct interpretation of legislation the purpose of which is clearly to provide compensation for the individual whose land has become subject to such control by the state to the detriment of the individual's right to develop his property. The essential question is how to interpret the terms aimed at providing compensation.

[19] At paragraph 28 of his judgment in Attorney General's Reference (No:4 of 2002) [2005] 1 AC 264 Lord Bingham referred to the interpretative obligation imposed upon the court, as a public authority, by Section 3 of the Human Rights Act 1998 as being:

> "… very strong and far reaching … and may require the court to depart from the legislative intention of Parliament."

In R v A (No: 2) [2002] 1 AC 45 Lord Steyn observed at paragraph [44]:

> "In accordance with the will of Parliament as reflected in Section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of expressed language in a statute but also the implication of provisions."

That approach was expressly approved by Lord Bingham at paragraph 24 of his judgment in Attorney General's Reference (No: 4 of 2002).

[20] As the Tribunal acknowledged in Kerr v NIHE Reference R/37/2010 at paragraph [21] the search for a fair balance between the demands of the general interests of the community and the requirement to adequately protect the fundamental rights of the individual is inherent in the whole of the Convention and is reflected in the structure of A1P1. A fair balance is not achieved where the individual has to bear "an individual and excessive burden". Compensation terms are material to the assessment as to whether a fair balance has been achieved. In the view of the Tribunal the interpretation contended for by Mr Scoffield would provide the state with the power to reduce the development value of the claimants' land by restricting the claimants' ability to fully develop their property in accordance with

the outline planning permission while depriving the claimants of fair compensation therefor. Such an interpretation would not only severely strain the natural and ordinary meaning of the words but would also be inconsistent with a purposive interpretation consistent with the Convention-compliant general proposition that interference with the private rights of property by the state should not be disproportionate and should attract fair compensation.

[21] Accordingly the Tribunal proposes to answer the Preliminary Issues raised as follows:

(i) (a) Yes
(b) No

(ii) (a) The works detailed at paragraphs [6] and [7] hereof and executed between 3 August 2006 and 5 October 2007.

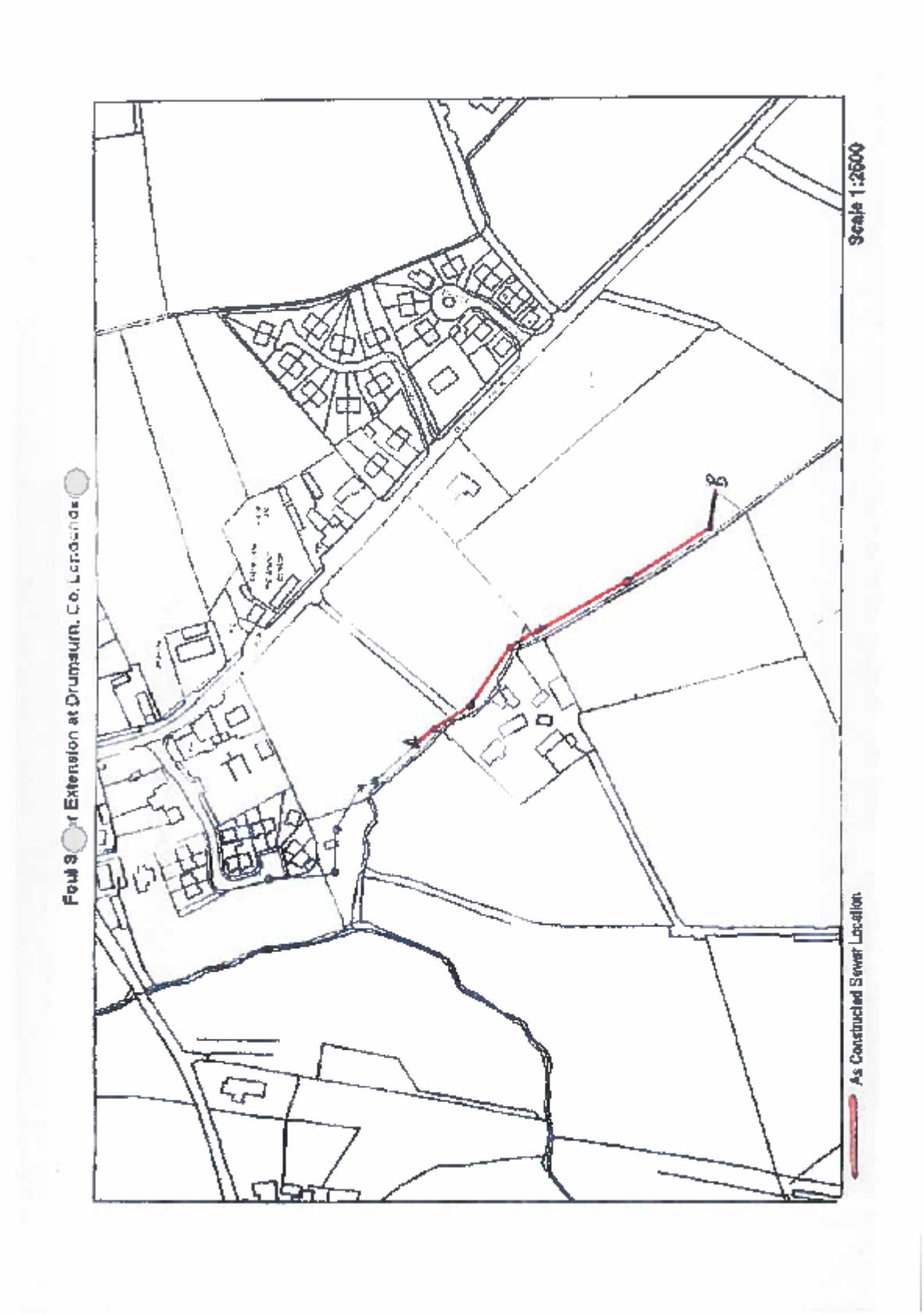
(iii) Yes

(iv) The exact nature and extent of any loss and/or damage sustained by the claimants is a matter to be established at a further hearing.

(v) To be the subject of further submissions

12th May 2015

Annex 1


Foul S r Extension at Drumsum, Co. Laoghaire
Scale 1:2500
As Constructed Sewer Location