Mc. KONE ESTATES

227

THE HIGH COURT

1982 No. 592 SS.

IN THE MATTER OF AN ARBITRATION

BETWEEN/

McKONE ESTATES LIMITED

AND

THE COUNTY COUNCIL OF THE
COUNTY OF KILDARE

FACULTY OF LAW
10 OCT 1983
U.C.G.

AND IN THE MATTER OF SECTION 55 OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACT, 1963.

Judgment delivered by O'Hanlon J. the 24th June, 1983.

On the 8th October, 1982, Mr. Sean McDermott, in his capacity as Arbitrator, referred by Case Stated, a number of questions of law to the High Court for determination. The Case Stated was in the following terms:-

"CASE STATED.

On the 30th day of October, 1981, I sat as property arbitrator at the County Council offices at Naas, in the County of Kildare, for the purpose of hearing and determining a claim for compensation brought by McKone Estates Ltd. (hereinafter referred to as 'the Claimant') against the County Council of the County of Kildare (hereinafter referred to as 'the Kildare County Council') pursuant to the provisions of Section 55 of the Local Government (Planning and Development) Act, 1963 (hereinafter referred to as 'the Act of 1963') arising out of a decision of An Bord Pleanala refusing to grant permission for a development described as 'the laying of a sewage pipeline at Leixlip to serve proposed housing and ancilliary development at Cooldrinagh, County Dublin'.

At the commencement of the arbitration it was submitted by Mr. Hugh Geoghegan S.C. who appeared for the Kildare Council instructed by Messrs. Brown and McCann, Solicitors, Naas, that I had no jurisdiction to entertain the claim for compensation for the following reasons:-

A. There was no valid claim for compensation before me because the letter of the 23rd February, 1981, sent to the Kildare Council by the Claimant's Solicitors and which constituted the claim before me related only to the lands owned by the Claimant at Cooldrinagh, County Dublin and no other lands, or alternatively related to the said lands at Cooldrinagh aforesaid and the adjacent property of the Claimant in the County of Kildare hereinafter referred to but was not confined to the said property in County Kildare which was the subject of the application for Planning Permission. A copy of the said letter of the 24th February, 1981 is annexed to this Case Stated and marked Exhibit A.

B. A claim for compensation is excluded by virtue of the provisions of Section 56 (1) (b) of the Act of 1963.

After hearing the submissions of Mr. E. M. Walsh S.C. who appeared on behalf of the Claimant instructed by Messrs. Gerard J. Quinn & Co., Solicitors, I held that there was a valid claim for compensation before me which was not excluded by the said Section 56 (1) (b) of the Act of 1963 and I proceeded to hear the evidence on behalf of the Claimant and the Kildare Council and the submissions of Counsel on the said 30th day of October, 1981, and on the 4th and 7th days of December, 1981.

The following facts were either agreed or proved to my satisfaction

during the course of the hearing.

1. On the 14th day of March, 1977, the Minister for Local Government granted permission on Appeal for a development comprising 455 houses, a shopping site, a school site and open space on approximately sixty acres of land at Cooldrinagh in the County of Dublin, in close proximity to the treatment works on the Kildare side of the river Liffey. The said permission was granted subject to five conditions including a condition which would have required the discharge of sewage from the completed development to the said treatment works at Leixlip. Copies of the said permission and of the refusal by Dublin County Council appealed against are annexed hereto (Exhibit B).
2. The said lands at Cooldrinagh were subsequently acquired by the Claimant in fee simple and the Claimant was at all times material to the arbitration the owner of the said lands.
3. On the 18th day of May, 1979, the Claimant purchased a property known as the Toll House at Leixlip, in the County of Kildare, comprising a dwellinghouse on 0.3 acres of land close to the said lands of Cooldrinagh but on the opposite side of the river Liffey in County Kildare. The Claimant was at all times material to the arbitration the freehold owner of the Toll House.
4. On the 3rd and 7th days of August, 1979, the Claimant applied to the Kildare County Council and to Dublin County Council respectively for permission to construct a foul sewer to connect the already conditionally approved development at Cooldrinagh with the treatment works at Leixlip and for a surface water drain from the development to the river Liffey in County Dublin. The application to Dublin County Council simply involved laying a pipe along the public road from the lands of Cooldrinagh to the Salmon Weir Bridge across the river Liffey. The line took a defined route as far as the bridge and it was then proposed to attach a pipe to the structure of the bridge. The application to the Kildare Council involved three alternative

pipe lines from the bridge to the treatment works. The first alternative involved a road excavation and the laying of a pipe on the grounds of Toll House where it would connect with the main County Kildare sewer leading to the treatment works. The second alternative proposed laying a pipe entirely on the public road to a point where it would connect with the said main sewer. The third alternative proposed laying a pipe until it connected with the main sewer in land not owned by the Claimant. Both applications for planning permission proposed a temporary connection to the treatment works at Leixlip and an ultimate permanent connection to piped services in the County of Dublin on a date to be agreed between the Kildare Council and Dublin County Council. This was made clear in the letter of application and accompanying notes. The said letter and accompanying notes and extract from the drawings i.e., the large scale enlargements of the drains to cross the bridge, are marked Exhibit C.

5. The County boundary is the centre of the river Liffey and the Salmon Weir bridge is owned as to one half by the County Council of the County of Dublin and as to the other half by the Kildare Council.

6. The Kildare Council and the County Council of the County of Dublin duly issued notifications of decisions to refuse permission, copies whereof are annexed hereto (Exhibits D. & E).

7. The Claimant appealed to An Bord Pleanala against both decisions and following an oral hearing at which both appeals were considered together An Bord Pleanala refused permission for the proposed development. Attached hereto is a copy of the letter of Appeal to An Bord Pleanala and the decision of An Bord Pleanala in the case of the application to the Kildare Council (Exhibit F). The decision of An Bord Pleanala on the application to the County Council of the County of Dublin was in identical terms.

8. The treatment works at Leixlip is designed for a population of 20,000

and in the view of the Planning Authority that capacity has been fully absorbed. As of March, 1977, and also as of October, 1979 the existing treatment works would not have been fully absorbed but the sewerage from the Cooldrinagh development could only have been taken in place of a corresponding reduction of projected development in the County of Kildare. It is proposed to carry out works which will increase the capacity of the treatment works at Leixlip to 45,000 at the next stage and ultimately to 93,000 beyond which figure the capacity cannot be increased because of the absorption capacity of the river Liffey. The Planning Authority accepts that the treatment works will have a spare capacity from 1984 to 1995 or at the latest to the year 2000, but the Kildare Council has earmarked in its development plan that spare capacity for projected further development in the administrative County of Kildare which it anticipates will use up the entire capacity of the treatment works between 1995 and 2000. If so entitled, the Kildare Council as sanitary authority would have refused to enter into an agreement with the Claimant under Section 24 of the Public Health (Ireland) Act 1878.

9. It was established at the oral hearing hereinbefore referred to that the County Council of the County of Dublin was not prepared to extend its piped services at any future time so as to accommodate the proposed development at Cooldrinagh and that the development could only proceed on the basis of a permanent connection with the treatment works at Leixlip.

10. On the 24th day of June, 1981, in the course of an arbitration in which the present Claimant claimed against it in the sum of three million pounds for reduction in value of the Claimant's interest in the Cooldrinagh lands by reason of refusal of permission to lay the mains referred to at 4 above the County Council of the County of Dublin undertook to grant Planning Permission to the Claimant to

enable the sewage from the development at Cooldrinagh to be discharged into the treatment works at Leixlip subject to certain conditions and a copy of the said undertaking is annexed hereto (Exhibit G).

11. As a result of the decision of An Bord Pleanala to refuse permission for a connection from the proposed development at Cooldrinagh to the treatment works at Leixlip there was a diminution in the value of the said lands at Cooldrinagh.

On the application of Counsel for Kildare Council I agreed to state a consultative case for the opinion of the High Court and to adjourn the further hearing of the arbitration pending the decision of the High Court on the questions raised in the Case Stated. The questions which I respectively formulate for the opinion of the High Court are as follows:-

1. Was I correct in law in refusing to accede to the argument of Counsel for the Kildare Council that I should decline jurisdiction to hear and determine the claim on either or both of the grounds hereinbefore recited?

2. Is the Claimant entitled to include as part of its claim a claim in respect of injurious affection to the lands of Cooldrinagh having regard to the diminution in value of the said lands arising as a result of the aforesaid decision of An Bord Pleanala?

3. Is the permission of the Minister for Local Government operative having regard to the provisions of Condition no. 1 of the said Permission and to the foregoing facts?

4. Whether on the basis of the foregoing facts and having regard to the provisions of Section 24 of the Public Health (Ireland) Act 1878 it is open to me to find that the Claimant might not have been entitled to discharge sewerage from the said development at Cooldrinagh to the treatment works at Leixlip?

5. If the answer to question no. 4 is in the affirmative am I obliged as a matter of law to make a finding that the Claimant would not have been so entitled?

6. If it is open to me to find that the Claimant would have been entitled to discharge sewerage from the proposed development at Cooldrinagh to the treatment works at Leixlip is it open to me to find that such entitlement would have been for a limited period only?

Dated the 8th day of October 1982.

Signed: Sean McDermott
Property Arbitrator".

Before proceeding to deal with the specific questions raised by the Arbitrator in the Case Stated, it appears to me to be helpful to consider the legal position under Sec. 24 of the Public Health (Ireland) Act, 1878, as to the entitlement of owners or occupiers of premises to require the

sanitary authority of an adjoining district to permit a connection of sewers or drains from such premises to the sewers of that sanitary authority.

Since the present case was first argued before the Court, a judgment of the Supreme Court delivered on the 13th day of May, 1983, has clarified the position under Sec. 23 of the Act of 1878. In The County Council of the County of Dublin -v- Nora Teresa Shortt, the judgment of the Court was delivered by O'Higgins CJ, with whom the other members of the Court concurred. He said:

> "The planning and engineering witnesses called on behalf of the acquiring authority had stated that the Dodder Valley sewer to which a housing development on the subject lands would require connection, was "pre-empted" for other housing development in the area which had not yet taken place. I assume that this means that the sewer had been constructed in the light of the development which the planning officers foresaw as probable in the area intended to be drained ..... The arbitrator asks whether the County Council as the sanitary authority could, in the event of housing development taking place on the subject lands, refuse a connection for sewerage to its main sewer, such sewer then being capable of absorbing such

sewerage. In my view, it could not so refuse. It seems to me that the Public Health (Ireland) Act, 1878, particularly Section 23 thereof, obliges the sanitary authority to receive into its sewers the sewerage of all premises within its district, provided proper notice is given and the appropriate regulations observed. I agree with Mr. Justice McMahon, and for the reasons which he gave, that this Section is not repealed by implication by the provisions of the Planning Act.

"The second question raises the possibility, in the event of such a development being proposed, of the County Council as planning authority refusing permission under the provisions of Section 56 (1) (b) (i) of the Planning Act. This provision refers to a refusal of a planning application on the basis that it is premature in that there is an existing deficiency in the provision of water supplies or sewerage facilities. If a refusal is properly made on such grounds, compensation under the provisions of Section 55 is not payable. Here, however, it is apparent that an existing deficiency could not be established. On the basis of such a supposed development in the subject lands in accordance with the evidence before the arbitrator the main sewer would have been capable,

without any difficulty, of taking such sewerage. It seems to me, therefore ... such a decision would not be within the provisions of Section 56 (1)(b)(i) of the Planning Act.

"I only wish to add that I appreciate the problem which the last two questions were intended to highlight. Obviously it is one which is becoming increasingly complex and one which is causing growing concern to planning authorities. I cannot feel, however, that any solution to the problem raised can be found under existing legislation. It seems to me that a solution can only be found in amending legislation."

That decision of the Supreme Court referred to the position at present obtaining under the provisions of Sec. 23 of The Public Health (Ireland) Act, 1878. What arise for consideration in the present case are the provisions of Section 24 of the Act, dealing with the possibility of securing connection of sewers or drains servicing premises in one district with the sewer of a sanitary authority in a different district. As the wording of the two Sections is different in some important respects it may be helpful to quote the relevant provisions at this stage. They are as follows:-

"23. The owner or occupier of any premises within the district of

a sanitary authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed to superintend the making of such communications.

.....

"24. The owner or occupier of any premises without the district of a sanitary authority may cause any sewer or drain from such premises to communicate with any sewer of the sanitary authority on such terms and conditions as may be agreed on between such owner or occupier and such sanitary authority, or as in case of dispute may be settled, at the option of the owner or occupier, by a court of summary jurisdiction or by arbitration in manner provided by this Act."

The terms of Section 22 of the English Public Health Act, 1875, which are in identical terms to those used in Section 24 of the Irish Act of 1878, were considered by Malins V.C. in the case of Newington Local Board -v- Cottingham Local Board. 12 Ch. D. 725, where the proprietors of some 55

acres of land known as the Botanic Gardens were proceeding to lay them out for building ground, and sought a connection with a sewer in an adjoining district. The Vice-Chancellor said:

"I have paid great attention to the case, which has been ably argued and I feel bound to come to the conclusion that it is the right of every owner without the district to consider what will be most convenient to him. It cannot, I think, be better illustrated than by the case of the Botanic Garden, which lies immediately contiguous, so that nothing could be more advantageous to them, nothing more obvious to them when building upon their ground, than to do that which it would be their duty to do, and drain into the nearest sewer, and that sewer is the sewer of the Cottingham district.

"That is the right which they have proceeded to exercise, and that is the right which, according to my view, is clearly conferred upon them by the 22nd section of the Act of 1875."

North J. reached a similar conclusion when considering the similar provisions of the English Public Health Act, 1848, s. 48, in the case of Mayor of New Windsor -v- Stovell, (1884) 27 Ch. D. 665. The relevant part of his judgment reads as follows:-

"The words of the section are: 'Be it enacted that any owner or

occupier of premises adjoining or near to but beyond the limits of any district, may cause any sewer or drain of or from such premises to communicate with any sewer of the local board of health upon such terms and conditions as shall be agreed upon between such owner and occupier and such local board, or, in case of dispute, as shall be settled by arbitration in the manner provided by this Act." It is said that this section conferred a discretionary power upon the board as trustees or quasi trustees, and that they could not exercise it as to the drainage of property, and could not agree as to communications to be made, or do anything, except with respect to what was actually in existence at the time; and it is said that after that arrangement a fresh bargain must be entered into with respect to every communication to be made after that date from a house not then existing with the sewer of the board, either mediately or immediately. As regards that section, it does not seem right to say that it is a case in which the board are acting as trustees in the sense in which it was put. No doubt it is left to them to settle the terms and conditions, and inasmuch as those terms and conditions did not affect them individually, but affected the ratepayers, they were so far acting on behalf of other persons. But

the power given to them is to make an arrangement as to the terms and conditions of the work, and there is nothing which enables them to say that it shall not be done at all. Under this Act, in case the terms should not be agreed upon they might be settled by arbitration. Under the Public Health Act, 1866 (29 & 30 Vict. c.90, s. 9), for the first time, an additional power is given of having disputes settled by two justices. That clause appears almost verbatim in the Public Health Act, 1875, except that instead of two justices, a court of summary jurisdiction, which means the same thing, is mentioned.

"This was a case in which, in my opinion, the owner of the adjoining property had a right to have the communication made, as was decided by Vice-Chancellor Malins in the similar case of Newington Local Board -v- Cottingham Local Board .....

"If that is so, there was a right on the part of Mr. Vansittart to have the sewer made to communicate with his land, and on what terms? The terms, no doubt, are to be settled, and if the parties cannot agree, the terms are to be settled by arbitration, and when so settled, notwithstanding any objection on the part of the board, they would be binding, and the right to connect with the sewer would arise. As soon

as that has been done, everything contemplated by the section has been done, and I do not see how after that anything further remains to be done.

"It is said that the board would have a difficulty in knowing upon what terms to settle, because they could not know what would be done with the land, how many houses would be built upon it, or what burden might be cast on them. That is one of the difficulties with which they have to contend, and they must deal with it by taking care that the terms which are made limit the number of houses, or require a payment in respect of them which will be a fair remuneration ..... Therefore Mr. Vansittart having a right to make this connection, and to have all the provisions of this section immediately carried out, the board must do the best they can for the purpose of fixing the terms and must fix them fairly and reasonably. Unless the terms are complied with the connection cannot be made, but as soon as they have been complied with, the connection is to be made, and, as it seems to me, there is an end of the matter. Under these circumstances the section is, in my opinion, equivalent to a grant to the owner of the adjoining land of a right to have the connection made and to use the connection when made. There are no express words as to the user, but

I consider that the direction to make the communication carries with it the right to do what was the only purpose in contemplation when the terms were arranged."

See also, Glenn, Public Health, 14th Edn. (1925), Vol. 1, p. 88n.:

"Sect. 21 gives the owner or occupier the right to drain into the sewers belonging to the local authority of his own district without any restriction except as regards the mode of making the communications between his drains and the sewers. The present section (Sec. 22) also gives a right of drainage into the sewers to which it applies and does not give the local authority the power to refuse to permit such drainage at their absolute discretion, if the owner or occupier is willing to abide by such terms and conditions as may be settled in the manner provided by the Act."

Accordingly, it appears to me that notwithstanding the significant difference in wording as between Sections 23 and 24 of the Public Health (Ireland) Act, 1878, a right similar to that conferred by Sec. 23 of the Act is also conferred by Sect. 24 - in the latter case, to the owner or occupier of premises to secure connection to the sewer of an adjoining sanitary district, subject to compliance with such terms and conditions as may be agreed with the sanitary authority or as may be settled by a court

of summary jurisdiction or by arbitration, in default of agreement.

When it comes to carrying out the necessary works to secure such connection, however, permission must be sought under the terms of the Local Government (Planning and Development) Act, 1963, (as amended), and it is clearly envisaged by that Act, that planning permission may be refused (inter alia) "by reference to any existing deficiency in the provision of water supplies or sewerage facilities and the period within which any such deficiency may reasonably be expected to be made good." If refused on this ground, compensation in respect of the refusal of permission under Section 55 of the Act shall not be payable. (Sec. 56).

In the present case, as in the case of Dublin Co. Council and Nora Teresa Shortt, what is concerning the sanitary authority is not so much an existing deficiency in the provision of sewerage facilities, as the fact that they have additional capacity for sewerage disposal available but that this has been provided for the future needs of their own sanitary district and they view with great concern the possible absorption of a large measure of that capacity by building works in a different county altogether.

Having regard to the decision of the Supreme Court in Shortt's case, however, I feel compelled to hold that this situation cannot be regarded as one entitling the sanitary authority to refuse the connection sought, out of

hand, or the planning authority to refuse planning permission on the basis of existing sewerage facilities being deficient.

In fact, the refusal of permission was couched in somewhat different terms. The decision of Kildare County Council gave four reasons for the refusal of permission. They were as follows:-

1. Capacity of the sewage treatment plant at Leixlip is already committed to provide for the overall development and expansion of the county towns to be connected to this system in accordance with the policy and zoning provisions adopted in the County Development Plan, 2nd Revision, 1978, and the proposed development would, therefore, be contrary to the proper planning and development of the area.

2. The housing scheme which the proposal is designed to service was not part of the design considerations of the Leixlip Sewage Treatment Plant and this development, if permitted, would constitute an undesirable precedent.

3. The proposed development which would interfere with the structure of Leixlip Bridge is not acceptable as it could lead to structural deterioration of the Bridge.

4. The proposed development involving the placing of a pipe on the

external face of the bridge would seriously injure the visual amenities of the Bridge.

On appeal to An Bord Pleanala, permission for the laying of the proposed pipe-line to connect to the Kildare County Council main sewer north of the bridge at Leixlip was again refused. The Board gave only one reason for this refusal and did not refer to the manner in which the proposed development would affect Leixlip Bridge. The Order of the Board, dated the 5th September, 1980, recited as follows:-

> As Kildare County Council have refused to accept the foul sewage from the development in question into the treatment works at Leixlip, the Board does not consider that the laying of the proposed pipe-line would serve any purpose in the context of the proper planning and development of the area.

On the basis of this refusal the developers then submitted a claim for compensation under Section 55 of the Act of 1963, by letter dated the 24th February, 1981. In order to substantiate such a claim it is necessary for an Applicant to establish that "as a result of a decision ... involving a refusal of permission to develop land .... the value of an interest of any person existing in the land to which the decision relates at the time of the decision is reduced ...." (I am omitting those parts of the sub-section

which have no bearing in the present case).

It appears to me that the applicants for compensation in the present case have a prima facie statutory right under the provisions of Section 24 of the Public Health (Ireland) Act, 1878, to seek a connection with the main sewer of the Kildare County Council, and until they have asserted and exhausted such right it is not possible for the Arbitrator to determine whether, in fact, the value of their interest in the land to which the decision of An Bord Pleanala relates has been reduced, and if so, to what extent. The documentary evidence which has been placed before the Court in relation to the present Case Stated does not indicate that the developers have at any stage applied for permission to connect a foul sewer with the Kildare County Council main sewer, in express reliance on whatever statutory rights may be available to them under the provisions of Section 24 of the Act of 1878. If Kildare County Council rejected such an application out of hand and it were subsequently decided in legal proceedings that they were not entitled to do so, then the entire basis for the decision already given by An Bord Pleanala would disappear. As has already been decided by McMahon J. in the High Court in Shortt's case, and affirmed on appeal by the Supreme Court, Sec. 23 of the Public Health (Ireland) Act, 1878, cannot be regarded as having been repealed by implication by the provisions of the

Planning Acts, and I reach the same conclusion in relation to Sec. 24.

Turning now to the specific questions raised for consideration in the Case Stated, I have reached the following conclusions in relation to same.

1. I conclude that the Arbitrator was correct in law in refusing to accede to the argument of Counsel for the Kildare Council that he should decline jurisdiction to hear and determine the claim on either or both of the grounds put forward in support of this contention. I agree with the submission made by Mr. Geoghegan on behalf of the County Council that the claim for compensation is open to serious criticism insofar as compliance with the requirements of the relevant Regulations made under Sec. 67 of the Act of 1963 is concerned. Regulation 49 of the Local Government (Planning and Development) Regulations, 1977 (S.I. No. 65 of 1977) requires that every claim for compensation under Part VI of the Act of 1963 shall be made to the planning authority in writing and shall include (inter alia) -

(a) a statement of the matter in respect of which compensation is claimed and of the amount of such compensation.

(b) a statement of the name and address of the claimant and of the interest held by him in the land to which the claim relates.

A claim arises under Sec. 55 when, as a result of a decision involving a refusal of permission to develop land, the value of an interest of any

person existing in the land to which the decision relates at the time of the decision is reduced. Subject to the other provisions of the Act, the claim is a claim to be paid, by way of compensation, the amount of such reduction in value.

The application to Kildare County Council was for permission to carry out works of development on a small tract of land involving only the laying of a sewage pipe line to link up with another pipe-line to be constructed on other extensive lands of the Applicants in County Dublin, and to connect up with the main sewer at Leixlip, Co. Kildare at its other extremity. The "land to which the decision relates" within the meaning of the Section was the land of the Applicants known as Toll House, Leixlip Bridge, County Kildare, comprising some 0.3 acres. If a claim for compensation arose against Kildare County Council under Sec. 55 of the Act of 1963, it was in relation to the reduction in value of those lands, subject to a possible additional claim for injurious affection to the other lands of the Applicants at Cooldrinagh in the County of Dublin. The application for compensation should have been so expressed, but while it refers to the refusal of planning permission by An Bord Pleanala in respect of the Applicants' lands in Co. Kildare, the claim for compensation is not expressed as relating to a reduction in value in the Co. Kildare lands, but

as relating to the lands at Cooldrinagh, Co. Dublin. With a considerable degree of hesitation I would be prepared to regard it as a claim for compensation based on the refusal of planning permission in respect of the lands in County Kildare and as including claims for a reduction in value of the said lands, and for injurious affection in respect of other lands of the Applicants at Cooldrinagh, Co. Dublin (if allowable).

For reasons already indicated in the course of this judgment, I consider that the Arbitrator was correct in refusing to decline jurisdiction on the basis that a claim for compensation was excluded by the provisions of Sec. 56 (1) (b) of the Act of 1963. I do not consider that the decision of An Bord Pleanala to refuse permission should be regarded as having been based on any existing deficiency in the provision of sewerage facilities and the period within which any such deficiency might reasonably be expected to be made good. It was based, rather, on the fact that Kildare County Council were unwilling to allow a connection from the Cooldrinagh development to the main sewer at Leixlip because the capacity of that sewer for the foreseeable future was required to be retained by them to service projected building development in their own area of jurisdiction.

2. Sec. 68 of the Act of 1963 provides as follows:

"68. A claim under this Act for payment of compensation shall in

default of agreement, be determined by arbitration under the Act of 1919 in the like manner in all respects as if such claim arose in relation to the compulsory acquisition of land, but subject to the proviso that the arbitrator shall have jurisdiction to make a nil award."

Sec. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, lays down a number of rules to be applied by an official arbitrator in assessing compensation under the Act. Rule (2) provides that the value of land shall, generally speaking, be taken to be the amount which a willing seller might expect to realise on the open market, but Rule (6) goes on to say that "the provisions of Rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land."

The Rules comprised in Sec. 2 of the Act of 1919 have been added to by Sec. 69 of the Planning Act of 1963 and the 4th Schedule of that Act. One of the added Rules is Rule (16) which provides that in the case of land incapable of reasonably beneficial use which is purchased by a planning authority under Section 29 of the Act of 1963, the compensation shall be the value of the land exclusive of any allowance for disturbance or severance. The argument put forward on behalf of the developers was that

as claims under sec. 29 were expressly deprived of a disturbance or severance factor, it should be inferred that it was to be included in respect of claims under Sec. 55; furthermore that Rule (6) in Sec. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919 enables such a claim to be brought in when compensation is to be assessed in accordance with the provisions of that Act.

The contrary argument put forward by Mr. Geoghegan was to the following effect. The Rules contained in Sec. 2 of the Act of 1919 do not confer any new right of compensation but merely provide the procedure for measuring the compensation to be awarded under the provisions of some other statute. Where a statutory provision for the award of compensation in respect of acquisition of land or diminution of an interest in land incorporates the provisions of the Land Clauses Acts this, in turn, gives rise to an entitlement to claim for injurious affection to other lands, but unless the statute creating the right to receive compensation does so expressly or by incorporating other statutory provisions which do so, such right is not created merely by incorporating the procedures laid down by the Act of 1919.

It appears to me that this is a correct reading of the situation. The position is stated as follows in Halsbury's Laws of England, 3rd Edn. Vol. 10 at p. 147:

"When part of an owner's land is taken, he may suffer damage in consequence of the injury thereby caused to his remaining land. It may, for instance, be cut into two parts, as when a road is made through an estate, or the alteration in its size or shape may render it less suitable for the purposes to which it is or could be applied .....

"Whether the owner is entitled to compensation for this damage depends, as in the case of compensation under other heads, on the provisions of the special Act and other enactments incorporated therewith. Under the Lands Clauses Acts the owner of land taken is entitled to compensation for damage sustained by him by reason of such severing, or otherwise injuriously affecting his other lands."

And at pp. 96-98, dealing with the purpose and effect of the Acquisition of Land (Assessment of Compensation) Act, 1919:

"That Act provided a set of rules for the assessment of compensation, which the official arbitrator was required to follow, whether the statute authorising the compulsory purchase was passed before or after 19th August, 1919.

.....

"Rule 2 reversed the old sympathetic hypothesis of the unwilling seller and willing buyer which underlay judicial interpretation of

the Lands Clauses Acts, and the purpose of rule 6 is generally to prevent misconception as to the scope of the alteration effected by rule 2 in the previous judicial basis for ascertaining the market value to the owner of the land sold and in particular to forestall the argument that a willing seller must in law be presumed to have moved out voluntarily to give vacant possession to the buyer. Rule 6 confers no new right to compensation nor does it purport to give statutory validity to every pre-1919 judicial determination on the subject of disturbance."

I conclude therefore, that where compensation for injurious affection of other lands is claimed, the jurisdiction to award compensation on such basis must be sought elsewhere than in the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, and it does not appear to me that it arises in relation to a claim for compensation under Sec. 55 of the Act of 1963 as I can find no indication in that Section or elsewhere that the provisions of the Lands Clauses Acts are to apply in relation to any such claim. This means that, in my opinion, the second question in the Case Stated should be answered in the negative.

3. Having regard to the conclusions I have already reached in relation to the applicability of Section 24 of the Public Health (Ireland) Act, 1878, it

cannot be said that the decision of the Minister for Local Government dated the 14th March, 1977 is inoperative, but the extent to which effect can be given to the development permission thereby granted has yet to be decided. If and when an application is made to Kildare County Council to permit a connection to be made between the proposed development at Cooldrinagh and the main sewer at Leixlip, in accordance with a claim of right made by the developer under the provisions of Sec. 24 of the Act of 1878, Kildare County Council will have to decide whether they wish to dispute the existence of any such right, or whether they are prepared to concede its existence in principle, and to lay down terms and conditions on which it may be exercised. These, in turn, if considered unreasonable by the developer, could be made the subject of an application to Court, or to an arbitrator appointed under the Act, to achieve a settlement of such dispute. It was suggested by Vice-Chancellor Malins in the passage already cited from his judgment in the Newington Local Board case that it would be open to a sanitary authority under similar circumstances to those obtaining in the present case to impose terms limiting the number of houses that could be permitted to connect to the system, as well as requiring payment in respect of whatever number were allowed the connection. I do not commit myself to saying that the imposition of such a condition would be permissible under

the Section but it is obviously something that Kildare County Council would consider very seriously if faced with an application from a large-scale development in an adjoining county. While the position of the developers and of the County Council under Sec. 24 remains in this condition of relative obscurity it is only possible to answer Question 3 of the Case Stated with a qualified 'Yes'.

4. This question is framed in terms which are not completely clear to me. It may suffice to repeat what has already been decided in the course of this judgment, namely, that the Claimant has, in my opinion, a prima facie right under Sec. 24 of the Act of 1878 to require Kildare County Council to grant permission for the connecting up of the sewer from the Cooldrinagh development with the main sewer at Leixlip, subject to the imposition of such terms and conditions as may be agreed, or as may, in default of agreement, be determined by the Court or by arbitration.

An apparent difficulty which faces the developers stems from the fact that no houses have as yet been built at Cooldrinagh, nor has any part of the sewer leading from the development to the main sewer at Leixlip been constructed. In Faber -v- Gosforth UDC (1903) 67 JP 197, a state of affairs very similar to that which has arisen in the present case existed. An owner of land proposed to lay out some of it for building and gave

notice to the authority of an adjoining district of his intention to connect his proposed sewer with their sewer. The authority objected, and stated that if he insisted on arbitration, they would appoint an arbitrator under protest, and raise their objection at every stage of the proceedings. He thereupon commenced an action claiming a declaration of his right to connect. Eady J. expressed himself unwilling to make the order sought. He stated:

> "Here the plaintiffs have not proceeded with the contemplated work, no portion of the estate is yet built on, and no drains or sewers have been constructed. I am asked to declare that no matter what the result may be of connecting the sewers shown on the plan with the defendants' sewers, the plaintiffs have the absolute right to connect. The scheme is extensive, and no doubt if it is carried out, a considerable volume of sewage will be sent down. But not a brick has been laid, and no step has been taken towards the construction of the sewers, and I am not prepared to make the declaration asked for under the circumstances. It is inexpedient to give a judgment which might hamper an arbitrator, or a court of summary jurisdiction, without any evidence as to what the effect would be of the work being carried out. It is suggested that the construction of a new sewer by the

defendants might be necessary. It seems exceedingly difficult to make a declaration "whatever the result may be, the plaintiff has this legal right to connect", and to say that I must now so determine irrespective of consequences. I am of opinion that it is not proper in the present case that I should exercise the jurisdiction given by Order XXV, r. 5. It is still open to the plaintiffs to go to arbitration, or to apply to a court of summary jurisdiction as to the terms on which they can cause any sewer or drain they may construct to connect with the defendants' sewer, and if on any such occasion any question of law arises, it can be determined."

Since that judgment was delivered, however, the usefulness of the declaratory judgment has been more widely recognised, and the Courts have been willing to entertain such claims where it was necessary to do justice between the parties. Certainly, in a case such as the present, I think it would be unreasonable to hold that a developer must develop his lands and go the expense of building his houses before having his right of access to the sewage disposal system determined.

5. This question may also be answered by referring again to the finding already made of a <u>prima facie</u> entitlement on the part of the Claimant to seek to discharge sewerage from the proposed development at Cooldrinagh to

the treatment works at Leixlip.

6. The answer to this question would appear to be governed by the possible imposition of conditions by Kildare County Council if a connection with the Leixlip main sewer is permitted at any time in the future. If a condition were sought to be imposed limiting the period during which such connection could be allowed to continue, the validity of such condition and its reasonableness would initially fall for determination, in case of dispute, by a court of summary jurisdiction or by an arbitrator appointed in accordance with the provisions of Sec. 24 of the Act of 1878.

Conclusion

To summarise the foregoing, and by way of general guidance to the Arbitrator who has submitted the Case Stated for the opinion of the High Court it appears to me that the Application for compensation which has been brought under Sec. 55 of the Planning Act of 1963 is premature by reason of the failure of the developers to assert and exhaust any rights which may be open to them, and which appear to be open to them, under the provisions of Sec. 24 of the Public Health (Ireland) Act, 1878, and that while this situation continues it is not possible to determine either the validity of the claim for compensation under Sec. 55 of the Act of 1963, or

the amount of compensation which should be awarded if a valid claim exists under the Act.

Approved.

Roderick J. O'Hanlon.
24th June, 1983.

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