

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF A REFERENCE

R/2/1988

BETWEEN

JOHN BARBOUR AND COLIN PAYNE TRADING AS BARBOUR AND PAYNE - CLAIMANTS

AND

DEPARTMENT OF AGRICULTURE FOR NORTHERN IRELAND - RESPONDENTS

Lands Tribunal for Northern Ireland - Mr A L Jacobson FRICS

Belfast - 9th February 1989, 16th June 1989 and 18th December 1989

This was a claim under Articles 17 & 21 of the Drainage (Northern Ireland) Order 1973 ("the 1973 Order") for compensation for physical damage to No 55 Bridge Street, Comber and consequential loss because of works carried out by the Respondent Department for the Comber Flood Protection Scheme.

Mr David McBrien of Counsel (for the Claimants) requested permission of the Tribunal to show a video prepared by Mr Barbour during the period of the works which depicted how the Claimants' property at No 55 Bridge Street, Comber, Co Down had been interfered with by noise and interference with its access.

Mr O'Reilly of Counsel (for the Respondent) informed the Tribunal that no advanced copy of the video had been given. He did not know what the video contained; what incidents and what day or days.

The Tribunal gave permission for the video to be shown.

Mr McBrien called Mr John Thomas Barbour, Mr Colin Thompson Payne and Mr Hugh Stewart BSc MI Struct E, to give evidence. Also Mr Hugh Stewart and Mr Charles Henry Adams BA (Oxon) FCA to give evidence regarding benefit to be set off against compensation.

Mr Barbour testified that the partnership were independent financial advisers (mortgages, life assurance, small and large saving plans, investments in bonds, unit trusts, personal

pensions and group pensions). The business commenced in 1979 and opened in Comber in 1982. The construction of the sheet pile wall at the adjacent river causes some damage to the building at No 55 Bridge Street.

The works which started in November 1985 and continued through September 1986 consisted of piling up to April 1986 with very loud noise disrupting the business in the building. There was continuing disruption after September 1986 up to April 1987 when the Department were installing drainage ducts in concrete. The main effect of the noise was disturbed telephone calls and loss of staff concentration and the near-impossibility of client discussion and interview. The number of office appointments reduced and home appointments encouraged. Two girls on staff left for other jobs and were difficult to replace. The access to the offices was interfered with and equipment and loads of stones were left in proximity. Clients attempting to reach the offices had to cross those stones as if it were an assault course.

Mr Barbour further testified that before going into occupation of the Comber premises it was known that they had flooded on occasion. The property had been used by a taxi firm. Damp-proofing liquid had been applied to the walls and four inches of concrete to stiffen one wall had been laid. New ceilings and floor boards on steel beams had been installed and the walls replastered. Industrial quality carpet tiles were laid in general office and reception at a cost of £32 per square yard. During the work those tiles (in part) had become badly scuffed, worn and dirty. Some have since been replaced with spare tiles in stock and others have been shuffled around. A crack had appeared between an addition forming the kitchen and the main building. That crack and a crack in the kitchen roof have been repaired.

Mr Payne testified that part of his responsibility had been to repair the building. He explained that in 1982 the ground floor had been raised by 18 inches with solid concrete because of the history of being flooded once and the risk of future flooding.

Mr Payne handed in four estimates of the cost of repairs:-

1. Estimate for redecoration to offices by Belmont Decorators (dated 2nd October 1987) in the sum of @ 1,100 plus VAT. That referred to "complete interior and exterior redecoration". Mr Payne referred to a pile of mud left against the premises and testified that the decoration had not been carried out because of lack of finance.

2. Estimate for replacement of window sill, shop front and front door frame. Including replacement of damp proof course, plaster work and replacing old door in the sum of £1,817.65 plus VAT.
3. Receipt for £800 for repairs to kitchen walls and roof and repair of outside plaster work.
4. Estimate by R Spence & Son for replacement carpet to main office in the sum of £1,055. Mr Payne testified that replacement carpet tiles cannot be obtained. He further testified that the repairs carried out in 1982 cost about £13,500.

The Anglia Building Society were asked for trends of business for other agents of that Building Society. The Regional Manager for Scotland/Northern Ireland by letter of 3rd March 1987 gave the following figures:-

	1983/84	1984/85	1985/86
Mortgage Business	+10%	+15%	+20%
Investment Business	+20%	+15%	+18%

indicating the development of business in year commencing April.

He further testified that on application to the District Valuer a "temporary allowance in respect of construction work" was granted on 4th September 1986 reducing the Net Annual Value from £315 to £280.

The loss of business was caused through the works for there was an upward trend of business prior to the works and again after the completion of the works. Loss due to noise and lack of vehicle access.

Mr Stewart testified that he inspected the premises in March 1986 and May 1987. At his first inspection he noted that there were some minor cracks in the internal plasterwork some of which had been painted over and some where there was paint within the cracks. There was a fine crack at the junction between the two-storeyed front portion of the building and the rear single-storey kitchen/store. Externally there were a few fine cracks at the gable end and around the first floor windows; these were old cracks. The May 1987 inspection indicated more fine cracking on internal plasterwork and those seen on the March 1986 inspection were more prominent. The crack at the junction with the single-storey extension

was wider at the top than at the bottom and extended for about three-quarters the height of the wall (instead of about one-half). Additionally there was a crack at the ground floor window sill which extended through the sill.

Mr Stewart testified that the minor cracks internally and externally should be dealt with at the next time of redecoration, but recommended the crack at the junction of the two-storey and one-storey portions should be cut back, replastered to a plaster bead and the resulting vertical joint covered with a timber or metal cover strip.

He recommended that the most serious and expensive repair was the cracked sill which should be removed and replaced which will probably entail the removal of the complete shop window.

Mr O'Reilly of Counsel (for the Respondent) called Mr Robin Francis Haldane BSc CEng MICE (Resident Engineer for Messrs W D R & R T Taggart - Contract Engineers) to give evidence. Also Mr Wesley McCamley (Partner in Messrs Taggart) to give evidence regarding benefit to be set off against compensation.

Mr Haldane testified that the work in the vicinity of the premises of Messrs Barbour & Payne consisted of

- (a) construction of a sheet pile river wall incorporating riverside walkway and access ramp thereto;
- (b) construction of back drainage pipeline and replacement sewers including manholes and storm overflow chamber;
- (c) reconstruction of the Bridge Street carriageway and footway.

The main contract was started on 2nd September 1985 but work in the vicinity of these premises started on 26th November 1985. Substantial completion of the contract took place on 9th February 1987 (but some further minor work up to 8th April 1987). Pedestrian access to the building was maintained apart for a few minutes during the whole time of the contract - reconstruction of the footway outside the premises was carried out on 5th/6th June 1987. Vehicular parking directly outside the property was restricted during most of the contract period. The adjacent bare site not owned by but used by the Claimants for vehicular parking was not available during most of the contract period.

He made the following comments on the various damage and estimates submitted:-

(a) Damage to kitchen walls and roof and to external rendering.

Mr Stewart's report (on behalf of the Claimants) makes no mention of the kitchen roof yet re-felting is included in the claim. The estimate for repairs to walls and roof (submitted by the Claimants) amounting to £719.40 plus VAT includes major work to the kitchen roof. Mr Stewart suggested remedial work which comprises only a portion of that quoted price and he included treatment of cracks existing prior to the works in the Scheme.

Mr Haldane considered a reasonable allowance is £200.

(b) Replacement carpet to Main Office.

The approximate area of this office is 35 square metres. The quotation for new carpet tiles @ £960 excluding fitting and VAT equals £27.4 per square metre. Mr Haldane considered a fair price to be £434 equals £15 per square metre approximately (The Tribunal notes that £15 per square metre arithmetically gives £525).

Mr Haldane testified that there is no justification for this part of the claim - replacement of tiles is excessive and an allowance of £50 towards cleaning is reasonable.

(c) Replacement of front window sill.

The submitted estimate of £1,817.65 plus VAT is reasonable for a new sill and a new shop front. Mr Haldane was of opinion that all that was required was the sealing of the crack in the window sill with a filler which retained some elasticity. He put forward an amount of £200 as reasonable for repairing the crack which is 2mm wide.

(d) Redecoration.

The quotation of £1,100 plus VAT includes the exterior of the building and includes significant betterment including redecoration as a result of the proposal to replace the shop window.

Mr Haldane considered £50 is reasonable this allows for spot painting of the gable wall and additional work in the kitchen area as a direct result of minor plasterwork repairs.

The Tribunal finds the following facts proved or admitted:-

1. The works carried out by the Department were extensive and were known as the Comber Flood Protection Scheme. The works in the vicinity of the Claimant's premises consisted of:-
 - (a) the construction of sheet pile river wall incorporating a riverside walkway and an access ramp thereto;
 - (b) the construction of a back drainage pipeline and replacement sewers including manholes and a storm overflow chamber;
 - (c) the reconstruction of the Bridge Street carriageway and footpath.

That work for the entire contract was commenced on 2nd September 1985 and substantially completed on 9th February 1987. The above work in the vicinity of the Claimant's premises was commenced on 26th November 1985 and substantially completed on 9th February 1987 but some further minor work was not completed until 8th April 1987.

2. During the period of the works extensive sheet piling was carried out and that work accompanied by various pipeline constructions and the construction of a storm overflow chamber made pedestrian detours inevitable. Pedestrian access to the Claimant's premises was maintained (apart from a few minutes) during the whole time of the contract, but vehicular parking directly outside the premises was restricted during the whole period of the contract.

The adjacent bare site not owned by the Claimants but used for vehicular parking was not available during most of the contract period.

3. The piling and other works caused dirt, noise and vibration. Many complaints were made by the Claimants during the contract period.

4. The Claimants carried on the business of independent financial advisers and an agency for the Anglia Building Society.

That business included mortgage and investment with the Building Society, life assurance, investment in bonds, small and large saving plans, unit trusts, personal pensions and group pensions. Personal interviews with clients were often necessary and during the works interviews with clients were in clients' houses where possible.

This business commenced sometime in 1979 from Mr Payne's house but opened up in the Comber premises in 1982.

5. No 55 Bridge Street, Comber is situated at the end of terrace property.

Before purchasing those premises the partnership were aware that they had been flooded on one occasion. Before occupying, damp-proofing liquid had been applied to all the walls and four inches of concrete had been laid (to stiffen one wall). The ground floor had been raised eighteen inches with solid concrete. New ceilings and floor boards on steel beams had been installed and the walls had been replastered and the premises were redecorated. The cost of those repairs in 1982 was £13,500 approximately.

6. The extensive piling carried out caused a number of cracks in the building as follows:-

- (a) at the junction of the two-storeyed portion and the single-storeyed return there was a fine crack extending for about half the height of the wall in March 1986 and by May 1987 that crack was more pronounced and extended for three-quarters of the height. The crack had now become wider at the top than the bottom;

- (b) externally at the gable there were a few fine cracks in March 1986 and by May 1987 there were more fine cracks and there was a crack in the ground floor window sill which extended through the sill.

Internally there were minor cracks in the plasterwork (although some of these were paint-bridged);

- (c) there was minor damage to wall corners perhaps caused by the Contractor's plant and equipment.

7. There was severe flooding in Comber on 2nd and 3rd October 1981. As a result a petition (undated) and signed by 67 business people was submitted to the Minister, Department of Agriculture for Northern Ireland indicating as a result of flooding in December 1978, October 1980, and October 1981 that there was a total estimated loss caused by damage to premises and consequential loss amounting to £487,560. Included in that petition was an estimate by the former owner for No 55 Bridge Street of £1,500.

Mr Francis O'Reilly of Counsel (for the Respondent) submitted:-

1. Article 17 of the 1973 Order has a rather unusual wording. The Claimant or his land must suffer loss. The cause must be the entry by the Department onto land owned by him - in this case there was no entry. Or, there had to be loss caused "by direct interference with any land belonging to him". Refers to McCreesh v County Court Judge of Armagh (1978 Blue Book - Bulletin No 7).
2. There must have been "loss". In Article 18 which deals with "compensation for injury to canals, fisheries, etc" the term used is "any loss or damage". In Article 2 of the 1973 Order there is no definition of the words "loss" or "damage"; neither does Article 2 cast any light on "direct interference".
3. It is conceded that damage to the building was caused due to the works (as found by Mr Haldane), but damage is not mentioned in Article 17 of the 1973 Order. A business affected by sound or dirt does not constitute direct interference but might fall into the category of indirect interference. It is acknowledged that the Claimants may have suffered a loss of business due to the noise but they are not entitled to compensation for that loss because there was no direct interference.
4. The Claimants have never suggested that access was denied. It may have been impaired and not of the same standard as before, but that was a public right-of-way not a private right-of-way. Once any occupier stepped out of No 55 Bridge Street there was a public right-of-way.
5. Submits that "loss" means pecuniary loss. Article 17 does not provide compensation in the circumstances subsisting in this case. Consequential loss is not payable at all.

6. As far as the benefit to be set off against compensation is concerned, Article 2 of the 1973 Order provides no definition of the word "benefit". Neither side provided valuation evidence, but it is only a blinkered person who would say that the property was not improved by the Scheme. The Department's evidence consisted of a calculation method which was used generally in practice. The Department would concede Mr Adams' method of updating the originally estimated figures in Mr McCamley's evidence ie a multiplier of 2.2 rather than 2.5. The 10% used by Mr Adams does not take into account inflation.

Mr David McBrien of Counsel (for the Claimants) submitted:-

1. The Claimants rely on Article 17 of the 1973 Order and on the words "by direct interference with any land belonging to him".
2. The two expert accountants have agreed the quantum of £8,500 consequential loss. The Respondent in part relies on the McCreesh Case but statutes must be in pari materia.

Refers to a decision of this Tribunal viz Patrick Murphy v Department of Agriculture for Northern Ireland (R/15/1984).

Also refers to:-

- (a) Gault v Northern Ireland Electricity Service (R/31/1981) - a Lands Tribunal decision under the Electricity (Northern Ireland) Order 1972;
- (b) Savage v Department of the Environment for Northern Ireland - a Lands Tribunal decision under the Roads (Northern Ireland) Order 1980;
- (c) Leonidis v Thames Water Authority (1979) 11 Building Law Report 16; (1979) 77LER722.

Although these authorities are under different statute law the Leonidis Case and this case may be compared:-

- (i) both are the result of the exercise of statutory powers;

- (ii) direct interference with No 55 Bridge Street is admitted for damage was caused;
 - (iii) consequential loss was caused in each case.
3. Once direct interference has caused physical damage to the property, the door is opened to compensation for any loss. That loss includes loss of business profits arising from noise disturbance and interference with the footpath access.
4. If that is wrong and there is a requirement for interference with land under each head of compensation then submits there is no requirement for actual physical interference for consequential loss. The word "direct" includes those activities which would constitute an actionable nuisance at common law (even though such activities have not physically affected or damaged the premises). The word "direct" is not the same as "physical".
5. As far as benefit to be set-off against compensation is concerned, submits:-
- (a) the correct test of betterment is to call an expert valuer to give evidence of an increase in the value of the property. The onus so to do was on the Department and they did not so do;
 - (b) the Claimants do not concede there is such benefit; there is no proper evidence of benefit put before the Tribunal. The Department have purported to rely on a general database and called an engineer to prove that database. It was agreed that was used in general within the industry, but there is no authority for using that general database and it is open to the Lands Tribunal to rule that its use is incorrect in this Case;
 - (c) if the Claimants are wrong and that database method is not incorrect then the reason Mr Adams was called was to show that the Department's calculations were mathematically wrong. The lower figure of benefit in Mr Adams evidence should then be used for set-off.

DECISION

The relevant statute is the Drainage (Northern Ireland) Order 1973 ("the 1973 Order") and the relevant parts of that Order dealing with compensation are as follows:-

Article 17

- "(1) Where any person suffers any loss by reason of the entry by the Department on any land owned or occupied by him, or by the construction of drainage works or sea defence works thereon, or by direct interference with any land belonging to him, the Department shall, subject to the provisions of this Order, pay to him reasonable compensation in respect of such loss, such compensation to be calculated in accordance with the following provisions of this order.
- (2) The Department may, before the carrying out of any drainage works or sea defence works, enter into an agreement with any person likely to suffer loss by reason of the carrying out of the works, whereby, in consideration of the carrying out of the works, the Department will be either wholly or partially exonerated from liability for payment of compensation in respect thereof, and the provisions of any such agreement shall bind that person and all the estate of the that person, and any person deriving title under him in, to or over any land specified in the agreement.
- (3) In view of awarding compensation, the Department may by agreement construct works or provide facilities which have been removed or impaired in the carrying out of the drainage works or sea defence works, but, in the event of such construction or provision affording any additional or improved advantages, facilities or rights as compared with those existing prior to the carrying out of the drainage works or sea defence works, the Department may enter into an agreement with any person whereby a fair proportion of the cost incurred by the Department in connection with such construction or provision shall be borne by that person, and any sum as required to be borne shall be recovered by the Department.
- (4) Every claim for compensation under this Article -
- (a) shall be made forthwith in writing to the Department, and such details of the claim as the Department may require shall be furnished in writing to the Department within such period as the Department may determine; and

(b) shall, in default of agreement, be heard and determined by the Lands Tribunal.

(5) In computing the amount of reasonable compensation, the Department may allow a sum in respect of the cost of employment of any solicitor, and may allow a sum in respect of the cost of the employment of any engineer, surveyor or valuer, where the Department is satisfied that such employment has been necessarily and properly incurred in connection with the preparation of a claim for compensation, but, save as aforesaid, costs shall not be payable by the Ministry in respect of claims for compensation."

Article 18 is not relevant in this case.

In respect of the matters to be regarded in assessing compensation:-

Article 19:- "When assessing compensation in pursuance of Articles 17 and 18, regard shall be had in every case to any benefit to any property (whether such property is or is not the property in respect of which such compensation is claimed) of the person claiming such compensation which is occasioned by, or may reasonably be expected to arise from the carrying out of, the drainage scheme in relation to which the compensation is claimed, and, in particular, regard shall be had -

- (a) in the case of a claim in respect of a canal or other navigable waterway, to any permanent benefit to the navigation of such waterway occasioned by, or which may reasonably be expected to arise from, the carrying out of the drainage scheme and to the extent to which that canal or waterway was used for purposes of navigation during the ten years immediately preceding the date of confirmation of the drainage scheme;
- (b) in the case of a claim in respect of water rights, to any alternative water supply provided by the Ministry; and
- (c) in the case of a claim in respect of interference with water or a watercourse providing power for a mill or other industrial concern or, for domestic purposes, to the extent to which the power so provided was used during the ten years immediately preceding the date of the confirmation of the drainage scheme by the Department, and to any

alternative source of power provided by the Department or otherwise available to the claimant".

In respect of maintenance of watercourses the relevant statutory matter is Article 21(2) viz:-

"Where any injury is caused to the property of any person by reason of the carrying out by the Department of any such works of repair or maintenance, he shall, subject to the provisions of this Order, be entitled to receive from the Department the like compensation in respect of such injury as would be payable under this order if such injury had been caused in the carrying out by the Department of a drainage scheme under Part III."

It is common case that:-

1. The Department carried out works using their powers given by the 1973 Order. Those works were entitled the "Comber Flood Protection Scheme".
2. The Enler River had caused flooding to (inter alia) No 55 Bridge Street on some occasions prior to the commencement of that Scheme, which had been prepared following receipt of a petition by a number of business people whose premises had suffered flooding.
3. Some damage was caused to No 55 Bridge Street during the works.
4. The pedestrian entrance to No 55 Bridge Street was maintained at all times but because of the close proximity of extensive works some difficulty to pedestrians might have been occasioned.

However, there were major differences between the parties on the compensation to be paid for each item of damage viz:-

A. Cost of Repairs:-

Total claim by Claimant:- £5,231.86

Total estimate by Respondent:- £ 500.00

The individual items making up those totals are:-

(i) **Damage to kitchen walls and roof and to external rendering**

The claim includes the repair of a vertical crack between the kitchen and the main block of the building and the kitchen flat roof to be stripped and completely refelted. The amount claimed is - **£ 714.40 plus VAT**

The Respondent notes that the Claimant's engineer in his report makes no mention of damage to the kitchen roof. The amount offered after deducting significant betterment is - **£ 200.00**

After close inspection by the Tribunal the repairs to the kitchen roof must be disallowed but the offer made by the Respondent is conservative and the Tribunal prefers - **£275.00**

(ii) **Replacement carpet to Main Office**

The claim was based on the complete replacement of carpet tiles which were originally laid sometime in 1983. The Claimants' evidence was that mud and grit walked in had gradually deteriorated some carpet tiles and an area of about 10 feet by 5 feet were replaced by some tiles which the Claimants' had in store and other tiles were shuffled around to put the "best face on it".

The estimate for the complete replacement was £960 plus £55 for fitting - **£1,100.00 plus VAT**

The Respondent notes that for 35 square metres that estimate is £27.4 per square metre for new carpet tiles (excluding cost of laying) and although it is suggested that a good quality carpet tile can be obtained for approximately 315 per square metre the Respondent contends that it is excessive to replace all carpet tiles and that it is reasonable to allow towards the cost of cleaning - **£ 50.00**

Following inspection the Tribunal rejects the claim for complete replacement of the carpet tiles; but a mere amount of £50 towards the cost of cleaning ignores the fact that some 50 square feet of carpet tiles were replaced (albeit

with tiles the Claimants had in stock). The value of those tiles the Tribunal estimates @ £80 plus £20 for fitting and therefore awards - **£150.00**

(iii) **Replacement of front window sill**

The Claimant claims that because of a crack through the front window sill the shop front will require to be completely replaced together with the window sill. The Claimants' estimate for that work is - **£1,817.65 plus VAT**

On the other hand the Respondent considers that crack to be capable of being sealed with a filler which would retain some elasticity. The Respondent considers reasonable compensation @

£ 200.00

On inspection the Tribunal does not find that the crack has caused dampness to any appreciable extent at the inside wall the Tribunal's inspection was carried out on a day or two after some appreciable rainfall. Nevertheless the under edge of the sill has been chipped unevenly - probably at the time when the footpath surface was being relaid. The Tribunal rejects the claim for a new shop front as being unnecessary and not the subject for reasonable compensation. The Tribunal's estimate of reasonable compensation is - **£ 300.00**

(iv) **Redecoration**

The Claimant includes the entire exterior including the gable wall and the entire interior. The estimate for this work is -

£1,100.00 plus VAT

But the expert engineer who gave evidence for the Claimant considered that "In the cases of minor cracking both internally and externally it is recommended these cracks should be raked out and filled with a proprietary filler, the repaired area being primed before repainting".

The Respondent accepts that because the existing paint finish on the gable wall is poorly bonded to the substrate that the cost of spot painting on the gable wall be allowed together with the cost of additional redecoration in the

kitchen area as a direct result of plasterwork repairs. The respondent's estimate of reasonable compensation is - **£ 50.00**

On inspection it was evident to the Tribunal that what was called the gable end was once the dividing wall between No 55 Bridge Street and the former building situate on the adjacent site. That building was knocked down and the site cleared some years ago and the dividing wall was plastered and painted to prevent ingress of rain water into No 55 Bridge Street. The Tribunal's inspection supports the Respondent's submission on this matter. However, at the join of the kitchen return and the main building there is still a long minor crack and when properly filled would require some redecoration. The Tribunal's estimate of reasonable compensation is –

£ 150.00

The Tribunal's total for cost of repairs (including redecoration) is, therefore:-

£275 + £150 + £300 + £150 = **£ 875.00**

B. Consequential Loss

In this head of claim the parties were completely opposed. The Claimants' expert witness produced a total claim of - **£11,000.00**

This was made up for a period November 1985 to December 1986 (inclusive) by projecting the growth in commission actually earned prior to November 1985 to estimate the commission which should have been received for the eighteen month period with that commission actually earned. This was done for life commissions, other insurance commissions, building society commission. To these figures were added the increased cost in 1986 of telephone charges; a deduction from the total loss for the reduction in rates because of a temporary reduction in the rateable value made by the District Valuer resulted in a total figure of £11,132 rounded down to £11,000.

On the other hand the Respondent submitted that no consequential loss was payable as any loss of profits did not arise because although it was conceded there may be some loss of business due to the noise of piling that was not compensatable for in the words of Article 17 of the 1973 Order the person claiming must suffer the loss by

reason of the "direct interference with any land belonging to him". There was no entry to the land and no construction of drainage works thereon.

The Tribunal derives no help from the authorities quoted by both counsel which were based on different facts and in some cases statutes differing considerably in wording from the 1973 Order.

The Respondent Department accepted that physical damage caused by vibration from piling or excavation for the storm overflow chamber was compensatable. Therefore that damage caused by vibration must have been caused "by direct interference" with No 55 Bridge Street. Is the loss caused by vibration and noise from piling to the business carried on in No 55 Bridge Street a loss caused by the direct interference with No 55 Bridge Street? The Tribunal considers that it must be a loss so caused.

In the case of Lingke v Mayor Etc of Christchurch [1912] 3KB595 the headnote reads:- "The mere temporary obstruction of access to premises, causing considerable inconvenience and loss of business to the occupier, may constitute "damage" in respect of which he is entitled to claim compensation under Article 308 of the Public Health Act 1875". The facts in that case shows the compensation claim was for loss of business and there was no physical damage.

In any event the undisputed facts clearly show that the constant noise for some fourteen months from sheet piling and the partial obstruction to the access to the property, which access was always available (for pedestrians) with some difficulty, did cause some loss. Had the claimants not been able to trade at all and such total loss of profits not compensatable because Article 17 of the 1973 Order gave no right to compensation, that would amount to confiscation without compensation.

In the case of Leonidis v Thames Water Authority (1979) 11BLR16; (1979) 77LGR722 Parker J said at page 27 "It would enable a Water Authority to close completely a street of shops for a year or more if it was reasonably necessary thus depriving the shopkeepers of their livelihood for a year and yet say that there was no right to compensation. A construction on the section (278 of the Public Health Act 1936) leading to such a result would be to attribute to Parliament an intention which amounts almost to confiscation without compensation".

The Respondent's accountant and the Claimants' accountant agreed during the hearing that the total loss of profit had been agreed at £8,500. There was no evidence given to the Tribunal as to how that figure was arrived at or whether that figure represented solely the reduction in profits due to the carrying out of the works. Commissions such as the partnership earned may fluctuate for a number of reasons eg because investors prefer for a time to invest money elsewhere than Building Societies and generally speaking the higher the income earned the greater are the expenses necessary to earn that income and the Tribunal has not any evidence to indicate whether or not those factors have been taken into account in arriving at an agreed figure for loss of commission.

The only figure given to the Tribunal is £8,500 and the Tribunal has no possibility of making its own assessment based on figures of the partnership's accounts for a number of years and, therefore, the Tribunal awards:- **£8,500.00**

C. **Any benefit to the property in the terms of Article 19 of the 1973 Order**

The Respondent applied to the Tribunal to be allowed to call an additional expert to prove the benefit to be set-off against compensation. Such permission was granted and the same permission granted to the Claimants. The parties agreed to save time by exchanging proofs of evidence at the same time as submitting same to the Lands Tribunal.

For the Respondent Mr McCamley spoke to a benefit figure of -

£16,925.00

The method used to arrive at this figure was based on a cost/benefit analysis prepared prior to the adoption of the Comber Flood Protection Scheme. The method was based on the book "The Benefits of Flood Alleviation" by Penning-Powells and Chatterton. A property survey was carried out of 172 properties likely to fall within a 100 year flood risk area - 64 were eliminated as not being theoretically at risk. Flood return periods of 1 in 2 years, 1 in 5 years, 1 in 10 years, 1 in 25 years, 1 in 50 years and 1 in 100 years were considered. The data provided in "The Benefits of Flood Alleviation" was then used to produce damage figures against each of the above 108 properties. That data is based on prices as at January 1977 and so when No 55 Bridge Street benefit was calculated a multiplication factor of 2.5 was used to update

the prices to March 1982. The totals for each floor return period were multiplied by the probability of flooding in the interval resulting in the annual benefit for the interval. These were then added to show the Total Annual Benefit - a result of £927.07. The present value of that total annual benefit was then found by the following:-

$$\text{Present Value} = \frac{X}{r} \left[1 - \left(\frac{1}{1+r} \right)^n \right]$$

Where X = Annual benefit
r = Discount rate = 5%
n = Projected life of
scheme = 50 years

That calculation resulted in the benefit of £16,925.68.

The Claimants expert engineer accepted:-

1. That the method set out in "The Benefits of Flood Alleviation" is well established and generally accepted;
2. The database consisted of symptomatic figures but does not include any information relating to Northern Ireland.
3. The method is intended to simplify the assessment of benefits to the community of any drainage scheme proposed to be carried out.

He considered that as insurance is carried by the partnership against consequential loss in the event of a flood they would suffer no loss. Any benefit which occurred accrued therefore to the Insurance Company and no benefit accrued to the property or to Barbour & Payne.

The Tribunal find this evidence of no assistance whatsoever especially as in answer to a question from the Lands Tribunal he agreed that from a common sense point of view the building must have benefited from the Comber Flood Protection Scheme.

The Claimants' expert accountant fully understood the concept of set-off for betterment. His evidence adapted the Respondent's method by making three different assumptions viz:-

- (a) the update factor of 2.5 should be 2.2;

- (b) the discount rate of 5% should be 10%; and
- (c) the benefit period of 50 years is wrong for the partnership will not necessarily be occupying the present property 50 years hence. The partnership might not even be in existence at that time. He considered that the period should be the period of interruption viz:- 14 months. Consequently he arrived at £1,803.

The Tribunal finds all the evidence on benefit highly unsatisfactory. It would not have been difficult for either side (or both) to produce expert valuation evidence of the increase in value to the Claimants of No 55 Bridge Street solely due to the Comber Flood Protection Scheme. That increase of value could have been the basis of the "benefit to any property".

Be that as it may there is no expert valuation evidence in front of the Tribunal and the Tribunal must do the best it can using the evidence in front of it.

First of all the method of using the particular database is for the sole purpose of assessing the benefit to the community of a proposed scheme prior to taking the decision as to whether or not to carry out the scheme. It is a necessary tool in the hands of the decision-makers. While surveying numbers of properties it arrives at a global figure of benefit to the community. In adapting that to estimate the benefit to one single property it is at best a very approximate method compared with better methods such as a property valuation. In addition each item of damage to property and the repair thereof is already discounted to a small extent by betterment.

The Claimants' updating factor of 2.2 (instead of 2.5) was agreed at the hearing by the Respondent and this adjusted the Respondent's benefit figure to £14,895 (instead of £16,925).

The Claimants' accountant considered a 5% discount rate used by the Respondent to be unrealistic when used for a benefit period of 50 years.

On the other hand, the Claimants' accountant gave alternative figures for benefit @ 10% if 10 years, 25 years or 50 years was used instead of his period of 14 months. Those figures were as follows:-

50 year period - benefit £8,090

25 year period - benefit £7,488

10 year period - benefit £5,013

The Tribunal prefers the first of those three figures for the probability is high that the Scheme as it has been carried out will eliminate flooding at this part of Comber - the risk factor would be extremely low; perhaps once in one hundred years.

The benefit to set-off against the compensation is £8,090.

SUMMARISING

The compensation payable is calculated thus:-

A.	Cost of Repairs totalling	£ 875
	add	
B.	Consequential Loss	<u>£8,500</u>
	Total Compensation under Article 17	£9,375
	deduct	
C.	Benefit to be set-off under Article 19	<u>£8,090</u>
	Total net compensation payable	<u>£1,285</u>

Having heard the parties on the question of costs, the Tribunal directs the Respondent to pay the Claimant a measured sum of @ 800 towards the costs of 18th December 1989 and makes no award of costs for the hearings of 9th February 1989 and 16th June 1989.

ORDERS ACCORDINGLY

25th January 1990

**Mr A L Jacobson FRICS
Lands Tribunal for Northern Ireland**

Appearances:-

Mr David McBrien of Counsel (instructed by Messrs Campbell, Bates & Co, Solicitors) for the Claimants.

Mr Francis O'Reilly of Counsel (instructed by R F Cole Esq, Solicitor, Department of Finance & Personnel, Solicitor's Branch) for the Respondent.