

THE HIGH COURT

2007 6160 P

BETWEEN

PETER McNICHOLAS AND NANCY McNICHOLAS

PLAINTIFFS

AND

MAYO COUNTY COUNCIL AND SIAC WILLS J.V. LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 31st day of July, 2009

1. The plaintiffs are the owners of a residential property at Culmore, Swinford, County Mayo. The property is adjacent to the N5 Charlestown Bypass, and for the purpose of constructing that road, part of the plaintiffs' lands was acquired by way of a Compulsory Purchase Order ("the CPO"). The Bypass cuts across what was formerly an access road to the plaintiffs' dwelling. The plaintiffs have been provided with an alternative means of access which they claim is unsuitable.

2. In these proceedings, they seek the following relief:

(1) A declaration that the defendants and each of them are obliged to provide to the plaintiffs suitable alternative access to their property in a form which accords to the terms and specifications set out in planning permission either adapted to permit part of the road cross a portion of the plaintiffs' lands or, in the alternative, in accordance with the planning permission drawings and specifications (including those to be agreed).

(2) An injunction restraining the defendants, or either of them, whether servants or agents, or howsoever, from constructing an alternative access to the plaintiffs' property save in accordance with the declaration at (1).

(3) A declaration that the 2004 Access Proposal does not constitute suitable alternative access to the plaintiffs' lands as required by the Roads Act.

(4) An order directing the defendants to meet and agree outstanding specifications and to construct alternative access to the plaintiffs' property in accordance with the declaration at (1).

(5) An order that the defendants remove any works which may have been effected to deliver an access save in accordance with declaration at (1).

3. The plaintiffs contend that the standard of access that is required to be provided is "*reasonable access or suitable alternative means of access*". They refer, in particular, to s. 49(4) of the Roads Act 1993, as amended. Other legislative provisions relied on by the plaintiffs provide that the Road Authority shall not remove, alter or restrict a means of access until an alternative means of access to or from a public road has been provided. I will deal with the legislative procedures in more detail later in this judgment.

4. While the first named defendant does not accept that the plaintiffs' interpretation of the legislation is correct, their legal submissions proceed on the basis of an assumption that the Local Authority was under a duty to construct a suitable alternative access. But they say that the plaintiffs have failed to adduce any evidence to support their assertion that the Council have failed in their duty. I am satisfied that the duty imposed on the first named defendant was to provide a suitable alternative means of access. The issue that arises in this case is whether or not that was done.

The law

5. The approval for the Charlestown Bypass Scheme was granted on 10th November, 2004, by An Bord Pleanála under s. 51 of the Roads Act 1993. This section deals with Road Developments. In March 2004, an application was made for a Compulsory Purchase Order and approved on 10th November, 2004, pursuant to s. 76 of the Third Schedule to the Housing Act 1966, as extended by s. 10 of the Local Government (No. 2) Act 1960 (as substituted by s. 86 of the Housing Act 1966). In the application for approval under s. 51 of the Roads Act 1993, the Bypass was described as a "*proposed road development ... known as the N5 Charlestown Bypass Scheme*". In the confirmation of the CPO, it was described as "*road construction and improvement*".

6. Section 52 of the Roads Act 1993, is entitled '*Acquisition of Land and Implementation of Scheme*'. The section authorises a Local Authority to compulsorily acquire any land or any right in relation to land and:

"... for that purpose, the Scheme shall have the same effect as if it were a compulsory purchase order in respect of that land or any rights in relation to land which, consequent on a decision made by the road authority, pursuant to s. 10(1) of the Local Government (No. 2) Act 1960 (as inserted by s. 86 of the Housing Act, 1966) had been duly made and confirmed".

The plaintiffs argue that property rights in both instances are affected and treated similarly and to the same extent.

7. Section 49(4) of the Roads Act 1993, as amended, provides that An Bord Pleanála may, in any case where it considers it reasonable to do so, *"direct the road authority to provide for any person who, by reason of the implementation of a motorway, busway or protected road scheme -*

(a) is permanently deprived of reasonable access to or from his property or to or from one part of his property to another – a suitable alternative means of access,

(b) is, during construction, temporarily deprived of reasonable access to or from his property or to or from one part of his property to another – a temporary means of access during the course of such construction, and the road authority shall comply with any such direction."

8. Section 52 of the Roads Act 1993, provides that in any case where the closing or restricting of an existing means of direct access under sub-section (2), results in the owner of any land being deprived of the only means of access from that land to any public road, or to that land from a public road, the road authority shall not close or restrict such means of access until an alternative means of access to or from the public road has been provided.

The alternative access provided

9. The Bypass cuts across the original driveway up to the plaintiffs' home. Originally, it was proposed to have an underpass to enable people in the locality to cross from one side of the bypass to the other. At a public hearing in August 2004, a design change to the road was requested by the Inspector for discussion purposes. This involved an overpass in place of the underpass. It was felt that this would address, in a more suitable way, the division of the community by the new roadway. The overpass is approximately 300m from the plaintiffs' dwelling house. On the south side of the overpass, there is a local road from which the new access to the plaintiffs' premises has been constructed. The new access runs parallel to the Bypass on the south side and has a downhill gradient. Between the access road and the Bypass, is a block wall approximately 2m in height, and this, in turn, runs along the top of an embankment which slopes down to the Bypass.

10. I have seen photographs of the new access road. From a functional point of view, it appears to be adequate. In the photographs, the quality of the surface appears to be somewhat rough and unfinished, particularly at the edges. The block wall, although it has been properly capped, has a fairly crude finish. Indeed, in an email of 24th August, 2006, Mr. Richard Glancy of Mayo County Council, admitted that:

"A block wall 1.5m high would be visually intrusive on the landscape, especially at that section of the access through the additional lands acquired from Mr. Lynskey."

The evidence of the County Council was that it is a standard type of wall used alongside major routes. No evidence was given to the contrary. For the purpose of this case, it has to be considered in the context that it is some distance removed from the dwelling house. There was evidence given that further landscaping was envisaged along the boundary, and a stone clad entrance is to be constructed. What appears on the photographs is not the finished road. Insofar as the finish to the roadway and wall to date is not aesthetically pleasing, these are matters that will be ameliorated in due course by landscaping and other entrance works, and in any event, this issue is not pleaded as part of the plaintiffs' case.

11. One of the major complaints made by the plaintiffs is that the access road is so steep and so close to the edge of the Bypass that it cannot be used safely by the first named plaintiff because he suffers from vertigo.

12. The evidence establishes that the road is no more steep than part of the original access at certain places along its route. Furthermore, on an objective view of the photographs, it does not appear to be particularly steep. The plaintiff undoubtedly suffers from vertigo and agreed medical reports were produced which establish that. I also heard evidence from his General Practitioner confirming the fact. The first named plaintiff's General Practitioner saw him at home when he got dizzy spells. Clearly, this had nothing to do with driving a motorcar. But the first named plaintiff gave evidence that he suffers vertigo when driving. He described how he would get vertigo when driving down the new access road, but also said that he suffered from the condition when driving across the new flyover over the Bypass and that when doing so, he cannot look at the road ahead, but has to concentrate on the dashboard. While this raises the issue as to whether the plaintiff should be driving at all, there is nothing in the evidence to show that the flyover was anything other than a normal flyover. I have seen the Bypass and driven under it on several occasions and it is clear to me, from my own observation of it and from the photographs produced in court, that there is nothing unusual about it. I am quite satisfied that the first named plaintiff's condition of vertigo has nothing to do with the suitability of the access road. There is no view of the Bypass to the immediate right of a driver proceeding down the access road to the plaintiffs' dwelling house. The block wall removes a view of the road at that point. I do not accept that the access road is unsuitable on the grounds of the first named plaintiff's condition of vertigo and how he is affected by it. Mr. Ron Bergin, a Consulting Engineer, was called to give evidence by the plaintiffs. On cross-examination, he accepted that the original entrance had an incline which was at least equal to the incline of the newly built access road, and he accepted that the issue of the gradient was not therefore material to the matters in issue in this case. Although there was some conflicting evidence on whether or not the new road was in accordance with national standards for roads and bridges, the evidence suggested that the gradient on the new road was within the limits set by the National Roads Authority for access routes to National Primary Roads. The evidence of the first named defendant was that it applies this standard to access roads leading to local roads, although it is not obliged to do so.

13. The plaintiffs' alternative claim is that they had been led to believe that if they withdrew an objection to a planning permission, that the access road would be built along a slightly different route which would have been more suitable. The plaintiffs say that they withdrew the appeal on the basis of this understanding, but that the defendants failed to build the road along that alternative route, but rather, built the road along a route to which the plaintiffs had always objected and which they claim is unsuitable.

The evidence

14. An extensive amount of evidence was given in this case. A number of material facts were established by the evidence. It seems to me that when the original CPO was confirmed, it may not have provided for the optimal amount of land being taken for the purpose of constructing an access to the plaintiffs' dwelling. But the scheme was approved by An Bord Pleanála and is, in my view, valid. Furthermore, the plaintiff did not challenge the scheme. While it would be something of an exaggeration to say that the access route to the plaintiffs' land had to be "shoe-horned" into the Compulsorily Purchased lands, there were certain constraints placed on the route of the access road. The first named defendant retained the second named defendant to carry out the works and to enter into negotiations with the plaintiffs with a view to providing a suitable road. The plaintiffs wished to have direct access onto the Bypass but this was never an option according to officials from the County Council and this was confirmed by Ms. Beverley Flynn, a local representative, who had engaged with the County Council on behalf of the plaintiffs.

15. Extensive discussions took place between both defendants and the plaintiffs with a view to providing a suitable access. At some point, modifications were made to the embankment between the Bypass and the route of the new access road which was on higher ground and running parallel to the Bypass. These changes were not of any significance for the purpose of this dispute. A wall of between 1.5m and 2m was then built along the top of the embankment along the route of the new access road.

16. The second named defendant arranged to procure some land from an adjoining farmer, Mr. Lynskey, with a view to moving the access road further away from the embankment and the Bypass. This was at the end of the access road closest to the point at which it joined the local road near the new overpass. Although the plaintiffs, at all times, sought the road to be moved further away from the Bypass, and this proposal went some way to achieving that, the plaintiffs inexplicably objected to a Planning Permission (P06/3897) obtained by the second named defendant for that purpose. Not only did the plaintiffs themselves appeal, but they arranged for their engineer, Mr. Bergin, to lodge an appeal.

17. At that point, there were two possible routes for the access road. The first was in accordance with the Road Development Plan 401 1A, being the road development plan approved by An Bord Pleanála. The second was the route proposed by Planning Permission P06/3897. This latter route, for which permission was obtained, included the provision of landscaped screening along the length of the northern boundary of the access road. The plaintiffs' daughter, Ms. Marilyn McNicholas, being a solicitor, took a prominent role in negotiations on behalf of the plaintiffs, with the defendants. While she maintained that the access road was not included in the decision of An Bord Pleanála, she accepted that the plan incorporating the modification of the access road was included in the order. Even a cursory glance at Drawing 401- 1A shows that the access road is included. This plan was included in the order of An Bord Pleanála under the heading 'Modifications'.

18. Instead of engaging with the defendants on the construction of the route over the Lynskey lands, the plaintiffs continued to pursue the issue of direct access onto the new Bypass. On 24th February, 2007, Mayo County Council granted planning permission for the road over the Lynskey lands (P06/3897). On 21st March, 2007, the plaintiffs appealed to An Bord Pleanála. When Ms. Beverley Flynn, T.D., contacted the first named defendant in April 2007, to make representations on the plaintiffs' behalf, she was pursuing the question of direct access onto the Bypass and was informed that this was not up for discussion or, as she was told, "it was not a runner".

19. Apart from the two possible routes for the access road which I have referred to earlier, there was a further proposal which involved the access road proceeding over the Lynskey lands and then through a portion of the plaintiffs' lands which they would cede to the Local Authority for that purpose. There was also a suggestion that further lands from Mr. Lynskey might be procured, although it was subsequently made clear that the Lynskeys were not prepared to give up further lands over and above what had been purchased for the purpose of Planning Permission P06/3897.

20. Going back in time, the first named defendant wrote to the plaintiffs' agricultural consultant on 1st September, 2006, outlining a number of matters in a schedule which contained "Proposal A" and "Proposal B". Proposal A stated:

"It is agreed that new access to Claimant's property would be constructed on lands made available by the Contractor, SIAC Wills J.V. Limited (SWJV), subject to SWJV arranging purchase of lands from Mr. Lynskey and dedication of lands by Claimant to facilitate construction of access at new location."

Proposal B stated:

"Access to be constructed by SWJV on Lands Made Available by Mayo County Council and SIAC Wills J.V. Limited."

The letter concluded by saying:

"Notwithstanding the negotiations that have preceded this correspondence, I have been advised by SIAC Wills J.V. Limited that if agreement is not reached on or before 15th September, 2006, in regard to Proposal A, then works in connection with Proposal B will commence on 18th September, 2006."

Proposal B is the scheme that led to Planning Permission P06/3897.

21. The problem with Proposal A was that there was never a planning permission obtained in respect of the lands to be dedicated by the plaintiffs to facilitate construction of access from the Lynskey lands. The defendants were pressing the plaintiffs for a resolution to the problem because the Bypass Scheme had to be completed by the end of 2007, and the first named plaintiff was aware of this.

22. The plaintiffs failed to meet the deadline of 18th September, 2006, set out in the letter of 1st September, 2006. In the circumstances, the position was that the defendants proposed to proceed with Proposal B. It is not quite clear how the defendants proposed to commence these works on 18th September, 2006, since the Planning Permission P06/3897 was not granted until February 2007. When the plaintiffs wrote on 1st June, 2007, confirming they were withdrawing their appeal, they stated that they wished ". . . to accept the accommodation works as set out in your letter of offer of 13th

July, 2006 . . .” But what they opted for was Proposal A for which there was no planning permission.

23. Therefore, on 18th September, 2006, the position appears to have been as follows:

- (i) the plaintiffs had failed to meet a deadline laid down by the first named defendant for reaching agreement with regard to Proposal A;
- (ii) the first named defendant had indicated that the works would commence in accordance with Proposal B if no agreement was reached by that date;
- (iii) the defendants, for their part, were not in a position to commence the works as planning permission had not been obtained for Proposal B at that time;

24. By the time the plaintiffs withdrew their appeal in June 2007, they opted for Proposal A, which was no longer available and for which planning permission had not been obtained. By that time, the planning permission had been obtained for Proposal B.

25. With time running out for the completion of the scheme and in the absence of any meeting of minds, the defendants decided to proceed to build the access road in accordance with the planning approval for the scheme granted by An Bord Pleanála and which is shown in drawing No. 401-1A.

26. I now summarise briefly evidence that was given by various witnesses and which I consider relevant. Mr. Peter McNicholas explained how his condition of vertigo was adversely affected by the new access road. He said that he was informed by the County Council that if the plaintiffs did not withdraw their appeal against the Planning Permission P06/3897, that the road would be built out on the edge of the embankment. He declined to deal with certain questions, leaving them for his daughter, Ms. Marilyn McNicholas, to answer. He accepted that no final agreement had been reached with the defendant as to what would happen when the appeal was withdrawn.

27. Ms. Marilyn McNicholas said that when the planning appeal was withdrawn, the plaintiffs assumed that the defendants would not build out on the edge of the embankment. In affidavit sworn by Ms. Marilyn McNicholas on 16th August, 2007, she stated, *inter alia*, in paragraph 13:

"I say, and believe, that at that point in time, it was clear to all that the McNicholas had been told, and were of the belief, that absent withdrawing their planning application appeal, access would proceed of (sic) the plan that was said to accord to the 2004 proposal. However, if the appeal was withdrawn, this threat would be withdrawn and discussions would take place to finalise agreement on an access, either as proposed by SIAC or such alternative access as the plaintiffs might persuade the defendants to accept . . ."

This suggests that there was no agreement between the plaintiffs and the defendants as to what route the access road would take, if and when the plaintiffs withdrew their appeal against the planning permission relating to the Lynskey lands. Ms. Beverley Flynn confirmed that the only way discussions could resume was if the appeal was withdrawn.

28. Ms. Geraldine Fahy, a town planner, gave evidence and stated that the modifications in drawing 401-1A would not have been considered by An Bord Pleanála. Mr. Ron Bergin, consulting engineer, said that he had not seen the road since it was built. He accepted that a driver proceeding down the access road to the plaintiffs' premises would not be able to see over the block wall to the new Bypass and if the "*as built*" drawing produced in court was correct, there was not a problem with regard to steepness. He also agreed that since the wall was built, there would not be a vertigo issue.

29. Mr. Matthew Chapman, a consulting engineer from Ove Arup, did not carry out a topographical survey and accepted that the gradient on the original access road was as steep in places as the new access road. Mr. Alan Lynskey, an architectural technologist, acknowledged that the old road had a similar gradient in places but over a shorter distance.

30. Mr. Richard Glancy, a senior executive engineer with Mayo County Council, said that no agreement was reached following the letter of offer of 13th July, 2006. He was given the impression by the second named defendant that the work was being held up by the attitude of the plaintiffs. The deadline was set in the letter of 1st September, 2006, to ensure that there was no delay in the completion of the Bypass scheme. When the appeal against Planning Permission P06/3897 was withdrawn, the plaintiffs opted for Proposal A, but there was no planning permission for works on the plaintiffs' land and there was uncertainty over issues of archaeology which might affect building over the plaintiffs' land. He said that the drawing number 401-1A went to An Bord Pleanála and became part of the plan. On this issue, I prefer his evidence to that of Ms. Geraldine Fahy. Mr. Glancy said that the contractor was preparing to go the route of Proposal B but the plaintiffs tried to prevent this by appealing the planning permission. Yet, it is Proposal B that they are now seeking.

31. Mr. Tony McNulty, a senior engineer with the County Council, gave evidence that at the arbitration due to be heard in September 2009, that agreement could be made to alter the wall. He said that landscaping will, in time, obscure the wall. He was of the view that the plaintiffs rejected almost every proposal that was put before them and that after two and a half years, nothing had been agreed. He accepted that the new access road would not be of the same standard as the original access road.

32. It is worth examining some of the correspondence leading to the defendants finally building the road at its present location. On 13th June, 2006, the County Council wrote to the plaintiffs' representative. The letter was without prejudice but any privilege attaching to the letter has been waived by the parties. In that letter, the County Council stated:

"(i) It is agreed that new access to Claimant's property would be constructed on lands made available by the Contractor, SIAC Wills JV Limited (SWJV), subject to SWJV arranging purchase of lands from Mr. Lynskey and dedication of lands by Claimant to facilitate construction of access at new location."

The letter contained other matters in a schedule of accommodation works to be carried out, including a new entrance made from stonemasonry walls, and pillars, landscaping and other works and features. No agreement was reached on these matters and on 1st September, 2006, the County Council wrote to the plaintiffs' agricultural consultant, following a telephone call which outlined the plaintiffs' concerns regarding the vertical alignment of the proposed access road. A table of comparison of accommodation work proposals was supplied with that letter which showed Proposal A and Proposal B already referred to. The letter concluded by stating:

"Notwithstanding the negotiations that have preceded this correspondence, I have been advised by SIAC Wills JV that if agreement is not reached on it before 15th September, 2006, in regard to Proposal A, then works in connection with Proposal B will commence on 18th September, 2006."

33. In a letter of 1st June, 2007, the plaintiffs' solicitors wrote to say that they were withdrawing their appeal to An Bord Pleanála in respect of planning permission P06/3897 on that date. The letter then stated:

"Accordingly, they confirm that they wish to accept the accommodation works set out in your letter of offer of 13th June, 2006, copy attached hereto. Subject to your written communication of same, they shall arrange for dedication of lands to facilitate construction of new access on their property in accordance with accommodation work item No. 1 of your letter as follows:-

'It is agreed that new access to Claimant's property would be constructed on lands made available by the Contractor, SIAC Wills JV Limited (SWJV), subject to SWJV arranging purchase of lands from Mr. Lynskey and dedication of lands by Claimant to facilitate construction of access at new location'."

34. One would have thought that if they were withdrawing their appeal to the planning permission in respect of Proposal B that they would have opted for that solution as it went some way to meet the plaintiffs' concerns about the access road being too near the new Bypass. There were now two planning permissions, namely, the permission granted for the scheme by An Bord Pleanála and showing the access road in drawing 401-1A, and the planning permission for Proposal B contained in Planning Permission P06/3897. But the plaintiffs opted for the solution which had no planning permission at a time when the Bypass scheme was approaching its completion date. The first named plaintiff conceded, in his evidence, that he knew the Bypass was to be completed by the end of 2007.

35. There is one other item of correspondence to which I wish to refer. On 9th May, 2006, Mr. John Mitchell, the project manager of the second named defendant, wrote to the first named defendant on the subject of the plaintiffs' entrance, in which he stated:

"As you are aware, the lands made available at the McNicholas property in Cuilmore, are insufficient to construct the access road and accommodation works to the standard of the existing entrance or to Mr. McNicholas expectations. In fact, it is (sic) appears that any access will be substandard in order to fit into the lands made available . . .

We consider that all efforts possible should be made to mitigate the undoubted risk this element of the works poses to the project as a whole. Please advise if and when you are available to participate in such a meeting with Mr. McNicholas or his advisors so that we can make any necessary arrangements."

36. This letter is significant. It acknowledges that any access which was built in order to fit into the lands which had been Compulsorily Purchased would be substandard. This letter was written before the purchase of the Lynskey lands by the second named defendant.

Conclusions

37. The access road which has been built is in accordance with the planning approval for the scheme passed by An Bord Pleanála. On the other hand, it is accepted by the defendants that it is substandard on the grounds that it was built on lands which were insufficient for the purpose (see evidence of Mr. Tony McNulty and letter from second named defendant, 9th May, 2006). The first named defendant accepts that it is responsible for any acts of the second named defendant. It must be pointed out that, insofar as there was an insufficient amount of land to enable a better access road to be built, the plaintiffs did not challenge the Compulsory Purchase Order. The access road, as built, is legal, in the sense that it has a permission from An Bord Pleanála. There is ample evidence to show that the defendants sought to address the problem by purchasing the Lynskey lands. I am satisfied that if the plaintiffs had been more cooperative, the new access road could have been moved further from the Bypass by means of the Lynskey land purchase and the plaintiffs ceding part of their own lands. The second named defendant went so far as to purchase part of the Lynskey lands and obtain a planning permission for the road to be built across those lands, but their plan was frustrated by the plaintiffs, who appealed the planning permission. The plaintiffs knew that the Bypass scheme had to be completed by the end of 2007. When a realistic proposal was put to them to deal with their concerns, they failed to properly engage with the defendants and make a decision within a reasonable time limit which was imposed on them. While the plaintiffs were understandably upset at the new Bypass crossing their original access road and the loss of amenity thereby arising, it did not excuse their conduct in frustrating the attempts of the defendants to provide a solution to the problem which had arisen. While the first named plaintiff undoubtedly suffers from vertigo, the manner in which this was used by the plaintiffs to object to the new access road was, in my view, spurious. I have been told that the arbitration arising on foot of the CPO will be heard in September 2009, and that the aesthetic problems with the new road and the block wall can be addressed at this arbitration and that the issue of landscaping can be addressed. Indeed, the Planning Permission P06/3897 addressed the issue of landscaping but this was appealed by the plaintiffs.

38. The access road, as built, complies with the planning permission granted for the scheme by An Bord Pleanála but it is accepted by the defendants that it has resulted in a road which is "substandard". When the plaintiffs withdrew their planning appeal, it is difficult to understand why the defendants did not proceed to build the road across the Lynskey lands in accordance with Proposal B. That would not have addressed all the plaintiffs' issues because the road would have continued along its existing path further along its route. But it would have improved the situation somewhat. The ideal solution would have been for the plaintiffs to engage in a meaningful way with the defendants so that the new access

road could have continued through the Lynskey lands and down through a portion of lands to be ceded by the plaintiffs. By the time they finally committed themselves to this, it was too late.

39. This has created an anomaly where the new access road is built in accordance with a permission of An Bord Pleanála and yet appears to be substandard as it has been built on lands which are insufficient for the purpose. To that extent, I think it could be described as an “*unsuitable*” access. I am satisfied, however, that a suitable access could have been constructed if the plaintiffs had behaved in a more reasonable fashion and they must bear responsibility for their own actions. I am also satisfied that the defendants could have built the road across the Lynskey lands which would have made it more suitable and no satisfactory explanation was given as to why this was not done. In short, I believe there was fault on both sides.

40. At this point, it would not be practical to re-route the access road and in view of the conduct of the plaintiffs, I do not propose to make any order in that regard. Insofar as the route on which the road has been built diminishes the amenity value of the plaintiffs’ property, this is something that can be adequately dealt with in the arbitration arising on foot of the Compulsory Purchase Order. I have been referred to the submission for compensation made on behalf of the plaintiffs on 12th June, 2007, under the Compulsory Purchase Order, and it includes a claim for the following matters:

- (a) Injurious affection to amenity and use of dwelling house;
- (b) loss of privacy and seclusion previously enjoyed and resultant exposure to a National Primary Route;
- (c) location of dwelling on edge of carriageway without benefit of facility to directly access said carriageway and replacement of mature tree-lined avenue with access of much steeper and higher gradient than original access to dwelling;
- (d) proposed access at highest point may trigger onset of vertigo suffered by the first named plaintiff.

The statement of claim does not make out a claim for damages, but rather, for declarations and injunctive relief and I am satisfied that this is not a case in which it would be appropriate to make an award of damages as any shortcomings in the suitability of the access are within the scope of the forthcoming arbitration and can properly be dealt with there.

41. In the circumstances which are particular to this case, I do not therefore propose to make any order or declaration.