

DIV/1B

22 JAN 1986

REF. TO 337

NORTHERN IRELAND OFFICE

WHITEHALL

LONDON SW1A 2A7

David Barrie Esq

RID

FCO

Dear David,

COMPENSATION FOR DAMAGE TO PRIVATE PROPERTY IN THE
REPUBLIC OF IRELAND: FUTURE CASES

Your papers will show a number of exchanges with the DFA over the payment of compensation for damage to private property in Irish Republic caused by explosives used to crater border roads, mostly during the mid-1970s.

2. Agreement was reached with the Irish that we would pay them IR £600,000 in settlement of those claims which had been processed through the Irish courts, on the understanding that we were not accepting liability and that money was an ex gratia sum rather than formal reimbursement. This was made public in February of last year. There were outstanding a number of individual claims, mainly from the Kiltclogher area, which had been lodged directly with MOD over the years. These claims were too old to be dealt with by the Irish courts and HMG undertook to settle them direct with the claimants. The NIO is providing the funds for this purpose; the negotiations are being conducted by MOD Claims Commission. So far three of these claims have been finally determined.

3. We agreed with the Irish that there would be further discussions between the two Governments about the handling of any future claims in respect of private property. The Irish have not since then reverted to the matter. We have had on the stocks for some time a note setting out a scheme which we might put to the Irish at the right moment. It is predicated on the assumption that HMG will have to offer compensation in future cases and that it is better for us to do so on an individual basis. The NIO would accept responsibility for finance and negotiations. Alternative approaches, for example undertaking to reimburse the Irish once claims had been processed through the Irish system were less satisfactory, mainly because they would inevitably oblige us to underwrite such compensation as the Irish courts had seen fit to provide. I attach a copy of our note.

/...

25/1/86

File 30.3

Mr Mearns
FCO INFO.

cc MR DAVID Hume
LAB
Somerset House Annex.
This is the document you were looking
for. I think, RD & not appear to have
replied to this
letter
28 March 1984

JACKIE SBAE
21.1.86.

ms sign → M. Skyle.
file 4/2.

4. Quite separate considerations will bear on how and when we put these matters to the Irish. Although we have not pressed ahead with things, and although the Irish have said nothing, there is clearly advantage in settling the whole matter once and for all so that there is no uncertainty over any future cases. It might also be argued that now and the foreseeable future is an appropriate time to offer a scheme to the Irish; with the one exception of what we say about reimbursement of compensation that might be paid through their courts they are likely generally to welcome it. I realise however there are conflicting considerations. The Irish have recently shown great sensitivity over border closures and we would not wish to take steps which would lead them to believe there was to be a further rash of such closures. These are however matters which we might better discuss between ourselves and which do not bear directly on the substance of the scheme.

5. A copy of this letter goes to Jamieson in the MOD Claims Commission.

*Yours,
S W Boys Smith*

S W BOYS SMITH

hidden ccs:

Mr McClelland
Mr Coulson
Mr Bell

COMPENSATION FOR DAMAGE TO PRIVATE PROPERTY IN THE
REPUBLIC OF IRELAND: FUTURE CASES

Introduction

1. This note outlines the nature of a scheme under which the Northern Ireland Office on behalf of the UK Government would fulfil an undertaking given to the Irish Government to pay compensation direct to private property owners in the Republic in respect of any damage caused to their property by Army cratering on the border.

Nature of the Scheme

2. The amount of compensation under the proposed non-statutory arrangement would be assessed in the same way as claims arising under the Northern Ireland (Emergency Provisions) Act 1978.

Annexed to this note is a summary of the kinds of claim which are admissible under the 1977 Order and which in principle would therefore be admissible under this Scheme.

3. Claimants would be invited to submit claims to the Northern Ireland Office in a form which, on application, they would be told of. The NIO would subsequently follow a course as similar as possible to that they would adopt in Northern Ireland in respect of, for example, the appointment of loss adjusters, the making of an offer of compensation, and the subsequent negotiations leading to a settlement. The NIO would also adopt a similar approach on such matters as out of time claims. The claimants would therefore not be in a position to argue that in respect either of the handling of their claim or of the amount of the settlement they were worse off than people resident in Northern Ireland; nor would people in Northern Ireland be in a position to claim that the opposite was the case.

Basis of the Agreement with the Irish Government

4. It should be put to the Irish Government that the UK is willing to agree with them to the implementation of a non-statutory scheme of this kind in discharge of such obligations as it may be thought to have, but without any acceptance of liability on its part for the payment of compensation. The scheme, by its nature, will involve the UK Government in dealings direct with individual claimants and not with authorities in the Republic, and the terms of any settlement will therefore be a matter between the UK Government and those claimants.

Publicity

5. The UK Government would not propose to give any general publicity to its willingness to enter into any arrangement of this kind, and it sees no need for publicity. Were there to be any future cratering on the border which might involve the risk of damage to property in the Republic, the UK authorities would have been forewarned and would make arrangements (? through the Garda) to be informed at an early date if damage had occurred. It would then be in a position to draw to the early attention of potential claimants its willingness to consider payment of compensation; it attaches considerable importance to being in a position to arrange for loss adjusters to visit the property in question without delay. Although the UK Government's position would thus become known after the first such incident it would wish to adopt a similar approach on any future occasion that might arise.

Double Compensation

6. The main difficulty over this approach, and a potential source of criticism, is the possibility that those paid compensation by the UK authorities would also be able to claim compensation under the Republic's malicious damage compensation scheme, provided they lodged their claims in time. There are four

main options for dealing with this difficulty:

- (i) That the Irish Government removes from its scheme the entitlement to compensation for those whose property is damaged in cratering operations on the border. This is highly unlikely to be practicable, and could carry unhelpful implications for the UK. The infliction of damage in cratering operations is sensitive and amendment of the Irish scheme would require primary legislation. It is not likely to be politically acceptable in the Republic for the scheme to be limited in this way. Moreover the Republic could not readily be expected to legislate in this way while our scheme remained non-statutory and therefore informal; we would wish to resist pressure in any way to formalise our undertaking to pay compensation in these cases. Additionally, we had accepted for our own purposes that to legislate for the very few possible future cases would be a quite dis-proportionate response.
- (ii) The UK compensation should be reduced by the amount of any compensation already paid under the Republic's scheme. This would be practicable, albeit in conflict with the general principle that non-statutory scheme should be comparable to the Northern Ireland arrangements, but is likely to be relevant in very few cases. Claims under the Republic's scheme are processed through their courts and appear to take a great deal longer to settle than do claims for compensation under the 1977 Order. Claimants could be expected to delay completion of their cases in the Irish courts if they learned that they might lose if they settled in the Republic before they settled with the UK authorities. At most therefore, this approach is likely to avoid double compensation only on the first occasion on which it arose.

- (iii) The UK authorities await the completion of any claims submitted in the Republic before finally coming to a settlement. Given the time which the Irish cases take, not necessarily as a result of prevarication on the part of the claimant, this is likely to mean an unacceptable degree of delay to the point where the UK authorities are seen not to be offering compensation on a basis in any way comparable with the Northern Irish scheme, and so to be in breach of the main principle on which the arrangement is based.
- (iv) To seek an undertaking from claimants in terms similar to that sought in respect of compensation for ships lost in Lough Foyle, as follows: "as a condition of the agreement to make a final offer and payment the Northern Ireland Office requires you to undertake that if you receive in proceedings outside Northern Ireland a payment in respect of the heads of loss and damage for which compensation will have been paid by the Northern Ireland Office you will immediately repay to the Secretary of State a sum equal to the final payment or the total amount received from the proceedings outside Northern Ireland whichever shall be the lesser." However, the Lough Foyle claimants were all Northern Ireland residents. To make such an undertaking following crater damage in the Republic would raise many difficult questions of public and private international law, depending on where the contract was deemed to be signed, which country's laws were deemed applicable, the residency of both parties and whether the claimant held assets in both countries. Although such a contract could be drawn up, there are strong doubts about the practicalities of enforcement and it is unlikely that such a course would be worth pursuing.

7. Of these solutions only (ii) is practicable and justified by the circumstances. It would not rule out the possibility of double compensation but would mean we had discharged our obligations to the claimant to ensure that they receive the amount they would have expected under the 1977 Order. And at the time of settlement we would be paying an amount which was proper in the then prevailing circumstances. This is better than having no regard to double compensation and paying the full amount regardless of what has happened already in the Republic.

Appeal

8. There is no court or other authority with jurisdiction over a non-statutory scheme of this kind. There can therefore be no appeal on either quantum or principle. It is in this that the main difference must lie between the scheme and the statutory compensation arrangements in Northern Ireland.

9. This may well be seen as a major disadvantage of the scheme, at least by claimants, and possibly, though not necessarily, by the Government of the Republic: discretion will rest entirely with the UK authorities. It may also prompt people to prefer recourse to the compensation available in the Republic. There is no way out of this, and a perfectly reasonable defence would exist along such lines as these: "claimants are being dealt with as they would be if the property was in Northern Ireland. [If Pressed] people can use the Republic's scheme if they prefer". This line skates over the fact that the availability of an appeal, and legal precedent, may well influence the course of negotiations, but is nevertheless a defensible position.

Conclusion

10. The UK Government should propose to the Irish Government a scheme on the lines proposed above in paragraphs 2 and 3, taken with paragraph 7. It would be put to the Irish along the lines of paragraph 4, making clear to them that this was the limit of our offer and that we would not therefore reimburse them for any claims successfully processed through the Irish Courts.

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BROAD HEADS OF DAMAGE COMPENSATION

1. Physical Damage

- (1) buildings
- (2) fixtures and fittings
- (3) contents
- (4) stock, including livestock
- (5) vehicles

2. Consequential Loss

- (1) increased cost of carrying on business
- (2) loss of profit
- (3) bank interest on necessary borrowings to reinstate business

Notes

1. A reduction may be made in respect of betterment of property.
2. Compensation for consequential loss is not paid in Irish Republic.