

[2016] IEHC 150.

THE HIGH COURT

Approved Judgment

(1)

No Redaction Needed

Record No. 2015/696/JR

Between

Approved Judgment

COLM MOORE

Applicant

– and –

THE MINISTER FOR ARTS, HERITAGE AND THE GAELTEACHT

Respondent

– and –

CHARTERED LAND LIMITED

Notice Party

(2)

Record No. 2016/51/MCA

Between

COLM MOORE

Applicant

– and –

THE MINISTER FOR ARTS, HERITAGE AND THE GAELTEACHT

First Named Respondent

– and –

CHARTERED LAND LIMITED

Second Named Respondent

(3)

Record No. 2015/387/MCA

Between

COLM MOORE

Applicant

– and –

THE MINISTER FOR ARTS, HERITAGE AND THE GAELTEACHT

Respondent

TABLE OF CONTENTS

(Numbers in square brackets are paragraph numbers)

PART 1

1916

Chapter 1	Nurse O’Farrell	[1]
<i>A.</i>	<i>27th April, 1916.</i>	[1]
<i>B.</i>	<i>28th April, 1916.</i>	[2]
<i>C.</i>	<i>29th April, 1916.</i>	[8]
<i>D.</i>	<i>30th April, 1916.</i>	[27]
Chapter 2	The Wider Picture	[28]
<i>A.</i>	<i>The GPO Garrison.</i>	[28]
<i>B.</i>	<i>Evacuation of the GPO.</i>	[30]
<i>C.</i>	<i>The O’Rahilly’s Attack.</i>	[31]
<i>D.</i>	<i>The Main Evacuation.</i>	[41]

<i>E.</i>	<i>Crossing Moore Lane.</i>	[46]
<i>F.</i>	<i>'Holed Up' in Moore Street.</i>	[51]
Chapter 3	The Civilian Experience	[64]
<i>A.</i>	<i>Overview.</i>	[64]
<i>B.</i>	<i>Civilian Deaths in Moore Street.</i>	[66]
<i>C.</i>	<i>The Deaths of Two Children.</i>	[71]
<i>D.</i>	<i>Conclusion.</i>	[74]
Chapter 4	The British Perspective	[75]
<i>Notes to Part 1</i>		[after 82]

PART 2

TIMELINE

Chapter 5	A Useful Summary Timeline	[83]
<i>A.</i>	<i>Overview.</i>	[83]
<i>B.</i>	<i>Summary Timeline.</i>	[83]

PART 3

SOME PRELIMINARY MATTERS

Chapter 6	The Parties Involved	[84]
Chapter 7	Alleged Abuse of Process Arising	[87]

PART 4

THE JUDICIAL REVIEW APPLICATION

Chapter 8	Netting the Issues Arising	[90]
Chapter 9	The Reliefs Sought by Mr Moore	[95]
Chapter 10	Some Unique Features Presenting	[96]
A.	<i>Some contentions by the Minister.</i>	[96]
i.	The Uniqueness of the Easter Rising.	[100]
ii.	The Uniqueness of the GPO.	[101]
iii.	The Uniqueness of the Moore Street Battle-Site.	[102]
B.	<i>The Unique Significance of this Case.</i>	[103]

C.	<i>Consequences?</i>	[104]
Chapter 11	The Act of 1930: Overview	[105]
Chapter 12	National Monuments, Monuments, Battle-Sites and Access	[110]
A.	<i>What is a “national monument”?</i>	[110]
B.	<i>What is a “monument”?</i>	[114]
i.	Definition of “ <i>monument</i> ”.	[115]
ii.	Remains and traces.	[120]
C.	<i>Can a battle-site be a monument?</i>	[124]
D.	<i>Means of Access.</i>	[130]
Chapter 13	Determination, Protection, Preservation and Access	[131]
A.	<i>Determination of what constitutes a ‘national monument’.</i>	[131]
B.	<i>Protection and Preservation of national monuments.</i>	[135]
i.	Section 8 of the Act of 1930.	[135]
ii.	Section 12 of the Act of 1930.	[139]
iii.	Section 14 of the Act of 1930.	[142]
Chapter 14	The Impugned Consent	[144]
A.	<i>Non-compliance with terms of consent.</i>	[144]
B.	<i>Lack of Standing to Claim Consent Had Lapsed?</i>	[153]

Chapter 15	Revocation of Impugned Consent	[155]
Chapter 16	Delay	[159]
Chapter 17	Jurisdiction to Make Declaration as to National Monument Status?	[163]
Chapter 18	The Venice Charter	[168]
Chapter 19	The Extent of the National Monument at Moore Street, as recognised by the Minister	[172]
Chapter 20	The Historical Importance of Moore Street and Its Environs	[177]
A.	<i>Overview.</i>	[177]
B.	<i>The Affidavit Evidence of Mr Kelly.</i>	[179]
C.	<i>The Affidavit Evidence of Mr Bateson.</i>	[180]
D.	<i>The Affidavit Evidence of Mr Coogan.</i>	[181]
Chapter 21	The View of the National Museum	[182]
A.	<i>Dr Wallace's Letter.</i>	[182]
B.	<i>Dr Lynam's Letter.</i>	[183]
Chapter 22	Mr Broderick's Report <i>or</i> No. 18 Reconsidered	[186]
Chapter 23	Mr Hosford's Report <i>or</i> What Brickwork Can Tell Us	[190]

Chapter 24	Mr Hennessy's Affidavit Evidence <i>or Of Numbers and Ruins</i>	[192]
A.	<i>Overview.</i>	[192]
B.	<i>Nos. 10–25.</i>	[193]
C.	<i>Nos. 18 and 19.</i>	[194]
Chapter 25	Mr Allen's Affidavit Evidence <i>or Why Nos. 14–17?</i>	[197]
Chapter 26	The Affidavit Evidence of Mr Cumming and Ms Donnelly <i>or A Review of Nos. 13 and 18</i>	[240]
A.	<i>Overview.</i>	[240]
B.	<i>No. 13.</i>	[242]
C.	<i>No. 18.</i>	[243]
Chapter 27	The Affidavit Evidence of Ms Lynch and Mr Colreavy	[244]
A.	<i>Is there a 'Moore Street Battle-Site'?</i>	[244]
B.	<i>A Question of Architecture?</i>	[246]
C.	<i>Three Suggested Reasons why there is No Battlefield Site.</i>	[248]
D.	<i>Interaction of planning law and the National Monuments Acts.</i>	[252]
E.	<i>An overall assessment of the Affidavit Evidence of Ms Lynch and Mr Colreavy.</i>	[254]

Chapter 28	The Garland Report <i>or</i> The Cellar and Certain Remains	[260]
A.	<i>Overview.</i>	[260]
B.	<i>The Cellar Behind No. 14.</i>	[261]
C.	<i>Certain Remains.</i>	[263]
Chapter 29	Comments on Specific Properties: Overview	[266]
Chapter 30	Nos. 10–11	[269]
A.	<i>The Historical Importance of No. 10.</i>	[269]
B.	<i>Past Voices.</i>	[271]
1.	Elizabeth O’Farrell.	[272]
2.	Eamonn Bulfin.	[273]
3.	Feergus de Búrca.	[274]
4.	Patrick Caldwell.	[275]
5.	Ruadhri Henderson.	[276]
6.	Seán McLoughlin.	[277]
7.	Seamus Robinson.	[278]
8.	Desmond Ryan.	[279]
9.	Michael Staines.	[280]
10.	Liam Tannam.	[281]
11.	Oscar Traynor.	[282]
B.	<i>The State of Condition of Nos. 10–11 at the time of the Myles Report.</i>	[283]
C.	<i>Summary of Position as Regards No. 10.</i>	[285]

Chapter 31	Nos. 11–12	[287]
Chapter 32	Nos. 12–13	[290]
<i>A.</i>	<i>State of Condition of Nos. 12–13 at the time of the Myles Report.</i>	[290]
<i>B.</i>	<i>Summary of Position as regards No. 12.</i>	[293]
<i>C.</i>	<i>Summary of Position as Regards No. 13.</i>	[294]
Chapter 33	Nos. 14–17	[297]
Chapter 34	Nos. 18–19	[298]
<i>A.</i>	<i>The State of Condition of Nos. 18–19 at the time of the Myles Report.</i>	[298]
<i>B.</i>	<i>Summary of Position as Regards No. 18.</i>	[299]
<i>C.</i>	<i>Summary of Position as Regards No. 19.</i>	[301]
Chapter 35	Nos. 20–21 (O’Hanlon’s)	[305]
<i>A.</i>	<i>Past Voices.</i>	[305]
1.	Eamonn Bulfin.	[306]
2.	Feergus de Búrca.	[307]
3.	Seán McLoughlin.	[308]
4.	Liam Tannam.	[309]
5.	Oscar Traynor.	[310]
<i>B.</i>	<i>State of Condition of Nos. 20–21 at the time of the Myles Report.</i>	[311]

C.	<i>Summary of Position as Regards Nos. 20–21.</i>	[312]
Chapter 36	Nos. 22/23–24/25	[314]
A.	<i>Past Voices.</i>	[314]
1.	Feargus de Búrca.	[315]
2.	Ruaidhrí Henderson.	[316]
3.	Diarmuid Lynch.	[317]
4.	Seán McLoughlin.	[318]
5.	Seamus Robinson.	[319]
6.	Michael Staines.	[320]
7.	Liam Tannam.	[321]
8.	Oscar Traynor.	[322]
B.	<i>State of Condition of Nos. 22–25 at the time of the Myles Report.</i>	[323]
Chapter 37	Henry Place and Places Thereon	[324]
A.	<i>Voices from the Past.</i>	[324]
1.	Frank Henderson.	[325]
2.	Ruaidhrí Henderson.	[326]
3.	Diarmuid Lynch.	[327]
4.	Seán McLoughlin.	[328]
5.	Seamus Robinson.	[329]
6.	Desmond Ryan.	[330]
7.	Michael Staines.	[331]
8.	Liam Tannam.	[332]

B.	<i>O'Brien's Mineral Water Works Building</i>	[333]
C.	<i>State of Condition of O'Brien & Co. Bottling Stores at the time of the Myles Report.</i>	[335]
D.	<i>State of Condition of the 'White House' (10, Moore Place) at the time of the Myles Report.</i>	[339]
E.	<i>State of Condition of O'Brien's Stables and Hay Loft at the time of the Myles Report.</i>	[342]
Chapter 38	Moore Lane	[344]
Chapter 39	O'Rahilly Parade	[347]
A.	<i>Past Voices.</i>	[347]
1.	Elizabeth O'Farrell.	[348]
2.	Seán McLoughlin.	[349]
3.	Michael Staines.	[350]
B.	<i>State of Condition of O'Rahilly Parade at the time of the Myles Report.</i>	[351]
Chapter 40	The Moore Street Battle-Site?	[352]
A.	<i>A Visit to Moore Street.</i>	[352]
B.	<i>Evidence Supporting the Concept of a Moore Street Battle-Site.</i>	[359]
Chapter 41	Some Key Conclusions as to National Monument Status	[365]

PART 5

THE FIRST SECTION 160 PROCEEDINGS

Chapter 42	What Mr Moore Seeks	[369]
Chapter 43	Section 160 of the Act of 2000	[370]
Chapter 44	An Aside on ‘Saving Provisions’ and Dual Régimes	[372]
A.	<i>Overview.</i>	[372]
B.	<i>‘Saving provisions’.</i>	[373]
C.	<i>Dual Operation.</i>	[376]
Chapter 45	Section 260 of the Act of 2000	[380]
Chapter 46	The Substance of the Present Application	[399]
A.	<i>Overview.</i>	[399]
B.	<i>Planning Permission.</i>	[400]
C.	<i>Ministerial Consent, as revised.</i>	[406]
D.	<i>Differences between Planning Permission and Ministerial Consent, as revised.</i>	[411]
Chapter 47	The Evidence of Mr Pearson Evans	[415]

Chapter 48	The Evidence of Mr Allen	[416]
Chapter 49	The Evidence of Ms Shaffrey	[417]
Chapter 50	The Evidence and Report of Mr Ryan	[418]
Chapter 51	Material Differences in Works	[420]
A.	<i>Overview.</i>	[420]
B.	<i>Material Differences in Relation to Works.</i>	[421]
Chapter 52	Material Differences in Relation to Use	[425]
Chapter 53	Non-Compliance with Conditions of Permission	[428]
Chapter 54	Breach of Sequence of Permitted Development	[437]
Chapter 55	Severability	[444]
A.	<i>Overview.</i>	[444]
B.	<i>Summary of reasons why severance is objectionable.</i>	[445]
i.	Permission granted for development as a whole.	[446]
a.	<i>Site notices and planning applications.</i>	[447]
b.	<i>Planning inspector's report.</i>	[448]
c.	<i>The Little Report of April 2011.</i>	[450]
d.	<i>Reasons and Considerations of An Bord Pleanála.</i>	[451]
ii.	Demolition of Nos. 13, 18 and 19.	[454]

Chapter 56	Case-law on Severability	[455]
Chapter 57	Construction of Condition 5	[463]
A.	<i>Overview.</i>	[463]
B.	<i>Interpretation of planning conditions.</i>	[467]
Chapter 58	The Detail of Condition 5	[470]
Chapter 59	Environmental Impact Assessment Requirements	[473]
Chapter 60	The Court's Discretion; a Consideration of Leading Case-Law	[479]
A.	<i>Overview.</i>	[479]
B.	<i>The Extent of the Court's Discretion.</i>	[480]
i.	<i>Stafford v. Roadstone Ltd.</i>	[480]
ii.	<i>Dublin County Council v. Matra Investments Ltd.</i>	[481]
iii.	<i>Morris v. Garvey.</i>	[482]
iv.	<i>Dublin Corporation v. McGowan.</i>	[484]
v.	<i>White v. McInerney Construction Ltd.</i>	[485]
vi.	<i>Grimes v. Punchestown Developments Co. Ltd.</i>	[486]
vii.	<i>Leen v. Aer Rianta c.p.t.</i>	[487]
viii.	<i>Altara Developments Limited v. Ventola Limited.</i>	[488]
ix.	<i>Wicklow County Council v. Forest Fencing t/a Abwood Homes</i>	[489]
x.	<i>Cork County Council v. Slattery Pre Cast Concrete Ltd.</i>	[490]

xi.	<i>Wicklow County Council v. Kinsella.</i>	[491]
C.	<i>Matters of principle versus questions of principal.</i>	[495]
D.	<i>Technicality and triviality.</i>	[498]

Chapter 61	The Court's Discretion – an Attempted Synthesis of Principle	[499]
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I.	Supreme Court Authorities.	
i.	<i>Breadth of Discretion.</i>	
ii.	<i>Rationale for Discretion.</i>	
iii.	<i>Role of Court.</i>	
iv.	<i>Balancing Exercise for Court.</i>	
v.	<i>Relevance of Equitable Considerations.</i>	
vi.	<i>Developer Behaviour.</i>	
II.	High Court Authorities.	
vii.	<i>Rationale for s.160.</i>	
viii.	<i>Role of Court.</i>	
ix.	<i>Breadth of Discretion.</i>	
x.	<i>Balancing Exercise for Court.</i>	
xi.	<i>Developer Behaviour.</i>	
xii.	<i>Factors Relevant to Exercise of Discretion.</i>	
xiii.	<i>Factors Justifying Refusal of Relief.</i>	
xiv.	<i>Relevance of Equitable Considerations.</i>	
xv.	<i>Relevance of Financial Disadvantage to Developer.</i>	
xvi.	<i>Technical Breaches.</i>	

Chapter 62	The Court’s Discretion – Application of Principle	[500]
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PART 6

THE SECOND S.160 PROCEEDINGS

Chapter 63	Overview	[534]
Chapter 64	Reliefs Sought	[535]
Chapter 65	Background Facts	[536]
Chapter 66	Section 260 of the Act of 2000	[541]
Chapter 67	Is the Erection of the Banner an Act of Maintenance?	[542]
Chapter 68	Is the Banner an ‘Advertisement’?	[551]
Chapter 69	Development, Works and Material Change of Use?	[555]
A.	“Development”, “works” and “use”.	[555]
B.	<i>Application of Law to Facts at Hand.</i>	[558]
i.	Overview.	[558]

ii.	Works.	[559]
iii.	Material change of use.	[560]
Chapter 70	Unauthorised and Exempted Development	[561]
<i>A.</i>	<i>Some Terms Defined.</i>	[561]
<i>B.</i>	<i>Exempted Development?</i>	[563]
i.	Overview.	[563]
ii.	Section 4(1)(f) of the Act of 2000.	[567]
iii.	Section 57 of the Act of 2000.	[571]
iv.	Issuance of declaration under s.57 of the Act of 2000.	[576]
Chapter 71	Temporary Development	[577]
<i>A.</i>	<i>Overview.</i>	[577]
<i>B.</i>	<i>Exempted temporary developments.</i>	[578]
<i>C.</i>	<i>Temporary Advertisements.</i>	[579]
<i>D.</i>	<i>Duration for which Banner in Place.</i>	[581]
<i>E.</i>	<i>Previous Section 160 Orders in Respect of Advertisements.</i>	[583]
Chapter 72	Discretion Arising	[587]

PART 7

THE RELIEFS THAT THE COURT WILL GRANT

Chapter 73	Reliefs	[622]
<i>A.</i>	<i>Overview.</i>	[622]
<i>B.</i>	<i>The Judicial Review Application.</i>	[623]
<i>C.</i>	<i>The First Section 160 Application.</i>	[660]
<i>D.</i>	<i>The Second Section 160 Application.</i>	[670]

PART 1

1916

Chapter 1

Nurse O'Farrell

A. 27th April, 1916.

1. By Thursday afternoon it was clear that the GPO could no longer be held. On Pearse's orders, all but three members of Cumann na mBan left the building. The three members who remained were Winifred Carney (Connolly's secretary) and two nurses, Julia Grenan and Elizabeth O'Farrell. Between them this trio cared for the wounded and gently ushered the dying to their end. O'Farrell and Grenan, Dubliners both, had been friends since their schooldays with the Sisters of Mercy. Carney appears to have been a more recent acquaintance. A photo taken from around the time shows O'Farrell in a crumpled blouse, hair parted plainly across a high forehead, and with a composed look about her. She was to play a remarkable role in the events of the next 48 hours.

B. 28th April, 1916.

2. At eight o'clock in the evening, the GPO was completely in flames, and the remaining Republicans were forced to quit the premises. Pearse was the last to leave, having done one final recce of the building to make sure that no-one was left behind. He joined the last of three units who ran out of a since-gone side-entrance to the GPO, and raced across Henry Street into Henry Place. O'Farrell and the other women were just ahead of Pearse. O'Farrell understood that the intention was to join up with other Republicans who were holding out further to the west, near the Four Courts. This was not to happen.

3. Henry Place is an 'L-shaped' street. One limb of the 'L' opens onto Henry Street. The other, longer limb runs between some buildings and opens onto Moore Street. About a third of the way down this second limb there is a junction into Moore Lane. Coming at it from the GPO, this junction is on the right. As the name perhaps suggests, Moore Lane runs to the rear of the buildings that front onto Moore Street. Turn left towards the end of the lane and you are on O'Rahilly Parade which also opens onto Moore Street. Continue on further up Moore Lane without turning left and you come out onto what is now Parnell Street.

4. When Pearse, O'Farrell and the others got to the junction with Moore Lane, they found the remainders of a partial barricade that an earlier contingent of Republicans had placed across the junction as a partial shelter from British troops who were positioned further up the Lane. The barricade appears to have been little more than a cart from a nearby stables. The British troops were able to fire over the cart and so the junction was still very dangerous to cross. The Republicans had to take their lives in their hands, run past the junction as quickly as they could and hope that they did not get struck by a British bullet.

5. As O'Farrell ran across the junction, she tripped and fell. In a second, a man – Sean McGarry – ran out of a house on the corner of Henry Place and Moore Street, swept O'Farrell up in his arms and ran into the house with her. For his part in the Rising, McGarry was later sentenced to eight years' penal servitude.

6. When O'Farrell entered the house – this was No. 10, Moore Street – she found several of the members of the Provisional Government there before her. The place was already well-barricaded and the wounded Connolly was lying on a stretcher in the middle of the ground-floor room. O'Farrell would later recall that she went over and asked Connolly how he was. “*Bad,*” he said. “*The soldier who wounded me did a good day's work for the British Government,*” he added.

7. After a time other members of the Provisional Government arrived. Some mattresses were found and Connolly was placed onto one of them. In all, O'Farrell counted that there were 17 men wounded in the retreat from the GPO. She spent the night of the 28th helping to nurse them. In the streets outside, the Republicans could hear the roar of burning buildings, machine guns playing on houses and, at intervals, what seemed to be hand grenades exploding. The air must have smelled of smoke and been tinged with excitement and apprehension.

C. 29th April, 1916.

8. The morning of the 29th, O'Farrell spent helping to cook breakfast for the other Republicans, many of whom had had worked hard through the night, smashing through the walls of the houses on Moore Street to create a line of passage, through the houses, from one end of the block to the other.

9. The outlines of the holes that the Republicans smashed through the walls are still visible today in the houses that have survived since 1916. The holes themselves have since been bricked up. They are a foot or two smaller than an average man's height. To move through the houses the rebels would have had to stoop at the same time that they skipped over any plaster left jutting up from the floor. One of the holes opens onto what is now a stairwell. It is not clear whether the stairwell was there in 1916 and so whether or not the Republicans would have had to leap across the gap to get to the far side of the stairwell. That they managed to burrow through the houses as they did in the course of one evening is a remarkable feat of industry: these were tough and determined individuals.

10. After breakfast, Connolly and the other wounded men were carried through the burrowed holes, with the rest of the able-bodied following after them. Connolly was put to bed in a back-room in No. 16, Moore Street. A council of war was then held in the room between various members of the Provisional Government, men whose names transcend the generations: Pearse, Plunkett, Clarke, Connolly and MacDermott. Today the back-room where this council took place is dusty and dilapidated. The ceiling is worn-through. There are traces of what looks like sky-blue wallpaper on one of the walls. Some people have scrawled their names on the paper. Plywood sheets thrown across the rafters of the parlour below make

it possible to enter the room safely. And yet, for all the stark simplicity of the room – perhaps even because of it – it is a place that that resonates with history. To think that Connolly once lay wounded in the far corner, with other members of the Provisional Government, all of them signatories to the Proclamation, gathered around him for a council of war sends a chill down the spine. To think of what these great men did, to recall that all of the signatories were to die without knowing that their fight for our nation’s independence was ultimately successful, makes this simple room a place of soaring inspiration for all who are children of the independent republic that has been their lasting bequest.

11. Lying on the floor of this small room, while the council of war proceeded, were three wounded Republicans and a badly-injured British soldier, a prisoner, who was lying on a bed to the side of the room. After a while, the three women – O’Farrell, Carney and Grenan – came into the room to attend to the wounded. The British soldier asked if Pearse would speak to him. According to a later account by O’Farrell, Pearse replied “*Certainly*” to this request and came over. The soldier, perhaps embarrassed to be helped by the women, asked if Pearse would lift him a little in the bed. Pearse did this, the soldier putting his arm around Pearse’s neck as the latter hoisted him into a more comfortable posture. Pearse then returned to Connolly’s bedside and the council continued quietly.

12. Shortly afterwards, O’Farrell got orders to bring a message to the British forces at the junction between Moore Street and Parnell Street, the end furthest from Henry Street. This was a very dangerous task for O’Farrell to undertake. There were dead bodies lying in the street outside, and the British were firing at anything that moved. Presumably the hope was that in broad daylight, the British would be less likely to fire on a woman than on a man. But there was every chance that O’Farrell would step from the house into a quick death.

MacDermott hung a white flag out of the window to alert the British to what was coming. Though No. mention of this is made in O'Farrell's later account of events, it is difficult to believe that some effort was not also made to shout up the street that she was coming out.

13. About 12.45p.m., O'Farrell stepped into Moore Street from the doorway of No.15. Her heart must have been thumping in her chest. She had a verbal message from Pearse that he wished to treat with the British. She waved a small, white flag as she moved carefully up the street. The British troops ceased firing and called O'Farrell up to the barrier that the troops had placed across the top-end of the street. As O'Farrell walked along, she saw – at the corner of what is now O'Rahilly Parade – the hat of The O'Rahilly lying on the street. Nearby was his revolver. O'Farrell's first thought was that The O'Rahilly must have made it safely into some house after a gun-fight.

14. At the top of the street, O'Farrell gave Pearse's message to the officer-in-charge. In her later account of events, O'Farrell describes how the officer then asked how many women were in the Moore Street houses. O'Farrell said that there were three. To which the officer said, "*Take my advice and go down again and bring the other two girls out of it.*" He was going to let her return to the houses when he changed his mind and said "*However, you had better wait. I suppose this will have to be reported.*" Then he sent another officer with O'Farrell up towards the Parnell Statue, to a house which the British had occupied, most likely No. 70 or 71 Parnell Street. When O'Farrell and this other officer reached the far-end of O'Connell Street, the officer sent inside for someone in command. After a time, the officer in command came out. The following exchange, as later recounted by O'Farrell, then took place:

O'Farrell – *The Commandant of the Irish Republican Army wishes to treat with the Commandant of the British Forces in Ireland.*

Officer – *The Irish Republican Army – the Sinn Féiners you mean.*
– *The Irish Republican Army, they call themselves, and I think that a very good name too.*

[It is difficult not to admire O'Farrell's spirited response].

- *Will Pearse be able to be moved on a stretcher?*
- *Commandant Pearse doesn't need a stretcher.*
- *Pearse does need a stretcher, madam.*
- *Commandant Pearse doesn't need a stretcher.*
- [to another officer] *Take that Red Cross off her and bring her over there and search her – she is a spy.*

15. This last development cannot but have been a frightening one for O'Farrell. If she were to be treated as a spy, there was every possibility that in the heat of the moment she might yet be shot. Yet, as good a sign of her strength of her character as any, O'Farrell did not panic. She stood as the officer cut the red cross from her sleeve and also from the front of her apron. She then went with him to a branch of the National Bank on the corner of Parnell Street and Cavendish Row. There she was searched and found to be carrying two pairs of scissors (only one was later returned), some sweets, bread and cake.

16. Being satisfied that O'Farrell was not dangerous, the officer took her to wait in, of all places, Tom Clarke's shop. The process of being led off and searched took about 45 minutes.

O'Farrell then had to wait 45 minutes more before she was joined by Brigadier-General Lowe. He treated her in a very gentlemanly manner. O'Farrell passed to Lowe the message that she had been given by Pearse. Lowe's response, Farrell later recalled, was that he would drive her back in his motor-car to the top of Moore Street and that she should return to Pearse and tell him "*that General Lowe would not treat at all until he [Pearse] would surrender unconditionally*". Lowe would then give O'Farrell a further half-hour to return, following which hostilities would resume.

17. All of Lowe's remarks were written down by the officer who had brought O'Farrell to the shop. Then he and Lowe drove back with O'Farrell to the Parnell Street junction of Moore Street. O'Farrell was later to suggest that it was now about 2.25 p.m. However, it must have been later. She had left No. 15 at 12.45 p.m. She had first to reach and then speak with the officer at the top of the street, all of which must have taken 5–10 minutes. By her own reckoning, the walk to the National Bank and the search process that followed took about 45 minutes. She then had to wait about 45 minutes for Lowe, and her account of their interview suggests that it was perhaps 10–15 minutes long. It would then have taken a couple of minutes or more to enter Lowe's car and drive back to Moore Street. All of this comes to in or about two hours which suggests that it must have been closer to 3 p.m. by the time O'Farrell got back to where Pearse was 'holed up'.

18. As O'Farrell walked down Moore Street, she again passed what is now O'Rahilly Parade. This time she saw The O'Rahilly's body lying about four yards up the lane. His feet were against the steps of the first door on the right of the Parade (the side-entrance to one of the shops that fronted onto Moore Street). His head was touching the kerb. He looked dead to her at this time.

19. Back at No. 16, O'Farrell delivered Lowe's written and spoken messages to Pearse. She also told him that Lowe expected an answer within half an hour. The situation was discussed between the members of the Provisional Government and perhaps with others also. Then O'Farrell was sent back to Lowe with a written message which she did not read. O'Farrell went back to the top of Moore Street and re-joined Lowe who was waiting for her in his motor-car. On her return, O'Farrell found Lowe a little vexed because, by his reckoning, O'Farrell was a minute over the agreed half-hour. Lowe may also have been anxious that Pearse and the others might be up to some form of trickery during the cessation of hostilities – and it does appear that even as Pearse was contemplating surrender, an assault group was separately being assembled to the rear of No. 25 to attack the British barricade. So the Republicans were not putting all their eggs in one basket. In any event, in the face of Lowe's ire, O'Farrell again proved her mettle. She insisted that she was not late and drew Lowe's attention to the time on her watch. Another English officer then set his watch by O'Farrell's to avoid any future confusion.

20. O'Farrell did not know what the second message was that she had brought to Lowe. However, one can guess at its substance by what, on O'Farrell's own later account, appears to have been Lowe's rather irritated reply: *"Go back and tell Mr Pearse that I will not treat at all unless he surrenders unconditionally and that Mr Connolly follows on a stretcher."* Lowe then told O'Farrell that he would give the Republicans a further half-hour's respite and then hostilities would resume. O'Farrell returned to No.16 with this message. A short council took place between the members of the Provisional Government. Then Pearse accompanied O'Farrell to a meeting with Lowe. By O'Farrell's account, it was about 3.30 p.m. when Lowe

received Pearse at the top of Moore Street, in Parnell Street. However, it seems likely that the half-hour was well gone by the time the two men met.

21. The British still proved remarkably suspicious as to the *bona fides* of the Irish. An officer who had been a prisoner in the GPO was asked to identify Pearse and was unable to do so. Curiously, this appears not to have affected the progress of matters. Pearse now handed his sword to Lowe, at which point O'Farrell was later to recall the following conversation as having ensued between the two men:

“Lowe – *The only condition I make is that I will allow the other Commandants to surrender. I understand you have the Countess de Markievicz down there.*

Pearse – *No, she is not with me.*

– *Oh, I know she is down there.*

– *Don't accuse me of speaking an untruth.*

– *Oh, I beg your pardon, Mr Pearse, but I know she is in the area.*

– *Well, she is not with me, sir.”*

22. Lowe then suggested that the British should detain O'Farrell. His intention was that once Pearse gave a list of the places being occupied by the Republicans, he would have O'Farrell driven from place to place on the following day to bring Pearse's order for surrender to the other commandants. Once this was done, he promised O'Farrell that he would set her free and give her a safe convoy pass. On hearing this, Pearse turned to O'Farrell and – according to Farrell's own later account – asked “*Will you agree to this?*” Perhaps Pearse had some sense of the considerable danger to which O'Farrell would be exposed if she did as Lowe

asked. O'Farrell replied "*Yes, if you wish it.*" To this Pearse said "*I do wish it.*" Pearse then shook hands with O'Farrell but said nothing further. One wonders if he had any sense of the greatness that now clothed him as his end of days approached.

23. After this final exchange with O'Farrell, Pearse was taken away in a motor-car and driven down O'Connell Street. He was accompanied by Lowe's son (then a hussar and later a Hollywood 'B'-star under the screen-name 'John Loder') together with another officer inside and an armed guard standing on the freeboard outside. He was preceded in another car by Lowe and a Captain Wheeler. There were several officers standing around as Pearse was driven off. One of whom remarked, within earshot of O'Farrell, "*It would be interesting to know how many marks that fellow has in his pocket.*" (The Great War was of course on-going at this time and the Germans would, as a result, have been natural allies of the Irish against the British).

24. After Pearse had been taken away, O'Farrell was entrusted to the charge of Lieutenant Royall. His orders were to keep O'Farrell under close watch but not to treat her as a prisoner. He brought her back to Tom Clarke's shop in Parnell Street and gave her a cup of tea. By O'Farrell's reckoning it was then about 4.15 p.m. – this timing makes sense. Sometime afterwards General Lowe returned with Pearse's written order for the other commandants to surrender and five or six typewritten copies. Lowe then gave O'Farrell one of the orders to take back to the Republicans in Moore Street, along with a written note as to how they should surrender. This note read as follows:

"Carrying a white flag, proceed down Moore Street, turn into Moore Lane and Henry Place, out into Henry Street, and around the Pillar [Nelson's Pillar] to the

right hand side of O'Connell Street, march up to within a hundred yards of the military drawn up at the Parnell Statue, halt, advance five paces and lay down arms."

25. Lowe also handed O'Farrell an order for the commandant at the Four Courts. So when she had given the order at Moore Street, she proceeded alone down Parnell Street and then Capel Street, towards the courts. On her way, O'Farrell was stopped by several officers, including one who would not let her pass on any condition. Her way blocked, O'Farrell returned to Moore Street. The officer there then gave her an armed guard so that she could move about. O'Farrell's courage in all of this is striking. In a city that was in a state of open rebellion, she could at any moment have been shot by a trigger-happy soldier or Republican. And still she did as she did.

26. It was about 7.15 p.m. when O'Farrell returned from the Four Courts area to O'Connell Street and the custody of Lieutenant Royall. After about half an hour, she saw the Republicans from the Four Courts marching up O'Connell Street and lining up outside Crane's. Then, at about 8 p.m., the Moore Street men came up the other side and were lined up outside Mackey's. While the men were still standing in the street, Royall took O'Farrell to the National Bank, fed her some supper, and procured a bedroom for her at the top of the house. The room was fairly comfortable and O'Farrell slept well. Royall sat in a chair outside her room for the night.

D. 30th April, 1916.

27. About 6 a.m. on the 30th, O'Farrell got out of bed. On looking out the window she saw about 300 or 400 Republicans, as well as Winifred Carney and Julia Grenan, sitting on the little plot of grass that still sits between the front of the Rotunda Hospital and Parnell Street. They had all spent the night in the cold and damp. All their arms and ammunition were piled up at the base of the Parnell Statue. O'Farrell had just finished dressing when she was told that she was wanted downstairs by Wheeler to take around the orders to the other commandants. [1]

Chapter 2

The Wider Picture [2]

A. The GPO Garrison.

28. Despite research done since the 1930s, there is still no definitive list of those who occupied the GPO and who left on the evening of 28th April. The most significant of the people to escape were the five signatories of the Proclamation – Pearse, Plunkett, Clarke, Connolly and MacDermott. There were also a number of other people who were not signatories but who are historical figures of some note. In truth, their names read like a roll-call of the great and good in the battles for Irish independence: Harry Boland, Michael Collins, Desmond FitzGerald, Seán MacEntee, Seán McLoughlin, Seán T. O'Kelly, Willie Pearse, Michael Staines, Oscar Traynor, and Donal Ua Buachalla.

29. Among the Republicans at the GPO, there was also a contingent known as the ‘Kimmage Garrison’. This comprised a group of about 90 individuals who had left Britain due to the threat of conscription during the Great War and who had been accommodated in the Larkfield Mill immediately prior to the Rising. Living under military discipline, the Kimmage Garrison was perhaps better prepared than the average Republican, and its members feature prominently in the events that were to unfold on Moore Street. Prior to the Rising, it is known that the Kimmage Garrison was busy in the preparation of incendiary grenades, bayonets and pikes. These were all brought into the GPO. However, it seems unlikely that any were brought out when the GPO was evacuated.

B. Evacuation of the GPO.

30. Once the decision had been made to evacuate the GPO, the general intention appears to have been that the Republicans would infiltrate through the laneways north of Henry Street and occupy the premises of Williams & Woods, a confectionery and jam factory which fronted onto Parnell Street and stretched back along Lower Dominick Street. If this was the plan, it was in some ways a curious choice. While there are no reports that Republicans were sent out to reconnoitre the streets before the evacuation began, it is difficult to understand how the GPO garrison could have been unaware of British deployments along Parnell Street. After all, these deployments would have been visible from the GPO roof; and there was certainly an awareness that, just before the evacuation, buildings to the rear of the GPO had been coming under heavy fire from an armoured vehicle that had been planted at the far-end of Moore Street. Part of the problem presenting for the members of the Provisional Government within the GPO may have been that, despite several large-scale manoeuvres undertaken in the City prior to the Rising, no pre-determined plan of retreat from the GPO

appears to have been agreed upon, with the result that it had to be devised on the spot. This makes it all the more remarkable, of course, that the eventual evacuation of the GPO was undeniably successful, with only one Republican lost to enemy fire and (such is war) two to friendly fire.

C. The O’Rahilly’s Attack.

31. Perhaps by way of foray, perhaps because of some awareness of the problems presenting towards Parnell Street, The O’Rahilly’s advance up Moore Street occurred around the time of the evacuation of the GPO. If The O’Rahilly’s advance had succeeded, it might conceivably have created an access-point by which other Republicans could have crossed Parnell Street into the Williams & Woods factory. Certainly, at least one Republican, 18-year old Tom Crimmins, often reputed to have been the last man captured in 1916, would later indicate that he had volunteered to go with The O’Rahilly in order to break through to the Williams & Woods factory.

32. In any event, whatever the rationale, The O’Rahilly’s attack involved himself and up to 20 men – Crimmins was later to put the figure as low as a dozen – leaving the GPO by a side-entrance, advancing to the corner of Moore Street and then moving up the street in two files along either side. At first, all was quiet in Moore Street. Sean McEntee would later recall that it had been like a lakeshore at the fall of the evening. If so, the storm-clouds were not long rolling in. Among the vast collection of ‘witness statements’ accumulated by Ireland’s Bureau of Military History between 1947–57 as part of laying down a national archive of records concerning Ireland’s revolutionary period in the early-20th century, is the witness statement of Thomas Devine, who remembers a swift British reaction:

“The wonder is our small force wasn’t wiped out there and then. After the first burst myself and six others swerved from the middle to the left-hand side of the street and hugging the shop-fronts dashed on at break-neck speed for a distance of about 170 or 180 yards.”

33. (Direct quotes throughout the entirety of this judgment from those who participated in Easter Rising are drawn from the ‘witness statements’ gathered by the Bureau of Military History).

34. The O’Rahilly was by now well ahead of his men and appears to have taken shelter in a doorway on the western side of the street. As the firing abated, he blew his whistle and attacked from the middle of the street. Here he was wounded and was soon seen dragging himself across to the relative safety of what is now O’Rahilly Parade, out of the line of British fire. Disturbingly, it has long been contended that The O’Rahilly was refused medical attention by the nearby British soldiers and deliberately left to die in the street. Albert Mitchell drove an ambulance in the city throughout Easter Week and later put on record that he had been expressly prohibited from bringing The O’Rahilly to hospital, stating:

“The sergeant drew my attention to the body of a man lying in the gutter in Moore Lane. [This would place The O’Rahilly some distance up O’Rahilly Parade.] He was dressed in a green uniform. I took the sergeant and two men with a stretcher and approached the body which appeared to be still alive. We were about to lift it up when a young English officer stepped out of a doorway and refused to allow us to touch it. I told him of my instructions from H.Q. but all to No. avail. When back

in the lorry I asked the sergeant what was the idea? His answer was – ‘He must be someone of importance and the b–ds are leaving him there to die of his wounds. It’s the easiest way to get rid of him.’ We came back again about 9 o’clock that night. The body was still there and an officer guarding it, but this time I fancied I knew the officer – he was not the one I met before. I asked why I was not allowed to take the body and who was it? He replied that his life and job depended on it being left there. He would not say who it was. I never saw the body again but I was told by different people that it was The O’Rahilly.”

35. “*War*”, Sherman observed, “*is Hell*”. Yet even in war there is surely no case or place for deliberately allowing a wounded opponent to bleed to death when he could so easily have been saved.

36. Apart from The O’Rahilly himself, there are three other known casualties from the action he led. These are Charles Carrigan, Patrick Shortis, and Francis Macken. Carrigan – killed on his 34th birthday – was born in Glasgow of Irish parents. A member of the Kimmage Garrison, he had been a tailor in Glasgow and attended night-classes, becoming proficient in French and Latin. He began to study Irish and, having first joined the United Irish League, eventually quit to join Sinn Féin, also becoming an enthusiastic Gaelic Leaguer. Shortis was a onetime seminarian, who had studied to become a missionary priest at All Hallows College before taking up the cudgels for Ireland with the Volunteers. Macken was a commander in the Rathfarnham Battalion. He had trained his men to obey orders given in Irish and had taught Irish classes at Rathfarnham College.

37. There is an alternative, not entirely inconsistent account of The O’Rahilly’s attack given by Denis Daly, a member of the Kimmage Garrison. He suggests that the attack took place later than is generally thought and was launched from an advance position in Henry Place. Instinctively, this makes more sense. It would mean that instead of going down Henry Street and turning up Moore Street, The O’Rahilly and his men would have dashed across Henry Street into Henry Place and emerged further up on Moore Street, rather than making their way the whole way up from the bottom.

38. Notably, Seán McLoughlin, who had arrived in the GPO from the Mendicity Institution, appears to have taken it on himself to follow The O’Rahilly via Henry Place to warn of the barricade that the British had positioned at the far end. That he chose to go by Henry Place is suggestive that, consistent with Denis Daly’s account, he expected to find The O’Rahilly and his men lining up there. Regardless, by the time McLoughlin reached Moore Street, it was too late. McLoughlin, not yet 21 by this time, has been credited in many of the more left-wing accounts of the Rising as the organiser of the evacuation. Whether or not he was the principal organiser, he was certainly a key player. Indeed, he was to be elevated by Connolly to the rank of Commandant General due to his quick thinking when the GPO garrison started the move up Henry Place into the Moore Street terrace of houses.

39. Up to the time of that move, McLoughlin had been advocating that instead of moving northwards towards Parnell Street, the GPO garrison should move westwards to join up with Ned Daly’s battalion which was holding the streets north of the Four Courts with some success. In fact, Elizabeth O’Farrell thought, even up to the moment that she was leaving the GPO, that the intention was to join up with Daly and the other Republicans ‘holed up’ at that end of the city. However, a possible ill-consequence of The O’Rahilly’s failed attack may

have been to alert the British to the fact that there was something in the offing, perhaps ruining any chance there was for a successful infiltration of the lanes west of Moore Street. Regardless, the valour of The O’Rahilly and his men has had the result that their attack remains among the best-known, if also one of the least-understood, episodes of the Easter Rising.

40. There is a poignant scene from the Saturday morning – this would have been the 29th – when McLoughlin and another man came across The O’Rahilly’s body in a doorway on what is now O’Rahilly Parade. (McLoughlin’s description of where he found The O’Rahilly mirrors Elizabeth O’Farrell’s account of having seen The O’Rahilly lying dead with his feet in the doorway and his head on the kerb – or in the gutter, as Albert Mitchell put it). According to McLoughlin:

“Arriving there we were still screened from the British who had No. idea of our presence. I saw a number of bodies lying on the footpath and roadway – our own men. One familiar one I approached and this was O’Rahilly lying on his back, his arms outstretched, blood oozing from his body in a pool under him and flies buzzing about his head....We knelt for a few minutes and said an Act of Contrition. I then took my handkerchief out of my pocket and covered O’Rahilly’s face. The same was done for the other three [presumably Carrigan, Shortis and Macken]. That was all we could do.”

D. The Main Evacuation.

41. The withdrawal of the bulk of the GPO garrison across Henry Street and into Henry Place was ultimately forced by the fire that had taken hold on the roof of the GPO and the danger of the building collapsing. There was some confusion and doubtless some heightened nerves as the garrison prepared to leave. According to Ned Bulfin, “[Nobody] *seemed to be in charge once we left the General Post Office. It was every man for himself.*” Because Pearse was the last to leave the building, he almost certainly missed the initial events that unfolded on Henry Place; O’Farrell’s later account of events would seem to bear this out.

42. The garrison left the GPO in three main groups through a double-door directly opposite Henry Place. The side-entrance did not survive the reconstruction of the GPO but is thought to have been roughly where Hickey’s Pharmacy now stands on Henry Street. Several accounts mention that prisoners were sent out first, some of them taking refuge in the Coliseum Theatre further along the street. The 15 metre dash across to Henry Place was done under fire from the western end of Henry Street. Even so, there was only a single fatality: Patrick O’Connor, a Kerryman. In truth, O’Connor was very unlucky to be hit; twilight had come, the street was drenched in smoke and dust, and it is thought that the British were probably shooting blindly from their position further down.

43. To those who made it across to Henry Place, there was complete shelter from enemy fire in the first limb of the ‘L’-shaped laneway. But it soon became evident that the junction with Moore Lane, perhaps a third of the way up the second limb of the ‘L’ that feeds onto Moore Street was a ‘killing zone’, with British troops shooting lethal volleys down the Lane from behind a barricade that was about 190 metres up the Lane.

44. With British troops shooting up Henry Street and down Moore Lane, the Republicans were soon looking for some means of escaping from Henry Place. Partly because of this, but also because they were very thirsty, they soon broke into the premises of O'Brien's water factory, apparently through two doors that opened onto the inner corner of Henry Place. Two unfortunate deaths occurred at this time. One Republican, Henry Coyle, was killed when he tried to break into the building using the butt of a cocked rifle and appears inadvertently to have shot himself. Another Republican, Michael Mulvihill, a second Kerryman, appears to have been killed inside by the 'friendly fire' of another Republican. That this should have occurred shows just how nervous everyone must have been.

45. Among all the tension and tragedy, there was some comedy. Liam Tannem, yet another Republican, would later record an account of his experience around this time:

“[Having noticed] a couple of tenement houses in Henry Place...I thought it would be a good idea to occupy a couple of windows in them. The doors of these two houses were locked and I turned the corner of the angle, entered by a stable of O'Brien's Mineral Water Factory, in an attempt to get into those houses from the rear. I climbed up an outside stairs, thinking I was getting in the general direction of the houses and entered the door. The lurid flames from the burning buildings that moment flashed up and disclosed about a dozen heads ranged along the room and apparently without bodies. I put my hand to something hairy and nearly died of fright...It was a workshop belonging to Drago, a hairdresser and wig-maker [to the rear of No. 36, Henry Street]”.

E. Crossing Moore Lane.

46. It is possible that the first few Republicans to pass the bottom of Moore Lane went largely unnoticed by the British. Liam Tannam would later recall that the only damage done was that one man's belt was sliced through by a bullet. But the British quickly wised up to what was happening and presently a rain of bullets was raining down Moore Lane, many of them hitting the façade of a whitewashed building that quickly became known as the 'White House', a warehouse that fronted a row of cottages which could be accessed off the bottom of Henry Place. In the confusion of the moment, many of the Republicans presumed that the bullets were coming from British troops within the White House.

47. It was around this point in events that McLoughlin, according to himself and other witnesses, was given his field promotion by Connolly (who was lying on a stretcher in Henry Place). One Republican, Feargus de Búrca, later recalled taking part in an attack on the White House:

“McLoughlin...was roaring and shouting at us to ‘charge the White House’. I’m blessed if I could see any white house but in company with the rest I charged. We had to pass a laneway which runs parallel with Moore Street down to Parnell Street [i.e. Moore Lane]. At the Parnell Street end there was a barricade from which the British were firing. We got by the lane opening safely, however, and it was then I saw the ‘white house’ indicated by our officer....We broke in the door and found ourselves in a ‘stone-beer’ store. There was No. enemy in waiting for us and for the moment we were out of the firing line....We went upstairs and

proceeded to barricade the windows on the instructions of a fine young Captain in full uniform. This was our first meeting with the famous Mick Collins...”.

48. The fond terms in which this particular memory is expressed perhaps suggest which side de Búrca favoured in the Civil War that was soon to come.

49. On McLoughlin’s orders, a cart was taken from the stables attached to the mineral-water factory and used to partly-block the junction between Henry Place and Moore Lane. Here, tradition has it that MacDermott stood sword in hand, peering carefully up Moore Lane to see what the British were doing, then lowering his sword each time he thought it safest for the next batch of Republicans to scurry across the junction. Joe Good later calculated that between 18–20 Republicans were wounded crossing the junction and this tallies with Elizabeth O’Farrell’s recollection of tending to 17 wounded when she arrived at Moore Street. Dr James Ryan, who had been administering morphine to Connolly, lost his supply of the drug in the rush across the lane. This must have left Connolly in tremendous pain by the next morning, a factor which may have contributed to Pearse’s decision that surrender was the most prudent course of action.

50. Even as the bottom of Moore Lane was being negotiated, it had become apparent that a further advance across Moore Street was impossible. So one detachment of Republicans, under the leadership of Diarmuid Lynch, was ordered by Pearse to enter No. 9, Moore Street from the rear and then to ‘burrow back’ through the buildings towards Henry Street. However, the heat of the encroaching flames from Henry Street, where the GPO was now completely ablaze, forced them to desist after, with some difficulty, they had broken through from No. 9 into No. 8. They joined their comrades across the lane in No. 10 at daybreak the

following day. Another detachment, led by Frank Henderson, occupied the bottling stores of O'Brien & Co., to the rear of Nos. 10–11 Moore Street, on the corner of Moore Lane. Patrick Cauldwell was one of the last to enter No. 10, having previously been left to man a barricade on Henry Street. He would later recall that:

“McLoughlin...gave us instructions to evacuate the barricade and move up Henry Place towards Moore Street. At this time he was carrying a sword in his hand. As we passed Moore Lane we came under British rifle fire for a short time but got safely through to a house at the corner of Moore Street. We entered this house and found that a number of houses running down Moore Street had been bored through to provide a line of retreat....In the particular house which I was in on the Friday night Tom Clarke was there also. He was seated on a chair and when I spoke to him he said he was feeling out of sorts and asked me could I get him a cup of tea. I obliged him and when he had partaken of the tea he said it had done him a lot of good.”

F. ‘Holed Up’ in Moore Street.

51. The night of the 29th was spent ‘holed up’ in the houses along the east-side of Moore Street, from the corner of Henry Place as far as O’Rahilly Parade. Cogan’s Provision Dealers (No. 10) was apparently entered by breaking through the external wall on Henry Place below a landing-window. The wounded and the signatories of the Proclamation spent the night upstairs while a detachment initially comprising ‘St Enda’s Boys’ took turns to smash through holes in the party walls running to the north. McLoughlin later gave an account of that first night, stating:

“When I got into the kitchen Connolly was laid on a stretcher on the floor. Sitting by him was Miss Carney, Miss Grenan, Elizabeth Farrell [it is notable that he seems more familiar with O’Farrell, perhaps suggesting that of the three women she had the most memorable personality], Sean MacDermott, Tom Clarke, P.H. Pearse, Willie Pearse, Joseph Plunkett and several of our own wounded including some British wounded....I then repeated my original advice to them to try to get some sleep. Pearse and his brother went upstairs and made their bed on a wide table, lying on top of it, and I lay underneath on the floor. I was awakened as daylight crept into the sky and I went to see how far the digging had gone.”

52. Perhaps to distract the British from the tunnelling operation, perhaps with an eye to covering all possibilities that might yet transpire, a mock barricade was constructed at the junction of Moore Street and Henry Place. Frank Henderson appears to have taken charge of this operation:

“[W]ith the aid of ropes, we ran a cart into the middle of Moore Street. We also threw out boxes and everything we could find. We managed to fill a couple of sacks with clay and placed them in position at the corner. Immediately the cart appeared the British opened fire, which was very intense....Shots were exchanged for a period, the duration of which I cannot now estimate. At one period during the firing, some kind of a missile fell beside our barricade. I was told afterwards that this was an incendiary bomb which did not explode...”

53. This appears to have been the sole occasion when the British were directly engaged in gun-fight along Moore Street after The O’Rahilly’s earlier attack.

54. A remarkable moment, that is a testament to man’s occasional humanity to man even in the furnace of war, has been recorded by Seán Numan: in later years, he recounted how he watched George Plunkett, under heavy gun-fire, run from Henry Place across Moore Street and into Sampson’s Lane to give water to a British soldier whom he then lifted onto his back and carried over to Henry Place so that the man could be treated with the rest of the wounded. What makes this episode particularly striking, of course, is the contrast between Plunkett’s actions and the cruel inaction of the British officers who were satisfied to let The O’Rahilly bleed to death at the far end of Moore Street.

55. The idea to break through the walls of the houses apparently came from one of the three women – Carney, Grenan, and O’Farrell – who were sheltering in No.10. Their intention appears to have been to accommodate the swell of men arriving from Henry Place. Doubtless it was also an offensive tactic to get closer to the British barricade at the top-end of Moore Street. The technique of burrowing through walls had already been utilised by Republican detachments to the rear of the GPO, and in positions on the far side of O’Connell Street, and had previously been recommended by Connolly as a tactic.

56. Progress through the thin brick walls would have been relatively rapid, though only a single large crow-bar and possibly one pick-axe were available for the work. Feargus de Búrca later implied that the holes were located on various levels of the buildings – which would seem to make sense tactically – though it appears that the surviving (bricked-in) holes have mostly been recorded at first-floor level. “*What a queer life!*” de Búrca was to observe.

“Creeping through holes into bedrooms, then downstairs and through another opening into sitting-rooms, through shops, and finally to our resting-place for the night...”.

57. Several names are mentioned in connection with the burrowing activity. According to Seamus Robinson:

“[T]here was a call for volunteers to bore through the buildings we now occupied, and I was one of the party. We were asking for a very large crowbar, and each man would take his turn at the bar for a few minutes and then stop to rest, a fresh man taking his place. During one of my spells of rest I lay flat down on the floor awaiting my turn to work the crowbar and fell fast asleep.”

58. Liam Tannam was ordered by Plunkett to:

“‘take turns with the squad of men in breaking through the walls with the others.’ I was rather exhausted and hungry and the only thing I could get to eat was a raw egg and a square of Chivers jelly. I ate this and then made my way through several holes until I came to where men were working. I got some fresh men and proceeded with the work allotted me.”

59. Ned Bulfin remembered that:

“[T]he walls were quite thin, and there was no bother breaking them. We reached as far as Price’s [Nos. 22–23] or O’Hanlon’s [Nos. 20–21] which was a fish shop. I remember the smells there. We spent Friday night barricading all the

houses that we occupied by throwing down the furniture from the rooms – clearing all the rooms – down the stairways into the bottom halls, blocking up the doorways.”

60. The witness statements are replete with references to the “*never stop attitude*” and “*untiring enthusiasm*” of the Republicans. And there is one particularly vivid vignette – with which perhaps all sons of Irish mothers can to some extent empathise – of one mother turning to her son after the unexpected arrival of the Republicans through the parlour-wall and telling him that he should have been out there in the Rising doing his bit, instead of lounging around at home.

61. Some Republicans witnessed the shooting dead of civilians on Moore Street around this time. James Kavanagh recalled that the British “*fired at everything that moved in the street, and at such short range, their shooting was deadly. I saw three men attempting to cross the street killed by three shots, one, two, three, like that.*”

62. Not everyone was needed for the burrowing work and many of the Republicans appear to have gone to sleep on securing some nook or cranny in which to rest. This is entirely understandable, considering that many of them would have had precious little sleep since the previous Monday. As the night unfolded, fire continued to rage on Henry Street, assisted by the explosion of the ammunition dump within the GPO. The fire spread across to Moore Street where Nos. 1–5 were completely destroyed. There was sporadic fire throughout the night from the British positions, in an apparent attempt to elicit a response and so flush out the whereabouts of the Republicans. The Kimmage Garrison was doubtless considerably exercised by the fact that, if caught, they would be further punished for having avoided

conscription at home. As a result, they appear to have been the last distinct group to have accepted the surrender.

63. After breakfast was prepared on the morning of the 30th, the principal officers, including Connolly who was carried on a stretcher, moved forwards to No. 16. Elizabeth O'Farrell's account of the hours that followed, considered above, captures in intimate detail all the key ensuing events of the day.

Chapter 3

The Civilian Experience

A. Overview.

64. Civilians bore much of the brunt of the fighting over Easter week. Four or five civilians were killed on Moore Street, with another three or four dying in its immediate environs. British Cabinet Papers of the era suggest the existence of what would now be known as a 'shoot to kill' policy. However, some of the killings that occurred may simply have been due to a natural British 'jumpiness'. There was too an apparent sense among the British troops that some of those participating in the Rising were disguised as civilians, a factor which, at least among the troops, would likely have legitimised the notion of shooting at civilians.

65. By the Friday evening (when the GPO was evacuated), the civilian population of Moore Street and beyond were taking shelter anywhere they could feel secure. Food would have been scarce and movement around and out of the area was extremely hazardous. Civilians

were caught between the roar of the burning buildings on Henry Street and the occasional gunfire of British deployments along Parnell Street. People were evicted without warning from their homes, while others fled as shells, bullets or flames came ever closer.

B. Civilian Deaths in Moore Street.

66. All deaths are significant. However, among the most significant deaths in Moore Street during the period from the evacuation through to the eventual surrender of the GPO garrison are those of four or five adult males shot down by the British, at least one under the white flag. Their bodies lay out in the street overnight, perhaps opposite No. 16 where one of the victims, John Doyle (36) resided. Anecdotal evidence suggests that Pearse may have been influenced by the sight of these dead civilians when contemplating whether or not to surrender. And, however great his cause, it must to some extent have played on Pearse's conscience that innocent non-combatants were now being killed by the British.

67. John Doyle had been a lodger above Patrick Plunkett's poultry shop. An on-looker saw him come out of No. 16 at a time uncertain, leading a group of seven people that included a child. He held his wife's white apron above his head. Yet fire was immediately opened on the group, killing Doyle and wounding his wife. The image that immediately springs to mind when reading of the manner of Doyle's passing is the iconic footage of the late Bishop Daly cowering nervously and waving a bloodied white handkerchief as he courageously escorts a group carrying a man mortally wounded by British troops in Derry on Bloody Sunday. One can only imagine the nervousness of Doyle as he stepped onto the street, his pitifully vain belief that a white flag would give him safety (as it ought to have done) and the cries of his desperate wife when Doyle was felled. Somehow she and the others managed to drag Doyle's

body off the street – perhaps the British troops held off when they saw the awfulness of what they had done – and into the shelter of the doorway of No. 49. But to no avail.

68. In what circumstances the other deaths occurred is not exactly known, though we do know the identities of the people who died. Patrick MacManus (61) lived at 12, Moore Street. No. 12 was a confectionery shop owned by a Thomas Cogan who had extensive business interests along the street. So McManus may have been a lodger or renting a tenement upstairs. Robert Dillon (65) was the proprietor of a poultry shop at No. 8. A Kerryman, he had moved to the capital after marrying a Dublin-woman. In 1916, the two were living above the shop with their 20-year old daughter. The fourth body was that of William Heavey (32). He was a general merchant, living at No. 57 with his brother and sister, all of them hailing from Roscommon. Of a fifth man, Francis Fee (35), practically nothing is known, save that it appears that he may have been shot under the white flag.

69. Ned Bulfin mentions that “[W]e had to evacuate the civilians from the houses, of course, under great pressure too, some were trying to cross the street.” Seamus Ua Caomhnaigh described breaking through the buildings in Moore Street and encountering civilians huddling in corners. He “*felt very sorry for them*” as the GPO Republicans were “*bringing them death and destruction*”. Oscar Traynor recalled trying to dissuade one resident, most likely Patrick MacManus, from venturing outside:

“On entering one of the buildings in the middle of Moore Street, we were met by a little family, an old man, a young woman and her children, cowering into the corner of a room, apparently terrified. I tried to reassure these people that they were safe. The old man stated that he was very anxious to secure the safety of his

daughter and his grandchildren, and that, for that reason, he intended to make an effort to secure other accommodation. It was his intention to leave the house under a flag of truce which, he said, he felt sure would be respected. I did my best to dissuade him from taking this action, especially during the hours of darkness. He, however, appeared to be very confident and said he would make the effort. I appealed to his daughter not to allow her father to take this action. It appears that he eventually ignored the advice which I gave him, because when we were forming up in Moore Street preparatory to the surrender I saw the old man's body lying on the side of street almost wrapped in a white sheet, which he was apparently using as a flag of truce. His body appeared to have been hit on several occasions by the bullets of his enemy.”

70. To the civilian death toll can be added Elizabeth Hanratty (30) of No. 39, Moore Street. A Meath-woman, there is record of her having worked as a servant in Clontarf back in 1911. Hanratty appears to be the butcher's wife who is recorded as having been shot through the window of a building that sat on the junction between Moore Street and Riddall's Row, a street-way across from what is now O'Rahilly Parade which has since been built over. There is also a Mary Corrigan (38), a possible resident of Moore Lane who appears in the casualty lists that followed the rising; however, nothing of her death appears to be known.

C. The Deaths of Two Children

71. Perhaps the most poignant of all the civilian deaths in the Moore Street area are the deaths of two children. Bridget McKane (16) was the third of eight siblings who lived at No.10, Henry Place, with her parents and a lodger. Her father, Thomas (40), came from Co

Monaghan and was a foreman of works. Her mother, Margarete (39) hailed from Carlow and was a homemaker. Bridget's younger brother, Thomas (14) had been born in Larnarkshire which suggests that the family must have lived in the Scottish Lowlands for a time. Her two older sisters, Alice (18) and Mary (17) were a fancy-box maker and a clerk respectively. After Thomas, there was an eight year gap, and then the McKanes had four more children, none of whom were above the age of six in 1916 and all of whom doubtless retained little or no memory of Bridget in the years that followed.

72. Bridget's death appears to have occurred when a lock was shot off a door. Although the Republican who shot at the lock shouted "*All clear!*", both Bridget and her father were hit, Bridget fatally so. Incredibly, all accounts have it that the McKanes showed no bitterness for what happened. When Seán McDermott offered to carry out an on-the-spot inquiry if the McKanes thought the Republicans had been guilty of brutality or negligence, both mother and father insisted that no-one was to blame. The bullet appears to have gone straight through Bridget's head. Later accounts describe a man picking a chunk of her skull from the floor and hiding it in his pocket so that her parents would not find it. There is also suggestion that the offending Republican was immediately struck in the face by an officer and disarmed, and that McDermott later offered Margarete some money by way of some form of recompense for what had happened. Margarete's initial acceptance of what had happened may have been due to the shock of the moment. Immediately after the accident, she thought that her husband, Thomas, had been killed and, in a moment of blind panic, ran down Moore Lane towards the British position. What she had in mind is unknown but miraculously she was not killed by a British shooter. Somehow she was rescued by a Dominican friar and brought back to Henry Place where she broke down at the sight of Bridget's body.

73. By contrast to Bridget, little is known about the death of the other child known to have died – William Brennan. He lived at 8, Moore Place, a laneway off Henry Place, and so was a near neighbour of Bridget. He must have died in great pain after receiving a gunshot wound to the thorax that resulted in massive blood-loss. His death does not figure in any of the ‘witness statements’ that were later collected by the Bureau of Military History and it may be that he was killed in crossfire that preceded the evacuation of the GPO.

D. Conclusion.

74. In the days following the Rising, reports began to emerge of the deliberate killing of civilians by British troops on nearby North King Street, down by Smithfield Square. While the inhabitants of Moore Street were spared deliberate execution, their experience was as dangerous and traumatic as anything that the actual combatants would have endured.

Chapter 4

The British Perspective

75. By Thursday evening (the 27th), the British had established and were able to maintain a cordon around the GPO. This cordon ran from Parnell Street in the north, turning south to the river Liffey along Capel Street. Across from the GPO, on the east side of O’Connell Street and south towards the quays, the buildings were in flames. In consequence, the British had taken up position along Marlborough Street. This position had been devised by Brigadier General Lowe, who was commanding officer until the arrival of the infamous General

Maxwell on the Friday of Easter Week. Within this cordon, of course, sat Moore Street, bounded at the GPO end by Henry Street and running up to Parnell Street at the other.

76. The cordon was initially held by reserve troops positioned behind make-shift barricades. A souvenir postcard of the era depicts the barricade at the north-end of Moore Street, though it is likely a posed picture taken in the immediate aftermath of the Rising, rather than as battle raged. A similar structure was photographed on Talbot Street, and both pictures suggest that anything the troops could find was used in the construction of the barricades. So, curiously, the British were reduced in the circumstances arising to precisely the type of urban combat techniques that were favoured by the Republicans, and which Connolly had sought to codify in his writings on street-fighting.

77. Early on Friday the 28th, there was a deployment of more experienced troops to the cordon around the GPO. From the Capel Street direction the Sherwood Foresters were ordered to clear the lanes and streets with a detachment of Royal Irish Regiment reservists. At the same time, a battalion of the Prince of Wales's Leinster Regiment, who had been in training in the Curragh, were deployed at the eastern side of O'Connell Street, where their activities were effectively halted by the fires that continued to burn. The Royal Irish Regiment was despatched to Parnell Street. It was the unit that faced The O'Rahilly's attack on Moore Street at about 8 p.m. that evening, and it appears also to have been the unit that later made a 'killing zone' of the junction between Henry Place and Moore Lane, though there is some suggestion that the unit tasked with shooting down Moore Lane was the Sherwood Foresters.

78. It is unknown at what exact stage in the Rising the barricades were established on Moore Street and Moore Lane. What is known is that the troops behind the barricades would have been well concealed and relatively safe from gunfire, apart perhaps from the well-trained gunfire of trained marksmen. It is likely that when the barricades were first thrown up the British had their rifles trained on the upper windows of the GPO; the British would have known nothing at this time of any intended break-out by the Republican volunteers.

79. The initial action along Moore Street, short of any opportune sniping that may have occurred, came with The O'Rahilly's attack up Moore Street from the corner of Henry Street (or emerging from Henry Place, depending on which account one favours). This attack came at approximately 8 p.m. As the Republicans emerged from the haze at the bottom of Moore Street, the order would have been given at the barricade to open rapid fire and to drop sights to a range of 100 yards. This may explain how The O'Rahilly managed to get close to the corner of O'Rahilly Parade before being felled.

80. The main break-out from the GPO came soon after. Several Republicans would later indicate that they were shot at from a British barricade at the Jervis Street end of Henry Street as they raced the short distance across Henry Street into Henry Place. From here, several Republicans managed to cross the bottom of Moore Lane before being observed by the troops on the barricade near the far end. Once the Republicans were spotted, it is likely that an order to open rapid fire was given. However, given the range (some 120 metres) and McLoughlin's placement of a cart across the junction, the efficacy of this particular British barricade was largely neutered by Republican ingenuity.

81. Once the GPO garrison entered No. 10, Moore Street, their exact deployment along the street would initially have been unknown to the British troops surrounding them. Those troops would, however, have been on high alert overnight, possibly expecting a further break-out attempt. There was sporadic fire directed at the buildings thought to be occupied by the Republicans in an attempt to get them to give away their position. However, such artillery as the British possessed arrived too late on the Friday evening to be deployed in the Moore Street area.

82. The surviving evidence suggests that the British troops in the area were possibly as nervous as those whom they were surrounding, even though they do not appear to have been fired upon after an engagement from the barricades thrown up by the Republicans at the Henry Place junction. As mentioned, they also seem to have been uneasy at the prospect of being faced with civilians, some of whom were armed, some not, and with little to distinguish between them.

Notes to Part I

[1] Elizabeth O'Farrell's memories of her remarkable experiences were recounted by her to *The Catholic Bulletin* and published in the April and May 1917 editions of that journal, at pp.266–270 and 329–334 respectively. Although later reminiscences of the Easter Rising were recorded and/or published, when there are discrepancies in and between such accounts, historians generally prefer O'Farrell's account of events given that they appeared so soon after the events that she describes and so were less subject to the vagaries of human memory.

[2] This part of the judgment draws heavily on a report of 6th February, 2012, prepared jointly by Shaffrey Associates and Mr Franc Myles, a licensed archaeologist, for the Department of Arts, *etc.* in response to a

request for additional information made by the Department in response to an application to carry out works at Nos. 14–17 Moore Street.

PART 2

TIMELINE

Chapter 5

A Useful Summary Timeline

A. Overview.

83. This judgment is concerned with three separate applications that spring from the same facts and which, in the issues they present, partly overlap. Ultimately all of the applications derive from the events of 1916 described in Part 1. More particularly, the three applications comprise a judicial review application and two separate applications under s.160 of the Planning and Development Act 2000. Perhaps the best way for the court to commence its consideration of the applications and issues arising is to set out a summary timeline of various key events that have happened in the last few years and to identify the reliefs now being sought consequent upon certain of those events.

B. Summary Timeline.

-- November 2005

Issuance of Architectural and Historical Assessment on No. 16, Moore Street, by Shaffrey Associates, Architects. This report was commissioned by Dublin City Council to assess No. 16 in terms of its architectural, historical and historic importance and to make recommendations with regard to its suitability for inclusion in Dublin City Council's Record of Protected Structures.

19th January, 2007

Minister for the Environment, *etc.* makes National Monuments Preservation Order No. 1 of 2007, the key part of which reads:

“WHEREAS the Minister is of the opinion that the monument known as Numbers 14, 15, 16 and 17 Moore Street, Dublin 1 and more particularly delineated and defined in red on the map titled Preservation Order Map, annexed hereto, dated 20 December 2006, is a National Monument.

NOW the Minister...in exercise of the power conferred on him by sub-section (1) of Section 8 of the National Monuments Act, 1930, as amended by Section 3 of the National Monuments (Amendment)

Act, 1954, does by this Order undertake the preservation of the said monument.”

24th April, 2008

Chartered Land seeks planning permission for a large mixed-use development on a site consisting of most of the block enclosed by Upper O’Connell Street, Henry Street, Moore Street, O’Rahilly Parade and Parnell Street.

12th February, 2010

Planning Inspector’s Report issues to An Bord Pleanála.

24th March, 2010

Planning Permission issues from An Bord Pleanála to Chartered Land to develop a site known generally as the ‘Carlton Site’, comprising lands and buildings extending behind the old Carlton Cinema on O’Connell Street and also Nos. 10–25 Moore Street. This permission authorises, *inter alia*, the following:

“Works to the National Monument at numbers 14–17 Moore Street, which are also protected structures, which are subject to Ministerial Consent under the National Monument Act, include the following: works to number 14 Moore Street to include demolition of non-original additions and partitions, lowering of basement floor level, extension at basement and ground levels of 34.5 square metres to

rear, repair of timbers, roof, windows, doors, plaster, stone, brick and metal, provision of new stairs, partitions and shopfront, change of use to a café/restaurant; works to number 15 Moore Street include demolition of non-original additions and partitions, lowering of basement floor level, 22.7 square metres extension at basement level, repair of timbers, roof, windows, plaster, stone, brick and metal, provision of new stairs, partitions and shopfront, use as retail with ancillary offices; works to number 16 Moore Street include demolition of non-original additions and partitions, lowering of basement floor level, extension at basement level (19.14 square metres), repair of timbers, roof, windows, plaster, stone, brick and metal, provision/reinstatement of new stairs, partitions and shopfront, change of use to a commemorative centre; works to number 17 Moore Street include demolition of non-original additions and partitions, lowering of basement-floor level, extension at basement level and two-storey extension to the north-western elevation (92.08 square metres), provision of new partitions and shopfront, repair of timbers, roof, windows, plaster, stone, brick and metal, use as a retail unit with ancillary offices;

other works to the National Monument include the demolition of existing structures to the rear of numbers 14 to 17 Moore Street, the excavation of the area to the rear of numbers 14–17 Moore Street, the provision of a basement (Level -1 to -4) partially within the area of the National Monument to the rear of numbers 14-17 Moore Street, and the provision of a new paved surface at Level 0 to the rear of numbers 14-17 Moore Street, and the provision of a new paved surface at Level 0 to the rear of numbers 14-17 Moore Street; and all ancillary, structural, services and development works. 769 number parking spaces are to be provided at basement level on three levels from Level -2 to Level -4 and are to be accessed via a ramp from Level 0. A single vehicular access/egress point to the basement is to be provided off O’Rahilly Parade, to be accessed and exited via Moore Street. Van delivery, refuse and service areas are located at basement level and utilise the access/exit point at O’Rahilly Parade. A service yard is provided at Level 0 on Moore Lane which is accessed/exited via Moore Lane, 646 number cycle parking spaces are to be provided at Level -3, accessible via a bicycle lift on Moore street. Ancillary uses included waste

management area, bicycle storage, management suite/offices, anchor units collection and storage, anchor units back of house area, water storage tanks, public toilets, escalators/lifts/stairs, service corridors and plant areas. Nine number electrical substations are proposed, four number on Henry Place and five number on O’Rahilly Parade at Level 0. A vehicular turning area is to be provided on Henry Place. All other buildings, other than the protected structures and façades, national monument, and other non-protected structures and façades noted above, are to be demolished. Works to include all site excavation, demolition, temporary and development works; and all landscaping, services and ancillary works.”

Condition No. 5 to the planning permission states that “*No. works shall commence within the preservation order boundary of the National Monument at 14–17 Moore Street unless the prior Ministerial Consent to such works has been obtained in accordance with the statutory requirements of section 14 of the National Monuments Acts, 1930–2004.*”

- 17th June, 2011** Application by Chartered Land for s.14 consent to doing of works to Nos. 14–17 Moore Street, pursuant to earlier planning permission.
- 21st September, 2011** Dr Patrick Wallace, Director of the National Museum issues a concerned letter to the Minister for Arts, *etc.* regarding Chartered Land’s s.14 application.
- 13th October, 2011** Department of Arts, *etc.* makes request for additional information, to take the form of a battlefield-cultural study of the wider Moore Street area, with particular reference to all the buildings proposed for demolition, and of their back-yards and property boundaries.
- 6th February, 2012** Issuance of second Shaffrey Report, to which is appended an archaeological assessment of Moore Street and its environs (the ‘Myles Report’), done in response to a request by the Department for Arts, *etc.* for additional information following Chartered Land’s s.14 consent application.
- 25th April, 2012** Dr Seamus Lynam, Acting Director of the National Museum, issues a concerned letter to the Minister for Arts, *etc.* regarding Chartered Land’s s.14 consent application.

- 10th July, 2012** Department of Arts, *etc.* requests Environmental Impact Statement (EIS) of Chartered Land.
- 18th January, 2013** Pursuant to s.14D(17) of the National Monuments Act, 1930, Chartered Land publishes a public notice of its intention to submit an EIS relating to the proposed demolition works at Nos. 14–17.
- 25th January, 2013** EIS received by Department of Arts, *etc.* from Chartered Land.
- 1st March, 2013** Chartered Land advised that Minister for Arts, *etc.* does not consider that the official notice of 18th January regarding submission of EIS provides adequate information and extent of the proposed works at Nos. 14–17.
- 21st March, 2013** Revised public notice of submission of EIS published in the *Evening Herald* newspaper. Department of Arts, *etc.* satisfied this revised notice complies with s.14(D)(18) and (21) of the Act of 1930.
- 11th July, 2013** Issuance of Environmental Impact Assessment done under s.14D of the Act of 1930 in connection with Chartered Land's s.14 consent application. The report concludes:

“7. Summary and Overall Assessment of EIS.

The EIS incorporates the information it is required to contain under section 14D of the National Monuments Act 1930. It includes a description of the aspects of the environment likely to be significantly affected by the proposed demolition of part of a national monument, including the matters specified in Section 14D.

There are a number of areas within the EIS where there is apparent confusion on the part of the authors as to the aim objective and scope of the EIS. Some of the consent appears to relate more to the scheme of works to which the consent application relates. The EIS is required to address the impact of demolition only. However, sufficient detail is provided on the demolition works and on the potential resulting impacts on the environment to allow for a full EIA to be undertaken.

The EPA guidelines state that the EPA should describe the worst case scenario for cultural heritage if all mitigation measures fail. This is a key issue with regard to the national monument. The proposal to which the EIS relates envisages

the demolition/removal of part of a national monument. The EIS describes works intended to safeguard the remainder of the monument while demolition works are carried out.

While the elements of the monument proposed for demolition are stated to be in the main post-1916, No. evidence is provided to support this contention. The Department's inspections suggest that there is evidence of extensive pre-1916 fabric in a number of the structures concerned.

8. Conclusion

On the basis of the above assessment of the EIS, it is reasonable to conclude that the proposed demolition works within the national monument site would adversely affect the integrity of the remaining parts of the national monument.

It is also considered that the proposed demolition works would have a negative impact on the character, amenity and setting of the national monument and would diminish the completeness of its historical context.

The assessment of the EIS in relation to proposed demolition works at the National Monument at Nos. 14–17 Moore Street has been carried out in pursuance of and in accordance with the provisions of section 14D of the National Monuments Act 1930.”

16th July, 2013

Issuance of s.14 consent by the Minister for Arts, *etc.* This consent allows the demolition of Nos. 13, 18 and 19 which were expressed as being “*post 1916 structures*”. The decision required the submission of revised plans and stipulated as a condition of the consent, under Condition 50 that “*Substantive works shall commence on site within 3 months of approval of the revised project design*”.

-- March, 2014

Issuance by Mr Austin Broderick, Structural Engineer, of Report on 18, Moore Street, done on behalf of the Cumann Gaolta 1916 (the ‘Broderick Report’). Appended to the Broderick Report is a report by Mr Fred Hosford on the brickwork along Moore Street (the ‘Hosford Report’).

30th April, 2014

Issuance by the Minister for Arts, *etc.* of variation to consent of July 2013.

17th July, 2014

McGeehin Toale, Solicitors, acting for interested persons other than Mr Moore, write to Minister for Arts, *etc.* (1) contending that Nos. 13, 18 and 19, Moore street are pre-1916 structures, and (2) seeking withdrawal of s.14 consent to demolition of same

22nd July, 2014

McGeehin Toale write to Minister for Arts, *etc.*, contending that certain proposed works of Chartered Land are in breach of the s.14 consent of July 2013.

22nd July, 2014

McGeehin Toale write to Department of An Taoiseach following meeting with Taoiseach on 16th July and mentioning Taoiseach's promise to follow up matters with Minister for Arts, *etc.*

29th July, 2014

Letter from Department of Arts, *etc.* to McGeehin Toale, explaining position of Department and denying anything untoward in process.

1st August, 2014

McGeehin Toale write to Minister for Arts, *etc.* reiterating that difficulty arising is that some structures previously thought by Department to be post-1916 are or may be pre-1916, and threatening judicial review proceedings.

- 11th August, 2014** McGeehin Toale write to Minister for Arts, *etc.* seeking answer to pre-/post-1916 issue, raising certain issues regarding s.14 consent (as varied) and querying whether substantive works commenced at Nos. 14–17 within the three months required by the s.14 consent.
- 13th August, 2014** Letter from Department of An Taoiseach to McGeehin Toale referring to correspondence from Department of Arts, *etc.*, and pending meeting with Minister for Arts, *etc.*
- 4th September, 2014** Letter from Department of Arts, *etc.* to McGeehin Toale indicating, *inter alia*, that substantive works did commence within three months of consent.
- 9th September, 2014** Letter from McGeehin Toale to Department of Arts, *etc.*, seeking, *inter alia*, detail as to substantive works, and indicating intention to bring judicial review proceedings.
- 3rd October, 2014** Letter from Department of Arts, *etc.* to McGeehin Toale confirming compliance with s.14 consent and planning requirements and indicating that substantive works commenced within required timeframe.
- 31st October, 2014** Letter from McGeehin Toale to Minister for Arts, *etc.*, *inter alia*, expressing disappointment that Minister declining to

freeze works contemplated by consents pending resolution of pre-1916/post-1916 issue arising.

18th November, 2014

Letter from Minister for Arts, *etc.* to McGeehin Toale, indicating Minister has No. power to ‘freeze’ s.14 consents, is satisfied with how matters are proceeding, that the ‘architectural/engineering and historical evidence’ provided by McGeehin Toale’s clients had previously been considered by her Department, and that wider development of Moore Street is not a matter for the Minister under the National Monuments Acts.

19th August, 2015

Letter from Hennessy Perrozzi, Solicitors (acting for Mr Moore), to the Minister for Arts, *etc.* (1) querying why ‘Moore Street Battlefield Site’ is not considered a national monument *in toto*, (2) suggesting that Minister does have power, under s.22(3) of the Interpretation Act, 2005, to set aside a determination, and (3) suggesting a contravention of Venice Charter to arise.

14th September, 2015

Ministerial (s.14) consent issues in respect of erection of banner currently hanging to the front of Nos. 14–17 Moore Street.

18th September, 2015

Letter from Department for Arts, *etc.* to Hennessy Perrozzi indicating that (1) Department has previously been in correspondence with McGeehin Toale, and (2) that as Minister is satisfied that all in order “*the question of whether section 22(3) of the Interpretation Act 2005 is applicable to a consent granted under section 14 of the National Monuments Act 1930 (as amended) is academic*”.

29th September, 2015

Minister for Finance issues a ‘good news’ letter to Ms Maureen O’Sullivan, TD (Dublin Central). In this letter, the Minister advises by way of response to a letter of enquiry of 27th July from Ms O’Sullivan that: “*NAMA...has facilitated the sale by the debtor of 14–17 Moore Street to the State and the transaction is underway....[T]he contract for sale will include all licenses needed to enable the State carry out the National Monument works.*” Although the Minister referred to the acquisition of Nos. 14–17, in fact it appears that part of No. 18 was purchased as well.

9th November, 2015

Advertising/public information signage comprising a screen-printed image over a vinyl/polymer sheet is affixed to a timber batten sub-structure which itself is affixed to the front exterior façades of the terrace of buildings located at Nos. 14–17, Moore Street.

- 14th December, 2015** Issuance by Mr Moore of a Notice of Motion (the judicial review application). The reliefs sought are identified in Chapter 9 below.
- 14th December, 2015** Issuance by Mr Moore of a Notice of Motion (the first s.160 application). The reliefs sought are identified in Chapter 42 below.
- 7th January, 2016** Letter from Hennessy Perrozzi to Chief State Solicitor's Office complaining of alleged acceleration of works at Nos. 13–19, Moore Street, pending hearing of the within proceedings.
- 4th February, 2016.** Issuance by Mr Moore of a Notice of Motion (the second s.160 application). The reliefs sought are identified in Chapter 64 below.

PART 3

SOME PRELIMINARY MATTERS

Chapter 6

The Parties Involved

84. Mr Moore comes to these proceedings in his own right. He is also a member of an association of people known as ‘The 1916 Relatives Association’ (or ‘Cumann Gaolta 1916’) and an association of people known as the ‘Save Moore Street Campaign’ which comprises the associations of people known as ‘The Concerned Relatives of the Signatories to the 1916 Proclamation’ and ‘The 1916 Relatives Association’.

85. The Minister for Arts, Heritage and the Gaelteacht requires no introduction.

86. By order of this Court on 16th February, 2016, Chartered Land, a developer whose interests stand clearly to be impacted by these proceedings, was joined as a notice-party to the judicial review portion of the within proceedings and as a co-respondent to the first s.160 proceedings. Counsel for Chartered Land effectively acknowledged that his client’s interests did not require that it be joined to the second s.160 proceedings.

Chapter 7

Alleged Abuse of Process Arising

87. At the hearing of these proceedings, it was contended by counsel for the Minister for Arts, *etc.* that Mr Moore is engaged in an abuse of process, that he has no real ‘gripe’ against the State, and that his true intention is to frustrate Chartered Land in its development of a plot of land and properties sometimes referred to as ‘Dublin Central’. Notwithstanding that this is a most serious contention to make, no evidence has been advanced by the Minister’s legal team to support it, apart from its being stated that Mr Moore has expressed opposition to the Dublin Central development in the past and that there are aspects of the challenged actions of the Minister which Mr Moore likely favours.

88. It is obvious from all the court has seen, heard and read throughout the course of these proceedings that Mr Moore cares deeply about the history of the Easter Rising, and about the preservation and conservation of what remains of the Rising in, on and around Moore Street and its environs. There is clearly nothing remotely wrong in Mr Moore’s caring so deeply about such matters. That he should care so offers good reason for him to commence and continue the within proceedings and to seek the reliefs sought. If, separately, Mr Moore happens to be opposed to Chartered Land’s development proposals – and the court does not know whether he continues to be so opposed – he is entitled to his views in this regard. That he may possess such views, if he does, does not suffice to render his commencement or continuation of the within proceedings an abuse of process. Hard evidence, not hard words are what count with the court, and when it came to impugning Mr Moore’s objectives in bringing the within proceedings, such evidence was wanting.

89. Notably too, not a single case on abuse of process was opened before the court, a fact which may well speak to just how tenuous a contention it was that Mr Moore's application was or is coloured by the abuse of process alleged. As it happens, this Court has considered at some length in its recent judgment in *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 716, the issue of abuse of process in the context of judicial review proceedings and does not propose to do so again here. However, it is perhaps worth noting in passing that the fact that legitimate use of a lawful remedy will or may result in a collateral benefit to an applicant does not affect the applicant's right properly to seek and be granted such lawful remedy. There is nothing at all before the court to suggest that Mr Moore is not engaged in the legitimate use of a lawful remedy.

PART 4

THE JUDICIAL REVIEW APPLICATION

Chapter 8

Netting the Issues Arising

90. So much has preceded and is in issue in the present applications that even the summary timeline in Part 2, though helpful, is still rather long. What is the key flaw presenting in the judicial review application that has occurred and in respect of which Mr Moore now makes

complaint? In essence, these proceedings spring from the letter of 19th August, 2015 sent by Mr Moore's solicitors to the Minister, and the correspondence that followed. In that letter of 19th August, three questions were raised with the Minister:

“1. Why, in the face of considerable evidence to the contrary, and in the knowledge of support of our clients view of the battlefield site and its future by An Taoiseach have moves not been made to designate the entire site as a National Monument?”

[Court Note: In fact, as will be seen later below, the Minister has no role in ‘designating’ national monuments. Whether a particular monument is or is not a “national monument” within the meaning of the National Monuments Acts is a matter of satisfying certain objective criteria: if a monument satisfies those criteria as a matter of fact, then it is a national monument for the purposes of the National Monuments Acts. When it comes to the Minister the true issue arising, and the court does not doubt that this was and is entirely understood by the Minister/Department, is why no preservation order/s had issued in respect of the Moore Street Battle-Site.]

2. Why, given that evidence has been presented by our client, that the decisions of successive Ministers re: the site, have been made further to false information, have those decisions not been expunged/varied? In this particular the Minister is referred to your correspondence of the 18th of November, 2014, wherein you state there is ‘no provision in section 14 of the National Monuments Act, 1930, as amended, that would permit the Minister to suspend or otherwise set aside, either

temporarily or permanently, any determination made pursuant to that section'. It is submitted, at the outset that it is entirely within your gift to designate the remaining buildings (which includes the battlefield site) as a National Monument. Further, our client has sought the advices of Senior Counsel wherein the firm view of counsel is that the Minister is entirely incorrect when she states 'she cannot suspend or otherwise set aside' a determination having regard to Section 22(3) of the Interpretation Act, 2005 and it is respectfully requested the Minister revisits this point.

3. Please confirm as to whether the Minister has considered the foregoing arguments in the context of the Venice Charter.”

91. Following a couple of letters of acknowledgement, Mr Moore's solicitors received from the Minister's private secretary a more substantial letter of 18th September, 2015 which Mr Moore has described in his affidavit evidence as a “*cursory dismissal*” of the issues raised in the letter of 19th August. This letter, written under the misapprehension that Mr Moore had previously been a client of McGeehin Toale, Solicitors (with whom, as the summary timeline in Part 2 shows, the Department had previously been in correspondence), referred to that previous correspondence before stating the following:

“[P]lease note that the Minister is satisfied in all respects that the consent already granted provides an entirely appropriate framework to facilitate the future protection and presentation of this historical site. Therefore, in light of the foregoing, the question of whether section 22(3) of the Interpretation Act 2005 is

applicable to a consent granted under section 14 of the National Monuments Act 1930 (as amended) is academic in respect of this matter.”

92. It is this assertion which has led to these judicial review proceedings. Mr Moore contends that the Minister is incorrect in what she has asserted in this regard and/or that she has mis-directed herself in law in determining that the application of s.22(3) of the Act of 2005 to a consent granted under s.14 of the National Monuments Act 1930 is “*academic*”, having regard to the facts presenting.

93. Is it possible for a judicial review to arise from such an exchange of correspondence? It is, and counsel for Mr Moore has referred the court in this regard to the latest edition of Hogan and Morgan’s seminal work, *Administrative Law in Ireland* (4th edition, 2012), in which the learned authors state, at para. 16–22:

“Any applicant for mandamus must first call on the administrative body concerned to do its duty [here to issue a preservation order in circumstances where such is claimed to be merited], and this must have been refused, although there is nowadays some room for doubt whether this ‘formalistic approach’ would be adopted in every case [here it has transpired in any event]. The requirement that there be ‘a demand and refusal’ has much to commend it: it makes sense that the administrative body concerned be given the chance to mend its hand before the aggrieved citizen resorts to litigation. But the courts do not insist upon this requirement where it is unsuitable or where the refusal can be inferred from the circumstances. [Again, a ‘demand and refusal’ has in any event occurred in these proceedings.]”

94. To some extent, regrettably perhaps, the State-side in these proceedings has sought to belittle the nature of the issue presented by Mr Moore for judicial review. It has suggested that Mr Moore's grievance is, to borrow a metaphor used by counsel for the Minister, a contrived minor border dispute being used as a cause for all-out war. There does not appear to the court to be anything contrived about these proceedings, and as Lao-Tzu so shrewdly observed, "*Great affairs always start off being small*".

Chapter 9

The Reliefs Sought by Mr Moore

95. In these judicial review proceedings, Mr Moore seeks the following particular reliefs:

- (1) an order of *certiorari* quashing the decision of the Minister dated 18th September, 2015 (received on 21st September, 2015) refusing to consider the application of s.22(3) of the Interpretation Act 2005 to a consent granted under s.14 of the National Monuments Act 1930, as amended;
- (2) a declaration that the decision of the Minister dated 18th September, 2015 (received on 21st September, 2015) as to whether s.22(3) of the Interpretation Act 2005 is applicable to a consent granted under s.14 of the National Monuments Act 1930, as amended, is academic, is unlawful having regard to the National Monuments Act 1930, as amended, the

- Interpretation Act 2005, the Ministers and Secretaries Act 1924 (as amended), and the Ministers and Secretaries (Amendment) Act 1939;
- (3) an order of *mandamus* directing the Minister to consider whether s.22(3) of the Interpretation Act 2005 is applicable to a consent granted under s.14 of the National Monuments Act 1930, as amended;
 - (4) a declaration that the curtilage of the terrace of buildings located at Nos. 14–17 Moore Street, such buildings being a national monument protected and preserved under the National Monuments Act 1930, as amended, includes the lands and buildings of the terrace located at Nos. 13, 18 and 19, Moore Street;
 - (5) a declaration that the curtilage of the terrace of buildings located at Nos. 14–17 Moore Street, such buildings being a national monument protected and preserved under the National Monuments Act 1930, as amended, includes all and/or any part of the lands and buildings and/or basements and/or cellars located on Moore Street and/or Moore Lane;
 - (6) a declaration that the extent of the national monument located at Nos. 14–17 Moore Street, includes any and all basements and/or cellars and any and all relevant and/or connected structures to the said national monument, including the basements and/or cellars located on Moore Street and Moore Lane;

- (7) a declaration that the lands and buildings located at Nos. 13, 18 and 19, Moore Street, and the curtilage of these mid-terrace buildings which adjoin the national monument located at Nos. 14–17 Moore Street, and extend to Moore Lane are a national monument as provided for by law and/or within the meaning of the National Monuments Act 1930, as amended;
- (8) a declaration that the lands and buildings at Nos. 6, 7, 10, 11–13, 18 and 19, Moore Lane, are a national monument as provided for by law and/or within the meaning of the National Monuments Act 1930, as amended;
- (9) a declaration that the lands and buildings located at Nos. 6, 7, 10, 11–13, 18 and 19, Moore Lane are within the curtilage of the terrace of the buildings located at 14–17 Moore Street, a national monument protected and preserved under the National Monuments Act 1930, as amended;
- (10) a declaration that the lands and buildings located at Nos. 8 and 9, Moore Lane, come within the curtilage of the terrace of buildings located at 15 and 16, Moore Street, which are part of a national monument protected and preserved under the National Monuments Act 1930, as amended;
- (11) an order of prohibition prohibiting the Minister from in any way allowing and/or facilitating the demolishing, removing (in whole or in part), disfiguring, defacing, altering, injuring or further interfering in any way with the terrace of buildings located at 14–17 Moore Street, a national

monument protected and preserved under the National Monuments Act 1930, as amended;

(12) an injunction restraining the Minister from in any way allowing and/or facilitating the demolishing, removing (in whole or in part), disfiguring, defacing, altering, injuring or interfering in any way with the terrace of buildings located at Nos. 14–17 Moore Street, a national monument protected and preserved under the National Monuments Act, 1930, as amended, pending the hearing of the within proceedings;

(13) a declaration that the Minister has facilitated and/or allowed the unlawful interference with the terrace of buildings located at Nos. 14–17 Moore Street, such buildings being a national monument protected and preserved under the National Monuments Act 1930, as amended, by the carrying out of works comprising the affixing or application of advertising/public information signage comprising a screen-printed image over a vinyl/polymer sheet on a timber batten sub-structure which itself has been mechanically fixed to the front exterior façades of the terrace of buildings comprising the national monument located at Nos. 14–17, Moore Street, and/or any associated works to such buildings;

(14) a declaration that the Minister has facilitated and/or allowed the unlawful interference, as aforesaid, with the terrace of buildings located at Nos. 14–17 Moore Street, a national monument protected and preserved under the

- National Monuments Act 1930, as amended, in the absence of the requisite ministerial consent;
- (15) a declaration that the Minister erred in law and/or acted *ultra vires* in allowing the unlawful interference, as aforesaid, with the terrace of buildings located at Nos. 14–17 Moore Street, a national monument protected and preserved under the National Monuments Act 1930, as amended, in the absence of the requisite ministerial consent;
- (16) a declaration that the Minister, in allowing the unlawful interference, as aforesaid, with the terrace of buildings located at Nos. 14–17 Moore Street, a national monument protected and preserved under the National Monuments Act 1930, as amended, in the absence of the requisite ministerial consent erred in law and/or acted *ultra vires* in failing to consult in writing with the Director of the National Museum of Ireland;
- (17) a declaration that lands and buildings referred to in the letter from Mr Moore’s solicitor to the Minister dated 19th August, 2015, which, in particular, includes the ‘Moore Street Battlefield Site’ and the lands and buildings at No. 10, Moore Street, the bottling stores situate to the rear of No. 10, Moore Street, the O’Brien’s Mineral Water Works Building located at Henry Place, the White House located at Henry Place, and Hanlon’s, located at 20/21 Moore Street, are a national monument;

- (18) a declaration that lands and buildings referred to in the letter from Mr Moore's solicitor to the Minister, dated 19th August, 2015, which, in particular, includes the 'Moore Street Battlefield Site' and the lands and buildings at No. 10, Moore Street, the bottling stores situate to the rear of No. 10, Moore Street, the O'Brien's Mineral Water Works Building located at Henry Place, the White House located at Henry Place, and Hanlon's, located at Nos. 20/21 Moore Street, are of national historic importance; and
- (19) various ancillary reliefs.

Chapter 10

Some Unique Features Presenting

A. Some contentions by the Minister.

96. None of the parties to the within proceedings denies the historical significance of the Easter Rising or the heroism and tragedy which that event involved. However, repeatedly pressed on the court by counsel for the Minister at the hearing of the within applications was that there is no especial significance to:

- (a) the events that occurred on what has become known to many as the 'Moore Street Battlefield Site', being the 'square-ish' plot bounded by longer part of Henry Lane, Nos. 10–25 Moore Street, O'Rahilly Parade, and the greater part of Moore Lane; as compared to

- (b) what happened elsewhere in Dublin during the Easter Rising, particular reference being made in this regard to the battle at Mount Street Bridge and the large number of deaths which that encounter entailed.

97. Counsel for the Minister did not mean in the above line of argument to diminish the significance of the events that took place at either battle location. His argument was simply that if, as Mr Moore contends, the Moore Street Battle-Site is a “*national monument*” within the meaning of the National Monuments Acts – a contention that the court considers in some detail later below – then where is one to stop? Is it now the position, counsel for the Minister asked, that we are to treat Northumberland Road and Mount Street Bridge as national monuments? And why stop there? What of the Battle of Clontarf? What of the Cromwellian battles that took place around town? Are the sites of each of these battles now to be treated as “*national monuments*” within the meaning of the National Monuments Acts?

98. In all of the above, it seemed to the court that, with every respect, counsel for the Minister was completely missing the point. There are a number of reasons why the Easter Rising is unique and why the comparison made by counsel with other historical events is un-founded. There are a number of reasons too why the Moore Street Battle-Site is unique and why comparison with other historic events around the city, whether in 1916 or previously, is un-founded. In consequence there are a number of reasons why the facts of this case are unique and why, as it happens, the court’s conclusions need not have consequences beyond the parameters of the circumstances now presenting.

99. To keep this judgment within reasonable bounds of length, the court confines itself here to three reasons each as to why (i) the Easter Rising is unique (and so worthy of greater commemoration than other battles, however important), (ii) the GPO occupies an iconic position in Irish history (making what happened to the men and women who fled the GPO when it was ablaze a matter worthy of unique commemoration), and (iii) the Moore Street Battle-Site, the site to which the men and women of the GPO fled, where battle was done and surrender was negotiated, and a site where workers, both civilian and combatant, lived and died in what to no little extent was a workers' rising) is uniquely worthy of commemoration. In providing these reasons the court draws on the generality of the evidence offered by Mr Moore but especially on the affidavit evidence of Messrs Bates, Coogan and Kelly (whose evidence is considered in greater detail later below).

i. The Uniqueness of the Easter Rising.

100. There are a number of reasons why the Easter Rising has both a unique hold on the popular imagination and a unique place in Irish history. Three of these reasons are as follows. First, the Easter Rising was the catalyst that led to most of Ireland achieving independence as a nation-state. Second, there is a unique workers' rights dimension to the Easter Rising (informed by the participation of Connolly) that cannot be ignored. Third, uniquely among significant world battles, the Easter Rising was relatively small-scale, with the names, addresses, ages, causes of death and burial sites of most of the participants and victims being known, making commemoration uniquely possible and especially desirable.

ii. The Uniqueness of the GPO.

101. There are a number of reasons why the events that happened at the GPO, and what happened to the Republicans after they fled the GPO, have a unique hold on the popular imagination and a unique place in Irish history. Three of these reasons are as follows. First, as a nation we generally date the genesis of our modern independent republic to the reading of the Proclamation outside the GPO. Second, no other venue around Dublin is so closely associated with the Easter Rising as the GPO. Yes, we remember Boland's Mills and St Stephen's Green and other locations, but it is the GPO that has seized the popular imagination; it is the bullet-pocks on its pillars that we point out with pride to children; it is the sight of the tricolour flying high above the GPO that makes our hearts soar. Third, the GPO is where Connolly and Pearse and others of the signatories to the Proclamation, some of the greatest names in Irish history, fought until they had to flee, so that the Irish people might be free.

iii. The Uniqueness of the Moore Street Battle-Site.

102. There are a number of reasons why the Moore Street Battle-Site is unique. Three of these reasons are as follows. First, the Easter Rising was a pivotal event in Irish history. At the very heart of the story of the Rising, steps from the iconic GPO, sits the Moore Street Battle-Site. Second, the Moore Street Battle-Site is the place to which the men and women of the GPO fled, where battle was done and surrender was negotiated, and a site where workers, civilian and combatant, lived and died in what was, to a large extent, a workers' rising. Third, significant physical fragments of the Moore Street Battle-Site landscape and streetscape survive; this is not true of many of the sites of the battles done at Easter 1916.

B. The Unique Significance of this Case.

103. Having regard, *inter alia*, to the factors mentioned at (i)–(iii) above, it seems clear to the court that counsel for the Minister is, with all respect, wrong, and that the uniqueness of the Easter Rising, the unique position that the story of the GPO holds in the story of that Rising, and the unique position that the Moore Street Battle-Site occupies as the site of the final skirmishes and surrender of the GPO garrison, has the result that the present case is entirely unique on its facts. If the court finds that the Moore Street Battle-Site is a “*national monument*” within the meaning of the National Monuments Acts, that has no wider consequences or ramifications for other sites of past battles; the flood-gates will not have been opened. Whether or not any one battle-site is a “*national monument*” would continue to have to be, to use the wording of McLoughlin J., at 12, in *Tormey v. Commissioners of Public Works* (Unreported, High Court, 20th December, 1968) “*interpreted in the light of the circumstances of any particular case*”, given that “[t]he expression ‘*national monument*’ is defined in the Act [of 1930] in...terms...which are wide and not very precise”. There cannot be many other sites that present the unique and uniquely historical concatenation of circumstances that the Moore Street Battle-Site presents.

C. Consequences?

104. If the court concludes that the Moore Street Battle-Site is a national monument, such a conclusion has no immediate consequences for the buildings which presently sit on that battle-site. Some of those buildings, as it happens, are national monuments in their own right, as for example is recognised by the Minister in the case of Nos. 14–17 Moore Street. Some

others are not; indeed some of the properties standing on the battle-site date from as recently as the 1960s, are of no historical or other interest and could be razed without any consequent historical or architectural loss arising. All the court would have recognised by such a finding aforesaid is that, as a matter of statutory interpretation, a battle-site which is claimed to be a “national monument” within the meaning of the National Monuments Acts, is a “national monument” within the meaning of the National Monuments Acts. For the court to so conclude would not – despite counsel for the Minister suggesting this was so – involve the court acting as a legislator or imposing its ‘world-view’ as to whether a particular monument is a national monument and/or ought to be preserved. All the court would be doing is what courts do every day of the week: reading an Act and applying the provisions of that Act to the facts at hand within the context of the form and substance of such application/s as present before it – discharging, in short, that limited role adumbrated by the late Baron de Montesquieu a quarter of a millennium ago as the appropriate role for the courts in a tripartite system of government such as ours.

Chapter 11

The Act of 1930: Overview

105. The principal, and much-amended, legislation concerning national monuments is the National Monuments Act 1930. The long title to this enactment states that it is “*An Act to make provision for the preservation of archaeological objects in Saorstát Éireann and to make provision for other matters connected with the matters aforesaid*”.

106. It has been confirmed in a number of cases that the overarching purpose of the Act of 1930 is the preservation and protection of ‘national monuments’. Thus, for example, in *Casey v. Minister for Arts, etc.* [2004] 1 I.R. 402, a case arising from the refusal of the Minister for Arts, *etc.* to grant a Skellig Michael landing permit to the eponymous Mr Casey, Murray J. stated as follows in the Supreme Court, at 419:

“The National Monuments Acts 1930 to 1994, of which the Act of 1930 is defined as the ‘Principal Act’ are intended to provide for the protection and preservation of national monuments and for matters connected with such protection and preservation. In the course of his submissions, counsel for the applicant made reference to the importance of considering the long title of an Act when interpreting its provision. Although it seems to me that the policy and objectives of the Act of 1930 are clearly expressed in its provisions, to which I will refer in more detail later, they are confirmed by the long title as ‘An Act to make provision for the protection and preservation of national monuments...’”.

107. Continuing at 423, Murray J. observed:

“The most fundamental principle and policy of the Act of 1930, as reflected in its long title, is the protection and preservation of national monuments. As O’Higgins C.J. stated in O’Callaghan v. Commissioners of Public Works in Ireland [1985] I.L.R.M. 364, 367:

'It cannot be doubted that the common good requires that national monuments which are the prized relics of the past should be preserved as part of the history of our people.'

The judgment of this court [in O'Callaghan], referring to the Act of 1930, also stated at p.368 that:

'Its purpose is to preserve in the national interests each such monument by prohibiting any action which may damage or destroy the same.'

108. Curiously perhaps, what is meant by “*preservation*” is not defined in the Act of 1930. However, as good a definition as any of what is connoted by the verb ‘to preserve’ is to be found in *South Lakeland District Council v. Secretary of State for the Environment* [1992] 1 All E.R. 45, in which Mann J., sitting in the High Court of England and Wales, had to consider the meaning of the verb ‘to preserve’ in the context of that jurisdiction’s Town and Country Planning Act 1971, and concluded as follows, at 49:

“[T]he ordinary meaning of ‘preserve’ as a transitive verb is ‘to keep safe from harm or injury; to keep in safety, save, take care of, guard’....In my judgment, character or appearance can be said to be preserved when they are not harmed.”

109. Mr Moore contends that the Minister for Arts, *etc.* would not be acting in accordance with the overarching objective of the Act of 1930 if she exercises any of her powers thereunder on an erroneous conception of whether a particular monument is a national

monument. Parsing this last line of argument a little more closely, counsel for the Minister contends that (a) if the Minister errs in preserving what is not a national monument, she cannot be contended to have acted in breach of the Act of 1930, so (b) if the Minister errs in not preserving what is a national monument, she cannot be contended to have acted in breach of the Act of 1930. That is a neat attempt at logic, but as Oliver Wendell Holmes, Jr., so wisely observed in *The Common Law* (1881), “*The life of the law has not been logic; it has been experience*”. The law cannot be dealt with as if it contained the axioms and corollaries of a book of mathematics, and it is futile to seek to construct legal propositions on such a basis because neither life nor law will ever fully satisfy such formulae as may be constructed. It is patently the case that if the Minister for Arts, *etc.*, despite being confronted with an abundance of evidence which suggests a monument to be a national monument, nonetheless proceeds on the basis that such a monument is not a national monument, then she would not be acting in accordance with the overarching objective of the Act of 1930. And, as will be seen hereafter, it is precisely such a combination of circumstance which presents in the within proceedings.

Chapter 12

National Monuments, Monuments, Battle-Sites and Access

A. What is a “national monument”?

110. The National Monuments Act 1930, *inter alia*, makes provision for the protection and preservation of national monuments. But what is a “*national monument*”? The term is defined in the much-amended s.2 of the Act of 1930 as meaning:

“...a monument or the remains of a monument the preservation of which is a matter of national importance by reason of the historical, architectural, traditional, artistic, or archaeological interest attaching thereto and also includes (but not so as to limit, extend or otherwise influence the construction of the foregoing general definition) every monument in Saorstát Éireann to which the Ancient Monuments Protection Act, 1882, applied immediately before the passing of this Act, and the said expression shall be construed as including, in addition to the monument itself, the site of the monument and the means of access thereto and also such portion of land adjoining such site as may be required to fence, cover in, or otherwise preserve from injury the monument or to preserve the amenities thereof.”

111. The word “*monument*” also bears a defined meaning and the court turns to this later below. But before moving on, there is perhaps a trio of points to make about the above definition.

112. First, whether or not a monument or the remains of a monument is a “*national monument*” is a question of fact. Provided the facts identified in the above-quoted text present in any one circumstance, the monument or remains of a monument being looked at constitute a “*national monument*”. It is (rightly) accepted by counsel for the Minister that no ministerial designation is required for a monument or the remains of a monument to become a “*national monument*”.

113. Second, when it comes to recognising the national importance of preserving a monument or the remains of a monument, that national importance can present by virtue of any one or more of “*the historical, architectural, traditional, artistic, or archaeological interest attaching thereto*”. Counsel for Chartered Land suggested in argument that Mr Moore had emphasised the historic importance of various properties in the Moore Street area but had not sufficiently addressed their national importance. The court has identified elsewhere above the unique national historical importance that the Moore Street Battle-Site and various of the properties thereon present...and it has done so on the basis of the argument and evidence proffered and adduced by counsel for Mr Moore in these proceedings.

114. Third, a “*national monument*” comprises not just the monument or the remains of the monument under consideration but also “*the site of the monument and the means of access thereto and also such portion of land adjoining such site as may be required to fence, cover in, or otherwise preserve from injury the monument or to preserve the amenities thereof*” – “*as may be*”, the court notes; there is no reason why a national monument should not be the relevant monument and the means of access alone.

B. What is a “monument”?

i. Definition of “*monument*”

115. Section 2 of the Act of 1930 has been amended by s.11 of the National Monuments (Amendment) Act 1987, so that the word ‘monument’ is now defined as follows:

“‘monument’ *includes the following, whether above or below the surface of the*

ground or the water and whether affixed or not affixed to the ground –

*(a) any artificial or partly artificial building, structure or erection
or group of such buildings, structures or erections...*

and

*(d) any place comprising the remains or traces of any such
building, structure or erection...*

situated on land or in the territorial waters of the State...”.

116. It was contended for Mr Moore that the term “*monument*”, when employed in the National Monuments Acts also embraces the curtilage of such a “*monument*” when the monument in question is a building. To this the response of counsel for the Minister is that ‘curtilage’ is a concept which finds no mention in the National Monuments Acts. The substance of this response is true; however its thrust, with respect, makes no practical sense. As the term “*monument*”, as defined in s.2, includes “*any artificial or partly artificial building, structure or erection or group of such buildings...*”, then there has to be some means of defining the spatial parameters of the said building, *etc.* when identifying what it is that comprises the monument. When it comes to defining these parameters, the traditional and long-defined notion of ‘curtilage’ – in essence, the parcel of land immediately associated with that building – just has to come into play. In the reality beyond this courtroom, mere postal addresses and street numbers do not suffice to define the scale of a particular property or monument. It does not suffice in life to say that ‘No. 14 Moore Street’ simpliciter is a national

monument...and what has happened in the case of No. 14 offers a good example of why this is so.

117. When No. 14 was made the subject of a preservation order back in 2007, it was stated that Nos. 14–17 were a protected structure and a map attached to the order showed the premises that the order embraced. But, some years after the order was made, it was discovered that there is a cellar behind No. 14 that extends under Nos. 8/9 Moore Lane and so outside the border identified on the map that accompanied the order of 2007. It is clear from the Garland Report (considered later below) that this cellar is of an age with No. 14 and satisfies, at the least, the necessary architectural and historical criteria for it to be considered a part of the national monument that all recognise No. 14 to be. No-one could seriously contend, and the court does not understand anyone to be contending, that the cellar should be treated as a separate national monument – and had this contention been made, the court would have found it to be both fanciful and false. At its simplest, the cellar is a part of the curtilage of No. 14 and thus along with the rest of No. 14 is a national monument. No preservation order might extend to the cellar but that does not affect its status as a composite element of a recognised national monument.

118. The court cannot but conclude that as a matter of practical sense, Mr Moore is correct and hence the term “*monument*”, when employed in the National Monuments Acts also embraces the curtilage of such a “*monument*” when the monument in question is an urban property. True, the term ‘curtilage’ gets no mention in the National Monuments Acts but this, it seems to the court, is because the Oireachtas (a) proceeded with greater sense than is encompassed by the line of argument that the area of a national monument does not include its curtilage, and (b) left unspoken the obvious: that when a national monument is a building,

the area of same will necessarily include its curtilage. If counsel for the Minister means to contend that, back in the early years of the State, the Oireachtas, a body comprised of sensible people of the world, decided that when it comes to national monuments that are urban properties, the scale of any one such monument should not embrace the area that (a) so-called 'lay-people' would understand those urban properties to embrace, and which (b) conveyancers would typically include in any contract pertaining to the sale of same, that is a line of contention with which this Court respectfully does not concur. When it comes to a town-house, even a terraced town-house, the curtilage typically includes the house, any railed area in front of it, cellars below the footpath, the rear garden, rear cellars and any mews house, sometimes even where the mews house is in separate ownership. What exactly comprises the curtilage in any one instance will be, as was noted in the English case of *Skeritts of Nottingham Ltd. v. Secretary of State for the Environment* [2001] Q.B. 59, a question of fact and degree. When seeking to identify the answer to that question in the context of the National Monuments Acts, as good a place as any to start is para. 13.1 of the *Architectural Heritage Protection Guidelines for Planning Authorities*, as published (as it happens) by the Department of Arts, *etc.* Those guidelines are concerned with identifying curtilage for the purposes of protected structures under the planning regime but offer, *mutatis mutandis*, an entirely sensible basis on which curtilage is to be defined when it comes to national monuments.

119. In the present case, the court finds that in respect of each of the houses from No. 10, Moore Street upwards which are national monuments (an issue addressed later below), the curtilage embraces the area mentioned immediately above in respect of townhouses generally, subject to the qualification that there is no railed or otherwise cordoned area to the front of the Moore Street premises. The court notes in passing that its attention was drawn in the course of

argument to the case of *Attorney-General v. Calderdale Borough Council* [1983] 46 P & CR 399, in which the Court of Appeal of England and Wales was satisfied to hold that the entirety of a terrace of workers' cottages came within the curtilage of a mill. However, the court respectfully does not accept the contention of counsel for Mr Moore that this decision has the effect that this Court should now find that the entirety of Nos. 10–25 Moore Street constitutes a single curtilage. The court does not consider that the terrace as a whole, being comprised of buildings of varying ages and styles, some very old, some comparatively recent, is or could be, in the context presenting, a single curtilage.

ii. Remains and traces.

120. It is clear from s.2 of the Act of 1930 that a building or a place comprising the remains or traces of such a building can be a monument. Curiously, there was remarkably little focus at the hearings of what is meant by the terms “*remains*” and “*traces*”. In common parlance these terms can refer to something that can be relatively slight. A Google search of both words yields a similar conclusion as to the meaning of these words; doubtless a search of any leading dictionary will do likewise. A Google search of the word “*remains*” yields the following definition:

“the parts left over after other parts have been removed, used or destroyed...

·historical or archaeological relics.

· a person's body after death.”.

121. Transmuting the above definition into the context of the within proceedings, it is clear that, for example, a partly renovated premises standing today that contains some fabric or

design features from yester-year could reasonably and properly be described as comprising “*the parts left over after other parts have been removed, used or destroyed*”, even if that premises contains some newly added parts.

122. As for the word “*traces*”, a Google search yields the following definition:

“1. *a mark, object, or other indication of the existence or passing of something.*
‘remove all traces of the old adhesive’ ...

2. *a very small quantity, especially one too small to be accurately measured*”.

123. Transmuting the above definition into the context of the within proceedings, it is clear that, for example, the existence of fabric from yester-year in a renovated premises that is standing today could reasonably and properly be described as a premises that comprises “*a mark, object or other indication of the existence or passing of something*”, even if those premises contain some newly added parts.

C. Can a battle-site be a monument?

124. Section 2 of the Act of 1930 states that the term “*monument*” when used in that Act “*includes...*”, *i.e.* embraces but is not limited to, the stated features. So apart from the stated features, one returns quickly to the dictionary meaning of “*monument*”. A Google search of the word ‘monument’ yields the following definition; doubtless a search of any of the leading dictionaries will yield a similar meaning:

“a statue, building or other structure erected to commemorate a notable person or event...

· a statue or other structure placed over a grave in the memory of the dead...

· a building, structure or site that is of historical importance or interest.”

125. Clearly a battle-site can be a *“site that is of historical importance or interest”*. This conclusion makes sense at law and, as it happens, and it does not always happen, chimes also with common-sense. There may be national monuments sitting on that site, there may be buildings that are not national monuments sitting on that site but that does not mean that the site on which all of those buildings sit cannot in and of itself be a national monument.

126. What of an urban battle-site such as the Moore Street battle-site comprised of a streetscape and particular properties? This is not a traditional battlefield like the site where the Battle of Boyne was fought with infantry and cavalry manoeuvres. The Republicans hurried down Henry Lane, faced fire down Moore Lane, broke into Nos. 9 and 10 Moore Street, burrowed through from Nos. 10 to 25 (with the possible exception of No. 19), The O’Rahilly led a charge up Moore Street under fire from the Parnell Street barricade, there were sorties into O’Rahilly Parade, men assembled to the rear of No. 25 in preparation for a ‘death or glory’ charge that was frustrated by the decision to surrender, civilians were killed in Henry Place and Moore Street, Nurse O’Farrell went up and down Moore Street during the surrender negotiations, Pearse walked up Moore Street to surrender, the Republicans gathered on Moore Street post-surrender and then marched down Henry Place and out into O’Connell Street. Is it possible to identify in all of this streets, street alignments and/or properties

comprising a “*site that is of historical importance or interest*”? Of course it is, and later below the court identifies the parameters of that site.

127. In passing, the court notes that the scale of an area is no bar to its being declared a national monument. Thus, for example, in *Tormey* an area of some 57 acres comprising part of the Hill of Tara was deemed to constitute a national monument; and in *O’Callaghan v. Commissioner for Public Works* [1985] ILRM 364, a 38½ acre site containing a fort and Martello Tower in County Dublin was held to be a national monument.

128. Lastly, the court notes the contention by counsel for the Minister that when it comes to battle-sites, merely to point at a location and to say that historical events happened there but few traces survive is inadequate for national monument status. This cannot be so. Perhaps the finest example of a battlefield location inspiring thoughts of national freedom, is offered by Byron’s musings in *The Isles of Greece*, after viewing the largely farmed-over plain of Marathon. Four lines suffice by way of example:

*“The mountains look on Marathon –
And Marathon looks on the sea;
And musing there an hour alone,
I dream’d that Greece might still be free...”*

129. Byron’s musings were prompted by what was largely no longer there. In the case of the Moore Street Battle-Site, as will be seen, there remains much of 1916 that is still there and that is evocative of a key moment in Ireland’s national history; this is unaffected by the fact

that there is also much of the fabric 1916 that, regrettably, has long disappeared from Moore Street and its environs.

D. Means of Access

130. The definitions in the National Monuments Acts of the terms “*national monument*” and “*monument*” are very broad. So, for example, the definition of “*national monument*” not only includes the site of same but also “*the means of access thereto*”. Mr Moore contends that this would mean that, if one assumes that any of Nos. 10–25 Moore Street, are a national monument (and Nos. 14–17 are presently recognised by the Minister as such), it follows that Moore Street would also be a “*national monument*” because it provides a means of access to those properties. The court does not accept this contention. When it comes to urban properties, such as terraced houses that open onto Moore Street and may have a back access via Moore Lane, the court considers that the most natural reading of the phrase “*the means of access*” – again, assuming that one or more of those properties is a national monument – means, *e.g.*, the front-yard or garden (if any), the front-door, the back-door, the back-yard or garden (if any) any side- or back-entrance or entrance-way.

Chapter 13

Determination, Protection, Preservation and Access

A. Determination of what constitutes a 'national monument'

131. As mentioned above, a “*monument*” constitutes a “*national monument*” by virtue of the operation of statute and the presence of certain objective factors. The Minister for Arts, *etc.* has no role as regards defining what is or is not a national monument. This is acknowledged by the Department of Arts, *etc.*, with Mr Terry Allen, a principal officer of the National Monuments Service, averring in his affidavit evidence that “[T]he Minister does not designate national monuments....If a matter comes within the definition of a national monument, then it is automatically one under the National Monuments Acts”. Indeed, with every respect to the high office of the Minister, given that the Oireachtas has not conferred any function or role on the Minister in this regard, there is in truth no reason for the court or anyone else to defer to the opinion of the Minister as to what is or is not a “*national monument*”.

132. Insofar as there is a dispute between parties as to whether or not a particular “*monument*” is a “*national monument*” (in each case, as defined in the National Monuments Acts), then provided that dispute can be formulated within the context of properly constructed and *bona fide* legal proceedings, it is open to the courts to declare whether or not a particular “*monument*” is indeed a “*national monument*”. In making this last assertion, the court is conscious that our courts have made such declarations in the past. So, for example, in *Attorney General (Martin) v. Dublin Corporation* (Unreported, High Court, 19th February

1979), one of the cases concerning the to-be-lamented destruction of Wood Quay, the location of a Viking site just down the river Liffey from the courtroom where this judgment is pronounced, Gannon J. made reference, at 2, *inter alia*, to “*the national monument as declared in the Order of Mr Justice Hamilton*”. Likewise, the Supreme Court in *Attorney General (Martin) v. Dublin Corporation* [1983] ILRM 254, refers to how “[i]n earlier proceedings [a] portion of the Wood Quay site had been declared to be a national monument”.

133. Insofar as the Minister for Arts, *etc.* is not entrusted with determining the scope of what constitutes a national monument, it would seem most appropriate for the court to determine, as a matter of fact, what is the extent of that national monument and not to determine whether, for example, the previous determination of the scope of a national monument, as identified in a related preservation order, was or was not reasonable. This being so, it follows that there is no scope for a reasonableness-type standard to be applied ‘à la’ *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. While the making of a preservation order clearly shows that the Minister has formed a view as to the existence and scope of a “*national monument*”, there is no requirement at law, nor does there even appear to be any basis in the natural comity that exists between the great organs of state, for the court to defer to the views of the Minister in this regard, albeit that the court will doubtless have regard to the basis for those views and such other evidence as may be furnished before the court.

134. Counsel for the Minister sought to construct an argument that when it comes to identifying a national monument, the Minister comes clothed with the advantage of having advisors to hand, as well as being accountable to the Oireachtas. Notably, however, this consideration did not stop the High Court making a declaration in the Wood Quay cases

referred to above. Nor did the actions of the High Court attract the censure of the Supreme Court in this regard. And there is good reason why this is so: if the courts were to take the view that Ministers have advisors and are accountable to the Oireachtas and that this suffices in our system of government, then we might as well put an end to judicial review of ministerial decisions, for it will always be the case that ministers have advisors and are accountable to the Oireachtas. But our system of government is comprised of three branches, not two. There is a recognised place for the courts in a system of tripartite government and that is to adjudicate upon such questions of law and fact as are presented before them in recognised forms of proceedings – proceedings such as those now presenting.

B. Protection and Preservation of national monuments

i. Section 8 of the Act of 1930.

135. The present s.8(1) and (2) of the Act of 1930 were inserted by s.3 of the National Monuments (Amendment) Act 1954, and provide as follows:

“(1) Where it appears to the Commissioners [now the Minister for Arts, etc.] on a report made by the Advisory Council or otherwise, that a monument which in their opinion is a national monument is in danger of being or is actually being destroyed, injured or removed, or is falling into decay through neglect, the Commissioners may by order (in this Act referred to as a preservation order) undertake the preservation order of such monument.

(2) *The Commissioners may at any time, by order made after consultation with the Advisory Council, revoke a preservation order.*”

136. It is notable that s.8 is phrased in permissive, not mandatory language. At first glance, it would appear that the result of this is that even when it appears to the Minister for Arts, *etc.* that there exists a monument which, in her opinion, is a national monument that “*is in danger of being or is actually being destroyed, injured or removed, or is falling into decay through neglect,*”, she is not under any obligation under s.8 to take any steps to make a preservation order in respect of the national monument. However, there is the clearest of Supreme Court precedent to the effect that there is a duty on the Minister (as the person who has supplanted the role of the Commissioners under the National Monuments Acts) to preserve any national monument. The Supreme Court case in question is that of *O’Callaghan* which was touched upon previously above. There a land-owner decided to deep-plough a promontory fort dating from somewhere between 200 B.C. and 100 A.D. in north County Dublin, a course of action which prompted the Commissioners of Works hurriedly to issue a preservation order in respect of what appears to have been commonly agreed was a national monument. Mr O’Callaghan questioned the power of the Commissioners to act as they had, contending that they had failed to act judicially, that they had made the order without affording him an opportunity of objecting and without hearing what he might have to say, and that they were bound to consider another option open to them, specifically to buy the national monument from Mr O’Callaghan. To these various contentions, O’Higgins C.J. gave short shrift, observing as follows, at 14:

“I may say at once that I find no substance in these objections. While the Commissioners might, in normal circumstances, be bound to hear any objection the Plaintiff might have to the making of a Preservation Order, the circumstances in this case were far from normal. Here, an emergency had been created by the Plaintiff’s own action in defiance of his legal obligations. If the Commissioners had hesitated in acting as they did, the monument which it was their duty to preserve would have been seriously damaged or destroyed.”

137. As mentioned, the role of the Commissioners has since been supplanted by the Minister. However, it is clear from the judgment of O’Higgins C.J. that he considers that the Commissioners (and so now the Minister) have a duty to preserve any national monument, notwithstanding that there may not be a preservation order extant in respect of that monument. Reference has been made in this regard by counsel for the State to the fact that O’Higgins C.J., in the later portion of his judgment concerned with the constitutionality of s.8 made reference, at 4, to the fact that s.8 is a “*machinery section [that]...provides merely for the manner in which a preservation order may be made and revoked.*” But all that indicates is that the duty to preserve (which can be effected via a s.8 order) derives from elsewhere in the Act of 1930 or, more likely perhaps, from the over-arching objectives of the enactment recognised by the courts in cases such as *Casey*.

138. How does the duty to preserve, as recognised by the Supreme Court, sit with the power conferred on the Minister for Arts, *etc.* by s.14 of the Act of 1930 to grant a consent which may allow the destruction of a national monument? At first glance, it may appear that this question places the court between the Scylla and Charybdis of binding Supreme Court precedent on the one hand and binding statute on the other. But in truth nothing of the sort

presents. The judgment of O’Higgins C.J. and the provisions of the Act of 1930 are easily reconciled: the Minister is subject to a duty to preserve; all her actions must be viewed through the prism of whether she has complied with that duty; but the Minister is not under a duty to preserve to the point of absurdity: there will be instances where she may move or remove a national monument (the movement of High Crosses to indoor premises so as to preserve them is an example); there will be instances (as may perhaps arise in the circumstances now presenting) where latter-day development that has occurred on a national monument before it was generally recognised as such will need to be tolerated as is; and, regrettably and doubtless rarely, there will be instances where, notwithstanding a general duty to preserve, it may prove necessary for the Minister to grant a s.14 consent that allows some – one would trust generally limited – element of destruction. Where the Minister appears to the court in the within proceedings to meet a very real difficulty is that it is hard to see how she can contend that she is properly discharging her duty to preserve when she refuses even to entertain a legitimate and reasonable query such as that which was placed before her in the letter sent by Mr Moore’s solicitors on 19th August, 2015, and when she does so too on a basis which, the court concludes in this judgment is unfounded.

ii. Section 12 of the Act of 1930.

139. Little mentioned at the hearing of the within proceedings, though of passing interest nonetheless, s.12 of the Act of 1930 provides, *inter alia*:

“12.–(1) *Where the Commissioners...are the owners or the guardians of a national monument, the Commissioners shall maintain such monument...*”.

140. As touched upon elsewhere above, by virtue of the Heritage (Transfer of Functions of Commissioners of Public Works) Order 1996 and s.4 of the National Monuments (Amendment) Act 2004, references to the Commissioners throughout the national monuments legislation fall now to be construed as references to the Minister for Arts, *etc.* Section 12 has implications for the State as regards its ownership of No. 18, Moore Street, which the court concludes later below is a national monument.

141. In passing, the court notes that Mr Terry Allen of the National Monuments Service, in the course of helpful oral evidence at the hearing of the within proceedings, indicated that instances of guardianship as referred to in s.12 do not occur very often but would typically involve situations where the owner of land on which a particular national monument sits does not wish for one reason or another to be responsible for the maintenance and up-keep of same and instead arrives at an arrangement whereby the Minister, acting in the national interest, undertakes the ongoing preservation of that national monument but without taking it into national ownership.

iii. Section 14 of the Act of 1930.

142. Section 5 of the Act of 2004 has substituted a new s.14 into the Act of 1930. Concerned with the issue of injury to national monuments, it provides as follows:

“14.—(1) In respect of a national monument of which the Minister or a local authority are the owners or guardians or in respect of which a preservation order is in force, it shall not be lawful for any person to do any of the following things in relation to such national monument:

- (a) *to demolish or remove it wholly or in part or to disfigure, deface, alter, or in any manner injure or interfere with it, or*
- (b) *to excavate, dig, plough or otherwise disturb the ground within, around, or in proximity to it, or*
- (c) *to renovate or restore it, or*
- (d) *to sell it or any part of it for exportation or to export it or any part of it,*

without the consent referred to in subsection (2) of this section or otherwise than in accordance with such consent.

- (2) (a) *In respect of a national monument to which subsection (1) relates and at the discretion of the Minister, the Minister may grant consent in writing to the doing to such monument of one or more of the matters specified in paragraphs (a) to (d) of subsection (1) of this section (in this subsection referred to as the carrying out of works’).*

[The word “works” is itself defined in s.2 of the Act of 1930 (thanks to s.2 of the Act of 2004) as including “development works of national, regional or local importance”.]

- (b) (i) *The Minister shall consult in writing with the Director of the National Museum of Ireland before granting a consent under paragraph (a) of this subsection.*

- (ii) *The period for consultation under subparagraph (i) of this paragraph shall not be more than 14 days from the day the consultative process was commenced by the Minister or such other period as may, in any particular case, be agreed to between the Minister and the Director of the National Museum of Ireland.*
- (c) *A consent granted under paragraph (a) of this subsection to the carrying out of works shall be subject to such conditions and restrictions as the Minister may determine and specify in the consent.*
- (d) *The Minister in exercising discretion under paragraph (a) of this subsection is not restricted to archaeological considerations but is entitled to consider the public interest in allowing the carrying out of works notwithstanding that such works may involve –*
- (i) *injury or interference with the national monument concerned, or*
 - (ii) *the destruction in whole or in part of the national monument concerned.*
- (3) *Without prejudice to the generality of subsection (2) of this section, the Minister in exercising discretion under that sub-section in respect of a national monument may have regard to the following to the extent that they appear to the Minister to be relevant in exercising discretion in any particular case:*

- (a) *the preservation, protection or maintenance of the archaeological, architectural, historical or other cultural heritage or amenities of, or associated with, the national monument;*
- (b) *the nature and extent of any injury or interference with the national monument;*
- (c) *any environmental, cultural, social, recreational or economic benefit that would accrue to the State or area in which the national monument is situate as a result of the carrying out of the works;*
- (d) *any matter of policy of the Government, of the Minister or of any other Minister of the Government;*
- (e) *the need to collect or disseminate information on national monuments or in respect of heritage generally;*
- (f) *the cost implications (if any) that would, in the Minister's opinion, occur from either granting or not granting a consent under subsection (2)(a) of this section.*

(4) *Where the Minister has granted a consent to a person under this section, then –*

(a) *any further consent under any other provision of the National Monuments Acts 1930 to 2004, or*

(b) *a licence under any provision of the National Monuments Acts 1930 to 2004, other than a licence under section 25 (as amended by the National Monuments (Amendment) Act 1994) of this Act,*

is not required to be held or obtained by such person or by any person acting as the first-mentioned person's employee, agent or servant in respect of any act or thing done in accordance with the consent and the conditions and requirements (if any) attached to the consent so granted.

(5) *A person who contravenes subsection (1) of this section is guilty of an offence....”.*

143. A brief summary of the above-quoted elements of s.14 may be useful. Section 14(1) requires that the consent of the Minister be obtained to the carrying out of works to a national monument. Section 14(2) and (3) identify the process whereby the Minister is to go about the process of issuing a consent. Notably, this includes, per s.14(2)(b)(i), a consultative process with the Director of National Museum of Ireland, who has and/or has access to persons with

expertise in the types of issues likely to arise when it comes to applications for such consents, and whose expert opinion seems likely to carry some weight with the Minister. Section 14(4) effectively establishes a s.14 consent as, to use a colloquialism, the ‘be all and end all’ of consents, though only so far as the National Monuments Acts are concerned. Section 14(5) renders a criminal offence of the carrying out of works to a national monument absent a s.14 consent.

Chapter 14

The Impugned Consent

A. Non-compliance with terms of consent

144. The intended works to be carried out on Nos. 14–17 Moore Street continue, ostensibly, to be authorised by a consent granted by the Minister for Arts, *etc.* on 16th July, 2013. As is apparent from the summary timeline in Part 2, this original consent was varied on 29th April, 2014 and purportedly revised on 14th September, 2015. So the court is presented with what is in effect a single omnibus consent that is conditional upon the satisfaction of certain conditions: no satisfaction; no consent.

145. Condition 50 of the July 2013 consent provides that “*Substantive works shall commence on site within 3 months of approval of the revised project design*”. That approval issued by decision of the 30th April, 2014. So the effect of Condition 50 was that substantive works had to commence by 30th July 2014. What are “[s]ubstantive works”? There is no definition of the term in the National Monuments Acts and suggestions by counsel for Mr Moore that the term

should be read as akin to “*substantial works*”, a term used in the Planning and Development Act 2000, appear to the court, with respect, to flounder on the fact that (a) ‘substantive’ is not the same word as ‘substantial’, and (b) the planning code is an entirely separate body of legislation from the National Monuments Acts. It seems to the court that the Minister, when using the word “[s]ubstantive”, must be taken to have intended the ordinary dictionary meaning of the word. But what is that meaning?

146. A Google search of the word “*substantive*” yields a number of definitions, the most relevant of which is “*having a firm basis in reality and so important, meaningful, or considerable*”. No doubt a search of any major dictionary will yield a like definition. The word derives from either the Old French word ‘substantif’/‘-ive’ or the late-Latin word ‘substantivus’, which in turn derive from ‘substantia’ meaning ‘essence’. So what the word “*substantive*” appears in a formal sense to convey – and, indeed, what ordinary parlance would suggest it to convey – is that the Minister for Arts, *etc.*, by including Condition 50, required that works which were important, meaningful, considerable or essential be commenced on any of Nos. 14–17 Moore Street by 29th July, 2014.

147. As it happens, certain minor and peripheral works are claimed to have been done to a wall to the rear of Nos. 15 and 16 Moore Street on 29th July, 2014. These appear from the evidence to comprise, *in toto*, checking for the outside presence of bats, checking for cracks, trimming some plants, sprucing up a garden wall, and removing some polystyrene boards – not much more, in truth, than most of us would get up to when pottering about the garden on a summer’s day. No works were done to any of the buildings comprising Nos. 14–17. Indeed the court’s strong sense when it comes to all of this is that it has been sought on behalf of the Minister to make ‘much ado about next to nothing’, *i.e.* to recite the precious little that was

done on 29th July in such a manner as to convince the court that something substantive was done – much as those of us caught sipping a Coke in the garden on a summer’s day might recite all of the many things we had done before sitting down, so as to assure a doubtless bemused spouse or partner that we had accomplished much before taking a break. But it is as clear to this Court, as it would be to that spouse or partner, that a detailed recitation of what little has been done does not suffice to convert the little into the substantive. The court is especially struck in this regard by the expert evidence of Mr Kelly, a specialist conservation architect who has far greater experience than this Court in the practicalities of planning and development and who opines as follows in his affidavit evidence:

“I refer to the Affidavit of Grainne Shaffrey of Shaffrey Associates [as furnished by the Minister]....At Paragraph 5 of her Affidavit, Mrs Shaffrey refers to works commenced on the 29th July 2014, which was the very last day of the 3 month period under which substantive works were required to be commenced under Condition 50 of the aforesaid Ministerial Consent. She goes on to refer to a number of documents which were submitted by Shaffrey Associates to the Minister on the 28th July 2014. These documents, which are exhibited with her affidavit, include the letter dated 30th July 2014 from Ashling Cronin of Scott Cawley which refers a pre-construction bat survey and states that she attended on the site 29th July 2014 to supervise certain dismantling works which comprised the removal of plastic sheet from the roof area; trimming vegetation; removal of brickwork from upper corner section of western gable wall of cold store; removal of polystyrene boards; checks for crevices and checks for evidence of bat activity. It is clear that the above description would not constitute the commencement of substantive

works and it is doubtful that the activities such as removing a plastic sheet and trimming vegetation would even constitute works at all....

I say that it is readily apparent from a description of these purported works that these are clearly not 'substantive' works within the meaning of Condition 50....

I say that it is patently clear from a description of the works set out in the exhibited documents that these were in the nature of preliminary maintenance works to outer wall which enclose a yard. The work did not relate to the main buildings at No. 14 to 17 Moore Street but were minor and peripheral in nature...

I say that the various descriptions of the works in [various expert reports referred to by Mr Kelly]...are further indicative that the works are not substantive works. Thus Courtney Deery Heritage Consultancy refer to them as 'consolidation works' while Shaffrey Associates in their Conservation Plan...state:

'The works...which this conservation plan recommends are preliminary consolidation works which will ensure the immediate structural stability and safeguard fabric condition from deterioration in the short to mid-term.'

The fact that they are described as 'preliminary' and in the 'short to mid term' are further indicative of the fact that the works are not substantive works....

A Construction Management Plan submitted with the application for consent to the Minister proposed to divide the proposed works to No. 13 to 19 Moore Street into Phase 1 and Phase 2....

Phase 1 primarily refers to the works to the main buildings at Nos. 14 to 17 Moore Street and the demolition of Nos. 13, 18 and 19 Moore Street, while Phase 2 refers to the works to relating to public access in particular the civic square or plaza to the rear. It is therefore clear that the consolidation works to a boundary wall did not even come within Phase 1 as described and in the light of the same, it is hard to conceive how they could be described as substantive works, when on the developer's own description they do not even fall within Phase 1 of the works....

I say that any claim by Mrs Shaffrey that substantive works commenced within 3 months of the approval (and her entire Affidavit) is in fact fatally and fundamentally undermined and contradicted by her own letter dated 6th October 2014 to Dublin City Council...where, having referred to Phase 1 of the works to Nos. 14 to 17 Moore Street, Mrs Shaffrey states:

'Please note that it is the intention to commence Phase 1 works after 1st October 2014 and prior to 31st November 2014.'

148. This last-mentioned letter was something that glinted in the great coal-pile of affidavits, exhibits, reports and assorted documentation that were furnished to the court in the course these proceedings. The reason why this was so is as follows. In the course of her affidavit

evidence in these proceedings, Ms Gráinne Shaffrey, the director and principal of Shaffrey Associates, a conservation architecture practice, addresses the issue of whether or not substantive works were completed, as required by the s.14 consent within three months of 30th July, 2014. In this regard, Ms Shaffrey avers, *inter alia*, as follows:

“[S]ubstantive works in fact commenced on 29th day of July 2014, which is less than three months from 30th day of April 2014 when the revised project design was approved and in compliance with Condition 50 of the Ministerial Consent which requires substantive works to have commenced within 3 months of approval of the revised project design.”

149. This averment is consistent with an anticipatory letter written by Ms Shaffrey on 28th July, 2014, to the Chief Archaeologist at the Department of Arts, *etc.*, and which states, *inter alia*:

“[W]orks consented under Ministerial Consent will commence on...28th July 2014. These works comprise consolidation works to sections of the boundary walls. These works form part of the Phase 1 development works.”

150. However, both averment and the letter of 28th July, 2014, sit most uneasily with a letter written by Ms Shaffrey on 6th October, 2014, and exhibited before the court. In that letter, Ms Shaffrey, acting as agent of Chartered Land, stated:

“Please note that it is the intention to commence Phase 1 works after 1st October 2014 and prior to 31st November 2014”.

151. It seems to the court that this later letter simply could not have been written if substantive works had already been commenced. The court inclines strongly to the view that, on the balance of probabilities, the substance of the letter of 6th October, 2014, having been written after the supposed substantive works were done and long before the within proceedings were commenced, is to be preferred both to a letter written before the actions of the 29th were done and also to averments made in the context of the within proceedings. The clear and simple truth of the matter, especially when one has regard to Ms Shaffrey's letter of 6th October, 2014, whether viewed in the context of Mr Kelly's averments or not, is that no substantive works were commenced within the requisite three months.

152. As the consent of July 2013 is conditional upon the commencement of substantive works by 30th July 2014, that consent – as varied in April 2014 and purportedly revised in September 2015 – must and does fall because the consent was expressed to be conditional on the satisfaction of a condition that was not satisfied within the prescribed timeframe.

B. Lack of Standing to Claim Consent Had Lapsed?

153. The court notes in passing that there was some contention in the pleadings that Mr Moore does not have any standing to claim that the consent has lapsed. This point was not assiduously pursued at the hearings but, in case it survives, it requires to be addressed. To the court's mind, Mr Moore's commencement and continuation of the within proceedings comes squarely within the ambit of *Mulcreavy v. Minister for the Environment* [2004] 1 I.R. 72 and, in particular, the following observations of Keane J. in his judgment in that case, at 78 *et seq*:

“While the applicant accepts that he has no private interest in these proceedings, it is not suggested that he has brought them for any other reason than to ensure that the national monument is not damaged irreparably, as he claims it would be by the second respondent carrying out the motorway project without the necessary statutory consents, approvals and licences....

It has been made clear in decisions of the High Court and this court in recent times that it is not in the public interest that decisions by statutory bodies which are of at least questionable validity should wholly escape scrutiny because the person who seeks to invoke the jurisdiction of the court by way of judicial review cannot show that he is personally affected, in some sense peculiar to him, by the decision. It is in that sense, I think, that the requirement in O.84, r.20(4) of the Rules of the Superior Courts 1986 should be read. It provides:

‘The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.’

It is at the same time essential to bear in mind that, while it is undesirable that invalid legislation or unlawful practices should escape scrutiny because of the absence of an indisputably qualified objector, it is also important to ensure that unfounded and vexatious challenges are not entertained.”

154. Here, of course, as touched upon elsewhere above, it has been suggested by counsel for the Minister that Mr Moore is engaged in an abuse of process in the within proceedings, and that his true intent is not to secure the reliefs sought, but to hamper Chartered Land in the pursuit of its legitimate objectives. In fact, there is every reason to believe from all the court

has seen, heard and read throughout these proceedings that Mr Moore does genuinely wish for the reliefs sought and does genuinely aim for a more complete preservation and conservation of the Moore Street Battle-Site and various of the buildings that are situate thereon. He may have expressed opposition to Chartered Land's development plans in the past; the court has no idea whether he remains opposed to same. Again, however, the court would note, as it noted in its recent judgment in *Dunnes*, referred to above, that the fact that legitimate use of a lawful remedy will or may result in a collateral benefit to an applicant does not affect the applicant's right to seek and be granted such remedy. There is nothing before the court to suggest that Mr Moore is not engaged in the legitimate use of a lawful remedy. That means he comes squarely within the ambit of *Mulcreavy* and that, in all the circumstances presenting, he undoubtedly possesses the standing necessary to claim that the consent has lapsed.

Chapter 15

Revocation of Impugned Consent

155. In the event that his contention that the consent had lapsed was not successful before this Court, Mr Moore had made various contentions as to the revocation of the consent. As the court has just concluded as it has, it is not strictly necessary for it to consider this alternative pleading. However, for the sake of completeness it does so. To understand the contentions made by Mr Moore in this regard, it is helpful to replicate a portion of the summary timeline that appears in Part 2:

- 11th August, 2014** McGeehin Toale write to Minister for Arts, *etc.* raising certain issues regarding s.14 consent (as varied) and querying whether substantive works commenced at Nos. 14–17 within the three months required by the s.14 consent.
- 4th September, 2014** Letter from Department of Arts, *etc.* to McGeehin Toale indicating, *inter alia*, that substantive works did commence within three months of consent. [The court has just concluded that this was not in fact so].
- 9th September, 2014** Letter from McGeehin Toale to Department of Arts, *etc.*, seeking, *inter alia*, detail as to substantive works, and indicating intention to bring judicial review proceedings.
- 3rd October, 2014** Letter from Department of Arts, *etc.* to McGeehin Toale confirming compliance with s.14 consent and planning requirements and indicating that substantive works commenced within required timeframe.
- 31st October, 2014** Letter from McGeehin Toale to Minister for Arts, *etc.*, *inter alia*, expressing disappointment that Minister declining to freeze works contemplated by consents pending resolution of pre-1916/post-1916 issue arising.

- 18th November, 2014 Letter from Minister for Arts, *etc.* to McGeehin Toale, indicating Minister has no power to ‘freeze’ s.14 consents, is satisfied with how matters are proceeding.
- 19th August, 2015 Letter from Hennessy Perrozzi, Solicitors (acting for Mr Moore), to the Minister for Arts, *etc.* (1) querying why Moore Street Battlefield Site not considered a national monument *in toto*, and (2) suggesting that the Minister does have power, under s.22(3) of the Interpretation Act, 2005, to set aside a determination.
- 18th September, 2015 Letter from Department for Arts, *etc.* to Hennessy Perrozzi indicating that (1) the Department has previously been in correspondence with McGeehin Toale, and (2) that as the Minister is satisfied that all in order “*the question of whether section 22(3) of the Interpretation Act 2005 is applicable to a consent granted under section 14 of the National Monuments Act 1930 (as amended) is academic*”.

156. As it happens, Mr Moore’s solicitors were entirely correct as regards the effect of s.22(3) of the Interpretation Act, 2005. In essence, this provision has the effect that what a minister can do by statutory instrument, that minister can undo by statutory instrument. It provides:

“A power conferred by an enactment to make a statutory instrument shall be read as including a power, exercisable in the like manner and subject to the like consent and conditions (if any), to repeal or amend a statutory instrument made under that power and (where required) to make another statutory instrument.”

157. The term “*statutory instrument*” is very widely defined in s.2(1) of the Act of 2005 as meaning:

“an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act and references, in relation to a statutory instrument, to ‘made’ or to ‘made under’ include references to made, issued, granted or otherwise created by or under such instrument.”

158. Counsel for the Minister contended that a s.14 consent – which in effect is a form of licence that issues under the National Monuments Acts – is not a “*statutory instrument*” within the meaning of s.2 of the Act of 2005. This is simply not a credible contention. More credible, and accepted by the court as correct, is that if undue uncertainty is not to be introduced into the planning process (something the Oireachtas and the courts have sought consistently to avoid) then it must be the case that the re-visitation and re-assessment of a consent in the manner contended for by Mr Moore would not often be done. Something exceptional would have to present. But as the court has been at some pains to emphasise, in these proceedings something exceptional does present. Here, the structures and works to which the impugned consent relates concern tangible remains of the triumphant genesis of our modern republic. If ever there was a case that cried out for care, if ever there was a case

which was so unique and which such presented such cogent and convincing evidence as to justify the invocation of s.22(3), this is it.

Chapter 16

Delay

159. The Statement of Opposition raises the issue of delay and that the within proceedings are out of time. This was very briefly touched upon by counsel for the Minister during his submissions and appears to survive as a live contention. In essence, the contention of counsel for the Minister is that Mr Moore is out of time as regards seeking judicial review of the preservation order of 19th January, 2007, the consent of July 2013, and the revising consent of April 2014.

160. This line of argument rather overlooks the fact that Mr Moore is not seeking to quash the said preservation order or the consent as varied, let alone any planning permission. He comes to court observing, *inter alia*, that (1) the works intended to be carried out by the Minister for Arts, *etc.* in respect of Nos. 13–19 Moore Street and the decision to proceed with those works is all to be done pursuant to the s.14 consent of April 2014, as varied; and (2) the said consent is no longer valid or effective because a condition on which it is predicated, *viz.* that “*Substantive works [i.e. not ‘any old works’, however trivial] shall commence on site within 3 months of approval of the revised project design*” has not been satisfied. It is established law that no time limit applies to proceedings raising the issue of whether an authorisation or consent ever existed. (See *Mone v. An Bord Pleanála* [2010] IEHC 395; and *Fenland District Council v. Reuben Rose (Properties) Ltd* [2000] All ER (D) 412). Those

cases were concerned with the issuance of void consents; however it seems but the slightest and most logical of developments to conclude that if no time limit applies concerning challenges to void consents, then it ought not to and does not apply to consents that existed but which have become a nullity.

161. Insofar as the Minister for Arts, *etc.* raises a general objection of delay in challenging the Minister's view as to the existence or extent of a national monument such as the Moore Street Battle-Site or any of the properties in the environs of Moore Street, it seems to the court that the decision of the High Court in *Duffy v. Laois County Council* [2014] IEHC 469 is of some note in this regard. In that case an engineer challenged an administrative practice of Laois County Council which provided that only Council personnel were authorised to perform a statutory site assessment as part of a planning permission process. The Council argued that as this practice had existed since 1991, Mr Duffy was out of time. Hogan J. rejected this contention, noting (at para 21):

“If the present case related to a specific, individual decision of the Council, then the applicant would have been out of time, albeit by just a matter of days. The present case does not, however, concern itself with a decision of this kind. Rather, the policy applied by the Council is a general one which has been in operation since about 1991, albeit with some temporary interruptions in the late 1990s and at some stage between 2009 and 2010. In these particular circumstances there is, in effect, a fresh daily accrual for time purposes of the cause of action for so long as the policy is applied. It follows, therefore, that the applicant was within time when he commenced these proceedings, because, for example, the policy applied just as much in October, 2013, as it had in July, 2013.”

162. Transmuting that observation into the context of the present proceedings, it seems to the court that the decision of the Minister to proceed with the works pursuant to a (no longer operative) s.14 consent, is based on (a) the erroneous and continuing view that the consent remains operative, and (b) what, by virtue of certain conclusions reached by the court later below, is the equally erroneous and continuing view that the only national monuments on or about Moore Street are Nos. 14–17, both (a) and (b) yielding a continuing fresh accrual of time *à la Duffy*.

Chapter 17

Jurisdiction to Make Declaration as to National Monument Status?

163. As noted above, in the *Martin* (Wood Quay) case, Hamilton J. issued a declaration that a portion of Wood Quay was a national monument. Likewise in *O’Callaghan*, a declaration was made as to the extent of a national monument. And in *Dunne & Lucas v. Dún Laoghaire-Rathdown County Council* [2003] 1 I.R. 567, the late Hardiman J., in the context of an interlocutory application, accepted on the evidence before him that certain medieval (including castle) remains were a national monument within the meaning of the National Monuments Acts.

164. Insofar as declarations are sought in these proceedings, such a remedy is available by virtue of the court’s constitutional status as a court of general and full jurisdiction which must and does include the power to grant such declarations as are now sought, if and as appropriate. The first general statutory recognition of the power to grant a declaration was

contained in s.155 of the Chancery (Ireland) Act 1867. Although this section was later repealed, it finds echo in the provision in O.19, r.29 of the Rules of the Superior Courts, 1986 (as amended) that:

“No. action or pleading shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not.”

165. A summary of the court’s jurisdiction to issue declarations, albeit in the context of s.160 injunction proceedings, was provided in *Wicklow County Council v. Fortune (No. 4)* [2014] IEHC 267. In issue there was the power of the court to grant a declaration that a timber chalet had been constructed illegally. In giving judgment, Hogan J. observed as follows:

“8. It is true that s.160(1) of the 2000 Act does not expressly vest the court with a jurisdiction to grant a declaration to the effect that development was unauthorised. Yet here it may be recalled that s.160 is simply a lex specialis which simply gives the court a wider jurisdiction to grant an injunction in respect of unauthorised development in planning cases than might have been the case under ordinary law.

9. The statutory power to grant an injunction is found in s.28(8) of the Supreme Court of Judicature (Ireland) Act 1877 (‘the 1877 Act’). Although that sub-section does not expressly empower the court to grant a declaration in lieu of granting an injunction, it has never been doubted but that the courts could make a declaration

in such circumstances. After all, both the injunction and the declaration were regarded as independent and, to some degree and in certain circumstances, interchangeable remedies developed by the Court of Chancery in the decades leading up to the creation of one unified High Court by the (English) Supreme Court of Judicature Act 1873 and, in Ireland, by the 1877 Act....It may be that, in strictness, even if the remedy was developed by the Victorian Chancery judges, a declaratory judgment has its origins in statute and rules of court rather than equity as such, so that 'it is not true equitable relief': see Chapman v. Michaelson [1909] 1 Ch. 238, 242, per Fletcher Moulton J.

10. What is clear, however, is that the first general statutory recognition of the power to grant a declaration which was contained in s.155 of the Chancery (Ireland) Act 1867 – which stated that No. action should be open to the objection that a merely declaratory order was sought thereby – acknowledged this remedy as an independent and free standing judicial power. Although this section was subsequently repealed, the actual language of s.155...is now reflected in the wording of the present O.19, r.29 of the Rules of Superior Courts 1986 and the principle is now one which has been firmly embedded in our legal system for well over a century.

11. In any event, the declaration is simply an essential aspect of this Court's general and full original jurisdiction. After all, Article 34.4.1° of the Constitution provides that this Court shall have a 'full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.' If this Court [does] not grant a declaration of right in an appropriate case, it is hard

to see how this constitutional mandate 'to determine all matters and questions' could properly be fulfilled and this is so even when this Court is sitting (as here) in its appellate capacity.

12. Moreover, as I pointed out in Albion Properties Ltd v. Moonblast Ltd [2011] IEHC 107...the express language of Article of 40.3.2° of the Constitution requires the courts to furnish an adequate and effective remedy....

13. The granting of a declaration in the present case is perhaps especially apt. Not only should the transgression of the law by the defendant be appropriately marked by judicial order, but in truth such an order simply gives effect more completely to the earlier judgments which I delivered.”

166. As regards declaratory relief in judicial review proceedings, in England and Wales it is recognised that in such proceedings a court may issue a declaration in respect of a disputed fact. Thus in *As (by his Litigation Friend the Official Solicitor) (Claimant) v. London Borough of Croydon* [2011] EWHC 2091 (Admin), Anthony Thornton J. stated, at para 43 that “*A declaration is appropriate since that is a remedy provided for in judicial review in a case where it is necessary to affirm and confirm a factual finding...”.*

167. Declaratory relief of the type sought in the within proceedings is not commonly granted. Again, however, the very uniqueness of the 1916-GPO garrison-Moore Street combination of factors presenting in the within proceedings and considered elsewhere above, might be argued in and of itself to be a factor favouring the exercise of this jurisdiction. In cases where the courts have declined to issue declarations, *e.g., ACC Loan Management Ltd v. Barry &*

Ors [2015] IECA 224, and *Grianán an Aileach Interpretative Centre Co Ltd v. Donegal County Council* [2005] 1 ILRM 106, this has been where the determination of certain legal rights and obligations had been specifically assigned by law to administrative bodies and so fell outside the original jurisdiction of the High Court, as envisioned by Article 34.3.1° of the Constitution. In *Barry*, the issuance of a declaration in respect of a solicitor would have usurped the disciplinary functions of the Law Society of Ireland, and in *Grianán an Aileach* it was held that, subject to certain exceptions (as in s.160 proceedings), the jurisdiction to determine whether or not a development is an exempted development has specifically been assigned to planning authorities (subject to the potential for review by An Bord Pleanála) pursuant to s.5 of the Planning and Development Act 2000. By contrast, under the National Monuments Acts neither any minister nor any administrative body has been specifically assigned the function of determining (whether or not in the context of a dispute) what is or is not a national monument. Indeed there is an added impetus to the granting of a declaration by the court in the context of the National Monuments Acts, given that any proposal to remove or alter a national monument without a s.14 consent is prohibited. “*This provision [i.e. s.14]*”, Hardiman J. noted in *Dunne & Lucas*, at 574, “*is part of the law of the land which the court is bound to uphold*”. As it is for the Supreme Court, so it is for every court.

Chapter 18

The Venice Charter

168. The Venice Charter is a code of professional standards concerned with the conservation and restoration of ancient buildings. It was adopted at a Congress of Architects and Technicians of Historic Monuments at Venice in 1964. Although the Charter is not a treaty, it

appears to enjoy some status as a guide to best practice when it comes to the type of conservation and restoration works with which it is concerned. Perhaps four elements of the Charter are of potential interest in the context of the within proceedings, namely the Preamble and Articles 1, 6 and 7:

“[Preamble]

...It is essential that the principles guiding the preservation and restoration of ancient buildings should be agreed and be laid down on an international basis, with each country being responsible for applying the plan within the framework of its own culture and traditions....

Article 1

The concept of a historic monument embraces not only the single architectural work but also the urban or rural setting in which is found the evidence of a particular civilization, a significant development or a historic event....

Article 6

The conservation of a monument implies preserving a setting which is not out of scale. Wherever the traditional setting exists, it must be kept. No. new construction, demolition or modification which would alter the relation of mass and colour must be allowed.

Article 7

A monument is inseparable from the history to which it bears witness and from the setting in which it occurs. The moving of all or part of a monument cannot be

allowed except where the safeguarding of that monument demands it or where it is justified by national or international interest of paramount importance.”

169. Although the initial focus of the Charter appears to have been on “*ancient buildings*” – and the court does not understand any of the parties to these proceedings to contend that any of the buildings on Moore Street or in its environs could properly be described as “*ancient*” – it appears that the Charter has grown to enjoy some currency in respect of buildings that can be described as being of historic significance, notwithstanding that they are not ancient. It has featured in case-law: see *Neville v. An Bord Pleanála* (Unreported, High Court, 31st July, 2001). And it has featured in the report of the planning inspector who considered the Chartered Land application for planning permission (ref. 2479/08/PL 29N.232347), at 77:

“The route from the site of the GPO across Henry Street and Moore Street and Henry Place and Moore Lane to the National Monument buildings on Moore Street therefore would appear to be integral to the historic setting and context of both National Monuments. Thus the development proposal might be in conflict with the spirit of Article 7 of the Venice Charter in which it is stated that a monument should be ‘inseparable’ from the history to which it bears witness and from the setting in which it occurs’, a point that has been raised in the objections.”

170. This observation is echoed in the observations of Dr Lynam, then the Acting Director of the National Museum, in a letter of 25th April, 2012 to the Minister for Arts, *etc.*, considered in more detail later below, in which he states, *inter alia*:

“From a heritage standpoint, it seems inescapable that I must advise you that the presentation of the National Monument at 14–17 Moore St should be done within the context of the surviving terrace house and original street pattern. This supports the advice already tendered by the former Director in his letter of 21st September 2011....The proposed development will significantly impoverish the historical and cultural significance of the National Monument (14–17 Moore Street) by depriving it of its historical, cultural and architectural context.”

171. Mr Moore relies upon the Venice Charter in support of the contention that the Moore Street Battle-Site constitutes a national monument. He maintains that even if the Minister for Arts, *etc.* was correct that the only structures of national monument status on Moore Street are Nos. 14–17, it is clear that streets and a streetscape exists in the environs of Moore Street that are a national monument and that this national monument and such national monuments as sit upon or by it (and the court does not understand anyone to be contending that all the buildings so situate are national monuments) are each and all inseparable from each other, with the site being a setting to those buildings that are national monuments, and with those buildings that are national monuments enriching the battle-site experience.

Chapter 19

The Extent of the National Monument at Moore Street, as recognised by the Minister

172. The Minister for Arts, *etc.* has issued a preservation order in respect of Nos. 14–17 Moore Street, albeit on the basis that No. 16 is the house of greatest historical interest. Thus

Mr Terry Allen, a principal officer of the National Monuments Service, avers, *inter alia*, in his affidavit evidence (which is further considered later below) that:

“Nos. 14, 15 and 17 were included in the Preservation order not exclusively on their own merits but as part of the amenity of No. 16 Moore Street, the actual location of the final council of war and the decision to surrender. Nos. 14, 15 and 17 are important in terms of ensuring the long term preservation and presentation of No. 16 in appropriate form to the public and are therefore in a different category to the public and therefore in a different category to the other structures on Moore Street or in its immediate environs”.

173. Later, Mr Allen avers as follows:

“The assessment has been that Nos. 15, 16 and 17 were built as a group under the same building lease, most likely by a Joseph Ryan in 1759. No. 14 is considered to have been built around the same time as the other three messuages and was refaced in 1876”.

174. (The word “*messuage*” means a dwelling-house and any out-buildings and land assigned to its use. It is not a million miles removed from the sense conveyed by the term ‘curtilage’).

175. Insofar as Mr Allen appears to focus in the last-quoted text on the building and architecture of Nos. 14–17, this seems to sit uneasily with his averment that No. 16 was considered to be a national monument, due to its 1916 connection. Be that as it may, it

seems from Mr Allen's affidavit evidence that the Minister appears to have taken a curiously narrow view of historical significance. Indeed, given the extensive evidence furnished by Mr Moore as to the historical significance of other buildings on Moore Street and Henry Place, it is not at all clear how the Minister could isolate the events of significance that happened at No. 16 and ignore events of equal or greater significance that transpired at such other properties of significance as Mr Moore has identified at the within proceedings.

176. The repeated reference by the State throughout the hearings that Nos. 14–17 had cost circa. €4m to buy and will take circa. €6m to refurbish, suggests to the court, rightly or wrongly, that the question of cost was a significant consideration in this regard – and when it comes to cost the Executive naturally seeks, as a matter of prudent government, to be careful as to how it spends taxpayer money. However, in identifying what constitutes a national monument, there are, as a matter of law, no cost criteria applicable. It is when it comes to deciding what to do as regards a national monument that issues of cost come into play, though again, as is apparent from the court's consideration of the decision of the Supreme Court in *O'Callaghan* – precedent that is binding on this Court – the discretion of the Minister for Arts, *etc.* has been rather curtailed by the Supreme Court in this regard.

Chapter 20

The Historical Importance of Moore Street and Its Environs

A. Overview.

177. A trio of affidavits from distinguished historians has been provided to the court in support of Mr Moore's contentions as to the ongoing historical importance of Moore Street and its environs. Those witnesses are (1) Mr Eamonn Kelly, the former Keeper of Antiquities at the National Museum of Ireland, (2) Mr Ray Bateson, the distinguished author of multiple histories of the Easter Rising, and (3) Mr Tim Pat Coogan, a renowned commentator and historian who counts among his literary output best-selling biographies of Michael Collins and Eamon de Valera – of which this Court, as it happens, owns a couple of well-thumbed copies.

178. Notably, the Minister has not adduced any evidence from any historian that contradicts the evidence of Messrs Bateson, Coogan and Kelly. Some affidavit evidence has been offered by the Minister from, *e.g.* witnesses with undoubted expertise in matters architectural, but none of the Minister's witnesses has assessed matters from a purely historical basis, notwithstanding that, as was seen above, solely the historical interest of a monument may suffice to make its preservation a matter of national importance.

B. The Affidavit Evidence of Mr Kelly.

179. The key elements of Mr Eamonn Kelly's affidavit evidence might be summarised as follows:

- (1) Nos. 14–17 Moore Street, are the subject of Preservation Order No. 1 of 2007, made under s.8 of the National Monuments Act, 1930, as amended.
- (2) Nos. 14–17 comprise a national monument protected and preserved under the National Monuments Act 1930, as amended.
- (3) on or about 21st September, 2011, Dr Patrick Wallace, the then Director of the National Museum of Ireland wrote to the then Minister for Arts, *etc.* in relation to an application for ministerial consent under the National Monuments Acts, regarding proposed works at the terrace of buildings located at Nos. 14–17 Moore Street. In his letter, Dr Wallace indicated that the said application for a ministerial consent failed to take into account the broader topographical, historical and military contexts of the National Monument. Dr Wallace further advised that any evaluation of the monument would have to be undertaken from an interdisciplinary – archaeological, architectural, historical and military – perspective.
- (4) subsequent to the foregoing, at the specific request of Dr Wallace, a detailed archaeological assessment of Moore Street and its environs was

commissioned of and undertaken by Mr Franc Myles, a distinguished professional archaeologist.

- (5) the Myles Report was sent to Dr Seamus Lynam, Acting Director of the National Museum of Ireland on or about 6th March, 2012; Dr Lynam then referred the matter to Mr Kelly, as Director of Antiquities, for the latter's advice.
- (6) the Myles Report confirms that the GPO-Moore Street area is a onetime theatre of conflict and constitutes a historic site of national importance within which monumental remains survive that form and inform the wider context of the battlefield.
- (7) all such buildings as comprise the battlefield site were scheduled for removal and/or demolition in a plan for the re-development of the area.
- (8) this anticipated removal and/or demolition included a number of buildings within the surviving Moore Street terrace that had original fabric, including No. 10, to which (per Mr Kelly) at least as much historic importance attaches as to Nos. 14–17 Moore Street.
- (9) other historically important buildings that formed part of the wider national monument include the White House, Henry Place, O'Brien's Mineral Water Bottling Stores, and the stables in Henry Place.

- (10) the Myles Report also points to the survival of original streetscape and surfaces that are historically significant and visible from the public realm.
- (11) in order to assess the likely status of the structures aforesaid, Mr Kelly applied relevant guidelines produced by Ireland's National Monuments Service, which guidelines are contained in the Department of Environment publication, *Review of Archaeological Policy and Practice in Ireland*.
- (12) when the said criteria were applied to the buildings and structures referred to above, it was concluded that the said buildings and structures were monumental in form, historic in character and national in importance.
- (13) consequent upon the assessment just described, two alternative conclusions arose, namely (i) that the national monument was more extensive than simply comprising the terrace of buildings and/or lands located at Nos. 14–17 Moore Street, or (ii) that there were a number of related national monuments on the said GPO-Moore Street battlefield site.
- (14) the said conclusions were communicated by Dr Lynam to the Minister in a letter of 25th April, 2012, it being emphasised in the letter that the protection and preservation of an extensive national monument or the existence of a number of related national monuments on the said battlefield site, did not preclude re-development of the site.

- (15) although Preservation Order No. 1 of 2007 extends to the protection and preservation only of the terrace of buildings located at Nos. 14–17 Moore Street, the whole Moore Street area, with its laneways and buildings, is of national historic importance. (In this regard, Mr Kelly avers that the historical and topographical context is what gives meaning and significance to the national monument).
- (16) he (Mr Kelly) concurs with the opinion of Dr Wallace, as expressed to the Minister in a letter sent on or about 21st September, 2011, that the low single- and two-storey red-brick buildings which make up the neighbourhood north of the GPO and on the east side of Moore Street and which stretch as far north as O’Rahilly Parade constitute a battlefield site of European importance which should be preserved in its entirety.
- (17) it is a national obligation that the precinct that comprises the Moore Street Battlefield Site and the buildings and/or lands and the historic streetscape associated with the Easter Rising should be preserved and protected.
- (18) the cultural, political, historical and international significance of the said battlefield site, and the associated buildings and lands and laneways mandates urgent action by the Minister to protect and preserve them.
- (19) the national historical importance of the national monument and the said battlefield site, buildings and laneways is not principally by reason of its architectural fabric or sub-surface architectural potential but rather its

significance as the surviving fragments of a battlefield landscape which is inextricably and inescapably linked to the cultural identity and origins of our republic.

C. The Affidavit Evidence of Mr Bateson.

180. Mr Ray Bateson's affidavit evidence is concerned in part with detailing the historical events that transpired in and about Moore Street in 1916 and need not be recounted at this part of the court's judgment, these having been described in Part 1 above. The court therefore confines itself to an account of the other key elements of Mr Bateson's affidavit evidence which might be summarised as follows:

- (1) unlike the site of the Battle of the Boyne (which Mr Bateson ranks with the Easter Rising as a key event of Irish history), the Easter Rising battlefield sites have been "*completely*" neglected.
- (2) many buildings associated with the Easter Rising have been allowed to be demolished, some being commercially developed beyond recognition.
- (3) the Moore Street battle-site and associated lands and buildings are at risk of being destroyed and re-developed or altered or allowed to become dilapidated to such an extent as to destroy what remains of "*probably*" the most important battlefield site of the Easter Rising.

- (4) it is still possible to follow the trail of the evacuation of the GPO across Henry Street, across the road to Henry Place, past Moore Lane and into Moore Street.
- (5) although one side (the west side) of Moore Street was demolished to make way for a shopping centre, one terrace still remains, being the terrace into which the Republicans made entry and burrowed from end to end, yet No. information boards, No. tourist trail and little official recognition of the importance of these lanes and buildings is manifest at the relevant points of interest.
- (6) without the intervention of the National Graves Association, the 'Save 16 Moore Street Campaign', the relatives of those involved in the Easter Rising, and some committed politicians, the whole area (in Mr Bateson's opinion) would have been demolished long ago and remains under threat.
- (7) a proposed commercial re-development - the Carlton Site development - will effectively obliterate the laneways and buildings of this battlefield site, leaving only Nos. 14–17 Moore Street standing.
- (8) the Easter Rising was the catalyst that brought about Ireland's independence, which in turn inspired other oppressed nations to establish their freedom; it is a part of Ireland's cultural heritage and part also of world culture and heritage.

- (9) a factor making the Easter Rising unique among great world battles is the fact that it was relatively small-scale, with the names, addresses, ages, causes of death and burial sites of most of the participants and victims being known; and
- (10) the Easter Rising was a pivotal event in Irish history and at the heart of the story of the Rising sits Moore Street and the nearby laneways.

D. The Affidavit Evidence of Mr Coogan.

181. The key elements of Mr Coogan's affidavit evidence might be summarised as follows:

- (1) the GPO/Moore Street/Moore Lane area of Dublin is a historic battle-site of national and international importance;
- (2) the battle-site is the only extant battlefield site in 20th century British and Irish history;
- (3) the streets and laneways that comprise the battle-site are the cradle of the nation;
- (4) all buildings that are linked to the evacuation of the Republicans from the GPO, in particular those buildings that became their last refuge from artillery bombardment, are our "*houses of history*";

- (5) the streets and laneways of the battle-site are our physical link to the pivotal event in our national history and, once destroyed, are lost forever; they are our lasting physical link to the birth of our modern nation;
- (6) there are in or around 32 locations in Dublin linked to the Easter Rising; 19 of these have been demolished, with some of the remaining sites unrecognisable today because of insensitive over-development;
- (7) it would, in Mr Coogan's informed view, be a travesty if any building occupied and secured by the Republicans upon fleeing for their lives was not considered to be of national historical significance and therefore worthy of protection and preservation;
- (8) the entire Moore Street terrace of buildings (Nos. 10–25 inclusive, as was) was occupied, held and became the headquarters of the Provisional Government;
- (9) all extant buildings of that terrace are therefore of great historical significance;
- (10) the building located at No. 10, Moore Street, was the point of entry and the leaders spent their last night there before moving along house by house to the building located at No. 16;

- (11) ‘Hanlon’s’, located at Nos. 20/21, Moore Street was where the Republicans gathered and finally agreed to the order to surrender;
- (12) the opportunity to remedy and to some extent rectify the loss of the streetscape and buildings connected with the Easter Rising remains available to us as a society;
- (14) the battle-site lies in very close proximity to the site of the GPO where an Easter Rising museum is to be housed; the destruction of the nearby streetscape and buildings where the Rising occurred would be on a par with the “*immeasurable loss*” almost four decades ago of the Wood Quay archaeological site just across from the buildings in which this judgment is pronounced.

Chapter 21

The View of the National Museum

A. Dr Wallace’s Letter.

182. On 21st September, 2011, Dr Patrick Wallace, then the Director of the National Museum wrote a letter to the then Minister for Arts, *etc.* concerning Chartered Land’s application for ministerial consent under the National Monuments Acts regarding proposed works at Nos. 14–17 Moore Street, Dublin 1. It would be fair to state that Dr Wallace favoured a battlefield site approach to the Moore Street area, was convinced as to the historical significance of both

the national monument and the surrounding battlefield site, and was eager to avoid past errors in terms of preserving our national archaeological and historical heritage. His letter makes for informative reading. The most pertinent extracts are replicated below.

“I have recently received...the application for the proposed destruction of part of the backyard areas of the National Monument as well as parts of the yards of no. 's 10 and 11 Moore Lane and the accompanying works to the structures on the Moore Street section of the monument. In approving the Dublin Central scheme An Bord Pleanála placed the condition that no works can take place within the National Monument 14–17 Moore Street unless prior Ministerial consent is obtained....The inclusion of a National Monument of this cultural-historical nature within a development such as Dublin Central should take into account broader considerations than that of an archaeological monument. As the broader historical and topographical context is what gives meaning and significance to the Moore Street National Monument, the roles played by the preserved buildings of the Moore Street Monument in the surrounding battlefield must be taken into account in the design of any development of this nature around the National Monument....

Both the application and the Chief Archaeologist's recommendations are inadequate, reflecting standard archaeological practices rather than engaging with the cultural-historical aspects of the monument. This is apparent in the failure...to take into account the National Monument as a key component of [the] General Post Office–Moore Street axis through the 1916 battlefield landscape. There is no historical account of the activities of Easter 1916 provided in the Archaeological Methodology. This omission is also reflected in the proposed

archaeological monitoring methodology which fails to comprehend that the requirement for archaeological supervision is due to the significance of the events of 1916 which culminated in the surrender in No. 16 rather than any preceding events at the site. As such there should be proposals for battlefield activity and a detailed finds retrieval strategy. The application fails to supply any information regarding the buildings use during 1916, the layout of the buildings as a strategic military strong point, and the interrelationship between the monument and other buildings at the time. It is of importance that the Minister insist that such detailed migration strategy be submitted with any application for Consent for works to the Moore Street National Monument....

Your advisers in the National Monuments Service will tell you that the application for your consent under the National Monuments Acts in respect of proposed works at 14–17 Moore Street...pertains only to the buildings in question, my considered view is that any consent you give should be mindful of the national historical importance of the whole Moore Street area with its laneways and buildings. I honestly believe that the low single and two storey red brick buildings which make up the neighbourhood north of the GPO and east of Moore Street north as far as the laneway where the O’Rahilly fell together constitute a battlefield site of European importance which should be preserved in its entirety. Apart from the intensive value of preserving such a precinct and indeed the national obligation to do so as we approach the centenary of the Rising, please consider the negative fallout nationally and internationally for the Government if it fails to respect the neighbourhood and also consider how the proper full-scale preservation of all the streets, lanes, buildings and boundaries if properly presented and marketed could be potentially one of Dublin’s leading tourist destinations. The neighbourhood of

small red brick buildings of the late 19th century could be retained for the use of small businesses and relevant heritage/souvenir outlets....

My advice is based on 40 years' service in the National Museum of Ireland (23 as Director) including charge of the archaeological excavation of the Wood Quay site with its attendant court cases and delays. I have seen many developments which resulted in costly over runs and compromises. Minister Roche chose not to take my advice about the M3 through Tara; Minister de Valera did similarly when the Book of Kells was sent to Australia. You have the same right, but please consider the fall out – both morally, cultural historical, political and economical. Our heritage and what is best for our national morale cannot surely be subjected to the impositions of another time and its disgraced government and remember please that once you allow the destruction of buildings and their neighbourhood ambience you cannot bring them back...”.

B. Dr Lynam's Letter.

183. By April 2012, Dr Wallace had retired as Director of the National Museum and Dr Seamus Lynam had taken up the reins as Acting Director. As with Dr Wallace's letter, Dr Lynam's letter of 25th April, 2012, to the then Minister for Arts, *etc.* is a helpful summary of the developments that occurred following Dr Wallace's letter of the previous September, the concerns that continued to present on the part of the National Museum and their views on the 'Myles Report', on which Part 1 of this judgment is, to a significant extent, based, and mention of which occurs here and elsewhere in this Part. Per Dr Lynam:

“[Subsequent to Dr Wallace’s letter of September 2011, and at] *the specific request of the Director [of the National Museum], a detailed Archaeological Assessment of Moore Street and its Environs was commissioned and the work was undertaken subsequently by Mr Franc Myles....*

Comment

The proposed development will see the removal of a substantial amount of original building fabric and streetscape throughout the Moore Street theatre of conflict. This destruction will significantly impoverish the historical and cultural significance of the National Monument by depriving it of its historical, cultural and architectural context. The proposed development will radically alter the street pattern, much of which still remains from the 1916 period. New thoroughfares with new alignments will be constructed while most of Henry Place will cease to be a public thoroughfare and much of Moore Lane will disappear. The impact upon the route along which Republican forces advanced to Moore St will be profound and the new alignments will make a coherent narrative of the battle difficult to sustain. Moreover, the removal of the original streetscape will make it extremely difficult for future generations to assess the strategic military decisions taken by the leadership of the GPO garrison in the final days of the Easter Rebellion. In addition to the surviving building fabric that was present in 1916, together with evidence in the fabric relating directly to the fighting, it is the streetscape along which the Republican forces advanced into the Moore Street terrace (containing the National Monument) that provides the clearest visual aid to the interpretation of the events of the battle as well as the most obvious physical connection with those events. Moreover, Myles has found evidence for

the survival of original cobbled surfaces and granite kerbstones exposed beneath damaged tarmacadam. How extensive this might be could only be determined by the removal of the overlying tarmacadam. However, the potential exists not only to follow the final route of the leaders of the Provisional Government and the soldiers of the headquarters battalion but to do so upon the original street surface that they walked along and fought upon.

It is clear that there are monumental remains surviving on the battlefield that form the wider context of the National Monument. Within the zone of development all of these will be destroyed including the remains of the White House, Moore Place, O'Brien's Bottling Stores and Stables and Nos. 8–9, 10, 21–22 Moore St....

It is clear from the Myles Report that nos. 14–17 Moore St are of great historical significance and that their fabric is relatively well preserved by contrast with many of the other surviving buildings. Furthermore they contain graphic visual evidence of the events of 1916 in the repaired holes in the party walls. However, the same can be said of No. 10 Moore St and it is also clear from the Myles Report that the surviving original building fabric, streetscapes and street surfaces elsewhere within the area are both monumental in form, historic in character and national in importance. Myles remarks that what survives of the period is disappointingly small. However, original building fabric survives in key areas such as the junction of Moore Lane and Henry Place and at No. 10 Moore St and it may be argued that the destruction of so much of the original 1916 landscape makes that which survives all the more important.

Given the huge national significance of the events of Easter Week 1916, consideration must be given to determining whether the monuments in question, including the original street surfaces are National Monument as no. 14–17 Moore St....

The Myles Report is excellent in assessing the battlefield, documenting the surviving buildings and street fabric and uncovering the evidence of the conflict. However, the need for independent advice is underlined by the fact that the Myles Report is predicated on the belief that the completion of the proposed development (with its widespread destruction outside the National Monument) is an inevitable fact. This No. doubt reflects the brief as presented to Mr Myles by the developer and his architect. Myles states that a purpose of his report is to 'inform the ultimate treatment of the historic landscape within the context of the redevelopment of the battlefield'In my view any Ministerial decision on this site, which is clearly of national importance, should be informed by a wider menu of options.

The Myles Report correctly treats the wider site as a battlefield.... I am given to understand that the general importance of Irish battlefields is recognised by the National Monuments Service which financed an initiative to map the location of Ireland's main battlefields....The importance accorded in existing State policy to battlefields is also evident in the development by the Office of Public Works of an Interpretive Centre connected with the site of the Battle of the Boyne.

From a heritage standpoint it seems inescapable that I must advise you that the presentation of the National Monument at 14–17 Moore St should be done within the context of the surviving terrace of houses and original street pattern. This supports the advice already tendered by the former Director in his letter of 21st September 2011.

If such an approach is taken it will provide an opportunity to deal with a problem relating to the complex's suitability for display purposes that was identified by Dr Wallace in his letter of 21st September 2011:

I also have concern about the feasibility of the proposed commemorative centre and its utilisation as a museum in compliance with Dublin City Council Development Plan 2011–17. For the structure to function as a Commemorative Centre it should be constructed to the highest possible museum standard and specification regarding curation, safety, security and environmental conditions. However, there are issues regarding the size of rooms and the floor bearing capacity of the rooms, visitor accessibilities, limited options available for providing an electrical supply, and so on. I would doubt the proposed centre would meet the requirements of the National Museum of Ireland in the event of the centre lodging a request for the loan of the archaeological or historical objects for future displays.'

The spaces in the terrace now occupied by post-1916 buildings would provide an ideal location within which to develop a custom-built Commemorative Centre, as

part of a complex that included the original historic buildings. This centre could be constructed 'to the highest possible museum standard and specification regarding curation, safety, security and environmental conditions.'

It is to be regretted that Mr Myles did not consult with the Relatives Group...as requested by Dr Wallace.

Summary

In summary, it is my view and of my colleagues in the National Museum of Ireland that:

- *The proposed development will significantly impoverish the historical and cultural significance of the National Monument (14–17 Moore St) by depriving it of its historical, cultural and architectural context.*
- *The National Monument exists within an historic battlefield.*
- *Outside the National Monument (but within the battlefield) there is original building and street fabric that is monumental in form, historic in character and national in importance.*
- *Any consideration of the National Monument at 14–17 Moore St must, in particular take account of the routeway between the GPO and Moore St to endeavour to maintain the link in a meaningful way given the extent of the surviving street plan and buildings, especially along Henry Place.*

- *The National Monument should be preserved within the context of the existing terrace and its other original buildings.*
- *A formal process should be undertaken by the National Monuments Service to assess the status of these survivals and to consider whether they are part of the same National Monument as Nos. 14–17 Moore St or constitute separate National Monuments.*
- *In relation to the proposed Commemoration Centre, consideration should be given to revising the proposed plans for this in order that such a centre be fitted out to a suitable museum standard. My staff would be more than willing to give further advice in this regard....”.*

184. As well as identifying manifold reasons why the entirety of the east terrace of Moore Street, certain buildings in the environs, and the streetscape bounded by Moore Street, Moore Lane and Henry Place ought to be preserved, Dr Lynam’s letter is of interest in identifying a fundamental deficiency in the Myles Report, not in the quality of the work done, but in one of its founding premises, viz. its being predicated on the belief that the completion of the proposed development of the area is an inevitable fact.

185. The above-quoted disinterested views of distinguished staff of the National Museum are clearly of some note.

Chapter 22

Mr Broderick's Report *or* No. 18 Reconsidered

186. In March 2014, the Cumann Gaolta 1916 received a report done by Mr Austin Broderick, a Structural Engineer, on No. 18, Moore Street. The purpose of the report was to seek to establish the age of No. 18 and to identify any distinguishing features remaining. To contemporary Dubliners, No. 18 is probably best known as the site of the recently closed 'Paris Bakery', the premises of which were occupied by disgruntled workers a couple of years ago over a dispute concerning unpaid wages.

187. No.18, unsurprisingly, adjoins Nos. 14–17, the latter currently recognised by the Minister as comprising a national monument. Mr Broderick is of the view that the original footprint of No.18 has been maintained. In 1911, the building was occupied by Ms Ellen Byrne, a widow, and her eight sons and daughters. At that time, the recorded dimensions of the building suggest that it was three floors over a basement and thus matched the height of all the buildings in the east terrace of Moore Street. A photograph from circa. 1930 shows damage to, and a collapsed wall, on the second-floor level. Because of this damage, sometime between 1930 and 1950 the building height was reduced to two floors over basement.

188. With regard to the front elevation of No. 18, Mr Broderick notes that the soldier courses over the windows, and also the pointing, match with the design of the buildings comprising the national monument and would have been typical of construction of the mid- to late-nineteenth century. A notable feature visible on the ground floor is a front corner-chimney, an unusual feature requiring, Mr Broderick suggests, further investigation. Mr Broderick also

observed some damage on the external brick-work, possibly bullet-strikes, and recommended that this be investigated. None of the windows or shop-front is original. No original internal features remain. However, Mr Broderick recommends a thorough investigation of the flooring and joisting.

189. The roof over No. 18 is curved, comprising so-called ‘Belfast’ trusses. This form of truss was introduced circa. 1860 but did not become used commonly until the early–1900s. Mr Broderick recommended that a more detailed inspection and survey of the roof should be undertaken. However, overall his view was that the roof is an unusual feature, with architectural merit that makes it worthy of preservation.

Chapter 23

Mr Hosford’s Report *or* What Brickwork Can Tell Us

190. Mr Hosford is the onetime Senior Lecturer in Brick Technology at Dublin Institute of Technology. He is also a Master Member of the Guild of Bricklayers. On 24th February 2014, he issued a report which is appended to the Broderick Report and headed “*Report on Number 18 Moore Street, Dublin 1*”. The ambit of his report is wider than its heading suggests. Thus Mr Hosford writes, *inter alia*:

“Following inspection of the facades of buildings number 10 (corner of Henry Lane [i.e. Henry Place]) and numbers 14, 15 16 17 & 18 Moore Street I am satisfied that all the above were constructed prior to 1916.

All buildings were originally built as three storey over basement structures.

The facing bricks used were of a consistent colour and texture throughout i.e. smooth faced clay bricks, russet or red in colour probably sourced from local brickworks in the Dublin area.

The arrangement or patterns of bonding of the bricks varied from 'Flemish Bond' on street numbers 10, 14, 15 & 16. 'English Garden Wall Bond' is used on street numbers 17 & 18."

191. As ever, the court marvels at the breadth of human knowledge and the range of disciplines in which people choose to specialise. The court must admit to being considerably taken with Mr Hosford's evidence which is simply stated but clearly evinces considerable professional knowledge.

Chapter 24

Mr Hennessy's Affidavit Evidence *or* Of Numbers and Ruins

A. Overview.

192. Mr John Hennessy is a retired Chief Examiner of Titles in the Property Registration Authority and a barrister-at-law. In his affidavit evidence he is concerned with two issues. First, whether each of the separate lands and buildings and curtilages known as Nos. 10 up to No. 25, Moore Street substantially pre-date or are contemporaneous with the Easter Rising.

Second, whether there were any buildings at Nos. 18 and 19 upon the outbreak of the Easter Rising.

B. Nos. 10–25

193. There is suggestion in Mr Allen’s affidavit evidence (considered further below) that the Minister for Arts, *etc.* does not accept that each of the separate lands and buildings and curtilages known as Nos. 10–13, and 18–25 Moore Street substantially pre-date or are contemporaneous with the Easter Rising. Mr Hennessy has exhibited along with his affidavit certain extracts from the Census of 1911 and Thom’s Directory (1862) which show the existence of the just-mentioned house numbers in use during at least the period 1862–1911. Notably, Mr Hennessy also avers that “[I]nsofar as improvements have been carried out to any of the permanent buildings at [the above-mentioned numbers] – by which the court understands him to mean those buildings that do not patently post-date 1916 – “*such improvements do not constitute any alteration or reconstruction of the buildings so that they lose their original character*”.

C. Nos. 18 and 19

194. There is suggestion in Mr Allen’s affidavit, by reference to Myles Report (and by reference to certain valuation records of 1915, the insurance claims which followed 1916 and Thom’s Dictionary) that Nos. 18 and 19, Moore Street were ‘ruinous sites’ in 1916. However, Mr Hennessy suggests that the term ‘ruinous site’ is not typically used in the context of, say, valuation records, to connote a completely empty site but rather to indicate the existence of

non-habitable buildings for ratings and valuation purposes. “[I]t does not mean that there was *No. structure or substantial structure in place.*”

195. As against this, the ‘witness statement’ of a Lieutenant-Colonel Charles Saurin (made to the Bureau of Military History at some time in the past) was handed up in court during the proceedings. In this statement, Saurin recounts his experiences as a Republican combatant on the night of Friday 28th April, 1916. So, for example, he describes how the Republicans moved up the Moore Street terrace through the burrowed tunnel, stating, *inter alia*, that “*At another time we had to cross an empty space where a house [one house] had once stood and were hidden from the street only by a flimsy wooden hoarding*”.

196. The court returns to the just-quoted element of Saurin’s witness statement later below. For now, suffice it to note that what leaps out from Saurin’s account, apart from the colour and nervousness of the moment, is that in carefully moving across “*the empty space where a house had once stood*”, he and his fellow Republicans had both transformed the Moore Street terrace into, and thus were now treading upon, a battle-site of national and European importance. The fact that a building was (if it was) built over that battle-site in the years following the battle is, in truth and to borrow a colloquialism, ‘neither here nor there’ when it comes to determining whether “*the empty space where a house had once stood*” and which was crossed by the Republicans during the night of 18th–19th April was part of a prominent battle-site of historic interest or meets the criteria to constitute a national monument now.

Chapter 25

Mr Allen's Affidavit Evidence *or* Why Nos. 14–17?

197. If so many people are right; if Dr Wallace and Dr Lynam and Mr Bateson and Mr Coogan, all eminent men of considerable knowledge and distinction in their fields are correct; if all those who stand four-square behind Mr Moore in the within proceedings are but stating the truth when they assert that the near-entirety of the east terrace of Moore Street, certain buildings in the environs, as well as the battlefield streetscape bounded roughly by Moore Street, O'Rahilly Parade, Moore Lane and Henry Place ought to be preserved, then why is Preservation Order No. 1 of 2007 and the whole focus of Executive attention solely on Nos. 14–17, and not the rest of the east terrace and the surrounding streetscape? After all, the men and women who occupy high office in our republic are no less patriotic, no less proud of our national heritage and no less eager to honour the men and women of 1916 than those ranked against them on Mr Moore's side in the within proceedings. There is too the fact that Cabinet ministers and their advisors are sensible people trying their best to do what they perceive to be in the public interest. So why has the Executive proceeded as it has? Why, in short, are only Nos. 14–17 the subject of a preservation order?

198. An affidavit sworn on 26th January by Mr Terry Allen, who is, as mentioned above, a principal officer of the National Monuments Service, provides some answers to the foregoing – though the court would note in passing, and with every respect, that when it comes to matters concerning the Easter Rising it does not appear that Mr Allen is possessed of any special expertise. Certain key elements of Mr Allen's affidavit evidence are summarised in italicised text below, each element being followed by certain observations of the court. A

significant portion of Mr Allen's affidavit evidence is concerned with specific comments made in the Myles Report concerning particular numbered properties. As the court engages in a separate property-by-property analysis later below, it does not address this aspect of matters in the present chapter.

199. *(Mr Allen). The historical significance of No. 16 was the determining factor in the decision to make the preservation order. Nos. 14, 15 and 17 were considered to form part of the national monument, on the grounds of being lands and premises required to enhance and preserve the amenity setting of No. 16.*

200. (Court). Later below, the court runs through the historical significance of various other of the properties on Moore Street, apart from Nos. 14–17. As will be seen, in terms of historical significance, it is difficult to understand why Nos. 14–17 are considered by the State to be individually or collectively to comprise a national monument, yet premises of historical significance such as Nos. 10, 20 and 21, all of which were occupied – with No. 10 forming the point of entry to the entire terrace and being the garrison headquarters for the evening of Friday, 28th April – are not considered to be a national monument. All of this leaves aside the question of whether Henry Lane, much of Moore Street, O'Rahilly Parade, and the length of Moore Lane ought to be considered, as so many people contend, to be and to bound a battle-site of national and European significance.

201. *(Mr Allen). Collectively, Nos. 14–17 represent the most significant, original, complete and continuous section of substantially intact pre-1916 buildings on Moore Street, most of the remainder being post-1916.*

202. (Court). The court would reiterate the points made by it regarding Mr Allen's first point above. Additionally, the court notes that despite the oft-repeated assertion by those on the Minister's side that, apart from Nos. 14–17, the rest of the Moore Street terrace from Nos. 10 upwards is post-1916, this simply does not hold true on an analysis of the relevant evidence.

203. (*Mr Allen*). *The 18th century form and profiles of Nos. 14–17 also largely survive as does the physical evidence of the presence of the Republicans in the form of openings broken through the party walls.*

204. (Court). The court would reiterate the points made by it regarding Mr Allen's first point above. Additionally, the court would note that while Nos. 14–17 may appear architecturally delightful to *aficionados* of 18th-century merchant dwellings, the suspicion arises that the critical significance of any of the properties from No. 10 upwards is the historical significance that they enjoy by virtue of their connection to the Easter Rising. There may be some architectural significance to Nos. 14–17; however, it is entirely secondary to the historical significance that any properties in the environs of Henry Place, Moore Street, O'Rahilly Parade and Moore Lane enjoy by virtue of their connection to the Easter Rising, a definitive event in our national history. People do not visit the site of the Battle of the Boyne because of the beauty of the Boyne-side, though it is beautiful, and protestors have not occupied the properties on Moore Street because of their love of 18th century merchant houses: in both cases, it is the significant military events which transpired there that are the 'draw'; all else is secondary.

205. (*Mr Allen*). *The architectural character and integrity of the buildings at Nos. 14–17 was not, of itself, the reason for considering them to form a national monument. That part of the*

national monument which comprises Nos. 14–17 is a national monument because it demonstrates the existence of intact structures and fabric associated clearly and intimately with the Easter Rising, a key historical event. Nothing comparable exists anywhere else in the City of Dublin.

206. In fact, something eminently comparable sits up and down the street and just around the corner on Henry Place and Moore Lane. The court would reiterate the points made regarding Mr Allen’s first point above.

207. *(Mr Allen). As regards the “so-called ‘Moore Street Battlefield Site”, there is No. provision in the National Monuments Acts that allows recognition to be given to the concept of a battlefield or battlefield site.*

208. (Court). This is a legal submission that has been considered and rejected by the court elsewhere above.

209. *(Mr Allen). When it comes to the question of whether the Minister should issue a s.8 preservation order in respect of a national monument situate in a metropolis, the Minister has to have among her or his considerations whether preserving and thereby in effect permanently sterilising the property in that area for future generations is an appropriate and proportionate act in all the circumstances.*

210. (Court). There is no express economic-related requirement imposed on the Minister in the National Monuments Acts. Presumably, this averment intends merely to suggest that the Minister should act rationally. Mr Moore has not contended that the Minister should act

otherwise. The court notes that the senior officers of the National Museum, in their above-quoted letters, were careful to note that preservation and re-development works do not have to be foes.

211. *(Mr Allen). This last-mentioned jurisdiction is complicated by the constitutional imperative to protect private property from unjust attack; here, apart from Nos. 14–17, the rest of the Battlefield Site is presently in private hands.*

212. (Court). This averment appears merely to suggest that the Minister must act lawfully when it comes to the exercise of the discretion under s.8 as to whether or not to undertake the preservation of a monument. Mr Moore has not contended that the Minister should act unlawfully.

213. *(Mr Allen). Preserving an urban battlefield might be appropriate where, for example, the town in question is no longer inhabited, but if one looks to the scenes of other 20th century urban wars on the European mainland such as Berlin and Stalingrad, there the emphasis was on building over the old, not preserving it.*

214. (Court). This averment seems to the court to rather miss the point that what is at issue in the within proceedings is not ‘just’ an urban battlefield. What the court is confronted with is an effort (a) to recognise as one or more national monuments, and (b) to see preserved, certain buildings and environs that are associated with the opening battle of Ireland’s ultimately successful early–20th century bid for national independence. The re-establishment of our national freedom and the efforts of the men and women who participated in the initial rising

which secured that enduring achievement, makes the events of Easter 1916 worthy of singular commemoration, just as our enduring national liberation is worthy of continuing celebration.

215. *(Mr Allen). The Minister does not accept that the lands and buildings and curtilages at Nos. 10–13 and 18–25, substantially pre-date or are contemporaneous with the Easter Rising, still less that they were undamaged during internal tunnelling works by the Republicans; the Minister accepts that there were buildings bearing these numbers on Moore St in 1916, but does not accept that the present buildings are a match for the buildings which bore the said numbers at that time.*

216. (Court). The court considers, later below, the historical significance of various of the properties on Moore Street, apart from Nos. 14–17. As will be seen, in terms of historical significance, it is difficult to understand why Nos. 14–17 are considered by the Minister to be individually or collectively of such national importance as to comprise a national monument but premises of historical significance such as Nos. 10, 20 and 21, all of which were occupied in Easter 1916 – with No. 10 forming the point of entry to the entire terrace and being the garrison headquarters for the evening of Friday, 28th April – are not considered to be a national monument. No-one is suggesting that any of the premises along Moore Street – indeed the court does not understand that even the State would contend this in respect of Nos. 14–17 – is a complete “*match*” for the buildings as they stood and were furnished in 1916; even Nos. 14–17 are in a state of some dilapidation, both externally and internally. And all of this, of course, leaves un-addressed the question of whether Henry Place, much of Moore Street, O’Rahilly Parade, and the length of Moore Lane ought to be considered, as so many people contend they ought, to be and to bound a battle-site of national and European significance.

217. *(Mr Allen). Even if all of Nos. 10–13 and 18–25 were there in 1916, age of buildings alone does not generally attract national monument status or a preservation order under the National Monuments Acts.*

218. (Court). No, it does not, and Mr Moore has not suggested in these proceedings that it does.

219. *(Mr Allen). Even if Nos. 10–13 and 18–25 were a national monument which benefitted from a preservation order (which they are not) the Minister could nonetheless lawfully give consent for works involving their demolition or destruction in the public interest.*

220. (Court). This is not denied by Mr Moore, though the Minister’s actions are constrained by, and fall to be exercised within the context of, *e.g.*, the observations of the Supreme Court in *O’Callaghan*, referred to above, concerning the “*duty to preserve*” applicable to the Commissioners of Public Works (and now the Minister for Arts, *etc.*) under the National Monuments Acts.

221. *(Mr Allen). As most of the buildings in the battle-site are in private ownership, do not enjoy national monument status and are not the subject of a preservation order then they do not require ministerial consent before they can be demolished.*

222. (Court). There appears to be a blurring in the above of what a national monument is and what ought to be done about it. There is no legal reason why a building in private ownership cannot enjoy national monument status under the National Monuments Acts. As will be seen

below, the court concludes that there are several national monuments in or about Moore Street, albeit that they are not recognised by the Minister as such, and which are likely to be (though the court does not know this for a fact) in private ownership. Clearly s.14 of the Act of 1930 is of relevance as regards any works done to or along by same.

223. (Mr Allen). The functions of the Minister under s.8 are entirely discretionary; having regard to such factors as aforesaid, it was or would be entirely appropriate for the Minister to decide not to make a preservation order in respect of any other national monument(s) (other than Nos. 14–17) in the Moore Street area, “even if such existed”.

*224. (Court). This averment conflates two issues. The first issue arising is whether the buildings on the battle-site and/or the battle-site itself are/is a “national monument”. This is not a matter for ministerial discretion. It is a question of objective fact. Whether a s.8 preservation order issues in respect of one or more national monuments is where ministerial discretion comes into play, albeit within the significant constraints identified, e.g., by the Supreme Court in *O’Callaghan*. The result of the foregoing is that the fact that the nature of the functions of the Minister under s.8 is neither here nor there when it comes to whether a monument is a “national monument” within the meaning of the National Monuments Acts.*

225. (Mr Allen). An Bord Pleanála gave permission to Chartered Land on 24th March, 2010, to re-develop the so-called ‘Carlton Cinema Site’ running from O’Connell Street to Moore Street, subject to its getting – what it was required in any event by law to get – prior ministerial consent to any works to be done within the preservation order of Nos. 14–17; there appears to have been No. challenge to this planning permission.

226. (Court). This is true.

227. *(Mr Allen). Following the issuance of the Minister's qualified consent on 16th July, 2013, and a second or varied consent on 30th April, 2014, there was No. legal challenge by Mr Moore or anyone else to the said consent(s).*

228. (Court). The Minister is confronted with the within proceedings now – and there is more than enough to resolve in them without the court getting into what proceedings might have been brought in the past.

229. *(Mr Allen). The second consent deals adequately with the issues raised in the Garland Report concerning the basements and cellars found under the rear of Nos. 14–17.*

230. (Court). The consent does not resolve the issue of the extent of the national monument presenting, given the position of the new-found cellar.

231. *(Mr Allen). The specifications for the works taking place or to take place in respect of Nos. 14–17 are to restore, stabilise, underpin and conserve those buildings for future generations to enjoy and visit.*

232. *From the perspective of preserving and restoring Nos. 14–17, the demolition of Nos. 13, 18 and 19 will, inter alia, enable the provision of permanent gables on either side of Nos. 14–17 and will facilitate the full stabilisation of Nos. 14–17 in a manner which aims to create structural independence from potential disruption during future works associated with the permitted Dublin Central Development scheme.*

233. *The demolition of structures to the rear of Nos. 13, 18 and 19 allows for construction access through these sites from Moore Lane without using 8–9 Moore Lane, which is part of the recognised national monument.*

234. *The Minister's consent of 16th July, 2013, included the intended works to be done to Nos. 13, 18 and 19, not because they are part of the national monument but as a result of the operation of s.14(1) of the Act of 1930 which requires ministerial consent before the carrying out of works within, around or in proximity to a national monument.*

235. (Court). Even if one were to accept the above as true, these observations do nothing to meet what is perhaps the central thrust of the within proceedings, namely that there are one or more national monuments in and around Moore Street in respect of which nothing has been done and which may yet be demolished or otherwise destroyed.

236. *(Mr Allen). Neither Mr Moore nor anyone else has produced cogent evidence of the particular and historical significance of any premises (other than the recognised national monument) in and around Moore Street. If this had been done, there might be grounds for consideration of a preservation order. Absent same, the issue of whether s.22(3) of the Interpretation Act 2005 might permit the Minister to revoke earlier consents for works in respect of Nos. 14–17 Moore Street is moot.*

237. (Court). The court does not accept that Mr Allen is correct as regards what he contends in respect of Mr Moore and so the balance the contentions made must also fail. In passing, the court cannot but note that the complete freedom of action that Mr Allen appears to consider to

present as regards the issuance of preservation orders sits uneasily with the observations of the Supreme Court in *O'Callaghan*, referred to above, concerning the “*duty to preserve*” applicable to the Commissioners of Public Works (and now the Minister for Arts, *etc.*) under the National Monuments Acts.

238. (*Mr Allen*). *Even if any such consent was revoked, Mr Moore has failed to demonstrate how it would ultimately avail him in preventing the demolition of largely private property, “especially when the Minister could re-consider the matter and grant an unimpeachable consent again in any event”.*

239. (*Court*). Again, this averment conflates two issues. The first issue arising is whether the buildings in the battle-site and/or the battle-site itself are/is a “*national monument*”. This is not a matter for ministerial discretion. It is a question of fact to be determined by reference to the applicable criteria as identified in the National Monuments Acts. Whether a s.14 order might issue in respect of the carrying out of works to a national monument is a separate matter.

Chapter 26

The Affidavit Evidence of Mr Cumming and Ms Donnelly

or A Review of Nos. 13 and 18

A. Overview

240. Mr William Cumming and Ms Jacqueline Donnelly are architectural advisors working under the auspices of the Department for Arts, *etc.* They gave evidence as to the architecture of Nos. 13 and 18, both of them concluding that an examination of the fabric of both buildings indicates that they were constructed after 1916, and that neither building has any architectural or historic special interest.

241. By way of general comment, the court would note that the usefulness of the evidence tendered by Mr Cumming and Ms Donnelly, being architectural advisors, is both limited and undermined by Mr Allen's averment in his affidavit evidence that:

"The architectural character and integrity of the buildings at Nos. 14 to 17 was not, of itself, the reason for considering them to form a national monument. (This would be of very great significance from the perspective of Dublin City Council in any consideration of placing a building on the record of protected structures, which is a different matter than national monument status or preservation status)".

B. No. 13

242. Mr Cumming's appraisal of No. 13 is that although there has been a building on the site of same since the mid-18th century, the present building appears to be a modern re-build from the period 1955–1965, with No. obvious internal evidence of surviving historic fabric, and without any visible evidence of any (surviving) basement. Ms Donnelly gives a similar appraisal. The court considers the evidence relating to No. 13 in greater detail later below. The court must admit to some surprise that in the course of the proceedings it appeared that the State-side witnesses appeared unaware that there is a portion of No. 13 (the portion that forms a party wall with No. 12) which is visible from the street as a column of old brick. It naturally colours the court's impression as to the evidence before it from particular witnesses when such a feature – which the Garland Report clearly indicates to be a pre-1916 feature – appears to have gone entirely missed.

C. No. 18

243. Mr Cumming's appraisal of No. 18 is that although there has been a building on the site of same since the mid-18th century, the present structure appears to be a post-1916 re-build, that at some stage was amalgamated with No. 19, which he mentions as having been in ruins in 1919, not a vacant site as Lt-Col Saurin's witness statement suggests. According to Mr Cumming, there is no obvious internal evidence of surviving historic fabric, and there is no visible evidence of any basement. Ms Donnelly gives a similar appraisal. Very little is offered by either witness in terms of analysis or detail to support these assertions. When it comes to No. 18, Ms Donnelly offers the view that the bonding pattern of the brickwork, together with a chimney indicates a later reconstruction following 1916. However, it is only fair to note that

the 40-year expertise of Mr Hosford (whose analysis has been set out above) far exceeds that of Ms Donnelly when it comes to issues of brickwork, and his conclusions in this regard are radically different to hers.

Chapter 27

The Affidavit Evidence of Ms Lynch and Mr Colreavy

A. *Is there a 'Moore Street Battle-Site'?*

244. Ms Lynch is the Chief Archaeologist with the National Monuments Service. Mr Colreavy is the Principal Advisor for Built Heritage and Architectural Policy in the Department for Arts, *etc.* Their affidavit evidence to some extent comprises the anti-Bateson/Coogan/Kelly evidence, albeit that neither appear to be historians, as distinct to possessing other, *e.g.* archaeological, expertise. Thus with specific regard to the affidavit evidence of Messrs Bateson (a distinguished author and historian), Coogan (a distinguished author and historian) and Kelly (the onetime Director of Antiquities at the National Museum) – and contrary, as it happens, to the views expressed in the above–quoted correspondence of Dr Wallace, the onetime Director of the National Museum, and Dr Lynam, the onetime Acting Director of the National Museum – Ms Lynch and Mr Colreavy, perhaps not uncourageously, opine that:

“In so far as the said Affidavits [of Messrs Bateson, Coogan and Kelly]...purport to furnish expert or opinion evidence to the effect that there is such a tangible thing as the ‘Moore Street Battlefield Site’ and the whole of said area comprises a

national monument, we believe and it is our expert opinion that this is not the case”.

245. The court must admit to being unpersuaded by this evidence. It goes against what a bevy of distinguished witnesses have averred, and what has also been stated in correspondence sent by the highest office-holders at the National Museum to the Minister for Arts, *etc.* Moreover, it is an assertion that, for example, goes against, *inter alia*, the Shaffrey Report (2005) which states (at 42):

“The activities relating to the 1916 Rising, which took place in Moore Street happened throughout the entire street, the adjacent lanes and within many of the buildings themselves....Nos. 10 to 25 [Moore Street] which were all occupied during the final stages of the Rising...a small number of buildings/sites can be identified as being of particular significance due to the specific events which took place within them. In addition to No. 16...No. 10 – on the corner of Moore Street and Henry Place, Nos. 20–21, the former Hanlons fish shop, and the corner site at the junction between Moore Lane and O’Rahilly Parade...are also sites of notable importance...”.

B. A Question of Architecture?

246. Mr Colreavy additionally avers that:

“[T]he wider area surrounding the national monument at Nos. 14 to 17 Moore Street is, unfortunately, not an architecturally intact ensemble of 18th to 19th

century structures. On the contrary, its architectural integrity has been significantly compromised...That is not to say that 18th and 19th century structures or fabric do not survive at all in the wider area – some such structures do indeed survive (though, as noted above, for the most part without presenting any evidence of the Rising)”.

247. All of this may be so, but if one was dealing with an area of purely architectural significance, then Moore Street would not, the court suggests, have excited the depth of feeling that has led to the within proceedings being brought. It is the historical significance of the site that is what makes it special – though it might perhaps be contended that given the historical significance of the area, and the fact that the events of the Easter Rising transpired in the early-20th century, that would afford an additional incentive to maintain and preserve all such 18th and 19th century structures as do survive, so as better to ensure for future generations a sense of the atmosphere of the battlefield site.

C. Three Suggested Reasons why there is No Battlefield Site

248. Ms Lynch does not consider that it would be reasonable to take the view that there is a single national monument comprising Henry Place/Moore Street/Moore Lane (she does not mention O’Rahilly Parade but the court assumes that her views are the same in this regard). She offers three bases for the view she holds:

“...[1] *the severe compromising of the architectural integrity of this area which has occurred in this area (apart from Nos. 14 to 17 Moore Street) in the decades since the Rising....* [2] *the general absence (apart from Nos. 14 to 17 Moore Street and a small number of other locations) of physical evidence of the Rising...* [3] [the fact that] *such an area cannot reasonably be considered to constitute a national monument within the meaning of Section 2 of the 1930 Act, having regard to the definition of same contained within the Act and the statutory criteria set out therein*”.

249. Re. [1]. The court would make the same point in this regard as it made in respect of Mr Colreavy’s last-quoted averment, namely that if one was dealing with an area of purely architectural significance, then Moore Street would perhaps not have excited the depth of feeling that has led to the within proceedings being brought. It is the peculiar historical significance of the Moore Street area that makes it so distinctive.

250. Re. [2]. The court must admit to finding the reference to “*a small number of locations*” (undefined) in addition to Nos. 14–17 to be somewhat unsettling, suggesting that, even on Ms Lynch’s account, Mr Moore is correct, that there are places directly connected with the Easter Rising in and about Moore Street which may well be national monuments and which have not been recognised as such, even though that is what they are (public recognition of their status as a national monument not being a pre-requisite to their being same).

251. Re. [3]. Statutory interpretation is a matter for the court. The court does not accept as correct Ms Lynch’s averment regarding the interpretation of s.2.

D. Interaction of planning law and the National Monuments Acts.

252. When it comes to the interaction of the planning legislation and the National Monuments Acts, Ms Lynch and Mr Colreavy opine as follows:

“There is no doubt, we believe, but that the Minister has free-standing powers under the National Monuments Acts (in particular, the power to make preservation orders) which could, in appropriate circumstances, be exercised to restrain the carrying out of development, notwithstanding that such development has been granted planning permission.”

253. The operation in tandem of the separate planning code and National Monuments Acts regimes is considered in some detail later below.

E. An overall assessment of the Affidavit Evidence of Ms Lynch and Mr Colreavy.

254. The court would make the following observations concerning the affidavit evidence of Ms Lynch and Mr Colreavy.

255. First, both deponents make their averments from an architectural and/or archaeological perspective. They make no averment from a historical perspective. Nor do they offer any expert evidence in rebuttal or contravention of the expert historical evidence adduced on behalf of Mr Moore. And even the scantest reading of the pleadings and evidence in this case makes patently clear that this is a case is concerned first and foremost with matters historical.

256. Second, Ms Lynch and Mr Colreavy place heavy reliance upon the Myles Report. That report is a well-written document prepared by a competent professional, but context is everything, and the context of the Myles Report is that it was commissioned by and written for a commercial developer that was seeking and secured planning permission for a large mixed-use commercial development.

257. Third, insofar as Ms Lynch and Mr Colreavy rely on the archaeological battlefield assessment contained in the Myles Report, there appears, surprisingly, to be no regard or consideration on their part of the historical significance of the Moore Street Battle-Site.

258. Fourth, as to the averment by Ms Lynch that it is not reasonable to take the view that there is a single national monument comprising an extensive area in the environs of Moore Street, the court cannot but note that the balance of reason is against her in the form of the historical evidence adduced by Mr Moore and the observations of the most senior of staff at the National Museum.

259. When it comes to the historical evidence that Mr Moore has adduced, counsel for the Minister indicated at one point during the proceedings that, *e.g.*, Mr Tim Pat Coogan is entitled to his views but that others may differ. He is, they may and, as it happens, they do. That is doubtless one reason why this matter has come before this Court for it to consider the questions of law raised and arising. When it comes to answering those questions, and when it comes to a consideration of the conflicting evidence presenting, the court does not enjoy the luxury of being able to shrug its shoulders at divergences in evidence as a natural fact of life. It must and does arrive at a conclusion on the balance of probabilities as to where the truth of

the facts lies, and then it must assess those facts in light of the applicable legal issues and law presenting.

Chapter 28

The Garland Report *or* The Cellar and Certain Remains

A. Overview.

260. In April 2014, Mr Kevin Rudden, a consulting engineer with Garland, a firm of consulting engineers, issued a report concerning the works that were the subject of the s.14 consent issued by the Minister for Arts, *etc.* the previous July. The report focuses on two matters, viz. (1) the cellar area discovered to the rear of No. 14, Moore Street, and (2) certain surviving remains of the Easter Rising at Moore Street.

B. The Cellar Behind No. 14.

261. The details as to the discovery, following the issuance of Preservation Order No. 1 of 2007, of the cellar behind No 14, has been described elsewhere above. Mr Rudden describes in a little more detail what this discovery entailed. Thus he describes how Nos 8/9 Moore Lane are located in the rear gardens of Nos 15/16 Moore Street and are within the boundary of the national monument recognised in the said preservation order. An industrial building located on the site of Nos 8/9 was apparently destroyed by fire at some stage in the past and only the front elevation of same survives.

262. This industrial building to the rear of Nos. 8/9 Moore Lane, formed a terrace of industrial buildings, and on the adjoining property to the rear of No 14, Moore Street, the entire building remains intact. This industrial building, according to Mr Rudden, dates from some date prior to 1916. It was during investigatory works at this surviving building that a large cellar of circa. 100m² was discovered. This cellar extends under the concrete floor of the now demolished Nos. 8/9 Moore Lane. It is five bays deep and two bays wide. The roof is barrel-vaulted concrete augmented with structural steel beams. Mr Rudden states in his report that the condition of the structure is good, notwithstanding the fact that it has been thoroughly neglected since the building to the rear of Nos. 8/9 burned down. Mr Rudden observes as follows, under the heading “*Newly Discovered Cellars*”:

“Although 14 Moore Street is within the National Monument [as recognised in the preservation order of 2007], the cellar behind it is not within the National Monument and is not a protected structure despite being of an identical construction to that contained within the National Monument. However, as its existence was not known about, it could not have been protected....The fact that these basements were not detected during the preparation of the original Environmental Impact Statement for the Development, prepared by the Developers [Chartered Land], demonstrates that this document was fundamentally flawed and incorrect....[I]t is recommended that this Environmental Impact Statement is corrected and re-submitted”.

C. Certain Remains.

263. As mentioned above, after fleeing from the GPO, the Republicans gained access to No. 10, Moore Street. According to Mr Rudden, under the heading “*Route to National Monument [i.e. the monument as recognised in the preservation order of 2007] from Henry Place*”, the Republicans “*gained access to No. 10 Moore Street via a window on the Henry Place elevation of this building. The window was broken out to form a door opening to accommodate the large number...entering. This opening is visible today.*”

264. The report of Mr Rudden points to surviving remnants of structures from 1916 in the form of the party wall between Nos. 12 and 13 Moore Street. Thus, per Mr Rudden, again under the heading aforesaid:

“Once the volunteers had entered No 10, we understand that access was gained to No 11 via a shared flat roof at first floor level. From No 11 it is understood access to No 12 was gained via an opening created in the party wall. It has been argued that 12/13 Moore Street are post 1916 buildings, however it is evident from an inspection from the street that the original party wall between 12/13 still exists. The brick front elevation has been replaced. It is therefore critical that a detailed examination is carried out on these buildings to determine the extent of pre 1916 elements that still exist and to determine the location of the opening between these buildings.”

265. The surviving party wall at Nos. 12/13 is so obvious that even this Court, with no experience in the practice of architecture or construction, was able to discern it when taken on a site visit of Moore Street by the parties to these proceedings.

Chapter 29

Comments on Specific Properties: Overview

266. Reference has been made elsewhere above to the fact that on 6th February, 2012, a report was submitted to the Minister for Arts, Heritage and the Gaelteacht by Mr Franc Myles, a licensed archaeologist, of Shaffrey Associates (Architects) on behalf of Chartered Land, the then owner of Nos. 14–17, as part of the latter’s application for ministerial consent for works to those properties, being a national monument. The report is of especial interest in the context of the within proceedings because it followed a thorough internal inspection of Nos. 8 to 25, Moore Street, including the rear areas and mews thereof, to ascertain any surviving evidence of conflict. Notably, the Myles Report treats Moore Street and its environs as a battlefield site.

267. As was seen above, in the context of the court’s consideration of Dr Lynam’s letter of April 2011, the Myles Report has been criticised within and by the National Museum of Ireland because, *inter alia*, it “*is predicated on the belief that the completion of the proposed development (with its widespread destruction outside the National Monument) is an inevitable fact. This no doubt reflects the brief as presented to Mr Myles by the developer and his architect. [Thus] Myles states that a purpose of his report is to ‘inform the ultimate treatment of the historic landscape within the context of the redevelopment of the battlefield’*” – a re-

development that Dr Lynam, writing for the National Museum, considers should not have been presumed as an inevitability, such presumption falling to colour the overall tenor of the Report. Aspects of the Myles Report also stand disputed by the findings in later reports such as the Broderick Report and the Hosford Report. Even so, the Myles Report is as good a place as any to start in terms of a review of those other properties in respect of which it makes report.

268. In passing, the court notes that In November, 2005, an Architectural and Historical Assessment of No. 16, Moore Street was prepared by Shaffrey Associates. The report, known generally as the ‘Shaffrey Report’ was commissioned by Dublin City Council with a view to determining whether No. 16 should be included in Dublin City Council’s Record of Protected Structures. Within the Report are numerous of the witness statements assembled by the Bureau of Military History, some of which were referred to in Part 1 of this judgment, all topographically arranged. (The names of the witnesses, though not the number of the relevant witness statement are identified in the Shaffrey Report). These ‘Past Voices’ provide a useful *aide-mémoire* that the court relies upon below to highlight the potential significance of various places along and around Moore Street whose present condition the court turns now to consider.

Chapter 30

Nos. 10–11

A. The Historical Importance of No. 10.

269. “Along with Nos. 10 and 11”, the Myles Report notes, “all houses within the National Monument, Nos. 14–17 Moore Street, carry physical evidence of the ‘burrowing’ undertaken on the Friday night”. In truth, No. 10 was the key property on Moore Street on the evening of Friday 28th April, with the focus only moving to No. 16 on the following day. The events of the 28th and 29th have been recounted with some detail in Part 1 above. However, it is worth quoting from the Shaffrey Report of 2005, a report commissioned by Dublin City Council, to highlight the centrality of No. 10 to events, following the evacuation of the GPO to Henry Lane:

“There was a frenzied and dangerous confusion as the different parties of men were forced to huddle together at the turning of the L-shaped Henry Place. This leads from Henry Street to Moore Street, but not before crossing Moore Lane which runs parallel to the terrace of buildings (house numbers 10–25) in which the great majority of the group were eventually to settle themselves....Most of the combatants made it across the opening into Moore Lane and onwards to the bottom of Henry Place where it joined Moore Street. Here the larger part of the group entered the terrace to the right, through Cogan’s the provision dealers [i.e. No. 10]....While the majority made directly for the house on the right-hand side of the lane, as they looked towards Moore Street (i.e. Cogan’s, No. 10) a

small party was ordered to break into No. 9 to gain access to the block of houses which led back to Henry Street....Eventually progress in this direction proved impossible [because of approaching fire from Henry Street], and all of those involved, retreated back across Henry Place to No. 10.

Importance of No. 10, Cogan's Provisions Dealer

By all accounts this is the house into which the majority of the combatants entered after the mass surge down Henry Place. Difficult as it seems to believe, at least one witness suggests that access to No. 10 was gained by breaking through its external side wall. Numbers in this house soon began to swell and, partly for matters of accommodation and partly to spread the danger of a concentrated British attack, the insurgents immediately began to burrow through from one house to the next on the 'second floor' (perhaps the first above ground). The men, exhausted and hungry, worked in shifts using a pick [possibly] and crowbar, made their way towards the top of the street, eventually reaching [O'Rahilly Parade]....Many of the residents were still in their upper storey flats when the insurgents broke through....

Elizabeth O'Farrell's account, recovered closest [in time] to the events...and the most plausible and consistent, makes it very clear that Connolly (whose lack of mobility determined his location as the position of the Headquarters at all times) 'and the rest' spent the night in No. 10....Whatever of the location of the decision to finally surrender, it is certain that during the first night, from sometime after dusk, to the next morning, the key figures in this drama [including various members of the Provisional Government], spent their time in

No. 10. It was only after breakfast was cooked and taken, that the main party, including Connolly carried on a stretcher, moved through the holes in the walls towards the centre of the street. According to O'Farrell, this was to No. 16."

270. The court notes that this is some suggestion in the literature about the events of 1916 that No. 10 may have remained the central scene of events throughout the entirety of the 28th and the 29th. In this regard, the court prefers Nurse O'Farrell's account of events, *i.e.* that the centre of events moved to No. 16, following breakfast on the 29th. If the court is wrong in this, then No. 10 is additionally important as a site. If the court is right in this, the centrality of No. 10 from the evening of the 28th up to breakfast on the 29th is in any event clear.

B. Past Voices.

271. The centrality of No. 10 to the events of Friday, 28th April and on into the next morning is evidenced by the fact that the Shaffrey Report refers to eleven witness statements concerning what transpired at No. 10.

1. Elizabeth O'Farrell.

272. *"She entered 'Gogan's' [i.e. Cogan's], No. 10. James Connolly [was] already there, lying on a stretcher, some mattresses [were] procured, and Connolly & other wounded men (17 of them) [were] put on these....[During the night] 'we could hear the roar of burning buildings, machine guns playing on the houses and at intervals what seemed to be hand grenades....The morning of the 29th I spent in helping to cook for the other Volunteers who had worked hard through the night*

burrowing from house to house up towards the top of Moore Street [Parnell Street end]”.

2. Eamonn Bulfin.

273. *“We got down to the corner house at Moore Street and Moore Lane [actually Henry Place, i.e...No. 10]. A section having been broken a hole in the end wall into the house, we entered the house by this means. They did not actually go into the street, as that was under fire too. We were there in that house for a while and, as the crowd began to swell, we decided to break through the houses along the street, on the second floor. Myself, Desmond Ryan, Kilganon and all the St Enda’s boys proceeded to break the divisions between the houses for about half the length of the street”.*

3. Feargus de Búrca.

274. *“This house [No. 10] faced on to Moore Street and our men had bored their way through the houses until they reached a yard which opened out onto the second lane in Moore Street near Parnell Street end [i.e. O’Rahilly Parade]”.*

4. Patrick Caldwell.

275. *“Commandant Johnnie McLoughlin, a Fianna boy gave us instructions to evacuate the barricade and move up Henry Place towards Moore Street. At this time he was carrying a sword in his hand. As we passed Moore Lane we came*

under British fire for a short time but got safely through to a house at the corner of Moore Street [i.e. No. 10]. We entered this house and found that a number of houses running down Moore Street had been bored through to provide a line of retreat....”.

5. Ruadhri Henderson.

276. *“[W]ith but few minor casualties all reached the Moore Street end of Henry Place. The corner house to the right [i.e. No. 10] was entered...”.*

6. Seán McLoughlin.

277. *“I then came back down and gave orders that the men were to be moved across in small groups and they were to move into the houses in Moore Street at the top of Moore Lane and that they were to break their way through from house to house so far as they could go....We now managed to get all the men into the buildings and I decided to move Connolly with the stretcher into the first house which was a grocer's shop at the corner of the lane [i.e. No. 10]. He was taken into the kitchen and in the meantime I went into Moore Street to carry out reconnaissance but the British were at the other end in force and opened up with machine guns....When I got [back] into the kitchen, Connolly was laid on a stretcher on the floor. Sitting by him was Miss Carney, I believe Miss Grenan, Elizabeth Farrell, Seán MacDermott, Tom Clarke, P.H. Pearse, Willie Pearse, Joseph Plunkett and several of our own wounded, including some British wounded...[[A]fter having made some detailed plans for a plan of escape] I then repeated my original advice*

to them to try to get some sleep. Pearse and his brother went upstairs and made their bed on a wide table, lying on top of it, and I lay underneath on the floor. I was awakened as daylight crept into the sky and I went to see how far the digging had gone.”

7. Seamus Robinson.

278. *“During a lull we dashed across the mouth of Moore Lane and entered the corner house at Moore Street [i.e. No. 10] by a side-door. This house was full of Irish Volunteers. I got a large jug and filled it with water and went around giving drinks to whoever needed them. I entered one room and saw James Connolly lying on a stretcher. He appeared to be very cheerful and waved his hand to me saying ‘Hello Townie’There was a call for volunteers to bore through the buildings we now occupied, and I was one of the party. We were using a very large crowbar and each man would take his turn at the bar for a few minutes and then stop to rest, a fresh man taking his place. During one of my spells of rest I lay flat down on the floor awaiting my turn to work the crowbar and fell fast asleep.”*

8. Desmond Ryan.

279. *“We reach Moore Street and enter a grocery store [i.e. No. 10]. We soon bore the walls of the adjoining house. Half a dozen houses are bored with pick and crowbarNext morning we proceed with the boring, barricade windows and see all manner of shops and houses. A charge upon the barricade closing Moore Street is postponed six hours.”*

9. Michael Staines.

280. *“We went into a house, No. 10 in Moore Street, at the corner of Henry Place. We placed Connolly in a bed and made his room the headquarters...”*.”.

10. Liam Tannam.

281. *“The corner house of Moore Street [i.e. No. 10]...seemed the best place that could be got especially as my mind was then running on the imminent danger of the collapse of the ceiling in the GPO. I instructed the men to enter at once and dashed back myself to the angle of Henry Place...”*.”.

11. Oscar Traynor.

282. *“We reached the corner of Moore Street and [Tom] Clarke called upon me to occupy these buildings, and to dig from one building to another in order to extend our position. We smashed our way into this building [i.e. No. 10] and progressed, as instructed, from house to house”*.”.

B. The State of Condition of Nos. 10–11 at the time of the Myles Report.

283. Myles notes of Nos. 10–11 that:

“[Stripping of plaster to the party wall between Nos. 10–11] revealed a blocked up opening in the rear room at second floor level. No. 11 has been substantially altered since 1916, the second floor No. longer survives so the party wall faces onto a flat roof at No. 11. As a result the render cover on the No. 11 face of this former opening is a dense cementitious render which has bonded onto the face of the underlying brick. Thus, on part removal of the render to confirm the former opening from both sides of the party wall, the face of the exposed brick was damaged...”.

284. Writing later of No. 10, Myles states:

“Cogan’s was the first building broken into....A section of repair work beneath an advertising hoarding and a blocked window ope is pointed out as the entry point from Henry Place and evidence of internal work at second floor level to the rear points to the first hole made by the Volunteers as they began to make their way towards [what is now O’Rahilly Parade]....The façade brickwork, granite cills and copings were more than likely there prior to 1916. The façade has nonetheless undergone subsequent interventions....[The fact that] there are no obvious indicators of bullet strikes present on the exterior...may well suggest a new façade. Insurance claims however relate to damage to walls, windows and

stock and it would appear unlikely that the claim would cover such extensive reconstruction.”

C. Summary of Position as Regards No. 10.

285. When it comes to the issue of the historical and other interest of No. 10 – separate from the issue of whether it sits upon or comprises part of a battlefield of national or European importance – the court notes the above and that:

- (1) No. 10 was the first point of entry by the Republicans into the Moore Street terrace;
- (2) the first Council of War was held in No. 10;
- (3) a field hospital was set up under Elizabeth O’Farrell in No. 10;
- (4) wounded volunteers and signatories to the Proclamation stayed overnight in No. 10 on Friday 28th April;
- (5) the final meal of the evacuated GPO garrison took place in No. 10;
- (6) No. 10 was where the overnight burrowing through the terrace commenced;

- (7) the historical interest of No. 10 is clear from the Shaffrey Report (2005) (esp. Part 3 and Appendices C and E) and such matters as have been referred in in A and B above;
- (8) the historical and/or architectural and/or archaeological interest of No. 10 today is clear from the Shaffrey Report (2012) (esp. pp. 14, 25, 36, 53–4, 95, 97, 111, 133–4, Appendix A, p.2, and Appendix B, fig.1);
- (9) the historical interest of No. 10 today is apparent from the affidavit evidence of Messrs Bateson, Coogan and Kelly).

286. The wealth of evidence before the court concerning the historical significance of No. 10 is such that the court cannot but, and does, conclude that No. 10 is both a monument and a national monument within the meaning of the National Monuments Acts.

Chapter 31

Nos. 11–12

287. Myles notes of Nos. 11–12 that “*Inspections determined that the party wall No. longer exists, having been removed and replaced with a concrete post and beam structure.*” He later observes that “*The façades here are in modern brick and obviously post-date the Rising, the interiors offer little of interest ...The breach through the party wall from No. 10 is now evident on an exterior wall to the rear...*”.

288. The court assumes that the wall of No. 11 on which the breach shows is part of the outer wall of No. 10, and the court has already concluded that No. 10 is a national monument, for the reasons stated. If it is the case that the area where the breach to which Myles refers as evident is on the No. 11 side of the party wall between Nos. 10 and 11, then the court is satisfied that the historical interest of this feature is such as to render the party wall as a whole a part of the national monument.

289. Save as noted in the previous paragraph, there is nothing in the evidence to suggest that any of the rest of Nos. 11 or 12 meets any of the criteria for either of those properties to constitute a national monument. This does not alter the fact that the court finds later below that the site on which Nos. 11 and 12 stand is a part of the Moore Street battle-site and that this battle-site is a national monument. Subject to ministerial consent under s.14 of the Act of 1930, there is nothing at law to stop Nos. 11 and 12 being razed, even if the battle-site *qua* national monument is to be preserved, albeit that in the context of No. 12, the status of No. 13 (which the court concludes later below is, at least in part, a national monument) would clearly have to be factored into the consideration of any s.14 consent in respect of No. 12.

Chapter 32

Nos. 12–13

A. State of Condition of Nos. 12–13 at the time of the Myles Report.

290. Myles notes of Nos. 12–13 that:

“Inspection of this building has determined that this building has been rebuilt following 1916 and the party wall between No’s 12 & 13 was found to be concrete following investigative openings at first and second floor level. There are also a number of openings in the party wall between No’s 12 and 13.”

291. Myles later notes that to the rear of Nos. 13–16, Moore Street, the unified façade of a late-19th or early-20th century warehouse survives which has no interconnection with the plots behind. There is no indication that this structure was occupied by the Republicans on the evening of 28th April, 1916. Thus there seems no reason on the evidence to conclude that this warehouse is a national monument. However, the court concludes elsewhere that Moore Lane comprises a part of the Moore Street battle-site (which is a national monument) and it may be that to preserve, insofar as possible, the integrity of the battle-site as it appeared in 1916, as well as the national monument presently recognised to exist at Nos. 14–17, that any preservation order which might issue would need to take account of the presence of the warehouse façade as it fronts onto Moore Lane.

292. Opposite the warehouse the right (southern) reveal of an entrance through to an O'Connell Street back-plot survives. The base of this reveal has been repaired in brick and sports the only likely bullet-hole that has been found along the length of Moore Lane. The bullet appears to have hit the brick almost head-on, chipping off the corner in the process. No evidence has been provided to the court as to whether this bullet-pocked wall is a national monument in and of itself and thus no conclusion can be reached by the court in this regard. However, the court concludes elsewhere that Moore Lane comprises a part of the Moore Street battle-site (which is a national monument) and it may be that to preserve, insofar as possible, the integrity of the battle-site as it appeared in 1916 that any preservation order which might issue will need to take account of the presence of this bullet-pocked wall.

B. Summary of Position as regards No. 12.

293. The court has already stated its conclusion as regards No. 12 in the context of its consideration of Nos. 11/12.

C. Summary of Position as Regards No. 13.

294. When it comes to the issue of the historical and other interest of No. 13 – separate from the issue of whether it sits upon or comprises part of a battlefield of national or European importance – the court notes the above and that:

- (1) the historical and/or archaeological interest of No. 13 is set out in the Shaffrey Report (2012);

(2) that report indicates:

(i) that blocked up openings in the party walls were uncovered including in the first-floor party wall between Nos. 13 and 14;

(ii) (at 15) that *“to have revealed a complete [burrowing] route...is a significant find and adds considerably to the narrative which can be presented within the proposed commemorative scheme”*;

(iii) (at 23) that the premises recognised prior to these proceedings as a national monument comprise *“Nos. 14–17, including the boundaries of 13 and 18”*;

(iv) (at 62) that the rear structures to No. 13 (fronting Moore Lane) are *“surviving pre-1916 built fabric visible from the public realm”*; and

(v) (at 113) that *“The opening between Nos. 13 and 14 was made on first floor level within the piano nobiles towards the back of the spaces”*); and

(3) the historical and/or archaeological and/or architectural interest of No. 13 today is set out in the Garland Report which states, inter alia, that *“It has been argued that 12/13 Moore Street are post-1916 buildings, however it is evident*

from an inspection of the street that the original party wall between 12/13 still exists”.

295. As mentioned above, the court must admit to some surprise that in the course of the proceedings it appeared that witnesses for the Minister appeared unaware that there is a portion of No. 13 (the portion that forms a party wall with No. 12) which is visible from the street as a column of old brick. It naturally colours the court’s impression as to the evidence before it from the State side when such a feature – which the Garland Report clearly indicates to be a pre-1916 feature – appears to have gone missed.

296. The wealth of evidence before the court concerning the historical significance of No. 13 is such that the court cannot but, and does, conclude that a portion of No. 13 is both a monument and a national monument within the meaning of the National Monuments Acts, being the portion comprising the party wall and any surviving remains of openings. As to the façade of the late-19th or early-20th century warehouse that survives to the rear of No. 13, the court has already indicated its conclusions in respect of same above.

Chapter 33

Nos. 14–17

297. These properties have previously been recognised by the Minister for Arts, *etc.* as a national monument within the meaning of the National Monuments Acts and a preservation order has issued in respect of same.

Chapter 34

Nos. 18–19

A. The State of Condition of Nos. 18–19 at the time of the Myles Report.

298. Myles notes of Nos. 18–19 that “No’s 18 & 19 are post 1916 – the Valuation records of 1915 Thom’s Dictionary and the property losses claims of 1916 all state that both these plots were ruinous sites in 1916.” Myles’ observations conflict with the Hosford Report which, by reference to a brickwork analysis, concludes that No. 18 was constructed prior to 1916. Myles’ observations also conflict with the conclusions in the Broderick Report that the soldier courses over the front windows to No. 19, and also the pointing, match with the design of the buildings now comprising the national monument and would have been typical of construction of the mid- to late-nineteenth century. Broderick also considers certain other elements of No. 18 to be of architectural merit and appears to suggest that the roofing may be of a turn-of-the-20th century vintage.

B. Summary of Position as Regards No. 18.

299. When it comes to the issue of the historical and other interest of No. 18 – separate from the issue of whether it sits upon or comprises part of a battlefield of national or European importance – the court notes the above and that:

- (1) the historical and/or architectural and/or archaeological interest of No. 18 is clear from the Broderick Report which states, at 10, that “*the front elevation is original*”.
- (2) the Shaffrey Report (2012) also evidences the historical and/or architectural and/or archaeological interest of No. 18 today, stating, for example (at 23) that the premises recognised immediately prior to these proceedings as the national monument “*comprises Nos. 14–17, including the boundaries of 13 and 18*”. (Much the same point also appears in Appendix A); and
- (3) the historical interest of No. 18 is also apparent from the Shaffrey Report (2005) which, as quoted elsewhere above, states that “[I]t would appear that by one means or another the large numbers of men burrowing through the walls in shifts had, by the end of the night, spread themselves along the whole of the terrace from No. 10 to No. 25.”

300. The wealth of evidence before the court concerning the architectural significance of No. 18 is such that the court cannot but, and does, conclude that No. 18 is both a monument and a national monument within the meaning of the National Monuments Acts.

C. Summary of Position as Regards No. 19.

301. The evidence of Mr Hennessy and Mr Broderick as to No. 19 does not sit easily with the statement of Lt-Col Saurin, one of the Republican soldiers who trekked through the Moore Street terrace on 18th April, 1916, that *“At another time we had to cross an empty space where a house had once stood and were hidden from the street only by a flimsy wooden hoarding”*.

302. Assuming this is a reference to No. 19, and it seems to be, the court is naturally inclined to give significant weight to what a participant in the battle-events later recounted, albeit that this account appears to have been given some considerable time after 1916. Confusingly, however, the court has also been provided with photographic evidence which shows at least the façade of a largely ruined No. 19 still standing in circa. 1930 – and one assumes that this is not the remains of a post-1916 re-build. Additionally, the court has been presented with expert evidence, especially from Mr Broderick as to the architectural interest and, if he is correct as to its dating, the historical interest of No. 19.

303. Faced with the completely diverging accounts of Saurin (an eye-witness) on the one hand and Broderick (an expert witness) and the photographic evidence (albeit from circa. 1930) on the other, the court cannot conclude on the evidence before it whether or not No. 19 is a national monument. The most the court can conclude is that it may well be such, and to respectfully suggest that before any action is undertaken in respect of No. 19, further examination of the premises might be undertaken.

304. Obviously none of the foregoing alters the fact that the court finds later below that the site on which No. 19 stands is a part of the Moore Street Battle-Site and that this battle-site is

a national monument. In this regard, the court notes that counsel for the State has advanced the argument that if, *e.g.*, No. 19 was in ruins in 1916, anything that survives on that site of what was there in 1916 is the remains of a non-monument. However, if it is the case, and the court has concluded, by reference to the plain and simple words of statute, that it is indeed the case that a battle-site can be a national monument, then Saurin's witness statement offers the clearest evidence that the heroes of 1916 physically traipsed across the location of No. 19 as part of their manoeuvres. Thus out of the mouth of Lt-Col Saurin, an eye-witness, we would appear to have evidence of at least the land at No. 19 in use as a battle-site.

Chapter 35

Nos. 20–21 (O'Hanlon's)

A. Past Voices.

305. Perhaps unsurprisingly, the pungent aroma of O'Hanlon's the fishmongers gets a mention in among the five witness statements referred to in the Shaffrey Report concerning Nos. 20–21, the premises occupied by the shop.

1. Eamonn Bulfin

306. *“The walls were quite thin, and there was No. bother breaking them. We reached as far as Price's [22 & 23] or O'Hanlon's [20–21] which was a fish shop. I remember the smells there. We spent Friday night barricading all the houses that*

we occupied by throwing down all the furniture from the rooms – clearing all the rooms – down the stairways into the bottom halls, blocking up the doorways.”

2. Feargus de Búrca

307. *“What a queer life! Creeping through holes into bedrooms, then downstairs and through another opening into sitting-rooms, through shops, and finally to our resting place for the night near the above-mentioned yard (I think it belonged to Hanlon’s). All was silence. We were under strict orders not to make any noise or to use our firearms. The owners or occupiers of the houses seemed to have all gone away as we met with No. opposition. All our men had got safely from the GPO and were in silent occupation of the row of houses on this side of Moore Street [i.e. the right-hand side looking from Henry Street]”.*

3. Seán McLoughlin

308. *“We had now reached Hanlons. There was an open space between there and the next houses. We got as far as Hanlons and I instructed them to continue the digging until, if possible, they reached what is now O’Rahilly Street...and gave orders that discipline was to be restored as quickly as possible and officers were to gather around the men they knew best, that all those who had bayonets were to be moved and formed into a separate section, and were to follow the digging until [O’Rahilly Parade]...was reached. I then decided that the only way open was to leave Moore Street in a frontal wave, cross to the other side and into the back-lanes, re-form again in Denmark Street near to the top of Henry Street....[The*

following day] [w]e went down towards Hanlons. Pearse, Connolly and the others had now been moved into houses in the middle of Moore Street.”

4. Liam Tannam

309. “When we got as far as Hanlon’s Fish Shop, I saw a number of our wounded lying about. They were quite cheerful although in some cases they were wounded through the lungs. There was one British soldier there, shot through the thigh, and he was moaning and groaning.”

5. Oscar Traynor

310. “Sometime around this period I was sent for this time and asked to report to Hanlon’s fish shop in Moore Street; this was one of the buildings through which we had passed on our way up the street.”

B. State of Condition of Nos. 20–21 at the time of the Myles Report.

311. Myles notes, *inter alia*, of Nos. 20–21 that:

“No. 20 has been altered at both first and second floor levels – the historic plan form No. longer survives, leaving just a full open space at each floor. No’s 20 and 21 are interconnected at both first and second floor level it is not known at what time these connections were made. The openings between these buildings occur approximately mid length along the party wall and are standard door opening

sizes in width and height. The adjacent sections of party wall were investigated....while these did reveal a historic brick party wall beneath, No. evidence of blocked up openings were found. It is possible, therefore that either the connections between these buildings already existed in 1916 – thus making movement between the two properties easy – or an opening was made where one of the door openings is now positioned.”

C. Summary of Position as Regards Nos. 20–21.

312. When it comes to the issue of the historical and other interest of Nos. 20–21 – separate from the issue of whether they sit upon or comprise part of a battlefield of national or European importance – the court notes the above and that:

- (1) the historical and/or architectural and/or archaeological interest of Nos. 20–21 is expressly set out in the Shaffrey Report (2012), *e.g.* where it states at p.94 that “*Nos. 21 and 20 have pre-1916 facades and some interior survival of fixtures and fittings*”. A further example of such a note is to be found at p.106;
- (2) the historical interest of Nos. 20–21 is also clear from the Shaffrey Report (2005) which, for example at pp.5 and 7 states “*O’Hanlon’s (nos. 20–21) – the green and white awnings of this shop can still be seen beneath the reds and golds of the Chinese Restaurant which has replaced it*”, and, at p. 10, notes, as noted previously above that “[I]t would appear that by one means or another the large numbers of men, burrowing through the walls in shifts, had

by the end of the night, spread themselves along the whole terrace from No. 10 to No. 25”; and

- (3) the site of Nos. 20–21 was, *inter alia*, the venue of a historically notable meeting between Pearse and Oscar Traynor (Shaffrey (2012), Appendix C).

313. The wealth of evidence before the court concerning the historical significance of Nos. 20–21 is such that the court cannot but, and does, conclude that each of same comprises both a monument and a national monument within the meaning of the National Monuments Acts.

Chapter 36

Nos. 22/23–24/25

A. Past Voices.

314. Myles notes of each of Nos. 22–25 that “[T]his is a known post 1916 building and so *No. investigation was carried out.*” Nothing survives today of Nos. 22 –25 as they were in 1916, though this does not detract in any way from the contention that the site on which the post-1916 buildings stand is a battlefield site. In this last regard, it is worth mentioning the eight witness statements concerning Nos. 24–25 that get a mention in the Shaffrey Report.

1. Feargus de Búrca.

315. *[I] joined the men out in the yard [behind Kelly's Fish Merchants (Nos. 24–25)]. Poor Harry Boland was there, Jim and Paddy Sweeney and a few others from 'E' Company whose names I cannot recall. We were in the first batch that were to charge out onto the street. There was only a wide door separating the yard from the lane into which we were to go [it seems O'Rahilly Parade]*".

2. Ruaidhrí Henderson.

316. *"[D]uring the night the walls were bored through to [O'Rahilly Parade]...and windows barricaded. This was No. light task for men exhausted after a strenuous and almost sleepless week....Though the situation seemed hopeless, a staff officer perceived the possibility that GHQ might decide to make a last desperate chance to push forward....A body of men with fixed bayonets was marshalled in a yard abutting [O'Rahilly Parade]. Their alacrity and their resolute mien as they stood in readiness to charge the enemy barricade 50 yards distant, are remembered with pride. But it was otherwise decreed..."*

3. Diarmuid Lynch.

317. *"I passed word to a few officers to line up in that yard [behind Kelly's] 50 men who were equipped with rifles and bayonets....The party being in readiness I left to report the fact to Pearse or Connolly. In the first house off the yard...I encountered Pdraig Pearse (and his brother Willie). I reported, but his decision*

was in the negative. To the best of my recollections, he said that negotiations had already been opened with the British Command. The anticipated bayonet charge would not (and did not) materialise!”

4. Seán McLoughlin.

318. *“Later word came through that we were now into Sackville Lane through a yardway with a big wide door. Seán MacDermott now came to see how I was getting on and I took him with me into Sackville Lane....We then returned to the houses....*

I then went out and formed the men into the ‘Death or Glory Squad’ – 20 men with bayonets....I moved them up to [O’Rahilly Parade] and ‘stood’ them in the yard and each man was given instructions what to do. Bayonets were fixed. As I was preparing, Seán MacDermott came and said I was to come back to HQ as Mr Pearse wanted to see me.”

5. Seamus Robinson.

319. *“When I awoke the next time it was daylight. There were sounds of firing some distance away. I got up and moved through the buildings towards an end house. There was a number of Volunteers there, including George Plunkett. We could see a British barricade nearby. A party was lined up to rush the barricade when orders came that we were not to fire on any British soldiers until further orders. I think it was Seán MacDermott who brought this order to us, and I think it was Seán McLoughlin, who had a yellow band signifying Commandant rank, that*

spread the order. Shortly afterwards we heard that the surrender had been arranged and we were eventually formed up in the yard of the house by George Plunkett and marched out into Moore Street and so into O'Connell Street."

6. Michael Staines.

320. *"We then cut through the walls along Moore Street until we reached [O'Rahilly Parade]....It was there reported to us that O'Rahilly's body was lying in the lane."*

7. Liam Tannam.

321. *"The next thing I remember is that Seán McLoughlin on the strength of his knowing the district very well, was instructed to get the remainder of our forces to, I believe, William & Woods Factory across Parnell Street into King's Inns Street, that being the next strongest building within easy reach. It was proposed that 18 men with fixed bayonets under the command of Captain George Plunkett should assemble in the yard of Kelly's Fish Shop, suddenly emerge into what is now known as O'Rahilly Parade, turn left and then right and charge the barricade held by the British at the Parnell Street end of Moore Street. There was no proper way of covering this charge and I personally thought it was doomed to failure. I remember George Plunkett getting these men ready to go..."*

8. Oscar Traynor.

322. *“We continued to extend our line until we reached the lane which intersects Moore Street about 50 yards from Parnell Street. At about 12 o’clock on Saturday, Diarmuid Lynch called for volunteers for a bayonet charge....The plan was that we were to leave the building on the corner of the lane to which I have referred, and to charge the barricade which was situated across the top of Moore Street....A man was actually moving the bolt of the gate in order to allow us to make our exit on a given signal. Almost on time for this charge to take place a Volunteer rushed into the yard and said that the bayonet charge was cancelled”.*

B. State of Condition of Nos. 22–25 at the time of the Myles Report.

323. There is nothing in the evidence to suggest that any of the rest of Nos. 22–25 meets any of the criteria for any of them to constitute a national monument. This does not alter the fact that the court finds elsewhere that the site on which Nos. 22–25 stand is a part of the Moore Street Battle-Site and that this battle-site is a national monument.

Chapter 37

Henry Place and Places Thereon

A. Voices from the Past.

324. The centrality of Henry Place to the events of Friday, 28th April, 1916 and the day that followed is apparent from the description of events in Part 1 of this judgment and is evidenced further by the fact that the Shaffrey Report refers to eight witness statements in this regard.

1. Frank Henderson.

325. *“There was great confusion in Henry Place. A couple of men were killed by stray shots from the enemy, and one man, Henry Coyle...was killed when trying to burst open a door with his rifle, which was loaded....*

[McDermott] said that, in order to draw the attention of the British off the men who were boring through, he wanted a ‘mock barricade’ erected where we were, at the junction of Moore Street and Henry Place. I took charge of this operation, and, with the aid of rope, we ran out a cart into the middle of Moore Street. We also threw out boxes and everything else we could find. We managed to fill a couple of sacks with clay and placed them in position at the corner. Immediately the cart appeared the British opened fire, which was very intense....Shots were exchanged for a period, the duration of which I cannot now estimate. At one

period during the firing, some kind of a missile fell beside our barricade. I was told afterwards that this was an incendiary bomb which did not explode”.

2. Ruaidhrí Henderson.

326. *“While the crossing of Moore [Lane] was in progress, General Pearse ordered a squad to penetrate a warehouse at the Henry Place angle, proceed over roofs or otherwise and occupy Moore Street to the left towards Henry [Street?]. By daybreak, flames spreading from the GPO pressed these men back; they were ordered to join the main body”.*

3. Diarmuid Lynch.

327. *“[H]aving crossed into Henry Place I saw some of our forces bunched up at the angle of the latter where it turns at rights angles towards Moore Street. As I came up with them I passed by a dead Volunteer in front of the double doorway of O’Brien’s store. (Later I learned that he had been shot by the discharge of a comrade’s gun during an attempt to break the door with its butt). A few paces further on I met Pádraic Pearse who ordered me to take half a dozen men, break into O’Brien’s, cross the roofs to Moore Street (to avoid running the gauntlet of enemy machine-gun fire down Moore Lane – which was the cause of the hold-up at the angle of Henry Place)....*

When retreating to GHQ that Saturday morning I noticed the semblance of a barricade which evidently our men had endeavoured to erect across Moore Street

from Henry Place. I learned that the attempt had failed due to enemy fire from Parnell Street”.

4. Seán McLoughlin.

328. *“We were opposite to Moore Lane when there was a terrific blaze of fire from the far end and we realised the British were in possession of the barricades. I turned back towards the Post Office and saw the whole garrison coming towards me at the run....Somebody shouted that we were being fired on from the roof of a mineral water factory. I detailed a number of men to break the door down. Another party entered from the opposite door and they opened fire on each other – one man was killed and several were wounded. I was incensed with rage, calling ‘Have you all gone made? What the hell is wrong!’ and I drove them towards the wall threatening them. A temporary calm seemed to come over them and then Pearse with Connolly, being carried on a stretcher, and a little cavalcade of wounded followed with a few women....Seán MacDermott came up to me saying ‘My God! We are not going to be caught without rats and killed without a chance to fight!’ I said ‘There is no need to get into a panic. I can get you out of here but there will be only one man giving orders and I will give them’. He spoke to Connolly and Connolly agreed....I then moved them across Moore Lane. The British were now alive to what was taking place and were opening up with all they had....I realised we had to get past Henry Place [Moore Lane]. We smashed open the door of a mineral water place and found a motor van. I got a number of men to pull this out and we pushed it across the end of Moore Lane to screen us from view.”*

5. Seamus Robinson.

329. *“We made our way up Henry Place and around to the opening into Moore Lane. There was heavy machine-gun fire from a British post coming down Moore Lane”.*

6. Desmond Ryan.

330. *“We move down a passage [in the GPO] towards a door opening upon Henry Street. We dash across the flame-lit and bullet-swept street, up Henry Place, into stables, down sombre alleys lighted by machine-gun fire. The bullets patter upon the walls. Men fall. Plunkett rallies the men past a bullet-swept barricade. Connolly has been borne on a stretcher to Moore Street beneath a red-cross flag. O’Rahilly out-distances his men and a machine-gun riddles him within a few yards of the barricade”.*

7. Michael Staines.

331. *“P.H. Pearse, Willie Pearse, [Judge Law Smith’s] chauffeur and myself brought Connolly on the stretcher. Although there was firing down Henry Street, we got across safely to Henry Place. Before we reached the corner of the ‘L’ of Henry Place we found some of the men in a panic as Henry Place at the end of Moore Lane was under machine-gun fire from the Rotunda Hospital. Sean McLoughlin lined the men up and steadied them. Joe Plunkett drew his sword and stood*

exposed in the middle of the machine gun fire and allowed two men to rush across each time he dipped his sword. All got over safely, including Connolly on the stretcher.”

8. Liam Tannam.

332. *“We [a small reconnaissance mission] rushed across the road into Henry Place and at the end of Henry Place turned left and when we showed up opposite Moore Lane we came under fire from troops apparently in Parnell Street or some little distance up Moore Lane. We stooped and ran across. The only damage done was one man’s belt was cut through with a bullet....*

The side door [of the GPO] seemed rather crowded and I shouted at once ‘Come on’, and the garrison poured out into Henry Place with no semblance of order....I showed [Pearse] where my men were and pointed out to him that there was very heavy firing on a white-washed cottage which faced Moore Lane’. [Tannam then goes on to explain how this was misconstrued as firing from the ‘White House’, and the chaos that ensued]....

I then went back to Henry Place. The two men who entered O’Brien’s with me had disappeared, but the third man waved to me from the post in Moore Street. A barricade had been thrown across by the retreating garrison at the head of Moore Lane.”

B. O'Brien's Mineral Water Works Building.

333. When it comes to the issue of the historical interest of the O'Brien's Mineral Water Works Building – separate from the issue of whether it sits upon or comprises part of a battle-site of national or European importance – the court recalls the description of events in Part 1 of its judgment and that the historical interest of the buildings (at Henry Place) is clear from the Shaffrey Report (2005); for example, at p.8 of same it states “*O'Brien's Mineral Water Factory...at the corner of Moore Lane and Henry Place was broken into and a van or float was hauled out as cover across the laneway. One witness remembered Seán MacDermott stationed at the corner keeping sight upon the enemy position and lowering an officer's sword when it was safe to cross.*”

334. The wealth of evidence before the court concerning the historical significance of the Water Works Building is such that the court cannot but, and does, unhesitatingly conclude that it comprises both a monument and a national monument within the meaning of the National Monuments Acts.

C. State of Condition of O'Brien & Co. Bottling Stores at the time of the Myles Report.

335. Myles notes as follows of the former O'Brien & Co. bottling stores (close by the junction of Moore Street and Henry Place, to the rear of Nos. 10/11):

“It is along this section of Henry Place that something of the atmosphere of the time survives, where there are some structures that can safely be dated to the years before the Rising....

One structure which can be dated to this period is the bottling stores of Michael O'Brien & Co. on the corner of Moore Lane to the rear of Nos. 10–11 Moore Street....This building was occupied by a detachment led (briefly) by Frank Henderson and until recently had a fragmentary first floor level surviving, with a brick cornice over suggesting the beginnings of a rood, which had been removed prior to its acquisition by the present owners. A large double-door with a decorative impost block still accesses Henry Place and the wide windows to the ground floor mirror the ones which survived above. The upper level was recently removed on the instruction of the Dangerous Buildings Section of Dublin City Council due to concerns over its structural stability. Only the ground floor shell of the structure survives today and an internal investigation revealed only modern features, with no obvious evidence of the Easter Rising.”

336. Myles also notes some survival along both sections of Henry Place of the 19th-century granite kerbing. And at a later point in the report, mention is made that “*Moore Lane would appear to retain its limestone paving setts under tarmacadam covering*” and again that “*Unusually a good proportion of the granite kerbing has also been covered*”. It will be recalled that Dr Lynam, writing as Acting Director of the National Museum to Minister Deenihan in April 2011 makes reference, *inter alia*, to the fact that “*Myles has found evidence for the survival of original cobbled surfaces and granite kerbstones exposed beneath damaged tarmacadam. How extensive this might be could only be determined by the removal of the overlying tarmacadam.*”

337. When it comes to the issue of the historical interest of the O'Brien & Co. bottling stores – separate from the issue of whether they sit upon or comprise part of a battlefield of national or European importance – the court notes that:

(1) the historical and/or architectural and/or archaeological interest of the bottling stores (to the rear of No. 10) is clear in the Shaffrey Report (2012); for example, at p.71 of that report, it is stated that “*One structure which can be dated to this period [1916] is the bottling stores of Michael O’Brien & Co. on the corner of Moore Land to the rear of Nos. 10-11 Moore Street. This building was occupied by a detachment led (briefly) by Frank Henderson....Only the ground floor shell of the structure survives today*”;

(2) the historical interest in the bottling stores is further apparent by virtue of the fact that they were occupied by the Republicans and it is the location where Michael Mulvihill was fatally wounded.

338. The wealth of evidence before the court concerning the historical significance of the bottling stores is such that the court cannot but, and does, unhesitatingly conclude that the stores comprise both a monument and a national monument within the meaning of the National Monuments Acts.

D. State of Condition of the 'White House' (10, Moore Place) at the time of the Myles Report

339. Myles notes, *inter alia*, as follows regarding Moore Place and the White House:

“A gated entrance hides what was Moore Place, a narrow L-shaped laneway which returned to exit through No. 6 Moore Street....

The significance of this location lies in its role in the narrative of the evacuation of the GPO and in the fact that two of the more poignant civilian deaths took place in the tenements to its rear. Today, all the structures on the western side of Moore Place, on the site of the White House and to the rear, have been amalgamated into a large storehouse on two levels under a new roof, with little interior evidence of historic fabric apart from a possible stair scar....It is evident from the historic and current photographs...that the fabric of the building has been significantly altered since the events of 1916. Large blocked opes on the side elevation and a single blocked ope on the façade to Henry Place suggest a secondary intervention subsequent to the amalgamation. The façade itself is obscured by a heavy cement render on a wire mesh, with the outline of modern brickwork visible above the opes, however a small section has failed revealing yellow stock brick with the remains of a white lime wash below. It is therefore quite likely that this lower elevation at least is primary to the 1916 structure, with an alteration to the position of the eastern door ope, where the entire western wall may survive in brick obscured by render.”

340. When it comes to the issue of the historical interest of the White House – separate from the issue of whether it sits upon or comprises part of a battlefield of national or European importance – the court notes that:

(1) the historical and/or architectural and/or archaeological interest of the White House is clear from the Shaffrey Report (2012); for example, at p.123 of that report, it states:

“What of the remainder of the historical grain along Henry Place and Moore Lane? Where certain structures have been shown to post-date the Rising, the White House, or what little survives of it, is of significance not only for the engagement with the barricade on Moore Lane, but also as the location associated with the death of Bridget McKane and perhaps that of William Mullen, who was presumably killed by British fire on the narrow lane outside his door”.

(2) notably, the White House was occupied by Michael Collins, one of the greatest of the architects of our modern republic, making the White House a site of especial national significance.

341. The wealth of evidence before the court concerning the historical significance of the White House is such that the court cannot but, and does, conclude that the White House comprises both a monument and a national monument within the meaning of the National Monuments Acts.

E. State of Condition of O'Brien's Stables and Hay Loft at the time of the Myles Report.

342. The final structure of note that remains on Henry Place and of which Myles makes mention is Nos. 11–13:

“[This is] a two-storey, four bay red brick premises occupying the footprint of the stables attached to O'Brien's mineral water business....Today the ground floor space is part of the shop premises in No. 9 Moore Street and the first floor was until recently a restaurant or function room, accessed through No. 8. The opes to the street are more suggestive of a warehouse than a stable, however a close examination of the large block-up window at ground-floor level suggests it was originally open to the ground, the lower section being bricked up and a replacement section...[of] the brick plinth laid. O'Brien's can be faintly made out under the painted Goodall's signage...and it is likely the structure was altered by Goodall's spice importers who established their business there in 1933.”

343. The wealth of evidence before the court concerning the historical significance of O'Brien's Stables and Hay Loft is such that the court cannot but, and does, conclude that they each comprise a monument and a national monument within the meaning of the National Monuments Acts.

Chapter 38

Moore Lane

344. Myles writes of Moore Lane that: “*What little historic fabric remains of Moore Lane can be found at its northern and southern extremities. The street is of lesser significance than Henry Place when the Rising is considered....[O]nly one possible example of a bullet strike was located.* [This was pointed out to the court when it visited Moore Street and its environs and is about a third of the way up the Lane from Henry Place]. *This is all the more disappointing as a proportion of the built fabric at this end of Moore Lane pre-dating the Rising survives. It is therefore likely that the usual weathering indicators on these elevations have effectively hidden the evidence of the conflict*”. That, or “*the British troops may...have had a better aim than they have been credited with*”.

345. Whether the men and women who had to run the gauntlet of the British volleys down Moore Lane as they raced across the junction of Moore Lane and Henry Place and on into No. 10 would accept that Moore Lane “*is of lesser significance than Henry Place*” is perhaps open to question, albeit that the movement of the Republicans was along the line of Henry Place. At the Parnell Street-end, the exterior of Conway’s pub, a protected structure listed on the Dublin City Development Plan, probably survives as it was in 1916. Further down the lane, an isolated ghost carriage arch in concrete blocks supports a long-vanished head. Moreover, the court noted when it was brought along Moore Lane that there does appear to be a layer of cobblestones in at least some places beneath the tarmacadam on the Lane. The court recalls too in this regard, *inter alia*, the observations of Dr Wallace in his letter of 21st September, 2011 to the Minister for Arts, *etc.*, quoted at length elsewhere above, that

“Your advisers in the National Monuments Service will tell you that the application for your consent under the National Monuments Acts in respect of proposed works at 14–17 Moore Street...pertains only to the buildings in question, my considered view is that any consent you give should be mindful of the national historical importance of the whole Moore Street area with its laneways and buildings”, [Emphasis added].

and the related, and perhaps even more pertinent observations of Dr Lynam in his subsequent, related letter of 25th April, 2012, to the Minister for Arts, *etc.*, also quoted at length elsewhere above, that:

“The proposed development [as then proposed by Chartered Land, following its receipt of its planning permission] will see the removal of a substantial amount of original building fabric and streetscape throughout the Moore Street theatre of conflict. This destruction will significantly impoverish the historical and cultural significance of the National Monument by depriving it of its historical, cultural and architectural context. The proposed development will radically alter the street pattern, much of which still remains from the 1916 period. New thoroughfares with new alignments will be constructed while most of Henry Place will cease to be a public thoroughfare and much of Moore Lane will disappear. The impact upon the route along which Republican forces advanced to Moore St will be profound and the new alignments will make a coherent narrative of the battle difficult to sustain. Moreover, the removal of the original streetscape will make it extremely difficult for future generations to assess the strategic military

decisions taken by the leadership of the GPO garrison in the final days of the Easter Rebellion. In addition to the surviving building fabric that was present in 1916, together with evidence in the fabric relating directly to the fighting, it is the streetscape along which the Republican forces advanced into the Moore Street terrace (containing the National Monument) that provides the clearest visual aid to the interpretation of the events of the battle as well as the most obvious physical connection with those events. Moreover, Myles has found evidence for the survival of original cobbled surfaces and granite kerbstones exposed beneath damaged tarmacadam. How extensive this might be could only be determined by the removal of the overlying tarmacadam. However, the potential exists not only to follow the final route of the leaders of the Provisional Government and the soldiers of the headquarters battalion but to do so upon the original street surface that they walked along and fought upon.” [Emphasis added].

346. Can there really be any doubt, faced with such powerful observations from men so distinguished in their field as to see them appointed, respectively, Director and Acting Director of the National Museum of Ireland, that the current streetways and alignments of the Moore Street theatre of conflict satisfy the criteria identified in the National Monuments Acts to be national monuments? To the court’s mind, there cannot.

Chapter 39

O’Rahilly Parade

A. Past Voices.

347. The situation in O’Rahilly Parade is the subject of a trio of participants’ accounts that appear in the Shaffrey Report.

1. Elizabeth O’Farrell

348. *“As I passed up Moore Street, I saw at the corner of Sackville Lane... O’Rahilly’s hat and a revolver lying on the ground – I thought he had got into some house.*
[On her way back to No. 16, after her first encounter with Brigadier General Lowe, O’Farrell saw The O’Rahilly’s dead body lying on the Parade].

2. Seán McLoughlin

349. *“Later word came through that we were now into Sackville Lane through a yardway with a big wide door. Seán MacDermott now came to see how I was getting on and I took him with me into Sackville Lane. Arriving there we were still screened from the British who had no idea of our presence. I saw a number of bodies lying on the footpath and roadway – our own men. One familiar one I approached and this was O’Rahilly lying on his back, his arms outstretched, blood oozing from his body in a pool under him and flies buzzing about his*

head....We knelt for a few minutes and said an Act of Contrition. I then took my handkerchief out of my pocket and covered O’Rahilly’s face. The same was done for the other three. That was all we could do. We then returned to the houses.”

3. Michael Staines

350. *“We then cut through the walls along Moore Street until we reached [O’Rahilly Parade]. It was there reported to us that O’Rahilly’s body was lying in the lane.”*

B. State of Condition of O’Rahilly Parade at the time of the Myles Report.

351. Towards the Parnell Street end of Moore Lane, lies O’Rahilly Parade, a small street that feeds from Moore Street into Moore Lane. Myles notes simply that today *“There is no historical fabric surviving [on the Parade]”*, though he also notes that The O’Rahilly’s body was found on the south side of the lane, directly across from where a large wall-memorial has been erected in his memory. Again, however, the court recalls, *inter alia*, the observations of Drs Wallace and Lynam as to the clear historical importance of the current streetways and alignments of the Moore Street theatre of conflict.

Chapter 40

The Moore Street Battle-Site?

A. A Visit to Moore Street.

352. The court has sought to set the scene for this judgment by describing the relevant events of 1916 at some length in Part 1. In the week prior to the commencement of the hearing of these proceedings, at the invitation of counsel and with the kind assistance of the solicitors for both sides, an archaeologist from the National Monuments Service, and the construction workers on-site at Nos. 14–17, to all of whom the court expresses its thanks, the court visited O’Rahilly Parade, Moore Lane, Henry Lane and Moore Street, and was taken on a memorable tour of the buildings and walk-ways that are at the heart of the dispute with which the court is now confronted.

353. The visit took place on a damp Dublin evening, the light was falling, the street-traders on Moore Street were gone or going home, and the Friday evening ‘buzz’ was beginning to rise. The visit began with a walk along O’Rahilly Parade where a large wall-plaque now commemorates The O’Rahilly’s death. The path where he lay is gone but it was not difficult to think of him lying there, callously left to bleed, his life ebbing slowly from him. Somewhere hereabout, McLoughlin and those others knelt and said that final Act of Contrition over The O’Rahilly’s body before covering his face with a handkerchief. Close by was the site of the British barricade at the Parnell Street end of Moore Street. And closer still, the bodies of Carrigan, Shortis and Macken would have lain dead around their leader.

354. From O’Rahilly Parade, the court was led along Moore Lane and in through the rear of one of the buildings that had been occupied earlier in the day by protestors who are keen to see this part of the city preserved. Once inside, the court was brought on a tour of various of the properties that line Moore Street, shown the remnants of the bricked-up holes that the Republicans had burrowed a century before, and shown the room in No.16 where the leaders of the Provisional Government held their final war councils.

355. Many of the buildings that the court viewed are in need of repair. They were originally built without foundations and the façades of some of them have been buckling into the street and need to be tied back onto the main body of the buildings. Throughout the court’s visit, workmen were quietly going about their jobs. Outside, the quiet hubbub of the city could be heard, but throughout the tour there was a remarkable sense of having stepped back into another era, and a striking sense of closeness to the men and women who fought that our republic might come into being.

356. After the visit indoors, the court was brought back outside to Moore Lane and shown what appears to be the sole surviving cartridge-mark along the lane from 100 years ago. A short stroll then took the court to Henry Place, to the junction where the cart was dragged across on McLoughlin’s orders, and close by where young Bridget McKane and William Mullen were so tragically killed. From here it was out among the last of the day’s shoppers on Henry Street to see the likely spot where the Republicans would have run across the street from the GPO to Henry Place. Many of them must have felt real terror as they ran across while being shot at by the British from the Jervis Street end. For them to be required just after that to run the gauntlet again, this time at the junction between Henry Place and Moore Lane, must have taken nerves of steel.

357. The visit ended with another walk up Moore Street to view the front of all the buildings that line the east-side of the street. In the steady drizzle that was now falling from an ever-darkening sky, it was not difficult to recall the events of a century ago. The courage of The O’Rahilly and his men as they charged up towards Parnell Street. The terrible nervousness that Nurse O’Farrell must have felt when she slipped into the street on the Saturday carrying a message from the Provisional Government for the British. The mixed emotions that Pearse doubtless sensed as he took those last fateful steps up Moore Street to deliver his surrender. The screams of young Mrs Doyle when her husband was shot under the white flag. The evocative image of old Mr McManus lying dead on the side of the street, his bullet-ridden body partly wrapped in the white sheet that he had waved as he came out of No. 12. The final line-up of the Republican volunteers before they marched down Moore Street, into Henry Place, and then wheeled out onto O’Connell Street, into the lasting embrace of immortal history and the ever-living memory of a still-grateful nation.

358. The court mentions all of this to make a point. Each of O’Rahilly Parade, the length of Moore Lane from Parnell Street down to Henry Place, the entire ‘L’ of Henry Place, the national monuments that the court has found to populate Moore Street, the length of the street on which Nos. 10–25 stand, and other properties – the Water Works Building, the bottling stores, O’Brien’s Stables and the White House – so patently comprise (and in the case of those buildings which the court has identified as being national monuments in their own right, so clearly sit upon) a battle-site that, in truth, even the shortest of visits suffices before manifest disbelief arises that anyone would truly suggest otherwise. And what took place here was not just ‘any old battle’ but the final throes of the GPO garrison. This garrison comprised men and women, many of whom had seen the Proclamation read aloud outside the GPO scant

days before, some of whom had died or were soon to die without knowing that their lives had not been sacrificed in vain, or that the battle they had started would result in our re-birth as a nation-state, independent and free. It was a battle-site too where civilians would die, some of them children. The fighting, the deaths, the burrowing through houses, the valiant charge of The O’Rahilly, the plans and commands and the eventual surrender, the unnatural courage and natural fear, all that took place within the rough quadrangle just described by the court, and those additional properties it has mentioned, was the hardest of battles, fought by the toughest of people for the greatest of ends.

B. Evidence Supporting the Concept of a Moore Street Battle-Site

359. The court has already identified in the opening chapters of this Part what it is that makes the Moore Street battle-site a place of unique historical interest. This unique historical interest is clear from, *inter alia*, (1) the affidavits furnished by Messrs Bateson, Coogan and Kelly – whose historical evidence goes uncontroverted from a purely historical perspective, (2) the letters of Dr Wallace and Dr Lynam referred to previously above, and (3) the Shaffrey Report (2005) which states, *inter alia*, (at 42):

“The activities relating to the 1916 Rising, which took place in Moore Street happened throughout the entire street, the adjacent lanes and within many of the buildings themselves....Nos. 10 to 25 [Moore Street] which were all occupied during the final stages of the Rising...a small number of buildings/sites can be identified as being of particular significance due to the specific events which took place within them. In addition to No. 16...No. 10 – on the corner of Moore Street and Henry Place, Nos. 20–21, the former Hanlons fish shop, and the corner site at

the junction between Moore Lane and O’Rahilly Parade...are also sites of notable importance...”,

and again (at 4):

“The occupation by the rebel forces of houses in Moore Street during the final days of the Easter Rising followed the evacuation of the General Post Office on nearby [O’Connell]...Street. The GPO had been shelled and fire-bombed by the British forces into a state of near complete collapse, and the rebels sought refuge in the houses of the nearby backstreets. Having exited the Post Office by a side-door, the rebels ran in bursts across Henry Street, into Henry Place and eventually in the relative haven of the central terrace of houses on the eastern side of Moore Street. All of this took place in the later evening of Friday, 28th April, 1916. The security of this bolt-hole was short-lived. Hemmed in by the flanking machine-gun fire from the top of Moore Street and Moore Lane, and forced to face up to the extent of civilian slaughter – bodies of gunned-down residents of Moore Street lay un-recovered along the street – the leaders of the rebellion sought terms with the British in the early afternoon of Saturday the 29thIf the reading of the Proclamation of Independence under the portico of the GPO around one o’clock on Easter Monday marked the beginning of the 1916 Rising, then the moment when Pearse laid down his arms before the British general in Moore Street five days later was the incisive gesture which marked its ending.”

360. The unique historical interest and national importance of the wider Moore Street Battle-Site is further apparent, having regard to the fatalities – military and civilian – that occurred

within and by the Moore Street Battle-Site. Mention of these deaths has been touched upon above but it is worth recalling the names of those who died. Eight Republican combatants are known to have been killed in action:

Charles Carrigan

Henry Coyle

Francis Macken

Michael Mulvihill

John Neale

Patrick O'Connor

Paddy Shortiss

The O'Rahilly.

361. In addition, there were in the Moore Street area more civilian deaths than occurred among the combatants. Eleven civilians are known to have died:

Edward Byrne (22), Corporation Buildings

Mary Ann Corrigan (38), Moore Lane

Robert Dillon (64), Moore Street

John Doyle (36), Moore Street

Elizabeth Hanratty (30), Moore Street

William Heavey (32), Moore Street

Bridget McKane (16), Henry Place

Patrick McManus (67), Moore Street

William Mullen (9), Moore Place

John Murphy (6), Henry Street

John O'Duffy (79), Rutland Square

362. The *Irish Times* of the day also reported between two to four British soldiers as having been killed in the vicinity of Moore Street.

363. The court must admit to a certain chill that so many deaths should have taken place on a single street, especially when it considers the emotional and likely also the financial toll that must have afflicted many of the affected families in the days and years that followed. The significant civilian death toll is especially striking and is clearly a matter that adds still greater historical importance to this nationally important location.

364. In passing, the court notes the contention by counsel that more people died elsewhere in Dublin and that fighting was fiercer elsewhere in Dublin. To the notion that the number of people who die in a battle is directly proportional to its significance as a battle, the death of the 300 Spartan hoplites at Thermopylae, and the signal historical achievement that they attained in the process, seems to give lie to such a contention. As to the fact that battle may have been fiercer elsewhere in Dublin, that is slim comfort to the 19-plus people identified above as having died in and about Moore Street. In any event, it is the unique concatenation of circumstance presenting at Moore Street – the evacuation of the GPO (the iconic centre of the Easter Rising), the last forays of the GPO garrison, and the final surrender negotiated by Pearse – that gives the events at Moore Street and its environs their unique significance.

Chapter 41

Some Key Conclusions as to National Monument Status

365. Various of the court's conclusions, both as to points of fact and law, have been stated by the court as it has proceeded through this judgment. However, it is useful at this point to set out some key conclusions as to what properties, if any, that have been referred to throughout this judgment are possessed of the status of "*national monument*" within the meaning of the National Monuments Acts.

366. Having regard to the wealth of evidence presented before it, and for all of the reasons stated above, the court concludes, *inter alia*, that:

- (1) (a) each and all of the streets and street alignments of (i) O'Rahilly Parade, (ii) the length of Moore Lane from Parnell Street down to Henry Place, (iii) the entire 'L' of Henry Place, and (iv) Moore Street, from the junction with Henry Place to the junction with O'Rahilly Parade, (b) the plot of land enclosed by (iii), (iv), (i), and the part of Moore Lane from the junction with O'Rahilly Parade to the junction with Henry Place, though not all of the buildings thereon, and (c) the national monuments that the court identifies in (2) below,

comprises and comprise a national monument within the meaning of the National Monuments Acts, which national monument is sometimes referred to as the 'Moore Street Battlefield'; and

- (2) each of and only (i) No. 10, Moore Street, (ii) the exterior wall to the rear of No. 11, Moore Street that evidences the breach through the party wall from No. 10, (iii) that portion of No. 13, Moore Street which comprises the surviving party wall with No. 12, along with any surviving remains therein of damage dating to the Easter Rising, (iv) Nos. 18, 20 and 21, Moore Street, as well as (v) the onetime O'Brien's water works, (vi) the onetime O'Brien's bottling stores, (vii) the onetime O'Brien's stables, and (viii) the so-called 'White House', comprises (a) a national monument in its own right and also (b) a part of the national monument that is sometimes referred to as the 'Moore Street Battlefield'.

367. The court does not need to reach any conclusion in respect of Nos. 14–17 Moore Street as these properties have previously been recognised by the Minister for Arts, *etc.* as a national monument within the meaning of the National Monuments Acts, and a preservation order has issued in respect of same, save to note that the court considers that the newly discovered cellar to the rear of No. 14 is a part of the national monument that is No. 14.

368. The court is unable to reach a conclusion at this time, having regard to the diametrically opposed evidence before it, as to whether the building that occupies No. 19 satisfies the criteria for it to be considered a national monument within the meaning of the National Monuments Acts. The most the court can conclude on the basis of the said evidence is that No. 19 may be a national monument, and to respectfully suggest that before any proposed action is undertaken in respect of No. 19, further examination of it, including its façade, might be done. This is without prejudice to the court's finding that the site commonly referred to as

No. 19, Moore Street, as opposed to the building presently thereon, comprises a part of the Moore Street Battle-Site.

PART 5

THE FIRST SECTION 160 PROCEEDINGS

Chapter 42

What Mr Moore Seeks

369. Pursuant to s.160 of the Act of 2000, Mr Moore seeks the following reliefs, in addition to those claimed in the above-considered judicial review application:

- (1) an order restraining the Minister for Arts, *etc.*, her servants and/or agents and/or any connected persons from carrying out unauthorised development comprising the works and/or proposed works (and/or requiring the cessation of any works) to and/or in connection with Nos. 13-19 Moore Street, including the demolition of Nos. 13, 18 and 19 Moore Street and/or all associated works in connection with the proposed commemorative centre and/or the restoration works at Nos. 14 to 17;
- (2) further and/or in the alternative, an order restraining the Minister, her servants and/or agents and/or any connected persons from carrying out any

of the works and/or proposed works (and/or requiring the cessation of any works) to and/or in connection with Nos. 13–19 Moore Street, including the demolition of Nos. 13, 18 and 19 and/or all associated works in connection with the proposed commemorative centre and/or restoration works at Nos. 14–17, unless and until the conditions of Planning Permission Ref 2479/08/PL.29N.232347 are complied with;

(3) further and/or in the alternative, an order restraining the Minister, her servants and/or agents and/or any connected persons from carrying out any of the works and/or proposed works (and/or requiring the cessation of any works) to and/or in connection with Nos. 13–19 Moore Street, including the demolition of Nos. 13, 18 and 19 and/or all associated works in connection with the proposed commemorative centre and/or restoration works at Nos. 14–17 unless and until a valid and existing s.14 consent has been made in accordance with Condition 5 of Planning Permission Ref 2479/08/PL.29N.232347;

(4) further and/or in the alternative, an order restraining the Minister, her servants and/or agents and/or any connected persons from carrying out the works and/or proposed works (and/or requiring the cessation of any works) to and/or in connection with Nos. 13–19 Moore Street, including the demolition of Nos. 13, 18 and 19 and/or all associated works in connection with the proposed commemorative centre and/or restoration works at Nos. 14–17, unless and until a planning permission for which a valid environmental impact assessment has been undertaken is carried out;

- (5) a stay and/or interim orders, including interlocutory relief restraining the Minister from carrying out the development that is the subject of these proceedings; and
- (6) various ancillary reliefs.

Chapter 43

Section 160 of the Act of 2000

370. Section 160 of the Act of 2000 empowers the court to grant an injunction in relation to an unauthorised development that has been, is being or is likely to be carried out or continued. Of central importance in this regard are s.160(1) and (2). These provide as follows:

“(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court...may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

- (a) that the unauthorised development is not carried out or continued;*

- (b) *in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*
- (c) *that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.*

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.”

371. Mr Moore comes to court claiming that certain proposed development to be done by the Minister for Arts, *etc.* on Moore Street is unauthorised development and asks that the court grant an injunction pursuant to s.160 of the Act of 2000. The basis for Mr Moore’s contentions in this regard is considered later below. Before proceeding further, however, the court must consider a preliminary objection by the Minister to the two applications being made under s.160 by Mr Moore at this time. (The second such application is considered in the next Part of this judgment). The preliminary objection is that Mr Moore’s application must fail even before it has started, thanks to s.260 of the Act of 2000.

Chapter 44

An Aside on ‘Saving Provisions’ and Dual Régimes

A. Overview.

372. The court considers s.260 of the Act of 2000 in the next chapter. However, before proceeding with that analysis, it is necessary to consider what a ‘saving provision’ is and does, and to demonstrate the possibility for dual legal régimes to operate in tandem in respect of the same subject-matter.

B. ‘Saving provisions’.

373. As will be seen hereafter, s.260 of the Act of 2000 provides that nothing in that Act restricts, prejudices or affects the functions of the Minister for Arts, *etc.* under the National Monuments Acts in relation to any national monument(s). Mr Moore contends that in making such provision, s.260 is what is commonly known as a ‘saving provision’. The court considers in the next chapter whether this is so. It pauses here briefly to consider what the term ‘saving provision’ actually means.

374. In *Comptroller and Auditor General v. Ireland* [1997] 1 I.R. 248, Laffoy J., at 260, approved the following definition from *Bennion on Statutory Interpretation* (2nd edition, 243):

“A saving is a provision the intention of which is to narrow the effect of an enactment to which it refers so as to preserve some existing legal rule or right from its operation.”

375. Laffoy J. also went on, at 260, to approve the following observation from *Bennion, op. cit.*:

“A saving resembles a proviso, except that it has no legal form. Furthermore it relates to an existing legal rule or right, whereas a proviso is usually concerned with limiting the new provision made by the section to which it is attached. A saving often begins with the words ‘Nothing in this (Act) (section) (etc.) shall...’ A saving may be qualified or conditional. Very often a saving is unnecessary, but is put in ex abundanti cautela [out of an abundance of caution] to quieten doubts.”

C. Dual Operation.

376. As to the potential for the planning regime established by the Act of 2000 to co-exist and operate in tandem with another statutory régime, there are numerous cases in which practical examples of such an occurrence have been identified by the courts, as for example by Murphy J. in *Houlihan v. An Bord Pleanála* (Unreported, High Court, 4th October, 1993), Lynch J. in *Re Tivoli Cinema Ltd.* (Unreported, High Court, 24th January, 1994), Costello P. in *Carty v. Fingal County Council* [1999] 3 I.R. 577, McKechnie J. in *South County Dublin Council v. Farrowvale* (Unreported, High Court, 28th April, 2005), and Charleton J. in *Sandymount and Merrion Residents Association v. An Bord Pleanála* [2013] IEHC 542. In

the interests of keeping an already long judgment to a manageable size, the court will confine its more detailed analysis to the last two of these cases.

377. In *Fallowvale*, McKechnie J. rejected the proposition that compliance with the aviation code meant that there was No. requirement for planning permission, stating, at para.71:

“Running throughout the respondent’s evidence and submissions are repeated assertions that they have an obligation to comply with aviation standards and in particular with any and all directions from the I.A.A. [Irish Aviation Authority]. Of that I am sure there cannot be any doubt. But implicit in these numerous references is the belief that as a result the provisions of the planning code can be disregarded or at least can be relegated to an insignificant position in the overall priority of things. This view, in my opinion, is not tenable. The law on this point is relatively clear-cut. It is that mere compliance with one statutory regime does not absolve the affected party from compliance with a different regime unless such is expressly provided for.”

378. In a similar vein, Charleton J., giving judgment in the *Sandymount* case, observes as follows, at para.4.8:

“[A] planning consent authorises nothing more than construction of the sewage works and pipeline, in this instance, and that is subject to stringent conditions for the protection of the environment. Where there is to be a modification in relation to the existing licence for waste water, and the plan to discharge treated sewage effluent into the special area of conservation in Dublin Bay is such a modification,

then the Environmental Protection Agency must consider the appropriate safeguards....In granting or refusing a foreshore licence for the necessary works, the relevant minister of Government has a similarly onerous obligation.”

379. Notably, perhaps, in the context of the within proceedings, in the *Sandymount* case, which related to a proposed extension of the Ringsend waste-water treatment plant, the local authority was required to obtain three separate consents before it could carry out the proposed development, viz. a strategic infrastructure development consent from An Bord Pleanála, a consent from the Environmental Protection Agency for a waste-water discharge licence, and a foreshore licence from the Minister for the Marine.

Chapter 45

Section 260 of the Act of 2000

380. Turning then to the specifics of s.260 of the Act of 2000, that section provides as follows:

“Nothing in this Act shall restrict, prejudice, or affect the functions of the Minister for Arts, [etc.]...under the National Monuments Acts...in relation to national monuments as defined by those Acts or any particular monuments.”

381. It suffices merely to trumpet this section, counsel for the Minister in effect contends, for Mr Moore’s s.160 application to collapse like the walls of long-ago Jericho. For, despite having spent the previous 259 sections of the Act of 2000 establishing a comprehensive

planning régime, the Oireachtas, it is contended, affords the Minister for Arts, *etc.* a veritable *carte blanche* when it comes to doing what she wants in relation to national monuments, provided she acts in accordance with the National Monuments Acts.

382. The court has been referred in great detail to the rules of statutory interpretation in support of this last contention, in particular to the primacy of the literal rule of statutory construction – though instinctively when presented with such a sweeping contention, the suspicion arises that one is straying into the realm of obscurity, ambiguity or, most likely, absurdity contemplated by s.5 of the Interpretation Act 2005. This last-mentioned provision, so far as is relevant to the present application, provides as follows:

“In construing a provision of any Act...

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of... [here the Oireachtas]...

the provision shall be given a construction that reflects the plain intention of the Oireachtas... where that intention can be ascertained from the Act as a whole.”

383. Could it be that in a liberal democracy such as ours with its manifold checks and balances designed to ensure, so far as possible, that no branch of government acquires or employs unrestrained power, that the Oireachtas would have elected to endow the Minister for Arts, *etc.* with the abundant freedom of action which s.260 is suggested by her to have

brought about? The short answer to this question is ‘no’ – and this answer springs so clearly from the decision, binding on this Court, of the Supreme Court in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, that the court must admit to some degree of surprise that counsel for the Minister, and Chartered Land, pursued the s.260 line of argument with the vigour that they did.

384. In *Howard*, the eponymous Mr Howard and his fellow applicants were members of a non-profit organization formed with the object of preserving the Burren as a wilderness area. The Commissioners of Public Works, a statutory corporation, proposed to build, maintain and manage a visitors’ centre in the Burren. After the building work had commenced, the applicants brought judicial review proceedings claiming, *inter alia*, that the Commissioners had acted illegally in failing to obtain planning permission for the proposed development. It was submitted on behalf of the Commissioners, *inter alia*, that since s.84 of the then extant Local Government (Planning and Development) Act 1963 imposed on the Commissioners an obligation to consult with the planning authority prior to the construction or extension of any building, it was to be implied that no requirement rested on the Commissioners to obtain planning permission for any such proposed development.

385. The *carte blanche*-style argument in *Howard* is clearly very similar to the *carte blanche*-style argument being raised by the Minister for Arts, *etc.* in the present proceedings. In this regard, the Supreme Court had to wrestle with ss.24(1) and 84(1) of the Act of 1963. Section 24(1) provided as follows:

“Subject to the provisions of this Act, permission shall be required under this Part of this Act –

(a) *in respect of any development of land, being neither exempted development nor development commenced before the appointed day...”.*

386. The equivalent provision in the Act of 2000 is s.32 which provides, *inter alia*:

“(1) Subject to the other provisions of this Act [of 2000], permission shall be required under this Part –

(a) in respect of any development of land, not being exempted development...”.

387. Returning, however, to the Act of 1963, s.84(1) of that Act provides as follows:

“(1) Before undertaking the construction or extension of any building...a State authority [this included the Commissioners] –

(a) shall consult with the planning authority to such extent as may be determined by the Minister, and

(b) if any objections that may be raised by the planning authority are not resolved, shall (save where the construction or extension is being undertaken by the Minister) consult on the objections with the Minister”.

388. In *Howard*, a five-person Supreme Court split 3–2 in its decision, with Finlay C.J., Blayney J. and Denham J. in the majority (O’Flaherty and Egan JJ. dissenting). When it came to the Commissioners’ submissions concerning the purported exemption that arose for them when it came to securing planning permission, Finlay C.J. observed, at 139:

“The combination...of what appears to be the unambiguous meaning of the words contained in s.24 in respect of a building constructed by the Commissioners and the equally unambiguous terms of the words contained in s.84 as leading to an incongruous or even an absurd result, cannot in my view, upon the principles applicable, entitle the courts in interpreting this statute to insert, as it were, into s.24 an implied exemption for development of any description carried out by the Commissioners of Public Works which is nowhere expressed in that section.”

389. Blayney J., who spends a good portion of his judgment considering the principles of statutory interpretation is even more fulsome in his rejection in the line of contention proffered by the Commissioners, stating at 152:

“If the construction of s.24 of the Act of 1963 is approached in the light of these principles, in my opinion the only reasonable conclusion that can be reached is that the section applies to development by the Commissioners of Public Works. The section is so worded that it clearly applies to all development other than development coming within either of the two exceptions in sub-section (1). So it applies to development by the Commissioners. This could have been avoided if the Act had provided in section 4 that development by the Commissioners should be

exempted development. But this was not done. The result is that development by the Commissioners does not come within either of the exceptions in sub-s.1 and so is subject to the general provision that planning permission for it is required....

It was submitted on behalf of the Commissioners, however, that s.24 does not apply to them because of the provisions of s.84. It was argued that it is a necessary implication from the provisions of that section that the Commissioners could not be required to seek planning permission as well as to comply with the provisions of section 84. It was submitted that the legislature could not have intended that the Commissioners should have to comply with both s.84 and s.24; that it would be pointless for the Commissioners to have to consult with the planning authority, as required by s.84, and possibly also, as a result of objections raised, to have to consult with the Minister, if subsequently they had to apply for planning permission in the normal way. It was argued that compliance with s.84 relieved them from having to comply with section 24.”

390. The similarity between, on the one part, the above-mentioned submissions for the Commissioners and, on the other, the submissions made on behalf of the Minister in the present proceedings is striking. Blayney J. continues, at 152–3:

“In my opinion there is no principle in the interpretation of statutes which would permit the Court to construe s.84 in this way. What the court is being asked to do is to construe s.84 as having by implication the effect of excluding the application of s.24 to the Commissioners. The rule in regard to construction by implication is stated as follows in Craies at p.109:-

'If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inferences or supply obvious omissions. But the general rule is 'not to import into statutes or words which are not found to be there,' [per Patteson J. in King v. Burrell (1840) 12 Ad. & El. 460, 468] and there are particular purposes for which express language is absolutely indispensable. 'Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context.' [per Evershed M.R. in Tinkham v. Perry [1951] 1 T.L.R. 91, 92]'

It is clear from this that the first condition that has to be satisfied before recourse can be had to construction by implication is that the meaning of the statute should not be plain. It seems to me that that condition is not satisfied here. The meaning is perfectly plain. In the first place, it is provided that permission is required for any development which is not exempted development, and secondly, it is provided in s.84 that where a statutory authority wishes to undertake the construction or extension of any building it must comply with the terms of that section. What is being suggested is that it is a necessary implication from the terms of s.84 that the Commissioners should be relieved from complying with section 24. But this conclusion does not result from any difficulty in interpreting section 84. It results from forming a conclusion as to the intention of the legislature without that intention being expressed in the section itself. It seems to me that this amounts to speculation, particularly as, if it had been intended to exempt statutory authorities from having to apply for planning permission for the construction or extension of

any building, it would have been a simple matter to provide that development by them should be exempted development.”

391. Denham J., as she then was, reached a similar conclusion to her other colleagues in the majority, stating, at 164:

“In plain language the Act establishes a scheme whereby permission is required for development, other than exempted development. The development in question here is not exempted development. On the face of s.24 it applies to the development in issue in this case. This explicit situation has to be considered in light of the provision for consultation established under s.84, and in light of the Act as a whole.

Section 84 requires consultation by certain State authorities before the construction or extension of a building. This section is limited in its application – it neither applies to ‘development’, nor does it refer to the alteration of user. It requires...[inter alia] the Commissioners of Public Works...or the Irish Land Commission, before undertaking the construction or extension of any building...(a) to consult with the planning authority to such extent as may be determined by the Minister, and (b) if any objections that may be raised by the planning authority are not resolved, shall (save where the construction or extension is being undertaken by the Minister) consult on the objections with the Minister.

In clear terms this section requires consultation prior to the construction or extension of a building. It is thus a preliminary requirement for a limited number of persons and for a restricted type of development. It does not refer [to]...s.24, it does not refer to an exemption, it does not create an exemption under section 24. I consider that it would be wholly wrong to infer into this requirement, to consult prior to undertaking the construction or extension of a building, the rule that s.24 does not apply to the State authorities named therein.”

392. Returning then to s.260 of the Act of 2000, in light of the majority judgments in *Howard*, what is the court to make of the provision that:

“Nothing in this Act shall restrict, prejudice, or affect the functions of the Minister for Arts, [etc.]...under the National Monuments Acts...in relation to national monuments as defined by those Acts or any particular monuments.”

393. Counsel for the Minister for Arts, *etc.* contends in effect that s.260 casts a protective shield around national monuments and that, under the cover of this shield, the Minister may act with relative freedom, provided she observes the requirements of the National Monuments Acts. Having regard to the conclusions reached by the Supreme Court concerning the very similar arguments of the Commissioners in *Howard*, the court cannot but respectfully conclude that counsel is wrong in this regard.

394. The court is especially mindful in reaching this last-mentioned conclusion of (1) the warning sounded by Blayney J. in *Howard* as to “forming a conclusion as to the intention of the legislature without that intention being expressed in the section itself”, and (2) to the

that, and here again the court echoes the judgment of Blayney J. in *Howard*, if the Oireachtas had intended to bring outside the scope of the Act of 2000 any development done on or to a national monument by or under the licence of the Minister for Arts, *etc.*, it would have been simple for the Oireachtas to provide that any such development was an exempt development.

395. It seems to this Court that s.260 is but a 'saving' provision which provides simply that the Minister has her functions under the National Monuments Acts and that the functions she enjoys thereunder are not restricted, prejudiced or affected by the Act of 2000. These functions, as identified in the National Monuments Act 1930, include:

- (1) becoming the guardian of a national monument by deed (s.5),
- (2) becoming a guardian by virtue of a transfer from a local authority (s.7),
- (3) making a preservation order in respect of a national monument which is in danger of being or is actually being destroyed, injured or removed (s.8),
- (4) acquiring a national monument compulsorily or by agreement (s.11),
- (5) the maintenance of national monuments (s.12),
- (6) the removal of national monuments to a museum (s.13),

- (7) giving consent to acts (*e.g.* of demolition or excavation) relating to a national monument owned by the Minister or subject to a preservation order (s.14),
- (8) giving advice to the owner of a national monument (s.15),
- (9) admitting the public to view a national monument (s.16),
- (10) making an order prohibiting the burial of persons within a national monument (s.17),
- (11) placing a tablet or plate on a national monument (s.18),
- (12) establishing a National Monuments Advisory Council (s.21), and
- (13) giving a licence for the excavation for archaeological purposes (s.26).

396. None of the above-listed functions is restricted, prejudiced and/or affected by a separate requirement to obtain planning permission under the Act of 2000. Thus none of the Minister's functions under the National Monuments Acts is to be construed as having been taken from her by the Act of 2000 and entrusted instead to a planning authority or An Bord Pleanála. But that is the extent of the saver: the Minister's functions fall to be exercised in tandem with the Act of 2000 and not despite it. For the court to endorse the 'protective shield' argument would involve it forming a conclusion as to the intention of the Oireachtas without that intention being expressed in s.260 itself or being apparent therefrom, and when a far simpler means of

creating that ‘protective shield’ (the exempt development route) was open to the Oireachtas. The court’s conclusions in this regard do not just make legal sense (not least by reference to the decision of the Supreme Court in *Howard*) but chime too with common-sense. The notion that the Oireachtas in preserving the functions of the Minister under the National Monuments Acts meant thereby to constrain the application of the Planning Acts just does not ring true. The Minister retains her functions; planning authorities and An Bord Pleanála have theirs; all operate freely but in tandem. Their comity of purpose perhaps makes disputes between them unlikely, but should such disputes arise they must be resolved and, if they cannot be resolved amicably, the courts stand by ready to assist.

397. For the reasons identified above, the court does not consider that s.260 presents any impediment as regards Mr Moore’s bringing the present s.160 application in the context of developments at a national monument site.

398. In passing, and perhaps of limited significance given the conclusion reached by the court immediately above, the court notes that the effect of its conclusions in the previous Part of this judgment is that certain of the buildings at Nos. 10–25 Moore Street do not constitute national monuments. Clearly, to the extent that any property to which Mr Moore’s s.160 application relates is not a national monument, then the s.260 argument could never be of avail, as the s.260 argument is pre-conditioned on the applicability of the National Monuments Acts.

Chapter 46

The Substance of the Present Application

A. Overview.

399. The Minister for Arts, *etc.* intends to carry out extensive works at Nos. 13 to 19 Moore Street. These works include the demolition of Nos. 13, 18 and 19, and further works in connection with a commemorative centre and the intended restoration of Nos. 14 to 17. All of this development, Mr Moore contends, is unauthorised development as no valid planning permission exists which authorises the carrying out of such development.

B. Planning Permission.

400. On 24th April 2008, Chartered Land applied for planning permission for a large mixed-use development comprising retail, recreational and commercial and residential development, as well as extensive demolition and conservation works on a site of 2.17 hectares which consists of most of the block enclosed by Upper O'Connell Street, Henry Street, Moore Street, O'Rahilly Parade and Parnell Street, an area sometimes referred to by the parties as 'Dublin Central'.

401. The proposed development included, *inter alia*, 109 retail units, an anchor store, and 108 apartments, all to be comprised in four distinct blocks, new north-south and east-west streets, three public spaces and what looks like a Nebuchadnezzar-inspired sloping roof-garden. The proposed blocks comprised: (i) Block 'A' with a so-called 'iconic' building

adjoining Moore Street, Henry Street and Block C; (ii) Block 'B' facing onto Moore Street, O'Rahilly Parade, and the north-south street; (iii) Block 'C', the retail anchor store, facing onto O'Connell Street, the plaza adjoining the east-west street, and Moore Lane, and (iv) Block 'D', facing onto O'Connell Street at the plaza and east-west street. There was a proposed net floor area of 72,068m² within the overall development, of which 77 per cent (55,593m²) was to be allocated to retail use.

402. Planning permission was subsequently granted by the planning authority and this was then appealed to An Bord Pleanála which conducted an oral hearing. An inspector for An Bord Pleanála prepared a report of June 2009 which recommended refusal of the permission, though noting that An Bord Pleanála might consider requesting revised plans under s.132 of the Act of 2000. At a meeting on 10th August, 2009, An Bord Pleanála decided to issue a notice to Chartered Land requiring it to submit revised drawings to address certain issues.

403. In response to this last-mentioned notice, on 9th November, 2009, Chartered Land submitted revised plans to An Bord Pleanála. In February 2010, these revised plans were the subject of a further report by a Bord Pleanála inspector. On 24th March, 2010, An Bord Pleanála granted planning permission to Chartered Land in light of the revised plans that had been submitted to it.

404. The order of An Bord Pleanála, granting permission pursuant to the revised proposals was for, *inter alia*, 83 retail units, 14 café/restaurant units and an anchor restaurant/café, 22 residential units, office space of circa 4,296m², a gallery, an assembly hall, a new public street, car parking, bicycle parking, and a commemorative centre. Notably, and very much worth noting:

- (i) the order granting planning permission makes no express reference to Nos. 13, 18 or 19 Moore Street.
- (ii) p.7 of An Bord Pleanála's decision makes reference to a change of use of No. 16 Moore Street to a "*commemorative centre*"; only No. 16 is mentioned; and
- (iii) p.8 of the decision contains a general and rather ambiguous sentence to the effect that "*All other buildings, other than the protected structures and façades, national monuments and other non-protected structures and façades noted above, are to be demolished.*"

405. The planning permission (ref. 2479/08/PL 29N.232347) requires a number of conditions to be satisfied prior to the commencement of the development. To date, it appears that few if any of these conditions have been complied with, given that the only works that appear to have been undertaken to date are such restoration works as have been undertaken by the Minister for Arts, *etc.* to Nos. 14–17 Moore Street.

C. Ministerial Consent, as revised.

406. Condition No. 5 of the grant of planning permission of 24th March, 2010, is of especial relevance in the context of the within proceedings. It provides as follows:

“No works shall commence within the preservation order boundary of the National Monument at 14–17 Moore Street unless the prior Ministerial Consent to such works has been obtained in accordance with the statutory requirements of section 14 of the National Monuments Acts, 1930–2004.

Reason. In interest of clarity, having regard to the inclusion within the site of works of works to a National Monument.”

407. The court notes in passing that this condition is clearly but a recognition by An Bord Pleanála of the fact that there is a separate régime that applies in the context of national monuments. The condition does not comprise any form of delegation. It is an example of that comity of purpose which one would expect to pertain between an emanation of the State and a department of government. An Bord Pleanála is simply stating in the above-quoted condition, for the avoidance of doubt and in an abundance of caution, that, in effect, ‘We have done our job, Chartered Land, but you will need to seek a ministerial consent before you can proceed’. Strictly speaking, there is no need for An Bord Pleanála to condition the need for ministerial consent in this way: it must in any event be sought as a matter of law pursuant to the National Monuments Acts. That An Bord Pleanála did condition matters so is simply testament to its competence and good sense.

408. Having regard to the above condition, it is unsurprising to discover that subsequent to the grant of the planning permission, Chartered Land made application for a s.14 consent. It appears that the works for which consent was sought were the same works for which planning permission was granted by An Bord Pleanála. However, by decision of 16th July, 2013 the

Minister for Arts, *etc.* issued a consent (sometimes referred to as ‘Consent C494’) that refused consent for certain of the works in respect of which consent had been sought of him.

409. Among the works for which Consent C494 stated the Minister’s consent to be refused were the construction of a two-storey extension to the north-west elevation of No. 17, and an extension at basement and ground levels to the rear of No. 14. The then Minister required the submission of revised plans and he further stipulated, as a condition of the consent (Condition No. 50) the requirement, mentioned elsewhere above, that “*Substantive works shall commence on site within three months of approval of the revised project design*”.

410. As required, Chartered Land submitted revised plans to the Minister for Arts, *etc.*, and on 30th April, 2014, there issued a further varying consent which stated that its “*conditions shall be read in conjunction with the conditions attached to Consent C494*”. A letter sent to, Mr Connolly-Heron, a descendant of James Connolly and a gentleman with a particular interest in the commemoration of the events that occurred at Moore Street around the time of the Easter Rising, stated that the new conditions included by the Minister in his consent included “*a new gable wall to be constructed to No. 14 Moore Street instead of the temporary finish that would otherwise have been in place until the wider development went ahead*” and “*a new building that will be incorporated into the Commemorative Centre, to be constructed to the side of No. 17 Moore Street as part of the restoration project*”.

D. Differences between Planning Permission and Ministerial Consent, as revised.

411. It will be recalled from the summary chronology in Part 2, that in the autumn of 2015, the State acquired, *inter alia*, Nos. 14–17 Moore Street, and thus became the on-site developer

at those premises. Insofar as the works now proposed to be carried out by the Minister, *etc.* being the revised plans as approved by the Minister in Consent C494, as revised, it is clear that these works are materially different to what was approved by An Bord Pleanála.

412. Testament to the scale of the changes unfolding over the course of the process described above, the Department of Arts., *etc.* recognised the obvious in a letter of 29th July, 2014, to McGeehin Toale, Solicitors, stating, *inter alia*, “*The basement works proposed in the Revised Design Proposal [i.e. the Chartered Land proposal that followed the issuance of Consent No. C494] are substantially different in form and size to the basement extension for which consent was refused.*”

413. The letter further stated, in respect of the structure proposed for the gable-end of No. 17, Moore Street, that:

“The structure proposed...will assist in securing the stability of the National Monument structure. It will also enhance the National Monument structure in terms of its façade onto Moore Street and the new street required to be constructed under relevant planning permission. This proposal is significantly different from the proposed structure for which consent was refused...”.

414. Given the differences arising between what the planning permission contemplates and the ministerial consent (as varied) envisions, Mr Moore contends that the development comprising the works that are now to be done by the Minister to Nos. 14–17 constitute an unauthorised development. In this regard, the Minister for Arts, *etc.* has advanced the contention that no planning permission is required by virtue of s.260 of the Act of 2000. This

contention is rejected for the reasons set out previously above. The court turns therefore to consider whether or not the development to be done at Nos. 14–17 is an authorised development. In this regard, the court notes the observation of Quirke J. in *Dublin City Council v. Liffey Beat Ltd* [2005] 1 I.R. 478, 486, as to the onus of proof that falls on an applicant in s.160 proceedings and how that onus of proof may be discharged:

“The onus of proving that a particular development is unauthorised rests upon the applicant for relief pursuant to the provisions of s.160 of the Act of 2000. That onus may be discharged inter alia by proof that the use of the land or premises concerned has materially changed from the use permitted by the planning permission and that the change of use is not lawful per se or has not been otherwise lawfully authorised....Proof that the use complained of offends and is in breach of a condition of the planning permission is sufficient to prove unauthorised use for the purposes of s.160.”

Chapter 47

The Evidence of Mr Pearson Evans

415. The principal affidavit evidence in support of Mr Moore’s first application under s.160 has been furnished by Mr Peter Pearson Evans, a registered architect with notable experience of architectural conservation. The key elements of Mr Pearson Evans’ evidence might perhaps be summarised as follows:

- (1) the Minister for Arts, *etc.* is in error when she contends that structures which constitute national monuments, and so are deserving of the highest levels of protection, are relieved of the protections of the planning code by virtue of s.260 of the Act of 2000.

[Court Note: The court accepts, for the reasons stated elsewhere above, that the Minister is in error in this regard].

- (2) If the Minister for Arts, *etc.* is correct that the planning code has no application to national monuments, thanks to s.260, that line of argument can have no application to structures that do not come within the National Monuments Acts.

[Court Note: For the reasons stated above, the court considers that the Minister is not correct in this regard. However, it is true that in any event the argument raised by the Minister as to the dis-applying effect of s.260 can have no effect in respect of structures concerning which the provisions of the National Monuments Acts are not engaged].

- (3) Nos. 14–17 are the subject of a protection order; it cannot be that their protected status is rendered nugatory by way of s.260.

[Court Note: This is accepted by the court as a matter of logic and law.]

- (4) The implications of the dis-applying effect of s.260 would have the effect in this case that the Minister would be relying on a consent previously granted by her to a third party (Chartered Land) on which she is now seeking to rely for her own benefit, having acquired the properties to which that consent expressly relates.

[Court Note: Again, the court does not accept the contentions of the Minister as to the dis-applying effect of s.260 vis-à-vis national monuments. The point made by Mr Pearson Evans in this regard highlights the type of absurdity that could result if such a contention were true. In effect, the Minister's powers would be almost completely untrammelled when it comes to works done on or near national monuments, save insofar as she would be and is accountable to the Oireachtas. That the Oireachtas would grant a Minister such largely unrestrained latitude of action seems an unlikely prospect in any event and, as it happens – and for the reasons stated previously above – is wrong as a matter of law in the circumstances presenting].

- (5) There are six reasons why the planning permission secured by Chartered Land on 24th March, 2010 (ref. 2479/08/PL.29N.232347) is not applicable to the proposed development to be carried out by the Minister. These are as follows:

- (i) insofar as the said planning permission granted permission for a commemorative centre at No. 16, Moore Street, and the

demolition of Nos. 13, 18 and 19, that permission was granted in the context of a very different development to that contemplated by the s.14 consent.

- (ii) the commemorative centre to be created pursuant to the s.14 consent is materially different to the commemorative centre at No. 16, Moore Street, that is contemplated by the planning permission.
- (iii) the proposed works to be done by the Minister for Arts, *etc.* arise from revised plans submitted by Chartered Land pursuant to the s.14 consent of July 2013; so the development being carried out is not what was granted permission by An Bord Pleanála.
- (iv) the planning permission that was granted specified numerous conditions, including pre-commencement decisions applicable to all or any of the proposed development; these general conditions appear not to have been entirely complied with.
- (v) Condition 5 of the planning permission requires the prior consent of the Minister for Arts, *etc.* under the National Monuments Acts. This consent, it will be recalled, required the doing of substantive works within 3 months of April 2014, and

this condition – the court has concluded elsewhere above – was not complied with.

- (vi) No environmental impact statement has been carried out with respect to the revised works; although an environmental impact assessment was submitted with the request for the s.14 consent, that assessment is much narrower than the environmental impact assessment that would fall to be done under the planning code.

[Court Note: Each of these issues is addressed at length by the court later below].

Chapter 48

The Evidence of Mr Allen

416. Mr Terry Allen, a principal officer of the National Monuments Service, has provided evidence in this application, as in the judicial review application. The key elements of his evidence as regards this application might be summarised as follows:

- (1) The Minister does not require planning permission to carry out works to a national monument in her ownership or guardianship, even if under other circumstances this might be required.

[Court Note: This is the s.260 line of argument and has been rejected by the court for the reasons stated previously above].

- (2) This is so irrespective of the status of Nos. 14–17 as protected structures.

[Court Note: Again, the s.260 line of argument is rejected by the court for the reasons stated previously above].

- (3) The demolition of Nos. 13, 18 and 19 Moore Street is and always has been expressly envisioned by the planning permission granted by An Bord Pleanála.

[Court Note: The Minister cannot approbate and reprobate. She cannot state the planning code does not apply but the proposed demolition works are unobjectionable because they were always contemplated by the planning permission. The permission is either an irrelevance or of relevance; it cannot be both. In any event, this contention presents issues as to severability which are considered below].

- (4) This s.160 application is, in truth, a collateral attack on the planning permission and the s.14 consent.

[Court Note: For the reasons stated previously above, the court does not accept the ‘collateral attack’ contentions made.]

(5) There is a slightly confused averment that:

“[T]he Minister will dispute [Mr Moore’s]...standing to raise any number of matters relating to alleged non-compliance with conditions attaching to the Planning Permission; but in particular with regard to the alleged non-commencement of works within three months under the consent of the Minister pursuant to Section 14 of the 1930 Act. The Minister disputes and rejects any contention that substantive works did not take place within that period. But even if this were not so, the condition exists purely for the benefit of the Minister and the Minister is free to waive the benefit of same as she should see fit”.

[Court Note: A couple of points might be made regarding this averment:

(1) the averment starts out by referring to the planning permission and then comments on the three-month timeframe that exists under the varying consent of April 2014. This confusion between the permission and the consent is suggestive of a complete confusion on the Minister’s side between the planning permission and the consent.

(2) even allowing for the averment involving an unwitting slip on the part of Mr Allen in the rush to swear a replying affidavit in proceedings that were brought and heard at some haste, the point made regarding the consent is, with all respect, fanciful. We live in a system governed by the rule of law, not the vagaries of ministerial whim. The process of issuing a s.14 consent is a formal legal process. If a consent expresses itself to depend on a particular condition being satisfied within a certain timeframe, then the consent ceases to pertain once that condition goes unsatisfied. If the Minister for Arts, *etc.*, wishes to issue a fresh consent, that is a matter for her. But it is not open to the Minister in effect to state that ‘I believe that a consent still exists but, if it does not exist, then take it that I waived the application of a requirement on which that consent expressed itself to be conditional so that it continues now to exist’. To borrow from Bolt’s *More*, one cannot cut a great road through the law to get after the Devil; one must give the Devil the benefit of the law for our own safety’s sake. In our liberal republic, the law is ever above us; if it is to be varied, it cannot be varied on the whim of those who serve us.]

Chapter 49

The Evidence of Ms Shaffrey

417. Ms Gráinne Shaffrey, encountered previously above, is the director and principal of Shaffrey Associates, a conservation architecture practice. Her affidavit evidence addresses the issue of whether or not substantive works were completed, as required by the s.14 consent within three months of 30th July, 2014. The court has already considered this evidence previously above and concluded that the balance of the evidence before it strongly favours the conclusion that No. substantive works were commenced within the requisite three months. As the consent of July 2013 is conditional upon the commencement of same, that consent – as varied in April 2014 and purportedly revised in September 2015 – must and does fall because it was conditional on the satisfaction of a condition that was not satisfied within the prescribed timeframe.

Chapter 50

The Evidence and Report of Mr Ryan

418. Mr Ray Ryan is a qualified town planner and the principal of BMA Planning, a planning and development consultancy. He has sworn a short affidavit, appended to which is a long report. The key elements of the report might be summarised as follows:

- (1) The Report details how Chartered Land secured its planning permission, and notes the inclusion of Condition 5 (the condition requiring that no works be done at Nos. 14–17 unless a s.14 consent was obtained) stating, *inter alia*, that “[I]t is clear...that consideration was given to the development proposed at Nos. 14-17 Moore Street as part of the overall development being proposed.”

[Court Note: This is clear. In truth it supports Mr Moore’s case. It points to the consideration and approval of the project as a whole, not to severable parts of it].

- (2) The Report details the process whereby the s.14 consent issued, including the conduct of a (limited) environmental impact assessment, and it acknowledges that the works permitted under the s.14 consent differ from those allowed under the planning permission. In this regard, Mr Ryan concludes as follows:

“It is my opinion that what the Minister ended up stipulating by way of works to 14–17 is all part of the intent of Condition 5 of the Planning Permission in that condition 5 involves An Bord Pleanála recognising the Minister’s role in relation to the works to be carried to the National Monument at No’s 14–17 Moore Street.”

[Court Note: There is no dispute that the works permitted under the s.14 consent differ from those allowed under the planning permission. Notably, Mr Ryan appears to shrink from the notion that Condition 5 involves a wholesale delegation of responsibility by An Bord Pleanála to the Minister for Arts, *etc.*, indicating instead that Condition 5 merely “*involves An Bord Pleanála recognising the Minister’s role in relation to the works to be carried to the National Monument at No’s 14–17 Moore Street*”, which is what this Court recognises it to be. Where the issue arises – and this is a key legal issue presenting – is whether a consent can permit a development that is entirely different from that anticipated in a related planning permission without any fresh need for planning permission arising.]

- (3) The last section of Mr Ryan’s Report is concerned with “*Planning Compliance*”. Mr Ryan writes “*On the 18th July, 2014, a submission of Planning Compliance was submitted to Dublin City Council, as Planning Authority.*” Unclear in this is that the said submission referred to the works proposed to Nos. 14-17. Then, on 4th September, 2014, and as referred to previously above, Dublin City Council wrote as follows:

“Re: Former Carlton Cinema Site, the site consists of the majority of a city block bounded by Parnell Street, Moore Lane, O’Rahilly Parade, Moore Street, Henry Street, Henry Place and O’Connell Street Upper.

Plan No. 2479/08....

I refer to the above planning application and in particular to the compliance documents submitted by you on 18th July, 2014.

Having examined the drawings, documentation and terms of the above conditions in relation to Phase 1 of the proposed works to the National Monument at 14–17 Moore Street and its immediate vicinity, including the demolition of 13, 18 and 19 Moore Street, and having examined the details of the Ministerial Consent No. C494 issued 16/07/2013, the material enclosed with this compliance submission dated 17.07.2014 is in compliance with the planning conditions imposed by An Bord Pleanála as they relate to Phase 1.

Further compliance submissions will be required for the balance of the development....” [Emphasis in original].

“The effect of this Planning Compliance submission”, Mr Ryan concludes in his expert report, “is to align the Ministerial Consent and the Planning Permission in so far as it relates to the planned works to Nos. 14–17 Moore Street.”

419. [Court Note: The court considers the adequacy of this letter as a confirmation of compliance later below. As regards the reference in the letter to ‘Phase 1’ and the general severance of the work at Nos. 14–17 from the balance of the work to be done at Dublin Central pursuant to the permission, the court also returns to this

when it considers the issue of severability later below. Suffice it for now to note that even on its own terms this letter makes little sense. There are a variety of pre-commencement conditions that have been imposed by An Bord Pleanála as part of the planning permission and that must be complied with before any development of any nature occurs, yet which, even to the time of the writing of this judgment, appear not to have been completely satisfied. Moreover, even if one reads the letter as saying, in respect of the works to Nos. 14–17, that all the pre-commencement conditions applicable to those works have been satisfied, this still makes no sense as a number of conditions imposed by An Bord Pleanála, as considered later below, simply cannot be split up in the manner which the letter can be construed as purporting to do. In short, while the letter may seek (and the court is not entirely convinced that it was thought through to this extent before it issued, but assuming for the moment that it does seek) to align the ministerial consent insofar as it relates to the planned works to Nos. 14–17, it has sought to align what cannot in this case be aligned and, not surprisingly, has failed to achieve what is in this case unachievable.]

Chapter 51

Material Differences in Works

A. Overview.

420. Seven key grounds have been identified by Mr Moore as to why the proposed works to Nos. 14–17 constitute an unauthorised development. These grounds are considered in this and succeeding chapters.

B. Material Differences in Relation to Works.

421. Mr Moore contends that the development being carried out or proposed to be carried out by the Minister for Arts, *etc.* pursuant to the ministerial consent is not the same development for which permission was granted and that there are material differences in terms of the works to be done. He points to the following differences:

- (1) a new two-storey structure that is to be built against the northern party wall of No. 17, Moore Street;
- (2) whereas under the planning permission, retail unit G7 was omitted (along with other changes under Condition 4), the s.14 consent will reinstate retail unit G7, with other changes to be made to retail units G8–10;

- (3) p.7 of An Bord Pleanála’s decision makes reference to a change of use of No. 16 Moore Street to a “*commemorative centre*”; only No. 16 is mentioned, yet the centre contemplated by the consent extends to Nos. 14–17 (and part of 18);
- (4) the initial s.14 consent refused consent to, *inter alia*, certain demolition works; this necessitated certain changes to the proposed design and lay-out of the commemorative centre;
- (5) notwithstanding that Nos. 14–17 Moore Street are protected structures, the revised consent of 30th April 2014 includes conditions requiring the submission of (i) further details concerning the proposed construction, finishes and use of the extended basement area to the rear of No. 14, (ii) a detailed review of the underpinning strategy, and (iii) detailed plans of the proposed structure to be placed within the footprint of Nos. 8 and 9 Moore Lane (including particulars of how the then newly discovered cellar was to be incorporated into the proposed use of the national monument).

[Point 5 is notable because under s.2(1) of the Act of 2000, the term “*works*” when it comes to a protected structure “*includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.*”]

422. As to (1), it was submitted by the Minister for Arts, *etc.* that the construction of a new two-storey structure against the northern party wall of No. 17 “*appears in fact to be authorised*”. This submission, as worded, is suggestive of hesitancy on the part of the Minister in this regard, and such hesitancy is merited. The truth is as follows. First, the building abutting to No. 17, the subject of the grant of planning permission, was expressly refused in the original s.14 consent which refuses consent for “[c]onstruction of a two-storey extension to the north-western elevation (42 sq m) to No. 17 Moore Street”. Second, in the revising consent, the Minister for Arts, *etc.*, incorporated a condition which provided for a new and different building to the side of No. 17. This is why the Minister in a letter of 30th April, 2014 states that “*The new conditions I have attached to the revised design include...a new building that will be incorporated into the Commemorative Centre, to be constructed to the side of No. 17...as part of the restoration project.*” Third, in a letter of 29th July, 2014, from the Department for Arts, *etc.* to McGeehin Toale, Solicitors, it was stated in relation to the new proposed building at the gable end of No. 17 that:

“This proposal is significantly different from the proposed structure for which consent was refused because the structure now proposed will, while having access into the National Monument, be clearly internally differentiated from the National Monument structure.”

423. Having regard to the trio of points just mentioned, it clearly does not – it cannot – accord with logic for the Minister to suggest that the construction of a new two-storey structure against the northern party wall of No. 17 “*appears in fact to be authorised*”.

424. Turning to a consideration of all of the above-mentioned changes, it might *perhaps* be contended that individually any of these changes is not a material difference; even if this were so, the cumulative scale of the changes arising has the effect that this argument loses all persuasiveness. That the above changes are material and significant is evident from the above-mentioned points. And it is evident too from certain oral evidence provided in the course of the judicial review proceedings, with Mr Terry Allen stating, *inter alia*, that “*There were significant changes introduced in the consent to what the planning permission would have provided for, yes.*” Mr Allen further stated under cross-examination that, so far as he is aware, No further planning permission was sought in respect of these “*significant changes*”. Nor has any variation or modification of the said planning permission been sought.

Chapter 52

Material Differences in Relation to Use

425. As mentioned above, when planning permission (ref. 2479/08/PL 29N.232347) was granted by An Bord Pleanála on 24th March, 2010, p.7 of An Bord Pleanála’s decision made reference to a change of use of No. 16 Moore Street to a “*commemorative centre*”, *i.e.* only No. 16 is mentioned. It is worth quoting an extract from the permission to show just how significant a change in use is contemplated under the consent. Thus the permission, at p.4, allows:

“Works to the National Monument at numbers 14–17 Moore Street, which are also protected structures, which are subject to Ministerial Consent under the National Monument Act, include the following: works to number 14 Moore Street to include demolition of non-original additions and partitions, lowering of basement floor level, extension at basement and ground levels of 34.5 square metres to rear, repair of timbers, roof, windows, doors, plaster, stone, brick and metal, provision of new stairs, partitions and shopfront, change of use to a café/restaurant; works to number 15 Moore Street include demolition of non-original additions and partitions, lowering of basement floor level, 22.7 square metres extension at basement level, repair of timbers, roof, windows, plaster, stone, brick and metal provision of new stairs, partitions and shopfront, use as retail with ancillary offices; works to number 16 Moore Street include demolition of non-original additions and partitions, lowering of basement floor level, extension at basement level (19.14 square metres), repair of timbers, roof, windows, plaster, stone, brick and metal, provision/reinstatement of new stairs, partitions and shopfront, change of use to a commemorative centre; works to number 17 Moore Street include demolition of non-original additions and partitions, lowering of basement floor level, extension at basement level and two-storey extension to the north-western elevation (92.08 square metres), provision of new partitions and shopfront, repair of timbers, roof, windows, plaster, stone, brick and metal, use as a retail unit with ancillary offices...”

426. It is helpful to highlight the use that the above-quoted extract from the revised permission ascribes to each of Nos. 14–17 Moore Street:

- No. 14: change of use to a café/restaurant;
- No. 15: use as retail with ancillary offices;
- No. 16: change of use to a commemorative centre;
- No. 17: use as a retail unit with ancillary offices.

427. Again, the court cannot but note that only No. 16 was to be used as a commemorative centre. Yet in a letter of 17th June, 2011, from Shaffrey Associates, agents for Chartered Land, seeking a s.14 consent to the doing of works to Nos. 14–17, application was made for a commemorative centre across all of Nos. 14–17. Thus p.4 of that letter refers to “*the proposed Commemorative Centre, which is to be accommodated within the four buildings No. 14, 15, 16 & 17 Moore Street, at the start of 2016.*” Perhaps worth noting too, in passing, is that this change came about not a result of the Minister’s eventual decision pursuant to s.14. The notion that Nos. 14–17 would become a commemorative centre is a matter that came about at the instigation of Chartered Land, not the Minister. But, in any event, the notion that Condition 5 involved some delegation of power, rather than just a recognition of the co-existence of a separate statutory regime to which Chartered Land was separately bound, has already been rejected by the court elsewhere above.

Chapter 53

Non-Compliance with Conditions of Permission

428. The planning permission contains numerous pre-commencement planning conditions which apply to the development as a whole. This follows from the fact that the conditions in question refer simply to “*the development*”, a shorthand term which clearly means the entirety

of the development. In passing, the court notes that there are instances where a condition specifically applies to a particular element of the development. But where this is so, this is expressly identified in the relevant condition. The general development-wide pre-commencement conditions are also to be distinguished from certain pre-occupation conditions (which can of course be satisfied post-commencement).

429. The effect of the foregoing is that where a pre-commencement condition applies to the development, it follows that it applies to the works at Nos. 13–19 Moore Street, being both the demolition works at Nos. 13, 18 and 19 and also the other works at Nos. 14–17. This is a consequence of the fact that the works to be done to Nos. 13–19 form part of the overall integrated project.

430. Pre-commencement conditions, to borrow from the Ronseal man, ‘do exactly what they say on the tin’: they impose requirements that must be satisfied before any development commences under the permission. Under the planning permission applicable in this case, the pre-commencement conditions include the following:

“CONDITIONS

1. *The development shall be carried out and completed in accordance with the plans and particulars lodged with the application...except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to the commencement of development....*

6. *Prior to commencement of construction works above the proposed Level 0, details of all the external finishes to the proposed buildings...shall be submitted to the planning authority for written agreement....*
10. *Prior to commencement of development, the developer shall submit for the written agreement of the planning authority, a detailed project proposal in which the historic significance of the critical locations along the evacuation route from the GPO through the site is featured and interpreted....*
11. *Prior to commencement of the development, the developer shall submit additional plans and particulars for the written agreement of the planning authority showing details of the internal streets, pedestrian bridges and incidental spaces, to include materials, finishes, street furniture, public seating, lighting, other fixtures and fittings and landscaping....*
12. *A scheme of shopfront design, including any associated signage, lettering, lighting or internal security screens, shall be submitted to the planning authority for written agreement before development commences....*
13. *Prior to the commencement of the development, proposals for a naming scheme for the streets, and public spaces within the development, and all associated signage shall be submitted to the planning authority for written agreement....*
15. *Public toilet facilities shall be provided in the proposed development. Details of the design, location and management thereof shall be submitted to the planning authority for written agreement prior to commencement of development....*
16. *The development shall incorporate the following requirements:-*

- ...(b) ...Details of footpaths, signalling and priority systems shall be submitted to the planning authority for agreement prior to commencement of development....*
- (d) prior to commencement of development, details of the traffic and car park management strategy and ITS system shall be submitted to the planning authority for written agreement....*
- (e) details of the type, location and number of cycle parking spaces to be provided within the development shall be submitted to the planning authority for written agreement prior to commencement of development....*
- 17 *...(2) A complete survey of all existing drainage services shall be carried out and fully detailed drainage and water supply designs, including specifications, shall be submitted to the planning authority for written agreement prior to commencement of development....*
19. *Prior to commencement of site development works...a detailed methodology for the excavation and construction of the basement areas, to include the prevention of adverse impacts on ground water levels in the area based on the proposals set out in the Environmental Impact Statement, shall be submitted to the planning authority for written agreement....*
20. *The construction of the development shall be managed in accordance with a Construction Management Plan, which...shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development....*
21. *Construction and demolition waste shall be managed in accordance with a construction waste and demolition management plan, which shall be*

submitted to, and agreed in writing with, the planning authority prior to commencement of development....

22. *The developer shall facilitate the planning authority in the archaeological appraisal of the site and in preserving and recording or otherwise protecting archaeological materials or historical features which may exist within the site. In this regard, the developer shall:-*

(a) notify the planning authority in writing at least four weeks prior to the commencement of any site operation...relating to the proposed development, and

(b) employ a suitably-qualified archaeologist prior to the commencement of development....

25. *Prior to commencement of development, the developer shall submit and obtain the written agreement of the planning authority, to a plan containing details for the management of waste...within the development....*

27. *Prior to commencement of development, the applicant or other person with an interest in the land to which the application relates shall enter into an agreement in writing with the planning authority in relation to the provision of social and affordable housing....*

28. *Prior to commencement of development, the developer shall lodge with the planning authority a cash deposit, a bond of an insurance company, or other security to secure the provision and satisfactory completion of streets, footpaths, watermains, drains, open space, car park and other services required in connection with the development, coupled with an agreement empowering the local authority to apply such security or part thereof to the satisfactory completion of any part of the development....*

29. *The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefitting development in the area of the planning authority....The contribution shall be paid prior to the commencement of development or in such phased payments as the planning authority may facilitate....*
30. *The developer shall pay to the planning authority a financial contribution in respect of the Metro North....The contribution shall be paid prior to the commencement of development....*
31. *The developer shall pay to the planning authority a financial contribution as a special contribution...in respect of the provision of traffic management works and facilities and paving works, which will facilitate the proposed development....The contribution shall be paid prior to the commencement of the development or in such phased payments as the planning authority may facilitate...”.*

431. The court has had sight of a ‘Planning Compliance Report’ that was prepared by Stephen Little & Consultants (town planning and development consultants) for Chartered Land in July 2014. That report, which has no status for planning law purposes, purports to detail Chartered Land’s compliance with the various planning conditions imposed by An Bord Pleanála. However, it seems to the court that the report, with respect, is fatally flawed, in that it treats Nos. 13–19 Moore Street in isolation from the overall project. If one looks, for example, to Conditions 22 or 29, as quoted immediately above, neither of those conditions can be said to relate to less than all of the development. And if one looks, for example, to Condition 11, this cannot have meaning solely where the internal street is being constructed

but must also have application to the commencement of the overall development, including but not limited to the works at Nos. 13–19 Moore Street.

432. Curiously, however, what is clear from the Little Report (2014) is how many of the pre-commencement conditions appear not to have been satisfied in any event. As can be seen from the above-quoted text, many of the conditions, such as Conditions 20, 21 and 25 require agreement in writing with the planning authority, *i.e.* Dublin City Council. Typically when such a requirement is imposed, such agreement is done by way of order of the Chief Executive. So, for example, if one looks to *Kenny v. Dublin City Council* [2004] IEHC 381, a case that was concerned with planning conditions that required the agreement of the City Council, Murphy J., under the heading “*Compliance Order*”, notes at 3–4:

“The acceptance letter of 24th December, 2001 refers to details submitted in August, September, and November of 2001. The Council states that these are satisfactory and in compliance with conditions 2, 6, 7, 8, 9 and 17 of the planning permission of 4th August, 2000 and are acceptable to the Planning Authority.

The preamble to the order of 4th January, 2002, refers to those conditions, to the submissions and to the report dated 24/12/01 of Patrick F.A. McDonnell, Dublin City Planning Officer. That report had stated that ‘the details submitted are satisfactory and comply with the requirements of the conditions’ and recommended that the applicant be so informed. The Senior Executive Office endorsed that recommendation.

The order itself was made by the duly authorised executive manager in the terms following:

'I direct that the applicants, Murray O'Laoire Architects be informed that the details submitted in August, September, and November are satisfactory and in compliance with Condition Nos. 2, 6, 7, 8, 9 and 17 of the planning permission granted by An Bord Pleanála on the 04/08/00 in respect of Plan No. 1101/99 and are acceptable to the planning authority.'

433. So, as befits a matter as serious as whether there has, to the satisfaction of a planning authority, been compliance with a condition of planning permission, Dublin City Council – as is typical in these instances – can be seen, from the decision in *Kenny*, to approach its duties in this regard with an appropriate formality, to the point of issuing an order of the Chief Executive concerning the matter at hand. In the present case, all that has issued from the planning authority is a letter of 4th September, 2014, on behalf of the Acting Deputy City Planning Officer, the key part of which reads:

"I refer to the above planning application and in particular to the compliance documents submitted by you...

Having examined the drawings, documentation and terms of the above conditions in relation to Phase 1 of the proposed works to the National Monument at 14–17 Moore Street and its immediate vicinity, including the demolition of 13, 18 and 19 Moore Street, and having examined the details of the Ministerial Consent No. C494 issued 16/07/2013, the material enclosed with this compliance submission dated 17.07.2014 is in compliance with the planning conditions imposed by An Bord Pleanála as they relate to Phase 1."

434. Striking in all of this is that no-one is asking ‘What has An Bord Pleanála got to do with works in relation to a national monument?’ Neither Chartered Land nor the City Council, it seems subscribed, at least at the time of the above correspondence, to the argument proffered by the Minister for Arts, *etc.*, at the hearing of the within applications – and rejected by the court – that when one comes to a national monument one has entered the exclusive domain of the Minister.

435. Leaving all this aside, and even disregarding for a moment the remarkable informality of process that the above letter evidences, by contrast to the process that pertained in *Kenny* and which is typical in practice, the letter does not state (nor could it) that there has been compliance with all of the pre-commencement conditions. Indeed in some ways it is not even clear that the letter referred to above is a full and proper response to the Little Report which, in certain instances, appears to seek agreement from the planning authority about certain conditions of planning permission.

436. As regards the reference in the letter to ‘Phase 1’ and the general severance of the work at Nos. 14–17 from the balance of the work to be done at ‘Dublin Central’ pursuant to the permission, the court returns later below to the issue of severability.

Chapter 54

Breach of Sequence of Permitted Development

437. When it comes to determining the proper scope of a planning permission, the court must look to the combined effect of the permission and such documents as are incorporated into the

permission. Two cases are of interest in this regard, namely the long-ago decision of the Supreme Court in *Readymix (Éire) Ltd v Dublin City Council* (Unreported, Supreme Court, 30th July, 1974) and the more recent decision of the High Court in *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 I.R. 565.

438. In *Readymix*, the Supreme Court had to consider a planning permission that permitted the modernisation of a concrete manufacture plant situated, surprisingly perhaps, deep in the ‘leafy glades’ of South County Dublin. After the permission issued, the site was sold and used for the distribution of ready-mix concrete by lorry from the site. Following complaints by people living near the site, the City Council referred to the Minister for Local Government the question of whether or not the development was an exempted development. Readymix instituted proceedings which would have the effect of validating their operations on-site and disbarring the Minister from making the ruling sought. The High Court granted Readymix the declarations and injunctions sought. Its decision was appealed unsuccessfully, Henchy J., observing in the Supreme Court, at 5:

“Where the permission recorded in the register is self-contained, it will not be permissible to go outside it in construing it. But where the permission incorporates other documents, it is the combined effect of the permission and such documents that must be looked at in determining the proper scope of the permission. Thus, because in the present case the permission incorporated by reference the application for permission together with the plans lodged with it, it is agreed that the decision so notified must be construed by reference not only to its direct contents but also to the application and the plans lodged.”

439. In *Kenny (No. 1)*, the High Court considered what were “*substantial grounds*” for granting leave to apply for a planning permission pursuant to s.82(3B) of the Local Government (Planning and Development) Act, 1963, being the primary statute concerning planning law prior to the enactment of the Act of 2000. There, one of the conditions of the grant of planning permission that was relevant to the judgment of McKechnie J. was Condition No. 1 which provided as follows:

“[T]he proposed development shall be carried out in accordance with the revised plans submitted to the planning authority and received on the 7th October, 1999, in response to a request for revised plans under art.35 of the Local Government (Planning and Development) Regulations, 1994, except as may otherwise be required in order to comply with the following conditions.

Reason: In the interest of clarity.”

440. When it came to Condition No. 1, McKechnie J. observed as follows, at 575:

“The planning permission sought in this case and granted on appeal by the respondent, was in respect of the development as proposed, which development had to be carried out in accordance with the revised plans submitted to the planning authority and received by it on the 7th of October, 1999. Whilst condition no.1 of the grant goes on to read:- ‘except as may otherwise be required in order to comply with the following conditions’ ...it should be clearly understood that the scheme as authorised is that as outlined in those revised plans. There can be no question whatsoever of the developer being at large, even to a limited extent, with

regard to what may be constructed. The reason given for condition No. 1 makes this clear – it is stated:- ‘In the interest of clarity’, namely that the developer and indeed the public would know what is authorised.”

441. Bringing all of the foregoing home, so far as the within proceedings are concerned, here the plans and particulars lodged with the planning permission application included a ‘Construction Methodology & Programme’ which was also expressly incorporated into the related Environmental Impact Statement. Section 2 of the Programme refers to demolition and façade retention and states “*The first phase in the work will be the site clearance*”, before proceeding to state, at sections 2.1 and 7 respectively:

“The first stage of site clearance will be to construct the temporary support framework to the façades of the No. 43, 44, 53, 54, 57 and 58 O’Connell Street”,

and

“The main focus of access onto the site will be along O’Connell Street, Moore Land and O’Rahilly. All construction vehicles...will use temporary access points on these streets. A Construction Traffic Management Plan will be prepared by the contractor and agreed with An Garda Síochána/Dublin City Council prior to the commencement of the development.”

442. In an appendix to the Programme is the Lafferty Project Management Plan which shows the following sequence of works: (1) site set-up and establishment; (2) mobilisation, site set-up and establishment; (3) archaeological; (4) archaeological investigation/supervision; (5) site

clearance; (6) building stabilisation and retention; (7) decommission and strip-out services; (8) services diversion; and (9) demolitions.

443. What the above evidences is a sequence of works for the entire project, including the demolition of all structures, starting with O'Connell Street. Notably, Condition 1 of the permission incorporates the anticipated sequence into the permission stating, as mentioned above, that "*The development shall be carried out and completed in accordance with the plans and particulars lodged with the application*". The plans and particulars relevant to the present proceedings clearly show the demolition works being carried out as part of the demolition of all the buildings that are to be demolished under the planning permission. So to demolish Nos. 13, 18 and 19, Moore Street, in advance of all the other demolition works (and indeed site set-up, archaeological investigations, *etc.* would clearly mean that the development would not be carried out in accordance with the plans and particulars lodged with the application.

Chapter 55

Severability

A. Overview.

444. 'So what if the sequencing is different?' one might ask. The so-called 'Dublin Central' project is enormous and for the Minister to sever a portion of it – the national monument portion – and proceed with that now in respect of the chunk of Chartered Land's onetime property that she now owns, is in some sense but the phasing of one part of the overall

development ahead of another. This was referred to at the proceedings as the question of ‘severability’, and there are a number of reasons why such severance is legally objectionable.

B. Summary of reasons why severance is objectionable.

445. Four key objections to severance arise:

- (1) Permission was granted for the development as a whole, as is evident from the reasons given by An Bord Pleanála. Moreover, and more importantly perhaps, the reason given for the demolition of Nos. 13, 18 and 19, Moore Street, was for a different purpose under the planning permission.
- (2) As considered above, the development as permitted was required to be carried out in accordance with the plans and particulars for the planning application (as identified in the Construction Methodology Report and Works Programme): these show the demolition of all buildings in the block commencing with O’Connell Street.
- (3) As was also addressed above, many of the pre-commencement conditions imposed by the planning permission show the demolition of all the buildings within the city block commencing with O’Connell Street.
- (4) The Environmental Impact Assessment carried out by An Bord Pleanála was predicated and assessed on the basis of a development which would be

carried out in a particular sequence. There has been no EIA of Nos. 13, 18 and 19 being demolished in isolation.

446. The court considers various of these objections in greater detail below.

i. Permission granted for development as a whole.

a. Site notices and planning applications.

447. The description of the development as set out in the site notices and planning applications refers, *inter alia*, to a development “*at an overall site of circa 2.17 hectares*”, then lists the streets and street numbers in question and further states “*The site consists of the majority of a city block bounded by Parnell Street, Moore Lane, O’Rahilly Parade, Moore Street, Henry Street, Henry Place and O’Connell Street Upper...*”. The maps of the site of the development further confirm that it is part of a “*block*” of development.

b. Planning inspector’s report.

448. That development at Nos. 13–19 Moore Street can only be understood in the context of the overall development is evident from, *e.g.*, pp.58 and 63 of the report of the Bord Pleanála inspector, in which it is stated, respectively:

“This major development proposal on the site which has been assembled from almost an entire block is pivotal to the achievement of the policy objectives of Dublin City Council for renewal and regeneration filling the gap between Henry

Street and Parnell Square at the northern end of the 'main civic spine' corridor of the city, the north central city area. It is a large contemporary mixed use development, which is a primarily high quality comparison shopping international retail quarter but supplemented by restaurant, residential, community, cultural, civic amenities and facilities."

and, under the heading "Policy Context",

"There are two integrated policy objectives that it is envisaged that the development opportunity addresses, the first being that of regeneration and renewal of the block, almost all of which comes within the assembled site area and the second is to facilitate the development of the area as a top international comparison shopping retailing destination commensurate with the top tier status of the city centre according to regional retail policy."

449. That the works at Nos. 13–19 Moore Street are integrated as part of the development is also evidenced at pp. 80 and 85 of the said inspector's report, where it is stated, respectively:

"Where breaches in the gable ends in the form of interventions for integration are proposed, a clear justification in terms of the securing of the protection of the structure through its use and integration within the scheme has been demonstrated. To this end, I refer to the lowering of the basement level to provide for toilet facilities and access, the integration within the new build at No. 13 that allows for...avoidance of intervention at No. 14, for alternative provision of

accesses and restaurant use without intervention within the fabric of national monument buildings themselves”,

and,

“With the proposed elevation on Moore Street the design team has sought to signify the primacy of the National Monument at Nos. 14–17 in the form of an amphitheatre effect with descending (or ascending) terraces or levels to the sky-garden behind and the falling (or rising parapet) along the Moore Street elevation.”

c. The Little Report of April 2011.

450. This integration of the works at Nos. 14–17 as part of the overall development is also acknowledged in a Planning Context Report of Stephen Little & Associates that issued in April 2011, the stated intent of which, at p.2 of same, is to *“set the scene in terms of the wider planning context that surrounds the National Monument and within which 14, 15, 16, 17 Moore Street sit”*. This report states as follows, at pp. 4, 8, 9 and 10 respectively:

“It is adequate to say at this point that the finally determined scheme includes proposals for the conservation, restoration and adaptation of Nos. 14, 15, 16 & 17 Moore Street which is integrated into a wider redevelopment proposal that seeks the urban regeneration of this neglected part of the north inner city of Dublin”,

and

“It is fundamental to the context of this application for Ministerial Consent to understand where the National Monument is placed within the City wide aspirations for the Retail Core”,

and

“An Bord Pleanála granted permission for a significant urban regeneration project on O’Connell Street...in March 2010....

The National Monument at Nos. 14, 15, 16, 17 Moore Street have been incorporated into this development proposal”,

and

“It is also intended, through the proposed restoration to Nos. 14–17, the physical relationship between these four buildings and the proposed public space to the rear of them, that there will be a coherent and successful architectural and functional engagement between the existing historic buildings and the new development. The space to the rear of the National Monument allows greater ‘breathing space’ to these buildings. Thus, the concept to integrate the National Monument, rather than isolate it is strengthened. It is suggested that this [is] the most appropriate approach for this urban modest streetscape building typology which Nos. 14–17 Moore Street reflects.”

d. Reasons and Considerations of An Bord Pleanála.

451. It is also clear from the reasons and considerations given by An Bord Pleanála in its decision of 24th March, 2010, granting planning permission to Chartered Land, that its reasons are applicable to the development as a whole. Thus An Bord Pleanála commences the “*Reasons and Considerations*” portion of its decision (at 9) with the following recitals and observations:

“Having regard to:-

- (a) the Dublin City Development Plan, 2005-2011 (as amended) with particular regard to Variation (No. 16) ‘Developing the Retail Core’,*
- (b) the O’Connell Street Integrated Area Plan of 1998,*
- (c) the O’Connell Street and area Architectural Conservation Area and the O’Connell Street Special Planning Control Scheme,*
- (d) the Parnell Square Framework Plan,*
- (e) the ‘Architectural Heritage Protection Guidelines for Planning Authorities’, issued by the Department of the Environment, Heritage and Local Government in 2004,*

- (f) *the 'Retail Planning Guidelines for Planning Authorities' issued by the Department of the Environment, Heritage and Local Government in January, 2005,*
- (g) *the sensitivity of the site and environs, and the significant architectural, cultural, historical and social heritage of the location, and*
- (h) *the city centre location,*

it is considered that the proposed development, as amended, and subject to compliance with the conditions set out below, would constitute an appropriate mix and intensity of land-use, would be comparable with the established pattern of development in the vicinity, would be acceptable in terms of impact on the cultural heritage of the area – including the National Monument at numbers 14–17 Moore Street, protected structures within the site and environs and the historic street network, would be acceptable in terms of traffic and pedestrian safety and convenience and in relation to existing and permitted retail and residential uses and the civic amenities of the area. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.”

452. The above-quoted reasons and considerations are notable in terms of their range. It is not possible to extract from them particular reasons that apply to but one aspect of the development, as is evident, for example, from the assertion that the development “*would constitute an appropriate mix and intensity of land-use*”. This assertion underlines the fact that (a) the development for which permission was being and was granted must be seen as a

whole, and (b) it is not possible to sever or extract one aspect of the development, such as the commemorative centre or demolition of adjacent structures, as a stand-alone development.

453. A further related point of note is that the entire development was subject to an environmental impact statement (or EIA) which was premised on the carrying-out of the development in the manner set out in the plans and particulars, as referred to elsewhere above.

ii. Demolition of Nos. 13, 18 and 19.

454. It is clear from the above that insofar as permission was granted under the planning permission for the demolition of Nos. 13, 18 and 19, Moore Street, this was in the context of the development as a whole, as opposed to being for the purpose of restoration of Nos. 14–17. But it appears to the court from the Statement of Opposition that the Minister is now proposing to demolish Nos. 13, 18 and 19 in the context of the restoration works contemplated by the ministerial consent. Per the Statement of Opposition, para. 13, “*It is ...intended that...Nos. 13, 18 and 19 Moore Street...will be demolished as part of works to preserve and restore Nos. 14 to 17*”. Likewise, in the affidavit evidence of Mr Cumming and Ms Donnelly in the judicial review application (as considered previously above), it is stated, at para. 14 that “*The demolition of Nos. 13 and 18 Moore Street is...designed to isolate the National Monument and allow for its proper repair and conservation.*” The significance of this is that permission for demolition granted to achieve one purpose is not permission for demolition granted to achieve another purpose. In this regard, the court is mindful too that:

- (i) the development to which the planning permission related was the subject-matter of an environmental impact assessment and the demolition works were assessed in the context of same; and
- (ii) the environmental impact statement also sets out methodologies and processes for dealing with demolition works as a whole, these being incorporated into the permission by way of Condition 1 – and, in accordance with the judgment of Henchy J. in *Readymix* (considered above), it is the combined effect of the permission and the incorporated documents that must be looked at in determining the proper scope of the permission. None of the EIA, the EIS and, most significantly perhaps, the planning permission, is applicable to the demolition of Nos. 13, 18 and 19 Moore Street in isolation.

Chapter 56

Case-law on Severability

455. A planning permission must generally be completed in its entirety except where any particular development is severable from the rest. In *Horne v. Freeney* (Unreported, High Court, 7th July, 1982), a case concerning the development of an amusement arcade on Bray seafront otherwise than in compliance with applicable planning permission, it was held that where two or more planning permissions are granted over the same land the developer cannot partially develop the land under each permission. Per Murphy J., at 5:

“I take the view that if Planning Permission is indivisible: that it authorises the carrying out of the totality of the works for which approval has been granted and not some of them only. A developer cannot at his election implement a part only of the approved plans as No. approval is given for the part as distinct from the whole.”

456. In *Dwyer Nolan Development v. Dublin County Council* [1986] I.R. 130, Carroll J. noted that a developer cannot operate mutually inconsistent planning permissions at the same time, stating, at 138:

“[I]t seems to me that a developer cannot operate two mutually inconsistent planning permissions at the same time but must opt for one or the other. If, having opted for one, a developer does not want or is not able to complete the estate as planned, he or his successors in title must apply for a variation in respect of the undeveloped part. But the failure to complete the scheme does not mean that the partial development which has taken place is unauthorised. In my opinion the position is that partial development is authorised development provided it can be regarded as severable, e.g. one could not build the bottom storey of a two storey house and leave it unfinished with the intention of using it as a bungalow. That could not be regarded as authorised partial development since the permission was to build a two storey house.”

457. Some guidance as to the issue of severability presenting in the within proceedings can also be gleaned from the case-law which deals with the not dissimilar issue of the severability of conditions of a planning permission. So, for example, in *Bord na Móna v. An Bord*

Pleanála [1985] I.R. 205, a case concerning whether An Bord Pleanála acted *intra vires* when it imposed a condition requiring a contribution towards the cost of reconstructing certain roads when it granted planning permission for the erection of a briquette factory, the future Chief Justice Keane observed, *inter alia*, at 211:

“On principle, it seems wrong that a planning permission should be treated as of No. effect simply because a condition attached to it, which has nothing to do with planning considerations, is found to be ultra vires. Again, if a condition of a peripheral or insignificant nature attached to a permission is found to be ultra vires, it seems wrong that the entire permission should have to fall as a consequence. But where the condition relates to planning considerations and is an essential feature of the permission granted, it would seem equally wrong that the permission should be treated as still effective, although shorn of an essential planning condition. This view is supported by English authority: see the speeches of Lord Reid, Lord Morris of Borth-y-Gest and Lord Upjohn in Kingsway Investments (Kent) Limited v. Kent County Council [1971] A.C. 72.

The question remains, accordingly, as to whether the invalid condition in the present case can be regarded as an inessential condition or one which is not related to planning considerations or is peripheral or insignificant in its nature. I think that the answer to this question is quite clear. There can be No. doubt as to the power of the planning authority to impose a condition of this nature, provided that it is framed in a reasonable manner. It unquestionably relates to planning and could not, on any view, be described as trivial or insignificant. On the contrary, to treat the permission as authorising the plaintiff to carry out a major

development without making any contribution whatever to the improvement of the road network which would be necessitated by their development would be to treat them as having been granted a permission which it was never the intention of the legislature that they should have. It seems to me that, in these circumstances, it is not possible to sever the offending condition from the permission and, accordingly, the decision to grant permission must be treated as a nullity in its entirety.”

458. What relevance do the above observations of Keane J., as he then was, have to the present proceedings? In *Bord na Móna*, planning permission might not have been granted if the shorn condition (which was related to planning and was not insignificant or peripheral in nature) was not included. In the present proceedings, planning permission for the demolition of Nos. 13, 18 and 19 (a matter related to planning and which is neither insignificant nor peripheral) might not have been granted had this not been necessary to facilitate the larger development for which application was made. Just as in *Bord na Móna* it was not possible to un-couple the permission from the shorn permission (and *vice versa*), here too it is not appropriate to un-couple the wider permission from the demolition permission and to proceed with the latter, ostensibly under the ministerial consent, as though it were a free-standing development.

459. Another decision in a similar vein to that in *Bord na Móna* is the decision of the Supreme Court in *State (F.P.H. Properties S.A.) v. An Bord Pleanála* [1987] I.R. 698. That was a case concerned with the breadth of power enjoyed by An Bord Pleanála under applicable planning legislation to impose a planning condition that concerned the wholesale

preservation of an 18th-century property in Killester. Under the heading “Severability”, McCarthy J., giving judgment for the court, made, *inter alia*, the following observations:

“Unless it can be demonstrated that the respondents would have granted the relevant permissions subject only to the other conditions, if it had been advised that the impugned condition was invalid, in my view the impugned condition is not severable from the remainder of the permissions. Having regard to the contents of the inspector’s report and, in context, taking the condition as it stands alongside its fellows, I am far from satisfied to hold that such would be the case....I do not find it necessary to express any view as to the relevance of the particular authorities; I am content to hold that the permissions cannot stand with the conditions severed from them. To hold otherwise would be to rewrite the permissions.”

460. Nothing akin to that contemplated by McCarthy J. in *F.P.H.* can be demonstrated in the within proceedings either. Here it is clear that insofar as permission was granted under the planning permission for the demolition of Nos. 13, 18 and 19, Moore Street, this was in the context of the development as a whole, as opposed to being for the purpose of restoration of Nos. 14–17.

461. The just-mentioned line of authority as to severability was recently the subject of consideration by Noonan J. in *Aherne & Ors v. An Bord Pleanála* [2015] IEHC 606 and *Ross v. An Bord Pleanála* [2015] IEHC 256. In *Ross*, the applicants sought to quash a condition of permission for the retention of a replacement mobile home which required that the replacement home would be confined to use as a holiday home during the summer months (a

period that seems to be of ever dwindling duration in recent years). Rejecting the view that this condition was invalid, Noonan J. observed as follows, at para.42 of his judgment:

“Even if I were wrong in my view of the validity of Condition 2, I am satisfied that it cannot be severed from the permission as a whole. The respondent was confronted with a very particular set of personal circumstances in concluding that the grant of permission was appropriate in this case. Those included the facts that historically over the previous forty years, the property had only ever been used by the first applicant and his family and then only during the summer months. In the absence of one or both of those factors, it seems to me that the application would have been of a radically different nature and the respondent may well have taken a different view of it. If Condition 2 were to be severed from the permission, it would leave in place a permission that was never contemplated by the respondent. Therefore, even if Condition 2 were invalid, it seems to me that the entire permission would have to be quashed. Clearly this is not a result which can have any benefit for the applicants nor is it one sought by them.”

462. In like vein, it seems to this Court that, absent the proposed overall rejuvenation and development of ‘Dublin Central’, any application in respect of Nos. 13 to 19 Moore Street, and more especially as to the demolition of Nos. 13, 18 and 19, would necessarily have been different in substance, context and in the manner in which it was viewed and considered. Again in this regard the court notes that the planning permission that was granted related to a development which was the subject of an environmental impact assessment, with the demolition works being assessed in the context of that assessment. The environmental impact statement also identifies certain methodologies and processes for dealing with the demolition

works as a whole. Thus it seems to the court to be entirely unrealistic to extract from that permission the demolition of Nos. 13, 18 and 19 in isolation from the overall works.

Chapter 57

Construction of Condition 5

A. Overview.

463. Condition 5 of the planning permission provides as follows:

“No works shall commence within the preservation order boundary of the National Monument boundary of the National Monument at 14–17 Moore Street unless the prior Ministerial Consent to such works has been obtained in accordance with the statutory requirements of section 14 of the National Monuments Acts...”

464. The court has already considered the arguments raised by the Minister for Arts, *etc.* concerning s.260 and concluded that a dual régime can and does exist by law pursuant to which a permission may be required under the Act of 2000 concomitant with a need to obtain a s.14 consent under the National Monuments Acts, notwithstanding that permission and consent apply to the subject-matter, the clear intention of the Oireachtas being that both planning requirements and national heritage protection needs would be the subject of separate but equal legal processes and protections aimed at different ends.

465. What then is the court to make of the notion that Condition 5 seeks to delegate planning powers to the Minister and/or to allow the Minister to amend, by way of s.14 consent, the development that is permitted under the planning permission? This is a notion that creeps into some of the affidavit evidence furnished on behalf of the Minister. So, for example, Mr Stephen Little, a chartered town planner and development consultant, who has sworn an affidavit for the Minister avers as follows:

“I say that An Bord Pleanála in its Decision, and in particular at Condition 5, delegated the final details of that part of the development relating to the National Monument to the [Minister for Arts, etc.]...These delegations are common practice where certain matters are the responsibility of particular statutory agencies. For example, it is a common practice for An Bord Pleanála in respect of roads to remit certain matters in that regard to be agreed with the relevant Road Authority or, in respect of certain matters relating to sanitary services, again to the relevant Sanitary Authority. In this instance, An Bord Pleanála left the details of the work to the National Monument to be the subject matter of agreement from the [Minister]...before any of the works specified in that consent were carried out.”

466. In his submissions to the court, counsel for the Minister indicated that he was not contending that Condition 5 is a delegating condition of the type contemplated in s.34 of the Act of 2000. All he contends is that Condition 5 involves recognition by An Bord Pleanála of the disapplication of the planning code once one strays into the realm of national monuments. The court has considered, and respectfully rejected, this proposition previously above.

B. Interpretation of planning conditions.

467. As regards the principles pertaining to the interpretation of planning conditions, it is generally recognised that a planning permission falls to be interpreted by reference to its ordinary meanings. So, for example, in *XJS Investments Ltd. v. Dun Laoghaire Corporation* [1986] I.R. 750, a case concerned in part with the breadth of the term “zoning objectives”, as included in a particular planning permission, McCarthy J., for the Supreme Court, identified four principles of interpretation applicable to planning documents, two of which are of especial relevance in the context of the present proceedings. Per McCarthy J., at 756:

“Certain principles may be stated in respect of the true construction of planning documents:-

(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning.”

468. In a similar vein, Charleton J. observes as follows, at 25, in *Lanigan v. Barry* [2008] IEHC 29, a case in which the plaintiffs, *inter alia*, sought injunctive relief under s.160 of the Act of 2000 in respect of the operation of a motor-racing track in County Tipperary:

“A planning permission is not a legal statute and nor is it to be construed as such. Rather, it is a document addressed to the world at large and one of particular interest to those who feel, by reason of proximity to the development authorised, or for good reasons like the preservation of what remains of the traditional Irish countryside, that they may be affected by it. It is the view of a reasonable person looking at the permission and the conditions attached thereto, which should determine how a court construes the documents.”

469. Somewhat closer in time, Fennelly J., in *Kenny v. Dublin City Council* [2009] IESC 19, one of a saga of cases concerning the building by Trinity College Dublin of its new halls of residence in Dartry, observes, at para. 28:

“A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even than the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context.”

Chapter 58

The Detail of Condition 5

470. At p.4 of its decision concerning the ‘Dublin Central’ development, An Bord Pleanála notes that *“Works to the National Monument at numbers 14–17 Moore Street, which are subject to Ministerial Consent under the National Monument Act, include the following...”*. Thus, not perhaps that this needs to be stated by the court, when Condition 5 to the planning

permission later states that “*No works shall commence within the preservation order boundary...*”, it is obviously referring to those “*works*” for which permission was sought.

471. Also notable in this regard is that the reason for the inclusion of Condition 5 is stated in the permission to be “*In interest of clarity, having regard to the inclusion within the site of works to a National Monument*”. The words “*In interest of clarity...*” patently indicate that the condition was only being included for clearness, not because of need. As mentioned previously above, even in the absence of the condition, there would have been a requirement to seek a s.14 consent. If matters were otherwise, if, for example, the condition sought to effect some form of delegation of power, or to grant a permission of some sort, to the Minister, an entirely different reason would have been stated for the inclusion of Condition 5, which reason would have been indicative and supportive of such a construction.

472. The ordinary meaning of Condition 5, as viewed by – to borrow from the above-quoted extract from Charleton J.’s decision in *Lanigan* – “*a reasonable person looking at the permission and the conditions attached thereto*”, is that those works for which permission was applied, for which permission is granted, and which fall to be done within the boundary of the national monument identified in Preservation Order No. 1 of 2007, shall not commence unless and until, additionally and separately, the Minister for Arts, *etc.* has given prior consent under s.14 of the Act of 1930. The court cannot but note in passing that even if it is wrong in this (and it does not consider that it is), *i.e.* even if the Minister is correct that Condition 5 allows her to make changes to the works in the context of the s.14 consent (which the court does not accept), Condition 5 relates only to “*works*” and so could not include the change of use of Nos. 14, 15 and 17 Moore Street from retail/office to commemorative centre.

Chapter 59

Environmental Impact Assessment Requirements

473. The development that was the subject of the planning permission was subject to an environmental impact assessment carried out by An Bord Pleanála, such an assessment being mandatory, pursuant to the Planning and Development Regulations 2001, for a development of the scale proposed.

474. Schedule 6 of the Planning and Development Regulations 2001 states, *inter alia*, that information in an environmental impact statement must include “*a description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular...material assets, including the architectural and archaeological heritage, and the cultural heritage.*”

475. The importance of cultural heritage has also been emphasised in recital 16 of Directive 2014/52/EU which states as follows:

“For the protection and promotion of cultural heritage comprising urban historical sites and landscapes, which are an integral part of the cultural diversity that the Union is committed to respecting and promoting in accordance with Article 167(4) TFEU, the definitions and principles developed in relevant Council of Europe Conventions, in particular the European Convention for the Protection of the Archaeological Heritage of 6 May 1969, the Convention for the Protection of the Architectural Heritage of Europe of 3 October 1985, the European

Landscape Convention of 20 October 2000, the Framework Convention on the Value of Cultural Heritage for Society of 27 October 2005 can be useful. In order to better preserve historical and cultural heritage and the landscape, it is important to address the visual impact of projects, namely the change in the appearance or view of the built or natural landscape and urban areas, in environmental impact assessments.”

476. (Directive 2014/52/EU is one of the amending directives to the Environmental Impact Assessment Directive regime, as established by Council Directive of 27th June 1985 on the assessment of the effects of certain public and private projects on the environment (O.J. L175, 5.7.1985, p.40). The initial directive of 1985, as amended, was codified by Directive 2011/92/EU; this codified version was then amended by the directive of 2014).

477. The significance of the above-quoted reference to cultural heritage is that the revised works and change of use brought about by the consent of the Minister for Arts, *etc.*, as varied and revised, involve altered works and a change of use in respect of Nos. 14–17, premises that the Minister has clearly accepted since the issuance of Preservation Order No. 1 of 2007 to comprise a national monument – and so are clearly relevant to cultural heritage. Not, in a sense, that any of this counts: where there are any material changes to any permitted development which requires an environmental impact assessment, there is a requirement to consider and screen in terms of environmental consideration for the purposes of the environmental impact assessment. The cultural heritage dimension presenting accentuates the need for such an assessment; it does not establish it.

478. The particular significance of the revised works under the s.14 consent not being subjected to a fresh environmental impact assessment is perhaps two-fold. First, neither of the environmental impact assessments that was carried out considered the entire development, including the new development anticipated by the consent. So there appears never to have been a properly scoped environmental impact assessment. Second, whether or not a new environmental impact assessment is required, there was no required screening done to determine whether this was so.

Chapter 60

The Court's Discretion; a Consideration of Leading Case-Law

A. Overview.

479. The great strength of the common law system is that so many judges have said so much; the great weakness of the common law system is that so many judges have said so much. When it comes to the fact that the court has a discretion to refuse relief under s.160 of the Act of 2000 (and it does), one might have thought that, to borrow from the logic of Gertrude Stein's *Sacred Emily*, it would suffice to note that 'a discretion is a discretion is a discretion' and to leave it at that. Indeed, the consideration of the case-law that follows suggests that despite much ink having been spilled on the nature of the discretion arising under s.160, the courts in truth have ultimately gone little further than the law of identity, as espoused by Stein. Be that as it may, it behoves the court to undertake an analysis of the key authorities arising in this area of the law. Thereafter, the court attempts to synthesise the statements of principle presenting in those authorities – albeit that it might be contended (and this court

would contend) that the ‘Steinian’ synthesis which the court has just identified largely suffices as a summary of the position at law regarding the exercise by the court of the discretion arising under s.160, and that individual judges ought to be allowed to, and can, proceed accordingly.

B. The Extent of the Court’s Discretion.

i. Stafford v. Roadstone Ltd.

480. In *Stafford v. Roadstone Ltd.* [1980] ILRM 1, the High Court had to decide whether the intensification of quarrying at a site in County Wexford represented a material change of use in land for which planning permission should have been obtained. In the course of giving judgment, Barrington J., at 19, having identified that the power to grant injunctive relief under s.27(2) of the Local Government (Planning and Development) Act 1976 – the predecessor to s.160 of the Act of 2000 – was a discretionary power, then considered the rationale for this discretion:

“It seems to me all the more important that the High Court should have such a wide discretion because of another innovation introduced by the section. The section allows the application for an injunction to be made, not only by the Planning Authority, but also by a private citizen ‘whether or not the person has an interest in the land.’ The section therefore makes each citizen a watchdog for the public. Presumably the purpose of this section is to guard against the kind of case (of which the present case may possibly be an example) where the Planning Authority may not have been as vigilant in the protection of the public’s interest

as it should have been. But, it seems to me, that if a person who is not the Planning Authority and who has no interest in the lands can apply for an injunction under s.27 then it is all the more important that the High Court should have a wide discretion on the question of whether or not to issue an injunction. It appears to me that the Oireachtas could not have intended that the High Court should have no discretion but to issue an injunction when the plaintiff has no interest in the lands and the breach of the planning law on the part of the defendant has been innocent or technical and can be put right by an application for planning permission.”

ii. *Dublin County Council v. Matra Investments Ltd.*

481. In *Dublin County Council v. Matra Investments Ltd.* [1980] 114 ILTR 102, an application for an order restraining certain use of lands, Finlay P. observed as follows in relation to an application for an order under s.27(2):

“In my view the order should be made if I am satisfied there is an unauthorised use of the land, unless exceptional reasons are shown by the respondents.”

iii. *Morris v. Garvey.*

482. In *Morris v. Garvey* [1982] ILRM 177, the Supreme Court approved an order by the High Court for the demolition of a block of flats that were being built on Rathgar Road in breach of the applicable planning permission. In the course of his judgment in that case, Henchy J. made the following remarks concerning s.27(2) of the Act of 1976, at 179–180:

“This Court has judicial notice, from what it has known to have happened in other cases, that developers who have contravened the conditions of the development permission have, for motives which may be put down to expediency, avarice, thoughtlessness or disregard of the rights or amenities of neighbours or of the public generally, knowingly proceeded with unauthorised development at such a speed and to such an extent as they hoped would enable them to submit successfully that the courts discretion should not be exercised against them under s.27(2), on the ground that the undoing of the work done would cause them undue expense or trouble.

For my part, I would wish to make it clear that such conduct is not a good reason for not making an order requiring work carried out in such circumstances to be pulled down. When s.27(2) is invoked, the court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations, and in carrying out that function it must balance the duty and benefit of the developer under the permission as granted against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or suchlike extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is necessary to ensure that the development is carried out in conformity with the permission. An order merely

restraining the developer from proceeding with the unpermitted work would not alone fail to achieve that aim but would often make matters worse by producing a part-completed structure which would be offensive to the eye as well as having the effect of devaluing neighbouring property.”

483. The above passages are clearly applicable in the context of s.160 of the Act of 2000 and were cited with approval by McKechnie J. in the High Court case of *Leen v. Aer Rianta* [2003] 4 I.R. 394 (considered later below).

iv. *Dublin Corporation v. McGowan*

484. In *Dublin Corporation v. McGowan* [1993] 1 I.R. 405, Dublin Corporation brought an application under s.27(2) of the Act of 1976 in respect of what it contended was an unauthorised use of certain property in Rathmines, by a party who, though something of an ‘innocent abroad’ when it came to planning matters, had acted in good faith in proceeding in accordance with what he perceived his obligations under planning law to be. Refusing the relief sought, Keane J. made the following observations, at 411–412, that are applicable by analogy to the court’s exercise of its discretion under s.160:

“[Section 27(2)] was not intended to enable the planning authority to secure a partial completion of a development. It is intended to ensure that a development is completed in accordance with the planning permission and does not apply to the present situation....It is intended as a ‘fire brigade’ section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act....It would

be manifestly unjust to have the draconian machinery of the section brought into force against a person who behaved in good faith throughout.”

v. White v. McInerney Construction Ltd.

485. In *White v. McInerney Construction Ltd.* [1995] 1 ILRM 374, the Supreme Court again pointed to the breadth of discretion enjoyed by the High Court under s.27 of the Act of 1976 (since supplanted by s.160 of the Act of 2000). Blayney J., giving judgment for the court, states, at 380:

“The court has a very wide discretion under s.27. It is admirably expressed by Barrington J. in his judgment in Avenue Properties Ltd. v. Farrell Homes Ltd. [1982] ILRM 21 at p.26:

‘However, so far as the High Court is concerned the order is discretionary. The term ‘injunction’ is not used in s.27 but it is clear that the order contemplated by the section is an order in the nature of an injunction whether restraining or mandatory. The reference to ‘interim’ and ‘interlocutory’ orders in s.27(3) appears to reinforce this interpretation. It seems to me therefore that the High Court in exercising its discretion under s.27 should be influenced, in some measure, by the factors which would influence a court of equity in deciding to grant or withhold an injunction.

At the same time the jurisdiction under s.27 is peculiar in that the applicant need have No. interest in the land the subject matter of the application and, it would appear, need have suffered No. damage beyond such damage as all citizens suffer when the Planning Act is broken and public amenities impaired. From the foregoing it would appear that applicants under s.27 could range from a crank or busybody with no interest in the matter at one end of the scale to, on the other end of the scale, persons who have suffered real damage through the unauthorised development or who, though they have suffered no damage peculiar to themselves, bring to the attention of the court outrageous breaches of the Planning Act which ought to be restrained in the public interest. In these circumstances it appears to me all the more important that the court should have a wide discretion as to when it should and when it should not intervene.”

vi. *Grimes v. Punchestown Developments Co. Ltd.*

486. In *Grimes v. Punchestown Developments Co. Ltd.* [2002] 1 ILRM 409, the High Court was presented with an application under s.27 of the Act of 1976 for an order preventing the ‘Creamfields’ pop concert from going ahead at a racecourse, such usage being contended to be a material change of use of the racecourse. At pp.5–6 of his judgment, Herbert J. observes, *inter alia*:

“Following upon what was said by Henchy J. in the case of Morris v. Garvey – I start with the proposition that Mr Grimes is entitled...ex debito justitiae [effectively as of right] to the relief he seeks unless there are some exceptional circumstances in the facts of this particular case which should persuade me not to make the order sought. I think there are such circumstances and I now propose to set out what I think they are....

(3) That the official watchdog that has been charged by the Oireachtas with supervising the proper planning and development of this area, though fully aware of all the matters relevant to a proper determination and fully aware of the conditions which were attached by the same planning authority to other planning applications made by Punchestown Development Co Ltd has clearly decided not to proceed under either s.26 or s.27 of the Act.,.,

(5)...I think it is something that I can take into account on the basis that it would be unjust and disproportionate to insist upon the letter of the law being observed where there is no evidence of any demonstrable or significant or lasting or even transitory damage to or interference with the planning and development of the Punchestown area. I think the maxim is that justice must be done despite the consequences not that the law must be strictly enforced despite the consequences....

(7) That there is evidence before me that the event which is going to take place has been known and has been widely publicised for a very considerable period, and notwithstanding this the applicant did not, and I accept that the applicant has

no obligation so to do, take any steps. This is not a question of the balance of convenience as in an injunction case but I think I can take what the applicant did not do into account in deciding whether or not I should exercise my discretion to refuse the relief sought under s.27 of the 1976 Act.”

vii. *Leen v. Aer Rianta c.p.t.*

487. In *Leen, op. cit.*, Aer Rianta had received planning permission to extend Shannon Airport, subject to certain conditions. Mr Leen sought relief under s.160 of the Act of 2000, alleging failure to comply with certain of the planning conditions. McKechnie J. held that there had been a breach of the planning conditions but, on public interest grounds, declined to grant the relief sought. In the course of his judgment, McKechnie J. considered the then applicable authorities, observing, at 409 *et seq*:

“[N]otwithstanding Morris v. Garvey...the caselaw demonstrates the discretionary nature of the old s.27, which in my view has been carried forward to the new s.160. In my opinion, this discretion, as correctly understood, has not been circumvented in any way by Mahon v. Butler [1997] 3 I.R. 369....

[T]he discretion, above mentioned, remains unaltered but, of course, can only be exercised when the relief sought is otherwise within the limits of the section. Therefore, I am of the view that the principles set forth in Stafford v. Roadstone Ltd....and O’Connor and Spollen Concrete Group Ltd. v. Frank Harrington Ltd. (Unreported, High Court, Barr J., 28th May, 1987) remain good law to this day and that the reference to ‘exceptional circumstances’ by Henchy J. in Morris v.

Garvey...must be understood and applied against the background of this discretion.

Finally, on the generality of the discretion point it seems to me that, subsequent to Morris v. Garvey...the courts have tended to individualise each case and decide it accordingly, rather than to inquire as to whether the resulting circumstances fell within any of the illustrations mentioned in that judgment. For example, in some cases where there was no question of bad faith or lack of candour, injunctions issued, whereas in others relief was refused, even though the facts did not sit comfortably with the exceptions identified by Henchy J. in Morris v. Garvey.

In deciding whether to grant an injunction in this case and, if so, on what terms, there are certain matters to which particular attention shall be given. These include-

- (a) the conduct, position and personal circumstances of the applicant;*
- (b) the question of delay and acquiescence;*
- (c) the conduct, position and personal circumstances of the respondent;*
- (d) the public interest, to include:-*

(i) as part of that interest, the business, commercial and tourist activities conducted at the airport and in the wider general area and

(ii) as members of the public, those who derive any employment benefit, either directly or indirectly, from the airport's overall operation as well as persons in the wider community and those who avail of or utilise the respondent's facilities."

viii. Altara Developments Limited v. Ventola Limited

488. In *Altara Developments Limited v. Ventola Limited* [2005] IEHC 312, application was made under s.160 to halt the continuing construction of a residential development in Delgany, Co Wicklow, which it was alleged was being finished in breach of a planning condition imposed by An Bord Pleanála. In refusing the relief, O'Sullivan J. concluded his judgment with the following observations, at 11:

"Most of all I am taking into account that the respondent has proceeded with caution and care in dealing with this development....This is not a case of a developer pushing ahead regardless. On the contrary it has proceeded...with the active support and blessing of the planning authority and in the reasonably held opinion that it was not in breach of the planning permission."

ix. *Wicklow County Council v. Forest Fencing t/a Abwood Homes*

489. *Wicklow County Council v. Forest Fencing t/a Abwood Homes* [2008] 1 ILRM 357 was a case concerning an alleged default planning permission for a change of use from a golf course to a timber products manufacturing and sales facility, notwithstanding that such development was in material contravention of the development plan for the relevant area. In granting the injunctive relief, Charleton J. observed as follows, at paras 49–50:

“The balance of authority is in favour of the court exercising its discretion to make a declaration that planning permission has been granted where the court has found as a fact that there is a default permission in favour of a developer. The court is there to uphold the law. Its discretion should not be used to change the law or...its operation....[W]here...[as in the case before Charleton J.]...the court has found that there is No. default permission....[t]he discretion of the court...is very limited. The balancing of that discretion must start with the duty of the court to uphold the principle of proper planning for developments under clear statutory rules. Then, the court should ask what might allow the consideration of the exercise of its discretion in favour of not granting injunctive relief....

To fail to grant injunctive relief in these circumstances, on these facts, would be to cause a situation to occur where the court is effectively taking the place of the planning authority. The court should not do that.”

x. *Cork County Council v. Slattery Pre Cast Concrete Ltd.*

490. In *Cork County Council v. Slattery Pre Cast Concrete Ltd.* [2008] IEHC 291, a case in which a s.160 application was made concerning what was argued to be so great an extension of the scale and extent of a business that certain physical structures upon, and associated use of, a particular were said to be unauthorised. In considering the High Court's discretion to refuse a s.160 application, Clarke J. observed as follows, at para.12.1:

"[T]he starting point has to involve a recognition that unauthorised development is unlawful and that a court should be slow to tacitly accept the unauthorised nature of a development by giving any undue leeway to the party who had been guilty of the unauthorised development in the first place."

xi. *Wicklow County Council v. Kinsella*

491. The recent decision of the High Court in *Wicklow County Council v. Kinsella* [2015] IEHC 229 offers a persuasive analysis of why there needs to be rigorous compliance with the planning laws, Kearns P. observing as follows, at 53:

"I believe in this case one must commence by considering why we have planning laws and why they must be enforced. In one sense the reason is obvious: without effective planning laws and adequate enforcement procedures to ensure compliance with them, anarchy would rule the roost with regard to all sorts of developments. Dangerous, unsuitable and haphazard developments would be likely, some of which might be constructed or established in locations where a

single citizen could inconvenience neighbours, destroy areas of natural beauty, disrupt traffic and even undermine the capacity of the community to engage in normal social function and activities. In short, there would be nothing to stop a 'free for all' development culture from running riot."

492. It seems to the court that, *inter alia*, the above text evinces good reason why Mr Moore would bring the within proceedings, notwithstanding that there are some aspects to the s.14 consent with which, as counsel for the Minister rightly indicated, Mr Moore likely agrees, such as, for example, the Minister's insistence as to the strengthening of the boundary wall behind the properties to which Preservation Order No. 1 of 2007 extends. But partial agreement on the incidental does not preclude complete disagreement on the substantial. So, while Mr Moore may agree that some of what the Minister has done is beneficial, it does not follow that he cannot in good faith contend that all of what the state has done is unlawful. And development that is not lawful yields the difficulties to which Kearns P. refers in the above-quoted text.

493. In passing, although this Court agrees with the above-quoted text from the decision of Kearns P. in *Kinsella*, it must respectfully observe that it does not agree with the later *obiter* view which Kearns P. offers, at 73, without reference to any supporting precedent, that "*a Circuit Court appeal, because it admits of no further appeal, is not an appropriate forum in which to introduce or lay down novel legal principles which may have far reaching effects and consequences*". Judgments are, of course, but notes on the margins of the law, and must be written and read as such. Even so, the common law, and our understanding of constitutional and statute-law, continues ever to evolve. Consequently any one case may mark, however unexpectedly, a leap forwards in that continuing process of evolution. There

appears to this Court to be no reason why this natural evolutionary process should be halted in Circuit Court appeals but continue unabated across the remaining spectrum of the High Court's activities. Indeed, the principle that Kearns P. espouses in the closing lines of *Kinsella* seems to collapse on its own logic: were such a principle to be applied, were the High Court to elect of its own volition (for it would be no more) to constrain itself in Circuit Court appeals in the manner that Kearns P. suggests, that could well result in an injustice being done in any one such appeal because of a perceived impediment to the evolution of principle or precedent. This would be the very antithesis of what the courts seek ever to achieve, it would render the judge on appeal little more than a judicial jobsworth, and would constitute a 'far-reaching effect and consequence' which this Court is entirely confident that Kearns P., now retired, would find entirely objectionable were it ever to occur in practice.

494. Returning, however, to the issues at hand, Kearns P. makes a number of generally helpful observations concerning the jurisdiction, powers and discretion of the court under s.160 of the Act of 2000. These might be summarised as follows (the page numbers shown refer to page numbers in the judgment of Kearns P.):

- (1) the statutory discretionary power exercised under s.160 must be exercised constitutionally (p.55).
- (2) the court must act proportionately with regard to the particular transgression in respect of which sanction is being sought (p.55).
- (3) key relevant factors include (a) the reasonableness of the conduct of both parties, (b) the *bona fides* of the respondent in dealing with the planning

authority, (c) the extent to which the public may be adversely affected, (d) any delay in bringing the application, (e) whether the error is merely technical or minor, (e) any undue hardship on the respondent, (f) the extent to which the respondent contributed to the situation, (g) the opinion of the planning authority. (pp. 56–57).

- (4) where the breach of the planning code is a gross one, the discretion of the court is limited, particularly where a developer has not acted *bona fide* (p.57).
- (5) the courts have historically shown themselves to be generally unsympathetic to hardship which was eminently foreseeable and which results from the culpable behaviour of a developer/landowner (p.58).
- (6) the public and community interest in protecting the environment and the integrity and efficacy of planning law enforcement ‘trumps’ Article 40.5 of the Constitution (p.58 *et seq*).

[Court Note: The judgment of Kearns P. in *Kinsella*, both as regards point (6) and generally throughout, is expressed in strong terms and represents a complete *volte face* from previous judgments of Hogan J. in *Wicklow County Council v. Fortune (No. 1)* [2012] IEHC 406 and, more particularly perhaps, *Fortune v Wicklow County Council (No. 2)* [2013] IEHC 255. While the constitutional point addressed by Kearns P. and Hogan J. does not arise for adjudication in these proceedings, this Court would express some

hesitancy at treating Kearns P.'s proposition, as summarised at (6), as holding true in every instance. Judgments are barnacles that encrust the firm rock of law; both are ever subject to the tides of time and circumstance. Some future case may yet present in which a more nuanced view of the relationship between Article 40.5 of the Constitution, on the one part, and the planning code, on the other, will require to be formulated. That this should be so is entirely unsurprising: the common law and our court-administered system of justice are uncommonly versatile in their practical application. And when it comes to the court's power under s.160, variability of result is, of course, the essence and the end of all discretion.]

- (7) Section 160 does not entrust to the court the function of reviewing, altering or setting aside a planning authority's decision concerning the granting or withholding of permission. Subject to limited exceptions established by statute, decisions as to the proper planning and development of any area are peculiarly the function of the planning authority and of An Bord Pleanála on appeal. (pp. 68–9).
- (8) The jurisdiction conferred by s.160 is a special statutory original jurisdiction and not a subsidiary aspect of some equitable jurisdiction to enforce public law. Section 160 makes no provision as regards making declarations.

C. Matters of principle versus questions of principal.

495. The Minister for Arts, *etc.* has made mention of certain commercial implications that may flow from the granting of s.160 relief (in the form of financial levies that may be payable by the Minister under her contracts with certain contractors). Judges pay taxes like everyone else and this Court, wearing its cloak as a taxpayer, is mindful of the need for the Executive to be prudent when it comes to the expenditure of public monies. However, weighing heavily in the scales as a countervailing force in this regard is the fact that there is a strong public interest in the protection of public monuments and sites of historical interest. Independent of the foregoing, and in the particular context of the planning code, the court notes too that Nos. 14–17 Moore Street are protected structures under the Act of 2000. There is a strong public interest in terms of the protection of such structures and in ensuring that any development related to same is properly authorised by planning permission. Indeed the planning inspector in her report concerning Planning Permission Ref. 2479/08/PL.29N.232347, stated as follows, at 77:

“By reason of their inclusion on the record of protected structures, the National Monument properties at No. 14–17 Moore Street are also subject to the higher order of protection provided for in Part IV of the Planning and Development Act, 2000 for protected structures.”

496. In this regard the court cannot but note that the works to which the present s.160 application relates are demolition works which, were they to proceed, would bring about largely permanent results. And there is too the consideration, now touched upon several times by the court that insofar as the revised works and change of use were not subject to a suitably

focused environmental impact assessment, that too presents a further point of concern and objection.

497. As always, counsel have laboured hard in the vineyard and plucked from the ever-fruitful vines of precedent a trio of judgments that are of interest when it comes to the issue of reconciling matters of principle with issues of principal. So, for example, in *Wicklow County Council v. Forest Fencing t/a Abwood Homes* (considered above), Charleton J. granted an injunction notwithstanding claims as to the effect of such order on the respondent's livelihood and employment. In *Limerick County Council v. Tobin* (Unreported, High Court, 15th August 2005), Peart J. granted an interlocutory injunction restraining an alleged unauthorised development, notwithstanding the objections of the respondent that his business, and the jobs of his employees, would thereby be placed in jeopardy. And in *Callan v. Boyle* (Unreported, High Court, 20th March 2007), in which an order was granted restraining certain quarrying, Murphy J. observed as follows, at para.2.6.9:

“While the court, of course, considers the fact that the respondent is conducting a business which supplies materials which are in demand, employs 20 persons and contributes indirectly to the livelihood of some 100 suppliers and subcontractors operating in a radius of 10 to 15 miles of the quarry the issue of a material change of use (and the consequential requirement for planning permission) is a matter in respect of which the public have an interest. The planning authority have not granted planning, the court must also consider the findings of the planning inspector and, the applicant and his wife's interest have got to be considered by the court.”

D. Technicality and triviality.

498. It is settled law that where a breach of planning law is of a technical or trivial nature, the court should, in general, exercise its discretion to withhold relief. A few examples suffice by way of support for this statement:

- in *Dublin Corporation v. McGowan*, as mentioned above, Keane J., at 411 noted that s.27 of the Act of 1976, the predecessor to s.160 “*is intended as a ‘fire brigade’ section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act.*”
- in *O’Connell v. Dungarvan Energy Limited* (Unreported, High Court, 27th February, 2001), Finnegan J. approved the following well-known observation of Denning M.R. in *Lever (Finance) Ltd. v. Westminster Corporation* [1971] Q.B. 22, 230:

“In my opinion a planning permission covers work which is specified in the detailed plans and any immaterial variation therein. I do not use the words ‘de minimis’ because that would be misleading. It is obvious that, as the developer proceeds with the work, there will necessarily be variations from time to time. Things may arise which were not foreseen. It should not be necessary for the developers to go back to the planning authority for every immaterial variation. The permission covers any variation which is not material.”

- in *Cork County Council v. Cliftonhall Limited* (Unreported, High Court, 6th April, 2001), the applicant sought a planning injunction in light of the fact that the height of one of the blocks on the site deviated from the plans lodged. On the facts, Finnegan J. found that the deviation was an increase of 0.5 metres. He held, with what he stated was some reluctance, that the deviation was immaterial, in light of a number of factors, including the fact that the plans expressly stated that the levels shown were proposed and might vary depending on ground conditions.

- in *Avenue Properties v. Farrell*, considered above, Barrington J. refused to grant relief under s.27 of the Act of 1976 because despite the fact that the development differed from the building for which relief had been granted, the effect of the changes was in fact to reduce its size. In the end, Barrington J. adjourned the application generally to allow the respondents to seek retention permission.

Chapter 61

The Court's Discretion – an Attempted Synthesis of Principle

499. Is it possible to arrive at a cohesive synthesis of principle from the various authorities to which the court has been referred on the issue of its discretion under s.160 of the Act of 2000? It seems to this Court that the various principles identified below arise from the varying precedents considered above:

I.

SUPREME COURT AUTHORITIES

[All principles are stated as referring to s.160 of the Act of 2000, albeit that some were crafted in the context of s.27 of the Act of 1976].

i. Breadth of Discretion

- [1] The court has a very wide discretion under what is now s.160. (*White*).

ii. Rationale for Discretion

- [2] The wide standing to bring a s.160 application makes it all the more important that the court should have a wide discretion as to when it should and when it should not intervene. (*White, Avenue Properties* (as approved by Supreme Court in *White*)).

iii. Role of Court

- [3] When s.160 is invoked, the court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations. (*Morris*).

- [4] It would require exceptional circumstances before the court should refrain from making whatever order is necessary to ensure that the development is carried out in conformity with the permission. (*Morris*).

iv. Balancing Exercise for Court

- [5] In carrying out its function as guardian and supervisor, the court must balance the duty and benefit of the developer under the permission, as granted, against the environmental and ecological rights and amenities of the public, present and future, particularly those closely or immediately affected by the contravention of the permission. (*Morris*).

v. Relevance of Equitable Considerations

- [6] The High Court in exercising its discretion under s.160 should be influenced, in some measure, by the factors which would influence a court of equity in deciding to grant or withhold an injunction. (*White, Avenue Properties* (as approved by Supreme Court in *White*)).

vi. Developer Behaviour

- [7] The court has judicial notice that developers who have contravened the conditions of the development permission have previously knowingly proceeded with unauthorised development at such a speed and to such an

extent as they hoped would enable them to submit successfully that the courts discretion should not be exercised against them, on the ground that the undoing of the work done would cause them undue expense or trouble. (*Morris*).

- [8] Such conduct as is referred to in [7] is not a good reason for not making an order requiring work carried out in such circumstances to be pulled down. (*Morris*).

II.

HIGH COURT AUTHORITIES

[All principles are stated as referring to s.160 of the Act of 2000, albeit that some were crafted in the context of s.27 of the Act of 1976].

vii. Rationale for s.160

- [9] Section 160 makes each citizen a watchdog for the public. (*Stafford*).
- [10] Section 160 guards against the kind of case where the planning authority may not have been as vigilant in the protection of the public's interest as it should have been. (*Stafford*).
- [11] Section 160 is intended to ensure that a development is completed in accordance with the planning permission. (*McGowan*).

[12] Section 160 is intended as a ‘fire brigade’ section to deal with an urgent situation requiring immediate action to stop clear breaches of the Act (*McGowan*).

viii. Role of Court

(See also Supreme Court Authorities at (iii))

[13] The court is there to uphold the law. Its discretion should not be used to change the law or its operation (*Forest Fencing*).

[14] The court should avoid a situation where, by failing to grant injunctive relief, it would cause a situation to occur where it would effectively be taking the place of the planning authority. (*Forest Fencing*).

[15] The starting point in a s.160 application has to involve a recognition that unauthorised development is unlawful and that a court should be slow to tacitly accept the unauthorised nature of a development by giving any undue leeway to the party who had been guilty of the unauthorised development in the first place. (*Slattery Pre Cast Concrete*).

[16] Section 160 does not entrust to the court the function of reviewing, altering or setting aside a planning authority’s decision concerning the granting or withholding of permission. Subject to limited exceptions established by statute, decisions as to the proper planning and development of any area are

peculiarly the function of the planning authority and of An Bord Pleanála on appeal. (*Kinsella*).

ix. Breadth of Discretion

(See also Supreme Court Authorities at (i))

[17] The statutory discretionary power exercised under s.160 must be exercised constitutionally. (*Kinsella*).

[18] The court must act proportionately with regard to the particular transgression in respect of which sanction is being sought (*Kinsella*).

[19] Given that a person who is not the planning authority and who has no interest in the lands can apply for an injunction, it is all the more important that the High Court should have a wide discretion whether or not to issue an injunction. (*Stafford*)

[20] The Oireachtas could not have intended that the High Court should have no discretion but to issue an injunction when the plaintiff has no interest in the lands and the breach of the planning law on the part of the defendant has been innocent or technical and can be put right by an application for planning permission. (*Stafford*)

[21] A s.160 order should be made if there is an unauthorised use of the land, unless exceptional reasons are shown by the respondents. (*Matra*).

[22] Subsequent to *Morris*, the courts have tended to individualise each case and decide it accordingly, rather than to inquire as to whether the resulting circumstances fell within any of the illustrations mentioned in that judgment. (*Leen*).

[23] Where the breach of the planning code is a gross one, the discretion of the court is limited, particularly where a developer has not acted *bona fide*. (*Kinsella*).

x. Balancing Exercise for Court

(See also Supreme Court Authorities at (iv))

[24] The question of whether or not to grant s.160 relief is not a question of the balance of convenience as in an injunction case but the court can take what the applicant did not do (so, for example, delay arising) into account in deciding whether or not to exercise its discretion to refuse relief. (*Grimes*).

[25] The public and community interest in protecting the environment and the integrity and efficacy of planning law enforcement ‘trumps’ Article 40.5 of the Constitution (*Kinsella*). (*Caveat lector*: see this Court’s comments concerning this principle in its consideration of *Kinsella* above).

xi. Developer Behaviour

(See also Supreme Court Authorities at (vi))

[26] A relevant consideration in refusing s.160 relief is that a developer has proceeded with caution and care, with the active support and blessing of the planning authority and in the reasonably held opinion that it was not in breach of the planning permission. (*Altara Developments*).

[27] It would be manifestly unjust to have the draconian machinery of the section brought into force against a person who behaved in good faith throughout. (*McGowan*).

xii. Factors Relevant to Exercise of Discretion

[28] In deciding whether to grant an injunction under s.160 and, if so, on what terms, there are certain matters to which particular attention shall be given, including (a) the conduct, position and personal circumstances of the applicant; (b) the question of delay and acquiescence; (c) the conduct, position and personal circumstances of the respondent; and (d) the public interest. (*Leen*).

[29] Key relevant factors to the exercise of the s.160 jurisdiction include (a) the reasonableness of the conduct of both parties, (b) the *bona fides* of the respondent in dealing with the planning authority, (c) the extent to which the public may be adversely affected, (d) any delay in bringing the application,

(e) whether the error is merely technical or minor, (f) any undue hardship on the respondent, (g) the extent to which the respondent contributed to the situation, and (h) the opinion of the planning authority. (*Kinsella*).

xiii. Factors Justifying Refusal of Relief

[30] A relevant factor justifying refusal of relief under s.160 is that the planning authority is satisfied not to proceed against the developer. (*Grimes*).

[31] A relevant factor justifying not granting relief under s.160 is that it would be unjust and disproportionate to insist upon the letter of the law being observed where there is no evidence of any demonstrable or significant or lasting or even transitory damage to, or interference with, planning and development: the maxim is that justice must be done despite the consequences not that the law must be strictly enforced despite the consequences. (*Grimes*).

xiv. Relevance of Equitable Considerations

(See also Supreme Court Authorities at (v))

[32] The jurisdiction conferred by s.160 is a special statutory original jurisdiction and not a subsidiary aspect of some equitable jurisdiction to enforce public law. Section 160 makes no provision as regards making declarations. (*Kinsella*).

xv. Relevance of Financial Disadvantage to Developer

[33] The courts have historically shown themselves to be generally unsympathetic to hardship which was eminently foreseeable and which results from the culpable behaviour of a developer/landowner (*Kinsella*).

[34] That financial disadvantage results to the subject of a s.160 injunction need not preclude the granting of such relief (*Forest Fencing, Tobin, Callan*).

xvi. Technical Breaches

[35] Where a breach is of a technical or trivial nature, the court should, in general, exercise its discretion to withhold relief. (*Avenue Properties, O'Connell, Cliftonhall; Lever (Finance) Ltd.* [Court of Appeal (Eng. and Wales)]).

Chapter 62

The Court's Discretion – Application of Principle

500. The court turns first to apply to the facts at hand the principles identified by the Supreme Court and recited in the previous chapter.

501. Re. [1]. Noted.

502. Re. [2]. Noted.
503. Re. [3]. The court is therefore required to ensure that the works to be done by the Minister for Arts, *etc.* conform to the requirements of the planning permission.
504. Re. [4]. The court does not see any such exceptional circumstances presenting. If anything the exceptional circumstance presenting in this case is the great historical/public interest arising when it comes to developments at or by the national monuments that the court considers to exist on Moore Street and in its environs.
505. Re. [5]. Again, weighing heavily in the court's considerations is the great historical/public interest arising when it comes to developments at or by the national monuments that the court considers to exist on Moore Street and in its environs.
506. Re. [6]. The relevant factors are more clearly identified in *Leen* and *Kinsella* and are considered below.
507. Re. [7] and [8]. The developer (here the Minister for Arts, *etc.*) has sought to behave properly throughout.
508. The court turns next to apply to the facts at hand the principles identified by the High Court and listed above.

509. Re. [9]. Noted.
510. Re. [10]. The planning authority and the Minister appear to have proceeded on the basis that the only national monument presenting on Moore Street and in its environs are as identified in Preservation Order No. 1 of 2007. The court has concluded elsewhere above that there are other national monuments presenting.
511. Re. [11]. The development at issue in the within application is not being completed in accordance with the planning permission.
512. Re. [12]. This case concerns potential demolition or damage to what the court has recognised to be national monuments. This is a 'fire brigade' situation.
513. Re. [13]. Noted.
514. Re. [14]. See comment re. [3].
515. Re. [15]. Noted.
516. Re. [16]. See comment re. [3].

517. Re. [17]. Noted.
518. Re. [18]. Noted.
519. Re. [19]. Noted.
520. Re. [20]. See comments re. [4] and [5]. The court does not consider that the transgressions arising can be viewed as technical given the national monuments dimension; nor does the court consider that unwarranted damage or destruction to a national monument can be put right by an application for planning permission.
521. Re. [21]. There is a significant concern regarding unauthorised use: the planning permission refers solely to No. 16 being used as a commemorative centre.
522. Re. [22]. Noted, though the obvious preference of any court is to act consistently with general practice (and, of course, it must follow binding precedent).
523. Re. [23]. See comments re. [20].
524. Re. [24]. There has been some delay on the part of Mr Moore. To the court's mind this rather pales in comparison with the great historical and public interest attaching to developments at or by

the national monuments that the court considers to exist on Moore Street and in its environs.

525. Re. [25]. Article 40.5 of the Constitution is of no relevance to the present proceedings.
526. Re. [26] See comments re. [7] and [8]. These considerations have to be and [27]. weighed against the heavily countervailing historical and public interest referred to in comments re. [4] and [5].
527. Re. [28]. The court does not consider any deficiency to present as regards the conduct, position or personal circumstances of Mr Moore. As to delay, see comment re. [24]. As to the conduct, position and personal circumstances of the Minister for Arts, *etc.*, see the comment re. [7] and [8]. As to the public interest presenting, see the comment re. [4] and [5].
528. Re. [29]. The only factors additional to [28] appear to be (e) and (h). As to (e), see comments re. [20]. As to (h), see comment re. [10].
529. Re. [30]. Noted, though this seems offset here by the court's observation re. [10].
530. Re. [31]. See comments re. [4] and [5]. Allowing unauthorised development that includes demolition work to proceed in the

context of one or more national monuments appears to this Court to raise issues of significant and non-transitory concern.

531. Re. [32] Noted, though this principle needs to be cautiously applied given the principle identified by reference to binding Supreme Court precedent at [6].

532. Re. [33] The court understands that the Minister may be exposed to and [34] financial levies under such contracts as she has already concluded with on-site contractors. It does not appear to the court that the injunctive relief sought would, in and of itself, present immediate and direct financial consequences for Chartered Land. Notwithstanding such financial risk as presents, weighing heavily in the court's considerations is the great historical/public interest arising when it comes to developments at or by the national monuments that the court considers to exist on Moore Street and in its environs (and of course the state of the law as noted at [34]).

533. Re. [35]. See comments re. [20].

PART 6

THE SECOND S.160 PROCEEDINGS

Chapter 63

Overview

534. In these proceedings, Mr Moore is again seeking orders pursuant to s.160 of the Act of 2000, this time directing the Minister for Arts, *etc.* to remove a large vinyl/polymer sheet banner which has been mechanically fixed to the façade of Nos. 14–17 Moore Street which, as the reader will by now know, are protected structures. Mr Moore maintains that the affixing of the banner represents unauthorised development in the form of unauthorised works and a material change of use. He further contends that the banner in question has caused or is likely to cause damage to protected structures and is also seeking orders for various reconstruction works.

Chapter 64

Reliefs Sought

535. To put a finer legal gloss on the details recited in the previous chapter, Mr Moore is seeking the following reliefs:

- (1) an order directing the Minister for Arts, *etc.* to remove, subject to the supervision and direction of the court, the unauthorised works and/or unauthorised structure comprising the fixing or application of the advertising/public information signage comprising a screen-printed image over a vinyl/polymer sheet that has been mechanically fixed to a timber batten sub-structure which itself has been mechanically fixed to the front exterior façades at Nos. 14-17 Moore Street;
- (2) an order directing that, as far as possible, the Minister restore, subject to the supervision and direction of the court, the front exterior façades of Nos. 14-17 Moore Street insofar as such façades have been damaged and/or altered by the affixing or the application of the said advertising/public information signage, and that such restoration works should not materially affect any or all of Nos. 14-17;
- (3) a declaration that the affixing of the said advertising/public information signage constitutes unauthorised development and/or an unauthorised structure and/or development which has been carried out without planning permission;
- (4) a declaration that the affixing of the said advertising/public information signage constitutes unauthorised development and/or an unauthorised structure which has been carried out in the absence of a declaration under s.57 of the Act of 2000; and

- (5) certain ancillary reliefs.

Chapter 65

Background Facts

536. On 9th November, 2015, agents of the Minister for Arts, *etc.* affixed a large banner advertisement across the façade of the protected structures and national monument at Nos. 14–17 Moore Street. This banner comprises a green-blue screen-printed image over an opaque vinyl/polymer sheet that has been mechanically fixed to a timber batten sub-structure which itself has been mechanically fixed to the front exterior façades of Nos. 14–17. In dimension, the banner is approximately 4.2 metres high x 24 metres wide, with the top of the banner being about 8.2 metres above street level. As a result, the first and second floors of Nos. 14–17 are now largely concealed by the said signage.

537. In terms of evidence, Mr Moore’s case concerning the signage relies largely on certain expert evidence of Mr James Kelly, a conservation architect. In an inspection carried out on 1st December last from Moore Street, which is of course a public street, Mr Kelly observed that the banner advertisement interferes with the brick frontage of the exterior façades of the buildings located at Nos. 14–17. He considers that the fixings holes will affect the brick insofar as the drill holes for affixing the batten sub-structure will need to be made good upon completion of any works done or to be done at the relevant buildings. Mr Kelly is also of the view that purported damage to the outer membrane of the brick façades to Nos. 14–17, which he maintains has been caused by the construction and affixing of the batten sub-structure and

banner to the buildings, will ultimately require that the brickwork be treated so as to prevent further damage to the fabric of Nos. 14–17.

538. In passing, the court notes that a report from Ms Gráinne Shaffrey, the director and principal of Shaffrey Associates, a conservation architecture practice, has been exhibited among the affidavit evidence of Mr Terry Allen, a principal officer of the National Monuments Service, in which Ms Shaffrey opines that certain of the risk identified by Mr Kelly is “*unlikely*”, with Mr Allen separately averring, in effect, that ‘all will be well’ as regards the condition of Nos. 14–17 following the removal of the banner. None of the risk identified would arise, of course, were it not for the erection of the banner. The court prefers the evidence of Mr Kelly, a conservation architect, to that of Mr Allen, the extent of whose expertise in the conservation of architecture is unclear. The court notes too that Ms Shaffrey accepts that there may be some risk to the national monument arising – and Mr Kelly in his final affidavit counters even this conclusion of Ms Shaffrey with the professional opinion that the experience of his consultancy is that there is a very high risk of brick saturation arising from what has occurred. Thus the court is faced on the one part with an acknowledgement of some potential for risk of damage to a national monument coupled with a general opinion that ‘all will be well’, and on the other part with a professional opinion that there is a strong risk of damage arising. Mindful that what is at stake is the proper maintenance of a suite of buildings acknowledged by all the parties to these proceedings to be a national monument, the preservation of which is a matter of national importance, the court instinctively inclines to favour the cautious views of Mr Kelly over the more sanguine opinion of Ms Shaffrey and the well-intentioned assurances of Mr Allen.

539. After these second s.160 proceedings were commenced, the Minister for Arts, *etc.* furnished in evidence a s.14 consent dated 18th September, 2015 from the Minister, asserting that the affixing of the said signage accords with Consent C494 (the original s.14 consent) and imposing an additional condition “*to be read in conjunction with the conditions attached to Consent 494*”, namely that “[r]egular inspections will be carried out to ensure that the banner remains in good condition and that any fixings that fall are renewed promptly.”

540. On its own terms the validity of the revising consent depends on the continuing validity of the consent of 16th July 2013, as varied on 30th April 2014. The difficulty arising for the Minister in this regard is that the court has already concluded elsewhere above that Consent C494 is now a nullity. But what if the court is mistaken in this regard? The court does not consider that it is mistaken; however, it appears to the court that the erection of the banner contravenes planning law in any event by virtue of its being an unauthorised development. The court’s rationale for this conclusion is identified hereafter.

Chapter 66

Section 260 of the Act of 2000

541. The Minister has raised again in the context of this application the contention that s.260 of the Act of 2000 affords the Minister for Arts, *etc.* a veritable *carte blanche* when it comes to doing what she wants in relation to national monuments, provided she acts in accordance with the National Monuments Acts. The court has considered and rejected this argument elsewhere above. Development at the national monument is subject to the dual governance of the planning code and the National Monuments Acts.

Chapter 67

Is the Erection of the Banner an Act of Maintenance?

542. Having reached the conclusions that it has regarding the legal purport of s.260, the court proceeds below to consider various issues arising under the planning code. However, it pauses first to address an unusual argument that was initially advanced by the Minister for Arts, *etc.* pursuant to s.12 of the Act of 1930, though it is not clear to the court whether much if any reliance continues now to be placed upon this line of contention.

543. Section 12 of the Act of 1930 provides:

“(1) Where the Commissioners...are the owners or the guardians of a national monument, the Commissioners...shall maintain such monument and shall, in the case of any monument of which they are guardians, have for themselves, their workmen, agents and licensees free access to such monument for the purpose of inspecting it and bringing such materials and doing such acts and things as they may consider necessary or expedient for the maintenance thereof.

(2) Where the Commissioners...are the guardians of a national monument, the Commissioners...may agree with the owner of such monument or with any other person for the maintenance of such monument by such owner or other person either at his own expense or at the cost of the Commissioners....

(3) *Where the Commissioners or a local authority are the owners of a national monument, the Commissioners or the local authority, as the case may be, may, in addition to maintaining the monument, carry out such other work and do such other things as they think fit to or at the monument and for those purposes they and their officers, workmen, agents and licensees shall have free access to the monument and may for those purposes and for the purpose of such maintenance bring onto and use on any land machinery, vehicles, equipment and materials.”*

544. (As mentioned previously above, references to the Commissioners now fall to be construed as references to the Minister for Arts, *etc.*)

545. There is suggestion in some of the affidavit evidence of Mr Allen that the erection of the banner comes within the meaning of “*maintenance*” in s.12.

546. Leaving aside for the moment the application of the planning code to the facts arising (and it does apply), the court must admit to being somewhat mystified as to how the erection of a banner could constitute an act of maintenance. A Google search of the word “*maintenance*” reveals the following definition: “*the process of preserving a condition or situation or the state of being preserved*”. The quoted definition accords with the meaning that is given to the word ‘maintenance’ when used in the present context in ordinary parlance; no doubt a search of any leading dictionary will yield a like definition. How the erection of a banner in circumstances such as those now presenting could ever properly be described in and of itself as “*the process of preserving a condition or situation or the state of being preserved*”

is beyond the wit of this Court. The court can see that a banner might be used (entirely legitimately) to conceal some act of maintenance that is being done, but for its erection to be described in and of itself as an act of maintenance defies comprehension.

547. In any case, neither s.12(1) nor s.12(3) (both were sought separately to be relied upon) is, to borrow from John Donne, “*an island, entire of itself*”. They must be interpreted in light of the objectives of the Act of 1930 as a whole, as well as in the specific context of s.12. The court has indicated previously above that in *Casey and O’Callaghan*, the objective of the Act of 1930 has been stated to be reflected in its long title, specifically the protection and preservation of national monuments. It is difficult to see how hanging a banner from and upon the façades of a national monument such as Nos. 14–17 could be said to be consistent with the protection and preservation of a national monument, not least when there is persuasive evidence on affidavit that the erection of the said banner has been and is causing damage to the national monument. This seems to the court to be the very opposite of preservation and protection.

548. The court has also been referred in this regard to the *noscitur a sociis* (‘it is recognised by partners’) principle of statutory interpretation, whereby the meaning of a term may be revealed by its association with other terms. This principle was memorably explained by Black J. in the following terms in *People v. Kennedy* [1946] 1 I.R. 517, 536:

“A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented.”

549. As it is with pictures, so it is with enactments. Thus when it comes to s.12(3), the sub-section upon which Mr Allen (and so the Minister) now appear to place the greatest reliance, the words “*in addition to*” in that sub-section must fall to be read as meaning in truth ‘ancillary to’. In other words, the other work and other things must be ancillary to the maintenance work. Why would the “*in addition to*” portion be included in a section clearly concerned with maintenance unless the other work and things were related to maintenance? If those other works and things were intended to be wider than work and things related to maintenance, then the section would have concerned itself principally with such other work and things and made maintenance a sub-set of same, not *vice versa* as the section now provides.

550. Suffice it to note that, in light of the foregoing, the court does not accept that the erection of the banner at Nos. 14–17 does or could come within the meaning of “*maintenance*” in s.12 of the Act of 1930.

Chapter 68

Is the Banner an ‘Advertisement’?

551. Turning then to such issues as present under the planning code, the court pauses first to consider what is meant by the word “*advertisement*” when used in the Act of 2000. The word is defined in s.2(1) of the Act of 2000 as meaning, for the purposes of that Act:

“any word, letter, model, balloon, inflatable structure, kite, poster, notice, device or representation employed for the purpose of advertisement, announcement or direction”.

552. It would be fair to say that this is a very wide definition which tries to capture the common-sense notion of what constitutes an advertisement and rather more besides – though the intriguing possibility arises that it would not capture an artistic representation which perhaps has a meaning recognised by some or all passers-by but which goes un-stated in the image itself. Notable for present purposes is that there is no requirement that an advertisement must serve some commercial purpose before it can constitute an “*advertisement*” within the Act of 2000.

553. The term “*advertisement structure*” is also defined in s.2(1), being:

“any structure which is a hoarding, scaffold, framework, pole, standard, device or sign (whether illuminated or not) and which is used or intended for use for exhibiting advertisements or any attachment to a building or structure used for advertising purposes.”

554. It cannot seriously be disputed that the banner at issue in the present application is anything other than an “*advertisement*” hanging upon an “*advertisement structure*”, each as defined above.

Chapter 69

Development, Works and Material Change of Use?

A. "Development", "works" and "use"

555. Section 2(1) of the Act of 2000 states that the word "*development*" bears the meaning assigned it by section 3, with the verb to "*develop*" to be construed accordingly. Section 3(1) states that:

"In this Act, 'development' means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land."

556. Section 3(2) of the Act of 2000 provides that for the purposes of s.3(1), and without prejudice to the generality of what s.3(1) provides, *inter alia*:

"Where any structure or other land or any tree or other object on land becomes used for the exhibition of advertisements...the use of the land shall be taken as having materially changed."

557. Also of note in this context are the definitions of "*works*" and "*use*" in s.2(1), viz:

“‘works’ includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

‘use’, in relation to land, does not include the use of the land by the carrying out of any works thereon”.

B. Application of Law to Facts at Hand

i. Overview.

558. It appears to the court, though in truth it seems beyond doubt, that, by reference to the above-quoted definitions, the erection of the banner has involved works and a material change of use, and hence development.

ii. Works.

559. The erection of the banner was by means of attachment to a timber batten sub-structure which was and is mechanically fixed to the front façades of Nos. 14–17 Moore Street. Having regard to the terminology of s.2(1), this clearly involved the carrying out of “works” in the form of “construction” or “alteration”. Moreover, given that Nos. 14–17 are protected structures, what was done additionally constitutes “works” in the form of the “application

of...other material [here the timber batten sub-structure] to...the surfaces of the...exterior of a structure.”

iii. Material change of use.

560. As mentioned above, s.3(2) of the Act of 2000 provides, *inter alia*, that “*Where any structure...on land becomes used for the exhibition of advertisements...the use of the land shall be taken as having materially changed.*” (The term “*exhibit*”, per s.2(1), “*in relation to an advertisement, includes affix*”). So far as the affixing of the banner to the façade of Nos. 14–17 is concerned, one is clearly presented with what, for the purposes of the Act of 2000 is a material change of use. ‘Changed from what?’ one might ask. The former existing use of Nos. 14–17 was retail use (or potentially no use); certainly there was no use for the exhibition of an advertisement. Moreover, it will be recalled from the consideration elsewhere above of the planning permission granted to Chartered Land on 24th March 2010 (Ref. 2479/08/PL.29N.232347) that it provided for a commemorative centre at 16, Moore Street, only, with different uses contemplated for Nos. 14 (“*change of use to a café/restaurant*”), 15 (“*use as retail with ancillary offices*”) and 17 (“*use as a retail unit with ancillary offices*”). So to the extent that the argument is, or continues to be, advanced for the Minister, that the banner is reflective of the permitted use of the commemorative structure, there is simply no permission for use as a commemorative centre at any of Nos. 14, 15 and 17...yet the banner spans the entire width of Nos. 14–17.

Chapter 70

Unauthorised and Exempted Development

A. Some Terms Defined.

561. The term “*unauthorised development*” is defined in s.2(1) of the Act of 2000 as meaning: “...*in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use.*” Also relevant in this regard are the definitions, again in s.2(1), of “*unauthorised works*” and “*unauthorised use*”, according to which:

“*‘unauthorised works’ means any works on, in, over or under land commenced on or after 1 October 1964, being development other than –*

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G or 37N of this Act, being a permission which has not been revoked and which is carried out in compliance with that permission or any condition to which that permission is subject”,

and

“‘unauthorised use’ means, in relation to land, use commenced on or after 1 October, 1964, being a use which is a material change in use of any structure or other land and being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G or 37N of this Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject”.

562. The combined effect of the above definitions is that a development constitutes an “*unauthorised development*” for the purposes of s.2(1) where it is (a) commenced on or after 1st October, 1964, (b) not exempted development, and (c) not the subject of a grant of planning permission (or is not being carried out in accordance with the conditions of the grant of any permission). The initial erection of the banner in dispute is an event which long post-dates the autumn of 1964. Moreover, there is no planning permission in place, and the court has already rejected the contention made pursuant to s.260 of the Act of 1964 that no planning permission is required. So is the court dealing with an exempted development?

B. Exempted Development?

i. Overview

563. Section 2(1) of the Act of 2000 states that the phrase “*exempted development*” has the meaning accorded it in s.4 of that Act. Section 4 in turn sets out certain types of development that are exempted development and also empowers the Minister for the Environment and Local Government to make regulations providing for further categories of exempted development. In this regard, the Minister has made the Planning and Development Regulations, 2001, as amended. Schedule 2 of these Regulations identifies various categories of exempted development.

564. Notably, there is no category of exempted development in either s.4 of the Act of 2000 or in the Regulations of 2001 that seeks to exempt development carried out by the Minister in relation to a national monument. In this regard, the court has considered elsewhere above, and would refer the reader to the extracted quotes from, the decision of the Supreme Court in *Howard*, in which that court rejected the notion that there was no obligation on the Commissioners for Public Works to obtain planning permission for a visitors’ centre in the Burren, specifically rejecting the contention that since s.84 of the then extant Local Government (Planning and Development) Act 1963 imposed on the Commissioners an obligation to consult with the planning authority prior to the construction or extension of any building, it was to be implied that no requirement rested on the Commissioners to obtain planning permission for any such proposed development.

565. It can be seen that the scheme and structure of the Act of 2000 is that matters of exempted development are either set out in s.4 of the Act of 2000 or, alternatively, in the Regulations of 2001. Again, insofar as the Minister for Arts, *etc.* seeks to rely on s.260 of the Act of 2000 (a line of contention considered in detail, and rejected by the court, elsewhere above), s.260 is not an exempted development provision – and any suggestion that it ought to be faces the additional difficulty, not considered above, that it is well established that the exempted development provisions of the Act of 2000 fall to be strictly construed, with any person seeking to place reliance on same having to demonstrate that they clearly come within them. Thus, for example, in *Fallowvale*, a case that has been touched upon elsewhere above and in which s.160 proceedings were commenced by Dublin County Council in respect of planning infringements at Weston Aerodrome, McKechnie J. states as follows, at para 70 of his judgment:

“[T]here is clear preponderance of authority in favour of the proposition that when the development complained of is sought to be excused under cover of either s.4 of the Act of 2000 or under the exempted developments provisions in the Regulations then the onus of establishing this point is upon he who asserts.”

566. And in *Dillon v. Irish Cement Limited* (Unreported, Supreme Court, 26th November, 1986), Finlay C.J., commenting on the exemption provisions under the then planning regulations, remarked, at 3, that “[F]or a developer to put himself within them he must be clearly and unambiguously within them in regard to what he proposes to do”.

ii. Section 4(1)(f) of the Act of 2000.

567. Section 4 of the Act of 2000 provides, *inter alia*:

“(1) The following shall be exempted developments for the purposes of this Act...

(f) development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned whether in its capacity as a planning authority or in any other capacity”.

568. The Minister for Arts, *etc.* has sought to rely on an e-mail exchange between her Department and Mr Brendan Kenny, the Deputy Chief Executive (Culture, Recreation, Amenity and Community) at Dublin City Council, in support of the contention that the erection of the banner is an exempted development pursuant to s.4(1)(f). This e-mail exchange takes the form identified below:

3rd July, 2015, 14: 59

Department official e-mails Dublin City Council, stating,
inter alia:

“[T]he Department proposes to erect a building wrap on the façade of the buildings [Nos. 14–17]....The Department would like to erect this building wrap as soon as possible in partnership with Dublin City Council if you are in agreement with the

proposal. We will of course also confirm before any works starts that the proposal is in conformity with the requirements of the National Monuments Acts.”

[The court cannot but note in passing that the Department official who wrote this e-mail is clearly of the view that the planning code and the National Monuments Acts operate as twin regimes, and that the National Monuments Acts do not supplant the planning code in the manner contended for in the course of the three linked sets of proceedings of which the present s.160 application is part.]

7th July, 2015, 12:17

Mr Kenny replies as follows:

“...The proposal as outlined is considered an exempted development under Section 4(1)(f) of the Planning and Development Act 2000 (as amended)....

The Planning Authority considers that the provision of a building wrap on the façade of the buildings as outlined by the Department in partnership Dublin City Council as part of the joint programme of commemorations will

potentially animate the buildings at 14–17 Moore Street and raise awareness of their national importance. The Planning Authority therefore considers that this proposal falls in line with the above exception...”.

[Mr Kenny then goes on to make certain comments regarding the detail of the proposal].

569. It seems to the court that there are at least five deficiencies arising when it comes to relying on the above exchange of e-mails to support that contention that a s.4(1)(f) exemption pertains as regards the erection of the banner. These are as follows:

- (1) with all respect to Mr Kenny, it is not clear what authority, if any, he has to bind the planning authority as planning authority.
- (2) it does not appear to the court that such an informal e-mail exchange should or ought to be held to bind a planning authority. Otherwise officials of local authorities would live in permanent dread of what reliance might be placed on an e-mail exchange that is neither drafted, nor intended, as a formal legal exchange.
- (3) there is, as it happens, a mechanism under s.5 of the Act of 2000, referred to by McKechnie J. in *Fallowvale*, at 73, as “*economic, efficient, and expeditious*”, for determining whether or not a matter is exempted

development and this was not invoked. All one gets in the above e-mail exchange is what the court reads as the informal solicitation of a public authority's views that would not untypically precede a more formal application process, so that no-one's time and money is wasted. In brief, what one has is 'Are you minded to agree?'; 'We are provided the following are observed'-type correspondence, with the expectation – certainly the court's expectation – that a more formal exchange would then ensue. If the courts were invariably to hang a particular legal effect on such informal enquiries and responses, it would quickly become all but impossible for public bodies to engage in everyday business and commerce.

- (4) the casualness and consequential inadequacy of the e-mail exchange is evidenced by the fact that there is nothing to suggest that any consideration was given to the fact that the proposed banner was to be hung upon and from protected structures (a factor which would significantly restrict any potential reliance on s.4(1)(f)). Testament too to the informality of the exchange with Mr Kenny is that if this constraining factor was later considered by the planning authority to render the development a non-exempted development, it is clear from the decision of McMahon J. in *Dublin Corporation v. McGrath* [1978] ILRM 208 that the above-quoted e-mail exchange would not act to estop Dublin City Council, as planning authority, from arriving at this contrary conclusion. (In *McGrath*, the Corporation was held not to be estopped from denying that a garage was an exempted development, despite the fact that a planning inspector, while in the employment of the Corporation, had so represented to Ms McGrath).

(5) it seems to the court to be straining the wording of s.4(1)(f) to a point beyond reasonable construction to suggest that where the Department does something and a particular Council official does not object, even if he purports to be representing the views of the relevant council in this regard, that this is “*development carried out on behalf of, or jointly or in partnership with, a local authority, pursuant to a contract entered into by the local authority concerned*”. The erection of the banner was not done on behalf of Dublin City Council. Nor was it done jointly with Dublin City Council. (Tolerance by one man of another man’s actions does not render those actions a joint venture). And there is not a whit of a suggestion that the banner has been erected pursuant to a contract entered into by Dublin City Council.

570. Having regard to all of the above-mentioned factors, the court does not consider that the Minister for Arts, *etc.*, as developer, has satisfied the onus of proving that the erection of the banner, to borrow from the wording of Finlay C.J. in *Dillon*, is “*clearly and unambiguously*” an exempted development.

iii. Section 57 of the Act of 2000.

571. Even if the Minister had discharged the requisite burden of proof arising under s.4, the court would in any event have concluded, by reference to s.57 of the Act of 2000, that the exemption could not apply in the context of what is a development that could materially affect the character of a protected structure.

572. Section 57(1) of the Act of 2000 states as follows:

“(1) Notwithstanding section 4(1)(a), (h), (i), (ia), (j), (k), or (l) and any regulations made under section 4(2), the carrying out of works to a protected structure, or a proposed protected structure, shall be exempted development only if those works would not materially affect the character of—

(a) the structure, or

(b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.”

573. In *CIÉ v. An Bord Pleanála* [2008] IEHC 295 (Unreported, High Court, Clarke J., 19th June, 2008), a judicial review application in respect of a decision by An Bord Pleanála pursuant to s.5 of the Act of 2000 that the erection of a particular signal mast was not an exempted development, Clarke J. stated of s.57 as follows, at para. 4.20:

“[Section 57] has the effect of de-exempting any development which would otherwise be exempted unless the development concerned meets the criteria for not materially affecting relevant features of the protected structure as set out in that section.”

574. As to the sense of the term “*character*”, as referred to in s.57, Finlay C.J. stated in *Cairnduff v. O’Connell* [1986] I.R. 73, a case in which relief was sought under s.27 of the Act of 1963 in respect of certain development, allegedly intrusive of the privacy of Mr and Mrs

Cairnduff, but which were held to be exempted development, that, in this context, the notion of “*the character of the structure...must relate...to the shape, colour, design, ornamental features and layout of the structure concerned. I do not consider that the character of the structure within the meaning of this sub-section, can depend on its particular use at any time...*”. In this regard, the court is mindful of the affidavit evidence sworn in these proceedings by Mr Kelly and, in particular, the following observation:

“[It] is difficult to conceive as to how a very large modern blue vinyl banner with modern text draped over almost the entire façade of a terraced...three storey...house built circa 1760 could not be said to materially affect the character of such structures. The character of the banner is fundamentally different to the character of the structures and so it clearly follows that the works materially affect the character of Nos. 14 to 17 Moore Street, within the meaning of section 57 of the 2000 Act.”

575. Having regard to all of the foregoing, the court considers that even if the banner could in theory be described as coming within any category of exempted development, the occurrence of such a possibility occurring in fact is precluded by s.57(1) of the Act of 2000.

iv. Issuance of declaration under s.57 of the Act of 2000

576. Among the reliefs sought by Mr Moore is a declaration that the affixing of the banner constitutes unauthorised development and/or an unauthorised structure which has been carried out in the absence of a declaration under s.57 of the Act of 2000. What is the declaration to which this relief refers? In short, a process is established by s.57(2) of the Act

of 2000 whereby an owner or occupier of a protected structure may make a written request to the planning authority, within whose functional area that structure is situated, to issue a declaration as to the type of works which it considers would or would not materially affect the character of the structure or of any element of such structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest. The remaining sub-sections of s.57 deal with the issuance and appeal process applicable as regards such declarations. The positive value of a negative declaration to the recipient of same is obvious. No such declaration has been sought or issued to the Minister in respect of the erection of the banner.

Chapter 71

Temporary Development

A. Overview.

577. It has been contended for the Minister for Arts, *etc.* that the erection of the banner upon and from the façades of Nos. 14–17 is a form of temporary development and so does not constitute “*development*” within the meaning of the Act of 2000. It seems to the court, with all respect, that this line of contention is unsound as a proposition of law. Even temporary development that is not exempt development constitutes development for the purposes of the planning code and requires permission.

B. Exempted temporary developments.

578. That the last-stated assertion is true is clear from the fact that certain development that is prescribed in Part 1 of Schedule 2 of the Act of 2000 as exempted development is temporary development, *e.g.*, “[d]evelopment consisting of the provision, construction or erection by or on behalf of the State authority of temporary structures or other temporary facilities” (Class 19), “temporary on-site school structures” (Class 20B), “[t]emporary use as a school of any structure formerly used as a school, hall, club...” (Class 20C), “[d]evelopment consisting of the use of land for any fair, funfair, bazaar or circus or any local event of a religious, cultural, educational, political, social, recreational or sporting character and the placing or maintenance of tents, vans or other temporary or movable structures or objects on the land in connection with such use”. (Class 37). Why would such temporary development be exempted if temporary development could not be development for the purposes of the planning code?

C. Temporary Advertisements.

579. Of particular note when it comes to matters temporary, is Class 17 of Part 2 of Schedule 2 of the Regulations of 2001 which specifically deals with advertisements of a temporary nature, insofar as it exempts:

“[a]dvertisements other than advertisements specified in class 17 of this Schedule, announcing any local event of a religious, cultural, educational, political, social, recreational or sporting character, and advertisements relating to any temporary matter in connection with any local event of such a character, not in either case being an event promoted or carried on for commercial purposes”.

580. To benefit from this exemption, an advertisement must not exceed 1.2m² in area, must not be more than 2.5 metres above ground level, and must not be glued, pasted or otherwise affixed to any structure other than an advertisement structure. If the banner at Nos. 14–17 could be said to be advertising a “*local event*” – and even Bob the Builder at his sunniest would likely hesitate before describing a sign signifying the commencement and continuation of on-site building works as an “*event of a religious, cultural, educational, political, social, recreational or sporting character*” – the banner at issue in the within proceedings falls outside the other applicable criteria in any event. At just short of 101m² in dimension, it is about 84 times bigger than the maximum size to which the Regulations of 2001 refer, and at 8.2m above street level, it is suspended 5.7m higher than the maximum height allowed under the Regulations.

D. Duration for which Banner in Place.

581. There is too the point that the banner has now been in place for over four months (it was erected on 9th November last) and can no longer be said to be ‘temporary’ in terms of a material change of use. Here, the decision of the High Court in *Butler v. Dublin Corporation* [1999] 1 I.R. 564 is of interest. That was a case concerned with the issue of whether two

concerts to be performed by U2 at Lansdowne Road stadium required planning permission. In giving judgment, Keane J. observed as follows, at 591:

“There are...two broad sets of circumstances in which permission is required: where ‘works’ are carried out on land or where a material change is effected in the use of land. In neither case is it expressly stated that the requirement for permission extends only to developments which are permanent, and not temporary, in their nature. This is hardly surprising: the owner of land may, for whatever reason, decide to put up a building on it with a view to removing it after a period of months or even years and replacing it with another structure. The first structure might well be regarded as ‘temporary’, rather than ‘permanent’ in its nature, but there would be reason to relieve the developer from the obligation of obtaining permission for the structure simply because it was intended to be ‘temporary’ in that sense.

Different considerations may, however, arise where one is considering whether a change of use is ‘material’ within the meaning of s.3(1) so as to constitute a ‘development’ for which permission is required. Although the Oireachtas clearly intended that, in general and subject to any exemptions that might be allowed by the Minister for the Environment in the regulations made pursuant to s.4(2), structures that might well be described as ‘temporary’ required permission, it is clear, in my view, that the radical controls imposed by the legislation were not intended to apply to changes in use which were so fleeting in their nature that they could properly be regarded as not material in planning terms.”

582. The court does not consider that a large banner which has been in place for over four months could properly be described as fleeting or temporary. It is therefore readily distinguishable from the circumstances of *Butler* which concerned the transitory use of a stadium for two concerts. (*Butler* also turned partly on s.40 of the Act of 1963, a provision that has no relevance in the context of the within proceedings). The fact that the banner can be taken down does not mean that it does not constitute development. Being a form of development and, not being exempted development, an order under s.160 may issue.

E. Previous Section 160 Orders in Respect of Advertisements

583. There are numerous examples of previous instances in which the courts have made orders pursuant to s.160 (or under the former s.27) to remove unauthorised advertisements. So, for example, in *Dublin Corporation v. Maiden Posters* (Unreported, High Court, 8th July 1982), Murphy J. made an order for the removal of advertisement hoardings, describing the development as follows:

“In June 1981 the Respondents acquired from Reg Armstrong Motors Limited the right to use the outer walls of 67 Pearse Street, Dublin for the purpose of displaying poster-type advertisements. Some time between June 1981 and the 27th August 1981 the Respondents erected four hoardings measuring 20 feet by 10 feet on those premises and proceeded to use them for the display of advertisements. It is common case that this development required planning permission and that No. such permission was sought or obtained prior to the development.”

584. Orders were also made in respect of advertisements in *Dublin Corporation v. Regan* [1989] I.R. 61. In that case the court made orders against the respondents who had erected three wooden-framed structures on the upper portion of the façade of a building, each being 20 feet wide by 10 feet high, and exhibiting commercial advertisements on them.

585. In *Fingal County Council v. Crean* (Unreported, High Court, 19th October, 2001), the facts were that around 1981 Messrs More O’Ferrall erected two hoardings on the first-named respondents’ land without obtaining planning permission to do so. An inspection of November 1997 revealed that these hoardings had been removed. However, a further inspection of 3rd March, 1998, revealed that new hoardings had been newly erected on the land. It was also found that there was freshly-laid concrete in place at the foot of the metal supports. O’Caoimh J. made orders pursuant to s.27 of the Act of 1963, observing as follows:

“[I]nsofar as the structures the subject-matter of these proceedings fall to be construed as unauthorised structures within the definition of same appearing in Section 3 to the Act of 1963...the exemption contended for under Section 4(1)(g) [the predecessor of what is now s.4(1)(f)] does not apply. I am further satisfied that the onus rests upon the respondents to satisfy this Court that the exemption contended for is one to which they are entitled....I am of the view that the respondents have failed to satisfy this Court that the complained of development constitutes an exempted development under the terms of the Act or Regulations made thereunder.”

586. That the court may issue an order under s.160 in respect of advertisements is undoubted. The issue presenting is whether it ought to exercise its discretion to refuse such relief.

Chapter 72

Discretion Arising

587. The court has considered at some length in Chapter 60 the principal case-law concerning its discretion to refuse relief under s.160 of the Act of 2000. At this point, it pauses merely to apply in the context of the within application those principles that it sought to synthesise from that case-law in Chapter 61.

588. The court turns first to apply to the facts at hand certain principles identified by the Supreme Court and of which a synthesis has been attempted in Chapter 61.

589. Re [1]. Noted.

590. Re. [2]. Noted.

591. Re. [3]. The court is therefore required to ensure that the erection of the banner conforms to the requirements of the planning permission.

592. Re. [4]. The court does not see any such exceptional circumstances presenting. If anything the exceptional circumstance presenting in this case is the great historical/public interest arising when it comes to developments at or by the protected structures/national monument comprising Nos. 14–17.

593. Re. [5]. Again, weighing heavily in the court's considerations is the great historical/public interest arising when it comes to developments at or by the protected structures/national monument comprising Nos. 14–17.

594. Re. [6]. The relevant factors are more clearly identified in *Leen* and *Kinsella* and are considered below.

595. Re. [7] and [8]. The developer (here the Minister for Arts, *etc.*) has sought to behave properly throughout.

596. The court turns next to apply to the facts at hand certain principles identified by the High Court and of which a synthesis has been attempted in Chapter 61.

597. Re. [9]. Noted.

598. Re. [10]. The court is mindful in this regard of the deficiencies that it has identified as presenting in the context of the e-mail exchange between the Department and Dublin City Council concerning the erection of the banner.

599. Re. [11]. The banner has not been erected in accordance with the planning permission.

600. Re. [12]. This case concerns actual and/or potential damage to the protected structures/national monument comprising Nos. 14–17. This is a ‘fire brigade’ situation.
601. Re. [13]. Noted.
602. Re. [14]. See comment re. [3].
603. Re. [15]. Noted.
604. Re. [16]. See comment re. [3].
605. Re. [17]. Noted.
606. Re. [18]. Noted.
607. Re. [19]. Noted.
608. Re. [20]. See comments re. [4] and [5]. The court does not consider that the transgressions arising can be viewed as technical given the national monuments/protected structures dimension.
609. Re. [21]. No exceptional reasons have been shown as to why a s.160 order should not issue.

610. Re. [22]. Noted, though the obvious preference of any court is to act consistently with general practice (and, of course, it must follow binding precedent).
611. Re. [23]. See comments re. [20].
612. Re. [24]. There has been no great delay on the part of Mr Moore. To the extent that there has been any delay, it seems to the court to rather pale in comparison with the great historical and public interest attaching to Nos. 14–17.
613. Re. [25]. Article 40.5 of the Constitution is of no relevance to the present proceedings.
614. Re. [26] See comments re. [7] and [8]. These considerations have to be and [27]. weighed against the heavily countervailing historical and public interest referred to in comments re. [4] and [5].
615. Re. [28]. The court does not consider any deficiency to present as regards the conduct, position or personal circumstances of Mr Moore. As to delay, see comment re. [24]. As to the conduct, position and personal circumstances of the Minister for Arts, *etc.*, see the comment re. [7] and [8]. As to the public interest presenting, see the comments re. [4] and [5].

616. Re. [29]. The only factors additional to [28] appear to be (e) and (h). As to (e), see comment re. [20]. As to (h), see comment re. [10].
617. Re. [30]. Noted, though this seems offset here by the court's observation re. [10].
618. Re. [31]. See comments re. [4] and [5]. Allowing unauthorised development to proceed in the context of protected structures/structures that are the subject of a preservation order under the National Monuments Acts, in circumstances where that development is actually or potentially damaging same appears to this Court to raise issues of significant and non-transitory concern.
619. Re. [32]. Noted, though this principle needs to be cautiously applied given the principle identified by reference to binding Supreme Court precedent at [6].
620. Re. [33] Neither factor seems of especial relevance in this context.
and [34]
621. Re. [35]. See comments re. [20].

PART 7

THE RELIEFS THAT THE COURT WILL GRANT

Chapter 73

Reliefs

A. Overview.

622. Having regard to all of the above, the court indicates below the reliefs that it is satisfied to grant in the context of each of the three applications made. Each of the requested reliefs is identified and the court's response indicated immediately thereafter.

B. The Judicial Review Application.

623. *Relief No.1 sought: An order of certiorari quashing the decision of the Minister dated 18th September, 2015 (received on 21st September, 2015) refusing to consider the application of s.22(3) of the Interpretation Act 2005 to a consent granted under s.14 of the National Monuments Act 1930, as amended.*

624. Court Response: The court will grant this relief.

625. Relief No.2 sought: *A declaration that the decision of the Minister dated 18th September, 2015 (received on 21st September, 2015) as to whether s.22(3) of the Interpretation Act 2005 is applicable to a consent granted under s.14 of the National Monuments Act 1930, as amended, is academic, is unlawful having regard to the National Monuments Act 1930, as amended, the Interpretation Act 2005, the Ministers and Secretaries Act 1924 (as amended), and the Ministers and Secretaries (Amendment) Act 1939.*

626. Court Response: This relief is declined.

627. Relief No. 3 sought: *An order of mandamus directing the Minister to consider whether s.22(3) of the Interpretation Act 2005 is applicable to a consent granted under s.14 of the National Monuments Act 1930, as amended.*

628. Court Response. This relief is unnecessary. The court has answered this question in its judgment: s.22(3) is so applicable.

629. Relief No. 4 sought: *A declaration that the curtilage of the terrace of buildings located at Nos. 14–17, Moore Street, such buildings being a national monument protected and preserved under the National Monuments Act 1930, as amended, includes the lands and buildings of the terrace located at Nos. 13, 18 and 19, Moore Street.*

630. Court Response: This relief is declined.

631. Relief No. 5 sought: *a declaration that the curtilage of the terrace of buildings located at Nos. 14–17, Moore Street, such buildings being a national monument protected and*

preserved under the National Monuments Act 1930, as amended, includes all and/or any part of the lands and buildings and/or basements and/or cellars located on Moore Street and/or Moore Lane.

632. Court Response: The court is satisfied to declare that the curtilage of No. 14, Moore Street includes the newly discovered cellar to the rear of same.

633. Relief No. 6 sought: *a declaration that the extent of the national monument located at Nos. 14–17, Moore Street, includes any and all basements and/or cellars and any and all relevant and/or connected structures to the said national monument, including the basements and/or cellars located on Moore Street and Moore Lane.*

634. Court Response: The court is satisfied to grant this relief.

635. Relief No. 7 sought: *a declaration that the lands and buildings located at Nos. 13, 18 and 19, Moore Street, and the curtilage of these mid-terrace buildings which adjoin the national monument located at Nos. 14–17, Moore Street, and extend to Moore Lane are a national monument as provided for by law and/or within the meaning of the National Monuments Act 1930, as amended.*

636. Relief No. 8 sought: *a declaration that the lands and buildings at Nos. 6, 7, 10, 11–13, 18 and 19, Moore Lane, are a national monument as provided for by law and/or within the meaning of the National Monuments Act 1930, as amended.*

637. Court Response to Reliefs Nos. 7 and 8. as sought: The court will address Reliefs Nos. 7, 8 and 17 together below.

638. Relief No. 9 sought: *a declaration that the lands and buildings located at Nos. 6, 7, 10, 11–13, 18 and 19, Moore Lane are within the curtilage of the terrace of the buildings located at 14–17, Moore Street, a national monument protected and preserved under the National Monuments Act 1930, as amended.*

639. Court Response: Subject to the declarations that the court has indicated that it is satisfied to make in relation to Reliefs Nos. 5 and 6, as sought, this relief is declined.

640. Relief No. 10 sought: *a declaration that the lands and buildings located at Nos. 8 and 9, Moore Lane, come within the curtilage of the terrace of buildings located at 15 and 16, Moore Street, which are part of a national monument protected and preserved under the National Monuments Act 1930, as amended.*

641. Court Response: Subject to the declaration that the court has indicated that it is satisfied to make in relation to Relief No. 6, as sought, this relief is declined.

642. Relief No. 11 sought: *an order of prohibition prohibiting the Minister from in any way allowing and/or facilitating the demolishing, removing (in whole or in part), disfiguring, defacing, altering, injuring or further interfering in any way with the terrace of buildings located at 14–17 Moore Street, a national monument protected and preserved under the National Monuments Act 1930, as amended.*

643. Court Response: The court will grant this relief but only until such time as the Minister has had an opportunity to consider the implications of this judgment and how she proposes to proceed. Once the Minister has had an opportunity to consider matters, the parties may return to court and application may be made for the court's order in this regard to be varied, if and as appropriate.

644. Relief No. 12 sought: *an injunction restraining the Minister from in any way allowing and/or facilitating the demolishing, removing (in whole or in part), disfiguring, defacing, altering, injuring or interfering in any way with the terrace of buildings located at 14–17, Moore Street, a national monument protected and preserved under the National Monuments Act, 1930, as amended, pending the hearing of the within proceedings.*

645. Court Response: This relief has now been overtaken by events.

646. Relief No. 13 sought: *a declaration that the Minister has facilitated and/or allowed the unlawful interference with the terrace of buildings located at Nos. 14–17 Moore Street, such buildings being a national monument protected and preserved under the National Monuments Act 1930, as amended, by the carrying out of works comprising the affixing or application of advertising/public information signage comprising a screen-printed image over a vinyl/polymer sheet on a timber batten sub-structure which itself has been mechanically fixed to the front exterior façades of the terrace of buildings comprising the national monument located at Nos. 14–17, Moore Street, and/or any associated works to such buildings.*

647. Court Response: This aspect of the reliefs sought is addressed by the court later below in the context of the reliefs sought in the second s.160 application.

648. Relief No. 14 sought: a declaration that the Minister has facilitated and/or allowed the unlawful interference, as aforesaid, with the terrace of buildings located at Nos. 14–17 Moore Street, a national monument protected and preserved under the National Monuments Act 1930, as amended, in the absence of the requisite ministerial consent.

649. Court Response: The court has concluded in its judgment that Consent C494 is a nullity and hence that any consent revising or varying same is of no effect.

650. Relief No. 15 sought: a declaration that the Minister erred in law and/or acted ultra vires in allowing the unlawful interference, as aforesaid, with the terrace of buildings located at Nos. 14–17, Moore Street, a national monument protected and preserved under the National Monuments Act 1930, as amended, in the absence of the requisite ministerial consent.

651. Court Response: To the extent that any action that ought to have been done pursuant to a valid s.14 consent has been done pursuant to Consent C494 (as varied and purportedly revised), the court has concluded above that the said consent is void and of no effect, rendering any action purportedly done pursuant to such consent, at the least on or after 30th July, 2014, an action that has been done in the absence of a requisite s.14 consent.

652. Relief No. 16 sought: a declaration that the Minister, in allowing the unlawful interference, as aforesaid, with the terrace of buildings located at Nos. 14–17, Moore Street, a national monument protected and preserved under the National Monuments Act 1930, as amended, in the absence of the requisite ministerial consent erred in law and/or acted ultra vires in failing to consult in writing with the Director of the National Museum of Ireland.

653. Court Response: The court refers to its response in respect of Relief No. 15. There is no evidence to suggest that the Minister has at any time failed to consult in writing with the Director of the National Museum of Ireland when and as required under the National Monuments Acts so to do.

654. Relief No. 17 sought: *a declaration that lands and buildings referred to in the letter from Mr Moore's solicitor to the Minister dated 19th August, 2015, which, in particular, includes the 'Moore Street Battlefield Site' and the lands and buildings at No. 10, Moore Street, the bottling stores situate to the rear of No. 10, Moore Street, the O'Brien's Mineral Water Works Building located at Henry Place, the White House located at Henry Place, and Hanlon's, located at 20/21 Moore Street, are a national monument.*

655. Court Response: Having regard to the wealth of evidence presented before it, and for all of the reasons stated above, the court concludes, *inter alia*, and is satisfied to make a declaration that:

(1) (a) each and all of the streets and street alignments of

(i) O'Rahilly Parade,

(ii) the length of Moore Lane from Parnell Street down to Henry Place,

(iii) the entire 'L' of Henry Place, and

- (iv) Moore Street, from the junction with Henry Place to the junction with O’Rahilly Parade,
- (b) (I) the plot of land enclosed by (iii), (iv), (i), and the part of Moore Lane from the junction with O’Rahilly Parade to the junction with Henry Place, but
 - (II) not all of the buildings thereon, and
- (c) the national monuments that the court identifies in (2) below,

comprises and comprise a national monument within the meaning of the National Monuments Acts, which national monument is sometimes referred to as the ‘Moore Street Battlefield’; and

(2) each of and only

- (a) No. 10, Moore Street,
- (b) the exterior wall to the rear of No. 11, Moore Street that evidences the breach through the party wall from No. 10,

- (c) that portion of No. 13, Moore Street which comprises the surviving party wall with No. 12, along with any surviving remains therein of damage dating to the Easter Rising,
- (d) Nos. 18, 20 and 21, Moore Street, as well as
- (e) the onetime O'Brien's water works,
- (f) the onetime O'Brien's bottling stores,
- (g) the onetime O'Brien's stables, and
- (h) the so-called 'White House',

comprises (i) a national monument in its own right and also (ii) a part of the national monument that is sometimes referred to as the 'Moore Street Battlefield'.

656. The court does not need to reach any conclusion in respect of Nos. 14–17 Moore Street as these properties have previously been recognised by the Minister for Arts, *etc.* as a national monument within the meaning of the National Monuments Acts, and a preservation order has issued in respect of same. The court merely notes that it considers that the newly discovered cellar to the rear of No. 14 is a part of the national monument that is No. 14.

657. The court is unable to reach a conclusion at this time, having regard to the diametrically opposed evidence before it, as to whether the building that occupies No. 19 satisfies the criteria identified in the National Monuments Acts for it to be considered a national monument within the meaning of same. The most the court can conclude on the basis of the said evidence is that No. 19 may be a national monument, and to respectfully suggest that before any proposed action is undertaken in respect of No. 19, further examination of it, including its façade, might be done. This is without prejudice to the court's finding that the site commonly referred to as No. 19, Moore Street, as opposed to the building presently sitting thereon, comprises a part of the Moore Street Battle-Site.

658. *Relief No. 18 sought: a declaration that lands and buildings referred to in the letter from Mr Moore's solicitor to the Minister, dated 19th August, 2015, which, in particular, includes the 'Moore Street Battlefield Site' and the lands and buildings at No. 10, Moore Street, the bottling stores situate to the rear of No. 10, Moore Street, the O'Brien's Mineral Water Works Building located at Henry Place, the White House located at Henry Place, and Hanlon's, located at Nos. 20/21 Moore Street, are of national historic importance.*

659. Court Response: This relief is redundant in light of the 'Court Response' to 'Relief No. 17 sought'. Section 2 of the Act of 1930 defines the term "*national monument*" as meaning "*a monument or the remains of a monument the preservation of which is a matter of national importance...*". So the court could not have given its favourable response to Relief No. 17, were it not of the view that the requisite "*national importance*" presents.

C. The First Section 160 Application.

660. Relief No. 19 Sought: *an order restraining the Minister for Arts, etc., her servants and/or agents and/or any connected persons from carrying out unauthorised development comprising the works and/or proposed works (and/or requiring the cessation of any works) to and/or in connection with Nos. 13-19 Moore Street, including the demolition of Nos. 13, 18 and 19 Moore Street and/or all associated works in connection with the proposed commemorative centre and/or the restoration works at Nos. 14 to 17.*

661. Court Response: The court is satisfied to grant this relief, in the first instance until such time as the Minister has had an opportunity to consider the implications of this judgment and how she proposes to proceed. Once the Minister has had an opportunity to consider matters, the parties may return to court and application may be made for the order to be continued and/or varied and/or stopped, if and as appropriate.

662. Relief No. 20 Sought: *further and/or in the alternative, an order restraining the Minister, her servants and/or agents and/or any connected persons from carrying out any of the works and/or proposed works (and/or requiring the cessation of any works) to and/or in connection with Nos. 13–19 Moore Street, including the demolition of Nos. 13, 18 and 19 and/or all associated works in connection with the proposed commemorative centre and/or restoration works at Nos. 14–17, unless and until the conditions of Planning Permission Ref 2479/08/PL.29N.232347 are complied with.*

663. Court Response: This relief is unnecessary in light of the relief to be granted in respect of ‘Relief No. 19 Sought’.

664. Relief No. 21 Sought: *further and/or in the alternative, an order restraining the Minister, her servants and/or agents and/or any connected persons from carrying out any of the works and/or proposed works (and/or requiring the cessation of any works) to and/or in connection with Nos. 13–19 Moore Street, including the demolition of Nos. 13, 18 and 19 and/or all associated works in connection with the proposed commemorative centre and/or restoration works at Nos. 14–17 unless and until a valid and existing s.14 consent has been made in accordance with Condition 5 of Planning Permission Ref 2479/08/PL.29N.232347.*

665. Court Response: This relief is unnecessary in light of the relief to be granted in respect of ‘Relief No. 19 Sought’.

666. Relief No. 22 Sought: *further and/or in the alternative, an order restraining the Minister, her servants and/or agents and/or any connected persons from carrying out the works and/or proposed works (and/or requiring the cessation of any works) to and/or in connection with Nos. 13–19 Moore Street, including the demolition of Nos. 13, 18 and 19 and/or all associated works in connection with the proposed commemorative centre and/or restoration works at Nos. 14–17, unless and until a planning permission for which a valid environmental impact assessment has been undertaken is carried out.*

667. Court Response: This relief is unnecessary in light of the relief to be granted in respect of ‘Relief No. 19 Sought’.

668. Relief No. 23 Sought: *a stay and/or interim orders, including interlocutory relief restraining the Minister from carrying out the development that is the subject of these proceedings.*

669. Court Response: This relief is unnecessary in light of the relief to be granted in respect of ‘Relief No. 19 Sought’ and also because it has been overtaken by events.

D. The Second Section 160 Application

670. Relief No. 24 Sought: *an order directing the Minister for Arts, etc. to remove, subject to the supervision and direction of the court, the unauthorised works and/or unauthorised structure comprising the fixing or application of the advertising/public information signage comprising a screen-printed image over a vinyl/polymer sheet that has been mechanically fixed to a timber batten sub-structure which itself has been mechanically fixed to the front exterior façades at Nos. 14-17 Moore Street.*

671. Court Response: The court will grant this relief.

672. Relief No. 25 Sought: *an order directing that, as far as possible, the Minister restore, subject to the supervision and direction of the court, the front exterior façades of Nos. 14-17 Moore Street insofar as such façades have been damaged and/or altered by the affixing or the application of the said advertising/public information signage, and that such restoration works should not materially affect any or all of Nos. 14-17.*

673. Court Response: The court will grant this relief.

674. Relief No. 26 Sought: a declaration that the affixing of the said advertising/public information signage constitutes unauthorised development and/or an unauthorised structure and/or development which has been carried out without planning permission.

675. Court Response: The court will grant this relief.

676. Relief No. 27 Sought: a declaration that the affixing of the said advertising/public information signage constitutes unauthorised development and/or an unauthorised structure which has been carried out in the absence of a declaration under s.57 of the Act of 2000.

677. Court Response: The court will grant this relief.

Approved:
TJ-DH
18/ii/16