THE COURT OF APPEAL

Peart J.
Birmingham J.
Hogan J.

Neutral Citation Number: [2018] IECA 28

Record No. 2016/295

BETWEEN/

COLM MOORE

RESPONDENT

- AND -

THE MINISTER FOR ARTS, HERITAGE AND THE GAELTACHT

APPELLANT

- AND -

DUBLIN CENTRAL LIMITED PARTNERSHIP

NOTICE PARTY

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JUDGMENT of Mr. Justice Gerard Hogan delivered on the 14th day of February 2018

1. Does the High Court enjoy a jurisdiction to declare that certain buildings or sites amount to national monuments for the purposes of the National Monuments Act 1930 (as amended)("the 1930 Act")? That is the essential question which is presented on this appeal from a judgment of the High Court delivered by Barrett J. on the 18th March 2016: see *Moore v. Minister for Arts, Heritage and Culture* [2016] IEHC 150.

2. In that judgment Barrett J. granted a declaration that certain streets and street alignments in the Moore Street, Moore Lane and O'Rahilly Parade area in Dublin 1 (which, for convenience, I propose to describe as the Moore Street battlefield site), along with Nos. 10, part of No. 13 and Nos. 18, 20 and 21 Moore Street constituted national monuments for the purposes of s. 2 of the 1930 Act. Both the Minister for Arts, Heritage and the Gaeltacht ("the Minister") and Dublin Central Limited Partnership have appealed against the granting of this relief. At the outset it should be stated that Nos. 14-17 Moore Street have already been recognised by the Minister as national monuments and a preservation order has already been made in respect of these buildings.

3. The name of Moore Street resonates with anyone with even a passing interest of Irish history, since it was here that the seminal events of Easter Week 1916 came to a conclusion. The basic facts are – or, at least, ought to be - well known to every Irish citizen: On Monday, April 24, 1916 Commandant P.H. Pearse stood on the steps of the General Post Office in Dublin and in the name of the Irish Republican Brotherhood, the Irish Volunteers and the Irish Citizen's Army proclaimed an independent Irish Republic and constituted himself as President of the Provisional Government.

4. There then followed five days of intense fighting between the Volunteers and the British forces throughout Dublin, with sporadic incidents in other parts of the country. This culminated in the evacuation of the GPO by the Volunteers in the evening of Friday, April 28, 1916. The Volunteers then ran the gauntlet of British fire – sustaining heavy casualties in the process - and they ultimately tunnelled their way into Moore Street. The final resting place of the Provisional Government was at No. 16 Moore Street. It was at that point that the decision was made on the following morning to surrender, not least given that Pearse himself was distraught by the ever mounting civilian death toll. Nurse Elizabeth O'Farrell then bravely made her way from No. 16 Moore Street to the British forces under a flag of truce and the surrender took place later afternoon between Brigadier Lowe of the British forces and Commandant Pearse. Summary executions of the members of the Provisional Government (and others) quickly followed. By the time the last volley of shots rang out from a British firing squad in a bleak prison yard on 12 May 1916 the final unravelling of the bonds of an unhappy and unstable union between Great Britain and Ireland was already well underway.

5. I fear that I have done scant justice to these momentous historic events with this all too brief summary. A full narrative of these

events is, however, found at Chapters 1 to 4 and Chapters 30, and Chapters 35 to 40 of the judgment of Barrett J. This judgment contains as deeply a moving, eloquent and comprehensive account of the end of the Rebellion as has ever been written.

6. The plaintiff is himself a member of an association known as Cumann Gaolta 1916/The 1916 Relatives Association, but he brings these proceedings in his own name qua citizen of Ireland and as a representative of that Association. The notice party, Dublin Central Limited Partnership, was joined to these proceedings by order of the Finlay Geoghegan J. on 20th July 2016 pursuant to the provisions of Ord. 15, r.14 and Ord. 17, r. 4 in substitution for Chartered Land. Both entities are developers whose commercial interests stand to be gravely affected by these proceedings and, specifically, by the grant of the declaratory relief to the effect that these streets and buildings in the Moore Street area constituted national monuments.

The nature of the judicial review proceedings

7. The question of whether Moore Street should be designated as a national monument has been a matter of civic controversy for some time. In January 2007 the Minister made a preservation order pursuant to s. 8(1) of the 1930 Act in respect of Nos. 14-17 Moore Street and there were plans for a commemorative centre at Nos. 14 to 17 which it was hoped would be ready for the 100th anniversary in 2016. Planning permission for this purpose had been granted in March 2010 and the requisite ministerial consent had been granted in July 2013 under s. 14 of the 1930 Act for the partial demolition of part of these structures to facilitate the construction of the new interpretative centre. It may be noted that no proceedings had been commenced at the time in which the validity of either decision had been challenged.

8. The proceedings have their background in correspondence emanating from the plaintiff's solicitors on 19th August 2015 in which they called upon the Minister to designate the entire Moore Street battlefield site as a national monument. The Minister was also requested to exercise her powers pursuant to s. 22(3) of the Interpretation Act 2005 ("the 2005 Act") to set aside that part of the consent issued under s. 14 of the 1930 Act which permitted the partial demolition of the national monument. By letter dated the 18th September 2015 the Minister refused to take such steps. Section 22(3) of the 2005 Act simply provides that the donee of a statutory power may exercise those powers from time to time as occasion requires.

9. The applicant then sought and secured leave to apply for judicial review on 21st December 2015 from the High Court (Eager J.). The first relief sought was an order of certiorari quashing the decision of the Minister as refused to exercise her s. 22(3) of the 2005 Act powers. The third relief sought was an order of mandamus directing the Minister to consider whether s. 22(3) of the 2005 Act was "applicable to a consent granted under s. 14 of the [1930 Act]." There then followed a series of prayers for relief by way of declaratory order that certain lands, buildings and sites in the Moore Street area constituted national monuments.

10. An order of certiorari was indeed granted by the High Court in its final order dated 20th May 2016 along with a series of declarations along the lines already indicated to the effect that named lands, buildings and sites in the general Moore St. region were national monuments within the meaning of the 1930 Act.

11. Both the Minister and the notice party have vigorously objected to the use of this procedure in this fashion which they contend is, *inter alia*, amounts to a contrived collateral attack on the earlier planning permission and ministerial consent. For my part, I cannot help thinking – without, I hope, any disrespect to Mr. Moore – that the primary reliefs of certiorari and mandamus sought by the applicant do indeed have a contrived air to them. It is as if the applicant had sought to manufacture a somewhat artificial dispute with the Minister in order that he could use these judicial review proceedings as a mechanism whereby he could, in effect, seek free standing declarations to the effect that certain areas of Moore Street and the surrounding district were national monuments for the purposes of the 1930 Act. It is hard to see how these declarations were in truth ancillary in any real sense to these primary reliefs of certiorari and mandamus and the judicial review proceedings really proceeded as if the plaintiff had commenced plenary proceedings in the High Court seeking a series of declarations regarding the status of the battlefield site as a national monument for the purposes of s. 2 of the 1930 Act.

12. While I cannot but sympathise with the Minister and the notice party in this regard regarding the procedural steps employed by the applicant in these proceedings, it is probably not necessary to decide this important case on this point of procedure, important and all as that procedural issue is in and of itself. The much more fundamental issue presented on this appeal is whether the High Court has a jurisdiction to grant declarations to the effect that certain buildings, lands and sites are national monuments within the meaning of the 1930 Act in the manner assumed in these proceedings.

13. I will accordingly proceed in favour of the applicant and treat these proceedings as if they were akin to plenary proceedings in which these free standing declarations had been sought. The fundamental question is whether the High Court has a jurisdiction to grant this type of declaratory relief in a case of this kind. I propose to return to this question having first considered the 1930 Act and then subsequently examined the judgment of the High Court.

The National Monuments Act 1930

14. The structure of the 1930 Act is not, perhaps, the easiest to follow. Despite the fact that the 1930 Act has been amended on a number of occasions – principally in 1987, 1994 and 2004 – it still cannot be said that this structure is altogether satisfactory. In particular as we shall now see, the 1930 Act is quite unclear on the fundamental question of who should determine what monuments are to be national monuments or whether, indeed, some formal designation of such monuments as national monuments for the purposes of the 1930 Act is actually necessary. It may be said that this lack of legislative clarity has been brought into sharp focus by this litigation.

15. The first thing to note about the legislation is that the terms "monument" and "national monument" are both separately defined by the 1930 Act. The term "monument" is defined by s. 2 of the 1930 Act (as inserted by s. 11 of the National Monuments (Amendment) Act 1987) as including:

> (a) any artificial or partly artificial building, structure or erection or group of such buildings, structures or erections,
>
> (b) any cave, stone or other natural product, whether or not forming part of the ground, that has been artificially carved, sculptured or worked upon or which (where it does not form part of the place where it is) appears to have been purposely put or arranged in position,
>
> (c) any, or any part of any, prehistoric or ancient:-
>
> (i) tomb, grave or burial deposit, or

(ii) ritual, industrial or habitation site,

and

(d) any place comprising the remains or traces of any such building, structure or erection, any such cave, stone or natural product or any such tomb, grave, burial deposit or ritual, industrial or habitation site,

situated on land or in the territorial waters of the State, but does not include any building, or part of any building, that is habitually used for ecclesiastical purposes;",

16. The term "national monument" is defined by s. 2 of the 1930 Act 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…."(emphasis supplied)

17. From these definitions it can be seen that while the term "monument" is widely defined, the 1930 Act applies only to monuments which are also national monuments. Save in the special cases of monuments such as the Hill of Tara which were already contained in the schedule to the Ancient Monuments Protection Act 1882 (and whose status as national monuments was expressly confirmed by reason of this fact by s. 2 of the 1930 Act), such monuments are only national monuments if, as we have just seen, their preservation "is a matter of national importance." One of the matters which are highlighted by this litigation is that the 1930 Act is strangely silent in respect of the critical question of precisely *who* is to determine *what* monument is a national monument. Specifically, the definition is not prefaced by words such as "if the Minister is of opinion" or "if the Commissioners of Public Works are satisfied" that a particular monument is a national monument or ought to be preserved as such. Whether through a drafting oversight or otherwise, the 1930 Act rather assumes the existence of a national monument as an objective fact which does not require formal designation in these terms, and, indeed, the Act largely confines the Minister (previously the Commissioners of Public Works) to the role of making a preservation order in respect of the national monument (s. 8) or giving consent to the doing of works to, or even the demolition of, the national monument (s. 14).

18. It is the very fact that s. 2 of the 1930 Act assumes the existence of a national monument as an objective fact that has given rise to the assumption – at least partly re-inforced by the case-law to date - that the High Court has a jurisdiction to determine this question and that this question presents a justiciable controversy which is capable of being resolved by the courts. One can fairly say that the correctness of this assumption lies at the heart of this appeal. But before considering this issue from the standpoint of principle, it is necessary first to consider the case-law: *Tormey v. Commissioners of Public Works* (1972)(belatedly reported at [1993] I.L.R.M. 703), the *Wood Quay case* (1978), *O'Callaghan v. Commissioners of Public Works* [1985] I.L.R.M.364, *Attorney General (McGarry) v. Sligo C.C.* [1991] 1 I.R. 99 and *Dunne and Lucas v. Dún Laoghaire-Rathdown County Council* [2003] IESC 15, [2004] 1 I.R. 567. I then propose to consider to examine the relevant parts of the High Court judgment dealing with this issue.

The earlier case-law

19. In *Tormey* the plaintiff was the owner of a 112 acre farm, 57 acres of which formed part of the Hill of Tara. The Commissioners of Public Works sought to acquire the 57 acres pursuant to their compulsory acquisition powers in respect of "any national monument which they consider it expedient to acquire" under s. 11(1) of the 1930 Act and had served a notice to treat for this purpose. There was no doubt at all but that the Hill of Tara was a national monument because it had been expressly listed for this purpose by the Schedule of the Ancient Monuments Protection Act 1882 ("the 1882 Act"). Section.2 of the 1930 Act had already expressly included such monuments scheduled to the 1882 Act in the definition of a national monument.

20. The plaintiff, however, objected to the inclusion of some 10 acres in the notice to treat on the ground that these 10 acres should not be regarded as a national monument. The argument was, in effect, that the 10 acres in question should not be regarded as part of the national monument listed in the 1882 Act (and thus by definition a national monument for the purposes of s. 2 of the 1930 Act) because there was nothing of archaeological value contained in these fields. The case was thus really one about the extent of a particular national monument which had already been designated as such. In particular, the Supreme Court had not been required to determine whether the preservation of the Hill of Tara was a matter of national importance given its earlier designation by s. 2 of the 1930 Act

21. In any event, Ó Dálaigh C.J. rejected the plaintiff's argument, saying ([1993] I.L.R.M. 703, 709) that the archaeological evidence supported a finding that the 10 acres "has sufficient archaeological features to warrant its inclusion in the notice to treat which is the necessary preliminary to acquisition." Moreover, as McLoughlin J. had memorably observed in his judgment in the High Court in that case, the exclusion of the 10 acre field "would amount, I think, to cutting a cake-tier out of the Hill of Tara and that would be unrealistic", a view which on appeal the Supreme Court was to endorse.

22. The *Wood Quay* case (*Martin v. Dublin Corporation*) from 1978 has certainly entered the public consciousness, but rather curiously, no written judgment in that case apparently survives and it may well be that the decision was made *ex tempore*. While it appears from press reports that Hamilton J. made an order in the High Court to the effect that the Viking settlement at Wood Quay in Dublin was a national monument for the purposes of the 1930 Act, the precise basis upon which that decision was made remains unclear. It should also be stated that in a subsequent judgment concerning the liability of the plaintiff to pay on an undertaking as to damages, O'Higgins C.J. is recorded as saying that "in earlier proceedings portion of the Wood Quay site had been declared to be a national monument": see *Attorney General (Martin) v. Dublin Corporation* [1983] I.L.R.M. 254, 255. At this remove, however, it cannot be established whether the jurisdiction of the High Court to entertain such an application was seriously contested or whether the existence of such a jurisdiction was simply assumed.

23. In *O'Callaghan* the plaintiff who was the owner of certain lands on which a promontory fort was situate unsuccessfully challenged the constitutionality of the 1930 Act. A preservation order had previously been made by the Commissioners of Public Works in 1970 under s. 8 of the 1930 Act. I find nothing in the judgment of O'Higgins C.J. to suggest that the High Court had a jurisdiction to declare that a certain monument was a national monument.

24. The next case for consideration is the decision of the Supreme Court in *McGarry*. In that case the plaintiffs had sought an

injunction restraining Sligo Co. Council from using certain lands at the site of the sepulchral remains and megalithic tombs at Carrowmore and Knocknarea, Co. Sligo. Critically, however, these tombs had already been designated as a national monument by virtue of the fact that they had already been scheduled to the 1882 Act. The Supreme Court granted the injunction, holding, inter alia, that the actions of the Council amounted to a disturbance of the ground in proximity to a national monument and since the consent of the Commissioners of Public Works had not been obtained, this amounted to a breach of s. 14(2) of the 1930 Act.

25. The final case is that of *Dunne and Lucas*. In that case the plaintiffs sought an injunction restraining the Council from performing certain works at Carrickmines Castle which was in the path of the current M50 motorway, then under construction. The Supreme Court granted an interlocutory injunction, saying that it was an arguable that the site amounted to a national monument and that it could not therefore be interfered with by the Council without the appropriate ministerial consent.

26. In his judgment Hardiman J. noted that it could scarcely be denied that Carrickmines Castle was a monument, albeit that there was "scope for differences of opinion as to whether the preservation of any particular monument is a matter of national importance": see [2004] 1 I.R. 567, 573. There was, however, uncontradicted expert evidence from a medieval historian to the effect that it was and Hardiman J. stated that the Court was obliged to proceed on the assumption that the site was a national monument. The jurisdictional question does not appear to have been raised as an issued before the Court.

27. As it happens, that case never came on to trial because in the wake of that decision the Oireachtas enacted the National Monuments (Amendment) Act 2004, s. 8 of which effectively disapplied the 1930 Act regime to Carrickmines Castle and any other archaeological artefacts found in connection with the construction of the M50 south eastern route. The first named plaintiff then subsequently challenged the constitutionality of s. 8 of the 2004 Act on the ground that the failure to protect the Castle's remains amounted to a dereliction of the State's duty to protect the archaeological patrimony of the nation contrary to Article 5 of the Constitution: see *Dunne v. Minister for Environment* [2006] IESC 49, [2007] 1 I.R. 194 ("Dunne (No. 2"). That challenge was ultimately rejected by the Supreme Court, as in the words of Murray C.J.:

> "The various contentions of the plaintiff under these invoked Articles relate entirely to the plaintiff's alternative view of the appropriate policy for the protection of the natural heritage of Carrickmines. As noted by the learned trial judge, it is not inconceivable that in a hypothetical case, a person in the position of the plaintiff might successfully challenge a statutory measure on the basis that it purported to permit a clear-cut breach of the State's duty to protect the national heritage. As noted by the learned trial judge, this is not such a case. In inviting the Court to review s. 8 in the light of the State's duty to safeguard the national heritage and on the basis of the other requirements of the common good, the plaintiff is inviting the courts to undertake a policy role which is conferred on the Oireachtas by the Constitution.
>
> As Keane C.J. noted in *T.D. v. Minister for Education* [2001] 4 I.R. 259, 288, this would be "to cross a Rubicon and to undertake a role which is conferred by statute on the Oireachtas under the Constitution." While it is hardly necessary to state it, it follows from the fact that no private or fundamental right of the plaintiff is involved in these proceedings, that there is no question of applying a proportionality test to the legislative measure under attack in the manner suggested on behalf of the plaintiff. Accordingly, all of the arguments advanced to impugn s. 8 by reference to the provisions of the Constitution must fail."

28. What, conclusions, therefore can be drawn from this case-law? The decisions in *Tormey* and *McGarry* are in truth of little assistance to the plaintiffs, since the monuments at issue in those cases were already national monuments by virtue of the fact that they had been scheduled to the 1882 Act. Insofar, moreover, as Ó Dálaigh C.J. opined in Tormey on the question of whether certain lands adjacent to the Hill of Tara site amounted to a national monument, this was simply in the context of whether the Commissioners of Public Works had validly served a notice to treat for the purposes of s. 11(1) of the 1930 Act. That judgment cannot, I think, be read as holding or even suggesting that the High Court enjoyed a free standing jurisdiction to declare a particular monument to be a national monument under the 1930 Act. It was rather a decision to the effect that the conclusion of the Commissioners that the 10 acres were also part of a pre-existing national monument was supported by the expert evidence which had been given in that case and that such a conclusion could not accordingly be judicially set aside.

29. The cases which are of most assistance to the plaintiff are those of the *Wood Quay* case and *Dunne* and *Lucas.* In the latter case, however, the existence of a judicial jurisdiction to declare a monument to be a national monument appears to have been assumed. The decision of the Supreme Court was, in any event, simply an interlocutory one and, as I have noted, the case never came on for full hearing, having been overtaken by events in the meantime. The one case where such a determination was unambiguously made by the High Court was in the *Wood Quay* case itself. But even then the matter is not free from difficulty so far as the plaintiff is concerned, since it is unclear whether the existence of such a free standing jurisdiction to make a declaration was contested or whether such a jurisdiction was simply assumed or conceded. In any event, this court is not bound by the High Court decision in the *Wood Quay* case.

30. In sum, therefore, it is clear from a close examination of the earlier case-law that there is no authority binding on this Court which holds that the courts have a free standing jurisdiction to declare a particular monument to be a national monument.

The judgment of the High Court in the present case

31. The jurisdiction of the High Court to grant a declaration that a particular monument is a national monument is set out at Chapters 13 and 17 of the judgment of Barrett J.. It is clear that Barrett J. was influenced to a significant extent by the *Wood Quay* decision. Thus Barrett J. said (at para. 132):

> "Insofar as there is a dispute between [the] parties as to whether or not a particular "monument" is a "national monument" (in each case, as defined in the National Monument Acts), then provided that [that] dispute can be formulated within the context of property 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 the Viking site just down the river Liffey from the courtroom where this judgment is pronounced, Gannon J. made reference…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] I.L.R.M. 254 refers to how "[i]n earlier proceedings [a] portion of the Wood Quay site was declared to be a national monument."

32. Having found that the matter was a justiciable controversy, Barrett J. then went to deal with the Court's jurisdiction to grant a declaration in aid of a justiciable controversy in Chapter 17. The judge then said (at para. 167):

> "Declaratory relief of the type sought in the within proceedings is not commonly granted. Again, however, the very uniqueness of the 1916 - G.P.O. 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 declaratory relief: see *e.g. ACC Loan Management Limited v. Barry and Ors.* [2015] IECA 224 and *Grinán an Aileach Interpretative Centre Company Limited. v. Donegal County Council* [2015] 1 I.L.R.M. 106, this has been where the determination of certain legal rights and obligations have 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…By contrast under the National Monuments Act neither any Minister nor any administrative body has been specifically assigned the functioning of determining (whether or not in the context of a dispute) what is or what 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 Act, given that any proposal to move or alter a national monument without a s. 14 consent is prohibitive. This provision [*i.e.*, s 14], Hardiman J. noted in *Dunne and Lucas* "…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."

33. Barrett J. then proceeded to an examination of the historical record – often supplemented by statements of survivors subsequently collected by the Bureau of Military History. No summary of mine could really do this exhaustive analysis full justice. One or two examples must serve as representative of this analysis. Thus, for example, dealing with the status of No. 10 Moore Street Barrett J. said (at paras. 285-286):

> "When it comes to the issue of the historical and other interests of no. 10 - separate from the issue whether it sits upon or comprises part of a battle field of national or European importance - the Court notes the above and that:
>
> (1) No. 10 was the first entry point 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 April 28th;
>
> (5) the final meal of the evacuated G.P.O. 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) …:;
>
> (8) the historical and / or architectural and / or archaeological interest of No. 10 today is clear from the Shaffrey Report (2012)…;
>
> (9) the historical interest of No. 10 today is apparent from the affidavit evidence…para 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 Act."

34. Barrett J. concluded this entire exercise by saying (at para. 358):

> "…each of The O'Rahilly Parade, the length of Moore Lane from Parnell Street down to Henry Place, the entire "L" Henry Place, the National Monuments that the court has found to populate Moore Street, the length of the street in which Nos. 10-25 stand, and other properties - the Water Works building, the Bottling Stores, O'Briens Stables, White House - so patently comprise …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 G.P.O. garrison. This garrison comprised men and women, many of whom had seen the Proclamation read aloud outside the G.P.O. scant days before, some of whom had died or were soon to die without knowing that their lives that not been sacrificed in vain or that the battle they started would result in our re-birth as a national 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 these additional properties it has mentioned, was the hardest of battles, fought by the toughest of people for the greatest of ends."

35. The judgment accordingly squarely and unambiguously raises the question of whether the High Court enjoys a jurisdiction to declare a monument or site to be a national monument. It is to that issue to which I will now turn.

Whether the High Court has a jurisdiction to declare a site to be a national monument

36. The fundamental difficulty presented by the language of s. 2 of the 1930 Act so far as the present case is concerned is that the Act applies only if the preservation of the Moore Street battlefield site as a national monument is "a matter of national importance." It is important to be clear at the outset about the nature of this particular difficulty: it is because the exercise of any free standing jurisdiction of this kind would require the courts to make a determination as to whether the preservation of any given monument was a matter of national importance, thus – as we shall now see – effectively requiring the court to pronounce to what amounts to a purely political question, unaided by any defined or established legal standards.

37. Other aspects of the definition provisions of the 1930 Act do not present with the same difficulty. The courts would, for example, be in a position to determine whether a particular building, thing or place was a "monument" within the meaning of the 1930 Act. The courts could likewise determine – as, on at least one view of the decision in *Tormey*, happened in that case – whether a particular monument formed part of an already designated national monument, such as those national monuments (including the Hill of Tara) listed in the schedule to the 1882 Act. But what the courts cannot be asked to do – and here is the heart of the difficulty created for this case by s. 2 of the 1930 Act - is to make this determination by reference to purely policy or political judgments or criteria. Specifically, the courts could not be given the jurisdiction to make such a determination by reference to purely policy considerations such as whether the preservation of a particular monument was a matter of national importance.

38. If, unaided by any prior recourse to the provisions of the 1930 Act or, indeed, the earlier case-law to which I have just referred, a constitutional lawyer or a political scientist were to be asked to characterise the nature of the power to declare that a particular

monument or park was a national monument or park, the standard answer would probably be to say that the power in question is executive in nature, although the lawyer or political scientists in question might well acknowledge that there are also instances of where the matter has been settled legislatively, such as the list of monuments scheduled to the Ancient Monuments Protection Act 1882. There are also instances of where particular estates have been declared by legislation to be a national park: see, *e.g.*, s. 12(1) of the Bourn Vincent Memorial Park Act 1932.

39. The reason why, however, the matter would be regarded as executive (or, possibly in some instances, legislative) in character is, however, readily apparent, because the designation of a monument as a national monument ultimately calls for political and, in some instances, perhaps, administrative judgment (aided, of course, where appropriate by advice from historians, archaeologists, conservationists, engineers and other similar specialists) precisely because of the manner in which this phrase has been defined by s. 2 of the 1930. As is clear from the definition in s. 2 of the 1930 Act - which requires an assessment as to whether "the preservation of [a particular monument] is a matter of national importance by reason of the historical, architectural, traditional, artistic, or archaeological interest attaching thereto" – the determination of whether a particular monument is a national monument is thus ultimately made a policy judgment because of the statutory necessity to make a judgment as to whether the preservation of the monument is a matter of national importance. While the judgment of Murray C.J. in *Dunne (No.2)* admittedly deals with this matter from the slightly different perspective of the State's duty to protect the national patrimony arising from Article 5 of the Constitution, it is nonetheless clear that this question was regarded by the Court in that case as an essentially policy question.

40. The judicial branch quite obviously lacks the institutional competence, capacity and, most of all, democratic legitimacy to determine policy matters of this kind. Article 34.1 of the Constitution instead requires the judiciary to administer justice, thus typically requiring the judges to apply conventional legal materials - such as the corpus of common law rules and principles, rules of statutory interpretation, precedent and reasoning by analogy – in a detached and principled fashion, regardless of the consequences. While it is true that, as Barrett J. correctly noted, the High Court enjoys a full original jurisdiction by virtue of Article 34.3.1 of the Constitution "to determine all matters and questions", it is perfectly clear that this jurisdiction extends only to justiciable controversies which are currently justiciable by law. In the words of Henchy J. in *R.D. Cox Ltd. v. Owners of M.V. Fritz Raabe*, Supreme Court, 1 August 1974, Article 34.3.1 merely declares "an amplitude of original jurisdiction in the High Court to encompass all currently justiciable matters".

41. As I pointed out in my concurring judgment in *Garda Representative Association v. Minister for Public Expenditure and Reform* [2016] IECA 18, the assumption that the other branches of government should or, indeed, must act in a similar fashion to the judicial branch when formulating matters of *policy* is a complete fallacy.

42. The other branches of government bring with them the strength of democratic accountability and the constitutionally assigned role of policy making. The Government brings with it the policy insights of its members and the wider civil service. It can give a lead as to what is likely to be effective in practical policy terms and it is likewise dispensed from the necessity to rationalise its actions by reference to conventional legal principles.

43. The reason for this different approach is, of course, because, generally speaking, the two other branches of government are engaged in the business of policy formulation as distinct from the administration of justice. In contrast to judicial decision-making, the policy makers of the legislative and executive branches are not required to be consistent or to have regard to established precedent or to proceed from legal principle or to give detailed reasons in writing for their decisions. Nor are they required to be detached and impartial in the same manner as is required of the judiciary by Article 34.6.1 of the Constitution. Critically, however, the two other branches of government are democratically accountable in a way that the judiciary are not.

44. Returning to the question of the 1930 Act, it is clear that the standard thereby articulated by s. 2 which is relevant to this case – whether the preservation of a monument is a matter of national importance - is one which, in the end, amounts to a policy determination for which the judiciary are quite unsuited. There are many reasons for this, but ultimately the standard is not one calling for the application of legally cognisable principles or rules. Any number of examples could be given to illustrate this point.

45. First, there is no doubt at all but that the 1916 Rising was a seminal national – even international – event. The courage and heroism of the Volunteers as they evacuated the General Post Office on the evening of Friday, 28th April 1916 and as they tunnelled their way from Cogan's Greengrocers in Moore Lane before arriving exhausted at No. 10 and then later No. 16 Moore Street early on the following (Saturday) morning – so movingly and eloquently described in the judgment of Barrett J. - cannot be doubted. Nor can it be doubted but that the Minister was fully entitled to make a preservation order – as was done in 2007 – in respect of Nos. 14-17 Moore Street, since this was the final meeting place of the Provisional Government prior to the final surrender in the early afternoon of that Saturday.

46. But should it follow from this that the entire Moore Street area and the adjoining lanes – the battlefield site – should be declared to be a national monument the preservation of which was a matter of national importance? No one doubts for a moment The O'Rahilly's dashing bravery and valour as he led a final Volunteer charge on a heavily fortified enemy barricade or fails to be moved by the tenderness of his final note written to his wife as he lay dying at Sackville Place/O'Rahilly Parade. Yet views would differ as to whether by reason of these facts alone this part of the battlefield site should be declared to be a national monument. One can, of course, make a pressing case for the entire battlefield site to be declared to be a national monument. But one might equally, for example, make a case that the area lying just outside the battlefield site where Commandant Pearse and Nurse O'Farrell met Brigadier Lowe on what is now Parnell Street to effect the surrender terms in the early afternoon of that fateful Saturday should by the same token also be regarded as a national monument. Yet others no less patriotic or unfamiliar with the historical narrative of these events might well think that it would be desirable for a variety of reasons that only Nos. 14-17 Moore Street should be regarded as a national monument and that it was not practicable or feasible to designate a large swathe of central Dublin as a national monument, the momentousness of these historical events notwithstanding.

47. Much emphasis was laid by the applicant and various other witnesses who filed affidavits in support of his application on the fact that the Moore Street site was the only extant battlefield site in either Ireland or Britain in the 20th century, thus re-inforcing its suitability for judicial designation as a national monument. One might, I think, query whether this area is, indeed, a battlefield site in the conventional military sense of that word, even if, sadly, a significant number of civilians and combatants from both sides died on or close to this site in the final hours of the Rebellion. But even if it should properly be so regarded, it is quite incorrect as a matter of history to assert that this is the only such 20th century battlefield site in either Britain or Ireland, since both the site of Kilmichael Ambush (November 1920) or the attack on the Custom House (May 1921) would, for example, by that standard have as good or even better claims to qualify as battlefield sites.

48. Other sites from 1916 (and, for that matter, from either the War of Independence period of 1919-1921 or from the Civil War of 1922-1923) could equally qualify as battlefield sites, including the Court of Appeal Building itself in which this very appeal was heard. Many – not least military historians - would probably regard the site of the Battle of Mount Street Bridge as having a greater claim

than any of these sites to national monument status, since the events at that Bridge on Wednesday 26 April 1916 present a classic example of how insurgents occupying fixed positions can engage and trap numerically superior enemy forces, inflicting huge casualties in the process. This was an example of how the Volunteers, led by Lieut. Grace and Lieut. Malone of the 3rd Battalion, effectively re-wrote the military textbooks with their tactics of disorienting cross-fire and then enfilading the advancing British troops. This was to be a model for street fighting which would be copied in the subsequent decades in street battles in Madrid, Budapest and elsewhere.

49. Away from the events of 1916, a similar case could be made for any number of sites. Should, for example, parts of Thomas St. be declared to be a national monument because this is where Robert Emmet was executed in 1803? By the same standards, areas of Wexford, Carlow, Kildare, Wicklow and Meath – and not just Boolavogue or Vinegar Hill - which saw conflict during the course of the 1798 Rebellion would also be candidates for national monument status.

50. Thus far, I have spoken only of events and places which form part of the heroic, valiant nationalist narrative. But should less creditable events – ranging from the massacres of loyalists at Scullabogue in the early summer of 1798 to the revenge killings committed by the Free State troops on Republican prisoners at Ballyseedy in March 1923 – be equally commemorated? What about events, person or places which form part of alternative Irish historical traditions, ranging from that of the Anglo-Irish Ascendancy on the one hand to the Unionist or Loyalist traditions on the other? Should, for example, the Dublin birthplaces of the Duke of Wellington or Edward Carson or, for that matter, the National War Memorial Gardens at Islandbridge be similarly treated as national monuments?

51. Moving for a moment from history to literature, no one seriously disputes the greatness of our pantheon of established literary figures such as Wilde, Shaw, Yeats, Beckett, O'Casey, Joyce and Heaney. But does that mean, for example, that the variety of Dublin homes occupied by the Joyce family as they slid from prosperity to poverty should equally be protected or preserved? One is then confronted with how to honour the contribution of writers such as Edgeworth, Goldsmith, Kavanagh, Synge, Swift and many, many others, writers which but for our *embarrassment de richesse* in the field of literary endeavour would, had they but been born in almost any other country, certainly enjoy iconic status as national poets or writers in those countries. Should notable houses or other property belonging or associated with these literary figures be similarly protected as national monuments?

52. I have taken the liberty of digressing slightly in order to make the more fundamental point that the narrative of history, archaeology, architecture and the arts is nearly always contested and open to differing and changing interpretations, fashions and tastes. J.S. Bach is nowadays regarded by many as perhaps the greatest of all composers, yet his great, magisterial works lay neglected and forgotten for almost 180 years after his death until they were championed by Mendelsohn in the 1830s. The narrative of the gallantry of the Confederate leaders and generals such as Robert E. Lee and "Stonewall" Jackson was marked by countless memorials in their honour south of the Mason/Dixon line long after the U.S. Civil War had ended in April 1865. Yet we find that in very recent times the accuracy of this narrative is increasingly questioned, with some of these monuments being removed or even destroyed as that historical narrative is re-considered and re-interpreted.

53. Much the same could have been said in respect of the statute of Queen Victoria which hung in Leinster Lawn until 1949 before being dispatched to Australia in 1986. While Victoria is revered in Britain as a great constitutional monarch who presided over a vast Imperial power, the scandalous indifference of her Government to the catastrophe of the Famine meant that her memory in post-1922 Ireland was reviled rather than revered. And returning to the debate at issue here one need only point to the different tone and emphasis found in the official celebrations by this State of the 1916 Rebellion at various dates between 1966 and 2016 as an illustration of this point regarding the essential contestability of historical interpretation.

54. The decision to preserve a national monument is accordingly at its heart a symbolic choice amounting, in effect, to a statement by the State as to the versions of history, architecture and the arts we choose to venerate as part of our official narrative. Echoing a point made by O'Higgins C.J. in *O'Callaghan*, these choices are ultimately part of the development by the State of our own political and cultural traditions in the manner envisaged by Article 1 of the Constitution.

55. All of this demonstrates that the choice of these particular political and cultural traditions is ultimately a political and policy choice which lies outside the realm of judicial determination and competence. On this point the system of separation of powers provided by the Constitution is quite clear, namely, that matters involving policy and political choices of this nature are matters for elected representatives and must therefore by definition be either executive or legislative powers which cannot appropriately be discharged by an unelected judiciary. There are, in particular, no legal standards which can guide the judicial branch in any determination of this question of what monuments should as a matter of national importance be preserved.

56. It is the absence of *legal* standards which is critical so far as the present case is concerned. Counsel for the plaintiffs, Mr. Collins S.C., contended with some force that the present question was really no different from the determination of other complex questions – such as medical negligence – of which the judiciary lacked specialist knowledge or expertise. There are, however, two significant differences between the question of whether, for example, a surgeon is guilty of medical negligence and whether a particular monument should be declared to be a national monument for the purposes of s. 2 of the 1930 Act.

57. First, the question of the appropriate treatment and care of a patient is always ultimately a question of medical science, medicine and clinical practice. Appropriately trained experts are available to provide the courts with expert testimony as to the parameters of acceptable medical treatment in any given case. Second, in any event, the court proceeds from the accepted principles of negligence enunciated in cases such as *Dunne v. National Maternity Hospital* [1989] I.R. 91. There are thus accepted legal standards available to guide the court in its determination as to whether a particular clinician has been negligent.

58. This is where, with respect, the example urged by Mr. Collins S.C. ultimately breaks down, because the case of medical negligence does present accepted legal principles for the resolution of this issue, even if the application of those principles to a given case may not be easy and even if also in some instances there may be judicial disagreement as to how these principles should be applied. This is not true in the case of whether a particular monument should be designated as a national monument because, to repeat, there are no legal standards which can assist in this determination, as it is ultimately one for subjective political appraisal and judgment. Determinations of this latter kind are assigned in our constitutional system to the two other branches of government because these are the issues which can only be determined in the democratic, rule of law-based State envisaged by Article 5 of the Constitution by those persons and institutions who, unlike judges, are democratically elected.

59. Nor is this to say that the issue of national monuments presents some kind of legal Alsatia in respect of which the judicial process has no role whatever. The courts can, of course, review executive decisions made under the 1930 Act on standard judicial review grounds such as vires, rationality, reasonableness, adequacy of reasons and so forth and, in many respects, the decisions in *Tormey and Dunne (No.2)* are best regarded as examples of where this has occurred. Another example from the UK is provided by *R. v. Environment Secretary, ex p. Rose Theatre Trust Co.* [1990] 1 Q.B. 504, a case where it was contended (admittedly without success) that the relevant Minister had acted unlawfully in failing to declare that the Rose Theatre (where at least two of

Shakespeare's plays had received their first performances) to be the equivalent of what we would describe as a national monument.

60. In such types of cases the courts are applying accepted and traditional legal standards of review of executive decisions. But there is a wide difference between, say, the High Court granting a free standing declaration that a particular monument should be declared to be a national monument for the purposes of s. 2 of the 1930 Act on the one hand and the High Court quashing a decision by the Minister consenting to the demolition of a particular national monument under s. 14 of the 1930 Act on the grounds of vires or rationality on the other.

Conclusions

61. In summary, therefore, I find myself coerced to the conclusion that the question as to whether a particular monument is a national monument "the preservation of which is a matter of national importance" for the purposes of s. 2 of the 1930 Act is, as so formulated by statute, one of pure policy in respect of which there are no established or otherwise manageable legal standards which a court can properly apply. Under our constitutional system of separation of powers a policy issue of this kind can only be determined *in the first instance* by an organ of government which is directly elected and is thus answerable to the People. One might equally say that for all the reasons canvassed elsewhere in this judgment the issue does not in reality involve the administration of justice for the purposes of Article 34.1 of the Constitution.

62. All of this means that s. 2 of the 1930 Act cannot be constitutionally interpreted as to vesting the courts with this function of declaring a particular monument to be a national monument where (as in the present case) this would entail the courts making purely policy assessments without reference to established legal criteria. It is, perhaps, possible to envisage circumstances in which the courts might with constitutional propriety be given this role by statute, but if so, the criteria specified in any such legislation would have to be significantly different than those presently contained in the relevant part s. 2 of the 1930 Act which has been relied on this case. As I have already indicated the courts would, for example, be in a position to determine whether a particular building, thing or place was a "monument" within the meaning of the 1930 Act. The courts could likewise determine whether a particular monument formed part of an already designated monument, such as those national monuments (including the Hill of Tara) first listed in the schedule to the 1882 Act. But what the courts cannot be asked to do is to make this determination in the first instance by reference to purely policy or political judgments or criteria. Specifically, the courts could not be given the jurisdiction to make such a determination by reference to purely policy considerations such as whether the preservation of a particular monument was a matter of national importance.

63. One way or another, it follows that the High Court does not have a free standing jurisdiction to declare a particular monument to be a national monument under the 1930 Act. Insofar as Hamilton J. decided otherwise in the *Wood Quay* case, he was, with respect, in error and that case must be regarded as having been wrongly decided.

64. It follows in turn that the declarations granted by the High Court in the present case which followed the approach in the *Wood Quay* case regarding what has been described as the battlefield site at Moore Street were similarly granted in error, since, in my judgment, the issue presented is a non-justiciable controversy in respect of which the High Court simply has no free standing, first instance jurisdiction. In these circumstances it is unnecessary to consider any of the other issues arising in this appeal in respect of this part of the judgment of Barrett J. The planning issues which arise in the judicial review proceedings will be considered in a separate judgment.

65. I would accordingly allow the appeal on the National Monuments Act issue on the simple – albeit fundamental - ground that the High Court does not have a jurisdiction to grant the declarations sought. In arriving at this conclusion, it is unnecessary to express any view as to the circumstances in which a particular monument can otherwise come to be regarded a national monument under the 1930 Act on the ground that its preservation was a matter of national importance beyond repeating once again that the High Court does not enjoy such a free standing jurisdiction to make such a declaration in the first instance.