[2023] IEHC 241

THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 562 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A, 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION

BETWEEN

NORTH GREAT GEORGE'S STREET PRESERVATION SOCIETY

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

HILLSTREET LIMITED PARTNERSHIP

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 15th day of May, 2023

1. By the late 17th century, north Dublin city was well developed around Smithfield and Church St., and its eastward expansion had progressed as far as Jervis St., Wolfe Tone St. and Bachelor's Walk, as noted in the developer's conservation assessment. The development of the north city crept steadily eastwards throughout the 18th century, a process that accelerated with the arrival of Luke Gardiner (who we met in *Sherwin v. An Bord Pleanála (No. 1)* [2023] IEHC 26, [2023] 1 JIC 2701 (Unreported, High Court, 27th January, 2023)). Henrietta St. was laid out from the 1720s, and as that process continued, Rutland Square (later Parnell Square) was laid out in the 1750s.

2. Bernard Scalé's map of 1773 shows a new street called Temple St. to the west of St. George's Church. By this date, the Archdall family had begun to develop a new street centred on the driveway to a house on the site, which previously formed part of the private estate of Sir John Eccles, Lord Mayor of Dublin in 1710. This new street became North Great George's Street. The north and west sides were developed between 1768 and 1769, and the southern end from the mid-1770s onwards. This included No. 35, which may have been one of the later ones constructed. The section of the street including No. 36 was developed in the mid-1780s. According to Dublin City Council, No. 35 was constructed in 1784 and No. 36 around 1785.

3. Despite the loss of some of the original buildings, North Great George's St. remains one of the finest 18th century streets in Dublin. It is parallel to Hill St., formerly part of Temple Street. The conservation assessment notes that in 1887: "The inhabitants of Temple Street Upper made representations to Dublin Corporation to have the name of Temple Street Lower changed, as it had become an area of ill repute and they wanted to dissociate themselves". Chatterton V-C had become unpopular with the corporation for granting an injunction restraining their proposal to rename Sackville Street after Daniel O'Connell (*Anderson v. Dublin Corporation* (1885) 15 L.R. Ir. 450). This resulted in a proposed name change of Temple St. Lower to Chatterton St. – an early attempted example of street renaming as political protest, currently topical in the derussification context. As the developer here notes, ultimately "the street was given the topographical description, Hill Street".

4. The development site with which we are now concerned is centred mainly towards Hill St., and replaces industrial buildings previously occupied by Orrwear, a supplier of protective clothing. A relatively narrow laneway links the development to North Great George's St., and emerges at a location named 36a North Great George's St. (so numbered from the 1890s as would appear from Thom's Directory). This lies between No. 36, a house previously occupied by William Joseph Dunbar, editor and proprietor of the *Irish Sportsman* (now the *Irish Field*), and No. 35, now the James Joyce Centre and formerly occupied by a tenant named Denis Maginn. He opened a dancing academy and ballroom on the premises and advertised himself as "Mr Denis J Maginni, Professor of Dancing, &c.". As Professor Maginni, he appears in James Joyce's *Ulysses*. (With such a rich history there are a wealth of options for any new locally-relevant place-naming of developments in the area, although maybe it's too much to hope for that something might yet be named after Vice-Chancellor Chatterton to rectify a lost historical opportunity and to keep the judicial flag flying).

5. The front of No. 36a is an archway noticeable by a sign for Orrwear. The Orrwear factory was developed in the 1930s, and the laneway was used for access to this from North Great George's St., although the premises fronted mainly onto Hill Street. Number 36 North Great George's St. became a listed building in 1971. By this time, the laneway had been used for decades for the purposes of access to Orrwear (see original affidavit of Mr Goodbody, para. 22). The building was added to the register of protected structures when the Planning and Development Act 2000 came into operation. There is currently no access from the laneway at 36a to either No. 35 or No. 36 (Mr Goodbody's affidavit, para. 20).

6. On 19th July, 2019, the notice party developer applied to the city council (reference No. 3546/19) for permission to demolish the former light industrial structures on the site and to construct

a shared accommodation scheme with 132 bed spaces up to seven stories plus roof plant at 39 to 42 Hill St. and 36a North Great George's St. This was an ordinary planning application and not one made directly to the board under the strategic housing development régime.

7. The applicant made a submission to the city council on 15th August, 2019. On 11th September, 2019, the conservation officer recommended refusal of the application due to the impact on protected structures. The conservation officer referred among other things to the planning policy preference for retention of existing structures where possible. Without in any way taking from that perfectly valid general point, or getting into whether that would have been possible in this particular situation, and while of course emphasising that my views on planning matters are irrelevant, one might mention in passing that the industrial buildings do present a rather grim vista when viewed from the upper floors of No. 35, so the developer's preference for a fresh start is perhaps understandable, without commenting on its merits.

8. On 3rd December, 2019 the council granted permission subject to 17 conditions. Seven appeals to the board followed (reference No. ABP-306181-19), one of which was made by the applicant on 6th January, 2020.

9. Following an inspector's report, the board granted permission on 16th June, 2020 subject to 20 conditions. Of note for the purposes of the proceedings are conditions 2, requiring the provision of hobs in the kitchens of the dwellings in the development, and condition 3 which had the effect that rooms would be for single occupancy.

10. On 20th July, 2020, the developer applied to the council for a second permission (reference No. 3061/20) involving the amendment and extension of the scheme permitted by the first decision. This included the extension of the site to No. 38 Hill St. and the demolition of the existing building on that site. Permission was sought for another 21 bed spaces as well as other amendments. The developer also sought the removal of condition 2.

Procedural history

11. On 10th August, 2020, the present proceedings were commenced. The legal submissions of the applicant (para. 2) incorrectly state that the second application was made in the course of the proceedings. That is not so – it had been made prior to that, as noted above. The submissions also incorrectly state that the archway at No. 36a will be demolished, which is not the case. It is perhaps strange that the impact on the archway assumed such outsize proportions in the case, when the whole issue began as a false premise.

12. On 11th November, 2020, the city council decided to approve the second application, subject to 14 conditions.

13. Four third-party appeals and six third-party observations were made to the board including an observation by the applicant.

14. Following an inspector's report, the board granted permission for the second development on 27th September, 2021 subject to 22 conditions. These again included conditions 2 and 3.

15. By order of 8th November, 2021, I allowed the applicant to amend the statement of grounds to challenge the second decision. Allowing proceedings to be amended to incorporate further decisions is frequently much more efficient, cheaper and faster than requiring an applicant to bring a fresh set of proceedings (see for example *Habte v. Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405 (Unreported, High Court, 4th February, 2019) para. 32). I was satisfied that that would have been the case here.

16. An amended statement of grounds was filed on 11th November, 2021 and amended statements of opposition filed in response.

17. While a hearing date had been envisaged in early 2022, a costs issue then arose, and on 24th January, 2022 the hearing date was vacated with directions to issue a costs protection motion by 26th January, 2022. That motion came before the court for mention on 7th February, 2022 and submissions were directed, as was the delivery of missing exhibits.

18. On 14th February, 2022, the board was allowed time for submissions on costs and directions were given regarding a substantive affidavit in the case. There was a consent adjournment on 28th February, 2022 and on 7th March, 2022, the applicant was given one week to lodge an affidavit.

19. The costs issue was then due to be heard on 30th March, 2022 but due to the illness of one of the trial participants, the motion date was vacated and the matter was listed for mention on 9th May, 2022. On that date the notice party indicated that it wanted to put in an affidavit in the substantive proceedings and the applicants were directed to indicate whether they wanted to raise additional costs issues above and beyond those which were contemplated as being ones to be referred to the CJEU in *Enniskerry Alliance & Anor v. An Bord Pleanála & Ors* [2022] IEHC 338, [2022] 6 JIC 1003 (Unreported, High Court, 10th June, 2022).

20. On 16th May, 2022, the matter was adjourned for one week to enable the parties to prepare a Scott schedule setting out their respective positions on costs. There was a further adjournment for that purpose on 23rd May, 2022 and on 2nd June, 2022, the matter was adjourned to be certified as ready on the basis of a pragmatic approach that there would be no order as to costs against the

applicant up to the close of pleadings (which was intended to include affidavits as would be normal for such purposes). When the matter came back before the court on 27th June, 2022 an affidavit of the notice party had been delivered and the applicant sought time to reply.

21. Some discussions then took place between the parties and the court afforded two adjournments for that purpose. By November 2022, the costs position had been effectively clarified but did not appear to have been formalised as between the parties - that was done on 16th January, 2023. The applicant sought an order for cross-examination which was granted. The matter was then listed for hearing on 1st to 3rd March, 2023.

22. Five of the twelve hours allocated for the hearing were devoted to oral evidence (heard on 1st March, 2023), almost entirely on the sole issue of whether the archway was an 18th or a 19th century construction, and related or subsidiary points. Legal argument was then heard on 2nd and 3rd March, 2023. After the conclusion of the hearing on 3rd March, 2023, with the agreement (or at least acquiescence) of the parties, I carried out a site visit later that day to view the archway and compare it with the photographs. A direct viewing was quite consistent with the photographs. I also took the opportunity to attend at No. 35. That wasn't for the purposes of the case, but while there, certain possibly relevant architectural features came to my attention so the appropriate thing was to share that with the parties.

23. On 6th March, 2023, I informed the parties of what could be seen on the site visit, and on 13th March, 2023, I was asked to permit further affidavit evidence, which was allowed, and cross-examination thereon was agreed.

24. On 25th and 27th April, 2023, further oral evidence was heard and judgment was reserved on the latter date. So in the end, about three of the five days of hearing were devoted to oral evidence on the age of the archway. This was far from ideal, at least with the benefit of hindsight.

Relief sought

25. The reliefs sought in the amended statement of grounds are as follows:

"First Decision:

1. An Order of Certiorari quashing the decision of the Respondent Planning Appeals Board to grant permission for the demolition of a light industrial/warehouse building and construct a three to seven storey shared accommodation building containing 132 residential units at 39-42 Hill Street and 36a North Great George's Street, Dublin 1 which decision An Bord Pleanála reference ABP-306181-19 was made on 20th June 2020.
2. Such Declaration(s) of the legal rights and/or legal position of the applicant and/or persons similarly situated and/or of the legal duties and/or legal position of the Respondents as the Court considers appropriate.
3. A Declaration that the present proceedings are covered by cost protection provisions Section 50B of the Planning and Development Act 2000 as amended, and/or otherwise and/or the provisions of the Environment (Miscellaneous Provisions) Act 2011.
4. Such further or other Order as this honourable Court shall deem fit.

[5 to 10 deleted]

11. Further and other relief.
12. The costs of the proceedings.

Second Decision

13. An Order of certiorari quashing the decision of the Respondent Planning Appeals Board to grant permission for the demolition of a light industrial/warehouse building and construct a three to seven storey shared accommodation building containing 150 residential units at 39-42 Hill Street and 36a North Great George's Street, Dublin 1 which decision An Bord Pleanala reference ABP-308836-20 was made on 27th September 2021.
14. Such Declaration(s) of the legal rights and/or legal position of the Applicant and/or persons similarly situated and/or of the legal duties and/or legal position of the Respondent as the Court considers appropriate.
15. A Declaration that the provisions of Section 50B of the Planning and Development Act 2000 (as amended) and/or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 and Article 9 of the Aarhus Convention apply to the above entitled proceedings particularly in circumstances where they relate to an amendment of grounds to which the said provisions already apply.
16. Interim and/or interlocutory relief.
17. Further and other relief.
18. The costs of the proceedings."

Grounds

26. Helpfully, in oral submissions the case was significantly boiled down from both the amended statement of grounds and the written submissions. Three headings were identified: protected structures, condition 2 and condition 3. In those circumstances, the other points fell away and I will focus on the specific arguments that were advanced.

Protected structures

27. The issues that arise under this heading are as follows:

(i) whether the dispute of fact should be resolved by the court or whether the attempt to introduce new evidence is a form of gaslighting of the decision-maker;

(ii) subject to that, resolution of that dispute of fact;

(iii) the argument that the archway is a protected structure because it is part of the curtilage of No. 36; and

(iv) the argument that the archway is part of No. 36 itself.

The dispute of fact and whether that dispute should be resolved by the court

28. The affidavits raised a basic conflict of fact as to whether the archway at 36a North Great George's Street was an 18th or a 19th century construction. That was the core issue but a number of sub-possibilities were canvassed:

(i) The archway was constructed contemporaneously with No. 36 in the 18th century to serve No. 36 – while the applicant kept that option open, the centre of gravity of its position moved towards the option of it being constructed immediately thereafter but as part of the same tranche of works.

(ii) The archway was constructed contemporaneously with No. 35 in the 18th century to serve No. 35 – the applicant had originally posited the possibility that the arch was to serve No. 35, No. 36 or both, but moved somewhat away from that possibility.

(iii) The archway was constructed contemporaneously with both Nos. 35 and 36 in the 18th century to serve both – as noted, the applicant moved somewhat away from that possibility as well.

(iv) The archway was constructed shortly after completion of No. 36 in the 18th century but as part of the same tranche of works – that seemed to be the applicant's primary eventual position.

(v) The archway was constructed after 1860 as a new construction – while that appeared to be the notice party's initial position, the situation became more nuanced as matters developed.

(vi) The archway was constructed after 1860 with some recycling of 18th century bricks – while that was a distinct sub-possibility, again the notice party nuanced that somewhat further.

(vii) The archway was constructed after 1860 and subsequently rebuilt at least once – that was ultimately the respondent's broad position.

The gaslighting issue

29. The board raised a threshold issue as to whether the "protected structure" issue was a form of gaslighting by the applicant, because it wasn't properly raised during the planning process itself. In those circumstances I need to consider whether the question of the status of the archway as an alleged protected structure is one that should be resolved by the court at all.

30. The basic inflection point in relation to situations of this kind is whether the point is one that has to be considered by the decision-maker autonomously or whether it only has to be considered only if and to the extent that it is raised in the process. Normally a point only has to be considered autonomously if it is an issue that the legal framework (whether constitutional, domestic, European or international and legally-applicable) requires the decision-maker to consider, or if it is an issue that a reasonable expert decision-maker would see as arising on the face of the materials (including what is evident on the ground in any case where the decision-maker is required to access, or actually accesses, any given location or physical item).

31. The more difficult problem is applying that general position to the complex facts here.

32. The applicant raised a threshold objection to the threshold objection, complaining that:

> "(a) The Board did not make complaint of gaslighting in its Statement of Opposition.
> (b) Nor did the Board make any complaint of gaslighting in its written submissions.
> (c) The Board made no objection to the cross-examination of witnesses which was focused on the subject of the identification of the protected structures relative to the application site."

33. That's as may be. But even assuming for the sake of argument that the objection was belated, that in itself doesn't render evidence relevant and legally significant if it would not otherwise be so.

34. The applicant goes on to submit that "if the archway and side access form part of a protected structure, then it necessarily follows that the application was void *ab initio* and the Board had no jurisdiction to deal with it because of the failure to comply with the mandatory notice obligation

under Art. 18(1)(d)(iii) [of the Planning and Development Regulations 2001]. There is no deference to planning judgment in a validity requirement under the PDR. The Board cannot hide behind planning judgment because it has no jurisdiction to make that judgement if, as a matter of law, the site included part of a protected structure. The question of law may be difficult, but the answer is black or white".

35. That sounds very plausible; but the subtle problem with that argument is that it does not take into account the principle that that which is invalid becomes effectively valid if the invalidity is not raised at the appropriate time and in the appropriate way.

36. Suppose an application is made for works on a protected structure, but the applicant states incorrectly that the structure is not a protected structure. One thing the decision-maker is required to do is to check the record of protected structures (RPS), which is a public document of which the decision-maker is on constructive notice. If the decision-maker fails to do that, and the illegality would have been apparent from the record, then the application and any consequent decision is invalid independently of whether anybody raised the point in the process or not. If the record would not have alerted a reasonable decision-maker to the problem, but there is a requirement for a site visit or alternatively if a site visit in fact happens, and if the problem would have been apparent on such a visit, then again the process would be invalid notwithstanding that nobody made the point. A hypothetical (incorrect) decision that the structure is not protected, in circumstances where the board had or could properly have had access to material indicating that it is, is not just a question of reasonableness but of lawfulness.

37. But on an alternative scenario, if nobody raises the issue, and it would not have been apparent from the materials before the decision-maker or any materials it was required to consult or was on actual or constructive notice of, and would not have been apparent from any site visit that the decision-maker was required to undertake or actually undertook, then even if at some later point it were to be considered that the structure was protected, this is not a point on which a decision should be quashed on judicial review otherwise than by consent. That sounds possibly harsh but it is the jurisprudential logic of the situation, because otherwise the court would be getting into making a substantive merits determination without that being called for by the legal framework. It is an example of how a decision-maker can permissibly make an incorrect decision – permissibly in the sense that the decision won't be quashed even though it was wrong, because the wrongness arises from facts that were not properly before the competent authority.

38. The same principle applies to the curtilage and attendant grounds. Assuming that the decision-maker has (or should have) identified that we are dealing with a protected structure, the terms of the 2000 Act require the board to properly consider and determine (whether anyone raises the point or not) what is the extent if any of the curtilage and the attendant grounds (see definition of "protected structure" in s. 2(1) and the terms used within that definition). That consideration and determination is not just a matter of reasonableness; it has to be carried out in a lawful manner with due regard to the relevant materials. That said, a decision is unlikely to be quashed merely because there is no express finding of the extent of the curtilage as long as that wouldn't have made any difference on the facts. But if something practical would have turned on whether a particular part of the lands were within or without the scope of protection, then a failure to be clear on what that scope is could potentially be fatal to the decision.

39. The applicant went on to submit that "[t]he English cases may tether the decision of a planning inspector in that regime to rationality, but in this jurisdiction the identification of a structure, and thus a protected structure, is a question of law – as in *Balscadden Road SAA Residents Association Ltd v An Bord Pleanala (No. 1)* [2020] IEHC 586".

40. One is sometimes uneasy about attempts to argue that Irish and English caselaw are radically different, because frequently there is much common ground and much that can be mutually learned. Maybe it's too jaded to comment that one's general impression is perhaps that we are willing to learn more from the English caselaw than *vice versa*, but regardless of that I am not sure that the gap is as radical as postulated. Yes, the interpretation of the development plan and RPS is a question of law and thus a question for the court, but in many situations it is not a "pure" question of law but rather a "mixed question of fact and law". The present situation is an example. The RPS here refers to No. 36 as a "House". What that means is a matter of law, but clearly not a pure matter of law – one would need to have a look at the house to see its layout and extent to determine what is and is not part of the house. So the general point that interpretation of the RPS is a matter of law for the court can comfortably co-exist with the point that insofar as that interpretation depends on matters of fact, such matters are ones for the decision-maker subject to review for legality, which includes but is not limited to reasonableness.

41. The applicant also argues: "As held in *Sherwin v An Bord Pleanala* [2023] IEHC 26 at [42], in the context of a development affecting a protected structure, the Board was obliged to proceed in accordance with the requirements of s. 57(10). Those obligations cannot be avoided by the failure to identify that the development affects a protected structure. As said in *Monkstown Road Residents'*

Association v. An Bord Pleanala [2022] IEHC 318 at [87], '[l]ogically, if the Board, in considering a planning application, is sensibly to have regard to the protected status of a protected structure, as required by s. 57(10), it must first and necessarily know of what the protected structure consists'. It was repeated at [89] that the statutory provisions relating to protected structures 'requires that the Board, in considering a planning application relating to a protected structure, must have regard to its protected status and, in having such regard, must consider the curtilage of the protected structure to be part of the protected structure and protected accordingly. So the Board must know of what the curtilage consists. It must also be presumed that the Board was aware of this necessity".

42. I totally agree with that in the sense that the decision-maker must (if the situation, materials or submissions raise any issue on the point) take a view on whether it is dealing with a protected structure at all, and if so, what is the extent of protection (in terms of the structure itself, its curtilage, and attendant grounds). That doesn't mean, as noted above, that any ambiguity or laxity in the implementation of that requirement is automatically fatal if it wouldn't have made any difference to anything. And more relevantly for present purposes, while the decision-maker has to consider the question of protected structures, that doesn't answer the question of by reference to what that consideration takes place. Such consideration has to take place by reference to what the decision-maker is required to consider autonomously, including what it is on constructive notice of, and what is before the decision-maker in the given case, including what would be apparent to a reasonable expert from that material.

43. The applicant's fourth argument under this heading is that "[t]he interpretation of listing of No. 36 in the development plan is a matter of law". While that is correct insofar as it goes, it is an oversimplification for reasons I have addressed above.

44. The fifth argument was: "As noted by the conservation officer of Dublin City Council, the development plan provides at policy CHC2 that there was an obligation not to 'cause harm' to the curtilage of a protected structure: it follows that if the way and the arch are within the curtilage of No. 36, then the development is in material contravention of the plan, which makes the question a matter of law arising autonomously for the Board". That doesn't add a whole lot to the previous points.

45. The applicant added a sixth point to the effect that material stating that there was a protected structure was before the board. However that material doesn't appear to have identified the archway as a protected structure. So it doesn't really get the applicant anywhere.

46. Applying all that here, the basic problem for the applicant is that there wasn't anything triggering an autonomous duty to identify No. 36a as a protected structure, nobody before the board suggested specifically that No. 36a as an archway or laneway or both were either part of a protected structure or part of the curtilage of a protected structure, and there wasn't anything otherwise before the board from which that issue would be seen to arise by a reasonable expert.

47. Yes, there were vague references in submissions to the curtilages of protected structures, recorded by the inspector in the first report at para. 6.1.1 as arguing that:

> "the proposed development should be refused permission based on guidance within the Architectural Heritage Protection - Guidelines for Planning Authorities, as well as policy CHC2 and the provisions of the Dublin City Development Plan 2016-2022, given the site context within the curtilage of protected structures, the impact on the historical cityscape and the opinion of the planning authority's conservation architect."

48. But it is not at all clear to me how the board could have deduced from such general references that it was being contended that No. 36a specifically was protected, or why. The applicant complaints that it is being penalised for narrowing its case from what it was before the board. That sounds hugely persuasive, but the problem emerges on realising that one can reverse that in an equally persuasive way - the applicant is facing consequences for failing to particularise its case before the board.

49. As pointed out by Mr Goodbody at para. 9 of his affidavit:

> "in its submission to Dublin City Council in respect of the proposed development dated 15 August 2019, the Applicant did not assert that the structures within the application site are protected structures."

50. The applicant's submission states:

> "In our opinion this proposal constitutes a gross overdevelopment of this relatively small site. It would have a seriously detrimental effect on the adjoining protected structures in North Great George's Street. North Great George's Street is one of the finest eighteenth century streets in Dublin. It is perhaps the only street of protected structures that has successfully maintained a predominantly residential element. This is to a great extent thanks to the efforts of owner-occupiers who have struggled to conserve the houses. Indeed the owners of numbers 37,38 and 39 North Great George's Street, those most affected by this proposal, have owned those houses for over 40 years."

51. The high point of the applicant's attempt to put the point before the board is its appeal which contended that:

> "The site is within the curtilage of the Georgian houses 34 to 37. It incorporates the sites of the original mews buildings and part of the gardens of these houses."

52. As stated by Mr Goodbody at para. 11 of his affidavit:

> "In its appeal made to the Board in this matter, the Applicant asserted that 'the site is within the curtilage of the Georgian Houses 34 to 37' but did not assert that any of the structures on the site of the proposed development were themselves protected structures. Rather, the appeal made by the Applicant contended that the proposed development would be 'seriously detrimental to the Protected Structures on North Great George's Street', including those adjoining the subject site."

53. Is that enough? Maybe this is a fact-specific conclusion, but on these particular facts I don't think so. It just isn't sufficiently specific to alert a reasonable decision-maker to the argument that No. 36a specifically was either part of No. 36 or of its curtilage. Indeed by confining the complaint to curtilage, it possibly excludes the argument that the site is "part of" No. 36. As far as the curtilage is concerned, the complaint encompasses far too broad an array of possibilities. What part of the site is in the curtilage, and are we talking about the curtilage of No. 34, 35, 36 or 37, and why? There are just too many mutating possibilities there for this kind of plastic formulation to adequately put the board on notice of the case as now reformulated. The board puts it elegantly in submissions:

> "it could not be credibly suggested that the Board had an autonomous legal duty to inquire into a multitude of hypothetical factual assertions regarding the extent of the curtilage of no. 36 NGGS that were never made by the Applicant or anyone else and where no fair reading/interpretation of the RPS would give rise to such an inquiry. Such a purported duty is self-evidently unworkable."

54. The much more natural interpretation of the point the applicant made during the process, especially given the references to mews and gardens, is that the applicant was reiterating the point made by the conservation officer – as put in submissions 'the conservation officer has confirmed that the application site includes part of the historic curtilages of protected structures'. The key word here – conveniently ignored by the applicant - is "historic". Absolutely, the conservation officer and the applicant are correct that the development site includes part of the *historic* curtilages – stable blocks and the like that were separated from the main houses long before the introduction of listing and protection. But that is a totally separate point from the case as run by the applicant.

55. As put in the conservation report for the second application:

> "16.10.16 Mews Dwellings
> The subject site lies within the historic curtilages of No/s 35-38 North Great Georges Street - which are all Protected Structures. Therefore development that is proposed to the rear of these Protected Structures should have consideration for aspects of Section 16.10.16 (Mews Dwellings) of the Dublin City Council Development Plan 2016-2022, as it would relate to development that impacts on the setting and special architectural character of the Protected Structures themselves."

56. But the applicant didn't make the latter point regarding consideration - it went large on the former point regarding curtilage but ignored the all-important qualifier of "historic". That qualifier (which implies not part of the current curtilage) explains why the conservation officer was not arguing for full protected status but only consideration in the context of setting and special architectural character "of the protected structures themselves".

57. The question then is whether the board can be faulted for not considering this really depends on whether this was something that would have been sufficiently evident to an expert on the materials before the board (including something that would have been apparent from the site visit by the inspector), in which case it would have to be considered autonomously by the board whether anyone raised it or not, or on the other hand whether it was something that the board only had to consider if it was specifically raised. The former proposition has to be established evidentially and in the present case that hasn't been done. It hasn't been shown that a reasonable expert decision-maker would have seen No. 36a as a protected structure based on the material of which the board was on constructive notice or was required to consult, the material before the board or specifically based on a site visit.

58. The question of curtilage is partly a question of fact and degree for the decision-maker, but that presupposes that the decision-maker is given the opportunity to consider facts relevant to such an analysis. Unless the issue relating to curtilage is one that arises from the materials that were before, or should have been before, the decision-maker, that can't happen if the issue is raised in the court for the first time. So if the point ought to have been examined autonomously in the circumstances or was sufficiently apparent on the materials but the board nonetheless failed to consider it, the decision might be open to challenge, but that isn't the situation here.

59. The doctrine that the decision-maker should be given a fair chance to consider any relevant issue (see *Clonres CLG v. An Bord Pleanála & Ors* [2021] IEHC 303, [2021] 5 JIC 0706 (Unreported, High Court, 7th May, 2021) at para. 87, *Reid (No. 1) v. An Bord Pleanála* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021) at paras. 15 and 16, *Jahangir v. Minister for Justice and Equality* [2018] IEHC 37, [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018) at para. 7) is flexible enough to allow for certain exceptions, where someone else has put the issue up or where the issue would be apparent to a reasonable expert body. But the doctrine is not infinitely flexible.

60. Nobody and certainly not this applicant made the specific argument that since No. 36 was a protected structure, No. 36a was protected as being either a part of it or within the curtilage of the main house (as opposed to the historic mews curtilage). So it isn't open to this applicant to complain that the board didn't consider this point. The central case of gaslighting a decision-maker is failing to make a point that the decision-maker wasn't otherwise required to consider, either at all or in sufficiently specific terms, and then seeking to condemn the decision for failing to consider such a point. That, unfortunately, is what we are looking at here.

61. The obvious distinction between this case and *Sherwin* is that in *Sherwin* there was no doubt about what the protected structures were. So the legal obligations regarding considering the restrictions on demolition followed as a matter of law. Conversely here, if the applicant wants to contend, contrary to anything that appears on the face of the RPS, that a particular structure is protected, it has to give the decision-maker a fighting chance to consider that first (in the absence of any autonomous duty or any other material putting that properly before the decision-maker).

62. On this basis I think that the argument that No. 36a is a protected structure should be determined against the applicant as a matter of law on the particular facts applying to this application. There would be other situations where the materials before, or that should have been before, the decision-maker would be sufficient to raise issues that could go to validity if not properly considered. However if I am wrong about the legal conclusion under this heading, I will go on to consider that issue on the basis of the evidence adduced.

Some definitions

63. Before addressing the substance of the issue regarding the protected structure, some of the technical terms in the evidence and materials call for definition, and I would offer the following which is largely based *verbatim* on wording supplied by the parties' experts:

(i) Arrise: the sharp edge formed by the intersection of two surfaces, such as the corner of a masonry unit; the edge of timber. In brickwork, arrises are the point where the plane surfaces of the bricks intersect with each other.

(ii) Bond: the way in which bricks could be laid with a regular sequence of headers and stretchers. One factor that is important for the strength of the wall is that the vertical joints between the bricks should never align or nearly align.

(iii) Calp bedding: an arrangement where a lower level of calp is used to provide a base for brickwork construction over. These beds can be quite thin but are commonly found in 18th century architecture through three quarters of the height of the basement wall up to a level where brick construction commences.

(iv) Calp: sometimes referred to as "Dublin Calp" is a bluish-black or dark grey, dark mud-bearing limestone with thick beds containing internal thin flat or convoluted laminations. It was commonly quarried in the Lucan and Palmerstown areas of Dublin and in Dublin it was first used in the construction of Christ Church Cathedral in 1190 and later was much employed in Georgian Dublin generally in basement and lower ground walling and in garden walling as well as and in Trinity College for the ground floor story of the Old Library.

(v) Closer: a brick used to close a sequence at a corner. A bond system such as the Flemish bond works until the corner of a building, or a window or door opening, is reached. When one row of bricks ends with either a stretcher or a header the row above and below will end with a space that is of a length intermediate between the header and the stretcher. This gap is filled using a brick called a closer.

(vi) Colour-washing: a technique that does not use mortars, but rather water-based pigments to help to even out the colour of a brick façade in advance of pointing. It was also used, mainly as a later intervention in the 19th century, to recolour yellow brick façades to give the impression of red brick.

(vii) Course of brickwork: while not defined by the parties, a course of brickwork appears to mean a horizontal line of bricks.

(viii) Cut-outs: cutting out of decayed or damaged stone or brick and its replacement with a replacement brick or stone. On occasion, a cut-out may involve the cutting out and replacement of only a small part of the brick or stone – most often in an area of specific wear and damage so as to minimise intervention into the historic fabric.

(ix) Flemish bond: the most common arrangement of bricks in eighteenth and nineteenth-century buildings in Dublin. It consists of alternating headers and stretchers along each row of bricks, with each header placed so that it is in the centre of the stretchers above and below it.

(x) Gauged brickwork: brickwork where a superior finish in the details of an important brickwork elevation is required, such as moulded reveals, arches, string courses and other forms of ornamentation. By definition, to gauge is to measure, set out and work exactly, objects of standard size so as they conform to strictly defined limits. Gauged brickwork as a specific typology, was introduced to England from the Netherlands in the sixteenth century, and reached its height during the Georgian period. Gauged brickwork is characterised by tight joints and requires a very high standard of finish and craftsmanship. Gauged brickwork is a method whereby bricks are cut and rubbed to fine tolerances. The bricks used are known as "rubbers" and are relatively soft compared to a standard brick. Rubbers can be saw-cut and rubbed to shape by means of a rubbing stone. Once the desired shape is achieved rubbers are soaked in water and dipped into a lime putty and silver sand mortar prior to being laid. By this method joints of less than 1 mm can be achieved. Gauged brickwork can also be carved to create embellishments.

(xi) Header: a brick laid with its short face visible on the face of the wall.

(xii) Keying in: this process was used in evidence in a sense equivalent to socketing (below). Public domain material also suggests it can be used to describe the process of fixing bricks in place using mortar to fill holes in bricks designed for that purpose.

(xiii) King closer: a brick that is intermediate in size between a header and a stretcher. This is used where the corner of the wall ends at stretcher, and it is placed at the corner of the wall.

(xiv) Pointing: the finishing of mortar joints in brick or stone masonry construction. Pointing is the implementing of joints to a depth of 10 mm to 20 mm and filling it with better quality mortar in desired shape. It is done for cement mortar and lime mortar joints. In pointing, the pointing mortar is inserted into the joint and finished to the desired profile. Pointing will usually use a superior quality of mortar of fine silica/silver sand and, frequently, either an improved class/strength of binder and/or a richer binder:filler ratio.

(xv) Queen closer: a brick that is shorter than a header. This is used where the corner of the wall ends at a header, and it is placed in from the corner and separated from the corner by a header, so that the vertical joint is not too close to the corner.

(xvi) Quoin: masonry blocks at the corner of a wall intended to provide for structural stiffening of a stone rubble wall. Stone quoins are also used as a decorative device to provide corner emphasis in brick architecture.

(xvii) Socketing: the insertion of a building element into a cutting, groove or hole formed for the purpose of receiving that building element. It can be applied to timber work jointing, the insertion of new bricks or stone elements (sometimes to establish a "key" between two parts of a structure) or even to a simple plaster ceiling embellishment which requires support.

(xviii) Springing point: the point at which an arch connects with and commences from the wall which is supporting it. An arch can be flat, curved, half-round or elliptical, however all arches commence at a springing point.

(xix) Stopping material: following application of white ribbon over brick joints, a "stopping mortar" coloured the same tone as the brick – usually red or yellow/buff – is applied under or around the ribbon to make it stand out. In Irish tuck pointing known as "wigging", the white mortar is applied first (finished into a ribbon), with the coloured stopping mortar then applied over and around the ribbon. This has subtle consequences over time. In the English version, the ribbon degrades first, causing the façade to gradually return to the colour of the brick/stopping mortar. In Ireland, the stopping mortar often washes away first, revealing more white area between the bricks.

(xx) Stretcher: A brick laid with its long face visible on the face of the wall.

(xxi) Tuck pointing: applying a thin white ribbon over the brick joints. Depending on the process used, a "stopping mortar" coloured the same tone as the brick – usually red or yellow/buff – is applied under or around the ribbon to make it stand out. English and continental tuck pointing typically applies a coloured mortar first, followed by a fine white ribbon to finish. Irish tuck pointing known as "wigging", reverses this process, applying the white mortar first (finished into a ribbon), with the coloured stopping mortar then applied over and around the ribbon.

(xxii) Wigging: a distinctive Irish pointing technique in which the joint finishes flush with the brick face and is ruled top and bottom, that emulates the visual aesthetic of English tuck pointing. It differs from English tuck pointing in that the ribbon and stopping material are a homogenous material formed in single application and a colour mortar (the "wigging") is applied over to give definition to the ribbon. A unifying "colour washing" of façade brickwork was also commonly applied. There is a considerable variety of historic pointing finishes in Dublin which is used as a finish to brickwork joints to give the brickwork a particular aesthetic. For much of the 18th century the dominant aesthetic that was aspired to was that of gauged brickwork of very high quality which has very fine joints and sharp arrises – at its best this type of brick even today can look like a machine made brick – for example at 4 Parliament Street Dublin 2, where a brick of this quality was used on the street façade in 1762 but proved so expensive that it could only be used as a "skin" over a cheaper Dublin Stock brick). However most of the brick made in Dublin during the 18th century was soft, under-baked and contained large pebbles and other matter and not only did the brick face tend to be pitted and striated if the manufacturing process was not carefully managed), but the edges of the brick were often highly irregular resulting in extremely thick lime flush jointing. As a result, pointing techniques were developed that gave an artificial impression that very fine quality brick had been used and fine joints had been made.

Findings on disputed issues of fact

64. I heard evidence from Mr Robin Goodbody on behalf of the notice party and Mr James Kelly on behalf of the applicant. The two experts were individually and collectively of great assistance to the court on this issue. There is a transcript available of the oral evidence so I do not think it is necessary for me to recount their testimony on a blow-by-blow basis.

65. Both Mr Goodbody (arguing for a 19th century date) and Mr Kelly (arguing for an 18th century date) were impressive witnesses. The relative merit of their qualifications is not particularly decisive. Practical experience is also a factor but of even more importance perhaps is the inherent logic of their positions (see para. 100(ii)(a) of *Minogue v. Clare County Council* [2021] IECA 98, [2021] 3 JIC 2902 (Unreported, High Court, 29th March, 2021) and *James Elliot Construction Ltd v. Irish Asphalt Ltd* [2011] IEHC 269, [2011] 5 JIC 2502, (Unreported, High Court, 25th May, 2011)). It is difficult to prefer the evidence of one witness without appearing to criticise the evidence of the other, which I don't intend to do, as there is something to be said for both theories. However insofar as I need to prefer one to the other in terms of which conclusion is more likely on the balance of probabilities, I would have to generally prefer the conclusion of Mr Goodbody overall, although on certain sub-points I would see merit in Mr Kelly's views as set out below.

66. Any attempt to synthesise three days of dense expert evidence as well as the underlying affidavits and exhibits is going to run the risk of over-summarisation, but I think that the main issues and the conclusions that can be drawn from them can be outlined as follows:

(i) **The approximate similarity of the springing point of the arch and the corresponding layout of the over-door arched light space in No. 36.** This is possibly a mild point in favour of the argument that the arch was constructed in a way to be visually compatible with No. 36 in particular. Mr Kelly says that one can associate such an alignment of two arch elements in a composed façade with a "common design intent" which I would broadly accept but that doesn't mean that the intention to have some limited compatibility in design was there from the date of the earlier of the two structures. All it means is that the later structure was designed in a way that had some compatibility with the earlier one. And as Mr Goodbody points out, the shape of the arch is quite different, so any integrated design concept is very loose at best.

(ii) **The existence of a possible degree of integration of the arch with the wall alongside No. 36 containing railings**. This was probably the applicant's best point. It was accepted that there had been some rebuilding work, but assuming that the wall and calp bedding are from the 1780s, it is possible to view the relationship between the archway, railings, wall and bedding as a factor in favour of an early date for the original construction of the archway. Some of the bricks at the junction between No. 36 and No. 36a do seem to overlap with the rising wall, and more fundamentally if the archway wasn't there when No. 36 was constructed, one has to ask what was there, if anything. There are a few possibilities. One obvious possibility is that the archway (or an archway) was there all along in much its present position. Another possibility is that the stonework or brickwork has shifted over time. A further possibility is that behind the wall there was originally no brick work as such and either nothing at all, or perhaps a wooden jamb for a doorway to the

laneway. One enters the realm of speculation here but on balance, if one were forced to choose one of these, it might be somewhat more likely than not that there was originally some brickwork behind the wall. One doesn't need to look at too many Georgian buildings to appreciate the deep appreciation of developers and architects of that period for aesthetics and symmetry. A rising wall half-way to nowhere at the edge of No. 36 wouldn't have looked that great, and would have been quite asymmetrical with the situation at the junction with No. 35. So with all necessary caveats, the more likely option on the evidence I had was the existence originally of some form of brick pier for a laneway gate. That doesn't mean that such brickwork is the self-same brickwork that exists at present, and having regard to the other factors, I don't think it is.

(iii) **The 18th century paving stones**. Mr Kelly referred to possible integration with the paving stones as "neutral" and it appears from a comparison with earlier photographs (showing smaller cobblestones of a more common variety in Dublin) that the paving stones are not original features. They appear to be 18th century stones moved from elsewhere. Thus they do not advance our argument one way or the other.

(iv) **The view of the archway at the front from a distance.** The wider-scale photographs show that the brickwork of the archway is noticeably a different colour from the adjoining houses of known 18th century construction. The site visit confirmed that. That does not seem to be just a matter of light. It may perhaps be the effect of construction or mortar techniques such as wigging, or possibly not, but on balance it is suggestive of a different process of construction, and therefore probably of a different and later time of construction.

(v) **A close-up view of the front bricks of the arch.** A closer view is somewhat more equivocal, in that some bricks look similar to those in No. 36, whereas others look radically different and have a much more mechanically-made appearance, particularly the bricks with ridged lines, of which there are quite a number. The photographs show both appearances of brick in the archway and my visit to the site confirms that. A mixture of bricks could be explained by the 18th century bricks being original and the later ones being the result of repair. Or it could be explained by the construction being 19th (or 19th but rebuilt in the 20th) century, but using older salvaged bricks. So finding 19th century mechanically-made bricks as integral elements of an alleged 18th century arch is not quite the archaeological equivalent of rabbits in the pre-Cambrian (to quote J.B.S. Haldane from another context), but the more of them there are, the less likely is the "repair" theory. Insofar as it was suggested that on behalf of the applicant that the archway was put in place on the end of the construction of No. 36, with the leaving of socketing spaces or cut-outs so that the archway could be added, that is again within the realm of possibility and could explain the inclusion of some brickwork that is relatively similar superficially to that in No. 36. But use of some 18th century brick could also be the result of later reconstruction or rebuilding with salvaged material, and overall this is more probable having regard to all of the factors, not least the not insignificant number of bricks with a mechanically-made appearance.

(vi) **The colour of bricks to the rear**. The colour of the bricks at the rear (internally to the lane) is markedly different to those of the adjoining walls which are of apparent 18th century construction. That difference doesn't hugely enhance the theory that the arch itself was a roughly contemporaneous construction, albeit that this is probably only a mild factor bearing in mind that as noted by Mr Goodbody, it would not necessarily be normal for the bricks at the rear of a house to match those at the front, so perhaps a difference between the rear of the arch and the side walls should not strike one as too unusual either.

(vii) **A close-up view of the appearance of bricks to the rear.** Apart from colour as such, the photograph of the bricks to the rear shows a very pronounced difference in appearance generally between the side wall and the archway brickwork. Again that is more consistent with a distinctly different construction time. Mr Goodbody's position that "if the arch was 18th century the bricks at the rear would match those of the side walls of the two houses" seems to have some weight. Mr Kelly's view was that the back face of the arch includes a large amount of "a red coloured hand-made brick … as well as some more recent brick". While more recent brick could have been later restoration, it is also possible that it was there originally. Insofar as Mr Kelly argues that the arch was "consistent with 18th century work", the

concept of consistency doesn't take us very far here because some of the features of the arch are also consistent with later centuries.

(viii) **The arrangement of bricks in each course of brickwork.** It is notable that there are very different brickwork arrangements as between the houses and the archway. The house bricks are laid out in a Flemish bond whereas the archway front brickwork is laid out in an alternating sequence of stretchers above two headers, repeating all the way down. That is similar on both sides and suggests a distinct construction process. All of the closer bricks are in the houses rather than in the archway. The queen closers are in No. 35. This suggests a different approach to construction and therefore the distinct possibility of either a materially different time of construction or very substantial reconstruction or both.

(ix) **The alignment of courses as between Nos. 35, 36 and 36a.** The higher one looks in the archway, the more the alignment of the courses of bricks appears to be out of sync with those in No. 36. Again that could be an effect of wigging, significant reconstruction or repair, or something else, but it does not particularly support the theory of near-contemporaneous construction.

(x) **Quoin-like marks.** The marks on the left-hand side of the arch at the edge of No. 36 which were referred to (perhaps loosely) as quoin marks correspond to positions of keyed-in bricks that have since been removed. These marks appear not to be the leftover marks of quoins as such. If anything these marks simply reinforce the point that very considerable repair and reconstruction has occurred on this arch.

(xi) **Similarity or otherwise with brickwork at rear of No. 35 in the context of reconstruction works on the rear return in 1990s.** The James Joyce Cultural Centre Ltd was granted a permission (1790/95) on 14th December, 1995 for reconstruction and restoration of a two-storey return to provide a new kitchen and toilet accommodation and the erection of a glazed canopy over the rear courtyard. The centre's architects referred to a "rebuilt return" which would "revert to its Original two storey form". The laneway wall between the lane and No. 35 is topped by ten courses of brick which are different in appearance from the lower part of the wall. Overall, Mr Goodbody's opinion was that the rebuild was more extensive than that suggested by Mr Kelly, and I think that is more likely, without being unduly definite as to the extent of rebuild. One can see a significant difference as between the light colour of some of the bricks used in the rebuild/ renovation, and the darker bricks of the original main structure. The lighter bricks used in the rebuilding of the rear of No. 35 appear as Mr Goodbody says "very similar" to the bricks in the piers and overhead of the archway. The photographs support that conclusion, as did my site visit. The fact that the arch bricks bear more resemblance, perhaps much more, to bricks in an area of known significant reconstruction than to the known original 18th century houses provides support to the thesis that the archway is a later reconstruction or rebuild rather than part of an original 18th century construction.

(xii) **No structure is shown on the site of No. 36a in maps of 1847 and 1864.** This may have been because the archway was essentially, although by no means entirely, an overhead structure; and it would also appear that some (but by no means all) other overhead structures in Dublin were omitted from maps of these dates. With such inconsistencies in the mapping I would hesitate to see that as a point of any decisive weight, although it modestly favours the notice party.

(xiii) **Comparison with 1990s photograph.** An early 1990s picture in the archives of the Joyce Centre shows a different arrangement of bricks as between No. 36a and No. 36, which is not there today. Again, this suggests significant reconstruction. Both parties tried to superimpose an alignment on top of this picture but I would be slow to draw any conclusions from such a medley of possible projections. However, one can place some modest weight on the fact that the keyed-in bricks adjoining No. 36 have been removed, and also that those bricks and some bricks adjoining No. 35 are of a stronger reddish colour and are distinct from the rest of the brickwork as of the date of the photograph. Mr Kelly didn't think there was much of a colour difference but one can discern a number of different colours in the photograph of which the reddish hue of these particular bricks is one that reasonably stands out. All of this adds some support to the theory that major repair, reconstruction or rebuilding of the arch has occurred.

(xiv) **Comparison with 1980s photograph.** Perhaps more telling is a comparison prepared by Mr Goodbody between a c. 1980 photograph from the Irish Architectural Archive and one he took himself showing a major disparity in the courses of brick suggestive of rebuilding *in toto*. The comparison also shows that the coping stopes

on top of the arch have been re-laid (exhibit RG6), a point with which Mr Kelly did agree. The older photograph shows a clear discontinuity between certain courses of bricks in No. 35 meeting in mid-brick with the courses of the archway bricks, as opposed to as a continuous line as at present. Mr Goodbody said in cross-examination, in his understated and effective way, that this was "pretty telling", and I agree. While the whole conundrum is light on slam-dunk points, this picture comparison appeared initially as being as close to a smoking gun as we are going to get (exhibit RG7 in affidavit of Robin Goodbody of 16th March, 2023). Mr Kelly's response to that was that perhaps five courses of bricks were removed and re-laid thus knocking the alignment out of sync – but just for that section. That is certainly within the realm of the possible but unfortunately that explanation wasn't clearly put to Mr Goodbody so I was deprived of his answer to it (the fact that Mr Goodbody didn't otherwise refer to this point under cross-examination isn't relevant as suggested, unfortunately – the point is set out in his affidavit). All the same, one can't dismiss the partial rebuilding theory as wholly implausible. But courts deal in probabilities, and when one puts together all of the various factors – particularly type of brick, colour of brick, appearance of the arch, alignment of courses, changes over time – the conclusion that a full rebuild of the arch at least once since the 19th century, using salvaged 19th and perhaps some 18th century bricks, seems more probable.

67. Overall, the onus of proof lies with the applicant, and that has not been discharged. All of that said, the specific issues mentioned could have conceivable explanations that are consistent with 18th century construction, so I don't rule that out as impossible in some absolute way. I just take the view that, on balance, while it is just about more probable that there was originally some brick construction (probably a pier for the laneway gate) behind the rising wall at No. 36, this is unlikely to have lasted much later than the late 19th century. What is currently there as the archway is likely to be a rebuild of a construction after 1860 when mechanically-made bricks came into regular use in Dublin. The latest reconstruction is likely to have used a considerable amount of salvaged brick, mainly from the 19th century, although some earlier brick seems to have been included.

Whether the archway is part of the curtilage of No. 36

68. Bearing the foregoing in mind, I now turn now to the question of whether the archway and laneway at No. 36a is part of the curtilage of No. 36. As Holland J. commented in *Monkstown Road Residents' Association v. An Bord Pleanála* [2022] IEHC 318, [2022] 5 JIC 3106 (Unreported, High Court, 31st May, 2022) at para. 93, while curtilage "may not be a precise concept … the concept is generally well-understood".

69. The most helpful distillation of the concept of curtilage is set out by Buckley L.J. in *Methuen-Campbell v. Walters* [1979] Q.B. 525 at 543-544, where he said that "for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter".

70. Andrews L.J. in *Blackbushe Airport Ltd. v. The Queen and the Secretary of State for Environment and Food and Rural Affairs* [2021] EWCA Civ. 398, [2022] Q.B. 103, [2022] 1 All E.R. 524, [2021] 3 W.L.R. 567, [2021] PLSCS 56 said of the "part and parcel" test at para. 66 that "[t]he expression is figurative and means that a reference to that building would be understood to include, or extend to, that other land".

71. In the same case, Nugee L.J. was sceptical of the *Oxford English Dictionary* definition which he said, "refers to land attached to a dwelling-house 'forming one enclosure with it or so regarded by the law', which begs more questions than it answers" (para. 130). He went on to say, very perceptively if I may respectfully say so:

> "131. If we want to know what a word's ordinary meaning is, it is to my mind more helpful to ask how it is used in practice. This is after all what we do with everyday words. We do not know what the word house means because we have looked it up in the dictionary; we know what a house is because we have experience of how the word house is used. In the same way if we want to know what curtilage means, it is helpful to look at examples of how it has been used in practice. Such an exercise may not indicate the outer edges of its meaning with precision, but it does help to illustrate its central meaning.
>
> 132. Fortunately the extensive array of authorities cited to us on this appeal enables us to do this. We find for example that in the case of modest houses, the curtilage would not on the face of it extend to the whole of 10 acres of pasture land let with a cottage (*Trim v Sturminster RDC* [1938] 2 KB 508); that a field used for keeping cows was not part of a house (*Pulling v London, Chatham and Dover Railway Co* (1864) 3 De G J & S 661); and that paddocks have been held not to be part of the curtilage of houses in both *Methuen-Campbell* and *Burford v Secretary of State for Communities and Local Government* [2017] EWHC 1493 (Admin). On the other hand the curtilage does include a wall enclosing a

recently expanded part of the garden (*Sumption v Greenwich* LBC [2007] EWHC 2776 (Admin)).

133. In grander houses, the curtilage would extend to 'the house, the stables and other outbuildings, the gardens and the rough grass up to the ha-ha if there was one', but not to the 100 acre park surrounding a mansion house (*Dyer* at 358F-G per Nourse LJ); thus it would include a wall forming part of a ha-ha (*Watson-Smyth v Secretary of State for the Environment* (1992) 64 P&CR 156); and a stable block even some distance away from the main house (*Skerritts*); but not 64½ acres of a park, meadow land and pasture land (*Buck d. Whalley v Nurton* (1797) 1 B & P 53); nor a 650m long fence along the driveway (*Lowe v First Secretary of State* [2003] EWHC 537 (Admin)). Admittedly a devise of a mansion-house to the testator's wife was held to include three meadows let for grazing in *Leach v Leach* [1878] WN 79, but in *Methuen-Campbell* at 543F Buckley LJ said that he did not think, unless there was some special context, that this very liberal construction adopted by Malins V-C was good law.

134. When one moves away from dwelling-houses we find that the purpose-built residence of a medical superintendent within the boundary of a lunatic asylum was within the curtilage of the asylum *(Jepson v Gribble* [1876] 1 Ex D 151); but firemen's houses outside the boundaries of the yard to a fire station were not within the curtilage of the fire station (*Barwick*). A courtyard and access to a warehouse and mill was part of the curtilage (*Caledonian Railway Co. v Turcan* [1898] AC 256); as was a piece of ground in front of a public house used for access (*Marson v London, Chatham and Dover Railway Co* (1868) LR 6 Eq 101); and two small open spaces in an oil depot (*Clymo*); but not a large hardstanding massively in excess of what was necessary for an undertaking in a modest building (*Challenge Fencing*). To these can be added *Calderdale*, which concerned a terraced row of houses physically linked to a mill by a bridge and within its boundaries, and which is extensively considered by Andrews LJ above."

72. These illustrations were "all examples of bits of land that go with a building of 'relatively limited' extent (*Skerritts* [*of Nottingham Ltd v. Secretary of State for the Environment, Transport and the Regions (No 2)* [2001] QB 59, [2000] 3 W.L.R. 511]), that are 'intimately associated' with it (*Methuen-Campbell*)" (para. 135).

73. In applying such an approach to the question of whether the airfield at issue in that case was within the curtilage of the terminal building of the airport, he said at para. 136:

"To repeat myself, the fact that we have a grasp of the central meaning of a word does not mean that we are able to define quite how far it extends with precision. But armed with this information, we can see that the relationship of the airfield to the terminal building in the present case bears very little resemblance to the cases where land has been held to be within the curtilage of a building, and although this cannot by itself determine the question, I do not find it surprising that the more detailed analysis undertaken by Andrews LJ demonstrates that Holgate J was entirely right to find that the airfield was not 'within the curtilage of a building' as required by paragraph 6 of schedule 2 to the [Commons Act 2006]".

74. In *Challenge Fencing Ltd v. Secretary of State for Housing, Communities and Local Government* [2019] EWHC 553 (Admin), [2019] PLSCS 50, Lieven J. set out an attempted summary of the law at para. 18 as follows:

i) The extent of the curtilage of a building is a question of fact and degree, and therefore it must be a matter for the decision-maker, subject to normal principles of public law;
ii) The three *Stephenson* [*sic – italicised in original*] factors must be taken into account;
   a) Physical layout;
   b) The ownership past and present;
   c) The use or function of the land or buildings, past and present.
iii) A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration. *Skerritts* p. 67;
iv) Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration, but it is not a legal requirement that the claimed curtilage should be ancillary; *Skerritts* p. 67C;
v) The degree to which the building and the claimed curtilage fall within one enclosure is relevant, *Sumption* at para 17 and the quotation form the OED of curtilage as *'A small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it'*. In my view this will be one aspect of the physical layout, being the first of the *Calderdale* factors.
vi) The relevant date on which to determine the extent of the curtilage is the date of the application; but this will involve considering both the past history of the site, and how it

is laid out and used at the time of the application itself; *Sumption* at [27]. It appears from *Sumption* that the Judge considered future intended use of the land or buildings may be relevant, but in my view some care would be needed in applying this proposition to the facts of a particular case. A developer cannot change the curtilage simply by asserting that s/he intends to use the site in a particular way in the future.

75. These so-called "Stephenson factors" (not to be italicised) are set out in *Attorney General ex rel. Sutcliffe v. Calderdale Borough Council* [1982] 7 WLUK 340, (1983) 46 P. & C.R. 399, [1983] JPL 310, [1984] C.L.Y. 3451 *per* Stephenson L.J. as follows at 406-407:

"There was, I think, at the end of the argument before us agreement that three factors have to be taken into account in deciding whether a structure (or object) is within the curtilage of a listed building within the meaning of section 54(9), whatever may be the strict conveyancing interpretation of the ancient and somewhat obscure word 'curtilage'. They are (1) the physical 'layout' of the listed building and the structure, (2) their ownership, past and present, (3) their use or function, past and present."

76. First of all, I don't think it is a desirable procedure to describe tests or rules set out in judgments by naming them after the particular judge concerned. To do so is to play the authority card for more than it is worth. What sustains a judgment over the long-term is normally its inherent logic, not merely the elevated status of the person making the pronouncement (although that can inject a fair bit of initial momentum from a realist point of view). But reference to "Stephenson factors" or any other test named after a judge rather than a case, runs the risk of improperly closing down debate by regarding any challenge to the logic of the case as almost a denigration of the eponymous judge, rather than a reasoned engagement with a particular piece of writing effected at a particular time in a particular context. But these reservations do not apply where a particular judge comes up with a *procedure* not tied to any specific case. Hence for example we have the excellent and already-referred to procedure of the "Scott schedule" named after Official Referee of the Supreme Court of Judicature, George Scott (1862-1933).

77. Secondly it is perhaps a little surprising that the *Calderdale* factors became fetishised in this way, because it is clear from *Calderdale* that they emerged as a concession and an agreed position rather than something that had to be judicially decided.

78. And most importantly, it is hard to accept that these factors are written in stone because they are so obviously problematic on their face. The main problems:

(i) Ownership is of no real relevance in itself. A change in ownership may well accompany or be evidence of a change of use, function or layout, but in itself it doesn't change anything.

(ii) The wording of the "factors" is strangely inconsistent. The qualifier "past or present" is only used for factors 2 and 3, not factor 1. This does not make sense because the layout can change over time just as much as use, function and ownership.

(iii) The concept of "past or present" is massively ambiguous without defining the time periods by reference to which this is to be determined. In the context of the RPS, the relevant date is when the structure was first listed. The meaning of the development plan is not diluted because someone changes the use of part of the property at a later point.

79. In online commentary on the *Challenge Fencing* decision (http://planninglawblog.blogspot.com/2019/12/curtilage-revisited-yet-again.html), English solicitor Martin Goodall made some quite penetrating and useful criticisms of the English case law. This sort of highly practical and non-deferential engagement, made in an academic spirit, is refreshing and is something a court should be open to learning from; it should not be dismissed as a mere "blog post" as the applicant sought to do at one point in submissions. The relevant issue is not the status of the speaker (retired solicitor versus Lord Justice of Appeal), or even the platform of communication (online blog post versus solemn judgment of an appellate court), but the inherent logic and practicality of the argument. Goodall suggested something of a reformulation of the tests emerging from cases such as *Challenge Fencing*. Without endorsing all of Goodall's wording, it certainly provides useful food for thought, and one can immediately agree with some of it, particularly the focus on the relevant time being the first listing in the case of a listed building. His view was that the factors should be rephrased as follows:

(1) The identification of the curtilage of the building in question is a matter of fact and degree, to be determined by the decision-maker.

(2) The determination is to be made by reference to the relevant point of time in the particular case (e.g. *the date of first listing in the case of a listed building*, or the date of the application in the case of an LDC [Lawful Development Certificate] application). [emphasis added]

(3) In order to be within the curtilage of Building A, the relevant land and/or other building(s) must, at the relevant time, have been within one and the same planning unit as Building A.
   (a) This question is to be determined in accordance with the rule in *Burdle* [v*. Secretary of State for the Environment* [1972] 3 All E.R. 240, [1972] 1 W.L.R. 1207], i.e. What was the unit of occupation at the relevant time?
   (b) At that time, were the alleged curtilage land[s] and/or other buildings in the same use as Building A, without having been divided off from it, or were they in separate use, both physically and functionally?
   (c) Past or present ownership (as distinct from occupation) is unlikely to be of assistance in relation to this question, which will depend on the actual occupation and use of the various parts *at the relevant point in time* in that particular case.
   (d) The historic layout or use of the land and buildings is unlikely to be of any assistance in answering this question; it is actual occupation and use at the relevant time that will be the determining factors.

   The following questions will only fall to be answered if it has been determined in answer to Question 3 that the alleged curtilage land or buildings were at the relevant time in one and the same planning unit as Building A.

(4) At that time, were the alleged curtilage land and/or building(s) used for the comfortable enjoyment of Building A? Did they serve the purpose of Building A in some necessary or useful way? (For example, if Building A is/was a dwelling, were the other building(s) and/or land also in use for domestic purposes in connection with the use and occupation of Building A as a dwelling?)
(5) Were the alleged curtilage land and/or building(s) attached (in spatial terms) to Building A, and did the land and/or building(s) form one enclosure with Building A? If not, were the relevant land and/or buildings divided from Building A by a wall, fence or other means of enclosure or were the relevant land and/or buildings separated from Building A by any intervening land (e.g. uncultivated ground, rough grass, pasture, etc.)?
(6) In a case where Building A was, or became at that time, a listed building, was any building within the alleged curtilage physically attached to Building A? If so, was it subordinate or ancillary to Building A? (The relative sizes of Building A and any attached building may be a factor in answering this question, as well as the relative functional relationship of the respective conjoined buildings.)
(7) Finally, whilst the claimed curtilage need not necessarily be "small", is its size and alleged necessary or useful function in relation to Building A proportionate to the size and function of Building A?

80. In the Irish context, the Architectural Heritage Protection Guidelines 2011 provide assistance as follows:

> "13.1.1 By definition, a protected structure includes the land lying within the curtilage of the protected structure and other structures within that curtilage and their interiors. The notion of curtilage is not defined by legislation, but for the purposes of these guidelines it can be taken to be the parcel of land immediately associated with that structure and which is (or was) in use for the purposes of the structure. It should be noted that the meaning of 'curtilage' is influenced by other legal considerations besides protection of the architectural heritage and may be revised in accordance with emerging case law.
> 13.1.2 In many cases the curtilage of a protected structure will coincide with the land owned together with it but this is not necessarily so. For example, in the case of a town house, the main house, the area and railings in front of it, cellars below the footpath, the rear garden and mews house may be considered to fall within its curtilage even where the mews house is now in a separate ownership. The planning authority should ensure, in such cases, that all relevant owners and occupiers are notified of the protected status of their structures. In the case of a large country house, the stable buildings, coach-houses, walled gardens, lawns, ha-has and the like may all be considered to form part of the curtilage of the building unless they are located at a distance from the main building.
> 13.1.3 It should be noted that the definition of curtilage does not work in reverse – a stable building may be within the curtilage of the main house which it was built to serve but the main house cannot be described as being within the curtilage of the stable building. It should also be noted where a protected structure is an element of a structure, it may, or may not, have a curtilage depending on the degree to which is *(sic.)* could in its own right be considered to be a structure. For example, a re-used doorway affixed to a later structure could not be said to have a curtilage.
> 13.1.4 The extent of the curtilage will need to be determined on a case-by-case basis and should ideally be identified by the planning authority prior to inclusion of the structure in the

RPS, although this is not always necessary. Where the curtilage has not previously been identified, a planning authority should take the opportunity to identify its extent at the time of making a declaration in respect of the protected structure. Where parts of the curtilage are in different ownership, the planning authority should ensure that separate notification is issued to each owner and/or occupier.

13.1.5 In making a decision as to the extent of the curtilage of a protected structure and the other structures within the curtilage, the planning authority should consider:

a) Is, or was, there a functional connection between the structures? For example, was the structure within the curtilage constructed to service the main building, such as a coach-house, stores and the like?
b) Was there a historical relationship between the main structure and the structure(s) within the curtilage which may no longer be obvious? In many cases, the planning authority will need to consult historic maps and other documents to ascertain this;
c) Are the structures in the same ownership? Were they previously in the same ownership, for example, at the time of construction of one or other of the structures?"

81. A side note says: "Changes in the ownership and subdivision of property can affect the extent of a curtilage. The structures illustrated here, including a dovecote, glasshouses and outbuildings have, for some time, no longer been associated with the principal house although originally within its curtilage. In order to be protected as items within the attendant grounds they must be specified in the RPS. Alternatively, they could be included in the RPS in their own right".

82. A few points can be noted here. The question of curtilage can erupt in any number of contexts – conveyancing, contract law, planning enforcement. It would be a brave systematiser who would seek to lay down exact rules for all contexts. I will limit the discussion here to what is relevant to interpreting the RPS, albeit that there is some obvious potential cross-over to other contexts (any further discussion of which can await some other case).

83. It is important to note that the meaning of an entry in the RPS relates to what was intended at the date when the building was first listed. To that extent Lieven J.'s comment about the relevant date being the one of the application is more relevant to situations like the English LDC procedure and is not relevant if the question is the meaning of the RPS set out in the Development Plan. One size does not fit all.

84. As far as the meaning of the RPS is concerned, the whole purpose of the RPS system is to provide adequate protection for structures of interest including their curtilages and attendant grounds. There should be a presumption in favour of the continuation of such protection where wording is re-enacted in an unchanged way from version to version. Otherwise there would be a creeping loss of protection if developments on the ground could whittle away the scope of what is protected, despite the elected members affirming the pre-existing scope of protection. This point would be clearer if the RPS stood for all time as a discrete register, subject to amendment, rather than having to be re-enacted every 6 years as part of the development plan. But that re-enactment process does not in itself change the meaning – it is a result of the statutory requirement to review development plans and of the inclusion of the RPS within the plan. The RPS should be interpreted as continuing the pre-existing protection (or protection under the previous listing system), unless provision is made to suggest otherwise. The elected members are at any time free to clarify, extend, or reduce, the scope of protection by express provision. In the absence of such provision, the curtilage should be protected to the full extent of the original scope of protection. The principle of an implied intention to continue the pre-existing protection also has the consequence that re-enactment in the RPS of something that was a listed structure prior to the establishment of the RPS system should be assessed by reference to the state of things when that structure was first so listed, unless again of course the RPS makes express provision to the contrary.

85. The question of common or diverse ownership is a sideshow. Indeed, even in *Calderdale* it was not considered a particularly relevant factor judging from the submission of counsel quoted with a seeming degree of acceptance by Stephenson L.J. at p. 408 to the effect that "less attention should be paid to title and division of ownership, otherwise listed building control could easily be evaded by colourable transfers of title; and more weight should be given to historical association and physical proximity". In such circumstances, the question of ownership in and of itself hardly warrants being incorporated in the formulation of any legal test. However a change in ownership may be *evidence of* a change in the necessary relationship of use, function or layout.

86. Insofar as it was suggested in submissions that relevant factors include "character and context" which were said to include "ineffable factors such as the aesthetic", this does not raise a distinct category of factors to be considered. A curtilage must have a physical manifestation rather than existing purely in the world of the ineffable.

Summary of the test to determine curtilage

87. Endeavouring to pull together the best interpretation of the materials, I would suggest the following summary of the test to determine curtilage, with particular reference to the RPS:

(i) Whether property B falls within the curtilage of property A should be determined by reference to the legally relevant time for the purposes of the determination of the issue. This may vary from legal context to legal context. For determining the legal effect of an entry in the RPS, the "legally relevant time" is the date on which the structure on property A was first listed prior to the establishment of the RPS system or first included in the RPS, whichever was earlier, unless the wording of the RPS has changed in a relevant way in the meantime or has made express relevant provision to determine the curtilage.

(ii) At the legally relevant time, properties A and B must have formed a common unit such that property B was part and parcel of property A.

(iii) Whether properties A and B formed a common unit at the legally relevant time is primarily to be determined having regard to use, function or layout as of that time, with due regard to use, function or layout prior to that.

(iv) Enclosure or lack of it is not in and of itself relevant. There is no legal requirement for properties A and B to have been collectively enclosed, although the presence or absence of enclosure may be considered insofar as it is an aspect of the question of use, function or layout.

(v) Ownership or a change in ownership is not in and of itself relevant, although a diversity of ownership may be evidence of a lack of unity of use, function or layout.

(vi) Character, context and the aesthetic are not separately relevant but only arise if they form part of the question of use, function and layout.

(vii) Property B is not required to be small but its size may be relevant to the questions of use, function or layout. Its size is also relevant to the basic question of whether land surrounding the main structure is part and parcel of it or merely attendant on it.

(viii) To be part and parcel of the main structure, property B must be of relatively limited extent, that is, relative to the concept of attendant lands, a concept that may be very sizeable. Thus, any front, back, side, internal or subterranean gardens, courtyards, parking spaces or walls (insofar as not part of the main structure itself), outbuildings, access routes such as laneways or driveways, limited surrounding lands up to and including a ha-ha, walled or otherwise, lands within any of the foregoing, or extensions to any of the foregoing, whether walled or otherwise, or other lands that are part and parcel of the main structure, could be curtilage, whereas forests, farmlands, parklands or pastures centred on a house, or airfields around a control tower, are part of the attendant grounds, not the curtilage.

(ix) For the purposes of the legal effect of the RPS, a change in use, function or layout after the legally relevant time does not change the extent of protection, unless the wording of the RPS also changes in some material way. Thus, if property B was part and parcel of property A at the legally relevant time, a subsequent separation does not nullify the protection of the curtilage for the purposes of the RPS. Likewise, if property B was not part of the curtilage of property A at the legally relevant time, a subsequent unification of the properties does not extend the meaning of curtilage for the purposes the RPS. In either case the RPS may expressly provide otherwise.

Application of the test

88. Considering these factors here, it is agreed that what is now No. 36a was originally part of the curtilage of No. 36 and was, as the applicant legitimately submits, effectively a side entrance to the house and garden. The question is whether it remained part of the curtilage particularly having regard to the change in use.

89. Number 36 was first listed in 1971. Was the archway or laneway part and parcel of it at that point? Obviously not:

(i) As of that date, the stables at the Hill St. end of No. 36 appear not to have been in existence.

(ii) There has been no apparent permeability with any part of No. 36 for many years and there is no evidence of any as of 1971.

(iii) The use and function of the laneway was to access the Orrwear facility, and any connection with No. 36 had long since been severed as of the date of first listing.

(iv) The applicant creatively alleged that the archway served a "decorative function" for No. 36. I would not call the archway decorative of anything – it is largely functional brickwork (even the arch shape above the door primarily serves the functional objective of enclosing the space across No. 36a – to call that a decoration is to confuse that concept with the more basic concept of an architectural feature, and to miss the point that something

doesn't become a decoration merely because it is not designed in the most boring manner possible) - but even if I am wrong about that, it does not serve a function as a decoration *of No. 36*. If it is decoration (which I don't accept), it is a decoration of the entrance to the laneway.

90. Some limited elements of the layout remained. The archway and laneway are still there and the archway was physically connected to No. 36 by being adjacent to it, but that in itself is insufficient. Other elements of the layout militate against any finding of connection.

91. It seems to me that on any view, the laneway and archway were not part of the curtilage of No. 36 as of 1971, or indeed for many decades beforehand, and therefore do not fall within the definition of a protected structure by reference to No. 36. Even if am wrong that we should not consider developments after 1971, matters have not improved from the applicant's point of view since then.

The argument that the archway is protected because it is part of No. 36

92. Regarding whether the archway/laneway is part of No. 36 itself, Goodall is helpful in terms of the physical fixture of a structure to a listed building (making due allowances for the separate English legal context):

"So far as physical attachment to another building is concerned, it is clear from section 1(5) of the Listed Buildings Act that any structure fixed to a listed building forms part of the listed building. However, the House of Lords in *Debenhams plc v Westminster LBC* [1987] A.C. 396 insisted that a structure fixed to a listed building would itself be listed only if it was subordinate or ancillary to the building that was actually listed. An obvious example (cited in *Debenhams*) is a terrace of houses; the listing of just one of the houses in the terrace clearly does not apply to the houses on either side if these are in separate ownership *or occupation*, even though they are structures that are 'fixed to a listed building'. I would submit that this applies equally to the situation in the *Calderdale* case, and that the terrace of millworkers cottages cannot, for the reasons explained above, be regarded as having been included in the listing of the mill building (in the absence of their having been specifically included in the listing description).

For the reasons explained above, I would respectfully disagree with Lieven J's formulation in *Challenge Fencing* of the tests that are to be applied in assessing whether or not a building or an area of land falls within the curtilage of a particular building (as summarised in paragraph 18 of her judgment), at least in so far as they depend, to a degree, on Stephenson LJ's observations in the *Calderdale* case.

The *definition* of what constitutes 'curtilage' is (and, in the absence of any general legislative definition, must remain) a matter for the courts. However, I entirely agree that the actual *identification* in a particular case of the extent of the curtilage of a building is a question of fact and degree, and so this must be a matter solely for the decision-maker, subject to normal principles of public law. This, however, depends on the correct application of the definition of 'curtilage' (as established by the judicial authorities referred to above)."

93. It can be noted that the argument made that the archway is part of No. 36 involved an evolution of the applicant's case. Paragraph 28 of the written submissions states that the archway formed part of *two* protected structures, Nos. 35 and 36.

94. However, I do not accept the argument on either version. The archway abuts Nos. 35 and 36 but that's about it. As noted above, it is more likely than not that it was a considerably later construction, and there is no satisfactory evidence that would lead the court to conclude as a matter of probability that it should be regarded as part of No. 36. The laneway certainly was part of No. 36 originally, but has long since ceased to be so. The fact that the archway touches the protected structure doesn't make it part of the protected structure when we are dealing with a row of houses and structures. There may well be cases where a physical connection is enough, but this is not one of them. Lord Mackay of Clashfern answers the point convincingly in *Debenhams* at p. 409: "I think it is not a natural use of language to describe two adjoining houses in a terrace by saying that one is an object or structure fixed to the other. It would, I think, be a perfectly appropriate provision in a contract for the sale of a house that there was included in the sale any object or structure fixed to the house but I think it highly unlikely that the purchaser would expect under the terms of such a contract to become the owner of the house next door, with which it shared a mutual wall".

95. As none of the legs of the protected structure ground can withstand analysis, I turn now to the other grounds of challenge based on conditions 2 and 3 of the permissions.

Condition 2 and the alleged radical change in the development

96. The original application included a kitchenette in each individual unit involving a small sink, microwave, under-counter fridge, high-level cabinet storage for delph and under-counter storage for refuse and food storage. In the first application, the inspector at para. 7.6.4 addressed the shared living criteria and recommended a condition regarding hobs by reference to other decisions of the

board and the need for a satisfactory standard of residential amenity. This ultimately translated into condition 2 attached by the board which is as follows:

> "The proposed development shall be amended so that all units shall be provided with functional kitchen to include cooking hobs.
> Revised drawings showing compliance with these requirements shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.
> Reason: In the interest of providing a satisfactory standard of residential amenity for occupants of the development."

97. In the second application however, the inspector reconsidered the issue of what should be provided in kitchens.

98. The developer stated as follows in the planning report for the second application:

> "Fire Cert Considerations - it is submitted to An Bord Pleanála that simply conditioning in hobs into proposed bedroom units is not as simple as accommodating them in the permitted kitchenette locations. To comply with fire regulations it is considered that the room layout may need to be reconfigured to the detriment of the optimal layout from a living perspective. As such we would ask Dublin City Council to permit as part of this development the removal of condition 2 of the An Bord Pleanála Order and to not require hobs in each bedroom unit."

99. The inspector dealt with this as follows at para. 8.7.12:

> "I note that recently permitted co-living schemes are not consistent regarding the functionality of kitchen facilities in individual units, with the Brady's, Old Navan Road scheme (ABP ref. 307976) featuring 'basic cooking facilities', the Rathmines House scheme (ABP ref. PL29S. 306742) featuring electric cooking hobs and the Former Player Wills site scheme (ABP ref. 308917) featuring kitchenettes with sinks, storage areas and microwaves. In terms of fire safety, I understand that updated guidance set out in Technical Guidance Document (TGD.B) requires a distance of 1.8m from a kitchen cooker to an escape route in open-plan apartments and notwithstanding that open-plan apartments, per se, are not proposed within this scheme, noting the layout proposed for a typical room, the 1,8m separation distance would not be achieved. With the exception of the cluster units, the units would be provided with kitchenettes with a reasonable level of functionality and, based on the information available, I do not consider it necessary or practical to attach a condition requiring cooking hobs within the functional kitchenettes to the individual units. Such an approach would also support the use of a minimum internal lighting target of 1.5% ADF for the majority of units, as considered in section 8.4 above."

100. The most legally significant part of this is that the inspector specifically said that the development did not contain open-plan flats.

101. With that background in mind, we now turn to the applicant's three grounds of challenge in relation to condition 2 which were essentially:

(i) the board failed to have regard to departmental guidelines or misdirected itself as to the meaning of the guidelines;
(ii) breach of public participation requirements; and
(iii) lack of reasons.

Allegation that the board failed to have regard to, or misinterpreted, relevant guidelines

102. A submission is made that condition 2 is inconsistent with the whole concept of shared accommodation which was the use for which permission was sought. The addition of the condition renders the units self-contained apartments, which it is said cannot be reconciled with shared accommodation, thereby meaning that the project for which assessment was carried out had been converted into a different use type. The guidelines in question are the Sustainable Urban Housing: Design Standards for New Apartments Guidelines 2018. While not relevant here, they have since been amended in 2020.

103. Paragraph 5.5 of the guidelines refers to communal facilities in built to rent (BTR) developments, not mentioning kitchens, but at para. 5.6 reference is made to BTR developments having possible communal kitchens and other facilities. Paragraphs 5.13 and 5.14 note that shared accommodation has features in common with student accommodation, and minimum requirements for shared living and kitchen facilities are set out at para. 5.16. Crucially for present purposes, para. 5.20 states that "shared accommodation may be considered as a sub-component of build-to-rent proposals as stand-alone developments under these guidelines". I do not see any rigid distinction here, or more particularly any prohibition on self-contained kitchens and living areas within an individual room in a shared accommodation development. In the absence of such a clear distinction or prohibition, it cannot be said that the board misinterpreted or failed to have regard to the guidelines, effected a radical change, or otherwise converted one type of development into another type.

Alleged breach of public participation requirements.

104. It is alleged that the supposed radical change in the development took place after the opportunity for public participation, thereby giving rise to a breach of natural justice or EU law rights particularly under the EIA directive 2011/92/EU. This is completely misconceived for multiple reasons.

105. Firstly, it is inherent in the public participation process that a proposal can change during that process. That in and of itself is not a breach of domestic or European law. Indeed one of the very purposes of public participation is so that the decision can change in the event that meritorious observations are made which should be incorporated or addressed in the ultimate decision. Article 9(1)(b) of the EIA directive notes that the competent authority must inform the public and relevant authorities *inter alia* of "the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how these results have been incorporated or otherwise addressed".

106. Secondly, and more relevant to the facts here, the change was not one that significantly impacted on the core of the application. In the absence of any rigid distinction between BTR and co-living, it cannot be said that the installation of hobs to supplement the other multiple features of the kitchenettes referred to above really changes the application fundamentally. The basics of the development remained, albeit with a slightly different set of facilities. There could be another case where the change is more significant which might legitimately raise questions of domestic or European law, but this is not such a case. In short there was no radical change. Therefore the premise of the argument does not apply.

Alleged lack of reasoning

107. Under this heading, the notice party rightly insisted that the applicant be held strictly to the pleadings and in that regard the relevant ground is 46(c). It will be instructive to go through the wording of that ground on a point-by-point basis.

108. The first complaint set out in that ground is that "condition 2 is not a condition specified in s. 34(4) [of the 2000 Act]". That is as may be but is not fatal to the validity of the condition.

109. The next point made is "... and the reasons given by the board to explain and/or justify condition 2 are meaningless and absurd". Unfortunately, I don't agree. The reasoning might be general but it certainly is not meaningless or absurd.

110. The next point is that the reasons for the conditions "do not amount to a reason for the purposes of s. 34(10)". Section 34(10)(a) of the 2000 Act says in relevant part that "where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions". In view of the reason that *is* stated, I do not see that requirement as being infringed here.

111. The final complaint under the heading of reasons is as follows: "There is no justification possible as to how a requirement considered in the recommendation of the Inspector as impractical and unnecessary, which would contravene a requirement of the Technical Guidance Document and would create a fire hazard could be considered necessary 'in the interests of providing a satisfactory standard of residential amenity' and where the guidance documentation indicate that such a bedroom can be as small as 12m² and in this case provides for apartment sizes of 18m² which include en-suite bathrooms".

112. Unfortunately, the premise of this argument is incorrect. The inspector did not find that the development would "contravene" the technical guidance document, because the relevant provision did not apply as the bedrooms were not open-plan. Nor does the inspector describe the situation as a "fire hazard". If the inspector had said either of those things, then there almost certainly should have been an explicit reason for disagreeing, but that is not the case.

113. Given the limited nature of the comments actually made by the inspector, the board's reasons are sufficient, especially where the imposition of condition 2 is just a reiteration of its previous position rather than a new finding. Normally, a requirement for reasons is at its weakest where a decision-maker is merely repeating something already decided, and indeed often in that context there is no particular need for reasons at all, on the basis that it must be taken that adequate reasons were provided on the previous occasion. That does not apply if anything particularly new is brought forward, but even assuming that the inspector's report here is something significantly new, the board's reasoning is adequate in the circumstances, given the limited nature of the point actually made by the inspector. Thus, I think that the wording of the decision here is sufficient to satisfy the standard, which is a requirement to give the main reasons on the main issues, as distinct from addressing every sub-point raised in the process.

Condition 3 regarding single occupancy

114. Condition 3 states as follows:

> "The shared accommodation units hereby permitted shall be for single occupancy only and shall operate in accordance with the definition of Build-to-Rent developments, as set out in the 'Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities' issued by the Department of Housing, Planning and Local Government in March, 2018.

Reason: In the interest of the proper planning and sustainable development of the area."

115. Insofar as the board's condition refers to the definition of BTR, that definition is set out in the 2018 guidelines as follows:

"5.2 To date rental only developments at scale in Ireland have been limited. 'Build-to-Rent' (or BTR) can be defined as:

'Purpose-built residential accommodation and associated amenities built specifically for long-term rental that is managed and serviced in an institutional manner by an institutional landlord.'"

116. The application documents themselves defined the nature of the occupancy requirements. The development involves only single occupancy bedrooms which would either be individual units or as part of a cluster arrangement. Provision for guests was made in the operational management plan as follows:

"GUESTS

- Residents will be able to sign in guests via the SQRE Living app.
- Guests will be limited to a maximum number of 2 overnight guests.
- Residents will be held fully accountable for their guests' behaviour."

117. Insofar as the applicant criticises the precision of the reference to single occupancy, it is important to emphasise that this is a concept which is clearly articulated in the 2018 guidelines. Paragraphs 5.15 and 5.16 provide as follows:

"5.15 One format of Shared Accommodation which is proposed by these guidelines is a residential unit comprising of 2 - 6 bedrooms, of single and/or double occupancy with a common shared are a within the residential unit for living and kitchen facilities.

5.16 Each of the provided bedrooms is required to be ensuite and to be of floorspace size per Table 5a below. The minimum floorspace extent of the common shared area for living and kitchen facilities will be calculated on a per bedroom basis per Table 5a below.

Table 5a: Shared Accommodation - minimum bedroom size

Single* 12 m^2

Double/twin* 18 m^2

*including ensuite

Table 5b: Shared Accommodation - minimum common living and kitchen facilities floor area

Bedrooms 1-3 8m^2 per person

Bedrooms 4-6 Additional 4m^2 per person

Overall, Shared Accommodation units would have a maximum occupancy of 8 persons calculated on the single or double occupancy of the bedrooms provided (e.g. 2 x double bedrooms [4 persons] + 4 x single bedrooms [4 persons] = 8 person total occupancy)."

118. Thus, insofar as the applicant complains that the concept of single occupancy is void for uncertainty, impermissibly vague and ambiguous, and impermissibly admits of more than one meaning, I must reject that as amounting in effect to an attack on the guidelines. Insofar as the guidelines expressly acknowledge the concept of single occupancy, any individual planning consent cannot be invalid for incorporating that concept. If the applicant had also challenged the guidelines, it could have advanced the point, but in the absence of so doing, the board cannot be held at fault for applying an unchallenged instrument.

119. Secondly, I do not consider that there is any real ambiguity about the concept. The notice party in submissions says quite simply that "single occupancy" refers to a single individual in occupational residence. "Single occupancy" would not be understood as precluding the occupant from having visitors. And the meaning of the term in context of the specific development must have regard to the application for permission, which expressly permits visitors on specified terms.

120. The subsidiary argument that the condition was unenforceable because of the absence of temporal guidance as to when a guest becomes an occupant seems to be very much a consequence of the argument that the term is lacking in meaning. Many legal concepts are matters of degree, and the fact that there is no specific maximum number of nights for which a guest could be signed in, after which she becomes a *de facto* occupant, does not render the concept of single occupancy either uncertain or unenforceable. As with many legal concepts, there is no particularly pressing need to define a rigid boundary in the abstract, but much as with the concept of "curtilage" (as we have seen above, particularly in the insightful comments of Nugee L.J.), the fact that there might be shades of grey, especially at the margins, does not render the whole concept meaningless, particularly at its core. Also yet again the "paradox of the heap" emerges – the fact that a visitor doesn't cease to be a visitor just because she stays one more night doesn't mean that there is no distinction between a visitor and a resident, or more generally the fact that there is a continuum

between two positions doesn't mean that there is no distinction between the two positions or that such positions don't validly exist at all.

121. Finally, the applicant rather tentatively touched on the merits of the condition regarding single occupancy, although its difficulties with doing so in terms of standing were to some extent accepted. The submission majored on the question of the validity and enforceability of the condition. The statement of grounds pleads the right to the dwelling under Article 40.5 of the Constitution, which was said in oral submissions to be dependent on the meaning and enforceability arguments and thus not a *jus tertii*. There is no argument made about privacy or discrimination. As a general approach, while a third-party judicial review applicant does not have to be personally affected by every issue being raised, human rights issues are probably an exception in the sense that those matters are best litigated by the person whose actual rights are allegedly being infringed. As noted above, that was broadly accepted by the applicant. Delicate questions could well arise in relation to issues such as for example what happens if a woman in sole occupancy becomes pregnant. That may give rise in due course to sensitive issues of privacy or discrimination, but those will be for such a person to litigate in due course. I do not think it would be proper for the court to be asked to determine her rights in the abstract in advance. Indeed the applicant basically accepted that point and framed its privacy argument as an aspect of vagueness. Ultimately however I do not think any legal impermissibility in the imposition of condition 3 has been made out by this applicant in this case because the clause is not unduly vague for the reasons explained.

Order

122. Before concluding, one point that falls out from the judgment is the finding that the (probably 19th century and recently reconstructed) archway, the (recently relocated from elsewhere) 18th century paving stones at the entrance to the laneway and any other features of interest in the laneway at No. 36a North Great George's St., are not protected structures. The applicant can of course draw that matter to the attention of the city council in case they disagree and wish to consider whether or not to extend the RPS to cover any or all of these structures. However any hypothetical extension along these lines will not affect the validity of the permissions that are the subject of the present case.

123. For the foregoing reasons, it will be ordered that:

(i) the action be dismissed; and

(ii) the foregoing order be perfected with no order as to costs unless a written submission making any application to the contrary is lodged with the court within 7 days from the date of this judgment.