THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2001 579JR]

BETWEEN

S. GREGG BEMIS

APPLICANT

AND

THE MINISTER FOR ARTS, HERITAGE, GAELTACHT AND THE ISLANDS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Herbert delivered the 17th day of June, 2005

The applicant is a citizen of the United States of America, and resides and until 2001, carried on a diving business in that country. I find that as of 7th March, 2001, no specific form of application had been declared, provided or confirmed by any statute, statutory instrument, bye-law, regulation, order or statutory scheme, or established by any clearly defined usage, practice or reputation for the purpose of obtaining a licence for the type of invasive diving, survey and exploration of the remains of the vessel R.M.S. Lusitania, of which he is the sole owner, intended by Mr. Bemis. On the affidavit evidence, for his application of 7th March, 2001, Mr. Bemis in the circumstances adapted a non-invasive diving form which he obtained from Dúchas, the heritage service of the Department of Arts, Heritage, Gaeltacht and The Islands. A similar form had previously been used for non-invasive detailed survey dives made with his consent by Mark Jones and Alan Clegg the results of which, on

the evidence, had been furnished to Dúchas in November 2000. I do not accept that this was a deliberate and premeditated strategy on his part to avoid applying for an excavation licence or any other licence.

By the provisions of s. 3(5)(d)(i) of the National Monuments (Amendment) Act, 1987, (hereinafter referred to as, "the Act of 1987"), the Minister for Arts, Heritage, Gaeltacht and The Islands (hereafter refeered to as the "Minister"), to whom all functions relevant to this matter were transferred by Statutory Instrument 332 of 1996 which came into force on 12th November, 1996, is required to grant or to refuse the licence sought, with or without conditions, within a period of three months from the date of receipt of the application. The Minister is entitled under that Act to seek further information from the applicant in relation to the application. This however, in my judgment, must be interpreted as requiring that the request be reasonable and that the information sought be necessary and relevant to the decision. If the Minister had, by usage or practice established a particular form on which application should be made, (with for example, the purpose of standardising and facilitating the processing of such applications), even if it had not been confirmed or formalised by statute, statutory instrument, bye-law, order, regulation or statutory scheme, it seems to me that it would be *intra vires* the power of the Minister to furnish a copy of this form to the applicant and to insist that it be used for the purpose of the application. This would have had to be done as soon as practicable. It certainly could not be done after a lapse of almost two and a half months from the date of receipt of the application, which in the circumstances of the three month period permitted by s. 3(5)(d)(i) of the Act of 1987 for the determination of the application, with the consequence of an unconditional licence deemed granted in default, of notification within that period, must be considered a wholly unacceptable delay.

No information was sought by the Minister in the instant case. Likewise I find, that the statutory scheme would demand that if the Minister had correctly determined, (the matter is strongly in controversy in this case), that the application should have been made by a qualified licensable archaeologist or a person competent to carry out archaeological excavations, or that it should be accompanied by an application for an excavation licence pursuant to the provisions of s. 26 of the National Monuments Act, 1930, (as amended), this should have been drawn to the attention of Mr. Bemis and the appropriate application form, (if any), furnished to him at the very earliest practicable date and he should have been invited to resubmit his application in that form. This did not occur.

By letter dated 22nd May, 2001, after a lapse of almost two and a half months from the date of receipt of the application from Mr. Bemis, his application was rejected as "invalid" without any points of information being raised or any determination on its merits. I find that the grounds for rejecting the application did not relate to a lack of information or an inadequate methodology statement except in the context of an excavation licence. The sole grounds of objection were that a form of application alleged by the Minister to be suitable for non-invasive diving only had been altered by Mr. Bemis to apply for invasive diving and that the application would not therefore be entertained and, that in any event every invasive investigation of the wreck or wreck site would require an application for an Excavation licence pursuant to s. 26 of The National Monuments Act, 1930 (as amended).

I find that in the particular circumstances there was a failure, without proper justification on the part of the Minister to consider the application made to him in the form it was made, on its merits, within the time allowed by the Act of 1987, so that the refusal was unjust, irrational and unreasonable and was *ultra vires* the power

vested in the Minister. The law, even as regards procedural matters of this nature, must be reasonable, clear and knowable. It could not be a fair procedure that an applicant should have to face a sort of lottery as to what might be a form acceptable to the Minister as a correct form on which to make application for a licence under s.3 of the Act of 1987.

In my judgment it is not necessary for the Court to consider whether on the particular facts of this case an "anxious scrutiny" test, as favoured by McGuinness, J., [p. 126/7] and Fennelly, J. [p. 202/3] in *AO and DL v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, applying the decision of the Court of Appeal of the UK in *Regina (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840 per Laws L.J. 847-9, rather than the test adumbrated in *O'Keeffe v. An Bord Pleanála* [1993] I.R. 39 should be applied and the Court does not therefore address this issue.

Mr. Bemis is not seeking from the court a declaration pursuant to s. 3(5)(d)(ii) of the Act of 1987, that a licence in the terms sought by him should be deemed to have been granted to him without conditions. Without prejudice to his contention that the form of his initial application was sufficient and valid, and to the Order of this Court made 30th July, 2001, granting him leave to seek judicial review, Mr. Bemis, with a view to avoiding the cost and delay of litigation decided to submit a new and significantly more expanded application for a licence on 4th October, 2002. He did this through the medium of a form entitled "Application for a Licence to Excavate." However, he expressly asserted in the application that this form was entirely inappropriate as he did not propose to carry out any excavation. He stated that he used this form only because he had been directed to use it. This application was also refused by the Minister by a letter dated 8th January, 2003, with no intervening

requests for information or explanation and, Mr. Bemis accepts, at para. 11 of his third replying affidavit sworn on 31st March, 2003, just within the time limit allowed by s. 3(5)(d)(i) of the Act of 1987 as the application was stated to have been received on 11th October 2002. The grounds for refusal were that the applicant was not a qualified licensable archaeologist and it was the policy of the Minister to grant licences to persons competent to carry out archaeological excavations; that the methodology indicated in the application form was unacceptable because of its potential impact on the remains of the vessel and, that the sale of artefacts to defray expenses was at variance with the right of the National Museum of Ireland to claim archaeological objects on behalf of the State. The Minister suggested that Mr. Bemis should apply for a dive-survey licence, (which would not involve any interference with or entry into the remains of the vessel).

No direct relief is sought by Mr. Bemis in respect of this second refusal, but he asserts that a consideration of the reasons given are relevant to understanding the first refusal by the Minister. Counsel for the respondents accepted that the material contained in the affidavits dealing with the second application could be relevant and it was a question of what weight ought to be attached to it but insisted, correctly in my judgment, that the fact of the second refusal was irrelevant to the appropriateness otherwise of the first refusal and could not be a basis for an argument that the Minster had a propensity to refuse all application by Mr. Bemis. The order of this Court granting leave to Mr. Bemis to seek judicial review of the decision of the Minister communicated in the letter dated 22nd May, 2001, was made on 30th July, 2001, well within the time limited by Order 84 rule 21(1) of the Rules of the Superior Courts. In the circumstances of this matter and in particular having regard to the fact that Mr. Bemis resides in the United States of America, I am satisfied that the application was

made promptly and there was no evidence of any detriment having been suffered by the respondents or by any third party.

I find that the remains of the vessel and any associated objects fall within the definition of "wreck" in s. 1 of the National Monuments (Amendment) Act, 1987, (repeated in s. 2(1) Heritage Act, 1995), which is in the following terms:-

> "A vessel, or part of a vessel, lying wrecked on, in or under the sea bed or on or in land covered by water, and any objects contained in or on the vessel and any objects that were formerly contained in or on a vessel and are lying on, in or under the sea bed or on or in land covered by water."

I find that, "vessel" and "wrecked" in this definition were intended by the Legislature to have the ordinary dictionary meaning of a "ship", "boat" or "navigable craft" and "wrecked", as meaning "destroyed", "ruined" or, "disabled".

I find that the Minister erred in law in holding that every invasive investigation of the wreck would require an application for an excavation licence pursuant to s. 26(2) of the National Monuments Act, 1930 (as amended), [hereinafter referred to as the Act of 1930 (as amended)]. The scheme of s. 3 of the Act of 1987 is in my judgment plain. Any person is prohibited from doing any of the things indicated in s. 3 (3)(a), (b) and (c) in areas subject to an underwater heritage order without a licence first obtained in accordance with the provisions of s. 3(5) of that Act. These prohibited activities include tampering with, damaging or removing any part of the wreck or of any archaeological object or carrying out any diving, survey or salvage operations directed to exploring the wreck or archaeological object or recovering it or any part of it from the sea bed. In my judgment the section clearly and unambiguously on its face extends to both non-invasive and invasive diving activities. However, the requirement for an excavation licence under s. 26 of the Act of 1930,

? grounds of appeal ?

(as amended) only arises where any person proposes to dig or excavate in or under land, (whether with or without removing the surface of the land), for a specific archaeological purpose. By s. 2 of the Act of 1930 as amended by s. 11 of the Act of 1987, "land" is defined as including, "land covered by water". This clearly envisages a much more restricted form of activity than that covered by s. 3 of the Act of 1987. In my judgment therefore it is not open to the Minister to consider that every invasive investigation of the remains of the vessel or any associated object must necessarily require an excavation licence. Some invasive investigations may require an excavation licence, but some may not. No general policy for such a requirement is maintainable at law and each individual case must be considered on its own facts.

It is significant that both s. 3(5) of the Act of 1987 and, s. 26(2) of the Act of 1930, (as amended), make use of the words, "any person" in referring to the applicant for a licence under these sub sections. There is nothing in those Acts which confines applications to, "qualified licensable archaeologists" or "persons competent to carry out archaeological excavations". This legislative code is concerned, and principally concerned, with protecting and preserving national monuments and objects of historical, archaeological or artistic importance and preventing these from being destroyed, damaged or wrongfully removed. If the Legislature had so intended, it could readily have restricted the class of person entitled to seek or to be granted a licence pursuant to s. 3(5) of the Act of 1987 and s. 26(2) of the Act of 1930, (as amended), to persons with particular estates or interests in the object or in the land on, in or under which it is found, or, with particular academic, artistic, scientific, or technical qualifications or skills. This legislation cannot be cut down by reference to the European Convention on the Protection of the Archaeological Heritage (Valetta, 1992) ratified by the State in 1997, or to the 1999 Policy and Guidelines on

Archaeological Excavation, of the Department of Arts Heritage, Gaeltacht and The Islands. In my judgment the Minister must have regard to the plain and unambiguous language of the subsections. A general policy, however prudent or advisable it might seem, of allowing applications for such licences to be made only by qualified licensable archaeologists or persons with proven competence to properly carry out archaeological excavations, is clearly contrary to the scheme and the express words of the statutes and therefore *ultra vires* the powers of the Minister, (*Carrigaline Community Television Broadcasting Co Ltd v. Minister for Transport, Energy and Communications and Others* [1997] 1 ILRM 241). This issue must not of course be confused with the wholly separate question of archaeological supervision after grant.

I find that in granting a licence pursuant to the provisions of s. 3(5) of the Act of 1987, there is no inhibition to the Minister lawfully imposing, as a general condition of any such licence, that an excavation licence under s. 26 of the Act of 1930, (as amended), must first be obtained before the applicant engaged in any digging or excavation in or under land including land covered by water whether with or without removing the surface of the land and, that a failure to obtain such a licence in such circumstances would effect an automatic revocation of the instant licence. However, in the present case the Minister determined that an excavation licence pursuant to the provisions of s. 26 of the Act of 1930, (as amended), was required for the diving, survey, and exploration which Mr. Bemis proposed to undertake in respect of the wreck. I find that the Minister erred in law in reaching this conclusion and that the decision to refuse the application by Mr. Bemis on this ground was accordingly unreasonable and irrational.

Section 26(1) of the Act of 1930, (as amended) provides as follows:-

> "It shall not be lawful for any person, without or otherwise than in accordance with a licence issued by the Minister under this section, to dig or excavate in or under any land (whether with or without removing the surface of the land) for the purpose of searching generally for archaeological objects or of searching for, exposing or examining any particular structure or thing of archaeological interest known or believed to be in or under such land or for any other archaeological purpose."

I find, contrary to what is argued by Mr. Bemis, that the sunken remains of R.M.S. Lusitania and any object associated with it is an, "archaeological object" as defined by s. 2 of the Act of 1930, as amended by s. 14 of the National Monuments (Amendment) Act, 1994, which definition is followed in s. 2 of the Heritage Act, 1995 and s. 2 of the National Cultural Institutions Act, 1997. The amended definition is in the following terms:-

> " 'Archaeological object' means any chattel whether in a manufactured or partly manufactured or an unmanufactured state which by reason of the archaeological interest attaching thereto or of its association with an Irish historical event or person as a value substantially greater than its intrinsic (including artistic) value, and the said expression includes ancient human, animal or plant remains."

no age anywhere in the definition?

I find that the remains the vessel itself and the various detached objects associated with it lying on, in or under the sea bed, including for example, coal, detached structural plates, rivets and other gear, are "chattels" for the purpose of this definition, [see *Behnke v. Bede Shipping Company Limited* [1927] 1 K.B., 649 per Wright, J., at p. 659 holding that a ship was clearly a chattel personal]. I find that the association of the remains of the vessel and these detached objects with the First

World War gives them a value substantially greater than their intrinsic value. I find the First World War to be an, "Irish historical event", within the statutory definition. I so find because:-

> "The entire island of Ireland was then part of the United Kingdom and as such was a participant in that war.
>
> In excess of 206,000 men and women from all parts of the island of Ireland were combatants in that war of which number more than 30,000 died as direct result of the hostilities including 5,000 men of the 36th Ulster Division killed during the first two days of the battle of the Somme on the 1st and 2nd July, 1916.
>
> That war and the circumstances prevailing as a result of that war brought about profound and permanent political and socio-economic changes for the Irish people, (see, "The Path to Freedom", Michael Collins [Talbot Press (1922)]).
>
> The sinking of R.M.S. Lusitania at about 14.15 hours on 7th May, 1915, by U. 20 of the German Imperial Navy under the command of Kapitan-Leutnant Walter Schwieger, resulting in the death by drowning of 1,195 crew members and passengers, (including Sir Hugh Lane, the great benefactor of this State), several hundred of whom are buried at Cobh and are commemorated there by a public monument, is referred to and considered in scholarly works on Irish history, for example, 'Chronology of Irish History since 1500' [1989] J.E. Doherty and D.J. Hickey, (Gill and MacMillan) and, A New History of Ireland' Volume VIII [1982] editors, T.W. Moody, F.X. Martin and F.J. Byrne, (Oxford-Clarendon Press)."

All these are matters of historical and published record capable of immediate and accurate demonstration of which this Court is therefore entitled to take judicial notice, (see, *Greene v. Minister for Defence* [1998] 4 I.R. 464).

However, I am satisfied that it could not reasonably or rationally be held by the Minister that the diving programme proposed by Mr. Bemis in his application of 7th March, 2001, even as elaborated in the second application made on 4th October, 2002, involved, "digging or excavating in or under land covered by water whether with or without removing the surface". The removal of silt suspended in the water within the wreck or lying on some interior or exterior surfaces of the remains of the vessel (up to 8.1 meters of which stands above the seabed "lying on its starboard side, the hull twisted and badly broken, the superstructure gone and the decks sliding away"), and any associated objects lying on the sea bed, but without interfering with the surface or undersurface of the sea bed, and, the forming of a suitable opening or openings at deck level on the port side of the wreck or the moving of internal obstructions for such purposes and for subsequent visual examination of the interior of the wreck, directly by divers or by the use of remotely operated vehicles, could reasonably and properly be an appropriate matter for conditions to be annexed to a licence granted pursuant to s. 3(5) of the Act of 1987. However, in my view it would be straining the language of the definition unduly to hold that this work would amount to, digging or excavating, (which by reference to the dictionary definition of "excavation" could extend to the removal of earth by a means other than digging), in or under land covered with water whether with or without removing the surface, where there is no intended interference in any way or at all with the surface or undersurface of the sea bed. I therefore find that the decision of the Minister that an excavation licence under s. 26(2) of the Act of 1930, (as amended), should have been

sought by Mr. Bemis, was an error based on a misinterpretation of the Acts and accordingly was irrational and unreasonable and that the refusal to Mr. Bemis of a licence pursuant to s. 3(5) of the Act of 1987 on this ground was *ultra vires* the power of the Minister.

In these circumstances, it is not necessary for the court to find whether the remains of the vessel and any object associated with it would fall within the definition of, "archaeological object" by reason of the, "archaeological interest attaching thereto", or whether any of them could be a, "structure or thing of archaeological interest", as referred to in s. 26 (1) of the Act of 1930, (as amended). However, as the matter was fully argued before me I believe that the court has an obligation to the parties to deal with it.

Area of appeal ?

I consider that a determination by the Minister that the remains of the vessel itself or any object associated with it was an, "archaeological object" by reason of the, "archaeological interest attaching thereto, or was a, "structure or thing or archaeological interest", could not be said to be unreasonable or irrational.

The advancement of knowledge of past human societies through the study of their material remains, and the evidence of their environment, is in my view an accurate definition of archaeology, (see for example, s. 2(1) Heritage Act 1995 and s. 1.1(1), of the Framework and Principles for the Protection of the Archaeological Heritage (1999); Department of Arts, Heritage, Gaeltacht and The Islands). The definition is not restricted as to period. The society which first produced the great ocean liners such as the R.M.S. Lusitania is a past society even though there are undoubtedly people still living who are born in that era. I find on the evidence that the Lusitania has great relevance to the study of social history and to the history of the development of marine design, construction and engineering. It is a matter of

historical record, of which the court may take judicial notice, that when the vessel was launched on 16th June, 1906, by John Brown and Company Limited, Clydebank, in addition to being the largest and fastest liner then afloat it incorporated many novel and experimental features of design, construction, propulsion and fitting-out. It was at the then very forefront of marine engineering. [See, Encyclopaedia of Underwater and Maritime Archaeology ([1997] British Museum Press) editor James P. Delgado, p. 248]. It was fitted-out to standards of excellence and luxury quite unique at the time. Despite the probable existence of a significant body of archival material and records relating to all or many aspects of the construction and operation of the vessel, I believe, that it would still be rational and reasonable for the Minister to conclude that the physical remains of the vessel and the items associated with it, though under water for less than 100 years, are of archaeological interest particularly to marine archaeology and industrial archaeology and as such should be persevered so far as possible from destruction or serious damage or unlawful removal. In the Oxford Companion to Archaeology ([1996] Oxford University Press), Brian M. Fagan, editor-in-chief, it is stated that, "Industrial archaeology is also related to historical archaeology but is primarily concerned with the study of western European and American societies during the industrial revolution and the rise of modern urban society as we know it". While useful as a general guideline, particularly in the context of international conventions for the protection of the underwater cultural heritage, I do not consider the fact that the remains of R.M.S. Lusitania have lain under water for less than 100 years to be sufficient in itself to render such a determination of the Minister, irrational, disproportionate or unreasonable.

However, for the Minister to determine that every part of the wreck (for example "to lift a piece of coal from the sea bed beside the Lusitania", – letter 14th

August, 2001, to Mr. Bemis), must be preserved in situ and should not be disturbed in anyway or raised or sold commercially, would in my judgment be utterly disproportionate, irrational and unreasonable for being in the teeth of plain reason and common sense and would constitute an unjust attack on the private property rights of Mr. Bemis in those items, which rights are protected by the Constitution. In my judgment if surveyed, plotted, sketched, photographed or otherwise carefully and permanently recorded in place and, if justifiable, further examined and documented either in situ or on being raised, there clearly are, on the evidence, parts of the vessel and objects associated with it which are so plentiful, so typical of the object in question and so utterly mundane as to be not worth preserving either in place or elsewhere for further research or being acquired by the State for scientific research or educational display in museums.

The decision in *King& Chapman v The Owners and all person claiming an interest in the "La Lavia,, "Juliana" and "Santa Maria de la Vision"* [1999] 3 I.R. 413, is entirely distinguishable on its facts from the instant case. That case concerned the discovery within the national territory at Streedagh Bay, Co. Sligo, of the remains of three vessels of the Levant squadron of the Spanish Armada which had been driven ashore and wrecked there in 1588. At p. 424 of the report, Barr J. found as follows:

> "The violent swirl of water in the bay generated by a westerly gale had scoured the top-sand from a significant area in the vicinity of the place where part of the gun-carriage wheel had protruded, thus revealing a treasury of artefacts which included an anchor, three bronze cannon in remarkable good state of preservation, cannon balls and, most important of all, an almost complete ship's rudder which was 38 feet long made of timber and iron fastenings, which was also in a

> remarkably good state of preservation. The rudder is believed to be unique as no other is known to have survived from the great period of Levant maritime history in the Middle Ages. It would be of particular interest to naval architects and historians as Ragusan ships, such as the "Juliana", were reputedly among the finest in the known world in the latter part of the 16th century".

All of these ancient and in some cases absolutely unique objects were the property of the State. The discovery group claimed to be salvors and were seeking "a just reward for locating the wrecks and carrying out the work", which they had done. Unlike Mr. Bemis they stated in evidence that they regarded themselves as being engaged in an archaeological expedition. They said that they did not wish to salvage artefacts until appropriate conservation facilities were available and that conservation and display were long term expensive projects the finding of which were beyond their means.

In the instant case, Mr. Bemis is the sole owner of the vessel, and most, if not all, (depending on their provenance), of the objects associated with it all of which are lying underwater for less than 100 years. I have already found that the work which Mr. Bemis proposes to carryout does not involve digging or excavating in or under any land, including land covered with water and whether with or without removing the surface of the land. The objects which he would like to be permitted to salvage and, as lawful and sole owner, to sell on a limited basis in order to defray some of the very significant cost of acquiring the wreck and of his diving expeditions, (which at paragraph 12 of his grounding affidavit sworn on 27th July, 2001, he calculates to be in excess of 3 million USA dollars), are much more mundane items than 417 year old artefacts of bronze, pewter and wood.

The items he has indicated are individual pieces of coal, rivets, small pieces of ship's metal and twentieth century table and sanitary ware. On the evidence these are probably of little historical interest and capable of providing only a very low level of scientific or cultured information and whose value therefore lies almost exclusively, if not entirely, in their association with this famous ship and its tragic sinking. There are other more important items which he would wish to be permitted to raise for preservation and subsequent permanent display in museums in this State, primarily in Cork and Kinsale and, to form travelling exhibitions for display in other countries, particularly in the United States of America. In my judgment this situation is exactly what was contemplated by Annex section (ii), Recommendation 848, (1978), on the Underwater Cultural Heritage, by the Parliamentary Assembly of the Council of Europe (30th Ordinary Session).

I find that the State through the National Museum of Ireland has the right to acquire any part of the remains of the vessel or any items associated with it which it reasonably and properly considers necessary for the furtherance of scientific research or the advancement of public education in the State, but, in my judgment, only by way of purchase from or voluntary donation by Mr. Bennis, whose interest in them entitles him to their actual possession. This appears to me to be the clear import of s. 2 and of s. 9 of the National Monuments (Amendment) Act, 1994. The State simply cannot either directly or indirectly expropriate this property from Mr. Bennis, or totally, or even substantially deny him access to or the use of his property or any part or parts of his property, even under colour of merely regulating that access or use for the purpose of safeguarding a national asset, without paying appropriate compensation. (see *Webb v Ireland* [1988] I.R. 353).

The granting or refusing of a licence under s. 3(5) of the Act of 1987, either with or without conditions attached, is a matter solely for the discretion of the Minister. However, this is not an unfettered discretion and must be exercised by the Minister in accordance with the principles indicated in several decisions of the Supreme Court, for example, *East Donegal Co-Operative Livestock Mart v. Attorney General* [1970] I.R. 317: *State (Lynch) v. Cooney* [1982] I.R. 337 and *Dunnes Stores Ireland Company v. Ryan* [2002] 2 I.R. 60. In the case of *State (Lynch) v. Cooney*, Henchy, J., at pp. 380 and 381 of the Report, held as follows:-

> "It is to be presumed that, when it conferred the power, Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, amongst other things, not only that the power must be exercised in good faith but that the opinion or other subjective conclusion set as a pre-condition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful – such as misinterpreting the law or by misapplying it through taking into consideration irrelevant matters of fact or through ignoring relevant matters of fact. Otherwise the exercise of the power will be held to be invalid for being *ultra vires*."

In the case of *Dunnes Stores Ireland Company v. Ryan* at p. 89 of the report, Murray J. (as he then was) held that:-

> "... in exercising her powers under s. 19, the second respondent [the Minister for Enterprise, Trade and Employment], without intending to be exhaustive as to all the elements which may be taken into account must do so, so that:-

(a) it is exercised for a purpose contemplated by the Act and within the terms of the section;

(b) reasons are given for her decision;

(c) the decision to do so is rational and neither arbitrary nor disproportionate."

It was contended on behalf of Mr. Bemis that the Minister is obliged to approach his application for a licence pursuant to s. 3(5) of the Act of 1987, in a manner entirely different from any similar application made by any other person. This it was submitted derives from the fact that he is the sole owner of the vessel, "her hull, tackle, appurtenances, engines and apparel" as so found by this Court (Barr, J.,) on 14th May, 1996, and by the Courts in several other jurisdictions. Enormously important also it was submitted, is the circumstance that the State came to have jurisdiction over the remains of the vessel and associated objects by the extending its maritime jurisdiction from 3 to 12 nautical miles, to the area of the sea floor on which it and they lie, by the provisions of the Maritime Jurisdiction (Amendment) Act, 1988, legislation enacted some six years after Mr. Bemis acquired ownership of the wreck in 1982.

The Minister through the officials of his Department took a contrary view and considered that the ownership of the wreck by Mr. Bemis was irrelevant to the granting of a licence under the National Monuments Code. They considered that they were obliged to apply the self-same criteria in determining applications from Mr. Bemis as they would in determining applications made by any other person. They considered that they cannot accept any lesser standards from Mr. Bemis in the presentation of his applications, particularly with regard to the details of his proposed methodology, in the proper discharge of their duty of policing the underwater heritage

order of 25th January, 1995, in the interests of the people of this State. They believe that they must consider his proposals and methodology with the same rigour as would be applied to any other applicant and must be free to impose whatever conditions they consider necessary to preserve the remains of the vessel and its associated objects, regardless of his private property rights in them. It was contended on behalf of Mr. Bemis that this approach on the part of the Minister was erroneous as it "ignored a relevant matter" in considering, as confirmed in the second affidavit of Fionnbarr Moore, that the question of his ownership of the wreck was entirely irrelevant to the determination of the licence application.

In my view the Minister's interpretation of his duties and obligations is in general correct. However, in my judgment his interpretation is incorrect to the extent that it holds that his ownership of the wreck by Mr. Bemis, which is a private property right which enjoys protection, but not absolute protection, under Article 40 s. 3 ss. 1 and 2, of the Constitution, considered together with Article 3 s. 2 ss. 1 and 2, has no relevance at all to the determination of any application by him for a licence pursuant to the provisions of s. 3(5) of the Act of 1987 or indeed pursuant to the provisions of s. 26 (2) of the Act of 1930, (as amended). In my judgment, in so holding the Minister has misapplied the law by ignoring a relevant matter of fact. I find that the sole ownership of the wreck by Mr. Bemis is relevant in a very material way as setting important limits to the conditions which may properly be imposed in any such licence and in determining whether or not a licence ought to be granted at all.

In my judgment the position taken by the Minister with regard to future policies and actions relating to Mr. Bemis and the Lusitania in his "position" paper of January, 2000, (which was communicated in a synopsised form to Messrs. Ronan Daly Jermyn, Solicitors, the legal advisors to Mr. Bemis, by letter dated 11th April,

2000, almost 1 year prior to the application of 7th March, 2001) the, "facilitation" and "partnership approach", even though it will be seen by this judgment to be incorrect in law on some matters, undoubtedly represents a correct legal and moral approach to the now unchallengeable fact that Mr. Bemis is the sole owner of the vessel and of some, if not all, of the objects associated with it and, to the inescapable fact that this ownership predated by some six years any right of this State to interfere in any way whatsoever with his rights as such sole owner. In adopting this position the Minister and his advisers must be assumed to have been aware of and to have taken into account such material as, Recommendation 848 of the Parliamentary Assembly of the Council of Europe, 1978: United Nations Convention on the Law of the Sea Article 30.3(1), 1982: 1992 European Convention on the Protection of the Archaeological Heritage (Valetta, 1992): International Charter on the Protection and Management of the Underwater Cultural Heritage, 1996: U.N.E.S.C.O. Convention on the Protection of the Underwater Cultural Heritage, 1998: and the Department of Arts, Heritage, Gaeltacht and The Islands' own 1999 Framework and Principles for the Protection of the Archaeological Heritage.

Though the facts of that case were very materially different from those of the instant case, I nevertheless accept the submission on behalf of the Minister, based on the decision of the Supreme Court, per O'Higgins C.J. in *O'Callaghan v. Commissioners of Public Works in Ireland and The Attorney General* [1985] ILRM 364, that the exercise of his constitutionally guaranteed private property rights by Mr. Bemis as sole owner of the remains of RMS Lusitania and some, if not all of the objects associated with it is subject to limitation should this be necessary in order to reconcile it with the exigencies of the common good of all the citizens of the State. It is clearly in the common good and an important social objective that the cultural life

of State should be developed. The advancement of knowledge and education through the protection, preservation, proper exploration and study of archaeological objects now lying within the national territory, must clearly enhance the cultural life of the State. However in my judgment the principles of social justice referred to in Article 43 s. 2 ss. 1 of the Constitution must require that a fair and just balance be struck between what is reasonably necessary for that purpose and his exercise of his private property rights in the wreck and surviving objects by Mr. Bemis.

Giving the decision of the Supreme Court on the reference to it by the President of Ireland of Part V of the Planning and Development Bill, 1999, [2000] 2 I.R. 321, Keane C.J. at p. 349 of the report held as follows:-

"The approach which, in general, should be taken by the courts in considering whether a constitutional right has been validly abridged were stated as follows by Costello J. as he then was, in *Heaney v. Ireland* [1994] 3 I.R. 593 in a passage subsequently approved by this court at p. 607:-

> "In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example, *Times Newspaper Ltd. v. United Kingdom* (1979) 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court in Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and

democratic society. The means chosen must pass a proportionality test. They must:-

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible; and

(c) be such that their effects on rights are proportional to the objective; see *Chaulk v. R.* [1990] 3 S.C.R. 1303, at pages 1335 and 1336."

The same learned judge applied those principles to private property rights in *Daly v. The Revenue Commissioners* [1995] 3 I.R. 1, as did Keane J. in *Iarnrod Eireann v. Ireland* [1996] 3 I.R. 321 in the following passage at p. 361:-

"If the State elects to invade the property rights of the individual citizen, it can do so only to the extent that this is required by the exigencies of the common good. If the means used are disproportionate to the end sought, the invasion will constitute an 'unjust attack' within the meaning of Article 40, s. 3, sub-section 2."

In my judgment, the starting point of any approach by the Minister to any application by Mr. Bemis for a licence under s. 3(5) of the Act of 1987, or indeed any other licence under the National Monuments Code, must be that there should be the least possible degree of interference by the State with the property rights of Mr. Bemis in the wreck and then only insofar as it is strictly necessary for the purposes contemplated by the National Monuments Code which are to protect and preserve archaeological objects from injury, defacement, destruction, alteration, cleaning,

restoration, sampling or wrongful removal, (see s. 25(i) of the Act of 1930 amended by s. 20 of the National Monuments (Amendment) Act, 1994).

I find on the evidence that the rapid deterioration and collapse of the vessel is such that in the not so distant future, even without the occurrence of any natural or other catastrophic event, it will have been reduced to an extremely fragile and dangerous pile of rusting metal no longer susceptible to any meaningful exploration, research or preservation and with a probable loss of important artefacts in the process. Section 8 of the National Monuments (Amendment) Act, 1994 confers powers on the Director of the National Museum of Ireland to enter any lands or premises and *inter alia* carry out an inspection or excavation where the Director considers than an archaeological object on the site is in immediate danger of destruction or decay. Article 5 of the I.C.O.M.O.S. Charter for the Protection of the Archaeological Heritage states, *inter alia,* that,

> "Excavation should be carried out on sites and monuments threatened by development, land-use change, looting, or natural deterioration . . ."

However, on the evidence before the court on this application there was no indication of any intention or any proof of capacity on the part of the State either now or at any time in the future to put into effect any programme of exploration, research, salvage, restoration, preservation or display of the wreck or any part of the wreck or of any associated object or objects.

I find, on the evidence that the desire expressed by Mr. Bennis to immediately carry out an exploration of the remains of the vessel, which I am satisfied on the evidence of visual, scientific and photographic surveys is deteriorating and collapsing at an alarmingly rapid rate, (as indeed appears to be accepted by the Minister in the January 2000 "position paper" entitled "Decisions required in relation to the restricted

area of the wreck of the Lusitania"), could not reasonably or rationally be said to be incompatible with the common good of the people of this State merely because some state agency might at some future date have a similar interest but which on the evidence is not presently or for the foreseeable future achievable due to the lack of allocatable financial resources, the lack of research, preservation and display facilities and, the lack of secondable experienced personnel. The desire of Mr. Bemis, set out in his application of 7th March, 2001, to try to provide through exploration of the remains of the vessel a definitive answer to the question of what caused the second massive explosion, which current published research, of which the court may take judicial notice, suggests almost certainly led to the rapid sinking of this 31,550 ton, 762 feet long vessel, in 18-20 minutes with such terrible loss of life, I find to be a wholly legitimate and rational aspiration on his part which is not in any way contrary to the exigencies of the common good. In the absence of any immediate, proportionate and compelling contrary reasons this proposal by Mr. Bemis should not be inhibited but should be encouraged by all relevant state departments and agencies even if they are unable themselves, through funding or other constraints, to participate either fully or at all in that exploration of the wreck and its associated objects for the foreseeable future.

In my judgment, to give the legislation constitutional meaning, Mr. Bemis as sole owner of the vessel and some (if not all) of the associated objects, must be entitled on a proper application to any licence (subject to reasonable conditions where justifiable), now required by the laws of this State to be obtained as a consequence of the making of the underwater heritage order on 23rd January, 1995, to enable him to fulfil this ambition unless his indicated intentions are so vague as not truly to be capable of any proper assessment or so utterly irresponsible as to be irreconcilable

with the purpose and object of the underwater heritage order. The State, without being in any way obliged to incur actual expense or assume onerous or burdensome obligations should be pro-active in assisting him to the greatest possible extent.

Unfortunately, instead of the mutual trust and assistance that should characterise a "facilitation" and "partnership approach" which the January, 2000 "position paper" indicated should be developed between the State and Mr. Bemis, I find with great regret that the attitude of the Minister, while claiming to be helpful and co-operative, has in fact become wholly formalistic and negative and that of Mr. Bemis less than diplomatic, (for example his letter of 14th August, 2001, to Deirdre Moloney of the Department of Arts, Heritage, Gaeltacht and The Islands and his letter of 10th November, 2000, to Mr. Brendan Pocock, Assistant Principal Officer of Dúchas). Perhaps an approach of this sort on the part of the Minister could be justified, or at least could not be challenged, on the particular facts of the *In re "La Lavia"* case, (ante). However, I find that in the instant case such an approach on the part of the Minister would amount to an unjust attack on the private property rights of Mr. Bemis. I consider that the present approach on the part of the Minister is due, not to any wilful determination on his part not to co-operate with Mr. Bemis in any circumstances, but rather to the working out of the policy indicated at para. 6 of the affidavit of Sean Kirwan, Archaeological Adviser in the Heritage Policy and Legislation Division of the Department of Arts, Heritage, Gaeltacht and The Islands, sworn on 20th December, 2001. This policy is not to issue licences under s. 3 of the Act of 1987 where any damage to or any movement of any wreck or archaeological object would be involved unless this could not be avoided or, was in the interests of archaeological research or, for the purpose of conservation and then only when proper long-term conservation and storage facilities were available for any removed material.

I find that the refusal of his first application by Mr. Bemis by the Minister was therefore unreasonable, irrational and disproportionate, contrary to the Minister's own "position paper" of January, 2000, and entirely indefensible as being in the teeth of plain reason and common sense.

In my judgment it is undoubtedly open to the Minister to control the manner in which Mr. Bemis should carry out his intended diving, survey and exploration by attaching reasonable and lawful conditions to a licence granted pursuant to the provisions of s. 3(5) of the Act of 1987. In my judgment, the Minister, for example must have the right to impose reasonable conditions in any such licence to ensure the safety of vessels, employees, agents or visitors directly involved in the work, or third parties or vessels who or which may have occasion to come into and be in the area, for example, merchant vessels or fishermen. I am satisfied that the Minister must have a similar right, provided he can demonstrate by proper reasons why this is necessary, to impose reasonable conditions for the purpose of preventing any unnecessary and avoidable destruction of or serious damage to the remains of the vessel or any item associated with it, for example, by the indiscriminate lifting, moving or removal of objects or parts or by the inappropriate use of explosives, cutting equipment or other destructive techniques.

However, in my judgment, the Minister has no right, either directly or indirectly to impose on Mr. Bemis financial or other burdens predominantly for the benefit of the people of this State or for the advancement of education or science generally which he could not have been obliged to assume before the extension of the national maritime jurisdiction of the State on 4th May, 1988. The Minister is entitled to expect and, to insist through conditions attached to any licence issued pursuant to s. 3(5) of the Act of 1987, that Mr. Bemis conduct himself with regard to the remains of

R.M.S. Lusitania and objects associated with it as a reasonable, responsible and prudent owner could reasonably be expected to conduct himself and as a careful and skilled diver and serious underwater explorer could reasonably be expected to behave in relation to the remains of a vessel of major historical importance in international waters. The fact that the remains of the vessel, on the evidence, had been very considerably damaged in the past by explosives employed by the Royal Navy of the United Kingdom, had been vandalised by persons in search of rumoured lost treasures, such as the 2 paintings by Rubens and 1 by Monet supposed to have been in the possession of Sir Hugh Lane, or of actual valuable disposable items, such as the propellers, and the ship's bells, taken and sold in 1982, and have been subjected to further looting even after the making of the Underwater Heritage Order on 25th January, 1995, provides no argument or excuse for a continuation of such uncontrolled access to and wanton destruction of the remains of the vessel and its associated objects; rather the contrary is the case.

The court regrets the attitude adopted by Mr. Bemis in some of his correspondence with government departments, for example in the fourth paragraph of his letter dated 4th October, 2002, to Dúchas, (though not pursued by counsel on his behalf at the hearing of this application), that any attempt whatever to regulate his access to or use of the wreck by this State is unlawful. By national and international law the wreck lies now within the national territory of this sovereign State and all rights exercised in respect of it are therefore regulated by the Constitution and laws of this State. Accordingly, Mr. Bemis is bound by and must observe these laws and must apply for a licence pursuant to s. 3(5) of the Act of 1987 in just the same manner as any other person wishing to enter the area restricted by the underwater heritage order or wishing to have access to the wreck would have to do. This obligation in

itself does not, I am satisfied, constitute an unjust attack on his property rights in the wreck and some or all of the associated objects.

I find that it is a necessary incident of this statutory scheme, indicated in particularly by the three month period allowed to the Minister for a decision, and the very serious consequences of its not being made in time, that in his application for such a licence Mr. Bemis must specify what he wishes to do and how he intends to do it in sufficient detail, with sufficient supporting material and, if necessary, expert opinions, to enable the Minister to make a properly informed determination, including whether and what conditions to annex, and to give reasons for that decision, within the time allowed, based on facts, and not surmise. The fact that the Minister has power under s. 3(5) of the Act of 1987 to seek further information does not in any way absolve Mr. Bemis from this obligation. I have already addressed and explained this right in the Minister and its limitations.

No challenge was made at the hearing of this application to the affidavit evidence of Mr. Bemis that he was from 1981 to 2001 the owner and, from 1974 onwards a director, of Ocean Corporation, an internationally renowned diving school in the U.S.A; that he was Chairman of Deep Ocean Engineering, the largest producer of remote operated vehicles in the world and that he has a comprehensive knowledge and experience of all aspects of diving, diving work, and diving regulation since 1974. From this one may infer that he is fully conversant with the various rules concerning activities directed at the underwater cultural heritage for example those contained in the UNESCO Convention on the Protection of the Underwater Heritage (Paris: 3rd November, 2001), the articles in the I.C.O.M.O.S. International Charter on the Protection and Management of the Underwater Cultural Heritage (1996), dealing with project design and, the Guidelines for Research, Recovery and Salvage of R.M.S.

Titanic (2001), and other documents. The Court, I am satisfied, may take judicial notice of the fact that since the perfection of the aqualung by Cousteau and Gagnan in 1943, there has been quite extensive diving activity in searching for and in exploring post-mid 19th Century wrecks in the higher latitudes. Taking these two matters together I see no reason why Mr. Bemis should have any difficulty in formulating and presenting an application which would anticipate and answer the majority of any lawful and reasonable queries which the Minister might have. However, I find that a dive plan and additionally or alternatively a methodology statement, while it must be reasonably comprehensive cannot rationally be expected to be exhaustive. Reasonable room must be allowed for flexibility and ongoing development and enlargement in order to take account of changes in circumstances due to the very many variables involved, particularly in a dive to 93 meters in open North Atlantic waters, with strong currents, 11.7 miles S.S.W. from the Old Head of Kinsale.

If the Minister requires that an application for a licence pursuant to s. 3(5) of the Act of 1987 be made using a standard form peculiar to such a licence made available or furnished by him, either prior to the application being made, (if advised that it is intended to be made), or even after it has been made in some other form, provided that this is done immediately, and does not introduce unlawful requirements, Mr. Bemis should comply and use the form. I find that a requirement by the Minister that such a form be used is neither irrational nor unreasonable. The use of such a standard form could, for example, serve the purpose of ensuring that essential relevant information is available to the Minister as soon as possible. This in turn could assist in the rapid evaluation of the application, (both of these being very necessary to the determination of the application within the period of three months mandated by

s. 3(5)(d)(i) of the Act of 1987). After a determination had been made the form might usefully be retained by the Minister as a record for archival and other purposes, such as the development of future policy in this area.

The Minister is entitled to the same level and the same standard of co-operation, transparency and professionalism from Mr. Bemis in making an application under s. 3(5) of the Act of 1987, or any other application, as he would be entitled to expect from any other person intending to dive, survey, explore or carry out research on an "archaeological object" and "national asset". In my judgment, neither this nor an insistence in the circumstances indicated on the use of an appropriate standard form (if available) in making such an application would amount to an unjust attack on the property rights of Mr. Bemis in respect of the vessel and its associated objects.

Beyond setting out these parameters and considerations, which in my judgment must inform any future decisions by the Minister in this matter, the court does not and cannot interfere with the proper exercise by the Minister of the discretion vested in him by the Legislature. It is not the function of the court to consider the merits of the application of 7th March, 2001, or any other application by Mr. Bemis, or to assess the adequacy or otherwise of the information given, the objectives indicated, or the methodology described in these applications. Such considerations are matters falling solely within the remit of the Minister.

Other cases referred to in argument:

International Aircraft Recovery LLC v. Unidentified Wrecked and Abandoned Aircraft: United States of America (Intervenor) [1999] U.S. Dist., Lexis 10846

Florida Department of State v. Treasure Salvors Inc. et al [1982] Supreme Court of the U.S. 458 U.S. 670.

McDaid v. His Honour Judge Sheehy [1991] 1 I.R.

International Fishing Vessels Limited v. The Minister for the Marine [1991] 2 I.R. 95

Mulcahy v. The Minister for the Marine & C.I.F. Teoranta, (High Court – unreported – 4/11/94 Keane, J.)

MacPharthalain, & O'Malley v. The Clifden & West Connemara Airport plc & Ors. [1992] 1 I.R. 111

Devlin v. The Minister for Arts, Culture and the Gaeltacht & Ors. [1999] 1 I.R. 47

D.P.P. (Ivers) v. Murphy [1999] 1 I.R. 98

Gorman, Kearns & The National Taxi Drivers Union v. The Minister for the Environment & Local Government & Ors. [2001] 2 I.R. 414

Regina (Daly) v. Secretary of State for the Home Department [2001] 2 A.C. 532.