



# An Chartlann Náisiúnta National Archives

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AN ROINN GNÓTHAI EACHTRACHA  
DEPARTMENT OF FOREIGN AFFAIRS  
BAILE ÁTHA CLIATH 2  
DUBLIN 2

SEEN BY  
TADÓISEACH

Confidential

8 March 1988

Mr. Matthew Russell  
Senior Legal Assistant  
Office of the Attorney General

Dear Matt,

I have just seen a copy of your letter of 7 March to Dermot Nally enclosing the draft defence in the McGimpsey case together with a copy of his letter to you in response.

I must say I agree with Dermot's reservations about paragraph 12 of the draft defence. As I explained in our earlier discussions, I think the concept underlying the Anglo-Irish Agreement in so far as "status" was concerned was that, in the phrase used at the time, the two Governments approached the issue "with different title deeds". The Agreement did not seek to resolve this or to define the present status of Northern Ireland. Indeed, it carefully avoided doing so. Rather, both Governments agreed in Article 1, on the circumstances in which any change in that status, however defined, would come about.

I hope it might be helpful if I offer the following further views.

My understanding of the Government's approach to the present Constitutional challenge to the Agreement is that, granted that the Agreement is there and that they wish to operate it, they would want

- (i) to defeat the present challenge and win the case;
- and, (in so far as this is possible while winning the case)
- (ii) do this in such a way as not to drain the Agreement as it stands of such political content as it may have for the other side and (possibly) for the Unionists.

*Tadóiseach,*  
This is a fuller note of the point I mentioned this morning. Essentially an argument is that the defence should not get drawn into arguments about things which the Agreement did not deal with and quite deliberately kept away from. *Fermeas can agree to the number of sheep they will put on the mountain without necessarily defining their title to the land.* *50*  
*9/13*

I appreciate the importance of (i). The worry, which I share with Dermot Nally, is that the present formulation of paragraph 12 of the defence goes beyond what is strictly necessary in this regard and leads to a problem under point (ii) in that it relies on the distinction between de jure/ and de facto recognition which, as Dermot says, raises again all the ghosts of the Boland case.

My preference therefore, if possible, would be, as he suggests, to drop paragraph 12 and let the point be covered by paragraph 16 of the draft defence. If necessary a small addition could be made to paragraph 16 on the following lines (new text underlined).

16. If and insofar as Articles 4(c) and 5(c) "confirm the status quo" they do no more than take account of its existence in terms consistent with Article 3 of the Constitution and are not, by reason thereof or at all, contrary to Articles 2 or 3 of the Constitution.

Alternatively, if it is felt necessary to say something on the lines of paragraph 12, then I would offer the following additional views.

Paragraph 12 of the defence as at present formulated is concerned to deny that Articles 1 or 2 (b) of the Agreement acknowledge the de jure sovereignty of the UK over Northern Ireland, while accepting that those Articles do "acknowledge the jurisdiction which, as a fact, the UK Government exercise... etc." I would argue that Art. 1 of the Agreement contains nothing about either sovereignty or jurisdiction. It simply did not address the issue (deliberately so, because the underlying concept was that of "different title deeds" - although it was not politic to say that explicitly).

In line with this, I would suggest that the following would be a better approach:

(i) deal separately with Article 1 and Article 2 (b) respectively;

(ii) deny that Article 1 contains any statement (or acknowledgement by either party) about either sovereignty or jurisdiction;

(iii) Insofar as sovereignty is concerned, draw on the language of Article 2 (b) (first half sentence) about "no derogation from the sovereignty of either the Irish Government or the United Kingdom Government";

(iv) Insofar as jurisdiction is concerned, argue that the second half sentence of Article 2 (b) ("each retains responsibility for the decisions and administration of government within its own jurisdiction") is fully consistent with Article 3 of the Constitution (which explicitly limits the "extent of application" of our laws to the area of this State "pending the reintegration of the national territory").

These points could be met and the necessary rebuttal offered to paragraph 7 of the statement of claim by redrafting your paragraph 12 as follows:

"12. Article 1 of the Agreement does not make any statement (acknowledgement ?) in relation to sovereignty over Northern Ireland and Article 2(b) states explicitly that there is no derogation from the sovereignty of either the Irish Government or the United Kingdom Government. In so far as Article 2(b) of the Agreement states that each Government retains responsibility for the decisions and administration of government within its own jurisdiction, it is fully consistent with Article 3 of the Constitution which, pending the re-integration of the national territory limits the extent of application of the laws enacted by the Oireachtas to the area within the present jurisdiction of the State".

#### Summary

I would summarise the general ideas I have been trying to convey here as follows:

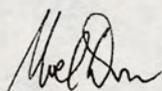
- (i) The underlying idea of the Agreement was to avoid defining "status" and to accept that each side came to it with different title deeds.
- (ii) This concept was not however spelled out in the Agreement and to that extent the Agreement is deliberately ambiguous. NB
- (iii) To "reduce" this ambiguity now and evoke again the de jure/de facto distinctions of the Boland case will raise further controversy and could drain the Agreement of whatever political content it may still seem to have for the other side. It would be

desirable therefore, in so far as this is consistent with winning the case, to avoid this distinction and to avoid flatly resolving the "constructive ambiguity" built into Article 1 of the Agreement (which focussed on possible future change rather than on a definition by either side of present status).

- (iv) The simplest way to do this, if you can live with it, is to drop paragraph 12 of the defence as Dermot Nally suggests and leave the matter to be covered by paragraph 16 with a small amendment if necessary as suggested above.
- (v) If, however, you must have something on the lines of paragraph 12 then my suggestion is, that as far as possible, you avoid accepting that Article 1 contains any acknowledgements about sovereignty or jurisdiction, since this draws you almost inevitably into the de facto/de jure distinction. I suggest instead relying on the explicit statement in Article 2(b) about no derogation from the sovereignty of either Government ; and arguing that the latter part of Article 2 (b) is fully consistent with Article 3 of the Constitution.

I appreciate that in all the circumstances it may not be possible at this stage to take the views I have expressed above into account in submitting the defence. I thought nevertheless that it might be helpful to try to clarify the points which I made orally in earlier discussions.

Yours sincerely,



Noel Dorr  
Secretary

cc Messrs. Dermot Nally, Des Matthews, Dermot Gallagher, Declan O'Donovan.