[Neutral Citation No. 2005 IEHC 381]

THE HIGH COURT

Record No.6981P/04

BETWEEN

JOHN DUNLEAVY

PLAINTIFF

AND
DUN LAOGHAIRE-RATHDOWN COUNTY COUNCIL

DEFENDANT
Record No. 6992P/04

BETWEEN

THOMAS McDONALD AND CLARA McDONALD

PLAINTIFFS

AND
DUN LAOGHAIRE-RATHDOWN COUNTY COUNCIL

DEFENDANT
Record No. 6973P/04

BETWEEN

HERMANGILD WALLACE AND KATHLEEN WALLACE

PLAINTIFFS

AND
DUN LAOGHAIRE-RATHDOWN COUNTY COUNCIL

DEFENDANT
Record No. 6970P/04
BETWEEN

GARRY SINNOTT

PLAINTIFF

AND
DUN LAOGHAIRE-RATHDOWN COUNTY COUNCIL

DEFENDANT

Judgment of Macken J. delivered on the 2nd day of November 2005

1. The plaintiffs in each of these proceedings are residents of local authority housing in Dun Laoghaire and are tenants of the defendant. They live in what are called maisonettes, or half houses. Each maisonette is in a paired arrangement, one positioned above or below the other. So far as the structure of these dwellings is concerned each pair has a common roof and the maisonettes share a small external area giving access to the respective hall doors. Some but not all may also, at this point in time, share a small number of utilities, such as water storage tanks which are installed in roof spaces, and sewerage pipes. The plaintiffs became tenants of the Corporation of Dun Laoghaire, the predecessor of the defendant, at different times between 1965 and 1987. In this judgment "the defendant" includes that predecessor, depending on the context.

2. These proceedings originally commenced by Equity Civil Bill in the Circuit Court in January 2001 and after several days at hearing, were transferred to this court following the judgment of the President of the Circuit Court delivered on the 2nd April 2004, in particular having regard to the public law issues raised. On the transfer up of the proceedings, Points of Claim, Points of Defence and a Reply to the latter were delivered together with certain particulars and replies to these.

3. There was a dispute between the parties at the commencement of the hearing of this case as to the precise scope of the proceedings, and as to whether the claim before this court, in particular a claim in contract, was wider or more extensive than in the Circuit Court. It was, agreed by the parties that the Points of Claim would be amended on consent by deleting the claim for exemplary damages, but by including a claim for damages pursuant to the doctrine of legitimate expectation, and also for breach of statutory duty.

4. The plaintiffs' claims are, in essence, identical. They plead that, as local authority tenants, they are entitled to the benefit of the Housing Acts, and in particular to the provisions of those acts relating to tenant purchase. They claim that as a result of representations made or promises given by the defendant to them as early as 1979 in the case of two sets of plaintiffs, and repeated to all plaintiffs on several occasions over a lengthy period of time, they had a legitimate expectation that their maisonettes would be sold to them at prices prevailing at the particular times in question. They also claim they have a right to have the maisonettes transferred to them on the basis of the doctrine of promissory estoppel, arising from the representations made upon which they relied to their detriment. They seek primarily declarations that they are entitled to purchase their respective maisonettes by reference to the market price prevailing under Sales Scheme 6 of 1979 (or in respect of some of the plaintiffs pursuant to later sales schemes), or such market prices adjusted in a manner to be determined by the court by reference to one of several possible dates, namely 1982, 1988, 1989, 1993 and 1995 being the years during which subsequent tenant purchase schemes or the defendant's sales schemes came into existence or were published and/or notified to them, and pursuant to which they say they offered to purchase their maisonettes.

5. In the course of the evidence, the plaintiffs accepted that their entitlement to have the maisonettes transferred to them as part of a Tenant Purchase Scheme was subject to their meeting the necessary financial conditions applicable to local authority tenants in their respective situations. The plaintiffs say however that they met, at the relevant dates, all such conditions.

The Facts as disclosed in evidence

6. Although evidence was received in this case over several days, the material facts are relatively straightforward. The evidence did, however, span a very lengthy period of time up to 1999, in some cases going back to 1979. I found that the plaintiffs who gave evidence as well as the witnesses for the defendant, did so with honesty and credibility, and with the best recollection they could, especially given the period of time which had elapsed.

7. The facts are very particular to tenants of maisonettes. According to the evidence, at certain dates between 1979 and 1995, depending on the plaintiff in question, the defendant sent each of them a circular letter(s) in which they invited the plaintiffs to

indicate whether they were interested in purchasing their respective maisonettes by reference to the market price then prevailing and pursuant to a formula set out, and if so, to indicate that expression of interest by completing a form and returning it to the defendant. The letters referred to the maisonettes as "half-house flats", but in this judgment they will be described as maisonettes. There was evidence that in some cases some of the tenants received copies of tenant purchase schemes, while in other cases, they received copies of standard form letters giving details of the sales scheme but the difference between these is not really material. It is however necessary to set out in some detail the exchanges, the content of circular letters or schemes, and the steps taken by both plaintiff and defendant, during this lengthy period of time, for the plaintiffs' case is based in effect on a course of dealings between them and the defendant.

8. The first of these standard form letters was sent as early as the 15th November 1979. It was received by Mr. Wallace and also by Mr McDonald. That letter is entitled "Sale Scheme No. 6, Suggested sale of half-house flats" and it stated in its relevant portions:

> "Dear Tenant,
>
> Consideration is being given to the feasibility and desirability of offering for sale by way of lease under the current Sales Scheme (No. 6), the half house flats constructed by the Corporation since 1945.
>
> As you will readily appreciate the proposal is fraught with many difficulties including *inter alia*:
>
> (a) Segregation of the individual areas to be included in lease maps.
>
> (b) Apportioning of responsibility for communal areas and services.
>
> (c) Arrangements for access by ground-floor tenants to water storage tank in roof space of top flat.
>
> However, while the detailed investigation of the feasibility and desirability of selling the flats is proceeding, it is considered that the tenants concerned should be given an opportunity of indicating whether or not they are interested in purchasing.
>
> …
>
> The fact that this enquiry is being made does not mean that the Corporation will be obliged to sell these flats under Scheme 6 or under any future Sales Scheme. Neither will the fact that a tenant indicates a willingness to purchase bind him to purchase should the Corporation decide to sell. Tenants, however who express interest in purchasing at this stage will, if the Corporation decides to sell, be given the benefit of the prices obtaining under Sales Scheme 6.
>
> The Corporation would appreciate if tenants returned the forms duly completed so that it can measure the extent of interest (if any) by tenants in purchasing. It is not to be assumed that if a majority express a wish to purchase that sales will take place, but a genuine indication of the wishes of tenants will be appreciated."

9. The difficulties referred to had been considered at a meeting of the housing committee on 23rd April 1979 and a further in-depth report was suggested, but in the meantime it was decided to canvas the tenants to assess the interest. No such report was before the court and is unclear whether it was prepared.

10. Only Mr. and Mrs. Wallace and Mr. and Mrs. McDonald were then tenants of the defendant. According to the evidence a further letter also issued to Mr and Mrs Wallace on the 4th March 1980, containing the following:

> "Dear Tenant.,
>
> In response to circular letter issued 15/11/79 you indicated, without any commitment to purchase, that you might be interested in purchasing your flat.
>
> The Council has agreed that before the Corporation makes a decision as to whether or not to sell the half-house flats, tenants who indicated some interest should have the probable terms and conditions of leasing fully explained to them before being asked whether or not they would wish to proceed any further with the purchase.
>
> Accordingly, it would be appreciated if you would contact this office at your earliest convenience."

11. Although there is further evidence in relation to matters concerning each plaintiff specifically and individually, which I shall deal with in due course, staying with the same line of documentation as above, there was also before the Court a circular letter of the 21st November 1983 in the following terms, *inter alia*:

> "Dear Tenant,
>
> The Borough Council has approved a recommendation of the Housing Committee that tenants of half-house flats be again circularised about the proposed sale of such flats. It is intended, where the tenants of the top and bottom flats are both interested in purchasing, to consider their requests.
>
> Accordingly, if you and the tenant overhead or underneath as appropriate are interested in purchasing you should notify the undersigned on or before 15/12/83.
>
> Particulars regarding sale terms, etc. can be had by contacting the Housing Section, Town Hall, Dun Laoghaire, during normal office hours."

12. By this stage, Mr. Dunleavy had also become a tenant of the defendant, as of 1981.

13. The evidence further disclosed that each plaintiff, at various dates, "expressed an interest" in purchasing their own maisonette in response to the circular or other letters issued by the defendant, and duly notified this to the defendant, acknowledged by the defendant in its points of defence. I should say something about an "expression of interest". It is the case made by the plaintiffs that this phrase is also the one invariably used by the defendant when inviting tenants of houses to say if they want to purchase their houses. It is, according to the plaintiffs, the notification to the defendant of such an expression of interest which triggers the

mechanism for sale of houses to tenants. The plaintiffs submit therefore that the defendant's invitation to the plaintiffs to indicate the same expressions of interest by them should be accepted by the court as the same triggering mechanism for the sale and purchase of their maisonettes. On the other hand, the defendant disagreed, saying in evidence that substantial matters always remain to be considered and agreed between the tenants and the defendant even after an expression of interest is received and before any house is agreed to be sold, or is in fact subsequently conveyed or transferred.

14. Over the intervening years, up to the 1990s, the plaintiffs continued to express an interest in purchasing their maisonettes, either when re-invited to do so by the defendant or upon independent enquiry of the defendant by some or other of the plaintiffs themselves, or through public representatives enquiring on their behalf. The evidence also established that, in general, each time a written invitation to express an interest, or to repeat an expression of interest was received, the plaintiffs replied in the affirmative. On occasion, they or some of them, attended the defendant's premises, on the invitation of the defendant, and there signed a ledger in connection with the proposed purchase, such as in the case of Mr. McDonald. and Mr. Dunleavy, who live one above the other, in response to the above letter of the 21st November 1983.

15. All the plaintiffs claim that they relied on the foregoing exchanges, or on similar exchanges over the years, on their own expression of interest during the same period up to the mid 1990s, as notified to and accepted by the defendant, as being evidence of representations or promises made to them by the defendant and upon which they relied, and that, as a result they had a legitimate expectation that the defendant would in fact sell their respective maisonettes to them.

16. Further, the plaintiffs claim that they did not opt to transfer from their maisonettes to houses, in the belief that their maisonettes would be sold to them. This was to their detriment because, had they taken up the option of transferring to houses, they would have been entitled to purchase those houses. In addition, acting further to their detriment, and in the belief that they would be sold to them, each of them expended monies in repairs and/or in renovations to the maisonettes.

17. As to steps taken by the various individual plaintiffs, consequent upon their expression of interest in purchasing their maisonettes, these were varied.

Mr. and Mrs. Wallace
18. Mr. Wallace gave evidence of being a tenant since 1965 in a maisonette, and that he had called to the Town Hall several times since 1979 when he had replied to the circular letter set out above. He had acted as a type of "go between" between the plaintiffs and the defendant and kept considerable notes of his dealings. He was, he said, told by officials that they were "looking into the manner", and at one stage even that an order was being made to transfer the maisonette within 3 or 4 weeks. He felt he was being fobbed off. He continued to express an interest in purchasing, and had indicated to the defendant that he would himself deal with certain matters such as the water storage tank in the roof. Originally when he moved in there were bare floors and walls and all the maintenance work to the maisonette was carried out by the defendant, but in 1979 he was told there would be no further maintenance. He then, in the belief that the maisonette would be sold to him and his wife, carried out work on the doors, windows, railings, and installed a new kitchen approximately 6 or 7 years previously, as well as a bathroom, and gas about 4 years ago. He had also created a drive-in space for a car, all the foregoing at various dates since late 1960s.

19. He accepted very fairly in cross examination that in so far as the circular letter of 1979 was concerned, there was no commitment by the defendant to sell the maisonettes, and no sale at that time. Apart from general circular letters, and acknowledgements of his response to those, he also accepted he had received no other document from the defendant upon which he wished to rely. He did receive further correspondence from local representatives when he asked them to help in the matter. He confirmed that he lived in a terrace of houses, all of which were tenanted, and that he knew there were legal difficulties concerning water, sewerage and other matters, and that the water and sewerage serve all the houses in the terrace in which he lives. He said that while he had indicated an interest in the premises, he was of the view that any problems in being able to do so should have been long resolved, and at the very latest by 1988.

Mr. and Mrs. McDonald
20. Mr. McDonald, gave evidence of becoming a tenant in 1976. When he moved in there was a livingroom, a kitchen with no electricity, a bedroom, sittingroom and bathroom. He received the circular letter of 1979 and considered he then had a chance to buy, which was important to him as his three sons were 12, 10 and 7 at the time. He had been on the defendant's list for a house because of the size of his family. He accepted that the letter of 1979 did not say yes or no to a sale, but he considered it was an open invitation by the defendant to him, and that if the defendant did sell, it would be at a particular price referred to. He had responded indicating his interest. He had made an application in December 1980 for planning permission to extend into the attic of his maisonette, he being a tenant of the upper part of the two maisonette dwelling. This was considered but by letter of the 27th April 1981 the defendant rejected the application on the basis that the services in the attic (into which Mr. McDonald wished to extend) were common also to the tenant in the ground floor maisonette. A representation on this matter was made by a public representative, on behalf of Mr. and Mrs. McDonald, in 1982, but no further documents exist in respect of the same from that time. He finally had the attic converted in 1985. If he had also responded to a similar invitation to purchase in 1982, and with Mr. Dunleavy who lived below him went to the Town Hall and signed a ledger. He did not get and terms of sale and there was no follow up. He had received more or less similar documents again in 1985, 1987, 1988 and 1989. He signed and returned all of these. He had gone to a meeting of the Council in 1997 and afterwards the local representative, Mr. Gilmore, had indicated the pilot scheme was passed for the sale of the maisonettes, and it would be dealt with in 3 months. It was again confirmed to him in 1998 that the transfers would be finalised within 3 or 4 weeks.

21. Someone had come to value the house subsequently in 1999. By that time, the prices had risen by about 50%, and the maisonette was offered at a price of £75,000. Between 1979 and 1985, he had installed a porch, secondary glazing of windows, central heating and a new fireplace. After 1985, he had constructed a new attic, 14' x 17' and raised the roof, at a cost of £10,000 and had installed a new kitchen.

22. In cross examination, Mr. McDonald agreed that the purpose of the letter of 1979 was to see the level of interest in purchasing, but that the defendant might not sell. He agreed he was told he might not be able to buy at that time, although he had a hope of doing so. When he went to sign the ledger in 1983, it was with Mr. Dunleavy because at that time, the defendant had indicated both parties must sign together, and he understood from the correspondence that the defendant had decided to sell only to those who were in agreement. If there was no agreement, there would be no sale.

23. As to the representations made in 1997, Mr. McDonald said that he was prepared to purchase, even at that time. By 1989 a period of ten years had elapsed from the date when he was first asked to indicate his interest in purchasing his maisonette, and that is the date on which the price should be fixed, although he was still prepared to purchase even in 1997. He accepted that if there was to be a sale then it could only have been under the 1995 Scheme, that he was willing to pay the 1997 market price, but only if,

as in the case of other house tenants, the house was first brought up to a proper standard of living.

24. He said he had carried out all the necessary maintenance on his maisonette because the defendant had refused to do so, in light of the fact that he was to purchase his home. As to common areas, he said that Mr. Dunleavy's water tank is in his roof space but is contained, and that there is a common area to ensure access to the gardens.

Mr Dunleavy
25. Mr. Dunleavy also gave evidence. He has been seriously physically disadvantaged since birth and requires a wheelchair to get around. He has resided in a maisonette since 1981 as a tenant of the defendant. He said in evidence that although the defendant agreed he indicated an interest in 1983, 1988 and 1995, he had in fact responded lots of times, as "flyers" were delivered from time to time, and he had answered all. He did not, however, receive the circular letter in 1983 as he was in hospital. His understanding of the letters sent by the defendant was that they were asking him if he was interested in purchasing his maisonette, and if so, the defendant was interested in selling. He received either the circular letter type invitation or else a copy of the tenant purchase schemes in which there was an indication of the sale prices or of the way the price would be calculated. He considered a fair date for fixing the valuation was 3 or 4 years after he was first told of the possibility of purchasing. He would have been able to purchase in 1986, not as easily in 1990 and it would be impossible for him to purchase at the prices now demanded by the defendant.

26. He had carried out works, such as removing a small garden to make way for his car, which was essential to him, he secured a grant for a shower, and had a steep ramp provided with the help of Mr. McDonald, reaching to his door.

27. In cross examination, he agreed he would not be entitled to rely on the circular letter of 1979, but said he had been told the maisonette would be for sale. He agreed the ledger he signed in 1983 with Mr. McDonald at the defendant's premises was something like the forms he had received earlier, but that he had no discussion with members of the defendant's staff at the time. He did not hear further from the defendant when he had replied back to the subsequent letters or schemes. He agreed that although Mr. Gilmore was making representations on his behalf in 1997, he would not have been able to purchase his maisonette at that time.

Mr and Mrs Sinnott
28. Finally, as to Mr. Sinnott, his wife has since died. He had a tenancy since 1987, and he said he got documents, and replied to them. He believes he saw the 1989 Tenant Purchase scheme, but not other similar ones. He understood he could buy his maisonette as a result of the documents sent to him, but agreed it was not actually offered for sale to him. He could only have purchased in 1997, if the price was acceptable, but believed he should have been able to purchase much earlier at a much lower price.

29. He had installed central heating, rewired the premises and installed a kitchen, all because it was going to be his own home.

30. The plaintiffs' case in law can be summarised as follows:

> (a) Having regard to the invitations from the defendant to express an interest in purchasing the maisonettes, and to the affirmative expressions made in that regard and notified to the defendant, and the steps taken by the plaintiffs, including the monies expended by them on repairs and maintenance, and their decision to forego transferring to houses which they could have purchased, they had a legitimate expectation that they would be afforded the opportunity to purchase their maisonettes by reference to the prices obtaining at the relevant times;
>
> (b) The defendant wrongfully reneged on the representations or promises made or the arrangements entered into, and/or was estopped from denying the existence of the same, having renewed the invitations to the plaintiffs to confirm their interest in purchasing the maisonettes on further dates from the years 1980 to the middle of the 1990s and at prices pertaining in those years.
>
> (c) By reason of the above matters, the defendant is bound in equity to sell the maisonettes to the plaintiffs by reference to the prices originally fixed in 1979 or subsequent appropriate dates.
>
> (d) In breach of the legitimate expectation in each of the plaintiffs to purchase at a lesser price according to the 1979 sales scheme (or other subsequent sales schemes), the defendant wrongfully failed to sell their maisonettes to them but rather in 1999 wrongfully offered to do so, without commitment, and at a greatly increased price fixed by reference to 1999 valuations;
>
> (e) Further, there was nothing in law to prevent such sales or the conveyance of those maisonettes to each of the plaintiffs at dates significantly earlier than 1999. In the circumstances, the defendant owed to the plaintiffs a statutory duty to prepare appropriate sales schemes and conveyancing documentation to ensure the reasonably speedy transfer of the maisonettes by the defendant to them at those earlier dates.

31. The defendant's position is also clear on the pleadings. It claims:

> (a) that these maisonettes were not included in Sales Scheme 6 in 1979, that no decision was made to sell any such maisonettes under that scheme, and none were sold under that scheme;
>
> (b) that the defendant did not form an intention to sell any maisonette, at any time, under any scheme prior to the offers made to sell in April 1999 pursuant to the 1995 Sales Scheme;
>
> (c) that the defendant has a statutory discretionary power whether or not to sell to a tenant in accordance with a purchase scheme duly adopted. The inclusion of maisonettes under sales scheme 6 was considered at the time not to be feasible for a variety of valid reasons, including legal difficulties in so doing.
>
> (d) that the defendant was unable and unwilling to offer for sale a maisonette to any tenant until it was satisfied that all legal difficulties in respect of the same could be overcome and the defendant could offer for sale a good marketable title. Prior to 1992 the defendant did not have any statutory power to sell a maisonette. The defendant's concern about the sale of such premises did not cease to exist with the passing of the Housing (Miscellaneous Provisions) Act 1992.
>
> (e) that while the plaintiffs expressed an interest in purchasing their respective maisonettes, in some cases in 1979 or at later dates, nevertheless the plaintiffs had no statutory entitlement to purchase those premises, and the defendant did not enter into any contract with any of the plaintiffs for the sale of any maisonette;

(f) the defendant did not represent to any plaintiff at any time between November 1979 and April 1999 or promise that any maisonettes would be sold to them, or give any assurance at any time to any of the plaintiffs that the defendant would sell any maisonettes so as to create any expectation that they would in fact be sold to the plaintiffs. The only expectation which could be inferred from the conduct of the defendant was a conditional one, that is to say that it would offer the maisonettes for sale provided that the defendant considered such sale to be a proper exercise of its discretionary statutory power of sale, which did not occur until 1999.

32. The defendant also pleads that insofar as John Dunleavy is concerned he entered into a tenancy agreement on the *19th December 1980* and insofar as Garry Sinnott, and his co-plaintiff who is now deceased, is concerned, they entered into a tenancy agreement on the 6th August 1987. In the circumstances the defendant says neither was a tenant of the Corporation of Dun Laoghaire when the circular letter of the 15th November 1979, upon which all the plaintiffs rely, issued.

The Legal Submissions
33. The plaintiffs filed very detailed submissions extending to several hundreds of pages, not all of which I propose to address, as I take the view that the material legal arguments are, in fact, fairly few in number. They argue firstly, that the case concerns the sale or lease of "dwellings" under section 90 of the Housing Act 1966, and in particular that the definition of "house" in section 2 of that Act is sufficiently broad to cover maisonettes and flats. Therefore, a sales scheme for "houses" automatically included the plaintiffs' maisonettes, as well as flats generally, but that this was not appreciated either by the Department of the Environment (not a party to these proceedings) or by the defendant, and that it appeared that staff employed by the defendant were hostile to any proposed sale of maisonettes. The defendant accepts that "dwellings" include all local authority housing, but rejects the plaintiff's submission that maisonettes are included in the definition of a"house". It argues rather that maisonettes are properly to be considered as flats, with all the attendant difficulties attaching to the conveyance of the same.

On this point, Section 2 of the Act of 1966 includes the following:

> *"'house' except in Part V of this Act, includes any out office yard, garden or other land appurtenant thereto or usually enjoyed therewith and, except as aforesaid and in sections 15, 16 and 17 of this Act, includes any part of a building used or suitable for use as a dwelling and 'housing' shall be construed accordingly."*

34. Section 89 of the said Act provides as follows:

> *"In this chapter – 'dwelling' includes any yard, out offices or appurtenances, garden or other land belonging thereto or usually enjoyed therewith;".*

35. Section 90 of the Act grants a specific power to the defendant to sell, subject to the provisions of the section and if they think fit, any "dwelling to which the section applies".

36. The combination of sections 2 and 89 does not make it clear that a house includes in all circumstances or in the circumstances under consideration here, all flats or maisonettes. In fact neither section 2 nor section 89 of the Act provides definitions of the word "house" or "dwelling" but merely clarifies that whatever they mean they should include ancillary buildings or appurtenances. The phrase in section 2 "any part of a building used or suitable for use as a dwelling" should be read in the context in which it appears in the legislation, namely, as relating to a "house". If a "house" were intended by the legislature to include also, and in all circumstances, a flat or a maisonette, it is difficult to see the purpose of the use both of "house" and "dwelling" in the same Act, for one or other would be redundant. Although a "dwelling" clearly includes in ordinary everyday language, a house, an apartment and a maisonette, it does not follow, as the plaintiff contends, that any of the sales schemes for the sale of "houses", as opposed to "dwellings", necessarily included in it, all maisonettes under the control of the local authority operating the scheme. Having regard to the foregoing, I do not accept that the plaintiffs' contention that in so far as there were sales scheme published in respect of "houses" these schemes, by virtue of the definition of "dwelling" or of "house" in the legislation, included automatically, and without any express reference to them, the plaintiffs' maisonettes.

37. Related to this aspect of the matter, the plaintiffs argue, secondly, that, on a correct interpretation of a letter dated the 1st February 1979 from the Minister for the Environment to local authorities, and which led to Sale Scheme no. 6 being adopted by the defendant, the Department of the Environment was also of the view that flats and maisonettes both fell within the definition of "house" in the 1966 Act, as otherwise the Department would have been in error in notifying local authorities that they could entertain applications from tenants of local authority flats to purchase them.

38. I am not persuaded that this is the correct interpretation of the letter of the 1st February 1979, which I consider to be quite clear. Such a suggestion actually flies in the face of the wording of the letter. That letter simply states that the Government has decided that a new tenant purchase scheme for the sale of houses to existing tenants *"may now be prepared by all local authorities"* and local authorities *"may also entertain applications to purchase received from tenants of local authority flats*" (emphasis added). It does not follow from its terms that that Department was of the view that a "flat" came within the definition of a "house", and there is no indication of this. Rather, the letter makes more sense if it is read as suggesting, if it be relevant - and I am not convinced that it is - that the Department considered that both houses and flats came within the definition of "dwelling", for otherwise there would be no need to mention "local authority flats" as a separate type of unit to "houses" at all. The letter refers simply to two specific categories of dwelling.

39. I am fortified in my view that maisonettes do not readily fall within the ambit of the term "house". Having regard to the extract from "Sale of Flats" by George and George (5th edition, 1994), introduced by the plaintiffs as evidencing the lack of legal difficulties arising in relation to the conveyance of maisonettes. According to that authority a maisonette can be described as "a self-contained flat possessing its own separate entrance from ground floor level". It "differs from an ordinary flat in that the building of which it forms part does not contain any passages or stairs common both to the ground floor and to the first floor". However "where any part of the stairs or passages giving access to the maisonette is used in common with another person or other persons, from a drafting aspect it is usually better considered as an ordinary flat of the type discussed in the next chapter".

40. In light of all the foregoing, I reject the plaintiffs' argument that a sales scheme in respect of "houses" such as Sales Scheme 6 of 1979 and those subsequent ones at least up until 1988 and 1989 included maisonettes.

The Statutory Scheme and the Sales Schemes
41. A major plank of the plaintiff's case is dependent upon the correct interpretation of the schemes for local authorities tenant purchase prepared and sent by the Minister for the Environment, the various sales schemes prepared by the defendant pursuant to those tenant purchase schemes, and notified to the plaintiffs, and the legal consequences of the steps taken by the plaintiffs and the

defendants pursuant to these.

42. According to the plaintiffs, these form the bases of the plaintiffs' contention firstly, that they had a legitimate expectation that their maisonettes would be sold to them at the prices prevailing originally; and, secondly, that the defendant owed them a statutory duty speedily to prepare all the appropriate conveyancing documents to enable the sales proceed. The plaintiffs submit that the statutory power granted to a housing authority to sell dwellings found in section 90 of the Act of 1966, while at first sight appearing to confer an unfettered discretion on a housing authority, nevertheless does not do so, as the housing department of a local authority has an significant influence over the way each housing authority exercised that discretion, and the Department of the Environment itself, in fact directed and controlled local authorities by telling them which type of dwellings to include in the relevant schemes and by setting out in detail the parameters of those schemes. In regard to the latter, the plaintiffs rely, inter alia, on the above circular letter of the 1st February 1979 from the Department of the Environment to Local Authorities, according to which all houses completed by the 31st December 1979 had to be included and several subsequent similar letters.

43. According to the defendant the plaintiffs misunderstand the scope of section 90 of the Housing Act 1966 which reads:

> *"Subject to the provisions of this section, a housing authority may, if they think fit, sell or lease any dwelling to which this section applies, in case the dwelling is occupied by a tenant, to the tenant, or in case the dwelling is not so occupied, to any person".*

44. The defendant submits this power of sale is subject to conditions being complied with, and is clearly a discretionary power. The section does not impose a statutory duty on a housing authority to sell local authority dwellings at all, but is merely an enabling and empowering one. Nor they say is there any provision in the Housing Acts 1966 to 1999 conferring on local authority tenants a right to purchase any dwelling allocated to them. Nor could the Housing Acts be interpreted on the basis that a housing authority would have no discretion but to sell a dwelling to a tenant whenever a tenant applied to purchase it. The use of the phrase 'if they think fit' in Section 90 of the Act of 1966 points, according to the defendant, to the conclusion that the legislature intended it was for the housing authority itself to decide, in the exercise of its exclusive discretion, whether or not the sale of a dwelling was desirable.

45. The defendant also submits that the letter of the 1st February 1979 and similar subsequent letters issued by the Department of the Environment are administrative measures. Prior to 1992, the Minister for the Environment had no statutory power under any of the Housing Acts or otherwise to make regulations concerning tenant purchase schemes. Therefore any such schemes circulated by the Minister for the Environment were for the guidance and consideration of local authorities and while the provision of such guidelines was perfectly lawful, the guidelines themselves had no binding legal effect on those authorities, including the defendant.

46. Secondly, according to the plaintiffs, since the scheme for 1979 applied as a tenant purchase scheme for all local authority "houses" including maisonettes, that scheme in fact operated to place the plaintiffs on the same footing as tenants in local authority houses, and by "expressing an interest" in the purchase of the maisonettes - the same phrase as used in relation to the sale of houses - the plaintiffs were entitled to have their maisonettes sold to them in the same way in which tenants of houses were also entitled. I have already expressed my finding on this argument.

47. The defendant submits that in 1979 the invitation to the tenants of maisonettes to "express an interest" in purchasing was an exercise carried out so as to discover the extent of any interest by tenants of maisonettes in the possible purchase of them. It says the interest which was expressed was high among those canvassed, but that it was clear from the circular letter sent that the defendant was not, by that letter, offering to sell the maisonettes to the tenants, even to those who expressed an interest in so doing. The defendant contends this was borne out by the evidence of the plaintiffs themselves. As to the letter of 1979 this is a correct view of the evidence.

48. Without going into detail in relation to each of the tenant purchase schemes either recommended to be adopted or actually adopted pursuant to letters from the Minster for the Environment, it is sufficient to say that, on the defendant's evidence, there were such schemes in 1979 , 1980, 1981, 1983 and 1988, as well as in 1989. In 1993, subsequent to the passing of the Act of 1992, there was a scheme established by statutory instrument and finally a further one by regulation in 1995. If a letter which issued in February 1980 from the Minister for the Environment obliged local authorities to prepare a scheme for the sale of houses but also, separately, indicated as follows:

> *"Local authorities may also entertain applications to purchase the fee from tenants of local flats…."*

49. A further purchase scheme for local authority dwellings came into being for 1981/2 following on from a letter from the Minister of the Environment of the 16th October 1981. Although the scheme adopted by the defendant at that time was not before the court, the letter from the Minister for the Environment, so far as flats were concerned, stated as follows:

> *"Housing authorities may also include flats with sale prices calculated in accordance with the terms of the scheme. The sale of all houses under the scheme will be in fee simple, subject to certain temporary restrictions. The transfer order should be in the form prescribed in the housing regulations 1980…or in a form substantially to the like effect. The sale of flats must be by way of lease and the prescribed form of transfer order provides accordingly…."*

50. The defendant admitted that both Mr McDonald and Mr Wallace had been notified at this time and had again expressed an interest in purchasing their maisonettes at the time (in the same way as they had expressed an interest under the 1979 scheme). The plaintiffs contend that the defendant failed to notify Mr Dunleavy of this scheme at that time and therefore failed to give him an opportunity to apply to purchase his maisonette at that time. The evidence established that Mr. Dunleavy became a tenant of the defendant in early 1981. Mr Sinnott was not a tenant of the defendant at that time.

51. There was a somewhat similar scheme under consideration or published in 1983/1984, but again the actual scheme was not before the court. It was acknowledged to have been notified to the plaintiffs, although Mr. Dunleavy did not actually receive it, due to hospitalisation. I have already earlier in this judgment set out in full the content of the letter of the 21st November 1983 written to Mr Wallace.

52. Mr Dunleavy and Mr McDonald both gave evidence of the importance to them of receiving that letter, or a similar letter, of going to the offices of the defendant and of signing a ledger in those premises, a very difficult task for Mr. Dunleavy, in the belief that progress was finally being made on the sale of their maisonettes. The plaintiffs say that no particulars regarding sale terms or any terms were ever communicated to any of them, despite their attendance at the defendant's premises pursuant to the above letter.

53. Although mention was made by the plaintiff to the possible existence of schemes for 1985 and 1986 such schemes were also not

before the court. However in 1987, on the 6th February 1987 Mr Wallace wrote to the defendant in the following terms:

> *"Re the tenants of No. 13 and 14 Pearse Close applied to purchase the half house dwellings in 1979 and we confirmed our purchase again in 1982 and 1983.*
>
> *We have called to your housing office on several occasions with regret without any satisfaction. We were at your office as recently as a fortnight ago and we propose to undertake the following agreement drawn up by our solicitor:*
>
> 1. Repairs to roof
> 2. Damage to water storage tank and pipes.
> 3. Damage to sewerage. We are prepared to meet these costs.
>
> Hoping you will consider our request without further delay."

54. No response appears to have been sent by the defendant to that letter.The letter from the Minister of the Environment of the 26th February 1988 stated *inter alia* as follows:

"1988 Tenant Purchase Scheme for Local Authority Dwellings

> *I am directed by the Minister for the Environment to state that a new tenant purchase scheme for the sale of rented dwellings to existing tenants should now be prepared by each housing authority in accordance with the terms set out in this circular. The new terms replace those of Circular HRT5/86 and will apply to applications received from eligible tenants up to the 31st December 1988. The 1988 tenant purchase scheme is a special 'once off' scheme, offering particularly generous terms to encourage the maximum number of tenants to become the owners of the dwellings in which they live. Authorities should ensure that all tenants are made aware without delay of the terms and conditions of the scheme so that they can now consider the purchase of their houses and make application in time. Schemes prepared in accordance with this circular may be deemed to have the Minister's approval."*

Sale of Flats

> *Recent sales schemes for local authority dwellings have allowed for the sale of flats as well as houses. However there have been certain practical (difficulties) in the sale of flats. A Working Group, representative of local authorities and the Department, has been examining the matter with a view to proposing ways in which these difficulties might be overcome. When the Working Group's report is available, consideration will be given to the steps which can be taken to encourage home ownership in the local authority flats sector. Pending completion of this report, authorities may continue to include flats in the sales scheme.*
>
> The 1988 scheme prepared by the defendant was adopted so late in the year it was inoperable due to the cut off date involved. For the purposes of showing, inter alia, the views of the defendant at the time, so far as maisonettes are concerned however, it is noteworthy that, after details of the sale price were set out, and the formula to be adopted for calculating the same, the following is also included:
>
> *"If only one tenant in a pair of flats are purchasers, an agreement will have to be entered into between the Corporation and the tenant purchaser as to responsibility for the common areas. This agreement may require, inter alia, a weekly contribution from the purchaser."*

55. This could only have been a reference to what would happen in the event of a sale of a pair of maisonettes, being the only "flats" in pairs. The defendant admitted that all the plaintiffs expressed an interest in purchasing their maisonettes in 1988.

56. A further "once off" scheme of 1989 which also included flats was proposed by the Minister. No flats were offered for sale however by the defendant. Two further schemes, in 1993 and 1995 ensued. Up to the 1995 scheme the plaintiffs responded positively to the notifications.

57. The plaintiffs say that, having regard to the foregoing, they were entitled to rely on their legitimate expectation that they would have the benefit of purchasing their maisonettes, and therefore in equity are entitled to have that benefit enforced. Further they submit that there was no inhibition in existence precluding the conveyance of the maisonettes to them. In the alternative, they submit that the defendant was in breach of its statutory duty to transfer the maisonettes at the earliest possible date, or to prepare the approved documents to do so, and that the failure to make the offers until April 1999 and at prices prevailing then – was a breach of that duty and caused damage to the plaintiffs.

58. I have set out in some considerable detail the events which occurred, because the plaintiffs' case depends on whether, in the particular circumstances of those events, their claimed legitimate expectation is a justifiable one, and whether in the particular context of the events, the defendant owed to the plaintiffs a statutory duty, the nature of such duty, and whether, assuming the existence of such duty, the plaintiffs are entitled to claim damages in respect of their claimed losses.

59. Before considering how these issues should be resolved, it is necessary to set out the defendant's approach to the sale of maisonettes and/or flats and the evidence tendered in that regard. Apart from the defendant's contention that the provisions of section 90 of the Act of 1966, granted it an exclusive discretion whether or not to sell, it argues that maisonettes were, in conveyancing terms, akin to flats, and that the circular letters from the Minister of the Environment had no legal binding effect on it. The defendant submits that in the exercise of their discretion whether or not to sell dwellings such as maisonettes, there were extremely difficult issues of a legal nature involved (which to some extent overlapped with policy decisions on the same), and which justified the defendant exercising its discretion against selling flats or maisonettes, at least until some time in 1999.

60. In essence the defendant claims that from 1979 through the 1990's, the sale of houses created little or no conveyancing or other legal difficulties. Such sales were well established in the private sector and did not throw up difficulties, so that once sold, a housing

authority was no longer responsible for the upkeep or maintenance of the premises. On the other hand the sale of flats and maisonettes created legal difficulties because of their nature. A report on the feasibility of including flats in a sale scheme was submitted to the housing committee of the defendant in October 1979 indicating that it would not be either feasible or desirable, for legal and social reasons, to include maisonettes in the sale scheme for the reasons inter alia, expressed earlier in this judgment.

61. In 1985 a Working Group was established by the Department of the Environment to consider problems identified at that time by several local authorities concerning the sale of local authority flats, and to make recommendations with a view to resolving those problems and in order to provide a basis upon which sales could take place. According to the evidence, this was important to the defendant, because it had 152 maisonettes and many hundreds of flats in its housing stock.

62. A circular letter issued from the Minister for the Environment introducing a tenant purchase scheme for 1988, in which, having referred to the difficulties relating to the sale of flats, it was stated:

> *"A Working Group, representative of local authorities and the Department, had been examining the matter with a view to proposing ways in which these difficulties might be overcome. When the Working Group's report is available consideration will be given to the steps which can be taken to encourage home ownership in the local authority flats sector. Pending completion of this report, authorities may continue to include flats in the sales scheme".*

63. According to the defendant, it retained its discretion to sell maisonettes and resolved to exclude their sale, in the proper exercise of its discretion pending resolution of the legal and practical difficulties involved. It invoked in evidence the minutes from the meeting of councillors to that effect in March of 1988 and on other dates. The defendant subsequently resolved to include flats in its 1988 tenant purchase scheme after all, by decision of the 28th November 1988 not circulated to tenants until the 6th December 1988 and with a closing date of the 31st December 1988, which the defendant accepted was in effect inoperable because of the short time available to closing.

64. In February 1989, the Working Group furnished a report to the Ministerentitled "tenant purchase of local authority flats". That report recommended, in relation to the sale of flats, the following:

> *"(a) The sale of flats should be by long term lease of at least 99 years.*
>
> *(b) In the interest of the housing management responsibilities, local authorities should have a discretion to decide which flats they would include in a sale scheme.*
>
> *(f) All leases would provide for the eventual possibility of the responsibility for management, maintenance and services being handed over to a purchaser's co-operative or other body.*
>
> *(g) Maisonettes would be disposed of on terms similar to those applying to flats."*

65. A new section 90 was inserted in the Housing Act 1966 by section 26 of the Housing (Miscellaneous Provisions) Act 1992 under which, subject to the provisions of the section, a discretionary power of sale was conferred on housing authorities to sell a dwelling in the state of repair and condition existing at the date of the sale to a tenant in occupation in accordance with the purchase scheme under which the dwelling was offered for sale. Additional powers were also conferred on housing authorities by section 90(6) of the said Act in respect of the sale of a dwelling which is a "separate and self-contained flat in premises divided into two or more such flats".

66. It is not necessary for me to set out the full content of the subsection, because according to the evidence of Mr Hughes the law agent of the defendant, Dublin City Council sought legal opinions on section 90 as inserted by section 26 of the Act of 1992 and was advised that the provision was deficient in respect of the sale of flats, as, *inter alia*, housing authorities were not empowered at that time to sell the reversionary interest in premises which comprised two or more self-contained flats.

67. According to Mr. Hughes these opinions were also made available to the defendant, and to his knowledge, senior counsel's legal advises were also made known by Dublin City Council to the Department of the Environment, and as a result of which a letter issued from that Department of the Environment regarding the sale of local authority flats, advising the defendant's county manager that the Minister for the Environment had concluded that the sale of local authority flats could not be effected in a way that would not prove to be a disservice to tenant purchasers. That letter stated that the Minister did not propose to introduce any amendments to the Housing Acts 1966 to 1992 in relation to the sale of flats and further stated that nothing in the earlier circulars issued in 1989 and 1993, or in the model purchase scheme, or in the Housing (Sale of Dwellings) Regulations 1993 should be regarded as requiring housing authorities to sell flats.

68. Arising from the foregoing in or about May 1995 the county manager of the defendant decided not to proceed with the sale of flats, including maisonettes, on the grounds that they would not be appropriate for tenants to purchase for three reasons namely:

> (a) The level of service charges that tenants would have to pay on top of the purchase price.
>
> (b) The availability and cost of public liability insurance.
>
> (c) Serious doubts about the future saleability of purchased flats.

69. This decision was referred to in the defendant's council meeting of the 18th May 1995. The foregoing represents the factual history of the inclusion or exclusion of maisonettes from sales schemes, up to that date.

70. In the course of his evidence, Mr. Hughes, who had previously served as assistant law agent, and had been law agent for a considerable number of years, outlined the legal difficulties which were inherent in the sale of maisonettes. It is not necessary for me to go through his evidence in detail. He rejected the suggestion by the plaintiffs' counsel that the sale of maisonettes, in conveyancing terms, posed no real difficulty, an argument put forward with vigour on behalf of the plaintiffs. However, no independent legal expert gave evidence on this aspect of the case on behalf of the plaintiffs. Mr Hughes, in his professional opinion, considered the conveyancing of such property created real difficulties for the defendant, including *inter alia*, the manner in which the shared access or common areas and utilities could be assured for each of the sharing parties for the future; the exposure for the defendant which might arise in the event that, on the sale of such premises, such factors were not sufficiently copper-fastened in law; the possible burden on the defendant in the event of default by either purchasing party and the necessity for the defendant to ensure that the maisonettes, when sold, would have a good marketable title, and would be capable of being sold on by the tenant

purchaser to a thirty party.

71. Mr. Hughes gave also evidence that these serious concerns were expressed not only by him, but also on behalf of several other local authorities; and that he had had ongoing discussions with others with a view to seeing how those conveyancing difficulties might be resolved to the benefit of both parties. It was also his evidence that the local authority did not have it within its own power to remedy the conveyancing deficiencies and that he and others had advised the Minister of the necessity to amend the legislation to provide for an appropriate mechanism by which flats and maisonettes could be sold.

72. Having regard to the foregoing, it is the defendant's case that its decision, which was a discretionary decision in any event, not to sell maisonettes which the defendant considered to be within the definition of "flats" was well based on appropriate advices, was properly considered, was founded on a reasonable apprehension of the legal difficulties and legal disadvantages in selling such premises, and was at all events reasonably and *bona fide* taken. In the circumstances the defendant argues that the plaintiff cannot lawfully challenge the decision made by the defendant not to sell the maisonettes until the month of April 1999.

73. In July 1995 the Housing (Sale of Houses) Regulations 1995 were adopted by the Minister for the Environment to govern the sale of tenanted dwellings to tenants, and Article 13 of those regulations provides:

> *"(a) A housing authority shall not sell a dwelling which*
>
> *(b) …..*
>
> *(c) Is a separate and self-contained flat in a premises divided into two or more flats which would require arrangements for the upkeep and management of common areas, works or services other than by the purchaser.*

74. I agree with the defendant's argument that at least until 1995 the decision to exclude flats from the scope of tenant purchase schemes cannot be challenged on the basis that the decision made was in some way unreasonable. It is true, as the plaintiffs submit, that according to certain writers the suggested difficulties encountered in relation to the sale of a maisonette are overstated and such sales do not require the unnecessarily elaborate conveyances sometimes drafted. In that regard, I agree with the plaintiffs' submission that the sale of maisonettes may not carry with it the same complicated difficulties which arise in the case of an apartment in a large block of apartments, because it is self-evident that in the latter case there will be significant common areas both external and internal to the building, creating the need for more complex arrangements as to future management, assurances, covenants, and possibly guarantees. Nevertheless, it cannot be denied that even if there are not the same common areas inside premises which comprise only two maisonettes, there are common services, common utilities and certain access areas common to both. Even in the extract from George and George presented in support of its case by the plaintiffs, it is acknowledged that there is a greater degree of interdependence between a pair of maisonettes than there is between, say, a pair of semi-detached houses, while acknowledging that some difficulties which arise in the case of a block of flats do not occur in the case of maisonettes. The authors also accept that there may be required to be positive covenants even if these may be restricted to a minimum, and the necessity to provide for respective covenants to repair.

75. The court does not have to consider whether or not the defendant was correct in the view which it took in relation to the scale of difficulties in question, nor in relation to how these might be resolved, nor whether those difficulties in the eyes of an academic writer in the United Kingdom could be overcome with appropriate easements and covenants. What the court is required to assess is whether or not, having regard to the evidence of difficulties perceived or proved to exist in relation to the sale of maisonettes and/or flats, these were reasonable concerns on the part of the defendant, and whether the defendant's decision not to include maisonettes in the various sales schemes or not to offer flats for sale, was not arbitrary or without a basis. I am satisfied that, having regard to the history of this matter, the defendant's doubts as to (a) its power or competence to divest itself of the title to maisonettes, particularly as regard the reversionary interest in certain parts of the premises, and to transfer a good marketable title to the purchasers of maisonettes; (b) the difficulties arising in respect of the same, having regard to legal advices coming to its attention; and (c) the possible burdens remaining on the defendant in the event of an incomplete or faulty conveyance of the same to new owners of maisonettes, whether the plaintiffs or those seeking to purchase from them, were wholly reasonable.

76. My analysis of the sequence of events leads me to conclude that up until the 1995 at least, there were, in the eyes of the defendant, a reasonably held view that there existed serious legal uncertainties in relation to the sale of maisonettes which might have as a consequence that the defendant would become liable for the failure of a purchaser, even of a maisonette, to comply with covenants or to carry out appropriate repairs, and which might also adversely affect the purchaser of the other maisonette in the unit, as well as having consequent burdens for the defendant also in that event. This notwithstanding the stated policy of the defendant, as disclosed during the evidence of Mr Hughes, to divest itself of such premises and of all responsibility for them, as well as the stated policy of the government, as evidenced in the letters from the Minister of the Environment, that tenants of all local authority residential dwellings, houses flats and maisonettes, should have the opportunity of purchasing them.

77. In the circumstances the defendant did not act unreasonably or arbitrarily in coming to the view that those legal difficulties were sufficient to persuade them to decide that the maisonettes should not be offered for sale to tenants, despite the existence of tenant purchase schemes in which it was envisaged they could be conveyed, until such time as the legal difficulties were resolved, at least until 1995.

The legitimate expectation claim

78. However, this does not fully resolve the issues arising from the plaintiffs' claimed legitimate expectation to be entitled to purchase the premises, arising from the course of dealings which the plaintiffs had with the defendant, notwithstanding that the defendant had a bona fide reason to exclude the maisonettes from its sales schemes. The defendant argues that since it had a discretion whether or not to sell, any legitimate expectation which the plaintiffs could expect is one in which the sale could only take place if the defendant considered it was desirable to do so, and that the plaintiffs ought to have known this. However, in that regard, I am not satisfied from the evidence that there was any reason for the plaintiffs to know this, save in respect of the letter issued in 1979. On the other hand, the real issue on the very unusual and particular facts of this case is not so much the entitlement of the plaintiffs to purchase their maisonettes, per se, or the discretion of the defendant to sell, since it was the stated policy of the defendant to seek to sell these and other dwellings to tenants of the defendant, including the plaintiffs, following the Government policy to do so, and the plaintiffs certainly wanted to purchase them. The defendant wished to sell the premises however only if it could establish a sufficiently acceptable legal mechanism for doing so, but did not wish to do so in the meantime until that position was arrived at.

79. This had required – having regard to the reasonably held belief that (a) it did not originally have the power or competence to sell the necessary reversionary interest, and (b) that in the best interest of the defendant it was not a proper exercise of its discretion until the legal difficulties had been resolved – an eventual amendment to legislation in 1992 and the passing or adoption of specific

Regulations by the Minister for the Environment, to facilitate their subsequent sale. The issue between the plaintiffs and the defendant was, and really is, whether the plaintiffs could rely on a legitimate expectation to be entitled to purchase the maisonettes at prices prevailing in 1979 or at some subsequent date or dates, well prior to April 1999 when the premises were finally (although conditionally) offered to them. That is the kernel of their case, as is plain on the pleadings, and in particular in the relief sought in the prayer on the Points of Claim.

80. The law relating to legitimate expectation has been well considered in several cases in this jurisdiction, and most particularly has been extensively reviewed by the Supreme Court in the recent case of *Glencar Explorations plc and another v The County County of the County of Mayo* (2000) I.R. 80.

81. The principles of law governing the entitlement of a party to claim a benefit pursuant to the doctrine of legitimate expectation, as enunciated in Glencar, supra, are clear. There, it was explained that the doctrine arose first in this country in *Smith v Ireland* (1983) I.L.R.M 300 when it was held, on the facts, not to have been established. In that case, the issue before the court concerned an alleged exercise of a power ultra vires the respondent, which does not really find any equivalent in the present case. The *Glencar* case does, however, set out very clearly the apparent variation found in the jurisprudence on the scope of the principle. On the one hand there is the approach enunciated most clearly in the case of *Tara Prospecting Ltd v. Minister for Energy* (1993) I.L.R.M.771 upon which the defendant relies and in which Costello, J. held that the right was solely a procedural one, relying on case law developed in the United Kingdom, and not a right to a benefit the itself such that it could be enforced by an order of mandamus.

In particular, Costello J. stated:

> *"In cases involving the exercise of a discretionary statutory power, the only legitimate expectation relating to the conferring of a benefit that can be inferred from words or conduct is a conditional one, namely, that a benefit will be conferred provided that at the time the Minister considers that it is a proper exercise of the statutory power in the light of current policy to grant it. Such a conditional expectation cannot give rise to an enforceable right to the benefit should it later be refused by the Minister in the public interest."*

82. On the other end of the scale are the cases of *Duggan v An Taoiseach* (1090) I.L.R.M. 710 and *Abrahamsom v The Law Society of Ireland* (1996) 1 I.R. 403, in which the doctrine was applied so as to confer an actual benefit on the claimant. In the Glencar, case, supra Keane, C.J. took the view it was not necessary at that time to determine whether the more expansive approach in the latter two cases, or the narrower approach found in the former, was to be preferred, since the applicants in the case in issue could not have complained that they had been deprived of a benefit in the form of a specific grant of planning permissions.

83. The issue was further considered by Fennelly, J., in the *Glencar* case, who concluded that the matter at issue in those proceedings did not come within the doctrine at all, and I note in particular he expressed the view that that case might not be the most appropriate one in which to delineate the contours of the principle of legitimate expectation.

84. Nevertheless, he outlined a series of very helpful matters which might properly be taken into account in assessing whether or not the principle was infringed by the actions of a defendant. In particular he approved of the trial judge seeking to find, in the evidence, something in the nature of an undertaking, promise or representation, express or implied, addressed to or applicable to the applicants. He did not consider it necessary to find the existence of a direct nexus, it being sufficient perhaps that the claimant should belong to a class or group of persons affected by an act which is accompanied by or implies an intention to follow an identifiable course of conduct by the public authority. He acknowledged that in the context of European Community law the doctrine has potentially substantive content, citing the case of *Mulder v Minister van Landbouw en Visserij* (Case 120/86) E.C.R. 2321, concerning milk quotas. Recognising the dilemma created by the apparent choice between the principle as found in some High Court jurisprudence as compared to other High Court jurisprudence, he posited a suggested, but not definitive, series of matters which must in any event be established.

85. These are, firstly, that the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity, which he called the representation. Secondly, that the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or that the person or group has acted on the fact of the representation. Thirdly, that it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation made to the extent that it would be unjust to permit the public authority to resile from it.

86. The plaintiffs claim under the principle of legitimate expectation arises from their respective expressions of interest in the purchase of their dwellings, repeated over a period of years, originally and generally in response to the first and then periodic invitations of the defendant to the plaintiffs, as well as the publication at least in 1988, 1989 and 1995 and even earlier, of tenant purchase schemes adopted by the defendant and sometimes incorporated into sales schemes for dwellings, including maisonettes and always by reference to prices or to formulae for calculating such prices.

87. According to the defendant any expectation harboured by the plaintiffs that the maisonettes would be sold to them by reference to Sale Scheme 6, or at the valuations applicable in 1979, or to the market prices prevailing under the defendant's sale schemes in later years is neither legitimate nor reasonable. In particular the circular letter of the 15th November 1979 did not represent that the maisonettes would be sold, and, according to the defendant, at no time prior to the 30th April 1999 did the defendant ever represent that those maisonettes could be or would be sold to the plaintiffs. Accordingly there was no representation.

88. Dealing with the first matter raised by Fennelly J. it seems to me that the correct interpretations to draw from the November 1979 letter is that the defendant was assessing the likely interest of tenants of maisonettes in the possible purchase of maisonettes, assuming that the defendant decided to sell these. It did not, on its correct interpretation, constitute a representation, express or implied, that the defendant would sell maisonettes, if any persons or even the majority of tenants, indicated they would wish to purchase. Still less was it a representation that the maisonettes would be sold at any particular price. The defendant fairly pointed to the evidence of the plaintiffs regarding that letter, and submitted, correctly in my view, that even the plaintiffs did not consider it an agreement by the defendant to sell any maisonette to the plaintiffs or any of them.

89. However, that is not the end of the story, and from the evidence, it will be recalled that a lengthy series of letters, tenant purchase schemes of the Minister of the Environment, or sales schemes of the defendant made pursuant to the latter, were sent or notified to the plaintiffs, either by copies being supplied to them with a form to be completed, or in the form of a circular letter explaining the scheme, and these were followed or interspersed by meetings at the defendant's premises, at its request, or the signing of ledgers etc. or by requesting a form to be completed and returned, or in the form of direct letters. That situation continued

more or less on an unbroken basis, from as early as 1980 right through to the 1990s with intervening representations being made directly by the plaintiffs, or by councillors on their behalf, either by letter or at meetings of the housing committee.

90. It is also fair to say that while at no time was an actual offer to sell made by the defendant to the plaintiffs until 1999, neither did the defendant on the evidence, on any occasion, ever write to any plaintiff to say the plaintiffs had misunderstood the position, nor, with the exception of the letter in 1979, to notify them that there were serious legal difficulties preventing the sale of the maisonettes. What happened was the opposite. Without ever being again notified of any difficulties in relation to the sale, the defendant notified tenants of maisonettes, including the plaintiffs, that it would be necessary to have the agreement of the tenants of both pairs of maisonettes, and sent an invitation to tenants to attend at the defendant's premises to record their agreement, and to have the terms of sale explained to them, so as to ensure that both tenants understood effectively the covenants and other obligations which would have to be accepted. It is worth looking again at the letter of the 4th March 1980, inviting the relevant plaintiffs to have the conditions fully explained to them *"before being asked whether or not they wish to proceed any further with the purchase"*. On its face that is a relatively clear indication that the matter was proceeding. It is true of course that it also contains the phrase *"before the corporation makes a decision as to whether or not to sell"*. That, however, on a reasonable interpretation of the letter appears to be dependent on the plaintiffs, once the probable terms and conditions are explained to and accepted by them, deciding to proceed. There is nothing indicative of the defendant's reservations about any legal difficulties or other impediments included in that letter.

91. It is also worth looking again at the letter sent to three of the four sets of plaintiffs, of 21st November 1983. It includes. *"It is intended, where the tenants of the top and bottom flats are both interested in purchasing, to consider their requests. Accordingly, if you and the tenant…are interested in purchasing you should notify the undersigned on or before…"*

92. It would be difficult to disagree with what Mr McDonald said was his interpretation of this letter. He explained that, although the letter of November 1979 clearly set out that there was no commitment to sell or buy "either way", this letter in contrast indicated that, if the tenant in the upstairs and downstairs maisonettes were in agreement, then the defendant would sell: if they were not in agreement, there would be no sale. It seems to me that the purpose of the invitation to come to the defendant's premises and have the terms and conditions explained to such agreeing parties was so as to ensure that each tenant knew what he was, in effect, getting into. Provided the tenants, once they knew the terms and conditions and accepted them, still wanted to proceed, then the clear suggestion of that letter was that the defendant would treat with them. Nothing in the correspondence exchanged since then really altered that position.

93. I am satisfied that on a correct analysis of the evidence as to the position adopted by the defendant, the first requirement mentioned by Fennelly J. in Glencar, supra., was met in the present case, not in 1979, but from the period commencing in 1983, and continuing, in the case of all plaintiffs save the last one, and in the case of Mr and Mrs. Sinnott, in the year 1988 or at least 1989 when, consequent upon the events in 1988, the defendant adopted a 1989 sales scheme which included maisonettes, and continuing thereafter, when one is looking to see if there was a representation that the maisonettes were being offered to the plaintiffs. I am also satisfied that the representation was made directly to a specific and identifiable class of persons, namely, the tenants of maisonettes which numbered about 152 at that time, which clearly included the plaintiffs and that therefore the second matter mentioned by Fennelly J. was also established.

94. And I am further satisfied that the plaintiffs, as persons falling within that group acted on the faith of the representation, by expending monies on the maintenance, repair and improvement of their maisonettes, and by foregoing the opportunity of transferring to a house as tenants of the defendant in circumstances where it was common case that they would have had an opportunity to purchase those houses, assuming that they, the plaintiffs, qualified to do so in all other respects. They also acted on the representation by continuing to notify the defendant of their interest when invited, made direct representations and had local representatives act on their behalf.

95. However, on the last of the matters which have to be established, namely, that it would be unjust to permit the public authority to resile from the representation, it seems that there is another factor which must first be addressed, specifically in relation to the question of price. As I have mentioned previously, the real issue between the parties is not so much that the defendant had made a representation as to the sale of the premises in the sense mentioned above, but rather whether a representation was made that it would sell on the basis of prices fixed or prevailing many years ago, and commencing in 1979. The evidence of the plaintiffs, very fairly and honestly tendered, was that so far as the 1979 Sales Scheme 6 was concerned, there was only a hope in the plaintiffs, Mr. and Mrs. Wallace and Mr. and Mrs McDonald, that they would be able to purchase their maisonettes at that time.

96. It is neither logical nor legally sustainable to posit the proposition that the maisonettes could be purchased in the year 1999 by reference to prices prevailing in 1979, and indeed – assuming a very substantial variation in price, as to the case, it would be negligent for the defendant to agree to do so.

97. It will be recalled that the 1979 scheme closed, in any event on the 31st December 1979, and with it, the possibility of purchasing at the prices fixed at that time. When the next scheme was propounded, in 1981, the relevant plaintiffs had the opportunity either of insisting that agreement had already been reached or of relying on an enforceable representation to sell under the 1979 scheme. None of the plaintiffs did so and on their own evidence could not have done so. I am of the view that the correct classification of their action is that, when they expressed an interest in purchasing the maisonettes pursuant to the next subsequent scheme, they waived any right they had to the benefit of prices prevailing under the earlier scheme. The position continued in much the same way each time a new scheme issued. When the plaintiffs expressed an interest in purchasing pursuant to the same, it could only have been by reference to that extant scheme and not by reference to prices prevailing under any earlier scheme upon which the plaintiffs, on their own case, could have relied, at least after 1983 or 1987, as the case may be. Nor could any representation made by the defendant under subsequent schemes be considered to have been one made by reference to prices obtaining under earlier schemes.

98. In these circumstances, I come to the conclusion that up until 1995, when the plaintiffs had continued throughout the years to express an interest in purchasing pursuant a series of sales schemes with increasing prices, they had waived any right which they had to purchase pursuant to prices prevailing under any of the earlier schemes, which prices had, by reason of the qualifying period expiring and the adoption of subsequent schemes with different prices, been supplanted.

99. However, in 1995 the position had changed. By that time statutory regulations had been passed dealing with the apparent deficiency in the power to transfer the maisonettes, although it is true that no steps were taken by the defendant at that time, forthwith to sell to the plaintiffs.

100. In the period 1995 through 1998 the position of the defendant appeared however from time to time to alter. At first it was intended to establish some type of pilot scheme. Then in 1997 it was decided that the pilot scheme would not be proceeding. Letters

were written by the defendant, including one in 1996 which repeated certain parts of a letter from the Department of the Environment, and which invoked difficulties arising in relation to the sale of flats, but did not include that portion of the letter which made a clear distinction between flats on the one hand and maisonettes on the other, expressing the view that the same difficulties did not occur with the latter.

101. I do not make any findings on the non inclusion of the latter material, because it was clear from the evidence tendered that it had been included as part of the appropriate minutes of the housing committee, and therefore it could not be said to have been suppressed in any way, and I accept the reason given for its non inclusion, namely that, even at that time there was still a concern expressed by the law agent's office of the defendant, about the viability of selling maisonettes as well as flats, notwithstanding the change in the law in 1992 and the Regulation of 1995. However, the existence of that part of the letter would have put the plaintiffs and their representatives on notice that there was a view about the sale of maisonettes which coincided with their own, and the representatives would have been in a position to put pressure on the defendant to speed up the adoption of the pilot scheme or the eventual sale of the maisonettes to the plaintiffs, as eventually occurred.

102. In late 1998 the correspondence indicates that the pilot project for the sale of the plaintiffs' maisonettes, effectively put on hold in 1997, was again to be implemented but without any indication as to why the defendant's view changed and the further documents put in evidence, and the evidence of the law agent, made it clear that the matter was by then been passed to the law department for consideration and for the preparation of suitable documents, which because of the complicated nature of the matter, also required the involvement of counsel. The offers to sell the maisonettes, although on a without prejudice basis, were finally made in April 1999.

103. Although Article 13 of the Regulation prohibited the sale of "a separate and self-contained flat in a premises divided into two or more flats, which would require arrangements for the upkeep and management of common areas, work or services other than by the purchaser", it does not appear that this provision actually inhibited the offer to sell when it was made, pursuant to the 1995 scheme, in 1999. What is clear is that a means was eventually found to offer the flats to the plaintiffs, without any indication of any change in circumstances or in the legal position between 1995 and 1999. Nothing in the evidence adduced persuades me that the entire of the period of delay between 1995 and 1999 was therefore justified.

104. In the foregoing circumstances, I am of the view that, as of a reasonable period of time after the coming into effect of the Housing (Sale of Houses) Regulations 1995 and the adoption of a model scheme by the defendant, the plaintiffs had a legitimate expectation that the maisonettes would be sold to them at the prices appropriate to that period. A reasonable period of time to allow for legal advices and drafting in such circumstances would be 9 – 12 months.

105. Even if one were to consider the position adopting the approach of Costello J. in Tara Exploration Ltd, supra., I am satisfied that his test would also be met, although on the basis of promissory estoppel. Here I have already held that a representation was made by the defendant.

106. The doctrine of promissory estoppel requires also that the promisee should also rely on the representation made. I have found that in the present case, the plaintiffs did rely on the representation made. Further, they must have done so to their detriment, namely put themselves in a position, by relying on the representation made, which as a result, was a position adverse to them. In the present case the evidence, not denied, was that at a very early date, the defendant had ceased providing for the maintenance of the maisonettes in question, on the basis that these were being sold to the tenants. As a result, all the tenants not only handled all the general maintenance and repairs of the premises, until then dealt with by the defendant, but also carried out improvements to the premises which I do not have to detail. Again. In the case of Mr Dunleavy, it is true he received a grant in respect of part of the work he did, and that was due to his disability, but in respect of other works he falls into the same category as the other plaintiffs..

107. Moreover, the plaintiffs gave evidence, again not countered, that each of them would have been entitled, as tenants of maisonettes, to apply to be allocated houses from the defendant's housing stock. They gave evidence of not having done so, on the strength of the representations made to them that their maisonettes would be sold to them. It was not seriously contested that had the plaintiffs been tenants of houses, they would have been permitted to purchase these, subject only to their being qualifying tenants and to meeting the necessary financial conditions. The entitlement to have transferred to, and purchased houses, was a substantial benefit. The foregoing of that benefit in the belief that the maisonettes would be sold was to the detriment of the plaintiffs, especially having regard to the significant increase in the value of all forms of housing in the period between 1983 or even 1989 and April 1999, when the maisonettes were finally offered for sale to them. The Plaintiffs would therefore have been entitled also to have invoked an entitlement to have the maisonettes offered to them under the doctrine of promissory estoppel.

108. Costello J. concluded that the doctrine of legitimate expectation in cases involving the exercise of a statutory power is limited to procedural matters, and the defendant invokes in particular the following findings of the judge:

> *"The existence of a legitimate expectation that a benefit will be conferred does not, of itself, give rise to a legal or equitable right to the benefit itself by order of mandamus or otherwise. In cases involving public authorities, other than cases involving the exercise of statutory discretionary powers, an equitable right to the benefit may arise from the application of the principles of promissory estoppel to which effect will be given by appropriate court order."*

109. For the reasons as I have given above, the right to invoke the principle of promissory estoppel only arises in the post 1995 period, however, when it became clear that maisonettes, at least, would or could be sold.

110. Finally, the defendant pleads and submits that where claims of inaction against public authorities are commenced by plenary summons, the safeguards contained in Order 84 should be applied *mutatis mutandis*, in reliance on a decision of Costello J. in *O'Donnell v Dun Laoghaire Corporation* (No. 2) [1991] I.L.R. 301, and the following citation:

> *"In considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in Order 84 Rule 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under Order 84, time would have been extended."*

111. According to the defendant, the obligation to apply promptly for relief in applications for judicial review is a primary requirement, and where such prompt application has not been made, an explanation for the delay must be before the court. In that regard the court has held on many occasions that the onus is upon an applicant to explain delay in bringing proceedings by way of judicial review, satisfying the court that there are reasons which both explain the delay and afford a justifiable excuse for that delay. According to the defendant, insofar as the plaintiffs claim that they are entitled to purchase their maisonettes by reference to the market price prevailing in 1979 under Sale Scheme 6 or by reference to a market price prevailing in 1982, 1988, 1989, 1993 or 1995,

the plaintiffs have not brought the proceedings promptly, nor within three months of the expiry of those respective dates.

112. Further according to the defendant when an offer was made to the plaintiffs in April 1999 under the 1995 purchase scheme the plaintiffs delayed further for a period of twenty months in issuing their equity Civil Bill proceedings. It argues that these delays in bringing their proceedings is inordinate and inexcusable and that no evidence was adduced by the plaintiffs to explain or justify the delay so as to enable this court determine that, had the claim been brought under Order 84, time would have been extended. Having regard to the alleged lateness in commencing these proceedings the court is invited on behalf of the defendant, in the exercise of the court's discretion, to refuse the reliefs sought by the plaintiffs.

113. On this issue, the question of delay is always one of degree. It is true of course that as a matter of general principle, claims of the nature raised here, against a local authority, or in respect of an alleged failure to comply with, say a statutory duty, the courts might be slow to grant relief to a plaintiff who had delayed unduly. But I am not satisfied that delay in commencing the proceedings in the present case can really be laid entirely at the feet of the plaintiffs. It is true that as between the offer made in 1999 and the commencement of the proceedings in the Circuit Court there was a delay of 21 months. But against the context of a history of inviting the plaintiffs to express an interest in purchasing their maisonettes, and the responses, of the repeated similar invitations and responses made, of the representations made on behalf of the plaintiffs of the defendant by public representatives, all well known to the defendant and the replies made to those representations, and to the history, from the defendant's point of view, of the steps considered by them for the purpose of establishing whether the perceived deficiencies in legislation and/or in conveyancing, could be overcome, it is in my view wholly inappropriate in the present case to refuse relief to the plaintiffs on the grounds of delay of the type considered by Costello J. in O'Donnell v Dun Laoghaire Corporation, supra.

114. Lastly although included in the written submissions and oral argument made on behalf of the plaintiffs, the plaintiffs did not either in their Civil Bill or the Points of Claim before this court make a claim in relation to alleged arbitrary discrimination between them as the occupiers of one type of dwelling and other tenants occupying a different type of dwelling, and I make no findings in relation to this aspect of the submissions filed on their behalf. Nor do I consider it necessary, in light of the foregoing, to make any ruling on the breach of statutory duty claim. Nor do I consider it necessary to make any findings pursuant to the European Convention on Human Rights Act 2003.

114. Having regard to the foregoing, I will make a declaration in favour of the plaintiffs that they were entitled to have the benefit of the purchase by them of their respective maisonettes, provided they met at the time, any conditions normally required to be met by a local authority tenant of the defendant for the sale and purchase of such maisonettes, the said benefit to be available to them at a cost which reflects a valuation of the maisonettes as if they been offered to the plaintiffs within a period of 12 months from the date in 1995 on which the defendant adopted a Model Scheme for the sale of local authority dwellings.