Glencar Explorations p.l.c. and Andaman Resources p.l.c. Applicants v. **The County Council of the County of Mayo, Respondent (No. 2)**

[1992 No. 149 JR; S.C. Nos. 323 of 1998 and 61 of2000]

High Court 20th August 1998

Supreme Court 19th July 2001

Local authority - Decision quashed as ultra vires - Misfeasance inpublic office - Breach of statutory duty - Negligence - Duty of care -Legitimate expectation - Whether liable for damages - Whether right todamages enforceable by individual.Tort - Misfeasance in public office - Breach of statutory duty -Negligence - Breach of legitimate expectation - Wrongful interferencewith constitutional rights - Local authority - Ultra vires decision -Duty of care - Contractual or equivalent relationship between parties- Property rights - Direct interference with or expropriation of -Whether dishonest attempt to perform public functions - Whetherstatutory duty enforceable by individual - Local Government Act, 1991(No. 11), s. 7.

The applicants were public companies. Their objectives were the exploration, prospecting and mining of ores and minerals. To that end they had secured a number of prospecting licences from the State in respect of certain lands in County Mayo. These licences which had been held from the Minister since 1986, had been continuously renewed and were not due to expire until the 25th June, 1993. On foot of the said licences, the applicants had carried out extensive prospecting and had achieved encouraging results. However, notwithstanding contrary recommendations received from the Minister for Energy, the respondent proceeded to ratify its draft development plan which incorporated a mining ban in respect of extensive tracts of land. The applicants, whose licences pertained to lands affected by the said ban, sought to set aside the impugned decision of the respondent. The High Court (Blayney J.) in a judgment reported at *[1993] 2 I.R. 237* , held that the inclusion of the mining ban in the respondent's development plan was *ultra vires* the respondent and was null and void.

Having succeeded in having the mining ban set aside, the applicants claimed damages from the respondent for misfeasance in public office, breach of statutory duty, negligence, breach of legitimate expectations and wrongful interference with their constitutional rights. The applicants claimed recovery of all the monies they had expended prior to the imposition of the ban.

Held by the High Court (Kelly J.), in dismissing the applicants' claim for damages, 1, that there was no direct relationship between the doing of an *ultra vires* act and the recovery of damages for that act.

Pine Valley Developments v. The Minister for Environment [1987] I.R. 23 , considered.

2. That no damages could lie for misfeasance in public office where there was no dishonest attempt to perform the functions of the office of the respondent.

McDonnell v. Ireland [1998] 1 I.R. 134 ; Farrington v. Thompson [1959] V.R. 286 ; Northern Territory v. Mengel (1995) 185 C.L.R. 307 ; Three Rivers DC v. Bank of England (No. 3) [1996] 3 All E.R. 558 followed.

3. That the relevant statutory provisions created a duty in favour of the general public, not any duty which the legislature intended to be enforceable by an individual in a claim for damages.

Pine Valley Developments v. The Minister for Environment [1987] I.R. 23 applied.

4. That the decision to impose the mining ban in the respondent's development plan was made negligently, in that the respondent did something which no reasonable authority would have done.

Anns v. Merton London Borough [1978] A.C. 728 ; Murphy v. Brentwood District Council [1991] 1 A.C. 398 ; Pine Valley Developments v. The Minister for Environment [1987] I.R. 23 considered.

5. That although the decision was negligent, there was no duty of care extant between the respondent and the applicants when the mining ban was imposed.

Ward v. McMaster [1985] I.R. 29 ; [1988] I.R. 337 applied.

6. That the existence of a legitimate expectation was not established by the applicants; but even if it had been, damages would not be available in the absence of a subsisting contractual or equivalent relationship between the parties.

Webb v. Ireland [1988] I.R. 353 distinguished. Association of General Practitioners Ltd. v. Minister for Health [1995] 1 I.R. 382 ; Tara Prospecting Ltd. v. Minister for Energy [1993] I.L.R.M. 771 ; Duggan v. An Taoiseach [1989] I.L.R.M. 710 considered.

7. That the only property right affected was a prospecting licence, which was only affected in an indirect way and no direct interference with or expropriation of property rights was established.

8. That the applicants did not demonstrate, on the balance of probabilities, that their venture would have been successful and would at least have yielded amounts sufficient to recoup the expenditure made and they were therefore not entitled to damages.

The applicants appealed to the Supreme Court in respect of their claims based on breach of statutory duty, infringement of the applicants' constitutional rights, breach of legitimate expectations and negligence. The claim based on misfeasance in public office was not pursued.

Held by the Supreme Court (Keane C.J., Denham, Murray, McGuinness and Fennelly JJ.), in dismissing the appeal, 1, that the decision of the respondent to adopt a mining ban constituted the purported exercise by the respondent of a power vested in it by law for the benefit of the public in general and not the fulfilment by it of a duty imposed by statute for the specific protection of particular categories of persons (such as the applicants), the breach of which would lead to an action in damages. The *ultra vires* exercise of the said power could not of itself provide the basis for an action in damages.

2. That the duty of the respondent imposed by s. 7(1)(e) of the Local Government Act, 1991 to have regard to policies and objectives of the Government or a particular

minister did not mean that its members were, in every case, obliged to implement the policies and objectives in question

Pine Valley Developments v. The Minister for Environment [1987] I.R. 23 followed.

3. That an administrative action which was *ultra vires* but not actionable as a breach of duty would only found an action for damages where either: a) it involved the commission of a recognised tort; b) it was actuated by malice or; c) the authority knew that it did not possess the power which it purported to exercise.

Pine Valley Developments v. The Minister for Environment [1987] I.R. 23 followed, Duff v. Minister for Agriculture (No. 2) [1997] 2 I.R. 22 queried.

4. That, whereas the imposition of the mining ban contributed to a reduction in value of the property right represented by the prospecting licences, this did not constitute an unjust attack on the applicants' property rights and that it was a reasonable requirement of the common good that there be an immunity conferred on persons in whom are vested statutory powers of decision from claims or compensation where they acted *bona fide* and without negligence.

Pine Valley Developments v. The Minister for Environment [1987] I.R. 23 followed, Osman v. United Kingdom (1998) 29 E.H.R.R. 245 and Francovich v. Italy (Cases C-6/90 & C-9/90) [1991] E.C.R. I-5357 distinguished.

5. That the doctrine of legitimate expectation did not arise in this case since the applicants had not been deprived of a benefit, namely a planning permission, which they reasonably and legitimately expected to receive and the constraint that the respondent had unlawfully imposed upon itself in respect of dealing with an application for planning permission was removed by the decision of the High Court.

Webb v. Ireland [1988] I.R. 353 distinguished.

6. That, despite the finding of the High Court that the respondent had acted negligently in that its decision was one that no reasonable local authority would have taken, the respondent did not owe a duty of care to the applicants.

7. That the decision by the respondent that it would not grant planning permission for any mining development within the area covered by the ban was, on the assumption that it was *intra vires*,the exercise by it of a statutory power which would result in the withholding of a benefit from the applicants, which would foreseeably result in their suffering financial loss. However, since the powers in question were exercisable by the respondent for the benefit of the community as a whole and not for the benefit of a defined category of persons to which the applicants belonged, there existed no relationship of proximity between the applicants and the respondent that would render it just to impose liability.

Donoghue v. Stevenson [1932] A.C. 562 , Anns v. Merton London Borough [1978] A.C. 728 , Siney v. Corporation of Dublin [1980] I.R. 400 and Ward v. McMaster [1988] I.R. 337 considered.

Obiter dicta (*per* Keane C.J.): That there was no reason why courts determining whether a duty of care arose should consider themselves obliged to hold that it did in every case where injury or damage to property was reasonably foreseeable and the notoriously elusive test of "proximity" or "neighbourhood" could be said to have been met, unless very powerful public policy considerations dictated otherwise. It would seem that no injustice would be done if, in such circumstances, a court was required to take the further step of considering whether, in all the circumstances, it was just and reasonable that the law should impose a duty of care on the defendant for the benefit of the plaintiff.

Ward v. McMaster [1988] I.R. 327 ; *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424 ; *Caparo plc. v. Dickman* [1990] 2 A.C. 605 considered.

That development objectives contained in a development plan did not have to be positive in nature and could legitimately constitute restrictions on development. Under the provisions of the Act of 1963, the preservation of views and prospects and of amenities of places and features of natural beauty or interest was expressly recognised as a proper development objective.

Glencar Explorations plc. v. Mayo County Council [1993] 2 I.R. 237 queried.

Obiter dictum (*per* Fennelly J.): That in order to succeed in a claim based on failure of a public body to respect a legitimate expectation, it would seem that the said authority must firstly have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it would act in respect of an identifiable area of its activity. This 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 formed part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group had acted on the faith of the representation. Thirdly, 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 to the extent that it would be unjust to permit the public authority to resile from it.

Cases mentioned in this report:-

Abrahamson v. The Law Society of Ireland [1996] 1 I.R. 403.

Ahern v. Kerry County Council [1988] I.L.R.M. 392.

Amalgamated Property Co. Ltd. v. Texas Bank Ltd. [1982] Q.B. 84; [1981] 3 W.L.R. 565; [1981] 3 All E.R. 577.

Anns v. Merton London Borough [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492.

Association of General Practitioners Ltd. v. Minister for Health [1995] 1 I.R. 382; [1995] 2 I.L.R.M. 481.

Bourgoin S.A. v. Ministry of Agriculture [1986] Q.B. 716; [1985] 3 W.L.R. 1027; [1985] 3 All E.R. 585

Caparo plc. v. Dickman [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568.

C.C.S.U. v. Minister for Civil Service [1985] 1 A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935.

Commission v. Council (Case 81/72) [1973] 1 E.C.R. 575.

Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398; [1949] 1 All E.R. 544.

Dascalu v. Minister for Justice (Unreported, High Court, O'Sullivan J., 4th November, 1999).

Donoghue v. Stevenson [1932] A.C. 562; [1932] All E.R. 1.

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294.

Duff v. Minister for Agriculture (No. 2) [1997] 2 I.R. 22.

Duggan v. An Taoiseach [1989] I.L.R.M. 710.

Dunlop v. Woollahra Municipal Council [1982] A.C. 158; [1981] 2 W.L.R. 693; [1981] 1 All E.R. 1202.

Everett v. Griffiths [1921] 1 A.C. 631.

Fakih v. Minister for Justice [1993] 2 I.R. 406; [1993] I.L.R.M. 274.

Farrington v. Thompson [1959] V.R. 286.

Francovich v. Italy (Case C-6/90 & C-9/90) [1991] E.C.R. I-5357.

Glencar Explorations plc. v. Mayo County Council [1993] 2 I.R. 237.

Hedley Byrne & Co. Ltd. v. Heller and Panners Ltd. [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575.

Hill v. Chief Constable of West Yorkshire [1989] A.C. 53; [1988] 2 W.L.R. 1049; [1989] 2 All E.R. 238.

Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 A.C. 520; [1982] 3 W.L.R. 477; [1982] 3 All E.R. 201.

Le Lievre v. Gould [1893] 1 Q.B. 491.

McDonnell v. Ireland [1998] 1 I.R. 134.

Mülder v. Minister Van Landbouw en Visserij (Case 120/86) [1988] E.C.R. 2321.

Murphy v. Brentwood D.C. [1991] 1 A.C. 398; [1990] 3 W.L.R. 414; [1990] 2 All E.R. 908.

Northern Territory v. Mengel (1995) 185 C.L.R. 307.

Osman v. United Kingdom (1998) 29 E.H.R.R. 245.

Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson Co. Ltd. [1985] A.C. 210; [1984] 3 W.L.R 953; [1984] 3 All E.R. 529.

Philips v. The Medical Council [1991] 2 I.R. 115.

Pine Valley Developments v. The Minister for Environment [1987] I.R. 23; [1987] I.L.R.M. 747.

Rowling v. Takaro Properties Ltd. [1988] A.C. 473; [1988] 2 W.L.R. 418; [1988]1 All E.R. 163.

Siney v. Corporation of Dublin [1980] I.R. 400.

Smith v. Ireland [1983] I.L.R.M. 300

Stovin v. Wise [1996] A.C. 923; [1996] 3 W.L.R. 338; [1996] 3 All E.R. 801.

Sutherland Shire Council v. Heyman (1985) 157 C.L.R. 424; (1985) 60 A.L.R. 1.

Tara Prospecting Ltd. v. Minister for Energy [1993] I.L.R.M. 771.

Three Rivers DC v. Bank of England (No. 3) [1996] 3 All E.R. 558.

Tomadini v. Amministrazione delle Finanze dello Stato (Case 84/78) [1979] E.C.R. 1801.

Ward v. McMaster [1985] I.R. 29; [1986] I.L.R.M. 43, (High Court); [1988] I.R. 337; [1989] I.L.R.M. 400, (Supreme Court).

Webb v. Ireland [1988] I.R. 353; [1988] I.L.R.M. 565.

Wellbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg (1970) 22 D.L.R. (3d) 470.

Yuen Kun Yeu v. A.-G. of Hong Kong [1988] A.C. 175; [1987] 3 W.L.R. 776; [1987] 2 All E.R. 705.

Z. and others v. United Kingdom (Unreported, European Court of Human Rights, 10th May, 2001).

Judicial review.

The facts have been summarised in the headnote and are more fully set in the judgment of Kelly J., *infra*.

The applicants applied by way of judicial review for various reliefs including an order of *certiorari* quashing the respondent's decision to include a ban on mining activities in its area in its development plan. The issue in relation to the validity of the decision was determined first by the High Court (Blayney J.) on the 13th November, 1992, (*Glencar Exploration plc. v. Mayo County Council* [1993] 2 I.R. 237). Thereafter, the applicants re-entered the action seeking damages on foot of the impugned decision, which was heard by the High Court (Kelly J.) on the 2nd, 3rd, 4th, 5th, 9th, 10th, 11th, 12th December, 1997 and the 20th, 21st, 22nd, 23rd, 27th, 28th January, 1998.

Paul Sreenan S.C. and*Rory Brady S.C.* for the applicants.

Michael Forde S.C. (with him *James O'Reilly S.C.* and*John Jordon*) for the respondent.

Cur. adv. vult.

Kelly J. 20th August, 1998

Introduction

This is a claim for damages of £1,938,264. It arises in the wake of the judgment of Blayney J. given in these proceedings on the 13th November, 1992, reported at [1993] 2 I.R. 237. By his order of that date Blayney J. declared that the inclusion of what has come to be called a mining ban which was inserted in para. 3.6.1 of the County Mayo Development Plan

on the 17th February, 1992, was *ultra vires* the respondent and was null and void.

Having obtained that decision in their favour the applicants now assert that they are entitled to recover damages against the respondent. They claim the recovery of monies expended by them (agreed in the sum already set forth) on the basis that in inserting the ban the respondent was guilty of at least one of five different wrongs. These wrongs are misfeasance in public office, breach of statutory duty, negligence, breach of legitimate expectation and wrongful interference with the applicants' constitutional rights. Each of these claims will have to be considered in turn.

Background

The applicants are respectively a public company registered in Dublin and a public company registered in Belfast. They are both involved in prospecting and mining ores and minerals.

On the 30th May, 1986, the applicants obtained from the Minister for Energy ten prospecting licences. These were obtained for the purposes of exploring for gold in townlands south of Westport in County Mayo. These licences have been renewed from time to time.

By the 17th February, 1992, the applicants had spent the amount claimed in these proceedings on an exploration programme in the areas authorised by the licences. As a result of their exploration, the applicants formed the view that gold in commercial quantities existed in the areas prospected. However, in order to bring matters a stage further substantial sums would require to be expended. To this end, they engaged in negotiations with a company called Newcrest Mining Ltd. which at that time was one of the largest Australian gold producers. It ranked in the top fifteen gold-mining companies in the world. Having considered and evaluated the applicants' work on the licensed lands, that company thought that the applicants' results warranted a considerable amount of additional work being done. Newcrest felt the potential ore size was striking and the geological evidence was regarded as spectacular.

As a result of this, Newcrest entered into a joint venture agreement with the applicants. It agreed to expend at least £1.6 million on further exploration. It was to receive a 51% interest for so doing. This agreement was made in November, 1991. In February, 1992, however, Newcrest pulled out of the joint venture because, it is said, of the mining ban having been included in the County Development Plan.

When the applicants first obtained their prospecting licences the respondent's 1984 Development Plan was in existence. It did not contain any mining ban.

In 1990, a new draft Development Plan was published. It was put on public display between the 2nd April, 1990 and the 31st July, 1990. Paragraph 3.6.1 of that draft plan dealt with mineral extraction. It was in the following terms:-

"It is clear that there are large potential mineral resources within the county from the scale of exploration currently underway. Development of these resources will have major implications for the environment, water resources, aquaculture, tourism and employment.

Policy

It is the policy of the Council that where mining and quarrying developments would seriously injure the visual environment, water resources, aquaculture, tourism, sites of archaeological, geological, historical, religious or scientific interest, the development shall not be permitted.

It is the policy of the Council that, as part of any planning application for the large scale extraction of minerals an environmental impact assessment under E.C. Directive 85/337/EC and S.I. 349 of the 1989 European Communities (Environmental Impact Assessment) Regulations, 1989 shall be required by the Mayo County Council.

Objectives

It is an objective of the Council to ensure, through control of mineral extraction developments, that the physical environment, flora and fauna is reinstated, on a phased basis, and with land, farms and vegetation in keeping with the natural environment.

It is an objective of the Council to ensure that all forms of discharges from mineral extraction shall be strictly controlled and monitored and that any breaches of such controls be prosecuted in accordance with the appropriate legislation.

It is an objective of the Council to ensure that adequate environmental safeguards are enforced to minimise disturbance and nuisance during operations.

It is an objective of the Council that features of archaeological interest are protected and preserved and if this is not possible that they be properly surveyed and recorded."

The ban was introduced as an amendment to this section of the plan. It was to be inserted between the two sub-paragraphs in the policy section. A motion adopting the ban was passed at a meeting of the respondent held on the 11th March, 1991. The ban was inserted under the heading "Policy" in para. 3.6.1 of the plan and was under the heading "Mineral Extraction". It read as follows:-

"It is the policy of the Council that no development and/or work shall take place in relation to minerals (as defined by the Minerals Act, 1940, as amended) in the areas shown dotted on map 10A."

The Development Plan incorporating this amendment was then put on public display from the 2nd April, 1991, to the 6th May, 1991. On the 2nd May, 1991, the applicants wrote to the respondent objecting strongly to the amendment being included in the Development Plan.

A meeting of the respondent was held on the 11th November, 1991. The members considered the written representations received in relation to this amendment but decided nonetheless to include it in the Development Plan. The county secretary informed the members that the County Development Plan, as amended, would be placed before them for their formal ratification at their December meeting. That meeting was held on the 16th December, 1991. On that day it was resolved to defer the ratification in order to give the members of the respondent an opportunity of considering a letter dated the same date which had been received from the Department of Energy. That letter made the views of the Minister for Energy known in no uncertain terms. The relevant parts of the letter stated:-

"I am directed by the Minister to state that he views with grave concern the draft policy statement in relation to minerals development in parts of County Mayo. The statement runs contrary to stated government policy that mineral resources should be explored for and should be exploited where this can be done in an environmentally acceptable manner. The statement, which implies that planning permission will be automatically refused to any mining project means that there will, in fact, be no exploration investment whatsoever …"

The letter went on:-

"The Minister is of the view that there is in principle nothing fundamentally wrong with the existing planning procedures and that it should be possible to accommodate the needs of both the mining industry and those concerned with the environment within the current legal and procedural framework.

Finally, I am directed by the Minister to state that it is his official view that the statement proposed for the draft Development Plan should be deleted."

The meeting having adjourned on the 16th December, 1991, six members of the respondent put down a motion to rescind the resolution of the 11th November, 1991, which had approved the Development Plan with the mining ban included in it. Their motion, if passed, would have removed the mining ban from para. 3.6.1 of the plan.

At a meeting of the respondent on the 17th February, 1992, that motion was defeated by 22 votes to 8.

Thus the mining ban came into force which in turn led to these proceedings. Later on in this judgment I will have to give much more detailed consideration to many aspects of the respondent's behaviour in relation to the imposition of this ban. The foregoing is merely the general background against which this litigation can be understood.

The present proceedings

The applicants were given leave to commence these proceedings which began on the 12th May, 1992. Judgment was delivered on the 13th November, 1992, (see *Glencar Explorations plc. v. Mayo County Council* [1993] 2 I.R. 237). In his judgment, Blayney J. made it clear that he was fully aware of the strong feelings which existed in County Mayo on the question of whether or not mining should be permitted in the Doolough area of that county. However, he pointed out that it was not the court's function to decide between the different interests. What it had to do was to determine the legal issue without regard to the relative merits of each side.

Having considered the relevant statutory provisions, Blayney J. said at p 245:-

"These provisions make clear the nature of a development plan. It is a plan consisting of a written statement and plan indicating the development objectives for the area of the planning authority. And since development is defined as meaning 'the carrying out of any works on, in, or under land …' development objectives must be seen in that context. So they must be objectives which have as their aim the carrying out of works on, in, or under land, which means that they must be positive in character. And if one considers the nature of the objectives referred to in s. 19, sub-s. 2 of and in the third schedule to the Act, one finds that with very a few exceptions they all answer this description.

This being the nature of the relevant plan which the planning authority is required to make, this is what the planning authority is empowered

to do when it comes to make its plan. Its power derives from the statutory obligation imposed on it so it cannot go outside what it is obliged to do. And since its obligation is to make a plan indicating the development objectives for its area, the question that has to be considered is whether the mining ban can be said to be a development objective.

It is not in my opinion necessary to decide the wider question raised by the applicants, namely, whether a planning authority is entitled to include matters of policy in its plan. The terms 'policy' and 'objective' are not mutually exclusive. A statement of policy may amount also to the definition of an objective. What is termed a policy may sometimes be equally accurately described as being an objective. What has to be considered here is whether or not the contested provision can properly be described as being an objective. If it can be, then it may be included in the development plan; otherwise it may not. When this test is applied to the mining ban, I am satisfied that the result must be a finding that the County Council did not have power to include it in the Development Plan. It is not a development objective. As I stated earlier such an objective must be positive in character. The mining ban is not. It is entirely negative. Its purpose is to prevent development not to have it as an objective. It would have totally prevented any further exploration in a substantial part of the county. For these reasons I am satisfied that it was *ultra vires* the County Council."

Blayney J. then went on to other considerations which in his view led to the same conclusion. He considered certain statutory provisions and regulations made thereunder as a result of which he came to the following conclusions at pp. 247 and 248:-

"It is clear from these articles that the use of land for the purpose of the winning and working of minerals is *prima facie* exempted development. That being so, the County Council has no power to prohibit such development. And while mining which has the effect specified in art. 11 sub-art. (1)(a)(vii) ceases to be exempted development, the question as to whether or not any particular development would come within that provision is not one which the County Council could decide. Under s. 5, sub-s. (1) of the Act of 1963 (as amended) any question as to what is or is not exempted development has to be referred to and decided by the Planning Board. So, in purporting to prohibit all mining in a particular area, the County Council is purporting to prohibit exempted development, which it has no power to do, and if the County Council is treating the mining works it is purporting to prohibit as not being exempted development, it is making a decision in regard to what it or is not exempted development, something which it has no

power to do either. It follows in my opinion that it has no power to include the ban in its development plan.

The only way which the County Council might achieve its aim of stopping mining in this part of the county would be by making a special amenity area order in respect of it. Art. 11, sub-art. (1)(b)(iii) of the Regulations of 1977 provides that in an area to which a special amenity area order relates mining is not exempted development. The County Council did have a detailed discussion at its meeting on the 22nd October, 1990, as to the merits or otherwise of making a special amenity area order in respect of the Westport area, and it was agreed to consider the matter further at a later meeting but no decision to make such an order was ever taken. The development plan does however list in para. 3.13.1 as one of the matters to be undertaken by the County Council 'to prepare action plans for selected areas of special scenic importance, where it is proposed to make a special amenity area order'."

Having decided that the mining ban was *ultra vires*, Blayney J. did not consider the other detailed submissions which were addressed to him. He did, however, comment on a further aspect of the case. It was by reference to the letter from the Department of Energy of the 16th December, 1991, from which I have already quoted the relevant extracts. The letter was addressed to the county manager and asked that it be brought to the attention of the Council members, which indeed it was. Counsel for the applicants submitted to Blayney J. that a further reason for nullifying the mining ban was the fact that the respondent, in including it in the Development Plan, had failed to comply with the provisions of s. 7 of the Local Government Act, 1991. The relevant part of that section is as follows:-

"(1) Subject to subsection (2), a local authority, in performing the functions conferred on it by or under this or any other enactment, shall have regard to -

(e) policies and objectives of the Government or any Minister of the Government insofar as they may affect or relate to its functions.

(2) A local authority shall perform those functions which it is required by law to perform and this section shall not be construed as affecting any such requirement."

Blayney J. dealt with this argument as follows at p. 248:-

"The Government's policy had been set out clearly in the letter of the 16th December, 1991, from the Department of Energy,*i.e.* that mineral resources should be explored for and should be exploited where this can be done in an environmentally acceptable manner. Counsel for the County Council submitted that since the members of

> the County Council had adjourned the meeting of the 16th December, 1991, specifically for the purpose of considering the Department's letter, they had had regard to the policy of the Government as required by the section. I am unable to accept that submission. Without attempting to define precisely the meaning of the phrase 'shall have regard to', I am satisfied that a local authority could not be said to have had regard to the policy of the Government in regard to mining when it adopted as part of its development plan a policy which was totally opposed to that policy. The members of the County Council may have considered the government's policy but, having considered it, instead of having regard to it, it seems to me that they totally disregarded it. However, in view of my having decided on other grounds that the mining ban is *ultra vires*, it is not necessary for me to come to any conclusion as to the effect of the county council having acted in breach of s. 7 of the Act of 1991, but it is a further indication of the vulnerability of the decision to include the ban in the development plan."

Having thus succeeded in having the mining ban set aside, the applicants then continued with these proceedings claiming damages under the various headings which I have already identified.

The legal basis for this claim

Blayney J. annulled the mining ban in the respondent's Development Plan. He did so because the respondent acted *ultra vires*. The effect of his judgment was to make void *ab initio* the offending provision. But it does not follow automatically that because a declaration of invalidity has been given that that of itself gives rise to a cause of action in damages. There is no direct relationship between the power of the High Court to quash a decision of an inferior tribunal or body and a liability being visited on the respondent in such a situation to pay damages. The applicants largely accept this general proposition and they cite the decision of Finlay C.J. in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23. The Chief Justice there said at p. 36:-

> "I would adopt with approval the clear summary contained in the 5th ed. of H.W.R. Wade, *Administrative Law*, at p. 673, when the learned author states as follows:-
>
> 'The present position seems to be that administrative action which is*ultra vires* but not actionable merely as a breach of duty will found an action for damages in any of the following situations:-

1. If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence.

2. If it is actuated by malice, *e.g*. personal spite or a desire to injure for improper reasons.

3. If the authority knows that it does not possess the power which it purports to exercise.'

I am satisfied that there would not be liability for damages arising under any other heading.

It is, of course, conceivable that proof of what has been submitted in this appeal as a gross abuse of the exercise of a statutory power of decision, or proof of a wholly unreasonable exercise of that power, would be taken by a court to be evidence that the authority knew or must have known that it did not possess the power which it purported to exercise.

I am quite satisfied, however, that the exercise by the defendant of this power in 1977, in the manner in which he did, and having regard to the legal advice which he sought and obtained prior to doing so, could not possibly constitute such a gross abuse of power or wholly unreasonable exercise of power as to lead to an inference that he was aware that he was exercising a power which he did not possess. The only evidence led in this case quite clearly indicates the contrary, and that the minister was of the belief that he was exercising a power which he possessed.

Not only am I satisfied that this is the true legal position with regard to a person exercising a power of decision under a public statutory duty, but it is clear that there are and have always been weighty considerations of the public interest that make it desirable that the law should be so. Were it not, then there would be an inevitable paralysis of the capacity for decisive action in the administration of public affairs. I would quote with approval the speech of *Moulten L.J. in Everett v. Griffiths* [1921] 1 A.C. 631 where at p. 695 he states:-

'If a man is required in the discharge of a public duty to make a decision which affects by its legal consequences the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of his duty to the public, and then to leave him in peril by reason of the consequence to others of that decision, provided that he has acted honestly in making that decision'."

The applicants recognise the strength of this statement but assert that they fall within one or other if not all of the categories identified in it as giving an entitlement to recover damages in respect of an *ultra vires* act.

I turn now to consider the behaviour of the respondent in imposing the mining ban with a view to ascertaining the true factual position. I will then consider whether my findings of fact support the applicants in their various allegations of wrongdoing against the respondent.

[Kelly J. then set out in detail the evidence given in relation to the behaviour of the respondent in imposing the mining ban, the approach and advice of the respondent's officials and legal advisors and the effect of this on the applicants.]

Misfeasance in public office

The applicants seek to recover damages against the respondent on the basis that the imposition of the mining ban constituted the tort of misfeasance in public office.

The tort of misfeasance in public office is committed where an act is performed by a public official, either maliciously, or with actual knowledge that it is committed without jurisdiction and is so done with the known consequences that it would injure the plaintiff (see Keane J. in *McDonnell v. Ireland* [1998] 1 I.R. 134).

The tort was defined by Smith J. in *Farrington v. Thompson* [1959] V.R. 286 at p. 293 where he said:-

> "If a public official does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance of public office would lie at the suit of that other person."

More recently, the ingredients of this tort have been considered both by the High Court of Australia in *Northern Territory v. Mengel* (1995) 185 C.L.R. 307 and the High Court in England in *Three Rivers DC v. Bank of England (No. 3)* [1996] 3 All E.R. 558.

I am of opinion that the following passage from the judgment of Brennan J. given in *Northern Territory v. Mengel* (1995) 185 C.L.R. 307 accurately summarises the tort. He said at p. 357:-

> "Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete."

In *Three Rivers DC v. Bank of England (No. 3)* [1996] 3 All E.R. 558 Clarke J. said at p. 632:-

"The tort of misfeasance in public office is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer. It is not to be equated with torts based on an intention to injure, although, as suggested by the majority in *Mengel* , it has some similarities to them."

In the present case, the applicants have not made out that in imposing the ban the elected members of the respondent were actuated by malice against the applicants or had a realisation that what they were doing amounted to an abuse of office. I do not believe that the evidence establishes that there was a deliberate and dishonest wrongful abuse of the powers given to the elected members. I am of the opinion that whilst considerable criticism can be made of the elected members of the respondent and their whole approach to the subject, the applicants have not satisfied me that there was any malicious intent on their part or that there was any realisation that by imposing the ban they were abusing their office. To adopt the approach of Brennan J. in the Australian High Court, the evidence here does not demonstrate a dishonest attempt to perform the functions of office. On the contrary, I am of the view that they were responding *bona fide* to the pressures put on them by their electorate. In so doing they sought to achieve a specific end. Whilst they did so unlawfully, they did so honestly. Furthermore, they believed they had legal authority to so do.

Accordingly, insofar as a claim is made for damages for misfeasance in public office, it fails.

Breach of statutory duty

Insofar as the respondent was guilty of a breach of statutory duty it appears to arise, if at all, under s. 19 of the Local Government (Planning and Development) Act, 1963 and s. 7(1)(e) of the Local Government Act, 1991. Section 19 of the Act of 1963 deals with the obligation of the local authority to make a plan indicating development objectives for their area. Section 7 of the Act of 1991 requires a local authority, in performing the functions conferred on it under that or any other enactment, to have regard to policies and objectives of the government or any minister of the government.

As far as s. 19 of the Act of 1963 is concerned, I am of the opinion that it creates a duty in favour of the general public to devise a plan. Nowhere do I find, either expressly or by implication, that it creates any duty which the legislature intended to be enforceable by an individual in a claim for

damages. The duties imposed are ones which fall to be discharged towards the public. The *dictum* of Finlay C.J. in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 at p. 36, is in my view wholly relevant to this case. He said:-

> "The Minister in making his purported decision to grant an outline planning permission was exercising a decision-making power vested in him for the discharge of a public purpose or duty. The statutory duty thus arising must, however, in law, be clearly distinguished from duties imposed by statute on persons or bodies for the specific protection of the rights of individuals which are deemed to be absolute and breach of which may lead to an action for damages."

In other words, if the duty is owed to the public at large then no action for breach of duty lies.

Insofar as s. 7(1)(e) of the Act of 1991 is concerned, I am likewise of the view that it does not create any enforceable statutory duty save in favour of the government or a minister in question. Such being the case any claim for breach of the duty therein prescribed on the part of an individual is fatally flawed.

Accordingly, insofar as the applicants assert an entitlement to damages for breach of statutory duty, it likewise fails.

Negligence

Damages for common law negligence are claimed. It is no understatement to say that the topic of liability for the negligent exercise of a statutory power is one which has given rise to much controversy. This area of the law is beset with many judgments, not all of them easy to reconcile one with the other.

In England one has seen the topic authoritatively decided (or so one thought) by the House of Lords in *Anns v. Merton London Borough* [1978] A.C. 728. There, Lord Wilberforce set out the famous "two-tier test" for liability. In order to bring home a claim for damages under the *Anns* doctrine one had to show as a prerequisite to liability the fact that the act complained of was *ultra vires.* Once that was established, the second part of the test had to be satisfied. This involved, *inter alia*, a consideration of whether the subject matter of the case involved a discretionary rather than an operational matter. Once that was established, it had to be considered in the context of the usual requirements of the tort.

Within a few years of that decision, the English courts were in full blooded retreat from it and ultimately it was over-ruled by the House of Lords in *Murphy v. Brentwood D.C.* [1991] 1 A.C. 398. Happily, I can confine my consideration of this topic to decisions in this jurisdiction,

although it must be said that some of them are difficult to reconcile one with the other at times also.

The first thing to note is what I have already stated in this judgment namely that there is no direct relationship between the doing of an*ultra vires* act and the recovery of damages for that act. There are very good reasons why that should be so and they are touched upon by Finlay C.J. in his decision in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 at p. 38 where he said:-

> "I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims for compensation where they act *bona fide* and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would, it seems to me, tend to avoid indecisiveness and delay, which might otherwise be involved."

That statement, of course, does not exclude an entitlement to recover damages in circumstances where the impugned act was carried out negligently.

I have come to the conclusion that the imposition of the mining ban in the present case was done negligently. Whatever may have been the motives of the elected members, they set about achieving their goal in a way which, in my view, no reasonable local authority in receipt of the advice which they obtained, would have done. It is not the function of elected representatives to slavishly give effect to their constituents' demands come what may. They must exercise a degree of judgment in any particular case.

In this case, the evidence demonstrates that the provision of the mining ban was unnecessary. The existing planning code was sufficient to protect all legitimate planning interests. This was the advice they received from their officials. It was also the view made clear to them by the Minister for Energy. Not merely was it unnecessary from a planning point of view, but the evidence was that it was in fact contrary to the best interests of the county because it would drive away investment in exploration and the county would lose the chance of evaluating the benefits of any project put forward for planning permission. Furthermore, there was in my view no objective justification for the adoption of the ban. It was to operate in respect of all minerals, regardless of their method of extraction, value or the quantity likely to be extracted. The ban was of enormous span and it was clear, particularly from the evidence of Mr. Dunleavy, that little or no thought went into the nature or the extent of the ban. It was nothing more than a crude exclusionary policy.

In concluding that the respondent was negligent in the sense that they did something which no reasonable authority would have done, I have yet to address the question as to whether that negligent act was done in the context of a duty of care being owed to the applicants. It is only in such context that a right to damages would arise.

The leading case on the topic is *Ward v. McMaster* [1985] I.R. 29 (High Court) and [1988] I.R. 337 (Supreme Court).

In the High Court, Costello J. at pp. 49 and 50 reviewed the relevant authorities and reached the following conclusions concerning the principles to be applied:-

> "(a) When deciding whether a local authority exercising statutory functions is under a common law duty of care the court must firstly ascertain whether a relationship of proximity existed between the parties such that in the reasonable contemplation of the authority carelessness on their part might cause loss. But all the circumstances of the case must in addition be considered, including the statutory provisions under which the authority is acting. Of particular significance in this connection is the purpose for which the statutory powers were conferred and whether or not the plaintiff is in the class of persons which the statute was designed to assist.
>
> (b) It is material in all cases for the court in reaching its decision on the existence and scope of the alleged duty to consider whether it is just and reasonable that a common law duty of care as alleged should in all the circumstances exist."

The decision of Costello J. was appealed to the Supreme Court. The appeal was dismissed. In the course of his judgment, Henchy J. having found that the local authority were plainly in breach of their public duty went on to say at p. 342:-

> "However, the breach of such a public duty would not in itself give a cause of action in negligence to the plaintiff; see *Siney v. Corporation of Dublin* [1980] I.R. 400. It is necessary for him to show that the relationship between him and the Council was one of proximity or neighbourhood which cast a duty on the Council to ensure that, regardless of anything left undone by the plaintiff, he would not end up as the mortgagor of a house which was not a good security for the amount of the loan. A paternalistic or protective duty of that kind would not normally be imposed on a mortgagee in favour of a mortgagor, but the plaintiff was in a special position."

McCarthy J. in the course of his lengthy judgment indicated that whilst Costello J. had rested his conclusion on the "fair and reasonable test", he preferred to express the duty as one arising from "the proximity of the

parties, the foreseeability of the damage, and the absence of any compelling exemption based on public policy". On the duty of care he said at p. 351:-

> "The proximity of the parties is clear. They were intended mortgagors and mortgagee. This proximity had its origin in the Housing Act, 1966, and the consequent loan scheme. This Act imposed a statutory duty upon the County Council and it was in the carrying out of that statutory duty that the alleged negligence took place. It is a simple application of the principle in *Donoghue v. Stevenson* [1932] A.C. 562 confirmed in *Anns v. Merton London Borough* [1978] A.C. 728 and implicit in *Siney v. Corporation of Dublin* [1980] I.R. 400 that the relationship between the first plaintiff and the County Council created a duty to take reasonable care arising from the public duty of the County Council under the statute. The statute did not create a private duty but such arose from the relationship between the parties."

In seeking to apply these principles to this case, there must be weighed heavily in the scales against the applicants the fact that the statutory powers which were conferred and operated here are, in my view, ones which were to be operated for the benefit of the public at large. They were not directed towards a particular class or group of persons of which the applicants are a member. That, of course, is not necessarily the end of the matter if it can be shown that a duty of care arose not from the statute *per se* but from the relationship between the parties. Whether one adopts the"fair and reasonable test" preferred by Costello J. or the"proximity of the parties, foreseeability of the damage and the absence of any compelling exemption based on public policy" test preferred by McCarthy J., in my view the answer in this case is the same.

It would be neither fair nor reasonable nor would the proximity of the parties suggest that there was any duty of care extant between the respondent and the applicants when the mining ban was imposed. The applicants were not even then applicants for a planning permission and indeed there was no guarantee that they would ever become so. The most that can be said of them was that they were prospectors who had a hope, nay even an expectation, of being applicants for planning permission at some stage in the future. It is indeed true that they had made representations to the respondent seeking to avoid the imposition of the ban and pointing out that they would sue in respect of any loss which they might sustain as a result of it. But that of itself does not appear to me to give rise to a proximity in the legal sense which would result in an entitlement to damages for a negligent act. Accordingly, I have come to the conclusion that the purported exercise of the statutory powers in question by the respondent was

not one which gave rise to a duty of care in the law of torts at the suit of the applicants against the respondent.

Legitimate expectation

The claim which is made here is that some legitimate expectation of the applicants was frustrated by the respondent thereby giving rise to an entitlement to damages. When asked to identify precisely what legitimate expectation the applicants were relying on and what exactly it was alleged the respondent did to generate that expectation, they replied as follows:-

"The applicants had a legitimate expectation:-

(a) that the respondent would act lawfully;
(b) that the respondent would have regard for the government and ministerial policy;
(c) that the respondent would only include development objectives in the Development Plan;
(d) that the respondent would pay due regard to the advices of the county manager, county engineer, senior executive planner and solicitor advising Mayo County Council;
(e) that the respondent would seek legal advice before inserting the mining ban in the draft Development Plan and putting same on public display;
(f) that the advices of the solicitor retained on behalf of Mayo County Council would be brought to the attention of Mayo County Council before they voted to ratify the plan with the proposed amendment in relation to the mining ban;
(g) that the Mayo County Council would seek and obtain the advices of their legal advisers in relation to their obligations at law in the light of the letter from the Minister for Energy dated the 16th December, 1991;
(h) that Mayo County Council would not act contrary to their legal obligations having received the letter from the Minister for Energy dated the 16th December, 1991;
(i) that Mayo County Council would not seek to circumvent the statutory procedure for the making of a special amenity area order by the misuse of their powers to make a development plan;
(j) that Mayo County Council would not seek to prejudge all applications for the development of mines within a substantial part of the area for which they were responsible.

The applicants had dealings from time to time with the respondent. Those dealings, the inevitable necessity for a planning application to the respondent to develop a mine within the areas covered by the applicants'

mining licences, and the statutory position enjoyed by the respondent all gave rise to the legitimate expectation claimed".

Just like the topic which I discussed in the immediately preceding part of this judgment, legitimate expectation has hosted a large number of decisions in varying jurisdictions, not all of them easy to reconcile one with the other.

Happily, I may confine myself to an examination of the law in this jurisdiction with a view to ascertaining whether or not the applicants have made out a case under this heading.

The starting point for any such examination must be the decision of the Supreme Court in *Webb v. Ireland* [1988] I.R. 353. Finlay C.J. said this (at p. 384):-

> "It would appear that the doctrine of 'legitimate expectation', sometimes described as 'reasonable expectation', has not in those terms been the subject matter of any decision of our courts. However, the doctrine connoted by such expressions is but an aspect of the well-recognised equitable concept of promissory estoppel (which has been frequently applied in our courts), whereby a promise or representation as to intention may in certain circumstances be held binding on the representor or promisor. The nature and extent of that doctrine in circumstances such as those of this case has been expressed as follows by Lord Denning M.R. in *Amalgamated Property Co. v. Texas Bank* [1982] Q.B. 84, 122:-
>
> 'When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands'."

Later in his judgment Finlay C.J. said at p. 385:-

> "… the plaintiffs' claim for compensation rests solidly on the fact that the assurance given to Mr. Webb that he would be honourably treated (which should be held to mean that he would be reasonably rewarded) was an integral part of the transaction whereby he deposited the hoard in the national museum. It would be inequitable and unjust if the State were to be allowed to repudiate that assurance and give only a meagre and disproportionate award."

There are a number of important matters to bear in mind when reading the aforesaid passages. No statutory powers of the State were involved in the case. A positive assurance had been given to Mr. Webb as to how he

would be treated. The case concerned itself with substantive rather than procedural rights. Finally, its roots were firmly planted in the soil of promissory estoppel.

There have been many cases decided subsequent to *Webb v. Ireland* [1988] I.R. 353 in this jurisdiction. Some seek to confine the application of the principle to the area of procedural rather than substantive rights. This is so particularly where a conflict might arise between the granting of a substantive right and the principle that the beneficiary of a statutory power may not fetter his freedom to exercise that power by estoppel.

Of the subsequent decisions in this court, the one which I find to be of greatest assistance to me is that of Costello J. in *Tara Prospecting Ltd. v. Minister for Energy* [1993] I.L.R.M. 771.

The case is remarkable because it is dealing with the same subject as this one, namely gold mining in County Mayo. The Minister granted prospecting licences in 1981 and 1984, to Tara in respect of areas which included Croagh Patrick. Letters from the Minister made it clear that the renewal of these licences would be conditional on certain matters such as Tara's work commitments. Tara and the second applicant in that case, Burmin, entered into a joint venture agreement. Gold was found in the Croagh Patrick area. There was much public opposition to their mining proposals. Efforts were made to use planning legislation to block any mining in the area. There was also opposition on religious grounds as Croagh Patrick is a traditional place of pilgrimage. The problems were discussed between the prospecting companies and the Department of Energy. The Minister announced in May, 1990, that he had decided to use his powers under s. 12 of the Minerals Development Act, 1940, to exclude Croagh Patrick from the prospecting licence because of the unique importance of it as a pilgrim site, a part of the national, cultural and religious heritage.

The Minister conveyed his decision to the applicants and excluded any further prospecting licences in respect of that mountain. He also clearly implied that no State mining lease would ever be granted in the excluded areas. A challenge was brought to the Minister's decision on the basis that it was *ultra vires*. It was also said that it was in breach of the principles of natural and constitutional justice and contrary to the legitimate expectations which the Minister had caused the applicants to entertain in relation to the licences sought.

Costello J. rejected the challenge to the Minister's decision and dismissed the claim for judicial review. In the course of his judgment on the topic of legitimate expectation, he said the following at p. 783:-

"It is unnecessary to examine here how legitimate expectations may be created. What is important to stress is that the case law developed

in England has established that a duty to afford a hearing may be imposed when such expectations are created by public authorities. The correlative right thus arising is therefore a procedural one. And it is important also to recognise that the claim I am now considering is a very different one. It is not that the legitimate expectations which the applicants held entitled them to a *fair hearing* (such a right arising from constitutional and well established common law principles I have already considered), but that they created a right to the *benefit itself* which should be enforced by an order of *mandamus.*"

Costello J. then went on to consider authorities both in the United Kingdom and in Australia, together with a number of further Irish authorities. It is not necessary for me to rehearse what he had to say concerning those cases and I confine myself to the conclusions which he drew. He said at p. 788:-

"I can summarise the legal principles which I think are to be derived from the authorities to which I have referred and which are relevant for the purposes of this case as follows:-

1. There is a duty on a minister who is exercising a discretionary power which may affect *rights or interests* to adopt fair procedures in the exercise of the power. Where a member of the public has a legitimate expectation arising from the minister's words and/or conduct that (a) he will be given a hearing before a decision adverse to his interests will be taken or (b) that he will obtain a benefit from the exercise of the power then the minister also has a duty to act fairly towards him and this may involve a duty to give him a fair hearing before a decision adverse to his interests is taken. There would then arise a correlative right to a fair hearing which, if denied, will justify the court in quashing the decision.

2. The existence of a legitimate expectation that a *benefit* will be conferred does not in itself give rise to any legal or equitable right to the *benefit itself* which can be enforced by an order of *mandamus* or otherwise. However, 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.

3. 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.

4. In cases involving the exercise of a discretionary statutory power in which an explicit *assurance* has been given which gives rise to an expectation that a benefit will be conferred no enforceable equitable or legal right to the benefit can arise. No promissory estoppel can arise because the minister cannot estop either himself or his successors from exercising a discretionary power in the manner prescribed by parliament at the time it is being exercised."

The observations which I have just quoted from these two judgments must be borne in mind when examining the assertions made by the applicants as to legitimate expectation (which I have already reproduced in this part of the judgment) and the evidence in the case. There is neither allegation nor evidence supporting any promise, express or implied, on the part of the respondent. It was never represented to the applicants that they would obtain planning permission. Furthermore, the applicants could not, in my view, have had a legitimate expectation that planning permission would be given for mining, even in the absence of the mining ban. In fact, the evidence suggests that great difficulties would be encountered even in getting to the stage of making an application for planning permission, never mind the actual obtaining of such permission. Just as the applicants in *Tara Prospecting Ltd. v. Minister for Energy* [1993] I.L.R.M. 771, from which I have already quoted, had no legitimate expectation that their exploration licences would be renewed by the Minister, neither, in my view, can there be any legal basis for holding that the applicants in this case had a legitimate expectation that planning permission would be granted. It is only on that basis that a claim for damages could succeed for reasons which I will explain when I come to the question of damages.

The only possible legitimate expectation which the applicants might have had was that if they applied for planning permission they would get a fair hearing. Indeed, after the judgment of Blayney J. there were never even informal overtures made to the respondent on this topic. These applicants were nowhere near even making a decision in principle as to whether it would be commercially feasible to apply for planning permission.

I am of the opinion that none of the ingredients required in order to mount a successful claim for the existence of a legitimate expectation have been made out in this case. It seems to me that it is an attempt to carry this doctrine to a distance never achieved before and probably not contemplated by the Supreme Court in *Webb v. Ireland* [1988] I.R. 353. The views of O'Hanlon J. in *Association of General Practitioners Ltd v. Minister for Health* [1995] 1 I.R. 382, have much to recommend them

> where he said that if a plea of legitimate expectation were "allowed its head it could introduce an unwelcome element of uncertainty into well defined law concerning rights of property, rights of contract and other matters."

Even if I am wrong in the view which I have come to as to the existence of a legitimate expectation not having been established, I am of opinion that damages would not be available for its breach in the absence of a subsisting contractual or equivalent relationship. The cases in which damages have been awarded such as *Webb* , or *Duggan v. An Taoiseach* [1989] I.L.R.M. 710, are distinguishable from this case because the applicants there were in long-term contractual or equivalent relationships with the respondents and the wrongs done were akin to a breach of contract. There is no such equivalent relationship between the parties to this litigation.

Reliance was placed on the decision of Blayney J. in *Ahern v. Kerry County Council* [1988] I.L.R.M. 392, to support the applicants' case but I derive no help from that since Blayney J. expressly refused to express a conclusion on the point that might help the applicants.

Accordingly, I reject the claim which is made here on the basis of a legitimate expectation having been defeated. I hold that there was no legitimate expectation such as is contended for and even if there was, damages would not be available as a remedy in respect of it because of the absence of a contractual or similar relationship between the parties. In fact, the relationship between the parties here was no more than one of planning authority and prospective applicant for planning permission.

Constitutional rights

The final claim which is advanced by the applicants is one which alleges that their property rights under the Constitution have been unlawfully interfered with. They say that in such an event they should be entitled to damages. These rights have allegedly been unjustly attacked and their value has been damaged to a significant extent by the unlawful acts of a State authority. In the course of their written closing submissions, the applicants elided the issue of legitimate expectation with their claim in respect of constitutional rights. They said this:-

> "The doctrine of legitimate expectation and its application in the Irish courts can be seen as a manifestation of its jurisprudence that those who suffer loss as a result of blameworthy conduct by State authorities have a right to a remedy and the inability to bring the facts of a case within the four corners of an existing tort is not a complete answer to a claim for damages."

This seems to me to go considerably further than what is warranted by the jurisprudence or justified in principle.

The property rights of the applicants here were confined to licences from the Minister for Energy to enable them to prospect. True it is that if the Minister was satisfied as to the results of that prospecting, a mining lease might well have been expected. But even then the development of a mine would of course be subject to the obtaining of planning permission. It seems to me that the prospecting licence was the only matter which they had as of right at the time that this ban was imposed. Their enjoyment of that was not jeopardised, save in a most indirect way in that their joint venture partners pulled out. This is certainly very far from a case of any form of direct interference with or expropriation of the property right such as it was.

The property right in respect of the licence must be seen in context. A prospecting licence is of itself of little value even though substantial sums of money may be sunk on foot of it in exploration. It becomes of substantial commercial value only when a return can be achieved from it. The evidence in the present case is that before one could get to that stage, a huge amount of additional work would have had to be done with uncertain results, a mining lease procured and a planning permission obtained. The mine would then have to be put into operation and a profit derived from it. It is only at that stage that one could speak in any realistic way of a commercial value attaching to the prospecting licence.

In these circumstances, I have come to the conclusion that no case for damages has been made out in respect of an alleged interference with the applicants' constitutional property rights.

Damages

As is clear from the views that I have already expressed, the applicants fail in this claim for damages. Lest, however, I am wrong in all or any of the views which I have expressed to date, I will proceed to state my conclusions on the question of damages.

The claim which is made is for the full sum expended by the applicants on prospecting in the areas affected by the ban. It comes to just short of £2 million. They seek to be recompensed in the entirety of that sum by the respondent. They assert that in assessing damages the court should do so as of the date upon which the ban was imposed rather than the date of trial. The importance of this submission will become clear in a moment.

McGregor on Damages (15th Ed., 1988) at p. 7 endorses the governing principle as stated by Blackburn L.J. that damages are"that sum of money which will put the party who has ..... suffered in the same position

as he would have been in if he had not sustained the wrong for which he is not getting his compensation or reparation".

As is clear from the evidence, prospecting for gold is a high risk enterprise. It is speculative. It is uncertain. On Mr. McCullough's own evidence, the prospects of success in mining projects on average is one out of one hundred. In the present case he said that they had established that there was gold in very significant quantities present and that figure was reduced to more like one in ten or somewhere in that region. Accordingly, at the time when the ban was imposed, there was only a one in ten prospect that the gold found was going to be what he described a commercial deposit. Even assuming that such a commercial deposit was found at the end of all of the prospecting, planning permission would then have to be sought for the mine and in my view that was never going to be easy. One then has to postulate that if planning permission were granted, the mine would then be established. One must then assume that it would trade profitably. It is only at that stage that a return of the original monies expended in prospecting would be likely to be recovered.

In these circumstances, it seems to me that even if the applicants were wholly successful on the question of liability, before any damages could be awarded to them they would have to demonstrate, on the balance of probabilities, that their venture would have been successful and would at least have yielded amounts sufficient to recoup the expenditure made. No such evidence was forthcoming. Indeed, Mr. McCullough's own estimate of a one in ten chance of a commercial deposit being found speaks for itself. In the light of this, it appears to me to be a bold claim to seek to recover from the respondent the entire sum expended. To award damages in the amount claimed would in effect constitute the respondent as a form of insurer for expenditure incurred which on the balance of probabilities would never have been recovered.

I accept that the evidence of gold was promising but it only demonstrated a one in ten chance of a commercial deposit being found. That means that there was a nine in ten chance that the money expended would never have been recovered but rather would have been lost. To make an award of damages in these circumstances would seem to me to be perverse since the applicants have not demonstrated on the balance of probabilities that these monies would ever have been recoverable by them. If I were to award them the sum claimed they would have recovered the entire expenditure made by them which, if no wrong had been done to them, they had at best a one in ten chance of recovering in any event.

If I am incorrect in the views which I have just expressed, it seems to me that putting the applicants' case at its highest, the most that they could hope to recover given the probabilities set forth in evidence by Mr.

McCullough's would be one-tenth of the expenditure incurred, namely, £193,826.40. That would be the sum recoverable if damages were assessed as of the date of the mining ban. If, however, the date of trial was the more appropriate date, I am satisfied that it would have to be reduced even further. I have already indicated that the prospects of obtaining planning permission were not very good but in the light of the evidence which I had concerning the European Union Habitat Directive, I am satisfied that the prospects of obtaining planning permission would have diminished even further by the time it might be applied for. At most, it appears to me that the applicants could hope to recover only one-twentieth of the expenditure. However, in the light of the views which I have already expressed, this is not a case in which damages should be awarded and consequently this claim is dismissed.

The applicants appealed to the Supreme Court against the judgment and order of the High Court. The appeal was heard by the Supreme Court (Keane C.J., Denham, Murray, McGuinness, Fennelly JJ.) on the 3rd, 4th 5th and 6th April, 2001.

Paul Sreenan S.C. and*Rory Brady S.C.* for the applicants.

James O'Reilly S.C. and*Michael Forde S.C.* (with them*John Jordon*) for the respondent.

Cur. adv. vult.

Keane C.J. 19th July, 2001

The factual background

The facts in this case, to the extent that they are not in dispute, are summarised with such admirable clarity in the High Court judgment under appeal, that I can limit myself, for the purposes of this judgment, to a relatively brief *résumé*.

The applicants are two publicly quoted companies engaged in prospecting for and mining ores and minerals. On the 30th May, 1986, they were granted ten prospecting licences by the Minister for Energy for the

purpose of exploring for gold in an area south of Westport in Co. Mayo. Those licences were renewed from time to time and, during the period from the date on which they were granted to the adoption by the respondent of what has been described as a "mining ban" in the County Mayo Development Plan on the 17th February, 1992, they expended a sum of £1,938,264 in prospecting for gold in the relevant areas. In July, 1990, Mr. McCullough, the managing director of the first applicant, had written to the respondent pointing out that the applicants' exploration work in south Mayo was well advanced and that they hoped to develop a gold mine in the area.

Although the results of the prospecting activities were highly encouraging, the applicants were of the view that, if the gold which appeared to exist in these areas was to be commercially mined, a further substantial investment would be required. They accordingly entered into a joint venture agreement with a company called Newcrest Mining Ltd., one of the largest Australian gold producers (hereafter"Newcrest") in November, 1991. Under that agreement, Newcrest was to spend at least £1.6 million on further exploration and, in return, was to be given a 51% interest in the venture. In February, 1992 however, Newcrest withdrew from the joint venture as a direct result, the applicants alleged, of the inclusion in the county development plan of the mining ban.

The applicants then applied for and were granted leave to institute the present proceedings by way of judicial review in the High Court, in which they claimed *inter alia* the following reliefs:-

(1) declarations that the respondent was not empowered by the relevant legislation to include the mining ban in the Development Plan and that it was *ultra vires* the legislation, unreasonable and contrary to constitutional and/or natural justice;

(2) an order of *certiorari* quashing so much of the Development Plan as included the mining ban; and

(3) damages for negligence and breach of duty, including breach of statutory duty.

A statement of opposition having been filed on behalf of the respondent, the substantive hearing of the claim for judicial review came on before the High Court (Blayney J.). In a reserved judgment delivered on the 13th November, 1992 and reported at [1993] 2 I.R. 237, he granted the declaration sought by the applicants that the mining ban was *ultra vires* the respondent's powers under the relevant legislation and was, accordingly, null and void. The applicants' claim for damages was adjourned with liberty to apply.

The High Court Judge found that the inclusion of the mining ban was*ultra vires* the respondent on two grounds:-

(1) that a development plan under Part 3 of the Local Government (Planning and Development) Act, 1963 must consist of a written statement and plan indicating the development objectives for the area of the planning authority, that such development objectives must be positive in character and that an objective which aims to prevent development cannot be such an objective;
(2) that the use of land for the purpose of winning and working of minerals is *prima facie* exempted development under the relevant regulations, that only An Bord Pleanála may determine whether such development is or is not exempted development and that, accordingly, the respondent could not, as a matter of law, include the mining ban in their development plan.

The applicants had relied on a further ground in support of their claim, *i.e.* that the mining ban was in breach of the policy of the Government as conveyed to them in a letter dated the 16th December, 1991, written on behalf of the Minister for Energy and that, accordingly, the respondent had not had regard, as it was statutorily obliged to do, to the policy of the government. The High Court Judge, however, while satisfied that the respondent had acted in disregard of government policy, did not find it necessary to come to any conclusion as to the effect in law of it having done so, having regard to his conclusion that, in any event, the mining ban was *ultra vires*.

On the 11th December, 1995, the applicants brought a notice of motion seeking directions as to the time and mode of trial of the applicants' claim for damages. It was ordered by consent that points of claim and defence should be delivered, that discovery should be made by both parties and that the applicants should be at liberty to amend their claim for damages by extending it to a claim for damages for breach of duty not to inflict damage by acting *ultra vires* and to respect the applicants' legitimate expectations, for misfeasance in public office and for wrongful interference with the applicants' constitutional rights.

The application came on for hearing before the High Court (Kelly J.). In his written judgment delivered on the 20th August, 1998, the High Court Judge dismissed the applicants' claim for damages. In particular, while finding that the respondent was negligent in adopting the mining ban, in the sense that it did something which no reasonable authority would have done, he was satisfied that the negligence in question did not give rise to any right to damages.

The applicants have appealed to this court from the dismissal by the High Court Judge of their claim for damages. While no notice to vary the judgment in the High Court was served on behalf of the respondent, arguments were advanced to this court on the hearing of the appeal to the

effect that the findings of negligence by the High Court Judge were erroneous in point of law.

The mining ban

It is now necessary to consider in some more detail the circumstances in which the mining ban was adopted by the respondent.

The question as to whether mining should be permitted in the Westport area gave rise to acute controversy in the early 1990s. It had come to a head with the work carried out by Burmin Exploration and Development plc. and Tara Mines plc. on the slopes of Croagh Patrick. There was similar opposition to a proposed development by Ivernia West in an area about a mile south east of the Westport urban district area.

When the applicants obtained their prospecting licences, the development plan which had been made by the respondent under Part 3 of the Act of 1963 did not contain a mining ban. In 1990, a new draft development plan was put on public display by the respondent. Paragraph 3.6.1 of the draft plan, dealing with mineral extraction, was as follows:-

"It is clear that there are large potential mineral resources within the county from the scale of exploration currently underway. Development of these resources will have major implications for the environment, water resources, acquaculture, tourism and employment.

Policy

It is the policy of the Council that where mining and quarrying developments would seriously injure the visual environment, water resources, acquaculture, tourism, sites of archaeological, geological, historical, religious or scientific interest, the development shall not be permitted.

It is the policy of the Council that, as part of any planning application for the large scale extraction of minerals, an environmental impact assessment under E.C. Directive 85/337/E.C. and the European Communities (Environmental Impact Assessment) Regulations, 1989, shall be required by the Mayo County Council.

Objectives

It is an objective of the Council to ensure, through control of mineral extraction developments, that the physical environment, flora and fauna is reinstated, on a phased basis, and with land, farms and vegetation in keeping with the natural environment.

It is an objective of the Council to ensure that all forms of discharges from mineral extraction shall be strictly controlled and monitored and that any breaches of such controls be prosecuted in accordance with the appropriate legislation.

It is an objective of the Council to ensure that adequate environmental safeguards are enforced to minimise disturbance and nuisance during operations.

It is an objective of the Council that features of archaeological interest are protected and preserved and if this is not possible that they be properly surveyed and recorded."

The mining ban was effected by an amendment to this section of the development plan which was passed at a meeting of the respondent held on the 11th March, 1991. It consisted of the insertion of a paragraph between the two paragraphs under the heading "Policy" as follows:-

"It is the policy of the Council that no development and/or work shall take place in relation to minerals (as defined by the Minerals Act, 1940, as amended) in the areas shown dotted on map 10A."

Map 10A indicated that the area in which mining was prohibited consisted of over 300 square miles extending from Achill Head in the west to Westport in the east and from Ballycroy in the north to Inisturk Island in the south. There was already a map 10 in the development plan delineating what were described as "areas of special scenic importance" and which included some, though not all, of the area delineated as the mining ban area in map 10A. It should be noted that, at an earlier stage, the possibility of making a special amenity area order in respect of the area subsequently affected by the mining ban had been considered by the respondent but rejected by it.

There was support for the mining ban across party lines, two of its most enthusiastic supporters being Mr. Seamus Hughes and Mr. Enda Kenny, who represented the Fianna Fáil and Fine Gael parties respectively on the Council. Indeed, at the meeting of the respondent held on the 11th March, 1991, the vote in favour of amending the draft plan in this fashion was passed unanimously. The amended draft plan was then put on display and various representations and objections were received and circulated to the respondent. Among them was a letter from the applicants which, however, was received outside the statutory period for the receipt of such representations.

On the 11th November, 1991, the respondent, having considered the written representations received in relation to the mining ban, resolved that the development plan should be amended so as to include the mining ban. The draft plan as amended would, in the normal course, have been adopted by the respondent at their meeting in the following December. However,

on the day of the meeting, the letter already referred to on behalf of the Minister for Energy was received by them. That letter stated *inter alia*:-

> "I am directed by the Minister to state that he views with grave concern the draft policy statement in relation to minerals development in parts of County Mayo. The statement runs contrary to stated government policy that mineral resources should be explored for and should be exploited where this can be done in an environmentally acceptable manner. The statement, which implies that planning permission would be automatically refused to any mining project means that there will, in fact, be no exploration investment whatsoever …
>
> The Minister is of the view that there is, in principle, nothing fundamentally wrong with the existing planning procedures and that it should be possible to accommodate the needs of both the mining industry and those concerned with the environment within the current legal and procedural framework.
>
> Finally, I am directed by the Minister to state that it is his official view that the statement proposed for the draft development plan should be deleted."

In view of the contents of this letter, the meeting of the 16th December, was adjourned. A motion was then proposed by six members of the respondent to rescind the resolution of the 11th November, 1991, which had approved the inclusion of the mining ban in the draft development plan. At a meeting of the respondent on the 17th February, 1992, that motion was defeated by 22 votes to 8.

The mining ban which was thus inserted in the development plan and which led to the institution of these proceedings was adopted by the elected members of the respondent, despite repeated advice from the officials of the respondent that it was not an appropriate course to take. The relevant evidence is referred to in detail in the judgment of the High Court Judge: it is sufficient to say that the County Manager, the Senior Executive Planner and the County Engineer were all of the view that the ban was unwise for a number of reasons. First, it was in the interest of the respondent, through prospecting activities, to find out what minerals were actually in the county, irrespective of whether or not permission to extract them was forthcoming: prospecting in the area would be improbable if the mining ban was adopted. Secondly, each application for such permission, in the event of the mining ban not being adopted, would be judged on its merits and in the light of all the relevant planning considerations and the provisions of the European directives on the environment.

Mr. Hughes and Mr. Kenny appear to have been under the impression that the effect of the mining ban would not be to prevent any mining development in the prohibited area: it would simply ensure that any

application for permission was considered by the elected members, who could then decide that a permission should be granted, although constituting a material contravention of the development plan. It was, however, pointed out by the officials that this would not necessarily be the case, since, under the relevant legislation, the application for permission would come before the elected members only where the County Manager decided to institute such a process. They also said that it was the duty of the elected members to take such steps as might be necessary to secure the objectives in the plan and that, if the plan were adopted, the granting of a permission in defiance of it could well be successfully challenged by an objector on the ground that the respondent was behaving irrationally and illogically. The difficulties arising from the fact that the course adopted by them were also contrary to stated government policy were also pointed out to them.

The respondent was also advised as to the legal implications of the mining ban by one of the foremost authorities on planning law at the time. The County Solicitor, in response to a letter from the County Secretary on the 15th May, 1991, pointed out that those who had objected to the adoption of the mining ban might succeed in having the resolution declared invalid for a number of reasons, which he enumerated, and said that he considered he should submit a detailed case to advise to senior counsel. He specifically referred to the fact that it was public knowledge that the first applicant had been prospecting in the relevant area for some time.

In his opinion, senior counsel for the first applicant said that he had not seen map 10A but that since the terms of the ban referred to"areas" in the plural he assumed that it referred to a number of different locations and that:-

> "the map was prepared with the degree of attention to detail and care to limit the exclusionary prohibition to specified amenity locations rather than by reference to a crude exclusionary policy."

He went on:-

> "In my opinion a planning authority is perfectly within its rights to make a decision in principle in its development plan that no mining would take place in particular areas where they perceive such mining activities are in conflict with amenity or other natural resources and to have a policy in the development plan stating this. A planning authority in general is under a positive obligation to formulate policies and to express them in the development plan and in my opinion the proposed amendment is doing just this. I assume the proposal is reasonable in the sense that it is made by reference to objective criteria."

Commenting on this passage in senior counsel's opinion, the High Court Judge said that had he seen map 10A and been aware of the evidence adduced in the hearing in the High Court, there could be little doubt but

that he would have concluded that the ban was nothing more than a"crude exclusionary policy". He would also probably have concluded that the proposal could not be regarded as reasonable, because it was not made by reference to objective criteria. However, as Kelly J. went on to point out, it appears that, unfortunately, it was mistakenly thought by the respondent that it was legally empowered to impose the ban, despite the important *caveats* in senior counsel's opinion. The minutes of the meeting of the 17th February, 1992 record the manager as stating:-

"The council was informed that it was legally entitled to include such a ban although advised not to do so."

The High Court judgment

In his judgment, Kelly J., having set out the facts, went on to deal with the various legal headings under which the applicants' claim for damages was brought.

The first was the tort of misfeasance in public office. He said that he was satisfied that the applicants had not established that, in opposing the ban, the elected members of the respondent were actuated by malice against the applicants or realised that what they were doing amounted to an abuse of office. While he was of the view that considerable criticism could be made of the approach of the elected members to the ban, he was satisfied that they were responding in good faith to the pressures brought to bear on them by the electorate: while they had acted unlawfully, they had also acted honestly and in the belief that they were entitled in law to adopt the ban.

As to the claim based on a breach of statutory duty, Kelly J. said that he was of the view that the duties imposed by the relevant sections of the Act of 1963 and the Local Government Act, 1991 were for the benefit of the public or the government and that, accordingly, no action for damages lay at the suit of an individual member of the public in respect of the alleged breach of duties.

As to the claim based on legitimate expectations, Kelly J. held that, while the applicants were entitled to expect that any application they might make for permission would be fairly considered by the respondent, that expectation had not been frustrated, since no such application had ever been made. He was also satisfied that, even if any legitimate expectations on their part had been frustrated by the actions of the respondent, damages would not be available as a remedy in respect of it because of the absence of a contractual relationship, or a relationship similar thereto, between the parties. He also rejected a submission that the applicants were entitled, in

the alternative, to damages for what was alleged to be a wrongful invasion of their property rights under the Constitution.

As to the claim based on negligence, Kelly J. said that he had concluded that the respondent had acted negligently in adopting the mining ban in the sense that it did something which no reasonable authority would have done. He expressed his conclusions as follows:-

> "Whatever may have been the motives of the elected members, they set about achieving their goal in a way which, in my view, no reasonable local authority in receipt of the advice which they obtained would have done. It is not the function of elected representatives to slavishly give effect to their constituents' demands come what may. They must exercise a degree of judgment in any particular case.
>
> In this case, the evidence demonstrates that the provision of the mining ban was unnecessary. The existing planning code was sufficient to protect all legitimate planning interests. This was the advice they received from their officials. It was also the view made clear to them by the Minister for Energy. Not merely was it unnecessary from a planning point of view, but the evidence was that it was in fact contrary to the best interests of the county because it would drive away investment in exploration and the county would lose the chance of evaluating the benefits of any project put forward for planning permission. Furthermore, there was in my view no objective justification for the adoption of the ban. It was to operate in respect of all minerals, regardless of their method of extraction, value or the quantity likely to be extracted. The ban was of enormous span and it was clear, particularly from the evidence of Mr. Dunleavy, that little or no thought went into the nature or the extent of the ban. It was nothing more than a crude exclusionary policy."

However, while Kelly J. was of the opinion that, to that extent, the respondent had acted negligently in adopting the mining ban, he also came to the conclusion, having reviewed the authorities, that, in so acting, it was not in breach of any duty of care which it owed to the applicants and that, accordingly, no actionable claim for damages for negligence had been established.

Although, as a result of those conclusions, Kelly J. was satisfied that the applicants' claim for damages should be dismissed, he went on to consider the extent of the damages to which they would have been entitled had they succeeded in their claim. He was of the view that, if the damages were to be assessed as of the date of the mining ban, they would be entitled, at the most, to one-tenth of the expenditure they had actually incurred, *i.e.*£193,826.40. If, however, the damages were to be assessed as of the date of the trial, then they would have to be reduced further, because

of the greater unlikelihood of permission ever having been granted as a result of the enactment of a European Union Habitats Directive: in that event, the most they could have hoped to recover was one-twentieth of the expenditure incurred by them.

Submissions of the parties

The claim of the applicants based on misfeasance in public office was not pursued in this court.

As to the claim based on breach of statutory duty and the applicants' constitutional rights, counsel on behalf of the applicants submitted that the judgment of Finlay C.J. in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23, left open the possibility of an action for damages arising from the commission of an*ultra vires* administrative action where the action in question was in breach of a duty owed to a particular person. They submitted that where, as here, the breach of a statutory duty had caused loss and damage to an individual, the latter was entitled to be compensated and that the granting of any immunity to public authorities in such circumstances was not in accordance with the jurisprudence of the European Court of Human Rights or of the Court of Justice of the European Economic Communities, citing in support the decisions in *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245 and *Francovich v. Italy (Case C-6/90 & C-9/90)* [1991] E.C.R. I-5357. They further submitted that, in any event, even adopting what they described as the restrictive interpretation of the tort of breach of statutory duty by the trial judge, the duty to have regard to government policy was in fact for the benefit of a limited class of persons who were the beneficiaries of that policy, *i.e.* the holders of mining licences.

As to the claim based on legitimate expectations, they submitted that the trial judge had been in error in treating their claim as based on a representation, express or implied, that they would obtain planning permission. The legitimate expectation on which they relied was that the respondent would act lawfully and with due regard to the advices it received from its officials and to relevant government policy as communicated to it, that it would not seek to prejudge all applications for planning permission for mining development within a substantial part of the area for which it was responsible and that it would act legally and fairly towards the applicants. They submitted that it was clear from cases such as *Fakih v. Minister for Justice* [1993] 2 I.R. 406, *Dascalu v. Minister for Justice* (Unreported, High Court, O'Sullivan J., 4th November, 1999) and *Philips v. The Medical Council* [1991] 2 I.R. 115 that a person could legitimately expect that public authorities would act in accordance with the law. They

also cited in support the decision of this court in *Duff v. Minister for Agriculture (No. 2)* [1997] 2 I.R. 22. They further submitted that the trial judge was wrong in law in holding that damages would not be available for a breach of a legitimate expectation in the absence of a subsisting contractual or equivalent relationship, citing in support the decisions in *Duggan v. An Taoiseach* [1989] I.L.R.M. 710 and *Webb v. Ireland* [1988] I.R. 353.

As to the finding of the High Court that the claim for damages for negligence was not maintainable because of the absence of any duty of care, they submitted that the existence of a duty of care had not been traversed in the points of defence furnished by the respondent. On the assumption that the respondent was entitled to argue that no duty of care existed, they submitted that this was not the law, having regard to the decision of the High Court and the Supreme Court in *Ward v. McMaster* [1985] I.R. 29; [1988] I.R. 337. The duty of care arose by virtue of:-

(a) the foreseeability of damage to the applicants as a consequence of the respondent's action;
(b) the statutory framework under which the relationship between the parties existed;
(c) the relationship of proximity between the parties, there being no factors in the relationship between the parties that would negative a duty of care;
(d) the absence of any factors that would make it "fair and reasonable" to relieve the respondent from any duty of care, applying the formulation adopted by Costello J. at first instance in *Ward v. McMaster* [1985] I.R. 29.

They further submitted that, if the criteria laid down by McCarthy J. in *Ward v. McMaster* [1988] I.R. 337 for determining whether a duty of care existed were to be adopted, the argument for holding that the respondent was under a duty of care was even more compelling.

On behalf of the respondent, it was submitted that, on the facts of the present case, no question of a legitimate expectation, as that doctrine had been developed in the authorities in Ireland and the United Kingdom, arose. The applicants had never applied for planning permission and, accordingly, could not contend that any expectation they might have of obtaining such a permission had been frustrated by any action on the part of the respondent: the evidence, indeed, established that the applicants had expressly refrained from applying for planning permission in order to preserve their possible claim for damages. In any event, he submitted that the doctrine of legitimate expectation was a guarantee of procedural fairness, not of substantive outcomes, citing *Tara Prospecting Ltd. v. Minister for Energy* [1993] I.L.R.M. 771. Moreover, damages were not a remedy for the breach of a legitimate expectation, assuming one existed, in

the absence of a subsisting contractual or equivalent relationship. *Webb v. Ireland* [1988] I.R. 353 was not authority for the proposition that a remedy by way of damages was available in cases of a breach of legitimate expectation: in that case, there had been an express assurance that the plaintiff would be reasonably treated and the court had treated this as a form of promissory estoppel rather than legitimate expectation.

As to the claim for damages based on a breach of statutory duty, counsel for the respondent submitted that it had been clear since the decision in *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398 that, for a liability to damages to arise, it had to be established that the legislature intended that a breach of the relevant Act should result in an award of damages in favour of a category of persons to which the plaintiff belonged. The *ultra vires* act found by the High Court (Blayney J.) to have been committed by the respondent in adopting the mining ban was, at most, a breach of a duty owed by the respondent to the public in general and not to any specific category of persons to which the applicants belonged.

As to the contravention alleged to have been committed of the duty under the Act of 1991 to have regard to the policy of the government, counsel for the respondent submitted that the trial judge was erroneous in point of law in inferring from the evidence that the respondent had acted in breach of its duty: both the trial judge and the applicants, in their submissions to this court, mistakenly assumed that, because the respondent, having considered the Minister's letter, had decided to proceed with the mining ban, it had acted in disregard of the policy of the Government. The Act of 1991 did not oblige the respondent to implement government policy, but rather to have regard to it in arriving at a decision. That did not mean, he said, that, having given appropriate consideration to the policy in question, it was then obliged to give effect to that policy.

Counsel for the respondent further submitted that, in any event, even assuming that the respondent was in breach of its duty under the Act of 1991, that was a duty owed at best to the Government or one of its individual ministers and not to any category of persons to which the applicants belonged.

As to the claim based on negligence, counsel for the respondent took issue with the inferences of fact drawn by the trial judge from the evidence. Since he had correctly found that the elected representatives believed, with good reason, that they had the legal power to impose the ban, there was no basis for his finding that they had acted negligently. Specifically, he gave no reason for holding that the ban had not been made by reference to objective criteria. Nor was it negligent for the elected representatives to act contrary to the advice of their officials on a matter of policy such as this on which their constituents had strong views. It was also not an act of negligence

on their part to decline to have regard to government policy, even supposing that that was what the elected representatives did.

On the assumption that the trial judge was entitled to infer from the evidence that the respondent had acted negligently, in the sense that it had done what no reasonable authority should have done, it was submitted that this afforded them no cause of action against the respondent. In the first place, the law of negligence was intended to provide redress for personal injuries and physical damage to property: it was only in exceptional circumstances, which did not arise here, that liability could arise in negligence for exclusively economic loss. He cited in this context the summary of the law in McMahon and Binchy on the *Law of Torts* (3rd ed., chap. 10). He further submitted that there was no authority for the proposition that a duty of care rested on a local authority in circumstances such as the present: the decision in *Ward v. McMaster* [1985] I.R. 29; [1988] I.R. 337 was clearly distinguishable. He said that it had also been held in a number of cases such as *Yuen Kun Yeu v. A.-G. of Hong Kong* [1988] A.C. 175; *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 and *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158 that where a decision in a policy area by a public authority was in issue, liability in negligence should not normally arise. He said that the public policy underlying that principle was reinforced, in the case of local authorities, by the fact that, if the respondent was made liable in the present case, it would be liable to a surcharge.

Counsel for the respondent further submitted that the collapse of the joint venture agreement with Newcrest and the impossibility of getting other joint venturers was not reasonably foreseeable by the respondent. He further submitted that the respondent's resolution was not the cause of any loss that the applicants' claimed to have sustained: even if the resolution had not been adopted, the provisions of the county development plan prohibiting mining and quarrying development which would impair the visual environment, *etc.*,might well have resulted in a refusal of planning permission. The collapse of the joint venture with Newcrest, moreover, was not caused by the ban, but by the low price of gold, the failure of the government to take any action regarding the ban and the subsequent unilateral act of Newcrest.

In reply, counsel for the applicants submitted that, in determining whether a duty of care existed, the correct approach was to look first at the conduct of the alleged wrongdoer and then determine whether, in the circumstances of the particular case, a legal relationship in the form of a duty to exercise reasonable care existed. He submitted that this was in accordance with the well known tests adopted by Lord Wilberforce in *Anns v. Merton London Borough* [1978] A.C. 728 and by Costello J. at first

instance and McCarthy J. in this court in *Ward v. McMaster* [1985] I.R. 29; [1988] I.R. 337. He also urged that, far from indicating any public policy against a finding of negligence in cases such as the present, the statutory liability to a surcharge reflected a public policy in favour of making such findings where appropriate.

Conclusion

Before stating my conclusions on the issues that arise in this appeal, I think it appropriate to make some observations concerning the decision of Blayney J. which gave rise to the claim for damages, the subject of the appeal.

The first ground on which he found the resolution adopting the mining ban *ultra vires* was that it was not positive in nature but simply constituted a restriction on a particular form of development. He based that conclusion on the undoubted fact that, by virtue of s. 19(2) of the Act of 1963, a development plan is to consist of a written statement and a plan indicating the "development objectives" for the area in question. He pointed out that "development" is defined in s. 3(1) as "the carrying out of any works on, in or under land …". From that, he inferred that the "development objectives" referred to must have as their aim the carrying out of works on, in or under land and that they must be positive in character.

That is at least questionable, since subs. (2)(a)(i) states that the"development objectives" referred to may include objectives:-

> "for the use solely or primarily … of particular areas for particular purposes (whether residential, commercial, industrial, agricultural or otherwise) …"

Thus, in the case of agricultural land, development plans may, and frequently do, legitimately include provisions ensuring that, during the currency of the plan, the land will continue to be used as agricultural land. Far from requiring the carrying out of any works on the land, such an objective would have the effect of restricting any development which would involve a change of use of the land, save for exempted development.

Even more critically, however, the learned judge does not appear to have had any regard to subs. (3) which provides that:-

> "Without prejudice to the foregoing subsection and subsection (5) of this section, a development plan may indicate objectives for any of the purposes mentioned in the Third Schedule to this Act …"

At this point the word "objectives" is used without any qualification and the third schedule itself indicates a number of objectives which can be achieved which do not require the carrying out of works of any sort, such

as (of particular relevance in the context of the present case) in Part 4 at para. 7:-

> "Preservation of views and prospects and of amenities of places and features of natural beauty or interest."

As to the second ground on which the learned judge found the mining ban *ultra vires*, it is undoubtedly the case that it was for An Bord Pleanála, and not the planning authority, to decide in any particular case whether a particular development constituted an exempted development or not. However, it seems to me that the prohibition of mining in a particular area could not, in law, have the effect of restricting the carrying out of any exempted development. Under the then law, contained in the Local Government (Planning and Development) Regulations, 1977, the following was an exempted development:-

> "The use of land for the purpose of the winning and working of minerals, the carrying out of works incidental thereto (other than open cast mining or surface working or the deposit of refuse or waste materials) and, in the case of land other than land situate in an area to which a special amenity area order relates, the erection or placing of structures on the land for such specific purposes."

It will be noted that open cast mining or surface working is removed from the category of exempted developments and, accordingly, the effect of the mining ban would have been to require permission to be obtained for any such development in the area of the ban. No doubt the fact that the mining ban would not preclude purely underground mining would limit its efficacy to that extent, but it by no means follows, in my view, that the ban was thereby rendered *ultra vires*.

It is noteworthy in this context that senior counsel had advised the respondent that the imposition of the ban would be lawful, provided that the prohibition was limited to specified high amenity locations and not by reference to a crude exclusionary policy. The ban might well have been successfully challenged on the ground that it failed to meet the criteria identified by senior counsel but that did not happen.

The parties naturally accepted that, there having been no appeal from the decision of the High Court (Blayney J.), it is binding as a matter of law for the purpose of these proceedings. I would expressly reserve for another occasion the question as to whether the decision that the mining ban was *ultra vires* on the grounds set out in the judgment of Blayney J. was correct in point of law.

I consider next the different headings under which it has been contended on the hearing of this appeal that the applicants were entitled to damages.

(1) *Breach of statutory duty and the applicants' constitutional rights*

The first breach of statutory duty alleged against the respondent arises out of the provisions of s. 19 of the Act of 1963 which imposed on the respondent an obligation to make a development plan for their area. The applicants cannot complain that the respondent did not fulfill its obligation under that section, because it manifestly did. Their complaint is rather that the development plan which it made in fulfilment of its obligation under the section contained, in the form of the mining ban, a provision which was *ultra vires*. On one view, that complaint was met when the offending section of the plan was deleted in consequence of the judgment and order of the High Court and it is difficult to see how, in those circumstances, a claim for damages for breach of statutory duty could be well founded.

However, apart from that consideration, it seems to me that, in any event, a claim for damages for breach of the statutory duty imposed by s. 19 could not arise in the circumstances of the present case. The applicants, in abandoning their claim based on the tort of misfeasance in public office, have in effect conceded that the respondent, in adopting the mining ban, was not deliberately and dishonestly abusing the powers conferred on them under the Act of 1963. The decision by the respondent to include the mining ban constituted the purported exercise by it of a power vested in it by law for the benefit of the public in general. It was not the fulfilment by it of a duty imposed by statute for the specific protection of particular categories of persons, the breach of which may lead to an action for damages. It follows that the *ultra vires* exercise of the power in the present case could not of itself provide the basis for an action in damages. This view of the law is authoritatively confirmed by the judgment of Finlay C.J. in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 where he cited with approval the following statement of the law in Wade on*Administrative Law* (5th ed.) at p. 673:-

"The present position seems to be that administrative action which is *ultra vires* but not actionable merely as a breach of duty will found an action for damages in any of the following situations:

1. If it involved the commission of a recognised tort, such as trespass, false imprisonment or negligence.

2. If it is actuated by malice, *e.g.* a personal spite or a desire to injure for improper reasons.

3. If the authority knows that it does not possess the power which it purports to exercise."

The Chief Justice added that he was satisfied that there would not be liability for damages arising under any other heading.

In the present case, paras. 2 and 3 in the passage cited are clearly not applicable. It will be necessary to consider at a later point in this judgment

whether the *ultra vires* act in the present case involved the commission of the tort of negligence.

The applicants sought to rely on the reference in the passage quoted to an administrative action which is "not actionable merely as a breach of duty" and submitted that it was, accordingly, envisaged that in some instances at least, an *ultra vires* administrative act might be actionable as a breach of duty. That is undoubtedly so, but only where, as pointed out by the Chief Justice, the statutory duty in question is imposed on the body concerned for the specific protection of the rights of individuals. It is clear that this is not such a case.

As for the damages allegedly sustained by the applicants as a result of the breach of their constitutional rights, a similar claim was made in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23, but was also rejected. In that case, the *ultra vires* decision by the Minister for Local Government, to grant permission for the development of the plaintiff's lands was treated by Finlay C.J. in the course of his judgment, as having probably contributed towards a diminution in the value of the land in the plaintiff's hands. Similarly, it could no doubt be said in the present case that the imposition of the mining ban contributed to a reduction in value of the property right represented by the prospecting licences which was vested in the applicants. Finlay C.J., however, said at p. 38 that:-

> "That fact, itself, however, does not, in my view necessarily mean that an injustice was done to the plaintiffs and I am certain that that does not constitute an unjust attack on the plaintiffs' property rights …
>
> I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims for compensation where they act*bona fide* and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would, it seems to me, tend to avoid indecisiveness and delay, which might otherwise be involved."

I am satisfied that those considerations also apply to the present case. The remedy available to persons affected by the commission of an*ultra vires* act by a public authority is an order of*certiorari* or equivalent relief setting aside the impugned decision and not an action for damages, to allow which, in the case of public officials, would be contrary to public policy for the reasons set out by Finlay C.J. in the passage just cited.

It was urged in the present case that this view of the law was not in accordance with the provisions of the European Convention on Human Rights and Fundamental Freedoms as applied by the European Court of Human Rights in *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245. At the time of writing, the Convention is not part of our domestic law.

However, I am in any event satisfied that the decision in *Osman v. United Kingdom* is of no assistance to the applicants. That was a case in which the courts in the United Kingdom had struck out proceedings for negligence against the police brought by the family of a victim of manslaughter. The Court of Appeal had done so on a preliminary application on the basis of a so-called exclusionary rule laid down by the House of Lords on grounds of public policy in *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53. That was held to be in breach of Article 6(1) guaranteeing to everyone the right to have any claim relating to civil rights and obligations brought before a court or tribunal. However, that was because the court was considering a claim in negligence and not one based on an *ultra vires* act. It was, moreover, a case in which the merits of the applicants' claim having regard to the facts of the particular case had never been the subject of an adjudication by a competent tribunal. In the present case, the applicants' claim based on negligence has been fully considered and rejected by the High Court and has been the subject of a fully argued appeal to this court.

It was also submitted that the decision in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 and of the High Court in the present case were not in accordance with European Community Law as laid down by the Court of Justice in *Francovich v. Italy (Case C-6/90 & C-9/90)* [1991] E.C.R. I-5357. However, the decision in the latter case was to the effect that an action for damages would lie against a public authority in a member state which had acted in breach of European Community Law where damage had been sustained as a result. The applicants' claim for damages in the present case is grounded on alleged breaches of Irish law and not of European Community law.

(2) *Legitimate expectation*

The doctrine of legitimate expectation, as it has come to be called, derives, it would seem, from the jurisprudence of the European Court of Justice, although some have seen it as also constituting a development of the English doctrine of promissory estoppel. It made its first appearance in our law in *Smith v. Ireland* [1983] I.L.R.M. 300 where Finlay P., as he then was, found on the facts that it had not been established that a legitimate expectation of the plaintiff had not been met. In *C.C.S.U. v. Minister for Civil Service* [1985] 1 A.C. 374, Lord Diplock said at p. 408 that it arose in the case of decisions which affected other persons by:-

"(a) altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) … depriving him of some benefit or advantage which either

(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted

to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment, or

(ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity for advancing reasons for contending that they should not be withdrawn."

In the same case, Lord Roskill said at p. 415:-

"As the cases show, the principle is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure."

There is authority in Ireland for the proposition that, to the extent that the doctrine of "legitimate expectation" exists in our law, the circumstances in which it arises are those identified in the passages cited. As Costello J. pointed out in *Tara Prospecting Ltd. v. Minister for Energy* [1993] I.L.R.M. 771 (a case coincidentally also arising out of the exploration of gold in County Mayo) at p. 783:-

"… the case law developed in England has established that a duty to afford a hearing may be imposed when such expectations are created by public authorities. The correlative right thus arising is therefore a procedural one. And it is important also to recognise that the claim I am now considering is a very different one. It is not that the legitimate expectations which the applicants held entitled them to a fair hearing (such a right arising from constitutional and well established common law principles I have already considered), but that they created a right to the benefit itself which should be enforced by an order of *mandamus*"

Having considered the authorities in Ireland and elsewhere, he then went on to hold *inter alia* at p. 788 that:-

"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."

It has been said that this is an unduly restrictive approach and that there is no reason, in logic or principle, why the doctrine cannot be successfully invoked so as to declare a person entitled, in an appropriate case, not simply to fair procedures, but to the benefit which he was seeking in the particular case (see the decisions of the High Court in *Duggan v. An Taoiseach* [1989] I.L.R.M. 710 and *Abrahamson v. The Law Society of Ireland* [1996] 1 I.R. 403).

It is unnecessary, however, in the context of the present case to determine whether the more expansive approach suggested by those decisions is to be preferred to the view of the law taken by Costello J. in *Tara Prospecting Ltd. v. Minister for Energy* [1993] I.L.R.M. 771. The applicants cannot, and do not, complain that they were deprived of a benefit in the form of a grant of planning permission which, in the language of the doctrine, they reasonably and legitimately expected to receive. They never applied for such a permission. Their complaint is that the respondent imposed an improper and illegal constraint on the manner in which it would propose to consider an application from the applicants for permission, in the form of the mining ban. That unlawful fetter on the powers of the applicants was removed by the decision of the High Court and thereafter the doctrine of legitimate expectations ceased to have any relevance in this case.

It should also be pointed out that the judgment of Finlay C.J. in *Webb v. Ireland* [1988] I.R. 353, on which the applicants also relied, proceeded on the basis that the facts in that case gave rise to a sustainable claim based on promissory estoppel, rather than on the doctrine of legitimate expectations as that doctrine has been explained in the other authorities to which I have referred. *Webb v. Ireland* was, moreover, a decision which turned upon particular facts - specifically the assurance that the finder of the chalice would be honourably treated - which have no parallel in the present case.

(3) *Negligence*

There are two preliminary matters which must first be considered.

It was submitted on behalf of the applicants that the existence of a duty of care had not been traversed in the points of defence furnished by the respondent. However, at para. 19 of the points of defence the respondent denied that it was guilty of negligence or breach of duty and the particulars of negligence and breach of duty are also expressly denied in para. 22. It was clearly implicit in those pleas that the respondent was contending that it was under no duty of care or, if it was, that it was not in breach of the relevant duty. Apart from that consideration, whether a duty of care existed in the particular circumstances of this case was a matter of law and, on the

orthodox view of the function of pleadings, the absence of a duty of care did not have to be expressly pleaded by the respondent. There is, of course, no question of the applicants having been taken in any way by surprise either in this court or in the High Court, having regard to the detailed written submissions furnished in both courts on the legal aspects of the case, and I would, accordingly, reject the submission based on this pleading point.

The second issue is in relation to the findings of fact made by the trial judge. As already noted, although no notice to vary had been served on behalf of the respondent, counsel for the respondent argued that the inferences of fact drawn by the trial judge from the evidence were not justified.

Although the trial judge found that the respondent had acted negligently in adopting the mining ban, I think that it is clear that, in so finding, he was not holding that they had been in breach of any duty of care they owed the applicants: a finding to that effect would have been inconsistent with the conclusions he later reached, after a consideration of the authorities, that the respondent had not been in breach of any duty of care it owed the applicants. He did, however, conclude that, in adopting the mining ban, it had done something which no reasonable local authority would have done.

I am satisfied that this was an inference which the trial judge was entitled to draw from the evidence and is not one which should be set aside by this court. The uncontested evidence was that the ban was adopted in the face of unequivocal advice from the officials of the respondent that it was unnecessary in planning terms and would be contrary to the interests of the people of County Mayo, since it would be a disincentive to investment and exploration and the absence of any prospecting would mean that the county would not know the extent of its mineral resources. The ban, moreover, was clearly to operate in an arbitrary manner and could not be objectively justified as being solely designed to protect high amenity locations. I will return at a later point to the question as to whether the trial judge was correct, in point of law, in also holding that the respondent had acted unlawfully in acting, as it was claimed it did, in disregard of government policy.

The next, and final, issue which has to be determined is as to whether the trial judge was correct in point of law in holding that, although the respondent's action in adopting the mining ban was properly characterised as one which no reasonable planning authority could have taken, it did not constitute a breach of a duty of care owed by the respondent to the applicants as a result of which they suffered loss and entitled to damages.

This has resulted in an impressively wide ranging discussion in this court as to the nature of the modern tort of negligence. The starting point is obviously the famous passage in the speech of Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562 at p. 580 which, however often quoted, must be set out here again, but including an introductory passage, which is of critical importance, and is frequently omitted:-

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of '*culpa*' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

The opening passage indicates that, in Lord Atkin's view, while the law of negligence involves some general conception of relations giving rise to a duty of care, it necessarily embodies rules of law which limit the range of complainants and the extent of their remedy. The well known biblical reference is then followed at p. 581 by Lord Atkin's clarification of the *dicta* in *Le Lievre v. Gould* [1893] 1 Q.B. 491 which suggested that the duty of care arose because of the "proximity" of the person or property injured to the person or property which caused the injury. He pointed out that "proximity" in this context should not be confined to "mere physical proximity" but should extend:-

> "to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

That was clearly an essential clarification when what was under consideration was the duty of the manufacturers of articles to the ultimate purchaser with whom they had no relationship in contract.

Finally, it should be noted that in *Le Lievre v. Gould* [1893] 1 Q.B. 491, in a passage cited with approval by Lord Atkin (subject to the qualification just mentioned), Lord Esher said at p. 497:-

> "If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

That passage is of importance for two reasons. It makes it clear in the first place, that, in general, the law of negligence is directed to a positive act which causes injury or damage rather than a failure to take action so as to prevent such injury or damage. No doubt in the course of a particular operation an omission to do something may render the defendant amenable in damages: the failure of a motorist to give a required signal which results in an accident converts a blameless form of driving into negligent driving.

The second feature of the law of negligence identified in that passage is that, in general, for a defendant to be found guilty of negligence the careless act must have caused personal injury to, or damage the property of, the plaintiff. The law of negligence normally does not afford redress to those who have suffered what has come to be described in the authorities as "economic loss" *simpliciter*.

Lord Atkin's speech in *Donoghue v. Stevenson* [1932] A.C. 562 thus established (or on another view, apparently his own, simply confirmed) that reasonable foreseeability on the part of the defendant that his actions would be likely to injure the plaintiff was a necessary but, of itself, insufficient condition of liability in negligence. It was also necessary for the plaintiff to establish that there was a relationship of "proximity" between himself and the defendant which gave rise to the legal duty to take care that the foreseeable consequence was avoided. However, in cases where the damage occurred outside the familiar territory of the highway and the workplace, the application of these principles has led, throughout the common law world, to a vast range of judicial decisions not always easy to reconcile.

So too with the principle that no action for negligence lay in respect of purely economic loss. A major qualification of that principle was established in *Hedley Byrne & Co. Ltd. v. Heller and Panners Ltd.* [1964] A.C. 465 in the case of pecuniary loss caused by a negligent misstatement, but until the much discussed decision of the House of Lords in *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520 it remained the law in both England and Ireland that, negligent misstatement apart, no action in negligence lay in respect of such damage.

In the following passage in his speech in *Anns v. Merton London Borough* [1978] A.C. 728 at p. 751, Lord Wilberforce set out the principles which in his view determined the existence of the scope of a duty of care:-

"Through the trilogy of cases in this House, *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.* [1964] A.C. 465 and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a*prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise …"

In later English cases, doubts were expressed as to whether this formula was of such universal applicability as a superficial reading might suggest. In *Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210 at 240 Lord Keith of Kinkel said of this reading of the passage (and an observation of a similarly general nature by Lord Reid in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004):-

"This is a temptation which should be resisted … in determining whether or not a duty of care of a particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so."

In *Yuen Kun Yeu v. A.-G. of Hong Kong* [1988] A.C. 175, the judicial committee of the Privy Council said at p. 191 that the two step test had:-

"… been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended."

Moreover, in the compressed form adopted by Lord Wilberforce, it was open to the possible interpretation that foreseeability alone was a sufficient criterion of liability. It was also seen as eroding the distinction, already noted, between positive acts causing injury or damage and a failure to prevent such injury or damage.

Ultimately, in *Caparo plc. v. Dickman* [1990] 2 A.C. 605, a different approach was adopted, epitomised in a passage in the judgment of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424 at p. 481 as follows:-

"It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established

> categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'."

In *Caparo plc. v. Dickman* [1990] 2 A.C. 605, Lord Bridge summed up the approach in England as follows at p. 617:-

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."

The law in Ireland must now be considered. The decisions in both *Donoghue v. Stevenson* [1932] A.C. 562 and *Hedley Byrne & Co. Ltd. v. Heller and Panners Ltd.* [1964] A.C. 465 have been considered and adopted by our courts in a number of cases and unquestionably represent the law in this jurisdiction. It has also been said - see, for example, McMahon and Binchy on the *Law of Torts* (3rd ed.) chapter 6 - that the two stage test adopted by Lord Wilberforce in *Anns v. Merton London Borough* [1978] A.C. 728 is also the test which must be adopted in this jurisdiction, having regard to the decision of this court in *Ward v. McMaster* [1988] I.R. 337.

The plaintiffs in that case, a married couple, had purchased a house from a builder. Shortly afterwards, they discovered that it contained serious structural defects which, if not repaired, would render it dangerous and a risk to health. The plaintiffs had bought the house with the assistance of a loan from the local authority under the relevant housing legislation. They had not had any independent examination of the house by a surveyor carried out before they bought it, but it had been examined on behalf of the local authority by an auctioneer. The plaintiffs sued both the builders/vendor and the local authority. Their claim against the latter was based on the contention that the local authority should have known that the plaintiffs, not being persons of means, would be unlikely to retain their own independent surveyor and would have relied on an appropriate inspection having been carried out on behalf of the authority. In fact, as already noted, the examination was carried out by an auctioneer who was not a qualified surveyor and whose report did not reveal the defects in the house.

In the High Court ([1985] I.R. 29), the plaintiffs' claim against both the builder and the local authority succeeded. Although the damage which

resulted was, on one view, purely economic loss, Costello J. in the High Court was satisfied that it was recoverable in the light of the decision in *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520. Having considered the authorities in England, he stated at p. 49 the legal principles which were applicable in determining whether a duty of care arose in the circumstances of that case to be as follows:-

> "(a) When deciding whether a local authority exercising statutory functions is under a common law duty of care the court must firstly ascertain whether a relationship of proximity existed between the parties such that in the reasonable contemplation of the authority carelessness on their part might cause loss. But all the circumstances of the case must in addition be considered, including the statutory provisions under which the authority is acting. Of particular significance in this connection is the purpose for which the statutory powers were conferred and whether or not the plaintiff is in the class of persons which the statute was designed to assist.
>
> (b) It is material in all cases for the court in reaching its decision on the existence and scope of the alleged duty to consider whether it is just and reasonable that a common law duty of care as alleged should in all the circumstances exist."

In the case of the local authority, he held that it was within the reasonable contemplation of the second defendant that carelessness on its part in carrying out the valuation of the house might be likely to cause damage to the purchaser. It was consistent with the local authority's public law powers that they should be accompanied by a common law duty of care in favour of the plaintiffs and he further held that, for similar reasons, it was "just and reasonable" that the court should hold that a duty of care arose in that case.

The local authority appealed to this court which unanimously upheld the judgment of Costello J. However, although there was, as in this case, an extensive debate as to the nature and scope of the duty of care, Henchy J. was satisfied that the facts of the case were such that it could be decided in accordance with what he described as"well established principles". In his view, the relationship between the first plaintiff and the local authority was such that the latter owed a duty to him to take due care in the valuation of the house since they should have known that, in the light of his lack of means, he would rely on their having carried out an appropriate valuation. There is, accordingly, nothing in his judgment to indicate that he was adopting the more expansive view of the extent of the duty of care, rightly or wrongly attributed to Lord Wilberforce in *Anns v. Merton London*

Borough [1978] A.C. 728, rather than the more restrictive approach subsequently adopted in the English authorities.

By contrast, in the only other judgment delivered in this court reported at [1988] I.R. 337, McCarthy J. expressly endorsed the two stage test adopted by Lord Wilberforce and added at p. 349:-

> "Whilst Costello J. essentially rested his conclusion on the 'fair and reasonable' test, I prefer to express the duty as arising from the proximity of the parties, the foreseeability of the damage, and the absence of any compelling exemption based upon public policy. I do not, in any fashion, seek to exclude the latter consideration, although I confess that such a consideration must be a very powerful one if it is to be used to deny an injured party his right to redress at the expense of the person or body that injured him."

As to the passage already cited from the judgment of Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, the judge commented that:-

> "This verbally attractive proposition of incremental growth … suffers from a temporal defect - that rights should be determined by the accident of birth."

Finlay C.J. and Griffin J. said that they were in agreement with the judgments of both Henchy J. and McCarthy J. Walsh J. confined his concurrence to the judgment of McCarthy J.

While the decision in *Ward v. McMaster* [1988] I.R. 337 has been treated by some as an unqualified endorsement by this court of the two stage test adopted by Lord Wilberforce in *Anns v. Merton London Borough* [1978] A.C. 728, it is by no means clear that this is so. As already noted, Henchy J. was satisfied that the case could be decided by reference to "well established principles" and made no reference in his judgment to the two stage test in *Anns v. Merton London Borough* . Since Finlay C.J. and Griffin J. expressed their agreement with both the judgments of Henchy J. and McCarthy J., it is not clear that the observations of the latter in relation to the two stage test in *Anns* necessarily formed part of the*ratio* of the decision. Given the far reaching implications of adopting in this jurisdiction a principle of liability in negligence from which there has been such powerful dissent in other common law jurisdictions, I would not be prepared to hold that further consideration of the underlying principles is foreclosed by the*dicta* of McCarthy J. in *Ward v. McMaster* .

In considering whether that approach, or the more cautious approach favoured in *Caparo plc. v. Dickman* [1990] 2 A.C. 605 and *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424 should be adopted, I think it is helpful to refer again to the philosophy reflected in Lord Atkin's approach in *Donoghue v. Stevenson* [1932] A.C. 562. The bystander who

sees a building on fire and knows that there are people inside no doubt foresees that if he waits for the fire brigade to arrive rather than attempting to rescue them himself they may die. But the law has never imposed liability in negligence on a person who fails to act as a more courageous citizen might in such circumstances. A strict moral code might censure his timidity: the law of negligence does not. It is precisely that distinction drawn by Lord Atkin between the requirements of morality and altruism on the one hand and the law of negligence on the other hand which is in grave danger of being eroded by the approach adopted in *Anns v. Merton London Borough* [1978] A.C. 728, as it has subsequently been interpreted by some. There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of "proximity" or"neighbourhood" can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J. at first instance in *Ward v. McMaster* [1985] I.R. 29, by Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424 and by the House of Lords in *Caparo plc. v. Dickman* [1990] 2 A.C. 605. As Brennan J. pointed out, there is a significant risk that any other approach will result in what he called a "massive extension of a *prima facie* duty of care restrained only by undefinable considerations …"

I observe, in this context, that it has been suggested in England that the difference in approach between *Anns v. Merton London Borough* [1978] A.C. 728 and *Caparo plc. v. Dickman* [1990] 2 A.C. 605 may ultimately be of no great significance, since the considerations which, in a particular case, may negative the existence of a duty of care under the *Anns* formulation are consistent with an assessment as to whether it is just, fair and reasonable to impose such a duty in the particular circumstances: (see the comments of Lord Hoffman in *Stovin v. Wise* [1996] A.C. 923 at p. 949).

In the present case, we are concerned with negligence alleged against a public authority in the performance of a statutory function. The circumstances in which a duty of care can be said to arise in the case of such authorities when exercising statutory functions has also given rise to an enormous volume of decided cases in the common law world, to many of which we were referred. There are, of course, many instances in which a public authority will be liable in negligence because the duty of care imposed by the law on them is no different from that arising in private law generally. Obvious examples are the duties owed by local and other public

authorities arising out of their occupation of premises or their role as employers. In such cases, the plaintiff does not have to call in aid the fact that the defendants may have been exercising a statutory function: their duty of care as occupiers, employers, *etc.*, is no greater, but also no less, than that of their counterparts in the private sector.

Difficulties have arisen, however, in determining whether, and to what extent, a statutory authority can be made amenable in damages for the negligent exercise of a power which they were entitled, but not obliged, to invoke. In *Anns v. Merton London Borough* [1978] A.C. 728, it had been held that, although a local authority was not under a duty to inspect the foundations of buildings, it could be made liable where proper consideration had not been given to the question as to whether they should inspect or not. In *Siney v. Corporation of Dublin* [1980] I.R. 400, this court held that, where a flat had been provided by a local authority pursuant to their duties under the relevant housing legislation, they were obliged to take reasonable care to ensure that it was fit for human habitation and that, accordingly, they were liable in damages because appropriate humidity tests had not been carried out in order to determine whether the flat would be sufficiently ventilated. In *Ward v. McMaster* [1988] I.R. 337, as we have seen, the local authority were found liable in damages for having failed to carry out a valuation by a qualified surveyor in circumstances where it could not be suggested that they were under a statutory duty to provide themselves or anyone else with such a valuation, although they were undoubtedly authorised so to do. Again, in the judgments of Costello J. at first instance ([1985] I.R. 29) and McCarthy J. in this court [1988] I.R. 337, *Anns v. Merton London Borough* [1978] A.C. 728 is cited with approval as authority for the proposition that a duty of care arises in such circumstances.

In *Anns v. Merton London Borough* [1978] A.C. 728, it was suggested that the imposition of a duty of care in cases of this nature was justified where the nature of the statutory power was such that it was obviously the intention of the legislature that it would be exercised and that, accordingly, a negligent failure to exercise what were described as "operational" powers or duties could give rise to liability. In subsequent cases in England, however, it has been said that the distinction between policy and operations may not be a particularly useful guide in determining whether a duty of care should be found to exist in any particular case. Similar considerations apply to the distinctions drawn in some of the authorities between discretionary and non-discretionary decisions.

For the purposes of this case, it is sufficient to say that the mere fact that the exercise of a power by a public authority may confer a benefit on a person of which he would otherwise be deprived does not of itself give rise

to a duty of care at common law. The facts of a particular case, however, when analysed, may point to the reasonable foreseeability of damage arising from the non-exercise of the power and a degree of proximity between the plaintiff and the defendant which would render it just and reasonable to postulate the existence of a duty of care. That approach is consistent with the reluctance of the law to impose liability for negligence arising out of an omission to act rather than out of the commission of positive acts which may injure persons or damage property. In the present case, the decision by the respondent that it would not grant planning permission for any mining development within the area covered by the ban was, on the assumption that it was *intra vires*, the exercise by it of a statutory power which would result in the withholding of a benefit from the applicants which would foreseeably result in their suffering financial loss. But, although such a loss was undoubtedly reasonably foreseeable, when one bears in mind that the powers in question were exercisable by the respondent for the benefit of the community as a whole and not for the benefit of a defined category of persons to which the applicant belonged (as in *Siney v. Corporation of Dublin* [1980] I.R. 400 and *Ward v. McMaster* [1985] I.R. 29; [1988] I.R. 337), I am satisfied that there was no relationship of"proximity" between the applicants and the respondent which would render it just and reasonable to impose liability on the respondent.

In considering whether such a relationship of "proximity" existed and whether it would be just and reasonable to impose a duty of care on the respondent, I think one also has to bear in mind that this was not a case in which it could reasonably be said that the applicants, in incurring the expense of their prospecting activities, could be said to have been relying on the non-negligent exercise by the respondent of its statutory powers. Their position is in contrast to that of the plaintiffs in both *Siney v. Corporation of Dublin* [1980] I.R. 400 and *Ward v. McMaster* [1985] I.R. 29; [1988] I.R. 337 where, in each case, they belonged to a category of persons for whose benefit a particular statutory framework had been created and who might reasonably be said to have relied on the local authority in each case taking reasonable care in the exercise of the statutory powers vested in them. The applicants in the present case could rely on no more than a general expectation that the respondent would act in accordance with the law which is not, in my view, sufficient to give rise to the existence of a duty of care.

It is also far from clear that the applicants have established that what the High Court Judge found to be the unreasonable manner in which the respondent had adopted the mining ban caused the damage of which they complain. Had it observed the criteria which its senior counsel had advised

were appropriate in adopting the ban it would still have been found to have acted *ultra vires* in the High Court on the grounds set out in the judgment of Blayney J. Accordingly, even if it had confined the ban to a significantly smaller area in a manner which could have been justified on objective criteria relating to the need to protect areas of particular scenic beauty, and which included those areas in which the applicants were prospecting, it would still have been set aside on those grounds. I should add that I am also satisfied that counsel for the respondent was correct in submitting that it had not been established that the respondent had acted in breach of its statutory obligation pursuant to s. 7(1)(e) of the Local Government Act, 1991 to:-

"have regard to …

(e) policies and objectives of the Government or any Minister of the Government in so far as they may affect or relate to its functions …"

There was no evidence to indicate that the respondent simply ignored the letter from the Minister for Energy: on the contrary, it adjourned the meeting at which it was to make the vital decision so that the Minister's views could be considered. The fact that it is obliged to have regard to policies and objectives of the Government or a particular minister does not mean that, in every case, it is obliged to implement the policies and objectives in question. If the Oireachtas had intended such an obligation to rest on the planning authority in a case such as the present, it would have said so.

There remains the question of economic loss. The reason why damages for such loss - as distinct from compensation for injury to persons or damage to property - are normally not recoverable in tort is best illustrated by an example. If A sells B an article which turns out to be defective, B can normally sue A for damages for breach of contract. However, if the article comes into the possession of C, with whom A has no contract, C cannot in general sue A for the defects in the chattel, unless he has suffered personal injury or damage to property within the *Donoghue v. Stevenson* [1932] A.C. 562 principle. That would be so even where the defect was latent and did not come to light until the article came into C's possession. To hold otherwise would be to expose the original seller to actions from an infinite range of persons with whom he never had any relationship in contract or its equivalent.

That does not mean that economic loss is always irrecoverable in actions in tort. As already noted, economic loss is recoverable in actions for negligent misstatement. In *Siney v. Corporation of Dublin* [1980] I.R. 400, economic loss was held to be recoverable in a case where the damages represented the cost of remedying defects in a building let by the local

authority under their statutory powers. Such damages were also held to be recoverable in *Ward v. McMaster* [1985] I.R. 29; [1988] I.R. 337, the loss being represented by the cost of remedying defects for which the builder and the local authority were held to be responsible. In both cases, the loss was held to be recoverable following the approach adopted by the House of Lords in *Anns v. Merton London Borough* [1978] A.C. 728. While the same tribunal subsequently overruled its earlier conclusion to that effect in *Murphy v. Brentwood District Council* [1991] 1 A.C. 398, we were not invited in the present case to overrule our earlier decisions in *Siney v. Corporation of Dublin* and *Ward v. McMaster.* I would expressly reserve for another occasion the question as to whether economic loss is recoverable in actions for negligence other than actions for negligent misstatement and those falling within the categories identified in *Siney v. Dublin Corporation* and *Ward v. McMaster* and whether the decision of the House of Lords in *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520 should be followed in this jurisdiction.

I would dismiss the appeal and affirm the order of the High Court.

Denham J.

I have read in draft the judgments of the Chief Justice and of Fennelly J. and I agree with them.

Murray J.

I also agree with both the judgments of Keane C.J. and Fennelly J.

McGuinness J.

I too agree with both judgments.

Fennelly J.

I agree with the judgment of the Chief Justice that the appeal should be dismissed. The appeal raises issues of importance concerning the liability of public authorities to pay compensation for *ultra vires* decisions.

It is necessary for a proper understanding of the issues to be aware of the facts. These have been very fully explained both in the judgment of the High Court Judge and that of the Chief Justice. Any repetition of those accounts would be needless and wasteful. I will content myself with recounting the barest essentials facts so as to highlight the central legal issues.

The applicants, at all material times, held licenses to prospect for minerals in areas of County Mayo. These were granted to them in 1986 by the Minister for Energy under statutory powers. As a result of prospecting and exploration operations pursuant to the licences, they had made findings of gold deposits in commercial quantities in these areas but this was an expensive business. They had expended some £2 million in proper and effective reliance on their rights under the licences. The finds were attractive enough to persuade Newcrest Mining Limited, an important Australian gold producer, to agree in 1991 to invest £1.6 million in the venture and in reality, by acquiring a 51% interest to become a partner in the enterprise.

The elected members of the respondent, the planning authority for the County of Mayo, adopted a new development plan, in early 1992. Amidst considerable controversy, an amendment providing for a policy which would amount to an effective ban on mining development was included in the plan. It said:-

> "It is the policy of the Council that no development and/or work shall take place in relation to minerals (as defined by the Minerals Act, 1940, as amended) in the areas shown dotted on map 10A."

I will call this, for the sake of brevity, the "mining ban." Obviously, the statute is the Minerals Development Act, 1940. The mining ban purported to affect an area, delineated in map 10A, of some 300 square miles, in the Westport electoral area, constituting about one seventh of the area of the entire county, and including the areas covered by the applicants' licences.

The result of the mining ban was that the prospective partner withdrew. For practical purposes, the entire venture has become what was colourfully described by the managing director of the first applicant as a "dead duck." Its investment expenditure is written off as a total loss. The trial judge found that the applicants have no further intention of carrying out any work in the areas covered by the licences.

The applicants challenged the validity of the mining ban in judicial review proceedings. In a judgment of the 13th November, 1992 at reported at [1993] 2 I.R. 237, the High Court (Blayney J.) held the mining ban to be *ultra vires* the powers of the respondent and made an order annulling it. I do not consider it necessary to review the reasons for that decision. Although the Chief Justice raises significant queries as to its correctness, the respondent did not appeal the order of the High Court, which now must be regarded as correct. The starting point for consideration of the legal issues on the appeal is that the respondent, as planning authority, in purported exercise of its statutory powers made a decision, which it had no power to make. As a consequence, it became obvious that the applicants'

mining prospect was rendered valueless. The trial judge has found as a fact that the mining ban caused the applicants' mining project to collapse and that the judgment of the High Court did not lead to any revival of confidence. The applicants claim that they should be allowed to recover damages from the respondent for losses in the form of the monies expended by them prior to the imposition of the mining ban.

A large part of the argument concerning the liability of the respondent necessarily centred on the contents of the legal advice received by the respondent from its solicitors and counsel regarding its power to include the mining ban in its Development Plan combined, of course, with the respondent's state of knowledge of the likely effect of the mining ban on the applicants.

The knowledge of the respondent of the applicants' interest is easily established. The applicants objected in writing to the draft Development Plan on the 2nd May, 1991. Its letter was transmitted to the county solicitor who, in conveying his legal advice dated the 5th May, 1991, to the respondent at the height of the controversy specifically drew attention to the fact that the applicants had been prospecting in the area for some time. He presciently warned that adversely affected mining companies might seek judicial review. On the 5th December, 1991, the applicants wrote to the respondent pointing out that the only areas selected for inclusion in map 10A were areas which had been of particular interest to mining companies. They demanded the withdrawal of the mining ban and put the respondent clearly on notice of their intention to sue it for any loss they suffered as a result of the ban. Thus, the respondent was fully conscious not only of the fact that the mining ban would cause loss to mining companies and the applicants in particular but that it would be sued for any consequential losses. Loss to the mining interest was, of course, inherent in the mining ban. Its very purpose was to make it difficult if not impossible for mining to be permitted in the area covered by map 10A.

The position regarding the state of knowledge of the respondent of its legal power to impose the mining ban is not so clear cut. Central to this issue is the advice of counsel and the respondent's appreciation of its effect. The County Solicitor had raised, in quite a pointed way the question of the validity of the resolution to include the mining ban in the Development Plan. He covered issues of powers under the planning acts, breach of Article 43 of the Constitution and legitimate expectation, all of which, to some degree, have made an appearance in the course of this litigation. His advice was not, of course, conclusive. He said:-

> "In view of the risks to the Council in adopting this resolution as an objective of the plan and the many and complex areas of law involved I would require some time to complete inquiries … to consider

further the implications and to submit a detailed case for the opinion of the appropriate senior counsel."

In the event, senior counsel was asked to advise. Because of its central role in considering the matters now before the court, at the risk of repetition, I will set out in full the part of his opinion which is cited by the trial judge:-

"I have not seen map 10A referred to in the resolution proposing the amendment to the mineral policy in the draft plan, but the wording refers to areas in the plural and I make the assumption that the map refers to a number of locations where mining activity is to be excluded. This suggests that the map was prepared with the degree of attention to detail and care to limit the exclusionary prohibition to specified high amenity locations rather than by reference to a crude exclusionary policy. In my opinion a planning authority is perfectly within its rights to make a decision in principle in its Development Plan that no mining would take place in particular areas where they perceive such mining activities are in conflict with amenity or other natural resources and to have a policy in the Development Plan stating this. A planning authority in general is under a positive obligation to formulate policies and to express them in the development plan, and in my opinion the proposed amendment is doing just this. I assume the proposal is reasonable in the sense that it is made by reference to objective criteria. It does not have to be the best policy or a policy which a judge would approve, or a policy which no one could criticise or which could not be improved. Providing it is based on objective criteria and is made *bona fide*, having regard to the proper planning and development of the area then, in my opinion, it is within the powers of the planning authority to have such a policy and the jurisdiction to make it is contained in Part III of the Planning Act of 1963, as amended."

Having quoted this extract, the trial judge continued:-

"Had senior counsel seen map 10A, comprising as it does three hundred square miles or one-seventh of the total area of Co. Mayo, and had he been privy to the evidence in this case, I have little doubt but that he would have concluded, as indeed do I, that this ban was nothing more than a crude exclusionary policy. The map was not prepared with a degree of attention to detail. Care was not taken to limit the exclusionary prohibition to specified high amenity locations. Neither could the proposal be regarded as reasonable because it was not made by reference to objective criteria."

The trial judge then concluded: "It is clear from the foregoing that in essence the legal advice was to the effect that there was no power to impose it" (meaning the mining ban). In this passage, the trial judge

reached a conclusion as to what the opinion of senior counsel would have been if he had seen Map 10A. In doing so, he was possibly influenced by the reasoning of Blayney J. However, that decision was delivered subsequent to senior counsel's opinion. The core of the opinion was to the effect that a planning authority was entitled to "make a decision in principle in its Development Plan that no mining would take place in particular areas …". Kelly J. may, of course, be right, but there is a degree of speculation involved. Personally, I am not persuaded that the opinion of senior counsel would necessarily have been different if he had seen map 10A. In so saying, I acknowledge that I am, myself, influenced by the doubts cast on the correctness of the judgment of Blayney J. In any event, I do not agree with the trial judge's summation of the effect of senior counsel's opinion being that there was no power to impose the mining ban. Kelly J. himself made it clear, in any case, in an ensuing passage, that the opinion was not so understood. He went on:-

> "That said, I am by no means satisfied that the import of the advice of senior counsel was understood by the respondent. His advice as to the legal ability to include the ban was clearly conditional on the matters addressed in that part of the opinion from which I have just quoted. The conditions were not met. Yet the respondent appears to have concluded that the advice was to the effect that there was power to proceed. This is particularly clear when one reads the minutes of the meeting of the 17th February, 1992. There, there is set forth the advice of the County Manager on the procedural aspect of that meeting. In the course of his recital of the events giving rise to the motion being proposed, he is reported to have said:-
>
> 'The Council considered the written representations following the last public display, at a meeting held on the 11th November, 1991. The Plan contained a ban on mineral extraction in a specific area as outlined in Map 10A. The Council was informed that it was legally entitled to include such a ban although advised not to do so.'
>
> This strongly suggests that senior counsel's advice was understood as an *imprimatur* for the proposal whereas, properly understood, it did not even amount to a *nihil obstat*.
>
> In any event, I am of the opinion that the respondent believed (wrongly) that it had power to impose the ban."

The legal issues can thus be approached on the basis that senior counsel's opinion was not understood by the respondent as questioning the power to adopt the mining ban. My only gloss on the judgment of the trial judge is that I do not necessarily think that the respondent was misreading senior counsel's opinion when it reached that conclusion.

Damages for ultra vires acts

I will now turn to the legal issues which arise on the appeal. These, and in particular, the arguments of the applicants have been fully explained in the judgment of the Chief Justice. The starting point of the applicant's claim has to be the decision of the High Court (Blayney J.) that the mining ban was *ultra vires* the powers of the respondent. Since it had no power to adopt the mining ban and since the applicants suffered loss as a result of their inclusion in the Development Plan, they should be compensated by the respondent for the making of this invalid decision. Such a crude characterisation of the issue does not, of course, do justice to the applicants' arguments. They do not suggest that they can establish the right to be compensated without bringing themselves within the four walls of one of the established causes of action. The lack of any link between the invalidity of a decision of a public authority and loss caused by it underlies, to a substantial extent, the real legal issues in the case.

As the trial judge correctly pointed out, "there is no direct relationship between the doing of an *ultra vires* act and the recovery of damages for that act." This fundamental proposition can be underlined in two ways.

Firstly, an individual needs no power to perform a wide range of actions which affect others and with the potential to affect them adversely. An individual's activity is not actionable, however, unless it consists of the commission of some civil wrong, most usually a breach of contract or a tort. The fact that a public authority must act within the scope of the powers conferred upon it has no necessary connection with loss which may be suffered by persons affected by it. Many people or bodies corporate are affected for better or worse by the actions of public authorities in the performance of their statutory functions. However, the incidence of gain or loss to individuals is unrelated to the validity of the decisions made. A valid decision is no more or less likely to cause loss than an invalid one. Breach of a specific statutory duty is, of course, a special case, to which I will return.

Secondly, the nature of the tort of misfeasance in public office emphasises that lack of *vires* is insufficient on its own to ground a cause of action sounding in damages. Keane J., observed in his judgment in *McDonnell v. Ireland* [1998] 1 I.R. 134 at p. 156, that that "tort is only committed where the act in question is performed either maliciously or with actual knowledge that it is committed without jurisdiction and with the known consequence that it would injure the plaintiff …". The common characteristics of those two alternative elements of that rare and unusual civil wrong are, as explained by Clarke J. in *Three Rivers DC v. Bank of England (No. 3)* [1996] 3 All E.R. 558 at p. 632, in a passage cited by the trial judge as

being that the tort "is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer." The applicants have not, of course, pursued their appeal against the rejection by the trial judge of their reliance on misfeasance in public office. Nonetheless, the conditions demanded by the law for success in invoking it explain the policy of the law that public authorities should not be at risk of claims for damages if they exercise their powers *bona fide.* Finlay C.J. in a well known passage from his judgment in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 at p. 38 said:-

> "I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims for compensation where they act *bona fide* and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would, it seems to me, tend to avoid indecisiveness and delay, which might otherwise be involved."

In his judgment in the same case, Henchy J. stated at p. 40:-

> "Breach of statutory duty may occur in a variety of circumstances and with a variety of legal consequences. Here we are concerned only with a breach of statutory duty in the making of a decision which has been committed by statute to the decision-maker. The weight of judicial opinion as stated in the decided cases suggests that the law as to a right to damages in such a case is as follows. Where there has been a delegation by statute to a designated person of a power to make decisions affecting others, unless the statute provides otherwise, an action for damages at the instance of a person adversely affected by an *ultra vires* decision does not lie against the decision-maker unless he acted negligently, or with malice (in the sense of spite, ill-will or suchlike improper motive), or in the knowledge that the decision would be in excess of the authorised power: see, for example, *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158; *Bourgoin S.A. v. Ministry of Agriculture* [1986] Q.B. 716. While the law as I have stated it may be lacking in comprehensiveness I believe it reflects, in accordance with the requirements of public policy, the limits of personal liability within which persons or bodies to whom the performance of such decisional functions are delegated are to carry out their duties."

I respectfully agree with those statements. I would add that the absence of the right to automatic compensation for loss caused by an*ultra vires* decision can find further justification from the protection of individual rights afforded by the existence of the remedy of judicial review. While the sufferer of loss from a lawful but non-tortious private act is entirely without a remedy, a similarly positioned victim of an *ultra vires* act of a

public authority, by way of contrast, has at his disposal the increasingly powerful weapon of judicial review. Thus, he may be able to secure, as in this case, an order annulling the offending act. In appropriate cases, a court may be able to grant an interlocutory injunction against its continued operation. I believe that the considered statements of the law made in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23 remain the law, despite apparent inconsistency with some *dicta* in the majority judgments in *Duff v. Minister for Agriculture (No. 2)* [1997] 2 I.R. 22, which appear to treat liability for damages as automatically flowing from a mistake of law said to have been made by a minister. *Pine Valley v. The Minister for Environment* ,though fully considered and applied in the High Court judgment of Murphy J. in that case, does not figure at any point in the judgments of the Supreme Court. I do not believe that it can have been intended to depart from such an important principle as that laid down in *Pine Valley* .

On the appeal, the applicants pursued only the claims based respectively on breach of statutory duty, negligence, breach of legitimate expectations and infringement of constitutional rights. I propose to consider the first three. As already stated, I agree with the Chief Justice that the appeal should be dismissed. It is only in respect of the issue of legitimate expectations that my views may appear to differ to any extent.

Breach of statutory duty

In my judgment, the trial judge was correct to say that: "nowhere do I find either expressly or by implication that it [s. 19 of the Act of 1963] creates any duty which the legislature intended to be enforceable by an individual in a claim for damages." He was, in that passage thinking of the type of statutory duty that is not infrequently imposed by the legislature with the object of protecting the interests of or creating a benefit for an identifiable class of persons. The notion of a protective norm is familiar to many systems of law. For example, the applicants have cited *Francovich v. Italy (Case C-6/90 & C-9/90)* [1991] E.C.R. I-5357, the decision which first established the principle and then laid down the criteria for establishing state liability for breach of a provision of European Community law. The first condition enunciated by the Court of Justice is that the Community act which is invoked - in that case a directive - "should entail the grant of rights to individuals" (para. 40 of the judgment). A duty imposed by statute on a public body will not be held to create a right to damages for its breach unless it can be shown to have within the scope of its intendment a reasonably identifiable protective purpose and identifiable class intended to benefit.

It is not possible without straining language to transpose that principle to the present case. The statutory duty, in the sense of obligation, which is imposed by the Local Government (Planning and Development) Act, 1963, on planning authorities is, as the Chief Justice has made clear and as seems to be accepted by the appellants, to adopt a "plan indicating development objectives for their area." However, that is a duty imposed for the benefit of the public and not for the protection of any particular class of the public. Moreover, it is not the duty whose breach is invoked by the applicants. It was, in fact, observed when the plan was adopted. Their complaint is that the respondent acted *ultra vires* when it decided to include the mining ban in the Development Plan. The decision to include any particular objective in such a plan is more appropriately characterised as the exercise of a discretion. Whether the decision fell properly within the range of the statutory powers of the body in question is *nihil ad rem.* No breach of statutory duty is involved. I agree with the Chief Justice's response to the applicants' argument based on the qualifying phrase in the judgment of Finlay C.J. in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23, which it is claimed leaves the door open for liability for an act which is "not actionable merely as a breach of duty."

The applicants developed this argument in their written submissions stating that the degree of immunity granted to public authorities by virtue of the strict restrictions on the tort of breach of statutory duty was inconsistent with the jurisprudence of the European Court of Human Rights, in particular *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245. The latter case originated in an action for damages commenced against the police alleging negligence in investigating complaints with tragic consequences. In *Osman v. United Kingdom* , the Court of Human Rights held that the United Kingdom had violated Article 6(1) of the Convention by denying the complainants access to a court. The Court of Appeal had struck out the applicants' statement of claim for failure to disclose a reasonable cause of action against the police. The police could not be held liable in negligence, under the precedent of *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, for failures in the investigation of crime even to persons, who, like the applicants, had justifiably sought protection from known and identified persons who posed a real and imminent threat to their safety.

In evaluating the relevance of this case-law to the present case, it has to be borne in mind that the pertinent article of the Convention guarantees the right to a fair trial, a right held to include the right to have access to a court competent to adjudicate on a complaint. Article 6 does not purport to regulate the substance of the legal remedies available under the law of the contracting states. The Court of Human Rights took the view that English law, as it had been interpreted by the Court of Appeal, conferred an

automatic blanket immunity on the police from civil suit in respect of their acts or omissions in the investigation and suppression of crime. It was this component of English law which was held to prevent the English courts from even considering competing public interest considerations. In effect, counsel for the United Kingdom had been unable to persuade the court that "the rule as interpreted by the domestic court did not provide an automatic immunity to the police."

Had the matter stood on the basis of the ruling in *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245 alone, I would not have been persuaded that Irish law confers any blanket immunity on public authorities for the consequences of their negligent acts of the sort which was there found to exist. Moreover, as it happens, the Court of Human Rights has taken the opportunity to clarify its ruling in *Osman v. United Kingdom* in a case decided since the hearing of the appeal in the present case. On the 10th May, 2001, it gave judgment in *Z. and others v. United Kingdom* (European Court of Human Rights, 10th May, 2001), a case concerning the liability of local authorities for alleged failures in the performance of its functions regarding the taking into care of children feared to be at risk. The court was at pains to stress, recalling earlier case-law, that Article 6 did not guarantee any particular content for the relevant rights and obligations in the domestic law of the contracting states. It accepted that the House of Lords in particular, in its development of the public policy element of the law of negligence, had not conferred any blanket immunity on the public authorities in question in that case. It also frankly acknowledged that its own judgment in *Osman v. United Kingdom* had to be"reviewed in the light of the clarifications subsequently made by the domestic courts and notably the House of Lords" (para. 100 of the judgment).

The judgments of the Court of Human Rights may be useful sources of persuasive authority where they contain reasoning which is relevant to the interpretation of legal rights guaranteed by the Convention which are analogous to rights which are known in our law and Constitution and which our courts have to apply. The value of *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245 as an authority is, in my view, undermined for the present case by the fact that it is concerned with a right of access to justice rather than the substance of the legal right asserted. The applicants' claim in essence that the civil wrong of breach of statutory duty is unduly narrow, by reason of its failure to include within its scope the claim made in this case, namely that the applicants should be compensated for the *ultra vires* act of the respondent. This is a claim that the substance of the legal right being asserted insufficiently protects the interests of the applicants. The applicants' access to the courts has not been restricted or impaired. The

Convention cannot *via* Article 6 supply what is lacking in Irish law. I agree with the respondent that *Osman v. United Kingdom* is irrelevant.

Negligence

On the issue of negligence, I am in full agreement with the judgment of the Chief Justice and with his extensive treatment of the English and Irish case-law.

I should advert, at first, as does the Chief Justice in his judgment, to the parameters of the appeal. The applicants failed in their claim because the trial judge held that the respondent did not owe them a duty of care in the exercise of its statutory powers pertaining to the drawing up of the Development Plan and specifically the inclusion of the mining ban. The applicants take issue with this conclusion in their notice of appeal. They say in particular that the trial judge:-

- gave undue weight to his view that the statutory powers were to be operated for the benefit of the public at large;
- having made findings of negligence, should have concluded that there was a duty of care;
- erred in failing to conclude that there was no compelling reason to base an exemption from liability based on public policy.

They object, however, that the respondent did not specifically contest the existence of a duty of care.

It seems to me artificial in the highest degree to ask this court to parse the pleadings of the parties in the High Court, when it seems that the existence of a duty of care was very fully considered on its merits by the trial judge and in circumstances where no significant objection appears to have been taken in the High Court. It is commonplace that the issues debated become transformed as a trial proceeds. If one party finds itself significantly disadvantaged by having to deal with a point not pleaded, that will become an issue at the trial and the trial judge will make rulings to ensure the fairness of the hearing. The points of claim and defence, in fact, seem to have concentrated very much on the question of whether the respondent was under a duty to ensure that it did not adopt a development plan containing a provision which it had no power to adopt. They focus very much on whether the respondent had taken proper legal advice or had proper regard to the advice which it had received.

I agree with the Chief Justice that the existence of a duty of care must be regarded as being in issue on the appeal. However, I think it is impossible before proceeding to discuss that issue to ignore the nature of the findings of negligence made by the trial judge, upon which the applicants place so much reliance. They do not, in fact, relate to the alleged duty not

to act in excess of statutory powers. They are contained in the following passage from the judgment under appeal:-

> "I have come to the conclusion that the imposition of the mining ban in the present case was done negligently. Whatever may have been the motives of the elected members, they set about achieving their goal in a way which, in my view, no reasonable local authority in receipt of the advice which they obtained would have done. It is not the function of elected representatives to slavishly give effect to their constituents' demands come what may. They must exercise a degree of judgment in any particular case.
>
> In this case, the evidence demonstrates that the provision of the mining ban was unnecessary. The existing planning code was sufficient to protect all legitimate planning interests. This was the advice they received from their officials. It was also the view made clear to them by the Minister for Energy. Not merely was it unnecessary from a planning point of view, but the evidence was that it was in fact contrary to the best interests of the county because it would drive away investment in exploration and the county would lose the chance of evaluating the benefits of any project put forward for planning permission. Furthermore, there was in my view no objective justification for the adoption of the ban. It was to operate in respect of all minerals, regardless of their method of extraction, value or the quantity likely to be extracted. The ban was of enormous span and it was clear, particularly from the evidence of Mr. Dunleavy, that little or no thought went into the nature or the extent of the ban. It was nothing more than a crude exclusionary policy.
>
> In concluding that the respondent was negligent in the sense that they did something which no reasonable authority would have done, I have yet to address the question as to whether that negligent act was done in the context of a duty of care being owed to the applicants. It is only in such context that a right to damages would arise."

This approach, by making findings of negligence before determining whether a duty of care exists, risks reversing the correct order of analysis. Admittedly, it was the course followed in this court in *Pine Valley Developments v. The Minister for Environment* [1987] I.R. 23, where it was held that the Minister could not be considered negligent without pronouncing on the existence of a duty of care. The elements of the tort of negligence are the existence of a duty of care, lack of proper care in performing that duty and consequential damage. The lack of care which we commonly call negligence consists in commission or omission of acts. In order to be actionable, the acts or omissions must be such as will reasonably foreseeably cause damage to any person to whom the duty is owed. Mere causation

is not enough. As a matter of principle, it seems to me that the failure to exercise due care can only be established by reference to a recognised duty. Then one can know what sorts of act are liable to cause damage for which one is liable. This dilemma is well illustrated by the passage from the judgment of Kelly J. which I have just quoted. At the beginning and the end of the passage, he concludes that the respondent acted as "no reasonable authority would have done," a test more relevant to the validity of the exercise of statutory powers than to the failure to respect that standard of care which is owed to another to whom a duty is owed. This is consistent with the concrete criticisms made in the rest of the passage. Whether the mining ban was "unnecessary" or "contrary to the best interests of the county…" or lacked"objective justification" are not in my view relevant to the question of negligence. To treat these conclusions uncritically as having found the respondent to have acted negligently not only begs the question as to whether it owed the relevant duty of care but also obscures the difficult issue of liability for pure economic loss. The trial judge was perfectly entitled to expose the actions of the respondent to the severest criticism. However, these particular criticisms do not appear to me to have any bearing on the issue of negligence. I agree, of course, with the Chief Justice that these findings of the trial judge cannot be disturbed on this appeal. I also agree with his view that the making of such findings did not mean that the trial judge was finding the respondent to be in breach of any duty of care owed to the applicants. For these reasons, the passage in question ceases to have relevance for the issues to be decide on this appeal.

In these circumstances, the question has to be whether the making of an admittedly *ultra vires* decision can form the basis for any finding of negligence against the respondent. In this connection, the focus has to be on the legal validity of the decision. I will consider whether a public authority in the position of the respondent can be held to owe a duty of care to persons affected by its decisions to see that the decision falls within the scope of its statutory powers. That seems to me to be the real issue here.

Let us consider the position on the hypothesis that the planning authority had the power to adopt the mining ban. On that assumption, could it have been liable to persons, natural or legal, to compensate them for economic damage suffered as the result of the incidence of the operation of the plan? In my judgment, the answer would clearly be in the negative. The development represents the culmination of a process designed to gather the views of all relevant interests, economic and social, and to give appropriate weight to them in the plan formally adopted. The authority is required to publish its proposals and receive representations from those affected or potentially affected. In its final form, it inevitably represents a whole series of compromises between potentially conflicting

economic, social and environmental aims - the list is not exhaustive - and objectives. The preference given to one objective will be to the disadvantage of another and consequently to those who have an interest in that other. This is inherent in the process. In certain circumstances, a person whose property is affected by a provision in a development plan may have the right to receive compensation. Such provisions recognise the possibility that an invasion of rights for the common good may be entitled to recompense from the public purse. However, as a general proposition, those affected by the restrictive provisions of a development plan are not entitled to payment. Equally obviously, landowners affected by zoning provisions or businesses affected by restrictions adopted for policy reasons in the general interest cannot, in my view, be regarded as coming within the scope of any duty of care owed by the authority in the framing of its plan.

This type of effect is quite different from that which arose in *Ward v. McMaster* [1988] I.R. 337. The loss suffered by the plaintiff in that case did not flow inevitably from the decision of the local authority to make the loan but rather from an act of incidental negligence in the performance of its statutory function. Similarly in *Siney v. Corporation of Dublin* [1980] I.R. 400, the defendant housing authority owed a duty of care to the tenant of a flat which it provided in pursuance of its statutory power because the tenant was entitled to rely on it to ensure that the flat would be habitable. In each of these cases, an individual direct relationship came into existence by reason of the statutory context. They do not support any principle of liability arising from lack of care in the decision-making process producing foreseeable loss.

I return then to what I consider to be the nub of the case, whether a successful claim can be made for damages for the fact of the decision being invalid. It may be no accident that almost all of the cases in which courts have had to consider this issue concern the exercise of planning powers. The most relevant authority in this jurisdiction is *Pine Valley Developments Ltd. v. The Minister for Environment* [1987] I.R. 23 The judgment of Finlay C.J. dealt with the claim for damages in negligence at p. 35 as follows:-

> "Having regard to that finding, I am quite satisfied that the learned trial judge was right in reaching the conclusion which he did that the first defendant could not be said to have been negligent or to have been guilty of negligent misrepresentation. If a Minister of State, granted as a *persona designata* a specific duty and function to make decisions under a statutory code (as occurs in this case), exercises his discretion *bona fide*, having obtained and followed the legal advice of the permanent legal advisers attached to his department, I can not see how he could be said to have been negligent if the law eventually proves to be

> otherwise than they have advised him and if by reason of that he makes an order which is invalid or *ultra vires*… I am, therefore, satisfied that in so far as the plaintiffs have appealed against the learned trial judge's findings, that an action in damages for negligence or for negligent misrepresentation does not and can not lie, the appeal must fail."

The court, having found that the Minister had not, in fact, been negligent because he had taken legal advice, did not consider whether the Minister would have been liable if he had taken no legal advice, in other words whether he owed a duty of care to take advice. In *Pine Valley v. The Minister for Environment* [1987] I.R. 23, it should be recalled, there was a close causal relationship between the losses allegedly suffered by the plaintiff and the invalidity of the decision. The plaintiff was in a position to argue at a minimum that a decision to grant planning permission would foreseeably be relied upon by potential purchasers of the affected land who would equally foreseeably suffer loss if the permission turned out to be invalid. Consequently, it could be argued that the Minister should exercise reasonable care in deciding whether he had power to make the decision. In the result, the judgment of the Supreme Court did not determine whether the Minister had any such obligation. He had, in fact, taken legal advice. Even though the advice was actually mistaken, the Minister was not liable, because he had reasonably followed legal advice from a reputable source.

This problem was considered only slightly more directly in two Privy Council cases in the 1980s. In *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158, also, as it happens, a case concerning losses caused by an invalid planning decision, the authority had passed two resolutions subsequently held to be invalid (one for lack of *vires* and one for failure to observe fair procedures) which adversely affected the plaintiff's interest in a development site. Although it was expressly argued that the council owed a duty to the plaintiff to exercise reasonable care not to affect adversely his property rights by passing invalid resolutions, the Privy Council, whose advice was delivered by Lord Diplock, contented itself with saying that it shared the doubts of the New South Wales Supreme Court as to the existence of any such duty of care. It ruled against the claim in negligence on the rather more debatable ground that the plaintiff was in as good a position as the council to know that the decision was void: "He can ignore the purported exercise of the power" (see p. 172). The existence of a duty of care to take legal advice was also considered by the Privy Council in *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, a case which concerned a decision by a New Zealand government minister to refuse his consent under statute to an investment transaction involving the sale of shares to a non-New Zealand investor. The New Zealand Court of Appeal

annulled the decision on the ground that the minister had mistakenly taken into account a reversion factor,*i.e.* the desirability that the property should revert to New Zealand interests. An action for damages was brought against the minister. The advice of the Privy Council on the issue of duty of care, upon which the respondent relied strongly, contains the following interesting statement (p. 500):-

> "The character of the claim is novel. So far as their Lordships are aware, it has never previously been held that where a minister or other governmental agency mistakes the extent of its powers and makes a decision which is later quashed on the ground of excess of statutory powers or of an irrelevant matter having been taken into account, an aggrieved party has a remedy in damages for negligence."

The Privy Council did not, however, find it necessary to provide a definitive answer. It did, nonetheless, suggest some powerful considerations militating against the imposition of the duty of care. These may be summarised:-

- since the process of judicial review is available to correct any legally erroneous administrative decisions, the effect of such decisions is likely to be limited to delay;
- it is most unlikely that a mistaken ministerial view of the law will amount to negligence: even a judge may be mistaken in construing a statute;
- the imposition of a duty of care may be counterproductive: public authorities may become over-cautious;
- it will be extremely difficult to say in which cases a minister is under a duty to seek legal advice; it would not be reasonable to expect a minister to seek legal advice before exercising a statutory discretion.

Even if somewhat tentatively, the Privy Council (at p. 503) suggested:

> "In all the circumstances, it must be a serious question for consideration whether it would be appropriate to impose liability in negligence in these cases, or whether it would not rather be in the public interest that citizens should be confined to their remedy, as at present, in those cases where the minister or public authority has acted in bad faith."

Counsel for the respondent also referred the court to a decision to similar effect by the Supreme Court of Canada (*Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg* (1970) 22 D.L.R. 3d 470). That court firmly rejected as"incredible" the proposition that the municipality which had in the ultimate view of a court (albeit upon the advice of counsel) acted beyond its powers, could be held to have "owed a duty of care giving rise to liability in damages for its breach."

In my judgment, the concerns of the Privy Council are highly relevant to the question of whether and in what circumstances a duty of care to act within the limits of its statutory powers should be held to exist. If a duty to obtain legal advice is to become a component of the duty of a public authority, in which cases will it apply? An enormous number of discretionary statutory powers are exercised on a daily basis. An obligation to seek legal advice even as a counsel of perfection could have a paralysing effect on public administration. As is clear from the judgment of the trial judge, the mere fact of an*ultra vires* decision does not confer a right to compensation. It is equally clear that liability of that type, including liability for failure to take legal advice, has never in fact been imposed. Individuals enjoy protection from the consequences of unlawful public action in three respects: firstly, if that action consists of the commission of a recognised existing tort, including, in certain cases, negligence; secondly, unlawful decisions can be quashed on judicial review; thirdly, misfeasance in public office by knowing or malicious abuse of power, combined with the right in appropriate cases to award exemplary or punitive damages is the most appropriate remedy. I do not consider that a general duty to take legal advice can realistically be imposed on public authorities.

As a matter of principle, it would not be wise to rule out the possibility that a case may in the future present itself where the relationship between a person liable to be affected by a ministerial or other public law decision is entitled to expect that care will be exercised in and about the decision to take legal advice and the manner of its taking. At the least, I think it would have to be shown that the statutory power in question was of the type which is designed to protect particular interests and that the plaintiff comes within its scope. In addition, it would probably be necessary for the claim to arise from the context of the type of individual transaction which was the subject-matter of *Ward v. McMaster* [1988] I.R. 337 or perhaps from the sort of reliance on the expertise of another which formed the background to *Hedley Byrne v. Heller and Panners Ltd* [1964] A.C. 465. I do not consider, however, that this is such a case. There is, of course, no doubt that the applicants' interests were well known to the respondent at the time the decision was in contemplation. The applicants could scarcely have made their interest more clear or their complaint more insistent. The respondent was fully aware that the applicants would be affected by a mining ban. But that is not enough to take them out of a class of mining enterprises, actual and potential, similarly affected. They were not engaged in any direct legal relationship with the respondent. Their prospecting licences had been granted by the State. They had not made any application for planning permission, not that that would necessarily alter the position.

In short, I do not believe that the respondent owed a duty of care to the applicants either to take legal advice or to take further steps to follow it up.

In addition to the foregoing, I think it is clear in any event that the effect of the legal advice actually given, as I have summarised it above, was not understood as casting any doubt on the respondent's power to impose the mining ban. For that reason, the respondent could not be held to have acted negligently. I would uphold the decision of the trial judge that the respondent did not owe a duty of care to the applicants to ensure that its decision to adopt the mining ban was valid.

Legitimate expectation

I am in full agreement both with the trial judge and with the Chief Justice that the applicants have not made out a case for infringement of their legitimate expectations. This is because the particulars of failure they allege do not come, in my view, in any meaningful way at all within the concept of action or inaction by a public authority which an affected individual legitimately has the right to expect. Consequently, I am not sure that this is an appropriate case in which to delineate the contours of the principle of legitimate expectation.

I believe that the trial judge was correct in concluding that:-

> "There is neither allegation nor evidence supporting any promise, express or implied, on the part of the respondent. It was never represented to the applicants that they would obtain planning permission. Furthermore, the applicants could not, in my view, have had a legitimate expectation that planning permission would be given for mining even in the absence of the mining ban."

In their written submissions, the applicants say:-

> "The applicants submit that they had a legitimate expectation that the respondent would act lawfully; that the respondent would have regard to ministerial and governmental policy; that the respondent would only include development objectives in the Development Plan; that the respondent would pay due regard to the advices of the County Manager, county engineer, senior executive planner and solicitor advising Mayo County Council; that the respondent would not act contrary to its legal obligations having received the letter from the Minister for Energy dated the 16th December, 1991; that the respondent would not seek to circumvent the statutory procedure for the making of a special amenity area order by the misuse of the powers to make a development plan; that the respondent would not seek to prejudge all applications for the development of mines within a substantial

part of the area for which they were responsible; that the respondent would act legally and fairly toward the applicants."

None of these matters, which paraphrase and repeat the submissions of the applicants as summarised in the judgment of the trial judge, amount in substance to saying any more than that the applicants had a legitimate expectation that the respondent would act properly and lawfully. Kelly J. was right, in my view, to seek in the evidence or submission of something in the nature of an undertaking or promise or representation, express or implied, addressed to or applicable to the applicants. I do not say that there must be a direct*nexus*. It may be sufficient that the claimant belongs 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. Every citizen can, however, assert an expectation that public authorities will act within the law, but that is clearly not enough. If it were, the doctrine would be almost meaningless and would duplicate the ordinary right, for example, to seek judicial review of administrative action. For that reason, I would dismiss the appeal. Consequently, my further comments on this issue are *obiter*.

The principle of respect for legitimate expectation is generally acknowledged to have originated in German administrative law where it is stated to constitute a fundamental, even a constitutional principle. Its proximate origins are to be found in the decision of the Court of Justice in 1973, (*Commission v. Council (Case C-81/72)* [1973] 1 E.C.R. 575.), a case described as the *locus classicus* of the principle, concerning the indexation of pay of Community officials. The Council had gone back on a decision to adopt an average of two indices for annual pay increases in favour of the single lower one, and the Commission challenged this before the court. The court annulled the relevant parts of the Council Regulation, resting its decision on what it called "the rule of protection of the confidence that the staff could have that the authorities would respect undertakings". (para. ?? of the judgment). Thus there came to be recognised the doctrine, described in the headnote of the case as"legitimate confidence" corresponding to the French*"confiance légitime"*. In the context of European Community law, the doctrine undoubtedly has potentially substantive content. Part of the milk quota regime was annulled for failure to take account of the legitimate expectations of a group of farmers who should have been allowed a quota (*Mülder v Minister van Landbouw en Visserij (Case 120/86)* [1988] E.C.R. 2321).

The Chief Justice in his judgment has reviewed a number of the cases on the doctrine of legitimate expectations as it has come to be recognised independently in our courts as well as in the United Kingdom. The dilemma he identifies is whether the doctrine, as ruled by the High Court

(Costello J.) in *Tara Prospecting Ltd. v. Minister for Energy* [1993] I.L.R.M. 771, confers only a"conditional expectation" capable of being withdrawn by the authority, following a fair hearing in the public interest, or whether it is capable of conferring substantive rights. I agree with the Chief Justice that it is not necessary for the court to choose in this case between those two alternatives. The applicants have not identified any meaningful legitimate expectation.

It is true that an official exercising a statutory power will, in most cases, have no greater obligation than to afford a hearing to an affected individual before departing from a prior position or policy. In other cases, this may not be enough. The damage may be done. It may not be possible to restore the *status quo*. If the official position is altered, the court may have to furnish "such remedy as the equity of the case demands" (*per* Denning M.R. in *Amalgamated Property Co. Ltd. v. Texas Bank* [1982] Q.B. 84 at p. 122). The Court of Justice seems to me to accord due weight to the competing imperatives of private justice and public policy in an often quoted passage *Tomadini v. Amministrazione delle Finanze dello Stato (Case 84/78)* [1979] E.C.R. 1801, at para. 20:-

> "… If in order to deal with individual situations the Community institutions have laid down specific rules enabling traders in return for entering into certain obligations with the public authorities to protect themselves - as regards transactions definitively undertaken - from the effects of the necessarily frequent variations in the detailed rules for the application of the common organisations, the principle of respect for legitimate expectations prohibits those institutions from amending those rules without laying down transitional measures unless the adoption of such a measure is contrary to an overriding public interest."

In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, 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. I will call this the representation. Secondly, 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 a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, 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 to the extent that it

would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavored to formulate seem to me to be preconditions for the right to invoke the doctrine.

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Nicholas Donnelly, Barrister