

# Doctrine of legitimate expectations assignment

Law



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ADMINISTRATIVE LAW ASSIGNMENT DIPLOMA IN LEGAL STUDIES PUBLIC LAW  
II 2010/2011 “ What is the current status of the doctrine of legitimate  
expectations in Irish law? How do you think the doctrine will develop in the  
coming years”? WORD COUNT 2881: NOT INCLUDING FOOT NOTES OR  
BIBLIOGRAPHY PAGE COUNT 10 DEADLINE 6. 00pm on the 31st March 2011 “

Take nothing on its looks; take everything on evidence. There's no better  
Rule. ” —Charles Dickens in “ Great Expectations” “ unhappiness could well  
be found by focusing alone on the expectations of citizens and seeking to  
discern their legal legitimacy or otherwise “

Some eighteen years ago, in *Fakih v Minister for Justice* O'Hanlon J. described  
that “.... the plea of legitimate expectation ... may have some of the  
characteristics of the ‘ unruly horse’ which were associated with the plea of  
public policy”. A year later, Costello J. in *Hempenstall v Minister for the  
Environment* commented that “.... the law relating to the doctrine of  
legitimate expectation is an evolving one, whose parameters have not yet  
been defined and whose exact scope has not yet been established’. Fennelly  
J in *Glencar Exploration plc v Mayo County Council* observed that “.... the  
doctrine of legitimate expectation is of relatively recent vintage when  
compared with other grounds of judicial review and the courts have  
repeatedly emphasised that it is still in development”. The authors of *De  
Smith's Judicial Review* describe legitimate expectation as the tension  
between legal certainty (abiding by representations) and preserving  
flexibility to pursue the changing public interest. In consideration of the  
above, a number of questions relating to the scope of the doctrine remain to  
be definitively answered by the courts in Ireland. Legitimate expectation as

been interpreted as having significantly different meanings ranging from a means of broadening the circumstances in which the common law rules of natural justice will apply to encompassing a substantive entitlement to a benefit or privilege. The scope of the doctrine of legitimate expectation can be extremely broad. As such, and for so for the purposes of this assignment I will focus on the following issues which give rise to the current status of the doctrine and the perceived development over the coming years. The format will be as follows;

- Established ground giving current status to the doctrine

The fundamental issue of whether the doctrine should be confined to a form of procedural guarantee or whether it can ever provide the basis for a substantive entitlement to the benefit being sought by a claimant.

- The extent to which the doctrine of legitimate expectation can fetter the exercise of a statutory discretionary power by a minister or a public authority.
- The overlap with estoppel
- Ultra Vires Representations
- Finally, and depending on how these issues are addressed, I intend to address the second question and consider whether the doctrine can develop and play a meaningful role in judicial review proceedings going forward.

**Established Ground** It is generally accepted now that, in order to succeed in a claim based on a failure of a public body to respect a legitimate expectation, the three matters set out by Mr. Justice Fennelly in the Supreme Court decision in *Glencar Exploration v Mayo County Council* need to be established: “..... 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 annually 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 body will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. " Fennelly J. went on to say that; "... 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 respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine. " The reference by Fennelly J. to the principle that persons in whom a statutory power or discretion is vested ought to be able freely to exercise that power or discretion properly is a reference to a point of central importance and debate in this area.

In this regard, a distinction has traditionally been drawn between a legitimate expectation, on the one hand, that certain procedures would be followed as a result of some representation, scheme or policy, and, on the other, that a substantive benefit or right would be conferred or obtained when some statutory discretion came to be exercised. As I will discuss below, making a claim based on the latter has not traditionally met with success.

It is seen as undesirable and incorrect in principle that the reasonable and proper exercise by a decision-maker of a statutorily-conferred discretion be fettered by any expectation previously held out by him to a particular person or group of persons. A procedural or substantive guarantee The very traditional distinction, therefore, is between the doctrine having procedural, rather than substantive, effect, the latter not being possible where any impermissible fettering of future decision-making involving the exercise of a statutory power is involved. As Mr. Justice Costello said in

*Tara Prospecting Limited v Minister for Energy* “.....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 light of the 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. In the High Court decision in *Cork Opera House Plc v The Revenue Commissioners*, Hedigan J. had found that the applicant for judicial review was wrong in law in contending that the Revenue Commissioners had the power to grant it a retail licence to sell beer, wines and spirit, and that it thus did not need to apply to the District Court in the normal way. Having so found, he turned his attention to the claim that, even if this was so, the applicant nevertheless had an enforceable legitimate expectation that the Revenue would continue to act as they had done for many years, granting such a licence under the Liquor Licence 1835 Act: “....

Legitimate expectation cannot prevail against a statute. It cannot operate to confer upon a statutory authority a power which that authority does not have under the terms of the relevant statute. " In this connection, he cited the decision of the Supreme Court in *Wiley v The Revenue Commissioners*, in which the applicant had sought and failed to enforce by way of legitimate expectation a right to the continuation of the Revenue's previous practice of paying him refunds of excise duty to which he was not, properly speaking, entitled.

In that case, the Chief Justice, Finlay J. stated that "...this applicant could not pursue on the basis of expectation a remedy which would involve the carrying out by the statutory authority, the Revenue Commissioners, of activities which they were not empowered to carry out, and the payment or repayment of monies which they were not empowered to pay or repay. However, there has been some debate recently as to the extent to which it can be said that a legitimate expectation can indeed relate - or ought to be capable with appropriate flexibility, depending on the circumstances, of relating - to a substantive benefit, rather than merely to an entitlement to have a process conducted in a particular way. The doctrine of legitimate expectation may, however, require that the way in which policy changes are effected does not breach existing legitimate expectations.

In the recent High Court decision in *Glenkerrin Homes v Dun Laoghaire Rathdown County Council*, for example, the plaintiff was held to have had a legitimate expectation that the relevant policy in that case would not change without reasonable notice having been given to that effect. In an instructive passage, Clarke J. stated as follows: "..... It is clear from the passage from <https://assignbuster.com/doctrine-of-legitimate-expectations-assignment/>

Glencar Exploration referred to above that the promise or representation may be expressed or implied. I am satisfied that an implied representation can derive from the universal following of a particular practice for a prolonged period of time.

It is, of course, important to note that the executive enjoys a constitutional entitlement to change policy..... It is clear, therefore, that a legitimate expectation cannot arise to the effect that a policy will not be changed. Thus in *Hempenstall v. Minister for Environment*, Costello J. determined that notwithstanding the fact that a new policy in respect of the issuing of taxi licences would have the effect of very significantly reducing the value of existing licences, nonetheless the overriding entitlement to change policy prevented a legitimate expectation arising.

I should, therefore, emphasise that the existence of a longstanding practice does not give rise to any legitimate expectation that that practice will not change. However where third parties reasonably arrange their affairs by reference to such a practice it seems to me that such third parties are entitled to rely upon an expectation that the practice will not be changed without reasonable notice being given. The notice that would be required is such as would reasonably allow those who have conducted their affairs in accordance with the practice to consider and implement an alternative means for dealing with the issues arising. Future developments in the legitimate expectation doctrine will reveal whether these questions will be determined by the application and outcome of a balancing process involving a weighing of competing considerations of relevance, including the public interest, and whether the traditionally rigid dividing lines will continue to be

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eroded. The extent to which the doctrine of legitimate expectation can fetter the exercise of a statutory discretionary power by a minister or a public authority. The clearest statement to date of judicial reluctance to allow legitimate expectations to fetter the exercise of discretionary powers is contained in the judgment of Taylor LJ in *R. v Secretary of State for Health ex p. US Tobacco International Incorporated*. There the applicant, who was the sole manufacturer of oral snuff in the UK sought judicial review of the decision of the Secretary of State to make regulations banning the product. The applicant contended, inter alia, that this decision was contrary to the company's legitimate expectations as the government had encouraged them to set up the manufacturing operation in the UK in the first instance.

While the court was prepared to issue an order of certiorari quashing the regulations on the basis that the Secretary of State had acted unfairly and in breach of his statutory consultation obligations, the applicant's claim based on legitimate expectations failed. Taylor LJ referred to the judgment of Lord Scarman in *Findlay v Secretary of State for the Home Department* where his lordship had concluded that an unfettered discretion conferred on a minister by statute could not be restricted by the doctrine of legitimate expectations so as to hamper or even prevent changes of policy.

Taylor LJ stated: "..... A Minister cannot fetter a discretion given him under statute. Providing he acts within his statutory powers, rationally and fairly, he is entitled to change his policy .... In the present case, if the Secretary of State concluded on rational grounds that a policy change was required and oral snuff should be banned in the public interest, his discretion could not be



fettered by moral obligations to the applicants deriving from his earlier favourable treatment of them ..." The overlap with promissory estoppel

While it has long been recognised that "there cannot be an estoppel to prevent a public authority from carrying on its statutory duty" 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 way of an order of mandamus or otherwise. Since the decision in *Webb v Ireland* where Finlay CJ spoke of the doctrine as being but "...an aspect of the well-recognised equitable principle of promissory estoppel...", the courts in certain cases have tended to treat the two concepts as variations of the same general principle.

This can be contrasted with the approach taken in other decisions, such as *Fakih v Minister for Justice*, where O'Hanlon J was prepared to give effect to the applicants' legitimate expectations despite the absence of any estoppel type requirement that they should have acted to their detriment in reliance on the procedure which they subsequently sought to enforce. More recently in *Lett & Co. Ltd v Wexford Borough Council* Clarke J. stated that "...the doctrine of legitimate expectation is often seen as the public counterpart of the equitable doctrine promissory estoppel.. " Ultra Vires Representations

Traditionally, ultra vires representations by public authorities were regarded as incapable of generating the basis for a legitimate expectation. An authority unlawfully assumed could not bind a public authority Sedley J. (as he then was) opined in *R v Ministry of Agriculture, Fisheries and Food, ex p. Hamble (Offshore) Fisheries Ltd* "... that to hold a public authority to an

unlawful representation by that body would have “ the dual effect of unlawfully extending the statutory power and destroying the ultra vires doctrine by permitting public bodies arbitrarily to extend their powers . The principle ostensibly reflects a neat logic, but it may fail to protect against maladministration. Sometimes it is precisely the making of an unequivocal representation limiting an authority’s discretion which constitutes the ultra vires act. Hogan and Morgan remark that if it “ is strictly applied, it is capable of causing considerable injustice and, incidentally, largely stifling the legitimate expectation-estoppel doctrine at birth in the public law field. ”

Legitimate Expectations going forward “..

Judges feel far more comfortable telling public bodies what procedures they should follow rather than what outcomes they should pursue.. ” To paraphrase Laws L. J, the niceties of substantive and procedural expectations; statutory and non-statutory power sources; intra and ultra vires representations should not dictate the reach of proper administration principles. It appears that when the public have their affairs dealt with by public bodies’ their conduct is not always privy to the rules of the legitimate expectation doctrine.

For example, the consequences of limiting a statutory discretion following upon specific express assurances to an individual, is quite different to a prospective fettering of a body’s freedom as regards a broad class from implied past practice. On this ground, the argument that none of these artificial divisions should be finally dispositive of legitimate expectation cases but rather inform the threshold for review and assist in deciding final outcome stands to reason .

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Conclusions The doctrine of legitimate expectation is a continuously growing body of law and opinion. The current status gives way to reason that the courts in this Ireland must address is the extent to which the doctrine of legitimate expectations exists independently of established estoppel principles. As I discussed above, this issue may prove to be of particular importance in the context of the fettering of discretionary powers .

Costello J in *Hempenstall v Minister for the Environment* commented, " ... It would appear that even if the doctrine does have a separate existence where there is no detriment suffered as a result of reliance being placed on a representation or policy, the courts are far less likely to provide a remedy ...", The approach of O'Hanlon J in *Fakih v Minister for Justice* would tend to support this argument, even though on the facts, the applicants were unsuccessful in their claim.

Finally, the question must be asked whether, in the light of recent judicial trends, the doctrine of legitimate expectations can continue to play any meaningful role in Irish administrative law having regard to the tendency of the courts to equate it in practice with traditional estoppel principles and bearing in mind the wide-ranging protection which the concept of constitutional justice would appear to afford to those affected by administrative decision making.

An examination of the authorities which I have considered above would tend to confirm that the current status requires a less restrictive view of the doctrine to be taken by the judiciary. If not, then it cannot continue to develop and may ultimately prove to be a concept of academic interest

rather than of practical value. a pull on one strand will distribute tensions after a complicated pattern on the web as a whole” BIBLIOGRAPHY Judicial Review 2nd edition Mark De Blamcam Tottel Publishing De Smith’s Judicial Review 6th Edition Harry Woolf, Jeffrey Jowell, Andrew Le Sueur Thomson sweet & Maxwell Judicial Review Conleth Bradley Roundhall press

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