Judgment Title: Private Residential Tenancies Board -v- Judge Linane

Neutral Citation: [2010] IEHC 476

High Court Record Number: 2009 441 JR

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Composition of Court:

Judgment by: Budd J.

Status of Judgment: Approved

Neutral Citation Number: [2010] IEHC 476

THE HIGH COURT

JUDICIAL REVIEW

2009 441 JR

BETWEEN

PRIVATE RESIDENTIAL TENANCIES BOARD

APPLICANT

AND

HER HONOUR JUDGE JACQUELINE LINNANE

RESPONDENT

AND

S & L MANAGEMENT COMPANY LIMITED

AND GARY MALLON

NOTICE PARTIES

JUDGMENT of Mr. Justice Declan Budd delivered on the 23rd day of April 2010

Background

These proceedings came before the High Court by way of judicial review proceedings in which the applicant is the Private Residential Tenancies Board (hereinafter referred to as the P.R.T.B.) which seeks an order of *certiorari* to quash the order of the respondent, Her Honour Judge Jacqueline Linnane, one of the Circuit Court judges who hear cases emanating from the Board. The application for judicial review is to quash the respondent's order made on 3rd April, 2009 vacating a District Court order made on 11th April, 2008 and seeking an order of *mandamus* compelling the learned Circuit Court Judge to deal with a dispute which had arisen between the two notice parties involving the jurisdiction of the applicant Board and the jurisdiction or the lack thereof the respondent, as a judge of the Circuit Court, to deal with disputes brought by management companies for the recovery of service charges by reason of the wording of the Residential Tenancies Act 2004, (hereinafter referred to as the "R.T.A. 2004"). The contention made by the second named notice party, Gary Mallon, is that the applicant Board and not the respondent Circuit Court Judge had jurisdiction to entertain the hearing of the dispute in respect of service charges. The applicant seeks an order by way of *certiorari* to quash the respondent's order made on 3rd April, 2009 vacating the District Court order made on 11th April, 2008 in respect of a liquidated sum in respect of four charges allegedly outstanding from the second named notice party, being the defendant in the District Court, in a case brought by the first named notice party, S&L Management Company Limited on behalf of the landlord of the apartments.

The factual background against which it is the applicant's contention that the respondent erred in law in failing to interpret the legislation in accordance with the applicant's contentions in relation to the intention of the Oireachtas in the legislation is explained as follows. The predecessor in title to the second named notice party was Gary Mallon's mother, Niamh Mahon, who was referred to as "the Lessee" in an indenture of lease dated 23rd May, 2003 between Larry Mahon, James Grew and Peter Edwards, being referred to as "the lessor", of the first part and S&L Management Company Limited (called "the Management Company"), of the second part and Niamh Mahon called "the Lessee" of the third part. The second named notice party's predecessor had purchased apartment No. 62 on the third floor of an apartment building known as Elmfield Court, Ninth Lock Road, Clondalkin, Dublin 22, the demised premises which are set out in the First Schedule to the lease. Her successor, her son Gary Mallon now holds the same apartment for the residue of a term of 500 years from 1st November, 2002, subject to paying thereafter the yearly rent of €0.05 in every year or such increased rent as shall be payable pursuant to the provisions of the Seventh Schedule hereto, such rent to be paid in advance on 1st January in each year, the first payment thereof being a proportionate part of the said yearly rent to be paid on the execution of the lease. The first named notice party, the S&L Management Company Limited, had issued proceedings in the District Court for the recovery of service charges and obtained judgment for €1,862.56 on 11th April, 2008 against the second named notice party as defendant. The respondent held in a considered and careful reserved judgment dated 3rd April, 2009 that a

dispute relating to the recovery of service charges concerning an apartment occupied by an owner under a long lease, the subject matter of an appeal from the District Court to the Circuit Court, fell outside the remit of the courts. The reasoning behind this order was that the court, after receiving written submissions and also after hearing verbal submissions, decided that the court had to have regard to the wording of the R.T.A. 2004, which appeared to state the proposition that the applicant Board has sole jurisdiction to deal with such disputes. For ease of reference, I propose to set out s. 182 which appears in Part 9 under the heading "Miscellaneous" in the R.T.A. 2004:-

> "S. 182 (1) On and from the commencement of Part 6, proceedings may not be instituted in any court in respect of a dispute that may be referred to the Board for resolution under that Part unless one or more of the following reliefs is being claimed in the proceedings –
>
> (a) damages of an amount of more than €20,000,
>
> (b) recovery of arrears of rent or other charges, or both, due under a tenancy of an amount, or an aggregate amount, of more than €60,000 or such lesser amount as would be applicable in the circumstances concerned by virtue of *section 115 (3)(b) or (c)(ii).*
>
> (2) In this section 'dispute' has the same meaning as it has in *Part 6*."

Part 6 of the R.T.A. 2004 deals with dispute resolution and in s. 75(3) it is stated:-

> "S. 75 (3) For the purposes of *subsection (2)* 'disagreement' shall be deemed to include –
>
> (a) any issue arising between the parties with regard to the compliance by either with his or her obligations as landlord or tenant under the tenancy,
>
> (b) any matter with regard to the legal relations between the parties that either or both of them requires to be determined (for example, whether the tenancy has been validly terminated),
>
> and, without prejudice to the generality of the foregoing, shall be deemed to include a claim by the landlord for arrears of rent to which the tenant has not indicated he or she disputes the landlord's entitlement but which it is alleged the tenant has failed to pay."

The covenants on the part of the Lessee in the Fifth Schedule of the Lease include paying rent and keeping the Lessor and the Management Company as the case may be indemnified from and against such service charges in respect of the apartment as are due under that schedule which includes the method of

calculation of the service charges.

Since this matter comes before this Court by way of judicial review seeking orders of *certiorari* and *mandamus*, it is appropriate that I should set out the basis on which the matter came before the Circuit Court by way of an appeal by the defendant/appellant, Gary Mallon who is the second named notice party in this Court. The S&L Management Company Limited was the plaintiff/respondent in the District Court and Circuit Court, being the Management Company endeavouring to collect the service charges by way of a liquidated claim well within the ceiling for such claims either in the District Court or in the P.R.T.B., if it has the exclusive jurisdiction contended for by the second named notice party in this Court, Gary Mallon, on this judicial review.

The background has been clearly set out by the learned Circuit Court Judge and I propose to set out the first few paragraphs of her judgment which sets the scene and also disposes of several peripheral contentions that were made by the P.R.T.B. before tackling the crucial jurisdictional issues which have been raised on this judicial review.

In her judgment delivered on 3rd April, 2009 the learned Circuit Court Judge said:-

> "This matter comes before the court by way of an appeal by the defendant from a decision of the District Court on 11th April, 2008 where the plaintiff obtained a decree against the defendant in the sum of 1,862.56 Euro in respect of service charges due under a Lease whereby the plaintiff is lessor and the defendant is the lessee. The defendant in fact purchased the apartment dwelling for a sum of €200,000 and is in occupation thereof and holds same for the residue of a term of 500 years subject to a yearly rent of €0.05. Counsel for the defendant has argued that this Court has no jurisdiction to deal with the matter on the basis that such a dwelling is not one of the specific exceptions set out in s. 3(2) of the Residential Tenancies Act 2004 (the 2004 Act). His argument is that there is a dispute capable of being referred to the P.R.T.B., the defendant is willing to so refer it and undertakes to do so or alternatively sign any form required to enable the plaintiff to so register the tenancy, and that the 2004 Act applied to his tenancy and the court has no jurisdiction in the matter. It would appear that the defendant some months ago tried to register the tenancy but this was rejected by the P.R.T.B. On 5th December, 2008, this Court made the P.R.T.B. a notice party and after hearing all submissions, written legal submissions have been submitted and considered by the court.
>
> Counsel for the plaintiff adopts these submissions of the P.R.T.B. and has expressed concern that if this Court has no jurisdiction, it will be left without a remedy or forum to deal with the dispute. An argument has also been advanced on behalf of the plaintiff that the lease in question is not in reality a lease and does not create a relationship of landlord and tenant and also that the term 'lease' was used as a matter of expediency. With regard to the latter

> argument, it is clear that the lease in question incorporates all the usual features common in a genuine lease, including payment of rent, term, covenants *etc*. Accordingly, I do not accept that argument.
>
> The argument of the P.R.T.B. is that as the tenancy is not registered, by virtue of s. 83(2) of the 2004 Act, the P.R.T.B. has no jurisdiction to deal with the dispute; that the plaintiff has already pursued an alternative remedy within the meaning of s. 91 of the Act and therefore the P.R.T.B. has no jurisdiction to deal with the matter and that the lease falls outside the remit of the 2004 Act so the P.R.T.B. has no role to play in the resolution of the dispute.
>
> Section 83(2) of the 2004 Act provides that the Board shall not deal with a dispute in relation to a tenancy referred to it under this Part by the landlord of the dwelling concerned if the tenancy is not registered under Part 7. Accordingly, in the absence of registration the Board has no jurisdiction to deal with this dispute. Counsel on behalf of the P.R.T.B. makes the point that to date a dispute has not yet been referred to it. While s. 134 of the 2004 Act provides that the landlord of a dwelling shall apply to the Board to register the tenancy, so that only a landlord can register a tenancy, it is clear from the submissions of the P.R.T.B. and acknowledged in the affidavit of Mr. Tom Dunne, Chairperson of the P.R.T.B., that the Board has jurisdiction to deal with a dispute referred to it by a tenant (as opposed to by a landlord) even where the tenancy is not registered."

At this stage I pause to make the comment that the affidavit of Tom Dunne sworn on 23rd April, 2009 at para. 6 recounted that the applicant P.R.T.B. received a registration form dated 15th October, 2008 from the second named notice party as tenant of the dwelling, 62 Elmfield Court, requesting the applicant P.R.T.B. to register the tenancy. The applicant, P.R.T.B. responded to this request by letter stating that a tenant cannot register a tenancy and that a landlord is the only party permitted to register a tenancy under the R.T.A. 2004. The applicant P.R.T.B. also wrote to the solicitor for the second named notice party by letter dated 19th November stating that a landlord is the only party permitted to register a tenancy and further asserting that the R.T.A. 2004, having regard to the full title, the short title and the construction of the sections and provisions of the Act only applied to "genuine landlord and tenant situations". It is apparent from the last paragraph quoted in parenthesis above that the P.R.T.B. must have conceded in the Circuit Court that the P.R.T.B. had jurisdiction to deal with a dispute referred to it by a tenant even where the tenancy was not registered. As for the earlier point made on behalf of the applicant Board, being the contention that the lease in question was not in reality a lease and does not create a relationship of landlord and tenant and is merely a device expedient for the collection of service charges, while it may indeed be a useful mechanism for that purpose, the lease is referred to as "a lease" and incorporates all the usual features which one would expect to find in a lease including payment of rent, the terms of the lease and covenants.

The learned Circuit Court Judge then continued:-

> "With regard to s. 91 of the 2004 Act relied upon by the P.R.T.B. – its argument is that as the plaintiff has brought court proceedings the P.R.T.B. has no jurisdiction to deal with the matter as an alternative remedy is being pursued – s. 91(1) provides that to the extent that an alternative remedy is available in respect of any dispute falling within this part, and a person takes any steps to avail himself or herself of that remedy, that person may not refer the dispute to the Board for resolution.
>
> In my view this should be read in conjunction with the preceding section which refers to an arbitration agreement and provides that the matter can be dealt with by arbitration if the tenant so agrees. Furthermore, I find this argument inconsistent with s. 182(1) of the Act which provides that from the commencement of Part 6, proceedings may not be instituted in any court in respect of a dispute that may be referred to the Board for resolution under that Part unless one or more the reliefs set out thereunder is being claimed in the proceedings – none of those reliefs apply in this instance.
>
> I also find this argument inconsistent with one of the main objectives of the Act – that the P.R.T.B. as opposed to the court deal with certain disputes between landlords and tenants heretofore dealt with by the court – the aim of which was to enable such disputes to be dealt with and resolved in a speedy, efficient and cost effective manner (according to the long title to the Act) and obliged the landlord to register the tenancy. On the basis of the P.R.T.B.'s argument, a landlord could choose not to comply with its statutory obligation to register, but could instead issue court proceedings and then circumvent the provisions of Section 182 of the Act. It is also inconsistent with the attitude adopted by a tribunal of the P.R.T.B. in a case referred to by the defendant's counsel in its submissions – in that case of *Collins v. O'Connor* the landlord issued Circuit Court proceedings against the tenant – it agreed not to pursue same if the tenant agreed to the Board dealing with the matter. It was then referred to a tribunal of the Board which proceeded to deal with the dispute on 26th February, 2007, on the basis it had jurisdiction so to do in the circumstances and notwithstanding the earlier institution of Circuit Court proceedings which were not pursued."

Since it was the first named notice party, the management company which sued in the District Court for arrears of service charges, it seems to me that the learned Circuit Court Judge was correct that this was not a bar to the second named notice party making the case that under s. 182 that the proceedings may not be instituted in any court in respect of a dispute that may be referred to the Board for resolution under that Part unless one or more of the reliefs set out thereunder is being claimed in the proceedings and when the position here is that none of those reliefs apply in this instance. I have indicated thus the

preliminary aspects which were argued and disposed of in the Circuit Court.

The nub of this case is the applicant's contention that the respondent Circuit Court Judge erred in law in coming to her decision that the provisions of s. 182 of the R.T.A. 2004 did apply and that proceedings may not be instituted in any court in respect of a dispute that may be referred to the Board for resolution except in the circumstances set out in s. 182 above at (a) and (b) which are not applicable. The exception at (a) involves damages of more than €20,000 and the exception at (b) concerns arrears of rent or other charges or both of more than €60,000 and accordingly are not germane.

It is the applicant's contention that the respondent erred in law in coming to her decision in that (i) it was never the intention of the Oireachtas to include owner occupied long leases within the ambit of the R.T.A. 2004, as the R.T.A. 2004 cannot accommodate nor facilitate the realities of a long lease; and (ii), if the R.T.A. 2004 were so to apply, many of the results would be wholly absurd.

The applicant also submits that the respondent's judgment drew an inference from the fact that there was legislation pending before the Houses of the Oireachtas which would, if passed, explicitly exclude long leases from the remit of the R.T.A. 2004, and the reference to this impending legislation was wholly inappropriate in respect of the contemplation of the task of interpreting the provisions of the R.T.A. 2004. I propose to comment on this criticism of the learned trial judge straight away because this seems to me to be based on a misunderstanding. While it is a fact that written submissions in the Circuit Court did advert to the article by Dr. Áine Ryall of UCC, published in 2006 in CPLJ, this was referred to by the learned Circuit Court judge as an afterthought after she had expressed her view that, if the P.R.T.B. and the management company were correct in their argument that it was never the intention of the legislature that long leases of owner occupied apartments be included in the Act, then in the judge's view, if that indeed was the intention, then the legislature should have expressly excluded such dwellings, as it did with other dwellings specified in s. 3(2). She went on to say that if the draftsperson omitted such a dwelling as this in error, then it was not the function of the court to add to any express statutory provisions to rectify such a mistake. The section is very clear and unambiguous and the function of the court in interpreting a statute is confined to ascertaining the true meaning of each statutory provision. It was only after she had said this and made the point that she had fully taken into account s. 5 of the Interpretation Act 2005, and the submissions made to her by counsel on behalf of the P.R.T.B. and the case law cited on this aspect, that the learned trial judge then added, as an afterthought, the reference to the article which had been referred to by counsel before her, and the fact that it had also been mentioned to her that the Housing (Miscellaneous Provisions) Bill 2008, contained a possible prospective amending provision to s. 3(2) of the 2004 Act, which was to specifically exclude a dwelling such as this from the ambit of the R.T.A. 2004 and this was apparently to be included as one of the exceptions listed in section 3(2). Furthermore, since the article by Dr. Áine Ryall is merely mentioned in a passing reference by the learned trial judge and since this article had been produced in written submissions in the Circuit Court, it was dutifully noted as part of the sequence of events in the evolving development in respect of the R.T.A. 2004, and was only mentioned by her as an afterthought to the statement of the *ratio decidendi* of her decision. Incidentally, I appreciate that

the article describes the exceptions to the wide embrace of the ambit of the Act and enumerates each of the exceptions thereto, and so is factually and practically useful. In any event, I am not aware of any objection having been taken in the Circuit Court to the mention of the reference at the end of the article to the Housing Miscellaneous Provisions Act section as providing an amendment to the R.T.A. 2004, section 3. The Housing (Miscellaneous Provisions) Act 2009, was enacted on the 15th July, 2009, and at Part 7, s. 100 (2)(b), included amendments to the R.T.A. 2004, s. 3:-

> "3. Notwithstanding the definition of "tenancy" in section 5(1), in this section a reference to a tenancy does not include a tenancy the term of which is more than 35 years."

The effect of this would appear to be that a lease or tenancy which is for longer than 35 years is now excluded from the ambit of s. 3(1) of the R.T.A. 2004, where previously such a lease or tenancy was included in the ambit until being exempt from 15th July, 2009, by s. 100(2)(b) above set out adding section 3(3). Counsel for the second named defendant makes the point that the R.T.A. 2004 contains penal provisions with regard to the registration of dwellings as set out in s. 144 of the R.T.A. 2004. He submits that accordingly, the construction of the provisions of the Act which determine which dwellings are within the purview of the Act must be strictly construed (*Mullins v. Harnett* [1998] 4 I.R. 426). He submits that this underlines the imperative that the courts do not stray into the realm of policy making by excluding or including categories of dwellings to be excluded and, in particular, by specifying vague or ill defined categories of dwellings from the ambit of the R.T.A. 2004. He stressed cogently that it was for the legislature and not for the judiciary to define the length of the tenancy or lease which would qualify a long tenancy or lease for exclusion from the ambit of the 2004 Act. Thus, the courts should refrain from trespassing on the legislative preserve of the Oireachtas.

I now return to the applicant P.R.T.B.'s counsel's contention that the learned trial judge was in error in the construing of the R.T.A. 2004 as not applying to the provisions of a long lease. Section 3(2) of the R.T.A 2004 excludes certain dwellings from the remit of its provisions. Counsel for the second named defendant, Gary Mallon, submits therefore, that unless a dwelling falls outside the remit of the R.T.A. 2004 pursuant to s. 3(2), the dwelling will be an appropriate and eligible dwelling for the purposes of dispute resolution, subject to certain conditions being satisfied, under the R.T.A. 2004. Once a dwelling falls within the remit of the 2004 Act, then the tenancy becomes subject to the entire legislative scheme of its proceedings. For ease of reference, I propose to set out s. 3 unamended of the R.T.A. 2004 in its entirety.

> "3(1) Subject to *subsection (2),* this Act applies to every dwelling, the subject of a tenancy (including a tenancy created before the passing of this Act).
>
> (2) Subject *to section 4 (2),* this Act does not apply to any of the following dwellings
>
> > (a) a dwelling that is used wholly or partly for the purpose of carrying on a business, such that the occupier could,

after the tenancy has lasted 5 years, make an application under section 13(1)(*a*) of the Landlord and Tenant (Amendment) Act 1980 in respect of it,

(b) a dwelling to which Part II of the Housing (Private Rented Dwellings) Act 1982 applies,

(c) a dwelling let by or to

(i) a public authority, or

(ii) a body standing approved for the purposes of section 6 of the Housing (Miscellaneous Provisions) Act 1992 and which is occupied by a person referred to in section 9(2) of the Housing Act 1988,

(d) a dwelling, the occupier of which is entitled to acquire, under Part II of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 , the fee simple in respect of it,

(e) a dwelling occupied under a shared ownership lease,

(f) a dwelling let to a person whose entitlement to occupation is for the purpose of a holiday only,

(g) a dwelling within which the landlord also resides,

(h) a dwelling within which the spouse, parent or child of the landlord resides and no lease or tenancy agreement in writing has been entered into by any person resident in the dwelling,

(i) a dwelling the subject of a tenancy granted under Part II of the Landlord and Tenant (Amendment) Act 1980 or under Part III of the Landlord and Tenant Act 1931 or which is the subject of an application made under section 21 of the Landlord and Tenant (Amendment) Act 1980 and the court has yet to make its determination in the matter."

It is to be noted that while s. 3(2)(d) does exclude "a dwelling, the occupier of which is entitled to acquire, under Part II of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978, the fee simple in respect of it", and excludes at (g), "a dwelling within which the landlord also resides", and excludes as well various other categories of dwellings at (a), (b), (c), (e), (f), (h), and (i). However, there is no exclusionary provision in respect of a long tenancy or lease nor is such "a tenancy" or "lease" defined or carefully described, with specified length, terms and features, as in several of the other paragraphs excluding dwellings. Nor is there any such carefully designed exclusionary provision in respect of any expected hypothetical paragraph 3(2((j). Counsel for the applicant contends that, although there is no explicit provision which removes long leases from the

ambit of the R.T.A. 2004, yet nevertheless it is implicit from the provisions of the entirety of the Act that it does not contemplate the type of lessor and lessee relationship created by a long lease. Counsel for the applicant P.R.T.B. submits that it is clear that there was no intention on the part of the Oireachtas to accommodate long leases of owner occupied apartments in the R.T.A. 2004 when one has regard to the Act as a whole. He submits that the counter argument, which points to the absence of such an exclusionary paragraph (j) facilitating an escape from the wide embrace of subsection (1) of section 3 of the R.T.A. 2004, amounts in effect to contending for an "ultra literalistic interpretation" of the R.T.A. 2004 in a way which would lead to "a pointless absurdity". In using this phrase he is referring to and echoing the graphic words of Henchy J. in the case of *Nestor v. Murphy* [1979] I.R. 326 at 330. Counsel goes on to contend that by adopting a literal interpretation of the R.T.A. 2004 the respondent, the learned trial judge, fell into error which went to the heart and core of the jurisdiction and in respect of this submission he relies on comments made by Henchy J. in *The State (Holland) v. Kennedy* [1977] I.R. 193. Before analysing the relevance of these two cases I propose, for ease of reference, to set out the provisions of s. 5 of the Interpretation Act 2005 which states as follows:-

> "5(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of -
>
> (i) in the case of an Act to which *paragraph* (a) of the definition of 'Act' in section 2 (1) relates, the Oireachtas, or,
>
> (ii) in the case of an Act to which *paragraph* (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where the intention can be ascertained from the Act as a whole."

Counsel for the applicant contends that, as he submits is required by s. 5 of the Interpretation Act 2005, the respondent ought to have applied a purposive interpretation to the R.T.A. 2004, so as to achieve what was intended by the legislature. Section 5 of the Interpretation Act 2005, he submits, provides that if in construing a provision of any Act (a) that is obscure or ambiguous, or (b) that on a literal interpretation a provision of an Act would be obscure or ambiguous, absurd or would fail to reflect the plain intention of the Oireachtas, then the provision should be given a construction that reflects the plain intention of the legislature, where the intention can be ascertained from the Act as a whole. He submits that courts may consider the enactment as a whole entity in order to identify the scheme envisaged by an enactment which is to be considered as an entirety. It is presumed that the legislature intends to create logical and smooth working schemes to achieve its legislative objective. He contends that

consideration of the purpose allows the Court to go beyond pure strict textualism and to consider the intended objectives of the legislation. The consequences of a statute are legitimate considerations in interpretation. It is presumed that the legislature does not intend its provisions to have absurd, impractical and inconvenient results. Accordingly, counsel says that it is the applicant's submission that the respondent's decision has created incongruous results and fails to reflect the intention of the legislature. In short, he laments that the respondent held that she could not adopt a more teleological or purposive approach.

It may be helpful if I interject to make clear that the opposition of counsel for the second named defendant to this contention of the P.R.T.B. is based on the premise that the clear meaning of s. 3 is as stated simply and plainly in the wording of Section 3 as set out above. Furthermore, there is no subsection (j) excluding a long lease from the embrace of s. 3(1) or defining what the legislature regards in this context as the features of such a long lease and its essential characteristics and its vital time frame, thus maintaining the stance that the intention of the legislature is to be derived from the words of the R.T.A. 2004 as a whole and from the phrases actually enacted which mean what they say and are neither obscure, ambiguous or absurd. Moreover since the drafter and the legislature have tackled the task of setting out the exclusionary provisions in s. 3(2)(a) to (i), but have not mentioned a long tenancy or lease or defined it with the meticulousness and care of the other exclusionary provisions in (a) to (i), then the maxim embodied in the canon of construction *expressio unius est exclusio alterius* meaning "to express one thing is to exclude another" appears in the context to be apt, in point and to apply. This canon is an aspect of the principle *expressum facit cessare tacitum* which translates or as "something expressed nullifies what is unexpressed" or "what is expressly made (provided for), excludes what is tacit". David Dodd in his useful "*Statutory Interpretation in Ireland"* at p. 145 in para. 5.89 states:

> "Where the legislature in the text deems it appropriate to expressly cater for particular matters, and could have included other matters, but did not, then the inference arises that such omissions are deliberate and that such matters are intended to be excluded from the provision. The maxim is at its strongest where the legislature enumerates certain matters connected by a common theme, class or category, as opposed to covering them by general words, but omits certain things from the list. The maxim operates by indicating the legislature's intention by implication or inference."

The second matter to be remembered is that the Interpretation Act 2005 must be construed in a manner consistent with the Constitution and in particular, Article 15.2 thereof in respect of the legislative preserve of the Oireachtas. In this regard, the Interpretation Act should not be used as a device to enable the courts to legislate. Counsel for the applicant conceded that s. 3(2) excludes certain specific types of dwellings from the remit or inclusive ambit of the R.T.A. 2004. It apparently has been stated that the list in that s. 3(2) is exhaustive and cannot be supplemented save by amending legislation and that this is accepted by the second named notice party as being correct. It is noted that the nine categories of the dwellings are specified with considerable precision as qualifying for exclusion. Neither counsel for the applicant nor counsel for the second named

notice party had submitted that the dwelling in this case belongs to any of the exclusionary categories listed. Thus the only way in which the dwelling in this case can be removed from the ambit of the Act in the submission of the second named notice party is by an explicit insertion into s. 3(2) of the Act of a further exclusionary provision assuming that the list cannot be supplemented otherwise. Thus the second named defendant is contending that a formula of words excluding a long lease and defining a long lease for the purposes of exclusion is explicitly required. Secondly, counsel for the second named notice party submits that to imply a further exception at s. 3(2) amounts to legislation. Counsel submits on behalf of Mr. Mallon that any exception must be specified with a degree of precision similar to the nine existing exceptions. Moreover he contends that it simply cannot be for the courts each time to hear conflicting arguments and then to hold in case after case whether or not a dwelling can be the subject of an implied exception until the point is reached when it can be said with certainty that a dwelling is or is not within the remit of the Act. This second ground of opposition to the applicant's contention that a purposive approach to the construction of the Act should be applied is based on the doctrine of the separation of powers, as outlined in Article 15.2.1 of the Constitution of Ireland:-

> "1°. The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.
>
> 2°. Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures."

Counsel for Mr. Mallon contends that the provisions of s. 5 of the Interpretation Act 2005 must be construed in a manner consistent with the Constitution and in particular, Article 15.2 thereof cannot be used as a device to enable the courts to legislate. There is support for this in the case of *McGrath v. McDermott* [1988] I.R. 258, where Finlay C.J. held at p. 276:-

> "The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective. What is urged upon the court by the Revenue in this case is no more and no less than the implication into the provisions of either s. 12 or s. 33 of the Act of 1975 of a new subclause or sub-section providing that a condition precedent to the computing of an allowable loss pursuant to the provisions of s. 33, sub-s. 5, is the proof by the taxpayer of an actual loss, presumably at least coextensive with the artificial loss to be computed in accordance with the sub-section.
>
> In the course of the submissions such a necessity was denied but

> instead it was contended that the real, as distinct from what is described as the artificial, nature of the transaction to be looked at by the court, and that if they were, the section could not apply to them.
>
> I must reject this contention. Having regard to the finding in the Case Stated, that these transactions were not a sham, the real nature, on the facts by which I am bound, of this scheme was that the shares were purchased and the purchaser became the real owner thereof; that shares were sold and the vendor genuinely disposed thereof and that an option to purchase shares really existed in a legal person legally deemed to be connected with the person disposing of them.
>
> In those circumstances, for this Court to avoid the application of the provisions of the Act of 1975 to these transactions could only constitute the invasion by the judiciary of the powers and functions of the legislature, in plain breach of the constitutional separation of powers."

In short, the opposing contention to the applicant's submission for a widely extended interpretation is that the listing of exceptions to the provisions of s. 3 is clear and is expressed to apply to every dwelling the subject of a tenancy unless expressly excluded in subparas. (a) to (i) of section 3(2). Because of the listing of exceptions to the Act in s. 3 it is clearly implied that any dwelling, subject to a lease which is not explicitly excepted, is included within the ambit of s. 3 (1). Having set out the two conflicting contentions in respect of the interpretation of this legislation, I now propose to set out the bones of the two conflicting view points on this and also the arguments put forward citing case law assisting in the construction of the two opposing contentions.

The applicant P.R.T.B.'s approach to interpreting the legislation

The applicant's submission is that the respondent trial judge's decision has created absurd results and has failed to reflect the intention and purpose of the legislature. Counsel for the applicant refers to s. 5(1) of the Interpretation Act 2005, which I reiterate for ease of reference:-

> "In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –
>
> (i) in the case of an Act to which *paragraph* (a) of the definition of 'Act' in section 2(1) relates, the Oireachtas, or,

(ii) in the case of an Act to which *paragraph* (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where the intention can be ascertained from the Act as a whole."

When one considers s. 3(1) indicating the applicability of the provisions of the R.T.A. 2004 "to every dwelling, the subject of a tenancy (including a tenancy created before the passing of this Act)", there is neither obscurity nor ambiguity about the wording. The ambit of the application of the provisions of the Act is clearly wide yet subject to the exceptions specifically enumerated and set out in subparas. (a) to (i) in section 3(2). Each of the exceptions in the subparas. (a), (b), (c), (d), (e), (f), (g), (h), and (i) are carefully set out and precisely worded and so it is clearly difficult to argue that the provision is obscure or ambiguous. Furthermore at subs. 3(2)(d) it is stated that:-

> "a dwelling, the occupier of which is entitled to acquire, under Part II of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978, the fee simple in respect of it."

It is clear that the drafter contemplated dwellings held under a lease of a length sufficient to qualify under the grounds rents legislation. The *maxim expressio unius est exclusio alterius* can be translated as "to express one thing is to exclude another" and in this case it would seem that where the legislature has deemed it appropriate expressly to prescribe in the text particular matters for exclusion from the wide ambit of s. 3(1), it could have included such significant qualifying criteria for such a long lease, by setting out provisions as to what it regarded as the appropriate features as to length of term, covenants and other essentials of such a long lease. Since the Oireachtas has chosen not to do this, then the inference arises that such an omission is deliberate and that such matters as the inclusion of a long lease among the exceptions has been considered and deliberately excluded. Accordingly the inference can be taken that since a long lease has not been mentioned nor delineated and described that such an obvious candidate for exclusion from the ambit and embrace of the R.T.A. 2004 has been deliberately omitted and was intended by the Oireachtas to be left out from among the categories specifically excluded from the wide ambit of the provisions of section 3(1). The maxim is taken to be especially strong where the legislature has enumerated certain matters connected by being in a category, but then specifically does not include a particular matter in the category but actually omits this particular expected eligible item from inclusion. It is ironic and somewhat confusing that this omission is from the category of being among the matters subject to exclusion from the wide ambit of the general embrace of section 3(1).

I note for completeness that the Explanatory Memorandum to the R.T.A. 2004 expressly states: "This memorandum is not part of this Act and does not purport to be a legal interpretation. It outlines at p. 1 that "s. 3 spells out the scope of this Act. It does not apply to formerly rent controlled and <u>long occupation lease tenancies</u> and to holiday or business lettings. It also does not apply to owner-occupied or social housing". (Underlining added). It is noteworthy that s. 3(2)(f) and (g) of the R.T.A. 2004 itself, unequivocally mentions holiday, formerly rent

controlled, business and owner-occupied dwellings for exclusion but omits the mention of long occupation lease tenancies in this category.

Counsel for the applicant criticised the learned trial judge for the reference to Dr. Ryall's article and I do not propose to rely on either the comment in her article about the then anticipated legislation or on the contents of the explanatory memorandum, apart from commenting that if the drafter did intend to exclude some types of long leases, then why was this category not included at a subpara. (j) for clarity and certainty, particularly when other categories to be excluded were carefully enumerated, defined, described and set out.

Since s. 3 of the R.T.A. 2004 is neither obscure nor ambiguous, counsel for the applicant concedes this and instead contends that on a literal interpretation the provisions of s. 3 would be absurd or would fail to reflect the plain intention of the 2004 Act and the provision should be given a construction that reflects the plain intention of the Oireachtas where the intention can be ascertained from the Act as a whole. Counsel points out that the courts may analyse the enactment as a whole in order to identify the scheme envisaged by such an enactment considered in its entirety and also submits that it is presumed that the legislature intends to create logical and smooth working schemes to achieve its legislative objective. The court can contemplate the intended objectives of the legislation and the consequences of a statute which are legitimate considerations for the purpose of interpretation. The applicant's submission is that the respondent trial judge's decision has created absurd results and fails to reflect the intention of the legislature.

As an aid to interpreting legislation, counsel refers to Bennion's *Statutory Interpretation*, 5th Ed. at Part XXI entitled "Construction against 'Absurdity'" which recites in that context a number of presumptions and principles which should be applied when interpreting legislation. Firstly, there is a presumption that an absurd result is not intended by the legislature. Absurd in this context means "out of harmony with reason or propriety; incongruous, unreasonable, illogical". He adopts Bennion's phrase at p. 969 that "the court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter mischief". Counsel for the applicant relies on several cases to illustrate the construction against absurdity. In *Nestor v. Murphy* [1979] I.R. 326 the provision in question was s. 3 (1) of the Family Home Protection Act 1976 which stated:

> "Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then … the purported conveyance shall be void."

The defendant husband and wife had executed a contract whereby they agreed to sell and assign their house to the plaintiff. The defendants failed to complete the sale and the plaintiff claimed in the High Court an order directing specific performance by the defendants of the contract of sale. At the hearing of the plaintiff's action the defendants contended that the contract for sale was rendered void by the provisions of s. 3 subs. 1 of the Act of 1976 because the

defendant wife had not given her written consent to the making of the contract of sale prior to the execution thereof. The High Court ordered the specific performance by the defendants of the contract of sale. On appeal by the defendants it was held by the Supreme Court (Henchy, Kenny and Parke JJ.) in disallowing the appeal that the purpose of the Act of 1976 precluded an interpretation of s. 3, subs. 1 which would have the result of applying the provisions of that subsection to a conveyance or contract for sale which had been executed by both spouses by mutual consent. At p. 328, Henchy J. explained why the Supreme Court was ordering a specific performance.

> "A surface or literal appraisal of s. 3, sub-s. 1 might be thought to give support to the defendant's objection to the contract . . . . That subsection states:- 'Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2) and (3) and section 4, the purported conveyance shall be void'. Subsections 2 and 3 of s. 3 and s. 4, are not applicable to this case. By reason of the definition in S. 1 subs. 1 the contract signed by the defendants is a 'conveyance'. Therefore, the argument runs, the provisions of s. 3 sub-s. 1 make the contract void because a spouse (the husband), without the prior consent in writing of the other spouse, "conveyed" an interest in the family home to the plaintiff.
>
> The flaw in this interpretation of s. 3 subs. 1, is that it assumes that it was intended to apply when both spouses are parties to the 'conveyance'. That, however, is not so. The basic purpose of the subsection is to protect the family home by giving a right of avoidance to the spouse <u>who was not a party to the transaction</u> (underlining added). It ensures that protection by requiring, for the validity of the contract to dispose and of the actual disposition, that the non-disposing spouse should have given a prior consent in writing. The point and purpose of imposing the sanction of voidness is to enforce the right of the non disposing spouse to veto the disposition by the other spouse of an interest in the family home. The subsection cannot have been intended by Parliament to apply when both spouses join in the 'conveyance'. In such event no protection is needed for one spouse against an unfair and unnotified alienation by the other of an interest in the family home. The provisions of s. 3, subs. 1, are directed against unilateral alienation by one spouse. When both spouses join in the 'conveyance', the evil at which the sub-section is directed does not exist.
>
> To construe the sub-section in the way proposed on behalf of the defendants would lead to a pointless absurdity. As is conceded by counsel for the defendants, if their construction of s. 3 subs. 1 is correct, then either the husband or the wife could have the contract declared void because the other did not give a prior consent in writing. Such an avoidance of an otherwise enforceable obligation would not be required for the protection of the family home when both spouses have entered into a contract to sell it.

Therefore, it would be outside the spirit and purpose of the Act.

In such circumstances we must adopt what has been called a schematic or teleological approach. This means that s. 3, sub-s. 1 must be given a construction which does not overstep the limits of the operative range that must be ascribed to it, having regard to the legislative scheme as expressed in the Act of 1976 as a whole. Therefore the words of s. 3, subs. 1 must be given no wider meaning than is necessary to effectuate the right of avoidance given when the non-participating spouse has not consented in advance in writing to the alienation of any interest in the family home. Such a departure from the literal in favour of a restricted meaning was given this justification by Lord Reid in *Luke v. Inland Revenue Commissioners* [1963] 1 A.C. 557 when he said at p. 577 of the report:-

> 'To apply the words literally is to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words. This is not a new problem, though our standard of drafting is such that it rarely emerges. The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result that the words of the enactment must prevail.'"

Counsel for the applicant then submits that to include long leases within the remit of the R.T.A. 2004 creates absurd results. He submits, for example, that Part II of the R.T.A. 2004 sets down a list of minimum obligations which both the landlord and tenant must comply with and which are implied into every tenancy agreement. Under s. 12 of the R.T.A. 2004, the landlord's repair obligations include compliance with the minimum standards set down in the Housing (Miscellaneous Provisions) Act 1992 at all times and this is not limited to external structures but includes structures within the dwelling itself such as repairs and replacement of fittings as are necessary from time to time. The landlord must also reimburse the tenant for any expenses for carrying out repairs to the structure or the interior of the dwelling. He points out that this is in stark contract to the lease agreement between the first named notice party and the second named notice party by the S. & L. Management Co. Ltd. and Gary Mallon, where the management company is only responsible for the external structure and common areas. To impose further repair obligations on a management company where they are also responsible for repairs to the interior of the dwelling would not only be unworkable, given the role a management company ordinarily plays but it would increase the service charges which the management company would have to charge to carry out such repairs, etc. for all of its lessees. This would apply to all management companies as it is standard in long leases of this kind that a management company would only be responsible for the external structure and common areas. Secondly, counsel submitted that from the second named notice party's perspective, pursuant to s. 16 of the R.T.A. 2004, a tenant must allow the landlord access to the dwelling at

reasonable intervals, notify the landlord of any defect in the premises which needs repair including the interior of the dwelling, and must inform the landlord of all persons ordinarily residing in the dwelling, not assign or sublet without the written consent of the landlord and not to alter or improve the dwelling without the written consent of the landlord (which includes the painting of the dwelling). He makes the point that there is a radical difference between the obligations under the R.T.A. 2004 and the obligations of both parties under the lease agreement. He submits that these statutory minimum obligations would have to be implied into the lease agreement as a result of the respondent's decision. For example, under para. 4 of the fifth schedule of the lease agreement dealing with lessee covenants, the lessee is required to keep the "premises and all parts thereof and all fixtures and fittings therein and all additions thereto in good and tenantable state of repair, decoration and condition throughout the continuance of this demise including the renewal and replacement of all worn or damaged parts and shall maintain and uphold and whenever necessary for whatever reason reconstruct and replace the same and shall yield up the same at the determination of this demise, in such good and tenantable state of repair, decoration and condition". This provision imposes the primary repair obligation on the second named notice party and also imposes an obligation on him to "reconstruct and replace" which under the 2004 Act is imposed on the landlord. In fact, if a tenant carries out repairs under the R.T.A. 2004 Act, the landlord must reimburse him or her for any expenses incurred. It is clear that the two types of "tenancies" operate entirely differently and the tenancy before the court could not have been envisaged by the legislature as falling under the ambit of the R.T.A. 2004. However, more importantly, although it is possible to create more favourable terms for the tenant pursuant to under s. 18(2) of the R.T.A. 2004, it is the applicant's position that imposing a repair obligation on the tenant is certainly not more favourable to the tenant and is contrary to s. 18 of the R.T.A. 2004 and would therefore be void. This is a standard clause contained in long leases and all such clauses would be deemed void if the dwelling were to fall within the ambit of the R.T.A. 2004. This absurd result would lead to radical changes to the relationship of a lessor and lessee where properties have been purchased under similar long leases. Counsel continues in this vein by referring to the anomaly of rent reviews when the lease dated 23rd May, 2003 in this instance has a peppercorn rent of €0.05 per annum. This was never a market rent but it would be open to the first named notice party to seek a rent review which would increase the rent owed so it would be set at a market rent, which even would prejudice the second named notice party substantially and would also trouble thousands of other lessees of other apartments who are holding under similar leases. Counsel also refers to the difficulty that would arise if the second named notice party wanted to let the flat and would have to seek permission to do this from the first named notice party, S. & L. Management Co. There are also the difficulties which counsel points out as existing if the provisions of the R.T.A. 2004 are applied to such a lease as that under which the second named defendant holds the apartment. Certainly the application of the terms of the R.T.A. 2004 to this lease does bring several incongruities and anomalies to the fore and into the glare of reality, albeit we have not yet set out the counter-arguments on behalf of the second named notice party. However, even at this stage it may be useful to remark that at the core of this case is the substantive point succinctly made by the learned trial judge who said at the bottom of p. 3 of her judgment:-

> "While the argument put forward on behalf of both the plaintiff and the P.R.T.B. is to the effect that it was never the intention of

> the legislature that long leases of owner occupied apartments be included in the Act, in my view if that was the intention then the legislature should have expressly excluded such dwellings as it did with other dwellings specified in s. 3(2). If the draftsperson omitted such a dwelling as this in error then it is not the function of the court to add to any express statutory provision to rectify such a mistake. The section is very clear and unambiguous and the function of the court in interpreting a statute is confined to ascertaining the true meaning of each statutory provision. In this regard I have fully taken into account s. 5 of the Interpretation Act 2005 and the submissions made to me by counsel on behalf of the P.R.T.B. and the case law cited on this aspect."

Counsel for the applicant further contends that the literal interpretation of the legislation as adopted by the respondent fails to reflect the plain intention of the legislature. In numerous decisions, reference is made to the primary aim of statutory interpretation which is the discernment of the intention of the legislature. In *Mulcahy v. Minister for Marine*, (Unreported, High Court, Keane J., 4th November, 1994), stated at p. 23 that:-

> "While the court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."

In *Rahill v. Brady* [1971] I.R. 69 at p. 86 Mr. Justice Gardner Budd stated that:-

> "While the literal construction generally has *prima facie* preference, there is also the further rule that in seeking the true construction of a section of an Act the whole Act must be looked at in order to see what the objects and intentions of the legislature were."

Thirdly, in *C. (R) & Others v. Minister for Health* [2008] 1 I.E.S.C. 33 at p. 36, Finnegan J. (in the Supreme Court; Murray, Kearns, Finnegan JJ.) stated that

> "The Interpretation Act 2005, section 5 permits a departure from a literal interpretation where it fails to reflect the plain intention of the Oireachtas and instead allows the giving of a construction that reflects the plain intention."

Murray C.J. agreed with Finnegan J. in this case.

Counsel went on to cite cases which indicate that it is not always necessary to exclude in express terms matters that are fundamentally foreign to the policy or purpose of an Act. In *Hutch v. The Right Honourable The Lord Mayor Alderman & Burgesses of Dublin* [1993] 3 I.R. 551 the applicant made a claim under the Malicious Injuries Act 1981 in respect of property which represented the proceeds of crime. Counsel for the applicant submitted that if the legislators wanted to exclude the entitlement to compensation, it would have been easy for the legislature to so provide. The Supreme Court rejected this view at p. 564 holding that 'it is not necessary for the legislation to exclude in express terms something which is fundamentally foreign to its policy and purpose'. Similarly in *Representatives of Terence Chadwick deceased and Sheelagh Davis Goff v. Fingal County Council* [2004] 1 I.L.R.M. 521, the applicant contended that the

Planning and Development Act 2000 provided for compensation arising from compulsory purchase even where there was no actionable wrong. This was rejected by O'Neill J. at p. 538 stating that:-

> "The principle that no compensation should be paid where the injury would not otherwise attract damages is of course not expressly included in s. 63 or in any other provision of the Act of 1845. The proposition stated in this principle would appear to me to be so obvious as to hardly require express statement. If this were an issue of interpretation of a contract in which it was claimed that the above principle was an implied term, I would have no hesitation in concluding that the 'bystander test' was satisfied."

Counsel for the applicant further drew support from the long title setting out the purpose of the R.T.A. 2004 in that the long title identifies the remit of the legislation as being *inter alia* an Act which will provide:-

> "(b) For amendments of the Law of Landlord and Tenant in relation to the basic rights and obligations of each of the parties to tenancies of certain dwellings,
>
> (c) with the aim of allowing disputes between such parties to be resolved cheaply and speedily, for the establishment of a body to be known as . . . the Private Residential Tenancies Board and the conferral on it of powers and functions of a limited nature in relation to the resolution of such disputes."

The main change introduced by the R.T.A. 2004 was the establishment of the Private Residential Tenancies Board to deal with disputes between landlords and tenants of certain dwellings whose functions and powers would be of a limited nature. The R.T.A. 2004 provides for a measure of security of tenure for tenants which security will operate in four year cycles, specified minimum obligations applying to landlords and tenants which cannot be contracted out of, rent to be determined by the concept of market rent and termination of tenancies to be assessed by gradated notice periods linked to the duration of a tenancy. Once a dwelling to which the R.T.A. 2004 applies then it is not possible to contract out of its provisions.

Counsel for the applicant drew attention to the fact that there are a number of examples in the legislation which illustrate that it was not the intention of the Oireachtas to cater for long leases. These are as follows:-

> (a) The Part 4 provisions envisage tenancies operating in four year cycles. Although it is possible to create more favourable security of tenure provisions for a tenant, creating a lease for a period of 500 years when the maximum period afforded under the 2004 Act is four years is an indication that the legislature never intended to cater for leases of such a lengthy nature.
>
> (b) Linked with (a) is the requirement to register a tenancy at the commencement of each four year cycle. A management company would be required to register the tenancy every four years of the

500 year lease incurring further costs for the lessee.

(c) In the event of the second named notice party wishing to sublet the dwelling, then a subtenant would have automatic Part 4 tenancy rights and the lessee subletting a tenancy would not be entitled to rely on the probationary period of six months.

Also the primary repair obligation is imposed on the landlord under the R.T.A. 2004 whereas the primary repair obligation is imposed on the tenant under the lease agreement made between the first named notice party and the second named notice party. Furthermore, counsel for the applicant submits that if a tenancy falls within the ambit of the R.T.A. 2004 then all of the provisions of the Act must be adhered to and it is not possible to contract out of its provisions. However, there is a stark difference between the type of landlord and tenant relationship envisaged in the R.T.A. 2004 and the landlord and tenant relationship which arises between the first named notice party and the second named notice party. In short it is the applicant's contention that the R.T.A. 2004 cannot accommodate a long lease because it would mean that parties to long leases would have to change radically the content of their lease agreement so as to comply with the provisions of the R.T.A. 2004. I have already touched on the criticism in the applicant's submission that the respondent was influenced by the proposed amendment to the R.T.A. 2004. I think that the *ratio decidendi* of the learned Circuit Court judge's decision was that if the intention was that long leases of owner/occupied apartments should be specifically excluded from the ambit of the Act, then on this her reasoning was clearly stated: "in my view if that was the intention then the legislature should have expressly excluded such dwellings as it did with other dwellings specified in s. 3(2). If the draftsperson omitted such a dwelling as this in error then it is not the function of the court to add to any express statutory provisions to rectify such a mistake. The section is very clear and unambiguous and the function of the court in interpreting a statute is confined to ascertaining the true meaning of each statutory provision." It was only subsequently that the learned Circuit Court judge added her remarks about Dr. Ryall's article and she referred to the fact that the counsel for the defendant, without objection as far as I am aware in the Circuit Court from the management company or the P.R.T.B., referred to the Housing (Miscellaneous Provisions) Bill, 2008, which contains the amending provision to s. 3(2) of the R.T.A. 2004 to exclude specifically a dwelling such as this (apartment) from the ambit of that Act and include it as one of the exceptions listed in section 3(2). She added:-

"In my view this would suggest a recognition that such dwellings need to be expressly excluded as they have not been heretofore."

Indeed, the Circuit Court judge had already referred to the article by Dr. Áine Ryall of UCC published in 2006 in the CPLJ in which Dr. Ryall had specifically noted: that as things stand it appears that the R.T.A. also applies to long leases of dwellings (including those created on "sales" of apartments) although this was plainly not the intention of the draftsman. An amendment by way of primary legislation is required in order to eliminate any doubt on this important practical point" (2006 11(1) CPLJ 4). (Ryall, Residential Tenancies Act 2004: Update and Review). I have quoted this extract from the judgment so that the criticism may be understood and taken in the context of no objection to the production and discussion of Dr. Ryall's Article in the Circuit Court.

This remark about the intention of the drafter was not conceded by counsel for the second named notice party. For completeness and accuracy, I should point out at the actual amendment in the R.T.A. 2004 inserted by s. 100 of the Housing (Miscellaneous Provisions) Act 2009 into section 3 of the R.T.A. 2004 was by s. 100(2):-

> "Section 3 of the Act of 2004 is amended –
>
> (a) . . .
>
> (b) by inserting the following subsection:
>
> "(3) Notwithstanding the definition of " tenancy" in section 5(1), in this section a reference to a tenancy does not include a tenancy the term of which is more than 35 years."

I would regard the amending provision to s. 3(2) of the 2004 Act to specifically exclude a dwelling such as this from the ambit of that Act and to include it as one of the exceptions listed in section 3(2) as being similar in effect to the subsection inserted by s. 100(2)(b) by inserting the following subsection into section 3 of the R.T.A. 2004:-

> "Notwithstanding the definition of 'tenancy' in section 13(1), in this section a reference to a tenancy the term of which is more than 35 years."

In aid of this criticism counsel for the applicant referred to *Cronin (Inspector of Taxes) v. Cork and County Property Company Limited* [1986] I.R. 559 at p. 572 in which Griffin J. sitting in the Supreme Court with Henchy and McCarthy JJ. held that Finlay P. in the High Court had been correct in answering the Case Stated and reversing the finding of the Circuit Court that the ordinary principles of commercial accounting demand that the profits of an accounting period consisted of the difference between the receipts of the accounting period and the expenditure laid out to earn those receipts. These principles were applicable to calculate the profit of a trade for tax purposes subject to the express prohibitions contained in the relevant statutes. Secondly, Finlay P. held that the evaluation method laid down in s. 18 of the Finance (Miscellaneous Provisions) Act 1968, as amended only applied to circumstances specified in the section. Those circumstances did not arise in relation to the dealings of the taxpayer, and accordingly, the ordinary principles of commercial accounting applied. On appeal by the respondent company it was held by the Supreme Court in dismissing the appeal

> 1. that the profit of a trade or business for tax purposes are those calculated by means of ordinary method of commercial accounting as modified by legislation; and
>
> 2. that where stock is bought and sold within an accounting period there is no question of valuing the stock within the period. In order to arrive at a true assessment of the profits gained by the trading in land it is therefore not necessary to have regard to the method of valuation provided for by s. 18. There is an ultimate paragraph of Griffin J.'s decision which has the *per curiam*

statement which counsel draws to the attention of this Court:-

> "With regard to the submission of counsel for the company that the amendment of s. 18 by s. 29 of the Finance Act 1981 was an implied acceptance by the Oireachtas of the construction of s. 18 for which they contended, the Court cannot in my view construe a statute in the light of amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be."

Both Henchy J. and McCarthy J. agreed with the judgment of Griffin J.

Counsel for the applicant submits that the respondent was influenced by the proposed amendment to the 2004 R.T.A. in coming to her decision where it is stated by the respondent at p. 4 of the judgment as follows:-

> "It is unfortunate that such steps were not taken although counsel for the defendant has referred to the Housing (Miscellaneous Provisions) Bill 2008 which contains an amending provision to s. 3(2) of the 2004 Act to specifically exclude a dwelling such as this from the ambit of the Act and include it as one of the exceptions listed in s. 3(2). In my view this would suggest a recognition that such dwellings need to be expressly excluded as they have not been heretofore."

Counsel for the applicant ingeniously links this submission in respect of the suggestion that the learned Circuit Court judge was influenced by the subsequent amending legislation into allowing the subsequent amending legislation to affect her decision on the interpretation of the provision. I think that the crucial words in her decision is that previous trenchant finding: "if it was never the intention of the legislature that long leases of owner/occupied apartments be included in the Act, then in my view if that was the intention then the legislature should have expressly excluded such dwellings as it did with other dwellings specified in s. 3(2). If the draftsperson omitted such a dwelling as this in error, then it is not the function of the court to add to any express statutory provisions to rectify such a mistake". This is the kernel and *ratio decidendi* of her decision. My understanding is that both the article by Dr. Áine Ryall of UCC in the CPLJ 2006 had been opened to her as well as the Housing (Miscellaneous Provisions) Bill 2008, which contained in draft an amending provision to s. 3(2) of the 2004 Act specifically excluding a dwelling such as the apartment in this case from the ambit of the R.T.A. 2004 and include it as one of the exceptions listed in s. 3. I think that she mentioned this for completeness in dealing with counsel's argument, and this was understandable in the light of the fact that apparently no objection was taken to the introduction of Dr. Ryall's article or of the amending provisions in the Housing (Miscellaneous Provisions) Bill 2008. She

has subsequently reiterated her view that it is clear from s. 3(1) of the 2004 Act that all dwellings are included by the provisions of the R.T.A. 2004 save those expressly excluded as set out and specified in s. 3(2), that this is a dwelling to which the Act applies and the Court is precluded from dealing with the dispute. Since the Bill was altered before enactment in s. 100 of the Housing (Miscellaneous Provisions) Act as set out above, it would seem that after 15th July, 2009 the lease of the second named notice party would be excluded from the ambit of section 3(1) of the R.T.A. 2004.

Submissions on behalf of the second named notice party

The second named notice party is the occupier of an apartment dwelling held under lease from the first named notice party, the S & L Management Company Limited, for a term of 500 years at an initial rent of €0.25 per annum. It was submitted by the second named notice party that the court has no jurisdiction in this matter by virtue of the then subsisting provisions in s. 3 of the R.T.A. 2004. This assertion was disputed by both the applicant, the P.R.T.B. and the first named notice party. Counsel on behalf of the second named notice party submitted that the relationship between the first and second named notice parties was that of landlord and tenant as defined by s. 3 of Deasy's Act 1860:-

> "The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and the reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent."

The second named notice party relied on the provisions of s. 3, s. 75 and s. 182 of the R.T.A. 2004 as meaning that the Act applied to his tenancy, that the dispute being in respect of alleged arrears of service charges was capable of being referred to the P.R.T.B. and that the court had no jurisdiction in the matter.

The applicant's complaint is that the decision of the respondent was wrong in law in that it would produce an absurd result and was made without full consideration of the submissions of the applicant. The second named notice party submits that the respondent was correct in law in reaching the impugned decision. Furthermore his counsel submits that s. 5 of the Interpretation Act 2005 must be construed in a manner consistent with the Constitution and in particular Article 15.2 therefore and cannot be used as a device to enable the court to legislate.

Submission of the second named notice party in respect of the correct approach to interpretation of the R.T.A. 2004

Counsel submits that it is for the court and the court alone to interpret legislation. It was held by Barr J. in *Shannon Fisheries Board v. An Bord Pleanála* [1994] 3 I.R. 449 at p. 456 that:-

> "Statutory interpretation is solely a matter for the court and no other body has the authority to usurp the power of the court in performing that function …. In the present case, the meaning of the provision is not free from doubt and, therefore, it is a matter for the court to interpret the regulation."

It follows therefore that the views of the P.R.T.B. itself are not relevant in interpreting the legislation, notwithstanding that it was set up by the legislation and empowered to apply the legislation. In fact, in the course of the hearing, it was conceded that the tenant did have entitlement to apply to the P.R.T.B. although the Board had sent considerable correspondence refuting the suggestion that the tenant was entitled to apply to the Board.

Counsel's second proposition was that legislation must be interpreted by the words in which the Oireachtas expressed itself. Again, it was stated by Barr J. in *P.J. v. J.J*. [1992] I.L.R.M. 27 that:-

> "A court is entitled to interpret legislation so as to resolve any ambiguity or obvious error therein. However, where the statute is clear in its terms, the court has no power to extend its provisions to make good what is perceived to be a significant omission. If the court took that course it would entail going beyond statutory interpretation and into the realm of law making, a function which under the Constitution is reserved to the Oireachtas. Occasionally circumstances arise where the court is powerless to avoid injustice." ([1992] I.L.R.M. 27 and [1993] 1 I.R. 150 at pp. 154/5)

In the important case of *McGrath v. McDermott* [1988] I.R. 258, Finlay C.J. in an appeal from the High Court in respect of a case in which the series of transactions was avowedly a tax avoidance scheme and had no other purpose but the steps taken were real as distinct from sham transactions, Finlay C.J. held at p. 276:-

> "The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable."

Further down on p. 276 Finlay C.J. continued:-

> "Having regard to the finding in the case stated, that these transactions were not a sham, the real nature, on the facts by which I am bound, of this scheme was that the shares were purchased and the purchaser became the real owner thereof; that shares were sold and the vendor genuinely disposed thereof and that an option to purchase shares really existed in a legal person legally deemed to be connected with the person disposing of them.
>
> In those circumstances, for this court to avoid the application of the provisions of the Act of 1975 to these transactions could only constitute the invasion by the judiciary of the powers and

> functions of the legislature, in plain breach of the constitutional separation of powers."

At p. 279 in the case McCarthy J. stated:

> "The first canon of construction of statutes is that words are to be given their ordinary meaning; . . .. Such a result may well appear as unfortunate as it is unintended, but if it follows from legislation which is reviewed in every Financial Bill, it is not for this or any other court to attempt to rewrite part or whole of the section. The Oireachtas is equipped to devise fair and effective taxation programmes in which discipline this Court has no expertise. The taxpayer has relied upon the constitutional prohibition of legislation by any legislative body other than the Oireachtas; I do not think it necessary to consider the full implications of this part of the argument; I am content to hold that upon the application of the ordinary canons of construction and statutory interpretation, the argument for the Revenue would involve this Court in either rewriting or adding to the actual wording of the subsection; this the Court cannot do."

Counsel adopts this reasoning and in particular the saying of Finlay C.J. that: "the courts have not got a function to add to or to delete from express statutory provisions so as to achieve objectives which to the courts appear desirable." Counsel makes this a main plank in his argument and submits that in this case s. 3(1) of the R.T.A. 2004 is clear as to the wide ambit of application of the Act. The Act is expressed to apply to every dwelling the subject of a tenancy. A number of exceptions are listed at s. 3(2). It is very clear that the second named notice party's dwelling is the subject of a lease and is not within any of the exceptions listed and accordingly is within the scope of application of s. 3 of the R.T.A. 2004 which applies to every dwelling, the subject of a tenancy (including a tenancy created before the passing of this Act.) The provisions dealing with the exceptions will be exempted from the inclusive ambit of the Act are carefully set out and described in sub-section 2(a), (b), (c), (d), (e), (f), (g), (h) and (i), none of which descriptions of listed and described dwellings includes the apartment of the second named notice party. Section 3 is clearly and precisely expressed. For example section 3(2)(d) involves a dwelling, the occupier of which is entitled to acquire, under Part II of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978, the fee simple in respect of it. Counsel submits that this is a clear recognition by the Oireachtas that some dwellings subject to long leases are captured by s. 3(1). The lease must be for longer than 50 years in order to allow the lessee to acquire the fee simple under the 1978 Act. Counsel also makes the point that the maxim "*expressio unius est exclusio alterius*" is relevant and in point in this situation as by listing exceptions to the inclusive net of the Act, it is clearly implied that any dwelling, subject to a lease, which is not explicitly excluded then is included, provided it is within the wide ambit of s. 3(1).

The applicant submitted originally that because the tenancy was not registered the P.R.T.B. had no jurisdiction to deal with a dispute. This is true in a case of a reference by a landlord, which is easily remedied by the landlord registering the tenancy but it is not correct in the case of a reference by a tenant. It had been suggested by the applicant P.R.T.B. that the non-registration of a tenancy removes it from the jurisdiction of the P.R.T.B. and this operates to confer a

jurisdiction on the court. Counsel for the second named notice party maintains that this is incorrect and would produce an absurdity if true. For if a landlord of an unregistered tenancy, and therefore in breach of his obligations under the R.T.A. 2004, is involved in a dispute he would have the option of registering the tenancy and proceeding through the P.R.T.B. or alternatively proceeding through the courts. On the other hand, a landlord of a registered tenancy who is legally compliant would have no choice but to proceed through the P.R.T.B. However, my understanding is that the applicant Board has now conceded that the tenant has a right to make application to the Board.

Long Leases and the R.T.A. 2004

Counsel for the applicant submitted that s. 3(2) excludes certain dwellings from the remit of the R.T.A. 2004 and that the list in s. 3(2) is exhaustive and cannot be supplemented except by legislation, unless by inference from the entirety o f the enactment. It is accepted by the second named notice party that this is correct. The nine categories of excluded dwelling are specified with considerable precision. Neither the applicant P.R.T.B. or the Management Company submitted that the dwelling in this case belongs to any of the categories listed. Counsel for the second named notice party submits that the only way in which the dwelling in this case can be removed from the remit and ambit of the R.T.A. 2004 is by an explicit insertion of a formula of words in the s. 3(2) of the Act given that the list cannot be supplemented.

Counsel for Mr. Mallon then submitted that to insert into or to imply a further exception into s. 3(2) amounted to legislation. Furthermore any exception must be specified with a degree of precision similar to the nine existing exceptions. He submits that it cannot be for the courts to hold in case after case whether or not a dwelling can be the subject of an implied exception until the point is reached when it can be said with any certainty that a dwelling is or is not within the remit of the R.T.A. 2004. He emphasises that the quotation of Finlay C.J. from *McGrath v. McDermott* [1988] I.R. 258 at p. 276 above:-

> "The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the court appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective. What it is urged upon the Court by the Revenue in this case is no more and no less than the implication into the provisions of either s. 12 or s. 33 of the 1975 Act of a new sub-clause or subsection providing that a condition precedent to the computing of an allowable loss pursuant to the provisions of s. 33, subs. 5 is the proof by the taxpayer of an actual loss, presumably at least as extensive with the artificial loss to be computed in accordance with the subsection. For this court to avoid the application of the Act of 1975 to these transactions could only constitute the invasion by the judiciary of the powers and functions of the legislature, in plain breach of the constitutional separation of powers."

He then further submitted that the decision of Denham J. in *Howard v.*

Commissioner of Public Works [1994] I.R. 101 at p. 162, sets out the approach to be adopted in construing legislation:-

> "Statutes should be construed according to the intention expressed in the legislation. The words used in the statute best declare the intent of the Act. Where the language of the statute is clear we must give effect to it, applying the basic meaning of the words. There is well established case law on this aspect of statutory construction.
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> Thus in *In Re MacManaway* [1951] A.C. 161 at p. 169, Lord Radcliffe, in dealing with a reference for advice as to a question as to the meaning of certain words which were contained in the House of Commons (Clergy Disqualification) Act 1801 said:-
>
> > 'The meaning which these words ought to be understood to bear is not to be ascertained by any process akin to speculation. The primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act use the words in dispute.'
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> In *Davies Jenkins & Co. Limited v. Davies* [1968] A.C. 1097 at p. 1120, Lord Morris of Borth-y-Gest stated:-
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> > 'I understand that it is accepted that when Parliament enacted s. 18 of the Finance Act, 1954, it must have proceeded on the basis that it was not necessary for the purposes of s. 20 of the Finance Act, 1953, that the recipient company should be trading at the time of the receipt of a subvention payment. This, in my view, neither relieves the Courts from giving free and untrammelled consideration to the interpretation of s. 20 nor does it furnish material for their guidance in so giving it. It is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.'
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> In *R. v. Wimbledon Justices ex parte Derwent* [1953] 1 Q.B. 380, Lord Goddard C.J. stated at p. 384:-
>
> > 'We are not concerned with that because, although in construing an Act of Parliament the court must always try to give effect to the intention of the Act and must look not only at the remedy provided but also at the mischief aimed at, it cannot add words to a statute or read words into it which are not there, and, if a statute has created a specific offence, it is not for this Court to find other offences which do not appear in the statute.'
>
> In *Cox v. Hakes* [1890] 15 A.C. 506, Lord Herschell stated at p.

528:-

> 'It is not easy to exaggerate the magnitude of this change; nevertheless it must be admitted that if language of the legislature, interpreted according to the recognised canons of construction, involve this result, your Lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the legislature.'

In Craies on *Statute Law* (7th Ed.) at p. 67 it is stated:-

> 'Even though a court is satisfied that the legislature did not contemplate the consequences of an enactment, a court is bound to give effect to its clear language.'

Halsbury's *Laws of England* (4th Ed.) (Vol. 44) states at paras. 863 and 864 respectively:-

> 'Primary meaning to be followed. If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning.

Speculation as to Parliament's intention is not permissible. If the result of the interpretation of a statute according to its primary meaning is not what the legislature intended, it is for the legislature to amend the statute construed rather than for the courts to attempt the necessary amendment by investing plain language with some other than its natural meaning to produce a result which is thought the legislature must have intended.'

The correct conclusion to be drawn is that the plain language of the Act must not be extended beyond its natural meaning so as to supply omissions or remedy defects. The court should neither misconstrue words so as to amend defects in the legislation nor legislate to fill gaps left by the legislature. If there is a plain intention expressed by the words of a statute, then the court should not speculate but rather construe the Act as enacted.

Applying the rules of the interpretation of statutes, in accordance with the fundamental concepts of the Constitution, it would be improper to give a strained construction to the Act of 1963 (Local Government (Planning and Development) Act 1963). Dealing with the fundamental concept, the balancing of rights and powers under the Constitution, the primary and literal approach to the construction of the statute is appropriate."

Counsel added the submission that there was no intention on the part of the Oireachtas to exclude all long leases. The Oireachtas considered one category of long lease, being that described above in s. 3(2)(d) and excluded it and by implication must have intended to include other categories. It must be assumed

that the Oireachtas deliberated carefully upon the legislation and enacted it after due consideration. It may have departed, for example, from the terms of the Report of the Commission of the Private Rented Sector for some or any reason which it deemed sufficient. A Report or White Paper is no more than a recommendation or suggestion to the Oireachtas and is not of itself law. It is of relevance only in resolving ambiguity in a provision if such an ambiguity exists. In the present situation the wording of s. 3 of the R.T.A 2004, is simple and clear, and is not obscure or ambiguous.

Consideration of R.T.A. 2004 as a whole.

With regard to consideration of the R.T.A 2004 as a whole, counsel submitted that the submissions of the applicant, at their highest, went no further than to show that the inclusion of dwellings of the kind occupied by the second named notice party in these proceedings was an oversight on the part of the Oireachtas, being a failure to exempt and exclude such an apartment from the general inclusions. The submissions did not show how another category of dwelling could have been included in s. 3(2) of the Act by implication. In fact, it was conceded that such an extension of s. 3(2) was not possible. This is consistent with the decision of the Supreme Court in the case of *The State (Murphy) v. Johnson* [1983] I.R. 235, where Griffin J. held that any attempt to substitute "Part V of the Act of 1968" for "Part III of the Act of 1968" would amount to amendment of s. 23 of the 1978 Act rather than interpreting it and this was a function of amending legislation reserved solely to the Oireachtas. This case was one of the many cases spawned by the legislation in respect of driving with an unlawful concentration of alcohol in the body contrary to s. 49 of the Road Traffic Act 1961. At the trial of the prosecutor in the District Court, he was convicted by the respondent District Court Judge or a complaint that the prosecutor had driven a vehicle in a public place at a time when he had unlawful concentration of alcohol in his body, contrary to s. 49 of the Road Traffic Act 1961. At the trial, the concentration of alcohol in the prosecutor's body at the relevant time was proved by, *inter alia*, a certificate issued by the Medical Bureau of Road Safety pursuant to s. 22 of the Road Traffic (Amendment) Act of 1978. Section 23 of that Act provided that such certificate shall, unless the contrary is shown, be sufficient evidence of compliance by the Bureau with all the requirements which the Bureau is obliged to comply with by Part III of the Act of 1978 "or under Part III of the Act of 1968". The reference to Part III of the R.T.A. 1968, appears to be a mistake since that Part III was concerned with driving licences and not with driving offences, while a reference to Part V of the Act of 1968 would have been more suitable. The prosecutor relied upon that mistake when he applied in the High Court and obtained a conditional order of *certiorari* quashing his conviction, unless cause were shown to the contrary. The High Court allowed the cause shown and discharged the conditional order. On appeal by the prosecutor, it was held by the Supreme Court (O'Higgins C.J., Griffin and Parke JJ.), in disallowing the appeal, (1) that the reference in s. 23 of the Act of 1978 to Part III of the Act of 1968 was an obvious error which the court would not attempt to remedy by treating the erroneous reference as being a reference to Part V of the Act of 1968, since to adopt that course would be to amend the enactment and to usurp a function of the legislature. (2) that proof of compliance with the provisions of Part V of the Act of 1968 was not necessary for a successful prosecution under s. 49 of the Act of 1961, while proof of compliance with the provisions of Part III of

the Act of 1978 had been necessary at the trial of the prosecutor and had been supplied by the certificate of the Bureau. O'Higgins C.J. at p. 239 said:-

> "On the hearing of this appeal counsel on behalf of the respondent has urged this Court to hold that, having regard to the obvious nature of the error which appears in s. 23, subs (1) and (2) of the Act of 1978, it is competent for a court or judge to read the reference to Part III of the Act of 1968 as a reference to Part V of that Act. I do not accept that submission. Whatever the reason for the apparent error may be, the reference in s. 23 subs. (1) and (2) of the Act of 1978 is to 'Part III of the Act of 1968'. That reference is clear and unambiguous. To read it as being something other than it is would be, in effect, to amend the subsections. That is not within the competence of the courts and cannot be done."

At p. 240, Griffin J. said that he agreed with the judgment of the Chief Justice, and enlarged on this by stating:-

> "It is for the Oireachtas alone to make laws; the function of the courts is to interpret and construe them. Under the common law, broad rules of construction of statute were laid down. These still apply, subject to the reservation that we now operate under a written constitution. Under these rules, the courts should not proceed on assumption that the legislature has made a mistake, as there is "a strong presumption" that the legislature does not make mistakes. However, mistakes do occasionally occur in printing or in drafting and, if it is possible, the words of a statute must be construed so as to give a sensible meaning to them *ut res magis valeat quam pereat*. In the last century it was held to be possible, in certain circumstances, to treat obvious misprints as if they had been rectified."

This case emphasises the caution exercised by the court not to usurp the sole and exclusive power of making laws for the State which is vested in the Oireachtas.

Counsel then referred to s. 5 of the Interpretation Act 2005, which has been set out above and referred to the construing of a provision of an Act which is obscure or ambiguous or on a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas. He submitted that the Oireachtas has chosen in this instance to proceed by way of including all dwellings which are the subject of a tenancy and to exclude dwellings, which meet precise criteria in s. 3(2) of the R.T.A. 2004. Counsel submits that the presumption is of inclusion rather than exclusion. It is clear that the scheme of the Act was to avoid devising criteria for the categories of leased dwellings to be included in the scheme. This is not absurd, he submits, as it makes the law certain and avoids the difficulty of having leases devised which would thwart the overall objectives of the scheme. He submits that it is for the Oireachtas alone to add to or vary the categories of dwelling which are to be included in the scheme and which are to be specifically put in a category which is to be defined for exclusion from the wide embrace of the scheme. The drafting of s. 3 in subparas. (a) to (i) shows readiness to set out the description of the exemptions with a degree of specific and precise categorisation. It is the province of the Oireachtas alone to deal with matters involving policy and to add to or vary the categories of dwelling to be specified and defined for exclusion from the scheme. Moreover, he submits that

this is not be done on a case by case basis by the courts, because this would be for the courts to trespass on the demesne of the legislature and, particularly where there is a lacuna in the Act in relation to long leases and the characteristics and features of such leases which would qualify such long leases to be included in a further category (j) or a subsection 3(3) of exclusion from the ambit of s. 3(1). There is no definition of a long lease included in the Act and there is no guidance given in the Act as to the terms including the length of such a lease or the types of terms and conditions to be included in such a lease as would qualify it for exclusion from the ambit of section 3(1).

Counsel for the second named notice party makes the point that in fact many of the provisions which counsel for the applicant referred to as being inappropriate in respect of the provisions of the R.T.A. 2004, in effect can be adapted to fit in with the requirements of the R.T.A. 2004. For example, the repair obligations imposed by the 2004 Act on the landlord can be dealt with by the members of the Management Company agreeing in general meeting to carry out necessary repairs on units leased by them or to indemnify the Management Company for the costs of repairs carried out by the Management Company in respect of a unit leased by a member. It is also the case that where a lease imposes repair obligations on a tenant, these will be applied if it is to the advantage of the tenant. With regard to rent review, s. 19 of the R.T.A. 2004 merely provides that the rent cannot be greater than the market rent. There is no prohibition on charging rent which is less than the market rent so the fact that the rent is €0.25 per annum is irrelevant. In the event of a review, the appropriate rent may be determined by reference to the criteria laid down in the Act. Any dispute about the appropriate level of rent may have been referred to the applicant under s. 78 of the Act. The applicant would have been able to take into account the length of the lease and the premium paid upon its commencement in determining an appropriate level of rent. In particular, the applicant would be in a position to ensure that all units in the development were charged the same rent. Since all of the leaseholders paying the rent are all members of the Management Company, it may safely be assumed that an excessive level of rent would not be sought from any or all of the leaseholders.

Section 26 of the R.T.A. 2004 states as follows:-

> "Nothing in this Part operates to derogate from any rights the tenant enjoys for the time being (by reason of the tenancy concerned) that are more beneficial for the tenant than those created by this Part."

Since the existing lease is more beneficial to the second named notice party with regard to security of tenure, his tenancy is not and never becomes a Part 4 tenancy, and the submissions of the applicant in this regard appear to be incorrect. Also, counsel contends that it is not unreasonable for the Management Company to be aware of the names of all persons residing in a dwelling, since there may well be security and safety implications if it is not known who is residing in each dwelling within an apartment block, nor is it absurd for the second named notice party to seek the consent of the Management Company before subleasing his dwelling. This is consistent with the good and orderly management of an apartment complex. This is a requirement of the lease in any case and so it cannot be considered to fly in the face of reason. Section 187 of the R.T.A. 2004 does no more than assist any subtenant of an apartment who

may well have a more immediate concern with the management than his own landlord to resolve difficulties he may have such as blocked stairways or noise or pollution or other nuisances. Counsel also contests the submission of the applicant that there should be a limitation of the meaning of s. 3(2) of the Act as this was not necessitated by the examples given on behalf of the applicant and this does not resolve the question as to how a long lease can be enforced with sufficient or any precision from the provisions of the R.T.A. 2004.

Counsel contests the submission made on behalf of the applicant that there should be a limitation on the meaning of s. 3(2) of the Act as this was not necessitated by the examples cited by the applicant and this does not in any way resolve the question as to how a long lease can be inferred with sufficient precision from the wording of the Act. In particular, counsel submits that there is nothing in the R.T.A. 2004 which would enable the question to be resolved as to how a long lease can be inferred with precision as to the length of such a lease and the terms and conditions and covenants involved in such a lease or what characteristics thereof there needs to be for it to be exempted from the ambit of s. 3(1) of the Act.

Counsel for the second named notice party makes two further points. First, the R.T.A. 2004 contains penal provisions with regard to the registration of dwellings as set out in s. 144 of the Act. He submits that accordingly the construction of the provisions of the R.T.A. 2004, which determined which dwellings are within the purview of the Act, must be strictly construed (*Mullins v. Harnett* [1998] 4 I.R. 246). It is, he submits imperative that the court does not stray into the realm of excluding or including categories of dwellings and in particular, well defined categories of dwellings from the ambit of s. 3 of the Act. Secondly, counsel submits that the structure of s. 3 is based on a rational and sensible approach. In the event of express inclusion, it would be easier to devise leases which would circumvent the categories specified in the Act. Enforcement action is also made easier by the fact that the prosecuting authority does not have to show that a dwelling was within a category defined by the Act. As things stand, once it is established that a dwelling is the subject of a lease, it is a relatively simple matter to decide if it falls within one of the precisely defined exceptions excluding this lease from the ambit of the Act. Counsel further contends that counsel for the applicant was incorrect in stating that there never was an intention to deal with long leases in the bill given that there is express mention in the Act of those leaseholders who are entitled to acquire the fee simple in respect of their dwelling. Finally, counsel points to a lacuna at s. 3(2) in the Act and points particularly to the lack of a further exclusionary provision at (j) or s. 3(3) by which preferably clearly described and defined longer leases would be excluded from the ambit of s. 3(1) of the Act. In the absence of such a further exemption provision or such other exclusion provision as fits the policy of the Act and commends itself to the Oireachtas, there is a void on the basis of the provisions being as they were at the time when the learned Circuit Court Judge gave her decision. Because of the maxim on the lines that if one sets out exceptions then by naming these, it is implicit that any further exclusionary clause, which is omitted, is to be taken as having been deliberately omitted by the Oireachtas. Furthermore, the provisions of such an exclusionary provision making certain long leases exempt from the scope of s. 3(1) are not described, nor are the covenants and features of and length of term thereof defined or set out in the Act either explicitly or implicitly. This is especially the case when the

features of such an exempting provision are neither explicit nor implicit nor to be deduced from the entire of the Act particularly as to the terms, length and features of any probable necessarily contemplated amending exclusionary clause.

In summary, the conclusion is that the decision of the respondent was correct and it is for the legislature and not for the courts to fill the gap if the Oireachtas so chooses. The courts should not be seduced by siren voices into trespassing on the legislative preserves of the Oireachtas. This is especially the case of the features of such an excluding provision and exempting legislation are at present in a void which it is for the legislature to fill and not for the courts to try to remedy by a process of case by case decision.

I have concluded that the learned Circuit Court Judge was correct in that if the provisions of s. 3(1) were not to apply to long leases of owner occupied apartments then the legislature should have expressly excluded such dwellings with clear descriptions and definitions of such long leases as were being excluded from the ambit of s. 3(1), just as was done to so exclude other dwellings as specified in s. 3(2)(a) – (i) inclusive. I agree that if the person drafting the Act omitted such a dwelling as this in error then it is not the function of the court to concoct an appropriate exclusionary provision at (j) or s. 3(3) to rectify such a mistake. The section is clear and unambiguous and the function of the court in interpreting a statute is confined to ascertaining the true meaning of each statutory provision and the courts have no license to trespass on the policy making and legislative role of the Oireachtas in devising amending legislation. It is, indeed, clear from s. 3(1) of the 2004 Act that all dwellings are included by s. 3 of that Act save those expressly excluded as set out and specified in s. 3(2) so that this apartment is a dwelling to which the Act applies and the court is precluded from dealing with the dispute in respect of the service charges. Accordingly, the court must refuse the reliefs sought by the applicant. I will hear counsel as to the appropriate orders to be made on foot of these findings.