Neutral Citation Number: [2010] IEHC 454

THE HIGH COURT

JUDICIAL REVIEW

COMMERCIAL

2010 552 JR

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

TRISTOR LIMITED

APPLICANT

AND

THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT, DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND (BY ORDER)

CRADDER

NOTICE PARTY

JUDGMENT of Mr. Justice Clarke delivered the 10th December, 2010

1. Introduction

1.1 On the 11th November last I delivered judgment on the main issues arising in these proceedings ("the principal judgment"). For the reasons set out in the principal judgment, I came to the view that two specified directions given by the Minister under s. 31 of the Planning and Development Act 2000 ("the 2000 Act") must be quashed. I went on to note, at para. 9.1., that it did not necessarily follow that the development plan which is at the heart of these proceedings had to be adopted in the form in which it was prior to the Minister's intervention by means of the directions to which I have referred. I, therefore, left over all questions as to the orders that required to be made to a further hearing. Parties are described and terms are used in this judgment in the same way as in the principal judgment.

1.2 The further hearing to which I have referred occurred and this judgment is directed to the issues which arose at it. At para. D of the statement of grounds in these proceedings, Tristor sought a large range of reliefs. However, those reliefs can be grouped in the following way:-

> (a) Paragraphs D(i) and D(ii) which seek orders of *certiorari* directed to the two ministerial directions to which I have already referred;
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> (b) Paragraphs D(iii) and D(iv) which sought orders of *certiorari* seeking to quash an initial resolution passed on the 10th March by Dún Laoghaire Rathdown Council in compliance with the ministerial directions to which I have referred and the final adoption of the Dun Laoghaire Rathdown County Development Plan 2010-2016 on the 11th March, which plan included the amendment made by virtue of the resolution of the 10th March;
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> (c) Various declaratory reliefs which do not add significancy to the substance of the matters referred to at (a) and (b) above; and
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> (d) Paragraph D(ix) in which a declaration is sought to the effect that Dún Laoghaire Rathdown Council is "obliged to reinstate the designation and land use zoning at Carrickmines as a district centre" for the purposes of the relevant development plan.

1.3 All parties were agreed that the reliefs referred to at (a) necessarily followed from the principal judgment. Likewise, it was accepted that, with the exception of the matter referred to at (d) above, the remainder of the declaratory relief did not add anything to the substantive *certiorari* reliefs sought.

1.4 The debate, therefore, turned on the reliefs sought at (b) and (d) above and was directed to the question of whether, and if so to what extent, it was appropriate for the court to quash the resolutions adopted by Dún Laoghaire Rathdown Council subsequent to its receipt of the ministerial directions which are the subject of these proceedings and, to the extent that it might be appropriate to quash either or both of those resolutions, what the status of the process for the adoption of a development plan by Dún Laoghaire Rathdown Council actually is.

1.5 On those issues, the State respondents indicated that they had no views. Tristor argued that the orders of *certiorari* referred to at (b) logically flowed from the principal judgment and also sought the declaration referred to at (d). Dún Laoghaire Rathdown Council opposed both of those applications.

1.6 Against that background it is appropriate to turn to the issues.

2. The Issues
2.1 The first set of issues concern, therefore, the question of whether it is appropriate to quash the original resolution passed by the Dún Laoghaire Rathdown Council on the 10th March, on receipt of the relevant ministerial directions, which had the effect of changing the zoning of the relevant lands at Carrickmines to objective E. As was pointed out in the principal judgment, the way in which Dún Laoghaire Rathdown Council gave effect to the ministerial directions was to pass that resolution of the 10th March, making that change.

2.2 Thereafter, on the 11th March Dún Laoghaire Rathdown Council adopted the entire development plan including the amendment as to the zoning of Carrickmines, which had been put in place on the 10th March. The second set of issues concerns whether, and if so to what extent, it is appropriate to interfere by way of *certiorari* with that development plan.

2.3 In the event that it is appropriate to quash some or all of the development plan, then further issues arise as to what is now to happen given the clear statutory imperative contained in the 2000 Act to the effect that a development plan must be formulated.

2.4 However, it seems to me that the issues which arise are logically best dealt with in the order in which I have set them out. In addition, the first two questions seem, at least to a significant extent, linked. I, therefore, propose to turn first to the consequences of the quashing of the ministerial directions.

3. The Consequences of Quashing the Ministerial Directions
3.1 The facts which underlie the issues in these proceedings need repeating at this stage. There clearly was a difference of opinion between various parties concerning the appropriate zoning for the relevant lands at Carrickmines. Tristor sought that same be zoned as a district centre. The County Manager took a different view. The Minister made submissions or representations largely in line with the views of the County Manager. Ultimately, when the draft development plan was adopted, the local representatives sided with Tristor and the designation of the relevant lands in that draft development plan was as a district centre.

3.2 In that context, it is appropriate to note the statutory process for the formulation of a development plan. The statutory intent is that a new development plan be adopted not later than six years after the previous development plan was put in place. Section 11(1) of the 2000 Act provides that, not later than four years after the previous development plan is adopted, a relevant planning authority must give notice of its intention to review the development plan and prepare a new development plan. A period of consultation follows. Section 11(4)(a) requires that, not later than sixteen weeks after the notice to which I have referred, the City or County Manager concerned must prepare a report on any submissions or observations received as a result of that consultation process. That report is submitted to the elected members of the planning authority (or a committee if thought appropriate) who are given power (under subs. (4)(d)) to issue directions to the manager in relation to the preparation of a draft development plan.

3.3 The manager is then required, under subs (5), to prepare a draft development plan which, subject to such amendments as may be put in place within eight weeks of the submission of the draft development plan to the elected members, becomes the draft development plan for the purposes of the legislation.

3.4 There follows a further period of consultation both with members of the public, the Minister and certain other specified parties. There is again provision for a report from the County Manager on any submissions or observations received in accordance with that consultation process.

3.5 In that context, it is important to note the provisions of s. 12(5) and (6) of the 2000 Act which require the elected members to consider the draft plan, the report of the manager to which I have just referred and, subject to subs (7), permits the elected members by resolution to accept or amend the draft and "make the development plan accordingly". The reference to subs (7) is a reference to the requirement that, in the event that any proposed amendment would be a material alteration of the draft, public notice of such a proposal must be made followed by a further period of public consultation, culminating in a report from the manager on any submissions or observations received as a result of that public consultation. The elected members are then required to consider the relevant amendment and the report of the manager on that public consultation as a result of which the members are required (by subs 10(a)) by resolution "having considered the amendment and the manager's report" to make the plan with or without the proposed amendment.

3.6 The statutory scheme is, therefore, one designed to ensure that there is proper public consultation at all stages in the process. The formulation of the draft development plan is not merely an administrative stage in the process leading to the formulation of the development plan itself. Rather, it is a formal step in the process designed to put interested members of the public on notice of what is under consideration and invite the observations of any such interested parties. The reason for the requirement to engage in a further period of public consultation where there is a material proposal to amend the development plan is equally clear. Persons who have an interest in all or certain aspects of the development plan are likely to consult the draft development plan when published to see if it accords with their wishes. Persons who find relevant parts of the draft development plan to be in accordance with their views, may choose not to make any representations because they are happy with what they see. It would be a most ineffectual form of public consultation if parties could be lulled into a sense of security by what they see in a draft development plan, only to find that amendments are made post the draft development plan stage on which they would have wished to have made observations had they known that material changes were under consideration.

3.7 It is clear, therefore, that, in the ordinary way, the formulation of a development plan is constrained by the statutory process which I have described precisely because it is necessary that it be so constrained in order that all interested members of the public and other relevant bodies are given a fair opportunity to have their views considered as part of the process. It is in that context that the ministerial direction needs to be seen.

3.8 Section 31(1) allows the Minister to make mandatory directions to a relevant local authority which are designed to "ensure that the development plan, when made, is in compliance with" the 2000 Act. There can be no doubt, and the parties did not dispute, but that an amendment of the zoning of the relevant Carrickmines lands from "district centre" to "Objective E" would have been material in the context of the development plan as a whole. It follows that it would not have been open to the elected representative of Dún Laoghaire County Council, in the absence of a valid ministerial direction under s. 31, to have amended the plan in the way in which they did on the 10th March, without engaging in the further public consultation required under the 2000 Act. Whether, having regard to the time limits contained within the Act, it would have been open to the Council at that late stage to have proposed a material alteration must, indeed, be doubted. However, be that as it may, the fact is that the resolution passed by the elected

representatives on the 10th March could only have been validly passed if there were a ministerial direction in place, for any attempt by the elected representatives to amend the draft development plan in the manner contained in that resolution would have been *ultra vires* the elected members (by reason of the absence of having invoked the material alteration consultation process), in any other circumstances.

3.9 The question which, therefore, arises is as to whether the amending resolution of the 10th March can stand if the ministerial direction falls, for without the ministerial direction there is no doubt but that the resolution could not have been passed. In that regard, counsel for Dún Laoghaire Rathdown Council places reliance on the jurisprudence of the courts which is to the effect that it does not necessarily follow that in all circumstances there can be no legally valid consequences of an invalid determination.

3.10 There will, of course, be a whole range of circumstances in which the courts may have to consider the knock on effect of a finding that a particular decision in the planning process is invalid. Each such case is likely to turn both on its own facts and the precise statutory issue with which the court is concerned. However, it seems to me that the overriding principle ought to be that the court should do its best to ensure that parties do not inappropriately suffer or, indeed gain, by reason of invalid decision making and that, insofar as it may be possible so to do both on the facts and within the relevant statutory framework, the situation should be returned to where it would have been had the invalid decision not taken place. The extent to which it may be possible to achieve that overall principle is likely to vary significantly from case to case.

3.11 It is also important to note the principle identified in *Glencar Explorations Plc & Anor v. Mayo County Council* [1993] 2 I.R. 237 where, on the facts of the case then in question, Blayney J. was happy to remove one aspect (*i.e.* the mining ban in question) from a development plan based on his finding that the inclusion of such a ban was *ultra vires* the county council concerned. Blayney J. was prepared, therefore, to leave the remainder of the development plan in place. It seems to me that the approach of Blayney J. in *Glencar,* is an aspect of another overriding principle which is to the effect that the court should only interfere with the planning process to the minimum extent necessary to right the consequences of any invalid decision. The extent to which it may be possible so to do by the exercise of a narrow excising of an offending part of a document will, of course, be very dependent again on the facts of each individual case. There are aspects of development plans, for example, which have an overall affect on the development prospects for the local authority area in question. Certain aspects of the development plan may necessarily be interactive with other aspects. The legitimate interests of the public generally or third parties may come into play. However, it seems to me that the principle behind the decision of Blayney J. in *Glencar* is that the court should at least look to see if there is some relatively straightforward and limited interference with the development plan as adopted which can be engaged in by the court for the purposes of undoing the consequences of a successfully impugned decision. It may not always prove possible so to do, but it should be the port of first call.

3.12 Applying those general principles to the facts of this case, it seems to me that it is appropriate both to quash the decision of the 10th March, and to quash that aspect of the adoption of the development plan which zoned the lands in question in these proceedings as Objective E. It seems to me that to take any other course would be to confer an inappropriate validity on the ministerial directions contrary to the findings made in the principal judgment.

3.13 For the reasons already analysed, the elected members did not have a legal entitlement to propose the amendment of the zoning of the lands in question from district centre to Objective E unless there was in place a ministerial directive. While they may well be circumstances in which, for one reason or another, a court either cannot or should not treat actions taken on foot of an invalid decision as necessarily being themselves invalid, it does not seem to me that this case is one of them. Not only is it clear on the facts that the elected members would not have taken the decision contained in the 10th March resolution were it not for the ministerial direction, it is also clear that they would have had no legal power to take that decision in the absence of such a direction. In those circumstances to treat the 10th March resolution as valid would be, as a matter of substance, to treat the ministerial direction as itself valid.

3.14 It is also worthy of some note to consider what alternative there might be. If a local authority, faced with a ministerial direction under s. 31 over which there was at least some doubt as to its validity, were to take legal advice, what should it do. If it were to comply with the ministerial direction then, if the argument put forward on behalf of Dún Laoghaire Rathdown Council be correct, and even if the ministerial direction proved to be invalid, nonetheless the development plan will be irrevocably altered by compliance with that ministerial direction. If a third party, potentially aggrieved by such a ministerial direction, were to invite the court to intervene prior to the adoption by the local authority of measures designed to comply with the ministerial direction, then the court would be faced with, on the one hand, the possibility that if the court did not immediately restrain the local authority, a decision made to comply with the ministerial direction might not be capable of being reversed, while if the court were to restrain the local authority, then the mandatory statutory time limits for the finalisation of a development plan might be breached. Neither of those eventualities are desirable.

3.15 It seems to me that a valid ministerial direction under s. 31 is a necessary pre-condition to the exercise by the elected local representatives of their power to amend a draft development plan without going through the further public consultation process to which I have already referred. It seems to me to logically follow that, in the event that the relevant ministerial direction is found to be invalid, then the actions taken on foot of that ministerial direction must likewise be taken to be invalid.

3.16 Likewise, I am satisfied that, following the principles laid down in *Glencar Exploration*, it is possible on the facts of this case to engage in a very narrow quashing of the portion of the development plan which derives from the resolution of the 10th March. This is not one of those cases where may to be a whole range of interacting measures where it would be impossible to say what might have happened in the event that the ministerial direction had not been made. Rather, it is a case, like *Glencar,* where the court can have a significant amount of comfort in treating the alteration contained in the 10th March resolution as being a more or less standalone matter.

3.17 In those circumstances, it seems to me that it is appropriate to make an order quashing the resolution of the 10th March and also quashing that part of the resolution adopting the development plan which designates the zoning of the relevant Carrickmines lands as Objective E. It remains to consider what the consequences of those two orders, and particularly the second of them, should be.

4. The Consequences

4.1 In *Usk & District Residents Association Ltd v. An Bord Pleanála* [2007] IEHC 86, Kelly J. had to consider what the consequences should be of quashing a decision of An Bord Pleanála on the facts of the case in question. Kelly J. identified that no question had been

raised in the proceedings as to the validity of the relevant planning process up to a point described in the judgment as the first inspector's report. On that basis Kelly J. remitted the matter back to the Board. The overriding principle behind any remedy in civil proceedings should be to attempt, in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act. The court should not seek to do more than that, but equally the court should not seek to do less than that. The extent to which it may be possible to do so will, of course, depend on the facts and the legal framework within which any invalid decision may have taken place. As Kelly J. pointed out in *Usk & District Residents Association*, to have required the applicant in that case to go back to the beginning and start with a wholly new planning application would have been unfair in circumstances where there was nothing wrong with the planning process up to a certain and relatively late stage of that process.

4.2 It seems to me that like considerations apply in this case. The process for the formulation of the development plan with which I am concerned had no difficulty attaching to it until what has turned out to be an invalid ministerial direction was received. In my view the proper remedy is to remit the matter back to Dún Laoghaire Rathdown Council, but on the basis that the council is now in the same position as it would have been on the day or days when it received the relevant ministerial directions but needs to consider the matter on the basis of the statutory process that had already been validly conducted up to that date.

4.3 The first difficulty stems from the fact that the legislation does not address the question of what is to happen if a particular provision or provisions in a development plan are found to be invalid. It is thus left to the court to attempt to deal with such a situation based on first principles. It seems to me that, in the circumstances of this case, the appropriate course of action to adopt is to remit the matter back to Dún Laoghaire Rathdown Council who will be required to adopt an appropriate zoning in respect of the relevant Carrickmines lands. However, in determining what the appropriate zoning is to be, the elected members are required to operate on the basis that a valid process, up to and including the early days of March of this year, had been engaged in. If, having regard to the time limits specified in the 2000 Act, it would not, at that stage, have been open to the elected representatives to have proposed a material alteration in the development plan, then it does not seem to me that the elected members have any authority to now propose such a material alteration. The purpose of the order of this Court is to restore matters insofar as it is possible to the position where matters lay immediately prior to the invalid exercise by the Minister of his power under s. 31. Where matters lay was that the draft development plan contained a district centre zoning and no proposal for a material alteration to that plan had been put forward as of that time.

4.4 I should emphasise that it is no function of this Court to decide what the proper zoning of any lands within the functional area of a local authority should be. That is a matter for the elected local representatives together with the Minister in circumstances where a valid exercise of ministerial power is engaged in. The sole function of this Court is to fashion an order which puts matters back into the position in which they were immediately before the wrongful exercise of a ministerial discretion occurred. The consequence of such a measure lies where it falls. The final adoption of an additional part of the development plan to comply with the need to provide for the zoning of the relevant Carrickmines lands is ultimately a matter for Dún Laoghaire Rathdown Council. However, in exercising the power of the elected representatives to finalise the zoning of the lands in question, the elected representatives are not at large. The reason why they are not at large is nothing to do with any views or order of the court. Rather, the reason why the elected representatives are not at large is because of their own actions up to the point when the process became tainted by an invalid ministerial direction. The elected representatives cannot go back behind that point for there was nothing wrong with the process up to that point. The elected representatives must take the matter up now from that point onwards and adopt a revised development plan to fill the gap left by the quashing of the zoning of the lands in question.

5. Conclusions

5.1 In conclusion, it seems to me that, for the reasons set out, I should grant the orders sought at paras. D(i), D(ii), D(iii) and D(iv) (save that D(iv) will be in a different form) which will have the effect of quashing both of the ministerial directions, the amending resolution of the 10th March and, in part, the Dún Laoghaire Rathdown County Development Plan as adopted on the 11th March. However, the order sought at para. D(iv) will be qualified by confining the operation of that order to that portion of the development plan in question which zoned the lands, the subject of these proceedings, as Objective E.

5.2 So far as the relief claimed at para. D(ix) is concerned, I propose to remit the matter back to the elected representative of Dún Laoghaire Rathdown Council for the purposes of deciding how the lands in question should be zoned for the purposes of the development plan. However, for the avoidance of doubt, I propose further declaring that, in dealing with such zoning, the elected representatives are required to recommence the process on the basis that the process up to and including the date of the first ministerial direction (the 5th March, 2010) was validly conducted and to the intent that the elected representatives are constrained, in recommencing the process in accordance with this order, to act only in a manner consistent with the 2000 Act on the basis that the process up to the 5th March, 2010 was valid and binds the elected representatives in their further actions.