Neutral Citation Number: [2010] IEHC 397

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 11th November, 2010

1. Introduction

1.1 There has been much debate over the years as to the extent to which it is appropriate to involve political decisions makers (both at local and national level) and professional planners (again at both local and national level) in making final decisions in the planning process. The courts also have their proper role where decisions involve the administration of justice such as where judicial review of planning decisions is sought or enforcement measures are proposed. However, so far as the ordinary planning process is concerned, the courts have a very limited role.

1.2 The extent to which it is appropriate that particular functions in the planning process are conferred on political decision makers or professional planners and the extent to which those decisions should be made either locally or nationally are primarily questions of policy to be determined by the Oireachtas and set out in relevant legislation. Subject to determining the proper interpretation of any such legislation and, if raised, considering whether such legislation is within the bounds of what is constitutionally permissible, it is no function of the courts to seek to second guess the policy decisions made by the Oireachtas in that regard.

1.3 This case principally concerns one such question of construction. It has traditionally been the case that the making of development plans has been a function allocated by legislation to political decision makers. By and large the formulation of a development plan is a matter which is conferred, under the Planning and Development Act, 2000 ("the 2000 Act") on the relevant planning authority with the decision ultimately resting on the elected members of that planning authority. However, s. 31(1) of the 2000 Act confers on the Minister for the Environment, Heritage and Local Government ("the Minister"), a role in relation to the formulation of development plans. At the heart of these proceedings is a dispute between the parties as to the extent of that role although, as will appear, there are some other issues raised.

1.4 In simple terms, the applicant ("Tristor") owns lands at The Park Carrickmines which is within the functional area of the second named respondent ("Dún Laoghaire Rathdown Council"). During the course of the formulation by Dún Laoghaire Rathdown Council of its current development plan, Tristor proposed that the relevant lands at Carrickmines should be designated as a district centre for retail purposes. Ultimately, the elected representatives on Dún Laoghaire Rathdown Council voted in favour of that proposition. Prior to a final decision being taken, the Minister had made representations or submissions to Dún Laoghaire Rathdown Council against the designation of the lands in questions as a district centre. It would also appear that the County Manager of Dún Laoghaire Rathdown Council was opposed to that designation.

1.5 Thereafter, the Minister purported to issue a direction (or more accurately and for reasons which will become apparent, two separate directions) which had as their effect, a requirement that Dún Laoghaire Rathdown Council delete the designation of Carrickmines as a district retail centre with a lettable space of up to 25,000sq m from the relevant development plan and a further requirement that the lands in question revert to their previous zoning being Objective E which is to provide for economic development and employment.

1.6 In compliance with that Ministerial Directive, Dún Laoghaire Rathdown Council amended the development plan accordingly. Tristor contests the validity of that Ministerial Directive while accepting that Dún Laoghaire Rathdown Council, having received what on its face appeared to be a valid direction under s. 31 of the 2000 Act, had no option but to comply.

1.7 It follows that these proceedings are, in substance, between Tristor and the Minister with Tristor contesting the Minister's exercise of his power under s. 31 and the Minister defending his actions. The notice party ("Cradder") was potentially affected by the zoning but having filed written submissions supportive of the Minister's position, took no active part in the trial.

1.8 Against that background, it is necessary to turn to the facts in a little more detail before specifying the precise issues which have arisen in the course of these proceedings. I, therefore, turn to the facts.

2. The Facts
2.1 Tristor is the owner of approximately 3.14 hectares of land forming part of "The Park Village" at Carrickmines. The lands were acquired by Tristor in October 2006. At that time, the lands were zoned under Objective E which, as has been pointed out, is specified as being to provide for economic development and employment.

2.2 Thereafter, Dún Laoghaire Rathdown Council became engaged in the ordinary way in the preparation of a new development plan. The plan in question is now the Dún Laoghaire Rathdown County Development Plan 2010 – 2016. Tristor engaged John Spain Associates, Town Planners, for the purposes of preparing and lodging a submission to Dún Laoghaire Rathdown Council in respect of its review of the then existing development plan being that for 2004 – 2010.

2.3 In the course of processing the necessary review of the existing development plan, the County Manager of Dún Laoghaire Rathdown Council ("the Manager") produced a report on a possible development plan for 2010 -2016. In s. 2.5.4 of the Manager's Policy Recommendations it was suggested that there might be a reassessment and possible reclassification within the retail hierarchy of Cherrywood, Sandyford Business Estate and Carrickmines. John Spain Associates made a submission seeking the designation of the lands at The Park Village as a district centre. The Manager's Draft Development Plan (produced under s. 11(5) of the 2000 Act) proposed the continuance of objective E as the zoning of the lands with which I am concerned.

2.4 At a special meeting of Dún Laoghaire Rathdown Council, held on 1st April, 2009, the elected members of the Council passed a resolution to amend the Manager's Draft Development Plan so as to change the status of the lands in question from neighbourhood centre to district centre, to change the zoning of the lands to district centre and further specified that the gross lettable retail sales space at what was to become the Carrickmines District centre was to be 25,000sq m. The lands included in the re-designation contained in that resolution included Tristor's lands.

2.5 On the 24th April, 2009, Dún Laoghaire Rathdown Council published notice of the preparation of the draft Dún Laoghaire Rathdown County Council Development Plan 2010 – 2016 and invited submissions. In the draft plan as published the relevant lands were identified as a district centre. John Spain & Associates made submissions on the 3rd July, 2009, on behalf of Tristor supporting that designation. Also on the 3rd July it would appear that the Minister made a submission recommending that the scale of the permissible retail space at Carrickmines be reconsidered on a number of bases including a view that the 25,000 square metre cap was excessive, the potential adverse impacts on other centres and the quantum of retail space already existing or permitted at "the Park" generally.

2.6 In September, 2009 the Manager reported on the various submissions received and recommended that Carrickmines be removed from the list of district centres and that it be included in the list of neighbourhood centres. On the 12th November, 2009, the elected members of Dún Laoghaire Rathdown Council considered both the Manager's report and the various submissions received and voted to reaffirm the district centre zoning and scale of retail floor space in respect of Tristor's lands subject to some minor amendments which are not material to the these proceedings.

2.7 There subsequently followed a further consultation process which arose from certain material alterations in the Draft Development Plan. The Minister made further submissions during that process. However, on the 5th March, 2010, the Minister issued a direction ("the First Direction") under s. 31 of the 2000 Act. On the 10th March, 2010, the Minister issued a further direction ("the Second Direction") which purports to replace the First Direction. Both Directions are in similar though not identical terms. No issue was raised in the proceedings as to any invalidity in the Second Direction arising solely from the fact that it was preceded by the First Direction. In those circumstances, it seems appropriate to concentrate on the Second Direction which will henceforth be described as the Direction. Given that the proceedings turn on the validity of that direction, it is appropriate to set it out in full.

2.8 The direction reads as follows:-

> "WHEREAS it appears to the Minister for the Environment, Heritage and Local Government, that the Draft Development Plan for Dún Laoghaire Rathdown County for the period 2010 to 2016 is unsatisfactory in failing to set out a proper strategy for the proper planning and sustainable development of the area and significantly fails to comply with the Planning and Development Act 2000, as amended, by reason of the following matters:
>
> The designation of Carrickmines as a district centre, with a lettable retail space of up to 25,000 square metres,
>
> (a) does not accord with the hierarchy of retail centres in Dún Laoghaire Rathdown as set out in the Retail Strategy for the Greater Dublin Area 2008 – 2016 as prepared by the Dublin and Mid-East Regional Authorities;
>
> (b) would be likely to adversely impact on the vitality of existing town centres such as Dún Laoghaire and proposed town centres such as Cherrywood, having regard to the amount of existing and permitted retail floorspace at Carrickmines, contrary to paragraph 25 of the 2005 Guidelines for Planning Authorities on Retail Planning; and
>
> (c) would be likely to exacerbate car-based traffic issues in and around the area, contrary to the transport-related guidance set out in paragraphs 26 and 55 of the 2005 Guidelines for Planning Authorities on Retail Planning.
>
> NOW, THEREFORE in exercise of the powers conferred on him by section 31(1) of the Act, the Minister for the Environment, Heritage and Local Government hereby directs as follows:-
>
> (1) This Direction may be cited as the Planning And Development (Draft Dún Laoghaire Rathdown County Development Plan) Direction No. 2 2010.
>
> (2) This Direction replaces the Direction previously issued by the Minister on 5 March, 2010.
>
> (3) The County Council of Dún Laoghaire Rathdown is to delete the designation and land use zoning of Carrickmines as a district centre, with a lettable retail space of up to 25,000 square metres, and all references thereto, from the Draft Dún Laoghaire Rathdown County Development Plan 2010-2016, an is to revert to the previously Zoning Objective E – to provide for economic development and employment – and the Specific Local Objective for Carrickmines to provide for the redevelopment of a neighbourhood centre, as set down in the Dún Laoghaire

Rathdown County Development Plan 2004 – 2010."

2.9 As a result of receiving that direction, the final Dún Laoghaire Rathdown Development Plan 2010 – 2016 was adopted on the 11th March, 2010, incorporating the measures specified in the Direction. Against the background of that general statement of the facts, it is next necessary to turn to the specific issues which arise in these proceedings.

3. The Issues

3.1 The principal issue between the parties turned on the proper construction of s. 31 of the 2000 Act, and its application to the facts of this case. In substance, Tristor argues that the Minister wrongly came to the conclusion that he had authority under s. 31 to issue the Direction concerned. It should also be noted that one of the questions debated by the parties was as to the standard of review by reference to which the decision of the Minister should be judged by this Court. Tristor argued that the Court should consider whether the Minister was correct in his conclusion. The Minister argued that the Court should apply ordinary judicial review principles and should only interfere with the Minister's decision in the event that, having regard to those principles, the decision was found to be unsustainable.

3.2 Irrespective of the standard of review there was a significant dispute between the parties as to the true construction of s. 31. The Minister argued that the section enabled the Minister to form his own planning judgment on the Dún Laoghaire Rathdown Development Plan and to give instruction or direction accordingly. Tristor, on the other hand, argued that the Minister could only form the view necessary to enable him to give a direction under s. 31 in circumstances where the Minister had a legitimate basis for concluding that Dún Laoghaire Rathdown Council was in breach of its obligations under the 2000 Act in formulating its Draft Development Plan. It will be necessary to turn to the text of s. 31 in early course. However, a particular focus of the dispute between the parties was the circumstances in which it could be concluded that a draft plan fails to set out an "overall strategy" for the proper planning and sustainable development of the area of the planning authority concerned.

3.3 In addition to the question of the standard of review to which reference has already been made, the general issues arising in respect of the s. 31 issue were as to:-

> (i) The basis on which it was open to the Minister to conclude that a draft plan had failed to set out an overall strategy as required by that section;
>
> (ii) The factors that the Minister could properly take into account in reaching any such conclusion; and
>
> (iii) Whether the Minister had reached a sustainable conclusion on the facts of this case having regard to the answers to issues (i) and (ii).

3.4 In addition to those general issues, Tristor also placed reliance on a claim based on legitimate expectation and a claim based on a contention that the absence of a further period of consultation prior to the making, by the Minister, of a direction under s. 31 is in breach of the principles of constitutional justice.

3.5 The basis of the contention that Tristor is entitled to be heard prior to the making of a ministerial direction stems from an assertion that Tristor's property rights are potentially interfered with by such a direction and that the Act should be construed as including such an entitlement. In the event that the Court was against Tristor on that point, Tristor included, in the pleadings, a claim which questions the validity of s. 31 having regard to the Constitution. It was, quite properly, agreed that that question would be left over until all other issues in the case had been determined, for depending on the judgment of this Court on those other matters, the constitutional issue may, or may not, arise.

3.6 The proceedings before me were a so called telescoped hearing as both the question of whether Tristor was entitled to leave to seek to judicial review (based on substantial grounds) and a substantive hearing in the event that it was deemed appropriate to grant leave were considered together (see for example *Dellway Investments & Ors v. National Asset Management Agency & Ors* [2010] IEHC 364). In respect of each heading it is, therefore, necessary to consider both whether substantial grounds have been established and, if so, whether the case is made out.

3.7 It seems to me that two of the questions which were before the Court can be dealt with quite quickly and straightforwardly. I, therefore, propose to turn, in order, to the issues arising under the headings of legitimate expectation and standard of review. I turn to the first of those.

4. Legitimate Expectation

4.1 It does not seem to me that Tristor can make any claim to a legitimate expectation on the facts of this case. It will be necessary to deal with the core issues concerning the proper interpretation of s. 31 of the 2000 Act and its application to the facts of this case in due course. However, either the Minister was entitled, under that section, to give the direction which he did or he was not. If the Minister was entitled to give the relevant direction, then it is difficult to see how Tristor could have a legitimate expectation that he would not exercise what would, in those circumstances, be his statutory power to give the direction concerned.

4.2 Tristor was involved in the statutory process. If, on a proper construction of the section, that statutory process includes the possibility that the Minister may intervene by making a direction under s. 31, then any expectation which a party involved in the process might have must be subject to the possibility that the Minister might exercise whatever powers he might have under that section. In *Lett & Company Ltd v. Wexford Borough Corporation & Ors* [2007] IEHC 195, I said the following at para. 4.7:-

> "In the light of those authorities it seems to me that, on the current state of the development of the doctrine of legitimate expectation, it is reasonable to state that there are both positive and negative factors which must be found to be present or absent, as the case may be, in order that a party can rely upon the doctrine. The positive elements are to be found in the three tests set out by Fennelly J. in the passage from *Glencar Exploration* to which I have referred. The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in *Wiley*, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in *Hempenstall*, legitimate changes in executive policy to take place. I therefore propose to approach the contentions of the parties as to the existence of a legitimate expectation in this case by first considering the positive elements of the test."

4.3 On the assumption, for the purposes of this aspect of the argument, that the Minister made a sustainable decision to exercise his

discretion to give a direction under s. 31, then it is clear that no legitimate expectation could arise. By analogy with *Wiley v. Revenue Commissioners* [1994] 2 I.R. 160, it is not legitimate to entertain an expectation that a statutory power will not be exercised. More importantly, it is not permissible to entertain a legitimate expectation which would fail to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned. Provided that the Minister operated within the confines of s. 31 and legitimately made a direction under that section, then it is impermissible to regard a legitimate expectation as arising for to do so would be to prevent the Minister from exercising his discretion under that section in accordance with its terms.

4.4 For those reasons, I am not satisfied that any legitimate expectation arises on the facts of this case. I now turn to the question of the standard of review.

5. Standard of Review

5.1 Tristor's argument under this heading stems from the text of s. 31 itself. Section 31(1) provides as follows:-

> "Where the Minister considers that any draft development plan fails to set out an overall strategy for the proper planning and sustainable development of the area of a planning authority or otherwise significantly fails to comply with this Act, the Minister may, for stated reasons, direct the authority to take such specified measures as he or she may require to ensure that the development plan, when made, is in compliance with this Act and, notwithstanding the requirements of Chapter 1, the authority shall comply with any such direction."

5.2 On Tristor's case a decision by the Minister to exercise his power under s. 31 amounts to a decision that there has, in fact, been a failure on the part of the relevant Council either to set out an overall strategy or otherwise comply with the 2000 Act. On that basis it is argued that the Minister is in substance determining that there has been a breach of the 2000 Act, for it is clear that a failure to set out an overall strategy for the proper planning and sustainable development is in itself a breach of the 2000 Act. It follows that whether the Minister reaches a conclusion under the provision that refers to failure to set out an overall strategy or the provision which relates to other failures of compliance with the Act, the condition precedent to the exercise of the Minister's power derives from a non-compliance by the relevant council with provisions of the 2000 Act.

5.3 However, it seems to me that counsel for the Minister was correct when he argued that the use of the word "considers" in s. 31 is decisive. The section does not require that there be a breach of the Act. Rather, the section requires that the Minister considers that there be a breach of the Act.

5.4 If the Act were differently worded so that it was necessary that there be a breach before the Minister could issue a direction, then there might well be an argument in favour of Tristor's proposition. However, it seems to me that, on the plain wording of the Act, the Minister is entitled to form a view (within the bounds of the section) that the conditions necessary for the exercise of a discretion under s. 31 exist. That ministerial view is, of course, subject to judicial review. In coming to that view the Minister must take into account all proper factors and exclude from his consideration any factors which are irrelevant. In addition, the view which the Minister ultimately forms must be rationally based on the materials available to the Minister at the time. However, subject to those limitations the Minister is entitled to come to a view, and if he does so, then it can properly be said that he "considers" that a relevant failure of compliance has occurred such as entitles the Minister to exercise his jurisdiction under the section.

5.5 A second limb of Tristor's argument under this heading was to refer to cases such as *Re XJS Investments Ltd* [1986] I.R. 750 and *Wicklow Heritage Trust Ltd v. Wicklow County Council* (Unreported, High Court, McGuiness J., 5th February, 1998), in which the Courts have consistently held that the construction of planning documents is to be conducted on the basis of how the document concerned would be viewed by a "reasonably intelligent person without particular expertise".

5.6 There is no doubt that planning documents are to be so construed in accordance with the jurisprudence. It does not, however, seem to me that that undoubted fact of itself changes the standard of review. Undoubtedly, any planning documents relevant to the issues which arise in this case need to be so construed. If, on the proper construction of any relevant documents, it were to transpire that it was not reasonably open to the Minister to reach a conclusion necessary to the exercise of the Minister's authority under s. 31, then there may well be consequences of such a finding. However, it does not seem to me that that question goes to the standard of review. Rather, it is a factor to be taken into account in exercising the ordinary standard of review as to whether the Minister came to a sustainable decision to exercise his powers under s. 31.

5.7 For those reasons, I am not satisfied that the standard of review to be applied to the Minister's decision in this case is anything other than the ordinary judicial review standard.

5.8 On that basis it is necessary to turn to s. 31 itself. For reasons which will be come apparent, it seems to me that the key question in this case is as to the proper construction of section 31. It also seems to me that the question, at least at the level of principle, of whether Tristor is entitled to be heard prior to the making of a ministerial direction under s. 31 is best dealt with in the context of the interpretation of the section itself. I, therefore, turn to the section.

6. Section 31

6.1 I have already referred to the text of s. 31(1) of the 2000 Act. As pointed out, the precondition to the making by the Minister of a direction under s. 31(1) is that the Minister considers either that the relevant Draft Development Plan "fails to set out an overall strategy for the proper planning and sustainable development" of the relevant area or "otherwise significantly fails to comply with" the 2000 Act.

6.2 In that context, it is necessary to refer to s. 10 of the 2000 Act which provides for the content of development plans.

6.3 Section 10(1) requires that:-

> "A development plan shall set out an overall strategy for the proper planning and sustainable development of the area of the development plan and shall consist of a written statement and a plan or plans indicating the development objectives for the area in question."

6.4 Subsection (2) of s. 10 provides for certain matters which, without prejudice to the generality of subs. (1), a development plan must include. Subsection (3) provides, without prejudice to subs. (2), that a development plan <u>may</u> include various objectives for any of the purposes referred to in the First Schedule of the 2000 Act.

6.5 While the items set out in those two subsections cover a very wide range of matters, it is of some importance to note that subs.

(2)(a) requires that the development plan include the zoning of land for use for particular purposes while item 4 of the First Schedule permits but, because of subs. (3) does not require, that a development plan may indicate an objective of "regulating, restricting or controlling retail development".

6.6 It seems to me that, on a proper construction of s. 31, the preconditions necessary to the exercise by the Minister of his powers to make a direction under that section are that the Minister reach a sustainable conclusion (having regard to judicial review principles) that there has been a breach by the relevant local authority of its obligations under s. 10 in respect of failing to set out an overall strategy or considers that there has been a significant failure to comply with some other feature of the 2000 Act. In *Dellway* the Divisional Court had to consider the basis on which a court should analyse the factors which a decision maker is required to take into account, whether for the purposes of determining that all necessary relevant factors were taken into account and also for determining whether irrelevant factors (that is factors which the relevant legislation does not permit to be taken into account) were, in fact, taken into account. At para. 6.13 of the judgment of the Divisional Court, having analysed and adopted the decision of the High Court of Australia in *Peko-Wallsend v. Minister for Aboriginal Affairs* [1986] 162 CLR 24, the court went on to say the following:-

> "It follows that, in a case where, as here, it is alleged that a decision maker has failed to take into account a relevant factor, then the Court must first ask itself whether the factor concerned is a matter which the decision maker is bound to take into account as a matter of law. In determining whether that be so, the Court must look at what the Act in terms requires to be taken into account or what may be said to be required by implication by virtue of the subject matter, scope and purpose of the legislation concerned."

6.7 The same principle applies equally to cases where it is said that the relevant decision maker took into account inappropriate matters. It follows that what the Court needs to consider is what the Act actually says needs to be taken into account, or what the Act actually says is the proper basis for the making of a statutory decision and in addition the Court may also look at what might be said to be required or excluded, by implication, by virtue of the subject matter, scope and purpose of the relevant legislation.

6.8 Applying that principle to the facts of this case, it seems to me that the Minister was required to consider whether there was a breach by Dún Laoghaire Rathdown County Council of s. 10 of the 2000 Act by virtue of a failure to set out the strategy required by that section or alternatively, the Minister was required to consider whether there was some other significant failure of compliance with the Act. It will be necessary to turn to the precise reasons given by the Minister for his direction in due course. However, one matter of principle concerning the interpretation of s. 31 needs to be addressed first.

6.9 One of the alternative bases on which the Minister can have the power to make a direction under s. 31, requires that the Minister must consider that the relevant Draft Development Plan "fails to set out an overall strategy for the proper planning and sustainable development" of the area in question. There was much debate between the parties as to the meaning of that term. Counsel for the Minister argued that it was open to the Minister to form a planning judgment as to whether the strategy contained in a draft development plan was appropriate. In that context, there was also significant debate between the parties as to the fact that the Direction uses the term "proper" strategy rather than "overall" strategy. It seems to me that these two questions are connected.

6.10 First, I should note that I fully accept the principles identified by counsel for the Minister concerning the proper way in which to approach the interpretation of ministerial directions under s. 31. In that regard, counsel for the Minister relies on *Dublin City Council v. Eighty Five Developments Ltd* [1993] 2 I.R. 392. That case concerned a question as to whether the reasons given by a planning authority for refusing permission were such as fell within s. 56(1) of the Local Government (Planning and Development) Act 1963. That issue was relevant, for in the event that the reasons given did fall within the section in question, no compensation would be payable. The Supreme Court noted that it was desirable "having regard to considerations of certainty and precision" that reasons should be expressed as closely as possible in accordance with the wording of the relevant section. However, Finlay C.J. noted at p. 399 that:-

> "The absence of that form does not, in my view, on the decision in *In Re XJS Investments Ltd* [1986] I.R. 750 or on any other principle, prevent a common-sense appraisal of what the real reason is from being made by the Court."

6.11 On this point counsel for Tristor drew attention to s. 2(1) of the Interpretation Act, 2005 which provides that, for the purposes of that Act, a "statutory instrument" is defined in a manner which includes a "direction". It does not, however, seem to me that the mere inclusion of a "direction" in the definition of statutory instrument for the purposes of the Interpretation Act, 2005 requires that a ministerial direction under s. 31 is to be interpreted in the same way as a formal statutory instrument giving rise to secondary legislation. The Interpretation Act, 2005 does not require that a direction is, for all purposes, a statutory instrument. Rather, where the term statutory instrument is used in the Interpretation Act, 2005 that term is taken to include a direction. The relevant definition also includes many other matters that can be made under a statute such as a certificate or even a notice or guideline. It does not seem to me that s. 2 of the Interpretation Act, 2005 has the effect of requiring the wide range of documents which are included in the definition of "statutory instrument" to which I have referred to be construed as if they were laws.

6.12 The question as to the basis on which the Minister considered that he had the power to give a direction under s. 31 is undoubtedly to be treated as a question of substance rather than of form. If, in substance, the reason that the Minister had for considering that he was entitled to give a direction under s. 31 was a reason consistent with that section, then the fact that the Minister did not use the exact wording of the section does not affect the validity of the direction given.

6.13 However, it seems to me that the question of the wording actually used by the Minister in truth goes to the heart of the issue of interpretation of s. 31 that was argued before me. If the Minister is correct in the argument put forward to the effect that the section entitles the Minister to take a different view as to the type of strategy for the proper planning and sustainable development that should be included in a draft development plan, then there can be little doubt that a ministerial direction which states that the Minister considers that there was not a "proper" strategy would meet the substance of the statutory test. On the other hand, if counsel for Tristor is correct in arguing that the Minister does not have an entitlement to second guess what the appropriate strategy should be, then the use of the term "proper" would be more than a mere question of form and would affect the substance of the Minister's decision. In one sense the real issue between the parties is as to whether s. 31, on its proper construction, allows the Minister to take a view as to whether the strategy contained within a draft development plan is a "proper" strategy.

6.14 A starting point for a consideration of that issue must the wording of the section itself. What the section says is that, in order that the Minister be entitled to give a direction on the first alternative basis, the Draft Development Plan concerned must "fail to set out" an "overall" strategy. It does not seem to me that that language implies an entitlement on the part of the Minister simply to disagree with the strategy contained within the development plan. It can hardly be doubted that there are many strategies which could be adopted which would be consistent with the statutory requirement contained in s. 10 that the strategy concerned be an "overall strategy for the proper planning and sustainable development" of the relevant area. It seems to me that, on a proper construction of the combined effect of s. 31(1) and s. 10, it is a matter for the planning authority to determine which of the range of

possible strategies that could be pursued are to be included in a development plan. Provided that there is a strategy set out, and that it is reasonably described as an overall strategy for the proper planning and sustainable development of the relevant area, then it does not seem to me that the Minister is entitled to impose an alternative strategy simply because the Minister may prefer it. If it were the intention of the Oireachtas to give the Minister the widespread powers which the Minister asserts, it seems to me that the language of the section would have been expressed in very different terms. In passing I should note that I see no reason in principle why the Oireachtas might not give such powers to the Minister. It is fundamentally a matter of policy to determine the relative roles of the elected representatives at local level on the one hand, and the Minister on the other hand. However, the way in which those respective roles have been determined at present by the Oireachtas is in the form of s. 31.

6.15 It seems to me that, to the extent that the Minister may wish to rely on a failure to set out an overall strategy for the proper planning and sustainable development of the area, then it is necessary for the Minister to identify factors from which it could reasonably be concluded that the Draft Development Plan does not set out, such a strategy. It is not a question of whether the Minister agrees or disagrees with the strategy. Rather, it is a question of whether it can be said that a strategy in the terms of the section has been "set out". Of course the strategy that is set out must be one which is designed to achieve the "proper planning and sustainable development" of the area. However, the section does not require that the Minister consider that the strategy be a proper strategy. Rather, the section requires that the Minister consider that a strategy is not set out at all or that the strategy as set out is not, in fact, a strategy for the proper planning and sustainable development of the relevant area. There would, in my view, be a significant difference between permitting the Minister to give a direction under s. 31, where the Minister considered that the strategy as set out is not a proper strategy, on the one hand, or is not at all a strategy for the proper planning and sustainable development of the relevant area, on the other hand. The former phraseology would entitle the Minister to take a view as to whether he agreed with the strategy. The second interpretation would require the Minister to go further and take the view that what was set out in the relevant Draft Development Plan was not a qualifying strategy at all. For the reasons which I have sought to analyse, I am satisfied that the former is the proper interpretation of the s. 31. There must, in at least most cases, be many strategies which are strategies for the "proper planning and sustainable development" of a relevant area. The Minister is not entitled to second guess the views of a planning authority as to which of those "qualifying" strategies is to be selected. It is only if the strategy as set out is non qualifying, in that sense, that the Minister can intervene.

6.16 It follows that, in order for the Minister to have properly come to the conclusion necessary to invoke his power of making a direction under s. 31, the Minister was required, by the statute, to be satisfied either that a qualifying strategy was not set out at all or alternatively, that there was some other significant breach of the 2000 Act. Against the background of that interpretation of s. 31, I now turn to the reasons actually given by the Minister.

7. The Minister's Reasoning

7.1 First, under this heading, it should be recalled that s. 31(1) requires that the Minister state, in a relevant direction, the reasons why the direction is being given.

7.2 It will also be recalled that three reasons were, in fact, given as forming the basis as to why the Minister did not consider that the Draft Development Plan set out a proper strategy for the proper planning and sustainable development of the relevant area. The reasons were that the designation of Carrickmines as a district centre was not in accordance with the retail strategy for the Greater Dublin Area 2008 – 2016 ("the Dublin Retail Strategy"), was likely to adversely impact on existing and proposed town centres contrary to para. 25 of the Guidelines for Planning Authorities on Retail Planning of 2005 ("the Retail Planning Guidelines") and would be likely to exacerbate car based traffic issues contrary to paras. 26 and 55 of the Retail Planning Guidelines.

7.3 It is perhaps first appropriate to consider whether any of those reasons would amount, *per se,* to a breach of the 2000 Act. It should, of course, be noted that the Minister did not suggest in the Direction that those reasons amounted to a breach of the Act per se but rather suggested that they were reasons for concluding that the "setting out a strategy" provisions of the Act had not been complied with. Strictly speaking it may not, therefore, be necessary to consider whether those matters are in breach of the Act *per se* for that was not a basis stated by the Minister to justify the Direction.

7.4 In looking at the reasons given by the Minister it is important to note that, in the case of the first reason, it is said that the Draft Development Plan does not comply with the Dublin Retail Strategy. The second and third reasons suggest that aspects of the Draft Development Plan do not comply with the Retail Planning Guidelines.

7.5 The status of those documents needs first to be addressed. In passing it is, I think, important to make one comment. There would appear to be a proliferation of guidelines, recommendations, strategies and the like in the planning field. There is nothing wrong with that as such. Promoting high standards and consistency in the formulation of development plans, in the consideration of individual planning applications and the like is a more than desirable object of public policy. Any help which can be given in promoting those high standards and a consistency of approach is to be welcomed. However, it is, in my view, important that there be clarity as to the legal status of any such documentation. The planning process involves legal rights, both of those who seek to develop lands and those members of the public who might wish either to oppose a particular development or type of development or to make observations as to the nature of permissions or zoning which might be attached to specific lands. Where rights are affected, it is important that there be clarity. Where strategies, guidelines and the like are promulgated, it is important that it be clear as to what the legal status of those documents is. Are they considered to be binding and, if so, by reference to what specific statutory authority. If they are not binding, what is their legal status? Against that background it is appropriate to look at the status of both the Dublin Retail Strategy and the Retail Planning Guidelines.

7.6 I turn first to the Dublin Retail Strategy. In that context I agree with counsel for Tristor that the Dublin Retail Strategy has no formal legal status. There is no statutory provision contained in the 2000 Act or elsewhere which provides for the making or issuing of regional or county retail policy strategies. It may well, of course, be the case that it is desirable that local authorities in the Greater Dublin region should attempt to coordinate retail policy. Shopping trends do not stop at artificial county borders or, less still, the internal borders of the four local authorities within Dublin City and County. However, the statutory obligation on a local authority is to produce a development plan for its area. It can, in so doing, have regard to any matter which might legitimately impact on a consideration of the proper planning and sustainable development of the area concerned. There can be little doubt, in that context, that a local authority within the Greater Dublin area is more than entitled to pay significant regard to the Dublin Retail Strategy in developing its own Draft Development Plan. However, that is very different to saying that there is any obligation on a local authority to be bound by such a plan.

7.7 If the Oireachtas considers it desirable that such plans are to be binding on local authorities (and there could very well be good reason why the Oireachtas might so consider it), then it seems to me that it is for the Oireachtas to enact enabling legislation to give mandatory statutory status to such plans. The Oireachtas has not, as yet, so done. As a matter of law the Dublin Retail Strategy has no legal status as such although, for the reasons which I have set out, it might well be expected that any local authority in the

Greater Dublin area would at least have regard to that strategy in formulating their development plans.

7.8 Next it is necessary to turn to the Retail Planning Guidelines. Section 28 of the 2000 Act provides in subs. (1) that "that the Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions".

7.9 In that context it is important to note that s. 27(2) permits the Minister, by order, to determine that planning authorities "shall comply with any regional planning guidelines in force for their area…when preparing and making a development plan…".

7.10 No order as contemplated by s. 27(2) has, in fact, been made. In those circumstances it is necessary to consider the obligation on Dún Laoghaire Rathdown Council to "have regard" to those guidelines in formulating its development plan. At para. 10 of the Minister's Statement of Opposition in these proceedings it is suggested that an obligation to "have regard to" those guidelines required Dún Laoghaire Rathdown Council to "seek to accommodate the objectives and policies contained in the guidelines and, in choosing to depart from them, the second named respondent must give bona fide reasons for doing so which are consistent with the proper planning and development of the area".

7.11 The first point that needs to be noted is that the Minister, in making the Direction, did not indicate that Dún Laoghaire Rathdown Council did not "have regard" to the guidelines. Rather, the Minister's stated reasons were to the effect that the Draft Development Plan was contrary to the specified paragraphs of the Retail Planning Guidelines. On that ground alone it would be difficult to conclude that the Minister had properly considered the position under the Guidelines. One can only take the Minister at his word. The Minister's direction suggests that the reasons why the Minister made the direction was, at least in part, because of the Minister's view that the Retail Planning Guidelines were not complied with. The Minister does not say that he considered that Dún Laoghaire Rathdown Council had not "had regard" or appropriate regard to the Guidelines. Even if, therefore, the Minister is right, at the level of principle, in suggesting that a local authority is required to have regard to the Retail Planning Guidelines in the sense that the relevant local authority is required to give a *bona fide* reason consistent with proper planning and development if departing from them, the Minister's direction contains no such conclusion. As was pointed out in *Glencarr Explorations Plc v. Mayo County Council (No.2)* [2002] 1 I.R. 84 (by Keane C.J. at p. 142) it may be inferred that, if the Oireachtas intended that there be an obligation to comply with a particular matter rather than simply have regard to it, it might be expected that the Oireachtas would have said so in the legislation concerned. Likewise, Quirke J. in *McEvoy v. Meath County Council* [2003] 1 I.R. 208, noted, in relation to an obligation to "have regard" to matters, that the local authority concerned was not "bound to comply with the Guidelines and may depart from them for *bona fide* reasons consistent with the proper planning and development of the areas for which they have planning responsibility". I adopt the view of the Quirke J. as being applicable to this case.

7.12 Turning then to the reasons given by the local authority for zoning the lands in question as a district centre, it is important to note that the resolution passed by the elected members did not simply provide for a change in the zoning of the lands in question. Rather, the resolution gave, as a reason for that change, the need "to cater for the projected residential and employment growth of Carrickmines, and the wider catchment area of Kilternan/Glenamuck, Carrickmines and Stepaside, with a projected population of 40,000 people, all located within a short distance of the centre and also served by the Luas extension to Cherrywood". In that context it is appropriate to refer to the Retail Planning Guidelines which, at para. 55, notes the need to provide district centre facilities to cater for projected population and the need to promote developments at locations that are accessible to the resident population and served by public transport" (see para. 24).

7.13 It also needs to be noted that the Retail Planning Guidelines themselves are, for entirely understandable reasons, expressed in general terms. The Guidelines are intended to cover a whole range of areas stretching from the major conurbation that is Dublin through larger cities down to major and provincial towns. The strategy itself, for example in the aspects of it to which I have already referred, allows, again understandably, for a significant degree of flexibility. While the overall thrust of the strategy seems to be designed, yet again for obvious reasons, to concentrate major retail development in existing retail centres, nonetheless flexibility is given where there are changes anticipated in population. An overall strategy for an area obviously involves the consideration of the interaction of measures designed to locate residential development with the placing of retail facilities to service that population. This is particularly so in the context of growing areas.

7.14 Precisely how to apply the Retail Planning Guidelines in a particular case can be a matter of judgment. There may, of course, be examples of proposals which plainly fly in the face of the Guidelines. In such a case there may well be a requirement that a local authority, in order to be able to demonstrate that it "had regard to" the Guidelines would need to establish that it had cogent reasons for such a departure. However, taking a view of the Guidelines as a whole and also of all of the reasons set out in the resolution passed by the elected members, I find it difficult to see how it could be said that the elected members had not at least had regard to those Guidelines. That the Minister might have felt that the application of those Guidelines to the facts of the case in question ought to have given rise to a different conclusion is one thing. The Minister may well have come to that view. However, there is nothing in the papers to suggest that the Minister either considered, or had any basis for considering, that the elected members had not at least had regard to the Guidelines.

7.15 That analysis leads only to the conclusion that the Minister could not have come to the view (and in fairness to him the Direction does not say that he did come to the view) that Dún Laoghaire Rathdown Council was "otherwise" in breach of the 2000 Act. The Dublin Retail Strategy had not statutory status and a failure to comply with it could not amount to a breach of the 2000 Act. The Minister did not say that he had considered that Dún Laoghaire Rathdown Council had not even had regard to the Retail Planning Guidelines and, even if he had, it is difficult to see what materials were available, having regard to the express terms of the resolution passed by the elected members, for coming to such a view.

7.16 In those circumstances it is necessary to return to the question of whether it can be said that the Minister was entitled to consider that an overall strategy had not been set out for the proper planning and sustainable development of the area.

7.17 That the Draft Development Plan sets out a strategy cannot, in my view, be doubted. It sets out a series of zoning objectives which, on their face, amount to a strategy. One must again take the Minister at his word. The reasons why the Minister did not consider a "proper" strategy for the proper planning and sustainable development of the area in question to have been set out are the three reasons which I have already sought to analyse.

7.18 It does not seem to me that those reasons can, by themselves, justify a conclusion that, in formulating the Draft Development Plan, the elected representatives had, by the inclusion of Carrickmines as a district centre, acted contrary to s. 10. Even if the Minister were entitled to "consider" that there was a problem by virtue of the failure of the Draft Development Plan to conform with the Dublin Retail Strategy and even if, contrary to the reasons which I have already set out, the Minister had a basis for forming the view that the elected representatives had failed to have regard to the Retail Planning Guidelines, I do not see that those matters of

themselves justify the Minister in reaching a conclusion that an overall qualifying strategy has not been set out.

7.19 It seems to me, therefore, that the Minister asked himself the wrong question. It is clear from the submissions made to the Court that the Minister considered that s. 31 permitted him to impose, by direction, his own views on the proper planning and development of an area over those of the elected local representatives. For the reasons which I have sought to analyse, it does not seem to me that the Act entitles the Minister to do that. Rather, the Minister must ask himself whether there is a significant failure to comply with provisions of the 2000 Act other than s. 10 or, in the context of s. 10, must ask himself whether the plan actually has a strategy which is set out in it and which complies with the mandatory obligations provided for in s. 10(2) which apply to such plans. If the Oireachtas wishes the Minister to have a wider power to interfere with draft development plans formulated by local authorities, then it seems to me to be incumbent on the Oireachtas to set out precisely how and in what circumstances such a power can be exercised.

7.20 In my view it is clear that the Minister did not apply the appropriate criteria in considering whether to invoke s. 31. It follows that the Minister's exercise of his power under s. 31 is invalid and the second direction must be quashed. It also logically follows that the first direction should also be quashed.

7.21 Before going on to the consequences which flow from that finding I should touch briefly, lest I be wrong, on the fair procedures argument.

8. Fair Procedures

8.1 In *North Wall Property v. Dublin Docklands Development Authority* [2008] IEHC 305, Finlay Geoghegan J. said the following:-

> "It is common case that, in accordance with well established judicial principles in relation to the construction of functions conferred by statute, that the implied decision making process of the respondent must be discharged in accordance with the principles of constitutional justice. This requires that the decision be taken in accordance with fair procedures which would appear to require that persons who have property rights that could be affected by the decisions taken be given an opportunity of making submissions and have those submissions considered."

8.2 In the context of s. 31(2) of the 2000 Act (which is concerned with an analogous statutory regime where the Minister can require a variation in a development plan after its adoption) McCarthy J. in *Talbotgrange Homes Ltd v. Laois County Council* [2009] IEHC 535 stated the following:-

> "The appropriate standard to apply when considering whether the lack of prior notice or prior consultation on the part of the Minister breached the applicant's rights is arguability. It is accepted by all parties that there was no prior actual notice of or consultation with the applicant. I am not satisfied that it is arguable that there should have been actual advance notification of the proposed making of the Ministerial direction in order to ensure adherence to fair procedures. However, s. 31 of the Act of 2000, whilst not providing expressly for prior actual notice or consultation, must be interpreted in conformity with the principles of natural and constitutional justice, which may require advance public notice or consultation. The scheme of the Act of 2000 is such that it provides for public participation in respect of the adoption of development plans and their variations. This might shortly be termed constructive notice.
>
> Generally public notice suffices in the realm of planning law. Neither s. 12 of the Act of 2000, which deals with the procedure for adopting a development plan, nor s. 13 of the Act of 2000, which deals with the procedure for varying a development plant, provide for personal notification. The only instance where personal notification to a landowner is envisaged under the Act of 2000 is where there is a proposed designation or deletion of a protected structure on his or her lands in a Draft Development Plan (ss. 12(3)) or at any time other than in the course of a development plan (s. 55 of the Act of 2000). I do not think that a Minister's order mandating variation (or a County Manager's order giving effect thereto) requires anything beyond the normal or general rule applicable in the planning code, even though the section is silent; variation always remains a possibility."

8.3 I agree with the views expressed in both of those cases. There is a general obligation to ensure that parties are given an opportunity to be heard in relation to planning matters. That obligation does not necessarily extend to giving direct notice to all individuals.

8.4 However, at least so far as the general question of the Minister giving consideration to intervening under s. 31 is concerned, there was, in fact, in this case, notification to Tristor of the Minister's concerns. That came about because the Minister had already made those concerns known in the course of the submissions which the Minister had made. There was nothing new in the reasons given by the Minister for making his direction under s. 31(1) which had not already been adverted to, at least in general terms, in the Minister's submissions. I am not, therefore, satisfied that, on the facts of this case, there was any requirement for the Minister to go further prior to considering whether it was appropriate to exercise his powers under s. 31(1).

8.5 However, there is a second aspect to the Minister's direction to which it is necessary to refer. Not only did the Minister direct that Dún Laoghaire Rathdown Council delete the district centre zoning applicable to the Carrickmines lands. The Minister also specified that the lands were to revert to their earlier zoning of Objective E. Section 31 entitles the Minister to specify the measures to be taken to remedy the failure to comply with the 2000 Act that has justified the making of a direction under s. 31 in the first place. For the reasons which I have already analysed, I am not satisfied that the Minister's jurisdiction arose in this case because I am not satisfied that the Minister asked himself the correct question or applied his mind to the correct issue in deciding that he had jurisdiction. However, if I am wrong in that view and the Minister did, in fact, come to the correct conclusions necessary to give rise to jurisdiction, then it seems to me that a second question arises as to whether the Minister was obliged to give some opportunity to interested parties (including Tristor) to make representations as to the precise form of intervention which the Minister might make. It seems to me that on this point Tristor is correct.

8.6 Even if the Minister had a legitimate basis for intervening under s. 31, the Minister had a range of options open to him as to the precise form of direction which he might give. Even if the Minister was entitled to conclude that the inclusion of Carrickmines as a district centre led to a situation where the Draft Development Plan did not set out an overall strategy for the proper planning and sustainable development of the area in question, it did not follow that the zoning of the lands in question had to revert to Objective E. What the Minister is entitled to do is to specify the measures that need to be taken to ensure that any failure to comply with the Act is remedied. It certainly is by no means clear that the only way in which any possible failure to comply with the Act (if contrary to the views which I have come to, such failure existed) could be remedied was in the manner specified by the Minister. At a minimum it follows that the Minister was obliged to afford some appropriate level of ability to make representations to all interested parties as to the precise measures which he ought to have imposed in order to remedy the situation. Even if, therefore, I had been satisfied that the Minister's decision to invoke s. 31 was sustainable, I would have come to the view that the Direction was invalid by reason

of the failure of the Minister to give an opportunity to interested parties to be heard in respect of the measures to be adopted by the Minister. That leads to the question of what should now be done.

9. Remedy

9.1 It follows from the conclusions which I have reached that the two directions given by the Minister under s. 31 must be quashed. It does not, in my view, follow that the Development Plan necessarily must be adopted in the form in which it was prior to the Minister's intervention. It seems to me that the Development Plan itself needs to be remitted back to Dún Laoghaire Rathdown Council to consider what measures should be put in place in the light of the fact that the Council is no longer bound by the Minister's direction. I will hear counsel further on any ancillary orders that may be required to give effect to that general intention.

10. Conclusions

10.1 In summary it seems to me to follow that it would be appropriate to grant leave to seek judicial review in favour of Tristor on both the grounds analysed earlier in this judgment concerning the proper interpretation and application of s. 31(1) and in respect of the fair procedures arguments but only insofar as same relate to the measures adopted by the Minister and not in respect of the underlying exercise by the Minister of his power to intervene under s. 31(1). In that latter regard, it does not appear to me that Tristor had made out a substantial issue to be tried and I would refuse leave to seek judicial review on that ground. Likewise, for the reasons earlier analysed, I would refuse leave to seek judicial review on the legitimate expectation issue.

10.2 In addition, for the reasons already set out, I am satisfied that Tristor is entitled in substance to succeed on the grounds in respect of which I have indicated that leave to seek judicial review will be granted. I will hear counsel as to the precise orders to be made.