

**THE HIGH COURT
JUDICIAL REVIEW
COMMERCIAL**

**2007 No. 1527 J.R.
[2007 No. 188 COM]**

BETWEEN

**NORTH WALL QUAY PROPERTY HOLDING COMPANY LTD.
AND SEAN DUNNE**

APPLICANTS

**AND
DUBLIN DOCKLANDS DEVELOPMENT AUTHORITY**

RESPONDENT

**AND
NORTH QUAY INVESTMENTS LTD.**

NOTICE PARTY

Judgment of Ms. Justice Finlay Geoghegan delivered on the 9th day of October, 2008

Preliminary

1. The applicants are each stated to have contractual rights in a property at North Wall Quay, Dublin, adjacent to the lands of the notice party, which are the subject matter of a certificate issued by the respondent pursuant to s. 25 of the Dublin Docklands Development Authority Act 1997, in respect of a proposed development on part of a site bound by North Wall Quay, New Wapping Street, Mayor Street and Castleforbes Street, Dublin 1. The certificate is dated 13th July, 2007, and bears the reference "DD457" and was issued to the notice party.
2. The respondent is a statutory body established by the Dublin Docklands Development Authority Act 1997 ("the Act of 1997"). The notice party is the beneficiary of certificate DD457 and the owner of a large site on part of which the development referred to in certificate DD457 is to take place. The notice party's site surrounds on three sides the applicants' site.
3. By order of the High Court of 19th November, 2007, (Peart J.) the applicants were granted leave to apply by way of an application for judicial review for *inter alia* an order of *certiorari* of the certificate DD457 and related declarations and other relief.
4. By order of the High Court (Kelly J.) of 10th December, 2007, the proceedings were admitted to the commercial list pursuant to O.63A, r. 4, of the Rules of the Superior Courts.
5. By further order of the High Court of 21st December, 2008, (Kelly J.) the applicants were granted leave to amend the statement of grounds so as to include an application for an order of *certiorari* quashing a purported agreement dated 31st May, 2007 ("the Agreement") between the notice party and the respondent, and to include additional grounds, both in relation to the application for *certiorari* of the certificate DD457 and the Agreement.
6. The respondent and notice party have each delivered amended statements of opposition. Affidavits have been filed on behalf of all parties and written legal submissions.
7. In the course of the hearing, there was limited cross-examination of one of the respondent's witnesses and two further affidavits were filed in Court on behalf of the respondent, clarifying certain confusion which had arisen as to precisely what documents were before the Board of the respondent when the decision to grant certificate DD457 was made.

Grounds

8. At the commencement of the proceedings, the major concerns of the applicants appears to have been a perceived failure of the development, the subject matter of certificate DD457, to provide for an east-west route between New Wapping Street and Castleforbes Street, and the potential adverse effect of that failure and the provision in the development for an "industrial-scale basement access ramp", both of which were alleged to potentially adversely affect the amenity of a residential development proposed by the applicants and which is the subject matter of a certificate DD188, dated 7th August, 2003, issued by the respondent. Prior to the hearing, the respondent applied for, and was granted, a certificate DD525 dated 10th April, 2008, for a development consisting of a relocation of the basement access ramp in the development the subject matter of certificate DD457, by 17m. to the north, and associated works. As a consequence of this, at the hearing the applicants did not pursue the grounds relating to the basement ramp and the east-west route became of less significance.

9. At the hearing the applicants pursued their claim for an order of *certiorari* of certificate DD457 on the ground that it was *ultra vires* the respondent on one or more of the following grounds:

- (i) The decision to grant certificate DD457 was taken in breach of the applicants' rights to fair procedures and, in particular, the opportunity to make submissions/observations on the application of the notice party for the certificate.
- (ii) The proposed development is not consistent with the Docklands North Lotts Planning Scheme ("the Planning Scheme"). In particular;
 - (a) The proposed development fails to meet the minimum mix of residential and commercial use prescribed by paragraph 4.1 of the Planning Scheme; and
 - (b) the height of the buildings of the proposed development is not consistent with the requirements of section 5 of the Planning Scheme.
- (iii) Section 25 of the Act of 1997 (as amended) does not permit the respondent to impose conditions for the purpose of making an otherwise inconsistent proposed development consistent with the Planning Scheme as was done in certificate DD457.

(iv) The decision of 13th July, 2007, to issue certificate DD457, was made in breach of the rule against apparent bias by reason of the existence of the Agreement of 31st May, 2007, and its terms and/or the respondent took into account an irrelevant consideration i.e. the Agreement in reaching its said decision.

10. The applicants also pursued a claim for an order of *certiorari* of the Agreement of 31st May, 2007, on the grounds that it was *ultra vires* for the respondent to enter into the said Agreement.

11. All the parties, correctly in my view, emphasized, in support of their submissions, the very special, and in some respects unusual, mix of functions imposed on the respondent by the Act of 1997. It is necessary to set out the statutory scheme in some detail to consider the applicants' claims herein, and the opposition thereto of the respondent and notice party. Whilst there was much common case between the respondent and notice party, their positions on all issues are not identical.

Statutory framework

12. The Act of 1997, in its long title, states that it is "an Act to make provision for the renewal of the Dublin Docklands area and for that purpose to establish a body to be known as the Dublin Docklands Development Authority, and to define its functions. . ." Section 14 (1) establishes the respondent "to perform the functions assigned to it by or under this Act".

13. Section 14 (2)(a) sets out the composition of the Authority:

"The Authority shall consist of a Chairperson appointed in accordance with *section 15*, a Council appointed in accordance with *section 16* and an Executive Board appointed in accordance with *section 17*."

Section 14 (3) states:

"The Authority shall be a body corporate with perpetual succession and a seal and power to sue and be sued in its corporate name and to acquire, hold and dispose of land."

14. Section 18 sets out the function of the respondent, as distinct from each of its identified organs which are subsequently dealt with in sections 19, 20 and 21. Section 18 provides:

"(1)(a) It shall be the general duty of the Authority to secure-

- (i) the social and economic regeneration of the Dublin Docklands Area, on a sustainable basis,
- (ii) improvements in the physical environment of the Dublin Docklands Area, and
- (iii) the continued development in the Custom House Docks Area of services of, for, in support of, or ancillary to, the financial sector of the economy.

(b) For the purposes of *paragraph (a)* and without prejudice to the generality of that paragraph, the Authority shall have the following functions in relation to the Dublin Docklands Area-

- (i) to prepare a master plan for the regeneration of that Area in accordance with *section 24*, and to promote the implementation of the master plan;
- (ii) to prepare, where appropriate, planning schemes in accordance with *section 25*;
- (iii) to prepare detailed proposals and plans for the development, redevelopment, renewal or conservation of land in that Area;
- (iv) to acquire, hold and manage land in that Area for its development, redevelopment, renewal or conservation either by the Authority or by any other person;
- (v) to develop, redevelop, renew or conserve, or secure the development, redevelopment, renewal or conservation of, any land in that Area or otherwise to secure the best use of any such land;
- (vi) to dispose of land-
 - (I) on completion of its development, redevelopment, renewal or conservation under this Act,
 - (II) to secure its development, redevelopment or conservation, or
 - (III) to secure its best use;
- (vii) to provide such infrastructure and to carry out such works of amenity development or environmental improvement as, in the opinion of the Authority, may be required to encourage people to work, shop or reside in that Area or otherwise to use the facilities provided in that Area;
- (viii) to promote the co-ordination of investment by statutory bodies and of investment by statutory bodies with private investment in that Area;
- (ix) to promote the co-ordination of the programmes and other activities of statutory bodies and other persons concerned with the regeneration of that Area and to promote co-operation between such bodies and persons;
- (x) to promote, in particular as regards persons residing in that Area, the provision of education and training opportunities, and the development of a wide range of employment in that Area;
- (xi) to promote the development of existing and new residential communities in that Area, including the

development of a mix of housing for people of different social backgrounds.

(c) *Paragraph (b)* shall not be construed as prejudicing the generality of *section 14(3)* insofar as it applies to the acquisition, holding and disposal of land.

(2) Without prejudice to the generality of *subsection (1)* or to any provision of this Act, apart from this section, the Authority may carry on any activity which appears to it be requisite, advantageous or incidental to, or which appears to it to facilitate, the performance by it of any of its functions under this Act.

(3)(a) The Authority may make such changes as it considers appropriate in consideration of the performance by it of its functions, the provision by it of services and the carrying on by it of activities.

(b) The Authority may recover, as a simple contract debt in any court of competent jurisdiction, from the person by whom it is payable any amount due and owing to it under *paragraph (a)*.

(4)(a) In making a draft master plan available under *section 24 (4)* it shall be a function of the Authority to make the plan available electronically in a form that is compatible with the World Wide Web or like form, and in such other form as the Authority considers appropriate.

(b) Following the laying of accounts under *section 43* or reports under *section 44*, it shall be a function of the Authority to make such reports and accounts available electronically in a form that is compatible with the World Wide Web or like form, and in such other form as the Authority considers appropriate.

(5) In addition to the functions assigned to it by *subsection (1)*, the Authority shall have such other functions related to securing the regeneration of the Dublin Docklands Area as for the time being stand assigned to it by the Minister by order made after consultation with the appropriate Minister.

(6) The Authority may do all such things as arise out of or are consequential on or are necessary or expedient for the purposes of the functions assigned to it by or under this Act, or for the purposes incidental to those purposes."

15. It is to be noted that the functions expressly assigned by sub-section (2) include the preparation of a Master Plan in accordance with s. 24 and Planning Schemes in accordance with s. 25, but there is no express reference to the issuing of the certificates the subject matter of this dispute.

16. The functions of the Council are set out in s. 20 and its primary functions are those set out in sub-sections (1)(a) and (b), and in addition to make recommendations to the Executive Board on certain matters set out in sub-section (c). Section 20 (1)(a) and (b) provide:

"(1) For the purposes of *section 18*, the Council shall-

(a)(i) in accordance with *section 24*, arrange for the preparation of, and adopt, a master plan for the Dublin Docklands Area, and review and update the plan at least once in every five years,

(ii) monitor the implementation of the plan;

(b) where appropriate, submit to the Minister, in accordance with *section 25*, a planning scheme or schemes for the Custom House Docks Area, or any part thereof, and any other area specified for that purpose by order under *section 25(1)(a)*."

17. The Executive Board is the organ of the respondent to whom the general power to conduct the business of the respondent is assigned by section 21 of the Act. This provides:

"(1) (a) Subject to section 20, the Executive Board shall conduct the business of the Authority and perform all of the functions assigned to the Authority by or under this Act.

(b) In addition to the functions referred to in *paragraph (a)*, the Executive Board shall arrange for the provision of such services to the Council as may be required for the effective performance by the Council of the functions assigned to it by or under this Act.

(2) In performing its functions, the Executive Board shall have regard to the recommendations made to it by the Council under section 20."

18. As appears from the above, the Scheme envisages the preparation and adoption by the respondent itself of a "Master Plan" for the Dublin Docklands Area, in accordance with section 24 of the Act. No issue arises in the proceedings in relation to the Master Plan for the Dublin Docklands Area. It is sufficient to note that it is clear from the terms of s. 24 of the Act, which is lengthy and detailed, that the Master Plan is intended as a written statement and plan, indicating overall objectives for the social and economic regeneration of the Dublin Docklands Area on a sustainable basis, with improvements in the physical environment and the continued development in the Customs House Docks area of services for the financial sector of the economy. Section 24 (2)(b) sets out certain provisions which must be in a Master Plan, and sub-section (3) requires the respondent *inter alia* to make arrangements for consultation with interested persons in relation to a Master Plan. The respondent is required to publish notices in relation to the existence of a Draft Master Plan, and consider submissions and observations made in response thereto. The effect of the adoption of a Master Plan under s. 24 on the general statutory scheme for planning and development, is set out at section 24 (5):

"(a) As soon as may be after the adoption by the Authority of a master plan under this section, Dublin Corporation shall consider the making of-

(i) a development plan under section 19(5)(b) of the Act of 1963 for that part of their area included in the Dublin Docklands Area which would be consistent with the master plan, or

(ii) such variations of the development plan for the County Borough of Dublin made under section 19 of the Act of 1963 as may be desirable to secure consistency between that plan and the master plan.

(b) Dublin Corporation and An Bord Pleanála shall, in deciding any application, or in determining any application on appeal, as the case may be, for permission under Part IV of the Act of 1963 in respect of development in the Dublin Docklands Area, consider the relevant provisions of the master plan.”

19. Section 25 sets out the statutory scheme for the preparation of a Planning Scheme and its consequences for the general statutory framework for planning and development. This section has been amended by s. 22 of the Housing (Miscellaneous Provisions) Act 2002, by the addition of sub-section (7)(ii)(c) and a new sub-section (8). Section 25 as amended provides:

“(1)(a) The Authority may prepare a scheme (to be known and in this Act referred to as a “planning scheme”) for the Custom House Docks Area, or any part thereof, and any other area specified for that purpose by order of the Minister.

(b) The Authority may at any time prepare a planning scheme amending a planning scheme under this section, including a planning scheme continued in force by virtue of section 9 (1) in respect of-

(i) the entire area to which the planning scheme applies, or any part thereof, or

(ii) the full requirements as to content specified in subsection (2), or any part thereof.

(c) A planning scheme under this section shall not include any development which is of a class for the time being specified under Article 24 of the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349 of 1989), or under any provision amending or replacing the said Article 24, other than industrial-estate development projects, urban development projects and sea water marinas as specified in classes 10(a), 10 (b) and 10(j) of Part II of the First Schedule to those regulations or such development as specified in any provision amending or replacing those classes.

(2) A planning scheme under this section shall consist of a written statement and a plan indicating the manner in which the Authority considers that the area to which the planning scheme applies should be redeveloped and in particular-

(a) the nature and extent of the proposed development,

(b) the proposed distribution and location of uses,

(c) proposals in relation to the overall design of the proposed development, including the maximum heights and the external finishes of structures,

(d) proposals relating to transportation, including the roads layout, the provision of parking places and traffic management, and

(e) proposals relating to the development of amenities and the conservation of the architectural heritage or other features.

(3) In preparing a planning scheme under this section the Authority shall-

(a) comply with any general directive that may be given to it under *section 45*,

(b) have regard to the master plan under *section 24*,

(c) consult with Dublin Corporation and with such statutory bodies as appear to the Authority to have an interest in the area to which the planning scheme relates,

(d) have regard to the development plan made by Dublin Corporation,

(e) make arrangements for the making of submissions by interested persons in relation to the planning scheme and the consideration by the Authority of any such submissions.

(4) A planning scheme under this section shall be submitted by the Authority to the Minister for approval and a copy thereof shall be sent to Dublin Corporation at the same time.

(5) Where a planning scheme under this section is submitted to the Minister by the Authority, the Minister shall consult with the Minister for Finance and shall consider any objections that may within one month of the sending of the copy to Dublin Corporation be made to the planning scheme by the said Corporation and may modify the planning scheme in such manner and to such extent as the Minister thinks proper and may approve the planning scheme or the planning scheme as so modified.

(6) Notice of approval by the Minister of a planning scheme under this section shall be published in the *Iris Oifigiúil* and in at least one daily newspaper published in the State.

(7) (a) Subject to *paragraph (b) and (c)*, each of the following shall be exempted development for the purposes of the Act of 1963-

(i) in an area in respect of which a planning scheme has been prepared and approved under this section, the carrying out by the Authority of any development in the area which is consistent with that planning scheme;

(ii) in an area in respect of which a planning scheme has been prepared and approved under this section, the carrying out of any development in the area by a person other than the Authority which is certified by the Authority to be consistent with that planning scheme; provided that a certificate under this paragraph may contain such conditions in relation to the carrying out of the development as the Authority considers appropriate.

(b) Where a planning scheme prepared and approved under this section is amended under *subsection (1)(b)*, any certificate previously issued under paragraph (a)(ii) in respect of the area which is the subject of the amending planning scheme during the period between the date on which the initial planning scheme was approved and the date on which the amending planning scheme was approved shall, as and from the date on which the amending planning scheme is approved, cease to be valid unless the development to which the certificate relates has been substantially commenced.

(c) For the avoidance of doubt, a certificate issued under paragraph (a)(ii) may include the following:

(i) in the case of a development wholly or partly for the provision of housing, a condition requiring that a percentage, not being more than 20 per cent, specified in the certificate, of houses being provided for in the development to which the certificate relates shall be provided for social or affordable housing;

(ii) a condition requiring the payment of a contribution towards any expenditure that has been, is being, or is intended to be incurred, by or on behalf of-

(I) Dublin City Council, in respect of the provision of public infrastructure and facilities that benefit or facilitate development in the area to which the planning scheme concerned relates;

(II) the Authority, in respect of the provision of public infrastructure and facilities in accordance with its functions under section 18 or to give effect to the master plan or the planning scheme concerned;

(iii) a condition relating to any matter which the Authority considers is in furtherance of the master plan or a planning scheme.

(8) In this section-

'house' includes any building or part of a building used or suitable for use as a dwelling and any outoffice, yard, garden or other land appurtenant to or usually enjoyed with that building or part of a building, and, where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building, and 'housing' shall be read accordingly;

'the provision of public infrastructure and facilities' means-

(a) the acquisition of land,

(b) the provision of open spaces, recreational and community facilities and amenities and landscaping works,

(c) the provision of roads, places for the parking of vehicles, bridges, sewers, waste water and water treatment facilities, drains and watermains,

(d) the provision of bus corridors and bus lanes, bus interchange facilities (including car parks for those facilities), rail and light rail transport and any other infrastructure to facilitate public transport,

(e) the provision of cycle and pedestrian facilities and traffic calming measures,

(f) the refurbishment, upgrading, enlargement or replacement of roads, places for the parking of vehicles, bridges, sewers, waste water and water treatment facilities, drains or watermains, and

(g) any matters ancillary to paragraphs (a) to (f)."

20. The functions of the respondent in relation to a Planning Scheme differ in some important respects from that of the Master Plan. There is a similar consultation procedure provided for in sub-section (3), but then, in accordance with sub-sections (4) and (5), the Scheme must be submitted by the respondent to the Minister and Dublin Corporation, for approval by the Minister. The Minister is given the power to modify the Scheme following consultation with the Minister for Finance, and receipt of any objections from Dublin Corporation. The final approval of the Planning Scheme, with or without modifications, is a matter for the Minister.

21. The potential impact of a Planning Scheme on the general statutory framework for planning and development is, as submitted by the parties, radical and extensive. Sub-section (7) makes certain types of development "exempted development" for the purpose of the general Planning Acts. First, if the authority itself carries out any development which is consistent with the Planning Scheme, such development is exempted development.

22. Central to these proceedings is the type of development identified in sub-section (7)(a)(ii), *i.e.* development in the area by a person other than the authority which is certified by the Authority to be consistent with the Planning Scheme.

23. Notwithstanding what counsel for the respondent described as this "extraordinary benefit" for a developer, namely, the possibility of carrying out a development without the necessity of going through the normal statutory scheme, seeking planning permission with all the application requirements, the potential for objections from members of the public, and appeal to An Bord Pleanála, it is surprising and regrettable that the Act of 1997 is silent as to how the respondent should exercise the function implicit from the provisions of s. 25(7) (ii), to issue certificates to persons that the development which they propose to carry out, is consistent with the relevant Planning scheme. The absence of any specific provisions as to how this function should be exercised is all the more

surprising, having regard to the express entitlement of the respondent to include conditions in a certificate, as authorised by section 25 (7)(a)(ii) and (c).

24. The only other provisions of the Act relevant to the issues in dispute to which the Court's attention was drawn, are the power given to the respondent in s. 27 of the Act, to acquire compulsorily land situate in the Dublin Docklands Area for the purpose of performing any of its functions, and that in s. 42, to accept gifts of money, land or other property, with a limitation that it should not accept a gift if the trusts or conditions attached would be inconsistent with or prejudice the effective performance of its functions.

25. Finally, counsel drew attention to what is a common provision in the definition section that "functions" include powers and duties.

The Docklands North Lotts Planning Scheme

26. The Dublin Docklands Area Master Plan was adopted in 1997. A review of the Master Plan 1997, was subsequently undertaken and in 2003, the Master Plan 2003, adopted.

27. In 2002, the Minister for the Environment and Local Government, pursuant to s. 25 (5) of the Act, adopted the planning scheme for the North Lotts Area, subject to certain modifications which are identified. The respondent made an amended Planning Scheme in or about December 2005, which was approved by the Minister on 26th June, 2006. The amended Scheme was exhibited in the grounding affidavits but not referred to or relied upon by any of the parties as being relevant to any of the issues in dispute herein. Insofar as I refer and cite below extracts from the Planning Scheme, it is the Planning Scheme as approved in 2002.

28. The developments proposed by the applicant and notice party, are on lands in Zone 4 of the area the subject of the Planning Scheme. The entire area measures some 32.7 hectares and includes the area bounded by the Campshires on North Wall Quay, East Wall Road, Sheriff Street Upper/Lower and Guild Street, and extends to the centre line of the River Liffey. Zone 4 is described as being in multiple ownership. The format of the Planning Scheme follows closely the requirements of s. 25(2), and of particular importance to the issues in dispute herein, sets out as required by s. 25(2)(b) and (c), the proposed distribution and location of uses in Chapter 4 and Chapter 5, provisions in relation to the overall design, including maximum heights and external finishes of structures. It also includes, in Chapter 5, provisions in relation to internal routes and public spaces.

29. The Planning Scheme, at para. 4.1, under the Introduction to the section on "Distribution and Location of Uses", states:

"In general, an even mix of development will be required in the Area. However, it will be desirable to allow for the concentration of some uses in certain locations to provide places with distinctive character.

The overall mix of development for the Area will be consistent with the Master Plan objective to assign 60% of developable land area for residential use and 40% for commercial use. The residential category includes community, cultural, hotels and local shopping for the purposes of this ratio. There is a prior assumption that this ratio will be met on all sites above 0.2 hectares (0.5 acres). Variations on the ratio may be considered subject to an absolute minimum of 40% residential and 30% commercial with 30% variable where a development:

- contributes to the enhancement of the Area through the provision of public open space; or
- provides social and affordable housing in excess of the Authority's minimum requirement; or
- provides other elements which can be clearly demonstrated to advance the social economic and physical policies of the Master Plan and where significant falling demand for either particular use can be independently demonstrated.

Small sites, i.e. those below 0.2 hectares (0.5 acres), may be exclusively devoted to a single use, provided the use at ground floor enlivens the street."

30. These provisions as to the mix of uses are, in substance, repeated as a policy which the respondent will ensure, at paragraph 4.12 of the Planning Scheme.

31. The proposals in relation to new routes and spaces is set out at para. 5.2.1 in the following terms:

"The Planning Scheme proposes a series of internal routes and public places (some of which may be shared surface between vehicles and pedestrians) as shown in Diagram 13. The objective is to create a strong east-west series of informal routes and spaces. These routes can be pedestrian or vehicular to suit internal access and design. Those intended for vehicular traffic will be designed to the lowest order of traffic speeds. These routes and spaces are not prescriptive in location. Developments will however be expected to adopt the objectives implied in the layout. A key principle is to include in each major block a local open space which could be used as a play area."

Insofar as relevant to certificate DD457, Diagram 13 shows an east-west staggered link between Castleforbes Road and New Wapping Street, with an open space immediately north of a portion of that route.

32. Paragraph 5.3.2 of the Planning Scheme, sets out under a heading of "Building heights and setbacks", the following:

"In order to provide a strong sense of street continuity, specific building heights have been identified for the main or primary streets identified in Diagram 10. Diagram 16 illustrates these building heights and allows for special provision for landmark buildings. It is generally anticipated that development will take the form indicated in Diagram 16, save contiguous to protected structures shown to be retained along North Wall Quay, where heights of new development may have to be scaled back to respect the setting of those structures (see Section 6.9). The Authority will seek appropriate building heights along the internal route network in the area indicated in that diagram. Design solutions will be considered that do not compromise the urban design quality of the Area or existing residential amenities. Building heights will be required to be such that satisfactory standards for sunlighting and daylighting are achieved and residential amenities are protected. However, the Authority also reserves the right to limit building heights on further internal routes to three storeys plus a possible set back storey. Building heights will not in any case exceed the maximum stated for the adjacent main or primary streets. (Modification No. 6)."

33. Diagram 16, insofar as relevant to these proceedings, colours in purple, North Wall Quay, in orange, New Wapping Street, and in

green, what are referred to as "indicative internal routes". The legend under the diagram, under a heading of "Maximum building heights", indicates in relation the streets coloured purple:

7 storeys commercial or 8 storeys residential

(all plus 1 possible set-back storey)

(Modification No. 4)

In relation to those coloured orange:

5 storeys commercial

(plus 1 possible set-back storey) or

6 storeys residential

(plus 2 possible set-back storeys)

In relation to those coloured green:

4 storeys (plus 1 possible set-back storey)

34. At para. 5.5 under the heading of "Policies", it is stated:

"The following urban design principles, mainly derived from Chapters 5 and 6 of the Planning Scheme, shall be regarded as being of fundamental importance in the consideration of any development proposals submitted for Section 25 certification: . . . (b) Maximum heights of buildings shall be as set out in Diagram 16 (except as amended by these modifications)."

35. This is again repeated in the full list of policies on p. 54 at the end of Chapter 5, where it is stated that:

"The Authority will: . . . Require building heights not to exceed the maximum heights shown on Diagram 16. It should be noted that the heights are expressed as main parapet heights. The Authority will consider architectural features standing above the main height limitation provided they contribute to the architectural design quality of the building."

36. While submissions were also directed to those parts of the Planning Scheme which related to plot ratios, it appears to me unnecessary by reason of the conclusions I have reached, to consider those submissions and therefore I do not propose complicating the judgment with reference to the plot ratios.

Respondent's certificate procedure

37. The respondent, through its executives, its CEO, Mr. Moloney; its Director of Architecture, Mr. McLaughlin; its Senior Planner, Mr. Keaney; and its Secretary, Mr. Mulcahy, have, in their affidavits, explained fully and frankly to the Court both its general procedure in relation to the determination for applications of certificates under s. 25 of the Act, and the procedure followed in the application which resulted in certificate DD457.

38. The respondent publishes on its website an application form which must be completed, with the documentation referred to therein, and states in the explanatory note:

"The section 25 application process is similar to a standard planning application, although there is no statutory third party involvement, with no requirement for a public notice or planning fee. There are no first or third party rights of appeal.

The public may view any section 25 certificate and accompanying application documentation."

It provides specific directions as to the form of maps, drawings, etc., which should accompany the form and gives certain directions, particularly in relation to applications for residential development and consultations with Dublin City Council's Waterworks and Drainage Division, none of which are relevant.

39. The respondent does not publish any public notice of the receipt of an application for a section 25 certificate. It is unclear as to when the applicants' documentation was available for public viewing in accordance with the above statement.

40. It is the practice of the executives of the respondent to have what they call "pre-section 25 application discussions" with developers. Such discussions took place with the notice party in November 2006. Mr. Mulcahy states at para. 23 of his first affidavit that, "the said discussions were with a view to establishing whether or not the Executive believed that the proposed development shown on plans and drawings prepared by the Developer's architect could be consistent with the Planning Scheme".

41. It is important to note the distinction between the "Executive Board" which is one of the organs of the respondent designated in s. 14(2)(a) of the Act of 1997, and those persons who, in the affidavits and even the Agreement of 31st May, 2007, are referred to as "the Executive". The latter are the employees of the respondent, none of whom are members of the Executive Board. The Executive Board are persons who in normal commercial terms would be considered as non-executive directors. For clarity in this judgment, I will simply refer to the Executive Board as the Board and use the term "the Executive" to designate collectively the senior employees of the respondent. The Executive, as so described, is not, of course, a legal person, and has no express recognition in the Act of 1997. It appears to have been adopted as the collective name for the senior full-time officials of the respondent.

42. I do not think that the Court was told of the attitude then formed by the Executive. However, Mr. Mulcahy does state that at the same time of the pre-application discussions, the notice party submitted an application to Dublin City Council for planning permission, which was subsequently refused. There has been exhibited and produced to the Court, a letter dated 24th January, 2006, written by Mr. Kearney on behalf of the respondent, to the Planning and Development Department of Dublin City Council, in relation to that

application. The conclusion of that letter is that in the opinion of the respondent, the proposed development is "not consistent with the Planning Scheme and not interest (sic) of the proper planning and sustainable development of the area". One of the specific matters referred to in the letter was the proposed height of the buildings, and Mr. Kearney expressed the view that as a result "it is considered that the proposed development is inconsistent with the requirements of the Planning Scheme". Reference is also made to plot ratio, streetscape and open space.

43. The application for a s. 25 certificate was lodged on 11th May, 2007. The application appears to have been initially assessed by Mr. McLaughlin, Director of Architecture. He states, at para. 9 of his first affidavit:

"As part of the pre section 25 application, discussions referred to in the Affidavit of Neil Mulcahy at paragraphs 22 to 24, I assessed the Developer's proposed development and in addition reviewed the plans and drawings which had been submitted on 11 May 2007 as part of the application. I formed the opinion from my preliminary examination that the development could be consistent with the Planning Scheme and was a development in respect of which the Executive should be prepared to recommend to the Board ought to be granted a Section 25 Certificate."

44. The next step appears, from Mr. Mulcahy's affidavit, to have been the culmination of pre-application discussions in the agreement made between the notice party and, as stated by the deponents, the "Executive of the Authority". That agreement, which only was disclosed to the applicants subsequent to the commencement of proceedings, is an agreement which is expressed to be between the notice party and the respondent, and is executed under hand only being signed on their respective behalves by Mr. Carroll and Mr. Mulcahy. The detail of the agreement will be referred to when I come to consider the grounds of challenge based on same.

45. The Board of the Authority met on 11th June, 2007, and noted the agreement entered into. Mr. Mulcahy's paper to the Board, informing them of same, was produced and states:

"North Wall Quay Development - Acquisition of Land for Amenity Purposes

1. Summary

The Board is asked to note that the Executive have entered into a contract with North Quay Investments Limited (a development vehicle owned by Liam Carroll) which has agreed to give, free of charge, to the Authority land adjoining Mayor Street to be used by the Authority as an amenity space subject to certain terms and conditions.

2. Background

Mr. Liam Carroll is the owner of a considerable area land in North Lotts (formally the Brooks Thomas Site) part of which fronts onto North Wall Quay. Mr. Carroll recently reached agreement with Anglo-Irish Banks and O'Donnell-Sweeney solicitors, for the construction by him of a major office development fronting onto North Wall Quay, and backing onto Mayor Street, which would accommodate both of these firms in corporate headquarters.

The development proposed was inconsistent with the Authorities (sic) Planning Scheme and he sought planning permission from Dublin City Council which was refused. Subject to providing amenity space for Docklands North Lotts, the Director of Architecture is satisfied that a development compatible with the planning scheme and satisfactory to Mr. Carroll and his tenants can be agreed. The transfer of the land for amenity would be essential to any such arrangement."

46. Mr. Kearney, the senior planner, prepared a planning report, which is dated 4th July, 2007. Some considerable confusion arose in the course of the proceedings in relation to various versions of Mr. Kearney's report. I wish to make clear that nothing turns on this for the issues which I have to determine. Mr. Kearney's practice appears to have been, when he prepared his planning report, to discuss it with Mr. McLaughlin, who is his superior, and to make changes pursuant to those discussions, but yet retain the same date on his report. Further, Mr. Kearney then both attended the Planning Sub-Committee of the Board and made further notes, and after the Board meeting of 13th June, 2007, at which the decision, in principle was made, he held further discussions, in particular in relation to one of the conditions which he proposed (which is not relevant to these proceedings) and again made further changes, whilst all the time retaining the initial date on the planning report. This appears an undesirable and inappropriate way of recording changes to a planning report. There is nothing wrong in Mr. Kearney incorporating changes to his report as a result of discussions or meetings. However, for good order, it appears to me that where a person, such as Mr. Kearney, revises a report by reason of discussions, then he should clearly indicate that the subsequent version is a revised report and date it as of the date the revisions occur.

47. The supplemental affidavits of Mr. Mulcahy and Mr. Kearney filed in the course of the proceedings, ultimately identified the version of Mr. Kearney's report which was put before the Board of the respondent as that exhibited at Exhibit 2NM1, to Mr. Mulcahy's affidavit filed in the course of the hearing. The report assesses the application and recommends that a certificate be issued subject to conditions. Twenty-two proposed conditions are set out.

48. The Planning Sub-Committee considered the application on 13th July, 2007, and subsequently on the same day a decision was taken by the Board of the respondent. The extract of the minutes from the meeting of the Board of the respondent records at paragraph 6.1 the following decision:

"DD457 - Proposed development of three office buildings on a site bounded by North Wall Quay, New Wapping Street and Mayor Street in Castleforbes Road - North Quay Investments Limited

Having received the recommendation of the Planning Sub-Committee and having considered the report of the Senior Planner dated the 4th of July 2007 (DD457) for the construction of three office buildings on a site bounded by North Wall Quay, New Wapping Street and Mayor Street and having examined the plans and elevations, the Board directed that a Certificate under Section 25 should issue to the applicant, subject to the conditions listed in Appendix 1 hereof."

Appendix 1 set out twenty-two conditions. There are some variations in those conditions to those set out in the version of Mr. Kearney's report which was before the Board. It is unclear when the terms of Appendix 1 as recorded in the minute were established. However, nothing turns on this, having regard to grounds upon which leave was granted herein.

49. The decision of the Board of 13th July, 2007, is characterised by the respondent's deponents as being a "decision in principle" to issue the certificate. They explain that an issue arose concerning condition 20 (J) in the planner's report, relating to a contribution towards a new foul and surface water drainage and collector sewer. It is stated that the Board of the respondent delegated to Mr. Maloney, the CEO, to investigate the nature of this requirement and to determine whether to include this financial levy as a condition. This is offered as the explanation for which the certificate did not issue until 29th August, 2007. In the meantime, meetings were held between Mr. Kearney and the CEO and the final set of conditions established. The applicants make much complaint in their affidavits that they were told no decision had been made in this period, but again, nothing turns on this. Mr. Mulcahy, in his affidavit, confirms that the certificate was sealed on behalf of the respondent. However, this could not have occurred on 13th July, 2007, as the certificate purports to state. Again, whilst this is not good practice, nothing turns on it for the purpose of these proceedings.

50. The certificate DD457 issued on 29th August, 2007, and dated 13th July, 2007, records the application on 11th May, 2007, for a certificate under s. 25 of the Act of 1997, for development being "the proposed development consisting of 3 no. office buildings - Blocks 1, 2 and 3:-

Block 1: The building will be eight storeys in height over ground level and will consist of 2 no. 8 storey finger blocks linked across a full height glazed central atrium space. Plant areas housed at roof level will be set back and screened. A roof terrace will be provided at the eighth floor level of the east finger block. A retail bank and staff canteen will be located at ground floor level. The gross floor area of Block 1 will be 23,739 sq.m.

Block 2: The building will be eight storeys in height over ground level. Plant will be set back and screened at roof level. A café and staff canteen will be located at ground floor. The gross floor area of Block 2 will be 9,785 sq.m.

Block 3: Block 3 will consist of an eight-storey block with stepped terraces and a penthouse gym/break out facility at roof level set back from the front and rear building lines. The roof level accommodation will also screen roof plant. A café and public exhibition space will be located at ground floor level. The gross floor area of Block 3 will be 17,704 sq.m.

All three buildings will be located above a shared two level basement car park that will accommodate 338 car spaces. Access to the car park will be from two separate locations; New Wapping Street via a new east-west street and directly from Castleforbes Road. The proposed development will also provide for the creation of a new east-west street that will link the New Wapping Street with Castleforbes Road and 3 new north south routes that will link North Wall Quay with the new east-west street. [Situated at Site Bounded by North Wall Quay, New Wapping Street, Mayor Street and Castleforbes Road, Dublin 1.]

51. The certificate then states:

"The Dublin Docklands Development Authority having considered the said application hereby certify that subject to the compliance with the attached [22] conditions the carrying out of the said development to be consistent with the Planning Scheme prepared and approved under Section 25 of the Dublin Docklands Development Authority Act, 1997, the said development is accordingly exempted development for the purposes of the Planning and Development Act."

52. The conditions relevant to the disputes are primarily those set out at 2, 14 and 22, which are:-

"2. The development relates to Phase 1 of the site consisting of buildings 1, 2 and 3. The development of Phase 2 of the site shall be the subject of a separate Section 25 application. The provision and distribution of 40% residential use and 60% commercial uses shall be consistent with the terms of the Planning Scheme over the entire landholding (i.e. Phase 1 and Phase 2)

14. The following amendments shall be made to the development:

(i) The western elevation of Building 1 which addresses New Wapping Street shall be redesigned in order to provide for a suitable architectural treatment which deals with the interface of the ground floor of this building and the public street.

(ii) In order to comply with the North Lotts Planning Scheme the top storey of Building 2 shall be redesigned as a setback floor.

(iii) Building 3 shall be redesigned in order to ensure compliance with the North Lotts Planning Scheme requirement in terms of height and the architectural quality of the elevations. This shall include for an increase in the separation distances between Building 2 and Building 3, and Building 3 and the eastern boundary of the site in order to improve the pedestrian environment.

Full details shall be submitted to the Board of the Authority as a reserved matter for written agreement prior to the commencement of development.

22. The strip of land located on the northern quadrant of the site (indicated in yellow on the attached map) shall be ceded to the Authority by deed of transfer to the Authority within 4 weeks of the date of issue of this Section 25 Certificate."

Nature of S. 25 certificate decision

53. The resolution of the disputes between the applicants and the respondent and notice party in relation, in particular, to the *vires* of the decision of the respondent to grant the s. 25 certificate of consistency with the Planning Scheme to the respondent, depend, at least in part, upon an identification of the nature and statutory purpose of the decision taken by the respondent. This is made difficult by the absence of any express provision in the Act of 1997 (as amended), expressly conferring the function of taking such a decision on the respondent, or to the procedure to be followed in taking such a decision.

54. All parties made extensive reference in submissions to what they perceive to be analogies and differences between the role and function or purpose of the respondent in taking such a decision, and a number of different decisions which may be taken by a planning authority under the Planning and development Acts, and judicial decisions relating to those powers. Whilst helpful, they are not

determinative. I have concluded that the nature of the function being exercised by the respondent in taking this decision, does not, unfortunately, fall neatly into any of the types of decisions which are taken by planning authorities under the Planning and Development Acts.

55. It is common case that the decision at issue is a decision which the respondent, by implication, has power to take, and one which must be taken by the Board by reason of the general assignment to the Board by section 21(1)(a). It appears to me important to note that the function of issuing a certificate of consistency with a planning scheme for the purposes of s. 25(7)(a)(ii) was not considered by the Oireachtas to be a function which should expressly be assigned to the respondent in s. 18(1)(b) for the purpose of the development duties assigned to the respondent under section 18(1)(a). The absence of any reference to the granting of certificates of consistency in s. 18(1)(b) appears to underline that this is an adjudicative function which is distinct from the general development functions of the respondent.

56. In relation to the procedure required, the respondent and notice party laid emphasis on the adjudicative nature of the decision making function and relied by analogy on the similar function now given a planning authority by s. 5 of the Planning and Development Act 2000, to determine a question as to what, in any particular case, is or is not exempted development within the meaning of the Act of 2000. I accept that there are similarities, but there also appear to me to be significant distinctions. Exempted development, for the purpose of the Planning and Development Acts, is defined either in the Act of 2000, or by regulations made by the Minister. Where a planning authority is required to determine what in any particular case is or is not exempted development, its function is confined to making a declaration on that question. Whilst the respondent, under the Act of 1997, has to determine whether or not the carrying out of a proposed development, is consistent with the relevant planning scheme, it is also given by reason of s. 25(7)(a)(ii) and (c) a power to include in the certificate conditions in relation to the carrying out of the development. The decision, therefore, goes beyond what is required of a planning authority in determining an application for a declaration under section 5 of the Act of 2000.

57. Further, the North Lotts Planning Scheme is not in all its provisions certain and prescriptive. This also distinguishes it from what does or does not constitute exempted development for the purposes of the Planning and Development Acts. Some of its provisions are prescriptive such as the maximum building heights set out at para. 5.3.2 and referred to above. However, it will be noted that, for example, the provisions already cited in the judgment at para. 5.2.1 of the Planning Scheme, in relation to the network of new routes and spaces, are not prescriptive, either as to the nature or location of the routes. It is expressly stated, "these routes can be pedestrian or vehicular to suit internal access and design". It also states, "these routes and spaces are not prescriptive in location". Similarly, even the provisions relating to building heights, whilst prescriptive as to the maximum height, the wording of para. 5.3.2 makes clear that lower heights may be required by the Authority in certain factual circumstances. For example, it states, "building heights will be required to be such that satisfactory standards for sunlighting and daylighting can be achieved and residential amenities are protected. However, the Authority also reserves the right to limit building heights on further internal routes to three storeys . . ."

Fair procedures

58. The first issue in dispute is whether the respondent was obliged to have in place in relation to its procedures for determining the application for a s. 25 certificate, an opportunity for the applicant, as an adjoining landowner to whom a certificate had already been granted for a development, to make submissions and have those submissions considered prior to making its decision.

59. The respondent and notice party oppose that obligation, primarily in relation to the nature of the statutory scheme and, in particular, the express provisions in ss. 24 and 25(3)(e) requiring the respondent to give interested parties an opportunity of making submissions and having those considered, both in relation to the Master Plan, and a planning scheme. They also drew, by analogy, on the procedure followed by planning authorities on applications for declarations under s. 5 of the Act of 2000 which they submit does not include publication of the application or the right of third parties to make submissions. The applicants in their submissions relied upon the interconnection of the certificate DD188 already granted to them, and, in particular, the requirement in that certificate in relation to the imposition by condition 5 or, the requirement that the applicant construct a road and footpath in the area allocated to future road space to the north of its site to Dublin County Council's "taking in charge" standards, and the requirement that same be transferred free of charge to the Authority, or the Roads Authority, at a date to be agreed with any proposal in the notice party's development for the remainder of that proposed east-west route between New Wapping Street and Castleforbes Road. They also referred in more general terms to the potential impact on the residential development the subject matter of certificate DD188 by the proposed commercial development the subject matter of certificate DD457.

60. 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 For the following reasons.

61. Section 25(7)(a)(ii) evidences a clear intention by the Oireachtas that there be a "fast track" procedure for the carrying out of development which is consistent with a planning scheme approved under s. 25 by the Minister, without the necessity of being subjected to the planning application procedures under the Planning and Development Acts. However, it is an exception to the general planning statutory scheme where the public including adjoining landowners have significant rights to participate. Also the provisions of ss. 24 and 25(3)(e) make clear the proper concern of the Oireachtas that interested parties be given an opportunity of both making submissions and having those submissions considered in relation to the Master Plan and a proposed planning scheme. It is not in dispute that the applicants are interested parties, having contractual rights to properties in the area of the North Lotts Planning Scheme and, subsequently, as a person to whom a certificate has been granted. If the only decision which had to be taken by the respondent was a decision as to whether or not the proposed development is or is not consistent with the Planning Scheme, and if the Planning Scheme was prescriptive in all important matters, then it appears to me that the respondent's submissions, that the right to make submissions prior to approval by the Minister of the Planning Scheme is sufficient discharge of their right to fair procedures, might well be correct. However it is not.

62. I have concluded that having regard to the implied power given to the respondent to impose conditions as to how a development should be carried out, and the fact that certain important matters such as the nature and location of new routes for pedestrian and/or vehicular access are not prescriptive in the North Lotts Planning Scheme, that the taking by the respondent the decision on an application for the s. 25 certificate at issue in these proceedings, without affording an adjacent landowner whose property will be affected by the decision the opportunity of making submissions and in considering same, is in breach of that person's rights to fair procedures. It does not appear to me that the express rights given in ss. 24 and 25(3)(e) to make submissions on draft Master Plan and planning schemes should be construed as implying any intention by the Oireachtas that the applicant, as an adjacent landowner, should not be given an opportunity to make submissions on an application for a s. 25 certificate for which no procedure is prescribed. On the contrary, those sections indicate an intention by the Oireachtas that interested parties be entitled to participate in this

statutory scheme. As the North Lotts Planning Scheme is not fully prescriptive and the respondent has a wide discretion to impose conditions in relation to the carrying out of the development, it appears to me envisageable that an application for a s.25 certificate and a potential decision with conditions, could raise matters of concern to an adjacent landowner which might not have been addressed in submissions on the draft planning scheme. Accordingly, I have concluded that the decision taken by the respondent on 13th June, 2007, was in breach of the applicants' rights to fair procedures.

63. I think I should make clear that the procedure which the respondent requires to have in place is not necessarily identical to that under the Planning Acts, but at least a procedure whereby interested persons such as landowners in the relevant area of the Planning Scheme, can ascertain that an application for a s. 25 certificate has been made, such as from a public register maintained by the respondent, and is then given a short period of time in which to make submissions. Such submissions would also have to be made available to the applicant for the certificate with a right of reply again within a short period.

Standard of review

64. Prior to considering the contention of the applicants that the proposed development of the notice party is not consistent with the North Lotts Planning Scheme, it is necessary to consider the standard according to which the Court should review the decision of the respondent that the development is consistent with the North Lotts Planning Scheme.

65. The applicants submit that the North Lotts Planning Scheme is the blueprint for the development in the North Lotts Area. This is not in dispute. Further, that it is, in its nature, similar to a development plan under the Planning and Development Acts, albeit far more detailed in its terms than a normal development plan. They submit that it follows from this that the North Lotts Planning Scheme should be regarded as an "environmental contract" similar to a development plan, as described by McCarthy J. in *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 at p.113, where he stated:

"The plan is a statement of objectives; it informs the community, in its draft form, of the intended objectives and affords the community the opportunity of inspection, criticism, and, if thought proper, objection. When adopted it forms an environmental contract between the planning authority, the Council, and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan and, further, that the Council itself shall not effect any development which contravenes the plan materially. The private citizen, refused permission for development on such grounds based on such objectives, may console himself that it will be the same for others during the currency of the plan, and that the Council will not shirk from enforcing these objectives on itself."

They also submit that it follows that the construction of the Planning Scheme is a matter of law which should be determined by the courts in accordance with the decision of Barr J. in *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527, and that the Court should not defer to the respondents, in accordance with the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

66. The respondent and notice party submit that review by the Court of the decision on consistency with the Planning Scheme is limited to the type of review permitted by *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, and the notice party, in particular, also submits that the proper analogy is not the development plan, but rather a planning permission and that, in accordance with the decision of the Supreme Court in *Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] 2 I.R. 625, the Court has no jurisdiction to construe the North Lotts Planning Scheme and it is a matter for the respondent.

67. Having considered each of the decisions referred to above, I have concluded that, in substance, the submissions of the applicants appear correct. Whilst I think there are distinctions between a development plan and a planning scheme drawn up under s. 25 of the Act of 1997, it appears to me that a planning scheme is much closer to a development plan than to a planning permission. The Planning Scheme is drawn up by the respondent after public consultation, but then not ultimately determined by the respondent. It is determined by the Minister, with or without modification, following a further consultation procedure. It is, therefore, not the respondent's document, as would be a planning permission.

68. It also appears to me to have some of the hallmarks of the type of environmental contract referred to by McCarthy J. in *the Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99. It is in the nature of a contract between the respondent and if not the public at large, at least the property owners within the area to which the planning scheme applies. Those property owners are entitled to rely on the fact that any development undertaken by the respondent in that area, without applying for planning permission, will be consistent with the Planning Scheme, and that the respondent will only grant a certificate to any other person pursuant to s. 25 if such development is consistent with the Planning Scheme. Each property owner is entitled to rely on the fact that any other property owner within the area will be only able to carry out development in accordance with this fast track method if it is consistent with the Planning Scheme.

69. Further, it appears to me that there is a close analogy between the decision impliedly entrusted to the respondent by the Oireachtas, having regard to the terms of s. 25, sub-section 7, and a determination by a planning authority that a grant of planning permission is not a material contravention of a development plan. This latter decision and the distinction of the appropriate nature of the review by the Courts of planning decisions which are a matter of planning judgment were described by Barr J. in *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527 at p.534 where he stated:

"Where a decision is made by a planning authority on an application made to it by a developer under s. 26 of the Act of 1963 for permission to proceed with a proposed development, it may be open to challenge on two broad grounds. First, on purely planning criteria (as, for example, a contention that the decision of the authority to exclude certain units from a proposed development was erroneous in that it was unnecessary and did not accord with good planning practice) and, secondly, that the decision is *ultra vires* the powers of the planning authority. The latter category of dispute includes issues relating to the meaning of the development plan relating to the particular application. The Oireachtas has provided in the planning code a forum for the adjudication of appeals from decisions of planning authorities within the first category i.e., those relating to planning matters per se. Such appeals are heard and determined by An Bord Pleanála which is a tribunal having the benefit of special expertise in that area. The court is not an appropriate body to adjudicate on such matters and in my view it ought not to interfere in disputes relating to purely planning matters. However, where the dispute raises an issue regarding a matter of law such as the interpretation of the wording of a development plan in the light of relevant statutory provisions and the primary objective of the document, then these are matters over which the court has exclusive jurisdiction. An Bord Pleanála has no authority to resolve disputes on matters of law."

70. Similarly, it appears to me that a decision by the respondent to grant a s. 25 certificate that the carrying out of a development is consistent with the North Lotts Planning Scheme, and to impose conditions in relation to the carrying out of the development, may be challenged on the basis either that it is *ultra vires* the powers of the respondent as, on the proper meaning of the Planning Scheme,

the proposed development is not consistent with the Scheme or the conditions imposed are *ultra vires* or that the conditions while *ultra vires* are unreasonable in the legal sense. This latter matter, having regard, for example, to the terms of s. 25(7)(c)(iii), appears to be a matter which the Oireachtas has exclusively entrusted to the respondent and which would be subject to the O’Keeffe principles.

71. However, by contrast, it does not appear to me that the Court could construe s. 25(7)(a) as demonstrating an intention to entrust exclusively to the respondent the determination of whether or not a development is, or is not, consistent with the Planning Scheme. That sub-section provides that the carrying out of certain development will be exempted development. The first category is the carrying out by the respondent itself of any development in the area “which is consistent with that planning scheme”. It could not be the intention of the Oireachtas that if a genuine dispute arose between an interested person, such as a landowner in the area, and the respondent as to whether or not a development which the respondent itself proposed to carry out was, or was not, consistent with the relevant planning scheme approved by the Minister pursuant to s. 25(5), that it would be a matter for determination by the respondent itself, subject only to review by the Courts in accordance with the O’Keeffe principles. Rather, it appears to me that such person is entitled to have the dispute as to the proper meaning of the planning scheme approved by the Minister under s. 25, which is in the nature of an environmental contract upon which they are entitled to rely, determined by the Court in accordance with the principles set out by Barr J. in *Tennyson*.

72. Further, the essence of the O’Keeffe principles are that the courts should not interfere with decisions of planning authorities on matters which the Oireachtas has clearly entrusted to those specialised bodies, and which are primarily a question of planning judgment, unless such decisions are unreasonable or irrational in the legal sense. The construction of what a planning scheme properly means has not been so entrusted to the respondent and it is not exercising such a planning judgment in determining what the planning scheme, as approved by the Minister, properly means. Further, in taking a decision on consistency on an application for a s.25 certificate, it is not exercising a development function entrusted to it by s. 18, but rather, an adjudicative function. Accordingly, I have concluded the Court should construe the North Lotts Planning Scheme and determine the dispute as to whether or not certain factually agreed aspects of the notice party’s proposed development are or are not consistent with the Planning Scheme.

73. The proper approach to the construction, by the Court, of planning documents, was also considered by Barr J. in *Tennyson* at p.535, in which he referred to the judgment of McCarthy J. in the Supreme Court in *re. X.J.S. Investments Ltd.* [1986] I.R. 750, and the following passage at p.756:

“Certain principles may be stated in respect of the true construction of planning documents:-

(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning . . .”

Those were the principles then applied by Barr J. in *Tennyson* and appear to be the ones which I should apply in construing the North Lotts Planning Scheme.

Consistency with the North Lotts Planning Scheme

74. As set out at the commencement of this judgment, the primary contention of the applicants on this aspect of the case is that the proposed development of the notice party is not consistent with the North Lotts Planning Scheme in two respects, the first of which is that it fails to meet the minimum mix of residential and commercial use prescribed by paragraph 4.1 of the Planning Scheme.

75. It is not in dispute that the proposed development is a development exclusively for commercial use, and is on a site which is larger than 0.2 hectares (0.5 acres). Paragraph 4.1 of the Planning Scheme requires the overall mix of development for the Area to be consistent with the Master Plan objective to assign 60% of development of land for residential use and 40% for commercial uses. It also states that there is a prior assumption that the ratio will be met on all sites above 0.2 hectares, but that variations on the ratio may be considered, subject to an “absolute minimum of 40% residential and 30% commercial with 30% variable” where a development meets certain criteria. It is also not in dispute that the proposed development of the notice party is on part only of the area owned by the notice party.

76. A condition imposed by the respondent at para. 2 of the conditions, explains the view taken by the respondent. It states:

“2. The development relates to Phase 1 of the site consisting of buildings 1, 2 and 3. The development of Phase 2 of the site shall be the subject of a separate Section 25 application. The provision and distribution of 40% residential use and 60% commercial uses shall be consistent with the terms of the Planning Scheme over the entire landholding (i.e. Phase 1 and Phase 2).”

77. The essence of this dispute between the parties is whether the respondent is confined to considering whether the development to which the application relates, if carried out, is consistent with the Planning Scheme, or whether it may have regard to some future unspecified potential development on land also owned by the developer.

78. I have concluded, on a proper construction of s. 25(7) and the North Lotts Planning Scheme, that the respondent is so confined. The effect of granting the certificate for the current proposed development of the notice party is that that such 100% commercial development is exempt development for the purposes of the Planning and Development Acts. It may therefore be carried out, regardless of whether any development is ever carried out on the balance of the lands owned by the notice party. Where the effect of granting a certificate is to make the development to which the certificate relates exempt development, it appears to me that such development to be entitled to a certificate must, of itself and by itself, be consistent with the Planning Scheme. The respondent has no control over whether or not the notice party will ever carry out any further development on the balance of the lands owned by it. I recognise, of course, that if it did apply for a certificate in relation to proposed development, that the respondent has indicated an intention as to how it will consider any such application. However, the notice party is not obliged to make any such application.

79. The respondent and notice party submitted that a “site” is not defined in the North Lotts Planning Scheme and therefore it is open to the respondent to consider as the relevant site, for the purposes of para. 4.1, the entire land holding of the respondent. They are correct in submitting that site is not defined. However, it seems to me, having regard to the wording of para. 4.1, that its plain meaning is that if a person seeks to carry out a development on a site which is in excess of 0.2 hectares, then such development will only be consistent with the North Lotts Planning Scheme, if the mix of residential and commercial uses are in accordance with the provisions of paragraph 4.1. It is, of course, a matter for a developer as to the size of the development for

which it seeks a section 25 certificate. The notice party could have sought a certificate for development on the whole site owned by it but did not do so.

80. Accordingly, I have concluded that the carrying out of the development to which the certificate dated 13th June, 2007, applies, is not consistent with para. 4.1 of the North Lotts Planning Scheme, even taking into account condition 2 thereto.

81. Having decided this issue, it is not strictly necessary to decide the second aspect of alleged inconsistency, namely, in relation to building heights. However, this alleged inconsistency raises a different issue which is of general importance to the respondent, and therefore it appears to me that I should determine that issue. It is not in dispute between the applicant and the respondent that the heights of the buildings in the development, as proposed in the application to the respondent, was inconsistent with section 5 of the North Lotts Planning Scheme. The issue is whether or not the respondent may impose a condition, or conditions, requiring modifications of the proposed development so as to make it consistent with the Planning Scheme as it did at condition No. 14 in certificate DD457.

82. The parties all referred extensively to the judgment of Hardiman J. (with whom the other members of the Court agreed) in *Ashbourne Holdings Ltd. v. An Bord Pleanála* [2003] 2 I.R. 114. That decision, in part, was concerned with the *vires* of a condition directed at ensuring or regulating public access to the old Head of Kinsale on lands adjacent to the lands for which permission or retention was sought and being in the same ownership. The condition was imposed pursuant to the powers given by s. 26(1) and (2) (a) of the Local Government (Planning and Development) Act 1963. Notwithstanding the extensive references to this judgment, all parties accepted the differences in the two statutory schemes and the differences in the nature of the decision being made by An Bord Pleanála the subject matter of the Supreme Court judgment in *Ashbourne*, and the decision taken by the respondent herein.

83. Hardiman J. at p.122, in his decision on *vires*, stated:

"Despite the strong positions adopted on each side, the question of *vires* comes down to a consideration of s. 26. If the power to create conditions of this sort is within s. 26, then only a successful attack on the constitutionality of that section could prevent its exercise in an appropriate case. If it is not within the section it is legally irrelevant that the first respondent may think it should be. The rights of property and the imperatives of public access are alike irrelevant to the question of *vires*, which is a wholly legal one."

84. I have concluded that exactly the same position pertains here. The question of the *vires* of the respondent to grant a certificate with a condition such as that included at para. 14 of the conditions attached to certificate DD457, the effect of which is to require redesign of the buildings to make them consistent with the North Lotts Planning Scheme, is a matter of construction of section 25 of the Act of 1997.

85. This issue raises a difficult question of interpretation. There are persuasive arguments for both constructions. The respondent relies heavily on the general duties and functions of the respondent, set out in s. 18, to secure the development of the Dublin Docklands Area, and the very general nature of the functions assigned to it by section 18(1). It also makes the common sense submission that where, as in this instance, it receives an application for a s. 25 certificate in respect of a development which is not, in all respects, consistent with the Planning Scheme for the area, that it can more effectively secure the carrying out of that development by granting the certificate with a condition which requires modification of design etc., to make the proposed development consistent with the Planning Scheme. They also refer to the very general nature of the wording in s. 27(a)(i) that a certificate may contain "such conditions in relation to the carrying out of the development as the Authority considers appropriate".

86. There was some difference in submission between the respondent and notice party as to the precise origin of the power to impose a condition to make the development compliant with the Planning Scheme. Mr. Cush S.C., on behalf of the respondent, submitted that such a condition could not derive from sub-section 7(c), inserted by amendment in 2002, but rather must flow from the original wording of section 25(7)(a)(ii). Mr. Collins, S.C., for the notice party, submitted that it could arise under sub-section 7(c)(ii).

87. The applicants, on the other hand, simply submit that s. 27(a)(ii) and (c) (as amended), does not permit of the certifying, as they put it, on a contingency basis. They say that such is the effect of condition no. 14 to certificate DD457. The respondent is granting the certificate but is requiring the notice party to modify its designs and then agree with the respondent such modifications. The certified development will only be consistent with the North Lotts Planning Scheme if carried out in accordance with a design not yet determined. The applicants submit that there is no statutory authority for any such approach. A certificate DD457 in its terms makes clear that the respondent is only certifying on a contingent basis as submitted. It states:

"... certify that subject to the compliance with the attached (22) conditions the carrying out of the said development to be consistent with the Planning Scheme"

88. I have concluded, as a matter of probability, that the applicants' submissions are correct that s. 25(7)(a)(ii) and (c) cannot be construed as giving to the respondent a power to certify, as consistent with the Planning Scheme, a development, subject to the notice party carrying out modifications to the design to ensure compliance with the Planning Scheme, and requiring subsequent agreement with the respondent of the revised designs.

89. Regretfully, I have concluded that the respondent has incorrectly approached its certifying powers by analogy too closely with the manner in which the planning authorities now exercise the statutory power to grant planning permissions in accordance with s. 34 of the Act of 2000, and previously, section 26 of the Act of 1963. The planning authority is making a quite different decision pursuant to those sections, and is expressly given the general power to grant permissions "subject to or without conditions". Essentially, it may grant permissions which it considers to be in the interest the proper planning and sustainable development of the area subject to certain limitations such as not being a material contravention for a development plan.

90. As already stated in this judgment, the function impliedly assigned to the respondent by reason of the provisions of s. 25(7)(a) is more limited. It has no jurisdiction to grant a certificate where the carrying out of the development would be in the interest of the Planning scheme. It is confined to granting a certificate adjudicating the development to be consistent with the Planning Scheme. Further, this function must be construed in the context of its purpose and the effect that it may have, namely, to confer what was described by counsel for the respondent as the "extraordinary benefit" of enabling a person carry out a significant development without being subjected to the rigours of the statutory planning code. Its purpose is to allow significant development by a fast track method by way of exception to the Planning and Developments Acts. As an exception, it cannot be construed more widely than the terms of the Act permit. It appears to me, primarily from the wording of s. 25(7)(a)(ii) and (c), that the Oireachtas intended that the primary decision which has to be taken by the respondent is whether or not the carrying out of a proposed development is, or is not, consistent with the Planning Scheme and it is only in the event that it is determined to be consistent with the Planning Scheme, that

the respondent is given the power to grant a certificate, and it may then include in the certificate for such consistent development conditions in relation to the carrying out of that development. It is the determination that the proposed development is consistent with the Planning Scheme which entitles it to be considered as exempt development. The need to permit the respondent include in the certificate, conditions in relation to the carrying out of the development, appears to arise by reason of the fact that these developments are ones which would normally require planning permission and the multiplicity of conditions which might normally be included by a planning authority in relation to the carrying out of a development, as distinct from conditions which pertain to the nature of the development which will be carried out. Many of the conditions included in certificate DD457 are of that nature. The amendment made in 2002 by the insertion of sub-paragraph (c) supports, in my view, such a construction. It is to be noted that this sub-paragraph provides that "for the avoidance of doubt, a certificate issued (emphasis added) under paragraph (a)(ii) may include the following", and then a series of types of conditions are listed and that at para. (iii) being the only one of relevance and, whilst undoubtedly of a very general nature, but as Mr. Cush accepted, correctly in my view, not one which would authorise the imposition of a condition, the intended effect of which was to make an otherwise inconsistent development consistent with the Planning Scheme.

91. Whilst I recognise the practical sense in the submission made on behalf of the respondent that development may be more effectively secured by granting a certificate subject to conditions that re-using and awaiting a revised application, it does not appear that such a construction is supported by the terms of the Act of 1997 as amended. As already stated, the adjudicative function is not one expressed to be for the purpose of securing development or regeneration of the Dublin Docklands Area. Also, importantly, the respondent is not given any powers of enforcement or to ensure compliance with a section 25 certificate. Enforcement remains with the planning authority. Certainty requires that the certificate of itself demonstrates whether or not the development to which the certificate applies is, or is not, exempt development.

92. I have therefore concluded that on this ground of challenge also that the decision to grant certificate DD457 was *ultra vires* the respondent.

93. I wish to make clear the limits of this conclusion. It is *ultra vires* the respondent to grant a s.25 certificate in respect of a development which, as proposed in the application, is inconsistent with the relevant planning scheme, even with a condition the purpose of which is to render the carrying out of the development in accordance with the condition consistent with the planning scheme. However, this must be distinguished from the situation where the carrying out of the proposed development the subject of the application, is determined to be consistent and the respondent considers it desirable in the furtherance of the planning scheme or Master Plan that the development be carried out with certain variations (obviously consistent with the planning scheme). The respondent has wide powers to impose such conditions in a certificate under section 25(7)(a)(ii) and (c). This could arise in practice in relation to the North Lotts Planning Scheme, for example, in relation to matters where it is not prescriptive such as location of routes and open spaces.

94. The final issue in relation to the *vires* of the conditions in certificate DD457 is the applicants' contention that condition no. 22, requiring the notice party to cede to the respondent the strip of land located on the northern quadrant of the site within four weeks of the date of issue of the certificate, is *ultra vires*. The submissions in relation to the purpose of this condition varied. Part of the submission was that this was also a condition intended to render the development consistent with the North Lotts Planning Scheme in relation to the provision of open spaces. If so, (which I am not holding), then the decision to grant the certificate is also *ultra vires* on this ground. However, there was also a wider submission that the respondent could impose a condition requiring an applicant for a s. 25 certificate to cede lands to it, free of charge, where the respondent considered such ceding to be in furtherance of either the Master Plan or the North Lotts Planning Scheme.

95. It is unnecessary for me, having regard to the conclusions already reached in relation to the *vires* of condition no. 14 and the other conclusion, to determine separately the *vires* of the respondent to impose a condition to cede as in condition number 22. It appears to me undesirable that I should do so on the facts of this application. The land is land owned by the notice party. It had agreed to cede this land to the respondent if the section 25 certificate was granted. It is not objecting in these proceedings to the *vires* of the respondent to impose the condition. Whilst the applicant has made legal submissions against the *vires* of the respondent to do so, it is doubtful that the applicant would have *locus standi* to challenge the validity of the certificate by reason of the imposition of this condition alone, where it is not the owner of the land. It therefore appears to me more appropriate to leave over the determination as to whether the respondent has the power to require the transfer to it, free of charge, by the imposition of a condition in a s. 25 certificate, until it arises (if at all) where the owner of the land who has an interest, objects to the imposition of such a certificate.

Bias

96. The last ground of challenge to the decision of 13th July, 2007 to issue certificate DD457, is that it was made in breach of the rule against apparent or objective bias by reason of the agreement of 31st May, 2007, and/or that the respondent took into account an irrelevant consideration, i.e. the Agreement, in reaching its said decision. I do not propose considering and determining on the facts of this case the extent to which the respondent took into account the Agreement in reaching its decision. It appears to me unnecessary, having regard to the conclusions already reached and only relates to the particular facts of this case.

97. However, the deponents for the respondent have made clear in their affidavits that it forms part of their common practice to enter into both pre-section 25 application discussions and agreements of this nature with developers. They referred to agreements entered into with one or both of the applicants. Having regard to the general practice and the extent to which the issue was debated in the course of this hearing, it appears appropriate that I should set out my conclusions on the issue.

98. There was no real dispute between the parties as to the legal principles according to which the Court should determine this issue. It is accepted by Mr. Cush, on behalf of the respondent, that in Ireland, unlike the position in England and Wales, the same "reasonable apprehension" test applies to both judicial and administrative bodies. In *Spin Communications Ltd. v. Independent Radio and Television Commission* [2001] 4 I.R. 411, Murray J. (as he then was), stated at p.431:

"The test to be applied in determining what may be regarded as constituting objective bias on the part of an adjudicator (and I use this term in order to cover judicial proceedings and administrative or quasi-judicial proceedings before tribunals or other administrative bodies) has been considered in a good number of cases in recent years before the High Court and in particular before this court. I think the law on this question is now clear and is that as expressed by Keane C.J. in his judgment in the *Orange Communications Ltd. v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159. In his judgment, with which a majority of the court expressly agreed, the Chief Justice stated at p. 186 that there is: -

'No room for doubt as to the applicable test in this country: it is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have been

biased i.e. where it is found that, although there is no actual bias, there is an appearance of bias' . . .

Moreover, for objective bias to be established it must be shown that there existed some external factor extraneous to the decision making process which could give rise to a reasonable apprehension that the decision maker might have been biased. Furthermore, this external factor must exist prior to the decision made."

99. These principles in relation to an administrative body are subject to some limitation or exception in favour of a bias of necessity or structural bias by reason of relevant statutory provisions. Keane J. (as he then was) considered the position of a body whose statutory scheme might mean that it does not present the appearance of strict impartiality required of a Court administering justice in *Radio Limerick One Ltd. v. Independent Radio and Television Commission* [1997] 2 I.R. 291 and at p.316 stated:

"There is a further consideration applicable to bodies of this nature which is relevant to the present case. Because of the factors to which I have already referred, a body such as the commission may not, in given circumstances, present the appearance of strict impartiality required of a court administering justice. That, however, does not relieve the commission of the obligation to take every step reasonably open to it to ensure that its conclusions are reached in a manner, not merely free from bias, but also of the apprehension of bias in the minds of reasonable people. But where, as here, a body is obliged to carry out certain statutory functions and no issue arises as to the constitutionality of the relevant provisions, a court cannot by the strict application of the legal principles already referred to prevent the body from exercising those functions, where all practical steps have been taken by it to free itself, not merely from actual bias but the apprehension of bias in the minds of reasonable people: see the decision of this court in *O'Neill v. Beaumont Hospital* [1990] I.L.R.M. 419."

100. The applicants also relied upon the decision of the High Court in England in *Steeple v. Derbyshire County Council* [1985] 1 W.L.R. 256. That decision deals with a number of issues and essentially in one part of the decision applies the above principles to the facts of that case. That is what I must do to the facts of this case.

101. It is not in dispute between the parties that the agreement of the 31st May, 2007, is an "external factor" extraneous to the respondent's decision making process on the notice party's application for a s. 25 certificate of the type referred to by Murray C.J. in *Spin Communications Limited v. Independent Radio and Television Commission*. It is also not in dispute that the existence of the Agreement was brought to the attention of the Board of the respondent, which is its organ responsible for taking the decision on the s. 25 certificate. The fact that the members of the Board may not have been aware of the detailed terms of the Agreement does not appear relevant. Its essential features were brought to the attention of the Board when it met on the 11th June, 2007, in accordance with the paper prepared by Mr. Mulcahy and exhibited and set out earlier in this judgment.

102. The parties were also in agreement that in accordance with the decisions of the Supreme Court, already referred to, the Court in determining whether a reasonable person might apprehend that there would be bias because of the external factor, that reasonable person must be deemed to have knowledge of all the relevant circumstances which, in this instance, would include the full terms of the Agreement and the statutory scheme under which the respondent operates and its practice of entering into discussions and even agreements with interested parties.

103. The terms of the Agreement are of crucial importance. The agreement of the 31st May, 2007, is an agreement expressed to be between the respondent and notice party. In its recitals it refers to the North Lotts Planning Scheme ("NLPS"), the initiation of a statutory scheme to revise the NLPS, the site owned by the respondent and then recites at paragraphs (D) to (G) inclusive:-

(D) The Authority has identified that part of the Site more particularly shown on the plan attached hereto and initialled by the parties as being appropriate for public open space. The Authority requires a portion of the Site fronting Mayor Street Upper to facilitate those public works.

(E) The current NLPS would not permit a development of the nature intended by NQIL [North Quay Investments Ltd.].

(F) NQIL is desirous of proceeding with the first phase of its proposed development as soon as is practicable.

(G) The Authority is desirous of facilitating NQIL in this regard subject to terms and conditions set out below.

104. The clauses of particular relevance to the issue of bias appear to be the following:-

1. NQIL lodged on Friday 11th May 2007 an application with the Authority, within the parameters of the current NLPS, for a Section 25 Certificate for the Site in respect of a modified version of its proposed office development.

3. The executive of the Authority will recommend to the Board that the application for a Section 25 Certificate received from NQIL pursuant to Clause 1 be granted by the Authority by no later than 31st July, 2007.

5. The Authority acknowledges that it is critical to NQIL to obtain such a Certificate, or alternatively planning permission from Dublin City Council, within the said twelve month time frame in order to allow NQIL honour its commitments to certain prospective tenants at North Wall Quay.

6. In consideration of the Authority granting the Section 25 Certificate to be applied for under clauses 1, 2 and 3 above NQIL will transfer free of cost to the Authority good and marketable title to that portion of the Site more particularly identified on the plan attached hereto and shown hatched green ("the Strip") in order to facilitate the Authority's long term plans for a major public space in the North Lotts area subject to:

[There are then set out seven conditions some of which provide for the type of transfer, certain circumstances in which the land would be surrendered back to the notice party and certain provisions in relation to the works to be carried out on the land, none of which are relevant to the issues herein.]

8. This Agreement does not create nor shall it in any circumstance be taken or construed as having created any partnership between the Authority and NQIL.

10. The parties agree with one another that they will keep confidential the contents of this Agreement and will not, without the prior consent of the other party (such consent not to be unreasonably withheld or delayed), divulge to any third party whatsoever the details thereof (other than to necessary professional advisors and others who are necessary

for NQIL in connection with its funding and other dealings with the development e.g. respective tenants and in any proceedings issued or intended to be issued or as required by law.

11. Nothing in this Agreement shall prejudice or affect any of the statutory rights, powers or duties for the time being vested in the Authority as the Statutory Authority for the area in which the Site is located.

105. The applicants submit that Clause 6, when properly construed in the context of the Agreement, means that the respondent agreed in this Agreement to grant the s. 25 certificate in consideration of the transfer of the land free of cost. I do not accept that this is the proper construction of Clause 6. Rather, it appears to me that Clause 6 when construed, particularly in the context of Clause 3, means that in the event that the respondent granted a s. 25 certificate, the notice party agreed to transfer the land free of charge. It is with this construction that I propose determining the issue of "reasonable apprehension of bias".

106. I have concluded that in applying these principles, and in particular those stated in *Spin Communications Limited v. Independent Radio and Television Commission* and *Radio Limerick One Limited v. Independent Radio and Television Commission*, that I must set aside the decision of the respondent to grant this s. 25 certificate to the notice party on the ground of objective bias, as it appears to me that the existence of the agreement of the 31st May, 2007, gives rise to the reasonable apprehension that the respondent might have been biased. My reasons for so concluding are the following.

107. The agreement of 31st May, 2007, at recital D and Clause 6, makes clear that the land to be transferred has been identified by the respondent as being appropriate for public open space and that its acquisition by the respondent is at a minimum desirable to facilitate the respondent's long term plans for major public space in the North Lotts Area. In the affidavits, the transfer of the land is referred to as a "planning gain". The respondent, in submissions, emphasised the absence of any material benefit to the respondent in the sense of the value of the land being transferred, but rather, that its transfer would impose financial obligations on the respondent to create open spaces. Notwithstanding that this may be so, the Agreement indicates that the acquisition by the respondent of this land is perceived by it as being something which will facilitate its plans for the development of the North Lotts Area and in that sense its transfer will create a benefit for the respondent.

108. Secondly, Clause 6 makes clear that it is only in the event that the s. 25 certificate is granted that the notice party becomes obliged to transfer the lands. Thus, there is a direct relationship between the decision to grant the s. 25 certificate and the obtaining by the respondent of the lands and the benefit in the sense that I have described.

109. Thirdly, the Agreement makes clear that the notice party is desirous for commercial reasons of proceeding with what is termed the first phase of the development, notwithstanding that the current North Lotts Planning Scheme would not permit a development of the nature intended. Clauses 3 and 5 acknowledge the crucial timing for the notice party of the grant of the certificate.

110. Clause 3 in its terms commits the "executive of the Authority" to recommend to the Board that the application for the s. 25 certificate be granted by the respondent no later than 31st July, 2007. The Board is, of course, the organ which takes the decision. However, as already observed, the members of the Board are non-executive members. That is clear from the terms of the Act. A reasonable person with knowledge of the entire Scheme will be aware of that fact and it seems to me, as a matter of common sense, that a board, such as the Board of the respondent, will inevitably rely considerably on any recommendation made to it by its full-time executives. Whilst the "executive of the Authority" is not a legal person and the individual members of the executive do not appear to be parties to the Agreement, it has been signed by the Secretary of the respondent who is one such executive. In accordance with its express terms, the executives of the Authority appear to be committing themselves to a particular viewpoint, and it appears to me that there must be a reasonable apprehension that the executives, having done so, that the Board will, in the absence of some special factor, follow the recommendation of the executives. This commitment, coupled with the benefit which the respondent will obtain if the certificate is granted, appear to me to be the crucial factors which create a reasonable apprehension of bias in the decision to be made on behalf of the respondent by the Board.

111. It does not appear to me that Clause 11 of the Agreement can in any way save the Agreement from creating this reasonable apprehension of bias. It does no more than state the obvious insofar as no agreement entered into, even if fully authorised, could affect the statutory rights, powers and duties for the time being vested in the respondent. It appears to me that this Clause is a formulaic Clause which undoubtedly attempts to preclude a person having a reasonable apprehension of bias but, in my view, having regard to the other terms of the Agreement which I have already referred, and the fact that the Agreement, albeit on its face with a statutory body, is to remain confidential pursuant to Clause 10, it cannot operate so as to prevent a conclusion that the Agreement itself does create a reasonable apprehension of bias in the decision to be taken on the application for the section 25 certificate.

112. The other factor relied upon strongly by counsel for the respondent and the notice party, is the existence of the very wide and extensive powers given to the respondent to secure development of the Dublin Docklands Area and its practice, which is stated to be well known, of entering into agreements with developers and the practical necessity to do so. Again, it does not appear to me that this can avoid the conclusion which I have reached. Undoubtedly, the respondent has very wide powers given to it to secure the development and regeneration of the Dublin Docklands Area. However, for the reasons set out earlier in this judgment, it appears to me that it has what is a separate and distinct power and obligation to adjudicate on applications for certificates under section 25(7)(a)(i). In carrying out this function, it is, in the first instance, carrying out an adjudicative function as to whether or not a proposed development is consistent with the Planning Scheme for the area. If it does so, it may then decide to impose conditions which are closely related to the development function. By reason of its development function and obligations, the respondents may not present the appearance of strict impartiality required, for example, by a Court administering justice in determining an application for a section 25 certificate. It might be considered to have a predisposition towards granting certificates. However, this being so, the principles set out so clearly by Keane J. (as he then was) in *Radio Limerick One Limited v. Independent Radio and Television Commission* apply, and the respondent is under an obligation to take practical steps to free itself in taking a decision on an application from a s. 25 certificate, not merely from actual bias, but the apprehension of bias in the minds of reasonable people. This appears to include having a procedure under which no commitment is given, not just by a member of the Board itself, but by the executives (who can only be or be perceived to be acting on behalf of the respondent), to any person as to the view to be taken (or a recommendation for a view) on an application for a s.25 certificate prior to the determination of the application by the Board. It further appears to me to require that the respondent does not permit any arrangements to be put in place in carrying out its development functions which would create an impression that the respondent would be obtaining a benefit in the sense of something that it wishes to have or achieve for the purposes of its development functions if it grants a section 25 certificate.

113. Accordingly, whilst it appears to me permissible for the executives of the respondent to enter into pre s. 25 application discussions, as is their practice, it appears impermissible that those discussions would result in either a commitment given by the executives to make a formal recommendation, or in an agreement whereby the respondent would obtain area benefit in any sense in the event that it grants the section 25 certificate. There is, I recognise, a thin line between what appears permissible, namely,

discussions under which a developer might seek to ascertain from the executives whether or not they perceive any inconsistency with what is being applied for or a discussions about potential conditions with the type of formal commitment by the executives to make a particular recommendation which appears impermissible. The practical working of the Act of 1997, having regard to the development function and the provision for s. 25 certificates, appears to require for its effective working some pre-application discussions and therefore must be considered as contemplated by the Oireachtas. However, it is important that the executives at all times make clear that they are not in a position either to commit themselves or the Board to a particular course of action, nor should they seek any benefit (in the very general sense of the word) for the respondent in the event of the grant of a certificate.. What is permissible falls short of what was done in this instance.

Certiorari of the Agreement

114. The applicants have sought an order of *certiorari* of the Agreement of the 31st May, 2007. They have not provided any authority to support the jurisdiction of the Court to quash an agreement entered into by a public body. The essence of the jurisdiction of *certiorari* is to quash a decision which is *ultra vires* a statutory body. There is no evidence of any decision taken by the Board, or any other organ of the respondent, to enter into the Agreement with the notice party. Whilst it is expressed to be an agreement between the respondent and the notice party, the evidence is that it was an agreement entered into by the executives of the respondent, but it is unclear under what authority they did so. No issue arose in the proceedings as to the authority of the executives to enter into such an agreement.

115. The applicants sought the order of *certiorari* of the Agreement on the basis that it was *ultra vires* the respondent. It follows from the conclusions which I have reached above, that the respondent has very wide powers in relation to steps which it may take to secure the development or regeneration of the Dublin Docklands Area. However, having regard to the adjudicative function imposed on the respondent by s. 25(7)(a)(i) and the principles set out above as to how that function must be exercised in order to avoid any apprehension of bias, it appears to me that it was *ultra vires* the respondent to enter into the agreement for two reasons. First, it is *ultra vires* the respondent to enter into an agreement in advance of determining an application for a s. 25 certificate under which it will obtain a benefit if it grants the certificate. In entering into the agreement it is rendering its subsequent decision invalid by reason of the existence of a reasonable apprehension of bias. It is *ultra vires* for it to do so. Secondly, insofar as the agreement should be construed as either the respondent or its executives committing that its executives would make a particular recommendation to the Board, that also appears to me to be *ultra vires* the respondent.

Relief

There will be:-

(1) An order of *certiorari* of the decision 13th July, 2007, to grant certificate DD457 to the notice party pursuant to s. 25(7) of the Dublin Docklands Development Authority Act 1997; and

(2) A declaration that the Agreement of the 31st May, 2007, between the respondent and notice party was *ultra vires* the respondent.