[2020] IEHC 642

THE HIGH COURT

JUDICIAL REVIEW

[Record No. 2018/1063 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

BAILE EAMOINN TEORANTA

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

GALWAY COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr.Justice Barr delivered electronically on the 4th day of December, 2020.

Introduction

1. The applicant applied for planning permission for demolition of a cottage and construction of an eighty-one bedroom hotel; two self-catering cottages; a business and food innovation centre; six detached residential houses; together with associated car parking and works at a site in Spiddal, Co. Galway. The applicant was refused permission for the development by Galway County Council on 10th November, 2017. He appealed that refusal to the respondent, but in a decision issued on 23rd October, 2018, the respondent also refused permission for the development.

2. Permission was refused by the respondent on two grounds: firstly, that due to the deficiency in the public waste water system servicing the Spiddal area, the development would be premature until a proper municipal waste water treatment plant (MWWTP) should be put in place by Irish Water, notwithstanding the fact that the applicant had proposed to install its own private waste water treatment plant (PWWTP) to service the development in the interim, and secondly, it was considered by the respondent that discharge from a private sewerage plant into an inadequate public sewerage network would be prejudicial to public health having regard to the additional hydraulic loadings involved and the fact that it would be discharged from the public system directly into the sea near two beaches.

3. In these proceedings, the applicant challenges the legality of the decision issued by the respondent. In summary, the applicant challenges the decision on the following grounds:-

   (1) The applicant claims that contrary to the provisions of the relevant guidelines, under which the respondent was obliged to have regard to the views of Irish Water, it failed to have regard to the views of that entity as contained in a letter, which it had issued to the applicant's engineer on 26th October, 2017, in advance of the lodgement of the planning application, confirming that it was feasible for the waste water from the proposed development to be attached into the existing public waste water system in the Spiddal area. In the alternative, it was argued that if the

respondent did have regard to that letter as required by the guidelines, it had failed to give any reasons or any adequate reasons in its decision as to why it was going to depart from those views in the decision that it gave;

(2) It was asserted that Galway County Council in reaching its decision had relied on a non-statutory policy which was stated to be against allowing developments which had private waste water treatment plants, when the provisions of the relevant County Development Plan expressly permitted the use of such plants in certain circumstances and when this had been raised by the applicant in its appeal to the respondent, this issue had not been addressed by it in its decision;

(3) The respondent's decision was irrational due to the fact that it had proceeded on the basis of a material mistake of fact in relation to the existence of any application by Irish Water to build a municipal waste water treatment plant for the Spiddal area; due to the fact that the Inspector had consulted an inaccurate website, he had operated on the basis that Irish Water had not submitted any planning application for a MWWTP, when in actual fact they had lodged an application for planning permission with Galway County Council three months earlier on 6th June, 2018, which permission had been granted twenty-three days prior to the respondent's decision, on 1st October, 2018; it was submitted that this mistake rendered the decision irrational; and

(4) It was submitted that in reaching the conclusion that the development, which involved the temporary use of a PWWTP, would be injurious to public health, the Inspector and the respondent had acted on unspecified "*potential concerns*" and "*reservations*" on the part of the Inspector, which were not backed up by any evidence and therefore such conclusion was irrational on the part of the respondent.

4. The response of the respondent can be briefly summarised in the following way:-

(1) In relation to the "*views*" of Irish Water as expressed in its letter to Mr. McDermott of O'Connor Sutton Cronin, consulting engineers, dated 26th October, 2017, it was submitted that that was merely a pre-connection feasibility letter, which confirmed that it was technically feasible for the waste water from the proposed development to be accommodated in the existing waste water treatment system servicing the Spiddal area. It did not constitute the views of Irish Water in relation to either the desirability of allowing such connection to take place, nor in relation to any public health consequences that there may or may not be, due to such connection. It was merely a technical letter confirming that it was feasible for the connection to be made. More importantly, it was submitted that the views set out in that letter, were not such as were mandated under the guidelines to be taken into account by the respondent. The respondent was only obliged to take into account submissions which were made by the statutory consultees after the application for planning permission had been lodged. In this regard Irish Water had been informed of the application on two occasions by Galway County Council, but had not made any

submissions. Accordingly, it was submitted that the respondent had not breached the guidelines, because no submissions had been made to it.

(2) In relation to the assertion that the respondent had not addressed the applicant's argument that Galway County Council had wrongly taken into account a non-statutory policy which was against the use of PWWTPs, which was inconsistent with its stated policy in the County Development Plan, it was submitted that neither the respondent's Inspector, nor the respondent, had reached its decision by reference to any such non-statutory policy and therefore it ceased to be relevant to the grounds on which the respondent had refused permission for the development and for that reason did not require to be addressed.

(3) In relation to the assertion that the respondent's decision was irrational due to the fact that they had proceeded under a material mistake of fact concerning the status of Irish Water's planning application, it was submitted that the decision had been made on the basis of the existing deficiency in the public waste water system servicing the Spiddal area and as such, the decision reached by the respondent was not irrational, when it had determined that the applicant's proposed development was premature having regard to the deficient state of the public sewerage system at the relevant time.

(4) Finally, in relation to the finding that the proposed development would be contrary to public health, it was submitted that the respondent was entitled to take into account the considerable additional hydraulic loading that would be placed on the public wastewater system and the fact that untreated sewerage from the Spiddal area was discharged directly into Galway Bay on the ebb tide, in an area that was close to two bathing beaches. In these circumstances it was submitted that the Inspector was entitled to give the views that he had done in relation to the adverse effects on public health and the respondent had been entitled to act on those views. Accordingly, it was submitted that there was nothing irrational in the decision that the respondent had reached in relation to the public health aspects of the decision.

5. The foregoing is just a brief description of the arguments raised by the parties. It will be necessary to consider these in more detail later in the judgment.

Chronology of Relevant Dates

6. The following would appear to be the relevant dates concerning matters in issue in these proceedings:-

26/10/2017	Letter from Irish Water to the applicant's expert giving positive response to their pre-connection inquiry.
10/11/2017	Application for planning permission for the proposed development lodged by the applicant with Galway County Council.
29/11/2017	Irish Water is notified by Galway County Council of the applicant's planning application.

19/02/2018	Irish Water is notified a second time by Galway County Council of the application lodged by the applicant.
23/03/2018	Galway County Council receives its planner's report in relation to the proposed development.
23/03/2018	Galway County Council refuses permission for the development.
19/04/2018	Applicant appeals the decision to the respondent.
06/06/2018	Irish Water submits an application to Galway County Council for planning permission for a MWWTP for the Spiddal area.
17/09/2018	The Inspector furnishes his report to the respondent in relation to the applicant's appeal.
1/10/2018	Irish Water is granted planning permission for a MWWTP by Galway County Council.
23/10/2018	The respondent rejects the applicant's appeal in relation to the refusal of planning permission by Galway County Council.
24/10/2018	An appeal is lodged with the respondent against the grant of planning permission that was made to Irish Water for its MWWTP.
17/12/2018	Applicant obtains leave from the High Court to seek relief by way of judicial review against the respondent's decision.
19/03/2019	The respondent dismissed the appeal against the planning permission granted to Irish Water for its MWWTP.

The Respondent's Decision

7. In its decision issued on 23rd October, 2018, the respondent refused permission for the proposed development for the following reasons:-

> *"It is considered that the proposed development would be premature by reference to the existing deficiency in the provision of public piped sewerage facilities serving the area and the period within which the constraint involved may reasonably be expected to cease. It is further considered that discharge from a private sewerage plant into an inadequate public sewerage network would be prejudicial to public health having regard to the additional hydraulic loadings involved."*

8. On 17th September, 2018, the respondent's Senior Planning Inspector, Mr. Kevin Moore, issued his report in relation to the appeal. He had reviewed all the documentation submitted and had carried out a site inspection on 12th September, 2018. In the section of his report dealing with sewerage treatment, he noted that the existing sewerage scheme for the Spiddal area consisted of a small collection system with a sea outfall. It discharged untreated sewerage directly into the sea. The outfall was in the vicinity of

public bathing areas. He noted that the two bathing areas concerned, being Trá na mBan and Trá na Céibhe, each had blue flag status. He noted that the local area plan had a policy to progress as a priority the provision of a waste water collection and treatment system for the area. The plan also had a specific objective to maintain the blue flag status for the two beaches.

9. The Inspector stated as follows in relation to the status of the plans which Irish Water had for the development of a MWWTP for the area:-

> "It is understood from the appellant's submission to the Board that it has been in consultation with Irish Water and it has been ascertained that consultants have been appointed for the design of a treatment plant for the village. I note from information available online from Irish Water that a proposed new waste water treatment plant to serve a population equivalent of one thousand is to be located at the site of the existing Údarás Waste Water Treatment Plant, north of the Údarás na Gaeltachta craft village. The available information from Irish Water states that it will submit the planning application to Galway County Council this year and, subject to statutory approval, works on the project will commence in 2019."

10. The Inspector went on in his report to outline the nature of the PWWTP which was proposed would service the development, which was a tertiary treatment plant. Having summarised how such a plant operates, he stated that he had "serious concerns" about the impact of a private treatment plant in terms of exacerbating the severe pollution impact on water quality arising from Irish Water's current foul water system. Arising from that, he had serious concerns about the prematurity of the proposed development in that context. He stated that adding significant volumes of foul waste water, albeit treated to some degree, would add further to the intensification of pollution of coastal waters at that location, with consequential adverse impacts for bathing waters. He stated that the final effluent output from the private plant still constituted foul water that would increase the load on a very deficient system. There were potential concerns remaining in relation to COD, E-coli etc., and he had reservations in relation to the intended discharge of swimming pool waters to the surface water system if a need arose. He had concerns for the regular removal of waste solids at the site. It was his opinion that the proposed arrangement did not adequately provide for effluent treatment. He stated that it posed a very significant pollution threat to nearby coastal waters, it raised a concern about odours resulting from solid waste removal and there was a clear deficiency in dealing with swimming pool water.

11. The Inspector went on to note again that the Irish Water website had made available information which demonstrated that it was to submit a planning application that year and that it aimed to commence construction in the following year. He stated that the Irish Water scheme "*clearly remains at the planned stage. There can be no guarantee at this time that the provision of a private waste water treatment plant will be required for the short term only. The construction period for and intended completion date of the public scheme is unknown.*"

12. The Inspector went on to state that it was his opinion that the proposed development at that time was at best premature. It should not be pursued until a new public sewerage system was in place. He felt that that was essential to protect water quality in the relevant coastal area and to ensure that the urgently required public treatment plant was pursued as an urgent project, so that the future orderly development of An Spidéal could be undertaken in a sustainable manner. He also expressed the view that if the applicant was allowed to proceed with its own PWWTP, others would seek to do likewise.

13. The Inspector made a recommendation that permission should be refused for the proposed development for the reasons and considerations set out at section 9 of his report. Those reasons and considerations were essentially the reasons and considerations that were ultimately adopted by the respondent in its decision, as quoted above.

The Applicant's Submissions

14. The applicant's first ground of challenge was on the basis that the respondent had failed to take into account the views of Irish Water, which had been expressed by it in its letter to O'Connor Sutton Cronin dated 26th October, 2017; or in the alternative, that if the respondent had made a decision to depart from those views, it was obliged to give reasons as to why it had done that and it had failed to give any such reasons.

15. It was submitted that under s.42 of the Planning and Development Act 2000, as amended, the Board in performing its functions was required to have regard to the policies and objectives of a number of specified entities, including any body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural.

16. It was submitted that under s.28(1) of the 2000 Act (as amended) the respondent was obliged to have regard to the draft Water Services Guidelines for planning authorities, which had issued in 2018. It was pointed out that both s.28(1) of the 2000 Act and para. 2.1 of the guidelines provided that planning authorities shall have regard to the guidelines in the performance of their functions.

17. Counsel referred to in *McEvoy v. Meath County Council* [2003] I.R. 208, where Quirke J. held that the obligation imposed by s.27(1) of the 2000 Act, to have regard to any regional planning guidelines, meant that the planning authority when making and adopting a development plan had to inform itself fully of and give reasonable consideration to any regional planning guidelines which were in force in the area covered by the development plan, with a view to accommodating the objectives and policies contained in such guidelines. However, the judge went on to state that while it was obviously desirable that the planning authority should try to implement the objectives and policies set out in the relevant regional planning guidelines, they were not bound to comply with the guidelines and may depart from them for *bona fides* reasons consistent with the proper planning and development of the areas for which they had planning responsibility. It was submitted that the duty was placed upon the planning authority, in this case the respondent, to have regard to the guidelines and if they were not going to comply with same, they were under a duty to state reasons why they were not doing so:

see *Spencer Place Development Company Limited v. Dublin City Council* [2019] IEHC 384, at para. 53.

18. It was submitted that in this case, the respondent was bound to have regard to the content of para. 5.3.3 (i) of the Water Services Guidelines which was in the following terms:-

> *"Where Irish Water confirms the feasibility of a connection and that it has no objection in principle to the development, the planning authority should be satisfied that the development (without prejudice to Irish Water's connections policy, as this is independent of the planning process and with consideration being given to any risk to the provision of water services; the development being prejudicial to public health or causing environmental pollution) is acceptable from a water services perspective."*

19. It was further submitted that the respondent had failed to have regard to the provisions of circular FPS 01/2018, which was issued by the Department of Housing Planning and Local Government and addressed to the chief executives of the planning authorities and to the respondent. It issued on 17th January, 2018. It dealt with the Water Services Guidelines 2018. The circular provided that the guidelines which had been published that day were issued under s.28 of the Act whereby planning authorities and the respondent were required to have regard to the guidelines in the course of carrying out their functions.

20. The circular provided that planning authorities and the respondent were obliged to have regard to the views of Irish Water as a statutory consultee, in the following terms:-

> *"Irish water is a statutory consultee under the Planning and Development Act 2000 (as amended) and planning authorities are required to take account of the views of Irish Water in making decisions on statutory plans, planning applications and other planning consents. Decisions with a potential interface or impact on public water services should be informed by the views of Irish Water. These Guidelines set out a clear process in this regard."*

21. It was submitted that there was a clear obligation placed on the respondent by the directions contained in the circular to have regard to the Guidelines when carrying out their functions and this meant that they had to have regard to the views of Irish Water contained in their letter of 26th October, 2017.

22. It was submitted that neither the Inspector's report, nor the decision of the respondent, showed any engagement or consideration of the views that had been expressed by Irish Water in that letter. In the letter, Irish Water had clearly stated that in the interim, pending delivery of the MWWTP in Spiddal, option 1 (being full treatment on site with a treated waste water discharge to the IW network) could be facilitated. The letter stated clearly "*this connection can be facilitated subject to the conditions outlined above with respect to waste water treatment*". Thus, it was submitted, that Irish Water had clearly

stated that pending delivery of the MWWTP, the existing waste water system in Spiddal could take the output from the proposed development, as long as it was subject to the tertiary treatment on site as proposed by the developer.

23. It was submitted that in breach of the terms of the guidelines, the Inspector and the respondent had simply failed to take into account the views of Irish Water as expressed clearly in that letter. In the alternative, in the event that such views had been taken into account and the Inspector and the respondent had decided not to go along with the views expressed by Irish Water; it was submitted that it was incumbent on the respondent in such circumstances to state clearly its reasons why it was not complying with the views expressed by Irish Water; which it had not done.

24. It was submitted that where a party had made submissions on a relevant issue that was germane to the appeal, it was incumbent on the decision maker to address those submissions and give reasons for his or her decision on the submissions that had been made on behalf of the relevant party: see Connelly v. An Bord Pleanála [2018] IESC 31; Christian v. Dublin County Council [2012] 2 IR 506 and Balz v. An Bord Pleanála (No. 2) [2019] IESC 90. In particular, counsel referred to the decision of O'Donnell J. in the Balz case at para. 57:-

> "It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."

25. It was submitted that in this case the respondent had either not engaged with the views expressed by Irish Water at all, or in the alternative, if they did engage with those views and had decided to reject them, they had not set out any reasons for so doing. If the court accepted that one or other of those propositions were established, then it rendered the decision unsatisfactory and would have to be quashed.

26. In the second ground of challenge to the decision, it was submitted that in the original refusal of permission by Galway County Council, it had relied on a non-statutory policy to the effect that it was the policy of the authority to lean against the granting of permission for PWWTPs. However, it was pointed out that that policy was in conflict with the stated policy of the planning authority as set out in the County Development Plan in WW5 and DM29, which expressly permitted private treatment plants, as long as certain conditions were met. It had been part of the applicant's appeal to the respondent, that Galway County Council had erred in applying a non-statutory policy, which was at variance with the stated policy of the planning authority in the County Development Plan. It was submitted that that issue had not been addressed at all in either the Inspector's report, or the respondent's decision.

27. It was submitted that a non-statutory policy which was not incorporated into the County Development Plan, was not a policy or objective for the purposes of s.143 of the 2000 Act and therefore the Board was not entitled to take it into account: see Daly v. An Bord Pleanála (Unreported High Court 26th January, 2018); *Element Power Ireland Limited v. An Bord Pleanála* [2017] IEHC 550 and *Tristor Limited v. Minister for the Environment* [2010] IEHC 397.

28. It was submitted that the Inspector's report had left the Board with the misleading impression that the provision of a PWWTP was contrary to planning authority policy, when in fact it formed part of its statutory policy under the County Development Plan. It was submitted that in those circumstances, the respondent could not have had regard to, or at least adequate regard to, the relevant provisions of the County Development Plan, as they had not been fairly or accurately recorded or reported in its decision, or in its Inspector's report, upon which its decision had been based. It was submitted that in these circumstances, the Inspector's report did not constitute a "*fair and accurate*" report. That unfairness was exacerbated by the Inspector's failure to refer in his assessment to the opinion of Irish Water that the PWWTP was acceptable. It was submitted that if the report was found to be unfair as alleged, then on the authority of *Simonovich v. An Bord Pleanála* (Unreported High Court 24th July, 1988), the respondent's decision, which had been based on a report from its Inspector that was not fair and accurate, would have to be set aside.

29. The third ground put forward on behalf of the applicant, was that the decision of the respondent would have to be set aside as it had proceeded on the basis of a material mistake of fact in relation to the status of the Irish Water application for planning permission for its MWWTP for the Spiddal area, such that its decision was irrational under the tests set down in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

30. In this regard, it was submitted that the Inspector had made a fundamental error by consulting the Irish Water website, rather than the planning register maintained by Galway County Council. The Irish Water website had been hopelessly out of date when consulted by the Inspector in September 2018. As a result, he had advised the respondent that the Irish Water plans for a MWWTP for the Spiddal area, "*clearly remains at the planned stage*". In other words, he was telling the respondent that as of 17th September, 2018, Irish Water had not even submitted any application for planning permission for its own water treatment plant. On that basis, he came to the conclusion that "*the construction period for, and the intended completion date of, the public scheme is unknown*". It was submitted that that was a very serious misstatement of fact, having regard to the decision reached by the respondent that the grant of permission to the applicant would be premature by reference to the existing deficiency in the provision of public sewerage facilities serving the area and "*the period within which the constraint involved may reasonably be expected to cease*". It was submitted that as the statement of facts as put before the respondent by the Inspector was hopelessly out of date and inaccurate, and having regard to the fact that the primary ground of refusal was on the

basis of its prematurity, this was a fundamental error of fact that rendered the decision irrational.

31. It was submitted that the true state of the facts was materially different. Irish Water had in fact submitted a planning application to Galway County Council on 6th June, 2018, some three months prior to the Inspector's report. Irish Water had been granted planning permission for its MWWTP by Galway County Council on 1st October 2018. So the true position, which ought to have been before the respondent when considering the question of the prematurity of the development from a waste water perspective, ought to have been that Irish Water had in fact obtained planning permission from Galway County Council. It was submitted that had those facts been known, that would have materially affected the views which the respondent would have had in relation to the period within which the constraint involved may reasonably have been expected to cease.

32. It was submitted that while an appeal had been lodged against the grant of planning permission to Irish Water, that appeal had ultimately been determined in favour of Irish Water in March 2019. The effect of that was to radically change the position on the ground. That was shown by the fact that on 27th June, 2019, the respondent's solicitor in open correspondence invited the applicant to withdraw the proceedings and thereafter to recommence the planning process. The letter went on to state that the respondent stood over its decision and in particular its decision that it would be premature to grant planning permission for the development by reference to the existing deficiency in the public waste water system. However, the letter also stated as follows:-

> *"We note, however, that in the period since the Board's decision, Irish Water has been granted permission for a new Waste Water Treatment Plant (WWTP) to serve the local area (ABP-302847-18), and is proposing to proceed with that project. This suggests that it may be in the applicant's interest to withdraw the proceedings and make a fresh application for planning permission.*
>
> *We would be happy to discuss this further. Please note that this letter may be relied upon subsequently by the Board in any application for costs."*

33. It was submitted that in order for a decision to be rational, it was necessary for all relevant material, or at least factually correct material, to be before the decision maker; if not the decision was irrational. In that regard counsel referred to *Halpin v. An Bord Pleanála & Ors*. [2019] IEHC 352 where Simons J. held that "*the implicit assumption underlying this rationale [of the O'Keeffe principles] is that An Bord Pleanála will have had all relevant material before it and, having weighed this material reached a decision*." While that case dealt with the absence of all relevant material being before the decision maker, it was submitted that where an agent of the decision maker had put before it factually incorrect material, the case for holding the decision to be irrational was all the stronger. It was submitted that in light of the facts that had been put before the respondent by its Inspector, the respondent could not have properly considered the period within which the constraint in relation to the public waste water system was likely to apply and on that basis the decision had to be struck down on grounds of irrationality.

34. The final ground of challenge to the decision, was based upon the opinion given in the Inspector's report and adopted by the respondent, that the proposed development, which involved the provision of a PWWTP on site, would pose a risk to public health. It was submitted that there was simply no evidence before the Inspector which would have allowed him to reach that conclusion. Instead, there was merely a reference to "*potential concerns*" and "*reservations*" which were based only on very vague assertions that there could be some prejudice to public health.

35. It was submitted that not only was there no evidence for any such conclusion, but in fact the evidence before the respondent was to the contrary. This was (1) the fact that the material coming out of the PWWTP, which was a tertiary treatment plant, would in fact be of a higher quality than the discharge from the Irish Water MWWTP when finally constructed; and (2) there was an inherent contradiction within the Inspector's report where he had concluded that there was no real likelihood of significant effects on the environment arising from the proposed development, while at the same time concluding that the discharge from a private sewerage plant into an inadequate public sewerage network would be prejudicial to public health, having regard to the additional hydraulic loadings involved. It was submitted that when one was looking at a discharge from a pipe into Galway Bay, there was no basis on which it could be held that such discharge would have no adverse effect on the environment, but could have an adverse effect on human health, in particular the health of people swimming at nearby beaches.

36. It was further contended that when one had regard to the functions of Irish Water under the Water Services Act 2007 and in particular to the provisions of s.31 thereof, where one of its functions was stated to be the protection of human health, that had to be read in conjunction with the letter that Irish Water had provided on 27th October, 2017, confirming that the existing system could take the waste water from the proposed development, as meaning that there were no adverse health implications anticipated by such connection.

37. Having regard to these matters, it was submitted that the decision of the respondent that the development and in particular the waste water aspects thereof were adverse to public health, was simply irrational.

38. It was submitted that taking all of the grounds set out above into consideration, the court should strike down the decision of the respondent dated 23rd October, 2018 and should remit the matter back to the respondent for fresh consideration.

Submissions on Behalf of the Respondent

39. It was submitted on behalf of the respondent that the applicant had misconstrued the issue as to whether the guidelines were applicable in the circumstances of this case. It was accepted that Irish Water was a statutory consultee and as such, it was entitled to have its views taken into account, but only if it chose to make submissions to the relevant planning authority. In this case, Irish Water had been invited on two separate occasions to make submissions if it wished to do so and it had not made any submissions to Galway County Council on the planning application lodged by the applicant. As such, it could not

be said that Galway County Council, or the respondent, had failed to have regard to the views of Irish Water, simply because they had not made any submissions to the planning authority as they were entitled to do. As no submissions had been lodged on behalf of Irish Water, it was not possible for Galway County Council, or the respondent to give any reasons why they were departing from those views, as none had been made known to them.

40. It was submitted that such eventuality had been specifically catered for in the guidelines, as para. 5.3.2 provided that if a submission was not made by Irish Water to the planning authority within five weeks of the date of receipt of the planning application, the planning authority could determine the application without further notice to them. Thus, it was submitted that it was clear that where the statutory consultee did not exercise its right to make submissions, the planning authority was entitled to proceed on without further notice to it.

41. It was submitted that insofar as the applicant contended that the respondent was obliged to have regard to the views of Irish Water as set out in its letter of 27th October, 2017, that was incorrect, as that letter was merely a response to a pre-connection inquiry. It only related to the technical feasibility of the proposed development being connected to the existing waste water system. Such inquiries were specifically provided for under para. 5.2 of the guidelines, which provided that engagement by the developer with Irish Water through the pre-connection inquiry process would facilitate Irish Water's assessment of planning applications and may therefore reduce requests for further information. In other words, it was something that the developer was advised to do, so as to speed up the ultimate consideration of his planning application by the planning authority. However, that did not take away from the fact that such confirmation was merely a confirmation of the technical feasibility of effecting a connection. It did not have any wider implications in relation to the suitability of the development having regard to the proper planning and development of the area.

42. In these circumstances, it was submitted that the issue as to whether the respondent had either engaged with the views of Irish Water as expressed in their letter, or had failed to give any reasons why it had reached a decision that appeared to be in conflict with those views, simply did not arise and did not form a valid basis for overturning the respondent's decision.

43. In relation to the second ground of challenge; that the Inspector and the respondent had failed to address the applicant's argument that the planning authority had been incorrect at the initial stage to have had regard to a non-statutory policy, which was against the provision of PWWTP's generally, which was alleged to be inconsistent with its stated policy in the County Development Plan; that was an issue which simply did not arise in the proceedings, due to the fact that it was not one of the reasons why permission had been refused by the respondent.

44. It was submitted that the respondent had clearly stated its reasons for the refusal of permission, being the fact that it was premature having regard to the existing state of the

public waste water system in the Spiddal area at the time that the application was considered and, given the existing deficiencies in the public waste water system, the proposed development would have an adverse effect on public health. Thus, the alleged existence, or reference by Galway County Council to any non-statutory policy against PWWTPs, simply did not arise for determination by either the Inspector or the Board, because it did not form part of their reasoning in relation to why permission should be refused for the proposed development. It was submitted that as the existence of any such non-statutory policy had not formed part of the reasoning why the proposed development was refused permission by the respondent, it was not a matter that had to be addressed in its decision.

45. In relation to the allegation that the respondent's decision was irrational due to the fact that it had proceeded on the basis of a material mistake of fact concerning the status of the planning application lodged by Irish Water for the MWWTP; it was submitted that it was a well-established principle of administrative law that the court must assess the lawfulness and rationality of the decision impugned on the basis of the material that was before the decision maker when it made its decision. The applicant was not entitled to supplement that, with new material, or with evidence of things that had occurred since the decision was made, with a view to persuading the court that the decision was wrong in law, or on the merits.

46. In this regard, the respondent referred to the decision in *Hennessy v. An Bord Pleanála* [2018] IEHC 678, where Murphy J. held that because the applicant had not made submissions to the Board within the time prescribed, he could not rely on such submissions of law as a means of asserting that the Board had come to an incorrect decision at law: see in particular para. 38 of the judgment, where the judge cited with approval a passage from Lewis "*Judicial Remedies in Public Law*" (5th ed., 2015) at p. 368 and in particular, to the following portion:-

> *"The courts will usually only look at the material before the decision maker at the time that he took the decision in order to determine whether he has made a reviewable error. The courts do not consider fresh evidence, that is evidence which, if it had been put before the decision maker, might have influenced his decision. The court cannot, therefore, admit in evidence material that became available after the decision in order to determine whether the decision maker erred in coming to his decision. Nor can the court have regard to material which existed before the decision was taken and which, if it had been drawn to the decision maker's attention and been considered by him, might have influenced his decision."*

47. Counsel stated that the principles enunciated in the Hennessy case were particularly relevant to the averments made in the affidavit of Mr. Andrew McDermott sworn on behalf of the applicant on 15th December, 2018, wherein he had compared the technical standards of the applicant's proposed PWWTP with those of the MWWTP proposed by Irish Water and had offered the view that the former would be to a higher standard. It was pointed out that when the respondent made the decision the subject of these

proceedings, there was no evidence before it in relation to an application for planning permission by Irish Water, or regarding the technical specifications of any MWWTP being proposed by it. It was submitted that the court should accordingly disregard this evidence: see *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888, at para. 35.

48. Without prejudice to that argument, it was submitted that the standard of treatment of waste water was not the only factor influencing whether from a planning and sustainable development perspective, it was preferable for a development to be connected to waste water infrastructure facilities owned and operated by Irish Water on behalf of the public, rather than having privately owned and operated on-site treatment facilities. Issues of access, control and maintenance were important considerations in this regard. It was submitted that there were clear planning reasons why a unitary, well-located public facility was preferable to a multiplicity of private facilities located on, or in the vicinity of the sites of the developments which they served. Odour emissions from such private treatment facilities was also a consideration and had been a concern for the Inspector in the present case.

49. It was submitted that the fact that the applicant was only proposing that the PWWTP would be a temporary facility, pending construction of the MWWTP, served to highlight that public waste water treatment was the optimal solution.

50. It was further submitted that the fourth schedule to the 2000 Act, as amended, set out a number of reasons for the refusal of planning permission which exclude compensation. These reflected legitimate considerations which went to the planning merits of a decision on an application for planning permission. These included at para. 1(a) that "*development of the kind proposed on the land would be premature by reference to any one or combination of the following constraints and the period within which the constraints involved may reasonably be expected to cease – (a) an existing deficiency in the provision of water supplies or sewerage facilities*". Furthermore, the non-compensatable reasons for refusal, also included at para. 10(a) in the case of development including any structure, the fact that the structure would be prejudicial to public health.

51. Given that the uncontradicted fact was that the existing public waste water system servicing the Spiddal area was grossly deficient, in that it did not treat the sewerage, but merely held it and then pumped it into Galway Bay on the ebb tide, there was ample justification for the decision which the respondent had made that the proposed development would be premature having regard to the existing deficiencies in the public waste water system and having regard to the hydraulic loading that would be placed thereon. In this regard, there was evidence before the respondent that on average, occupants of a hotel use twice the level of water than a normal occupant of a house would do on an average day.

52. Counsel submitted that the absence of the information concerning the status of the planning application which had been lodged by Irish Water, was not of the significance

contended for by the applicant. This was due to the fact that, while Irish Water had obtained planning permission for a MWWTP, that permission was not final and conclusive at the time that the respondent made its decision in relation to the applicant's appeal. Indeed, an appeal was lodged against the permission which had been granted to Irish Water, which was received by the respondent on the day after it had given its decision on the applicant's appeal. The appeal in relation to the grant of permission to Irish Water was only determined some months later in March 2019; even then it was open to challenge by way of judicial review.

53. Thus, while it could be argued that the position of Irish water had changed on 1st October 2018, at the time when the respondent considered the applicant's appeal, there was no finality to the permission which have been granted by Galway County Council to Irish Water for its water treatment plant. Accordingly, it was submitted that the erroneous impression which the respondent had of the status of the Irish Water planning application, was not material to the decision that it reached in relation to the applicant's appeal.

54. On the fourth ground of challenge, which was the assertion that the refusal of planning permission on grounds of public health was irrational, it was submitted on behalf of the respondent that there had been a basis for the respondent to reach that conclusion. Firstly, the environment section of Galway County Council in a letter dated 14th March, 2018 in relation to the proposed development, had advised as follows:-

> *"A development like this with an on-site waste water treatment plant will only compound on-going issues with water quality at both bathing areas in Spiddal, Trá na mBan and Ceibh an Spidéil. Environment would not be in favour of a grant of permission at this time."*

55. It was submitted that the respondent was also entitled to have regard to the fact that Irish Water was currently in breach of its EPA licence due to the discharge of waste material into Galway Bay under the current loading of the existing waste water system. It had been prosecuted in the District Court for breaches in this regard in the recent past. It was submitted that the respondent was entitled to have regard to that fact when considering the effect of the hydraulic loading that would be placed upon the system by the outflow from the proposed PWWTP on the applicant's site.

56. As pointed out above, the fourth schedule to the 2000 Act provided that a planning authority could refuse planning permission if it was of the view that the development would be premature by reference to an existing deficiency in the provision of water sewerage facilities. Counsel pointed out that in the *Hennessy* case, where the issue of concern had been whether the applicant had demonstrated to the Board that he had access to an operable private waste water treatment facility, and where the Board had refused planning permission on the ground that he did not have access and therefore the proposed development would be prejudicial to public health, Murphy J. had held that "*the decision of An Bord Pleanála in this case is a rational decision based on the evidence presented to it. The decision is underpinned by proper and appropriate planning principles and is clearly made within jurisdiction*."

57. Counsel also referred to the decision of McGovern J. in *Navan Co-Op Ownership v. An Bord Pleanála* [2016] IEHC 181, where he had held that the concept of prematurity in a planning context was a matter of planning judgment and planning policy which was essentially a matter for the decision maker. The judge had gone on to hold that having correctly interpreted the development plan, the other matters arising out of the decision were particularly within the sphere of the respondent, including the issue of prematurity. He found that there was no evidence of unreasonableness or irrationality in the decision, such as would meet the criteria outlined in the *O'Keeffe* or *Meadows* cases. Counsel submitted that in the present case the Inspector was entitled to form the view that adding significant volumes of foul waste water, albeit treated to some degree, would add further to the intensification of pollution of coastal waters at this location, with consequential adverse impacts for bathing waters. His assertion that the final effluent output of foul waters would increase the load on a very deficient system, was entirely rational. In such circumstances it was reasonable for him to note that there were potential concerns remaining in relation to COD, E-coli, etc. In these circumstances, it could not be said that the recommendation of the Inspector, or the decision of the respondent, that the proposed development constituted a risk to public health, was irrational.

58. It was submitted that having regard to all the circumstances in this case, the decision which had been reached by the respondent in respect of the applicant's planning application and in particular its decision to refuse same on grounds of prematurity, having regard to the existing state of the public waste water system in the Spiddal area and having regard to the potential adverse effects on human health, could not be seen as being irrational, or otherwise erroneous, either from a factual point of view, or on the law. Accordingly, it was submitted that the court should refuse the reliefs sought by the applicant herein.

Conclusions

59. The court has considered the voluminous papers and books of authorities submitted in this case, together with the submissions filed on behalf of the parties and the oral arguments of counsel presented at the hearing and has reached the following conclusions in the matter. The court will deal with each of the grounds of challenge put forward by the applicant in the order that they were presented at the hearing. Firstly, in relation to the assertion that the decision of the respondent made on 23rd October, 2018, is bad due to the fact that neither the Inspector in his report, nor the respondent in its decision, made reference to the views of Irish Water as expressed in its letter dated 27th October, 2017, the court is satisfied that the applicant does not have a stateable complaint in this regard.

60. There is clear provision in the 2000 Act for certain entities to be notified when a planning application is lodged with a planning authority. Irish Water is one of those entities. It is provided that once one of the statutory consultees makes a submission, having been notified of a planning application, the planning authority must have regard to that submission when reaching its decision. This would imply that if the planning authority

wishes to go against the views expressed by the statutory consultee in its submission, it would be required to give reasons why it was so doing.

61. In this case, Irish Water was notified on two occasions by Galway County Council that the applicant had lodged its planning application. Irish Water chose not to make any submission to the county council. I am satisfied that the respondent is correct when it states that as Irish Water elected not to make any submission, as it was entitled to do, the planning authority was then entitled to proceed to determine the application without further reference to Irish Water. That is specifically provided for at para. 5.3.2 of the guidelines.

62. The court is of the opinion that the letter issued by Irish Water on 27th October, 2017 in response to a pre-connection inquiry raised by the applicant, cannot be seen as a submission by Irish Water to which Galway County Council, or the respondent were obliged to have regard when coming to their decision. I accept the argument put forward by the respondent that that letter merely concerned the technical feasibility of connecting the waste water from the proposed development to the existing waste water system in the Spiddal area. It cannot be seen as giving any greater imprimatur by Irish Water to the proposed development.

63. There has to be certainty in the planning process. Where the planning code provides for statutory consultees to have the opportunity to make formal submissions, once an application for planning permission has been lodged and has been notified to them, it is those submissions to which the planning authority must have regard when considering the planning application. There is no obligation on the planning authority to have regard to the utterance of other views that may have been issued by Irish Water, or any other entity, to either the applicant, or to his expert advisers, in advance of the submission of the planning application.

64. It is clear from the guidelines that the purpose of the pre-connection inquiry is merely to speed up the processing of the planning application by effectively getting pre-clearance from a technical feasibility point of view of the proposed development from a waste water management perspective. In other words, the letter only confirmed that it was feasible to connect the applicant's waste water system to the public waste water system in the event that its planning application was successful.

65. As I have held that neither Galway County Council, nor the respondent, were obliged to have regard to the views expressed by Irish Water in its letter dated 27th October, 2017 and having regard to the finding that in any event, such views only concerned the technical feasibility of connecting the proposed PWWTP to the existing public sewerage system, it was not necessary for the respondent to make specific reference to such letter in its decision; nor was it necessary for it to give any reasons for the alleged departure in its decision from the views expressed by Irish Water in that letter. Accordingly, I do not find that there is any substance in this ground of challenge to the decision.

66. In relation to the assertion that the Inspector and the respondent failed to give consideration to the applicant's submission that had been raised on the appeal to the respondent, which had been to the effect that the county council had erred in applying a non-statutory policy, which was against granting permissions for PWWTPs, when there was explicit provision for such plants in the County Development Plan, subject to those plants meeting certain criteria; I accept the argument put forward on behalf of the respondent that it was not required to address such argument, due to the fact that the existence or non-existence of the non-statutory policy and the reliance on same by the county council, was not a factor in the decision that had been reached by the respondent. As it was not a matter that caused them to reach the decision that they had reached, it was not necessary for the Inspector or the respondent to deal with the submissions raised by the applicant in this regard. It was simply not a factor in their decision, much less was it a reason for their refusal to grant planning permission to the applicant. For that reason, it was not necessary to engage with the applicant's submissions in relation to the alleged non-statutory policy. Accordingly, the court refuses to set aside the decision of the respondent on this ground.

67. Turning to the third ground of challenge, which was that the decision should be set aside as being irrational, due to the fact that both the Inspector and the respondent had proceeded on the basis of a material mistake of fact, which concerned the status of the Irish Water application for permission for its MWWTP; the court is of the view that there is substance in this ground of challenge.

68. In the *Hennessy* decision, Murphy J. referred to the leading text book "*Judicial Remedies in Public Law"* (5th ed., 2015) by Sir Clive Lewis, a judge of the Queen's Bench Division in England. In para. 1.001 the learned author gives a succinct outline of the circumstances when a material error of fact may be a ground for judicial review of a decision. The principle is stated in the following terms:-

> *"The courts have held that, in certain contexts at least, a material error of fact may be a ground for judicial review. Such a ground will require a mistake as to a fact existing at the time of the decision, that the fact is uncontentious and objectively verifiable, that the mistake occurred otherwise than as a result of the fault of the claimant or his advisers and played a material part in the decision maker's reasoning."*

69. In this case, there was a clear error of fact stated in the Inspector's report. Due to the fact that he had consulted the Irish Water website, which appears to have been out of date, he informed the respondent that as of 17th September, 2018, while Irish Water had a stated intention to construct a MWWTP for the Spiddal area, no application for planning permission for such a plant had been submitted to Galway County Council. All he could say was that Irish Water had indicated on its website that it hoped to be in a position to submit such a planning application during 2018 and, subject to the necessary statutory approvals being in place, construction on the plant might commence in 2019. On that basis, the Inspector concluded that Irish Water was still at the planning stage in relation

to its scheme and therefore the construction period and the intended completion date for the public scheme remained unknown.

70. Unfortunately, that statement of fact was materially incorrect. Irish Water had in fact completed its design stage and had submitted a planning application to Galway County Council on 6th June, 2018. Between the time of the Inspector's report and the date of the decision by the respondent, Irish Water had obtained planning permission on 1st October, 2018, which was three weeks prior to the date of the respondent's decision. Thus, when it reached its decision on 23rd October, 2018, the respondent proceeded on a totally mistaken view of the material facts.

71. This was significant having regard to the fact that the respondent reached its decision that it would be premature to allow the applicant's development having regard to the situation on the ground concerning the public waste water system and the deficiency in that regard and in particular "*the period within which the constraint involved may reasonably be expected to cease*". In other words, the respondent had not unreasonably formed the view that, as Irish Water had not even submitted a planning application for its MWWTP, it could not be said with any certainty that the PWWTP proposed by the applicant, would only be needed in the short to medium term. That of course was an incorrect assumption, due to the fact that the respondent was not aware of the true state of the facts in relation to the planning application submitted by Irish Water.

72. In the course of argument, counsel for the respondent stressed that the decision reached by the respondent was based on the "*facts on the ground*". However, while that may have been correct in relation to the existing deficiency in the public waste water system for Spiddal in October 2018, it was absolutely incorrect in relation to the status of the Irish Water planning application. As a consequence thereof, their impression of the period during which the deficiency in the public system was likely to last, was not accurate.

73. In the course of the hearing, counsel on behalf of the respondent when discussing the materiality of the mistaken impression on the part of the respondent at the time that it made its decision, stated as follows in relation to the letter that was subsequently written to the applicant's solicitors inviting them to withdraw the proceedings and make a new application:-

> *"The Board, once it knows that the development is coming on stream, could reasonably, for example, impose a condition saying we're granting permission for this hotel but we are putting in a condition that says permission shall not be implemented, or the hotel shall not be operated, until the public facilities come on stream. However, it would not be appropriate to put in that condition if there was no certainty at all about the time frame, or of course whether permission will be granted for the municipal facility and about the timeframe of when that might reasonably be expected to come on stream. This is the first aspect of the decision the prematurity; the second aspect is prejudicial to public health."*

74. It should be pointed out that the above quotation of what counsel said at the hearing was taken from the DAR recording of the final day of the hearing, as transcribed by my judicial assistant, there being no stenographer present on the last day of the hearing. However, it certainly accords with my note and my recollection of what was said by counsel on that occasion.

75. Thus, while it is certainly true that there was no finality to the permission that had been granted to Irish Water and indeed an appeal was lodged against the permission that had been granted to them, which was received by the respondent on 24th October, 2018; it seems to me that the existence of a grant of planning permission by Galway County Council to Irish Water for an MWWTP was a material fact that was unknown to the respondent at the time that it reached its decision. Such error of fact was not due to the fault of the applicant and indeed was not even known to the applicant, but was solely due to the fault of the Inspector in consulting the Irish Water website, rather than the planning register as maintained by Galway County Council.

76. The court is satisfied that there is authority in Irish law for the proposition that a decision can be set aside due to a material error of fact on the part of the decision maker at the time that he or she makes their decision. In *West Cork Bar Association v. The Courts Service* [2016] IEHC 388, Noonan J. accepted the statement of law set out in *E v. Secretary of State for the Home Department* [2004] QB 1044 where the court set out the criteria which must be present in order for a decision to be set aside on the basis of there being a material error of fact, which criteria were then summarised above in the extract from the Lewis textbook. Noonan J. also referred to the decisions in *Efe v. Minister for Justice* [2011] 2 I.R. 798 and *HR (Belarus) v. Refugee Appeals Tribunal* [2011] IEHC 151, as support for the proposition that a material error of fact on the part of the decision maker can vitiate his or her decision; see also *Hill v. Criminal Inquiries Compensation Tribunal* [1990] I.L.R.M. 36 and *AMT v. Refugee Appeals Tribunal* [2004] 2 I.R. 607.

77. In the *West Cork Bar Association* case, there was evidence that three different estimates had been furnished as to the savings that might be made if Skibeereen courthouse were to close and accordingly only one of those estimates could have been correct and two of them must have been incorrect. On that basis, the learned judge held that there was no dispute about the fact that an error was made. He went on to state as follows at para. 25:-

> *"The respondent submits that the differences were immaterial but there is no evidence of that as no member of the Board has sworn an affidavit. The mistake, had it been realised, might conceivably have led to a different outcome. It seems to me that this is all that is required. It is not necessary to show that a different result would have ensued if the mistake had been discovered, merely that it might have. However, there is no way of knowing."*

78. The learned judge concluded that the errors of fact made in that case had to be viewed as being fatal to the impugned decision.

79. I am satisfied that the same considerations apply in this case. The applicant was not in any way responsible for the material error of fact, which had been introduced solely in the Inspector's report. The errors of fact were highly material to the reasons why the respondent reached the decision that it did. Had it known the true position in relation to the grant of permission to Irish Water for a MWWTP, it may well have reached a different decision. It may have imposed conditions such as those suggested by counsel in the course of argument. However, I am satisfied that it is not necessary for the applicant to show that had the true state of affairs been known to the decision maker, it would as a matter of fact have come to a different decision, it is sufficient to show that it might have come to a different decision and I am satisfied that that has been established in this case.

80. In resisting this argument, the respondent relied heavily on the decision in *Hennessy v. An Bord Pleanála*, however, I do not understand that judgment to greatly assist the respondent in the circumstances of this case. In the *Hennessy* case, the applicant had been granted planning permission for a change of use in respect of a building that he owned on his property. That building was serviced by a PWWTP situated on adjoining property owned by one of the notice parties. When the planning permission was granted, that notice party lodged an appeal against the grant of permission. The applicant was notified of his right to make submissions in response to the appeal, but did not do so within the time allowed. When the respondent overturned the grant of permission, on the grounds that, while the applicant had a right to be connected to the PWWTP on the notice party's land, he did not have a right to maintain the plant itself, and therefore it was inappropriate for him to be given the grant of planning permission on grounds of public health; the applicant challenged that decision on the basis that the respondent had not had regard to his submissions of law that had been lodged out of time, to the effect that he had implied easements and other statutory rights which gave him a right to maintain the PWWTP. Thus, that was not a case about a material error of fact, but was really a decision in relation to whether the respondent had been entitled to make the decision which it had, on the basis of the material that was properly before it at the time of its decision. Murphy J. held that the legality of the decision could only be addressed by reference to the material that was properly before it at the time.

81. That is a statement of law that cannot be gainsaid. However, it was not a case about the respondent proceeding on the basis of a material error of fact; it solely concerned whether the respondent was entitled to reach the decision that it had done on the basis of the material that was properly before it at the time. The key point in the case was that the applicant had been given an opportunity to make his submissions; he had not made them in time and therefore the respondent could not be blamed for reaching a decision without having had regard to those submissions.

82. It is also noteworthy that the passage cited by the learned judge from the Lewis textbook at p. 368 thereof, is from a section headed "*Fresh Evidence*". So the opinion of the learned author contained in that passage, was not in relation to material errors of fact, but concerned when it would be appropriate to allow fresh evidence to be called in relation to matters that had not been before the decision maker at the time that it

reached its decision. In this case, we are dealing with a much different scenario, which is where the decision maker proceeded on a material misunderstanding of the facts, which was entirely due to the error on the part of its Inspector. Accordingly, the *Hennessy* decision does not assist the respondent in this case.

83. For the reasons set out above, I am satisfied that the decision of the respondent must be set aside on the grounds that it reached its decision on the basis of a material error of fact, which was due to the fault of its own agent and was not due to any fault or omission on the part of the applicant.

84. Finally, turning to the public health issue, I am satisfied that on this ground as well, the decision of the respondent must be set aside. While it is accepted that the question of public health is an extremely important one and is one to which the planning authority must pay particular regard, this does not mean that a finding that a development may be adverse to public health, can be made without cogent evidence that that is in fact the case.

85. The technical evidence that was before the Inspector, was to the effect that the PWWTP, which was a tertiary treatment plant, would in fact provide a discharge of liquid that was of a very high quality. Indeed, it has been asserted by Mr. McDermott in his affidavit sworn on the 15th December, 2018 that the quality of the discharge from the PWWTP, would be of a higher quality than that which will ultimately be discharged by the proposed MWWTP belonging to Irish Water. While that affidavit was obviously not before the respondent when it made its decision on 23rd October, 2018, I am satisfied that there was considerable technical data in the report prepared by O'Connor Sutton Cronin, consulting engineers, which was before the respondent and which was to the effect that the tertiary treatment plant for the proposed development, was of a very high technical standard: see in particular p. 5 – 11 of their report of November 2017.

86. While it is accepted that the volume of waste water coming from the proposed development, consisting of a relatively large hotel, would be greatly in excess of that which would be produced by ordinary domestic use; nevertheless, the quality of the waste water discharge would not necessarily mean that the degree of pollution, or the effect on public health, would be materially adversely affected thereby.

87. This conclusion is to an extent supported by the fact that the Inspector came to the conclusion that the proposed development did not pose any adverse risks from an environmental point of view, yet somewhat paradoxically, he came to the view that it would pose a risk to the health of bathers at the two blue flag beaches. There is considerable substance to the argument put forward on behalf of the applicant, that where material is discharged into the sea from the existing waste water system, it is hard to see how same might not have any adverse effect on the environment, yet could pose a threat to bathers nearby.

88. Furthermore, the Inspector has not pointed to any report, or evidence, which would substantiate his reservations or concerns as indicated in his report. There was no

evidence that the discharge from the PWWTP as a result of the proposed development, would in fact cause a significant increase in harmful bacteria in the sea, such as to pose a risk to public health. If planning permission is to be refused on the grounds that the development poses a risk to public health, it is incumbent upon the decision maker to point to some evidence which supports that conclusion. It seems to me that that is lacking in this case. Accordingly, the court will quash the decision of the respondent on this ground as well.

Decision

89. For the reasons set out above, the court proposes to make an order setting aside the decision of the respondent made on 23rd October, 2018 in the appeal bearing reference ABP-301454-18. The court would propose to remit the appeal back to the respondent for further consideration. However, the court will allow the parties a period of fourteen days within which to furnish written submissions on the final order that should be made by the court, together with any submissions in relation to costs and on any ancillary matters that they may wish to raise.