THE HIGH COURT
JUDICIAL REVIEW

[2017 No. 927 J.R.]

BETWEEN

RAY HENNESSY

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
CORK COUNTY COUNCIL
AND CPFM

NOTICE PARTIES

JUDGMENT of Ms. Justice Murphy delivered on the 27th day of November, 2018

Introduction
1. The applicant is a solicitor and the owner of a dwelling house situate on lands at Ballylickey, Bantry, Co. Cork. The original planning permission for the dwelling house granted in 2000, restricted its use to that of a caretaker's lodge servicing a hostel built on the same lands. Both the hostel and the dwelling were contained in Folio CK33776 of the Register of Freeholders of the County of Cork, of which the applicant and his wife were registered owners. In September, 2009 the lands in Folio CK33776 were transferred to Marine Hostels Company Limited, a company owned and controlled by the applicant and his wife. In 2010 the portion of the lands on which the dwelling house is situate were hived off from the main folio and were transferred to the applicant solely, and a new Folio CK144415F was created. The balance of the lands in Folio CK33776, containing the hostel, were sold by a receiver appointed by AIB to CPFM Limited, the second notice party, in February, 2016. Later the same year, in November, the applicant applied to Cork County Council for planning permission for retention of the dwelling house with permanent use. In effect, he was seeking a change of use from a caretakers' lodge, servicing the hostel, to permanent residential use. The second notice party objected to the proposed change. Cork County Council granted permission for retention with permanent use on 28th March, 2017. The second notice party appealed that decision to An Bord Pleanála. The Board gave its decision on 5th October, 2017 refusing permission for the proposed development. It set out its reasons as follows:-

> *"Matters Considered*
>
> *In making its decision, the Board had regard to those matters which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.*
>
> *Reasons and Considerations*
>
> *The development for which retention is sought is located in a village which does not have a public wastewater treatment plant. The development is currently served by a wastewater treatment system located off-site, which has not been demonstrated to be available to the applicant, and therefore, (the development) does not have access to a suitable private wastewater treatment system over which it has sufficient rights to operate maintain and take corrective action as necessary. The development cannot provide an on-site wastewater treatment system to comply with the "Code of Practice: Wastewater Treatment and Disposal Systems Serving Single Houses (p.e.≤10)"-Environmental Protection Agency, 2009. The development for which retention is sought would, therefore, be prejudicial to public health and contrary to the proper planning and sustainable development of the area."*

2. In this application the applicant seeks an order of *certiorari* quashing the decision of the respondent dated 5th October, 2017. Secondly, the applicant seeks an order remitting the said decision (Reg. Ref. PL04.248373) to the respondent to be determined in accordance with law and in accordance with such directions and/or observations as to this Court seems meet.

Detailed factual background to application
3. In order to understand the decision of the court it is necessary to set out in some detail the factual background to the planning application and appeal.

4. On 18th March, 1994 the applicant and his wife were registered as owners of land contained in Folio CK33776 of the Land Registry of the County of Cork containing .69 hectares, situate in the townland of Ballylickey, in the barony of Bantry. By order dated 28th January, 1997, the first notice party Cork County Council (the council) granted the applicant planning permission for a hostel and wastewater treatment plant together with an outfall to the sea at Ballylickey, Bantry, Co. Cork (Reg. Ref. W/96/2776). Conditions of that planning which are relevant to this application for judicial review are conditions 8 and condition 9 attached to that permission.

Condition 8 required:-

> *"Foul drainage shall be by means of a proprietary small treatment system which shall meet the requirements of the Irish Agreement Board Certificate No. 92/0033 (second edition). Full details of this including location on site, design, structure, quality and means of disposal of final effluent shall be submitted and agreed before development commences. The capacity of the effluent treatment plant shall be not less than 70 persons equivalent. The exact route of the sewage outfall pipe shall be agreed with the Planning Authority. Discharges of treated effluent shall only take place within a period of one hour following high tide to four hours following high tide.*
>
> *Reason: In the interests of public health."*

Condition 9 provided:-

> *"The small treatment plant referred to in the above condition shall be operated and maintained in perpetuity to the satisfaction of the Planning Authority and before development commences, written evidence of a maintenance contract to ensure the continuous operation of the treatment plant shall be submitted and agreed with the Planning Authority.*

Reason: In the interest of public health."

5. In 2000, the applicant applied for further planning permission to construct a dwelling house and a domestic garage on the same lands, adjacent to the hostel and the wastewater treatment plant in respect of which planning had been granted on 28th January, 1997.

6. By order dated 30th May, 2000, the council granted the applicant planning permission for a dwelling and a domestic garage at Ballylickey, Bantry, Co. Cork (Reg. Ref. W/00/1050). Condition 4 of the grant of permission for the dwelling house and garage restricted the use to which the development could be put. It provides:-

> *"The proposed premises shall be used solely as a caretaker's residence and a change of this use shall not take place without the prior Permission/Approval of the Planning Authority…"*

The reason given for the condition was to regulate the use of the development in the interest of orderly development.

7. Condition 8 of the planning permission for the dwelling house required that the development be connected to the existing effluent treatment plant. This is a reference to the effluent treatment plant required under condition 8 of the grant of the planning permission for the hostel and wastewater treatment plant given on 28th January, 1997. As the entire site was then owned by the applicant and his wife, compliance with this condition presented no difficulty.

8. In or about September, 2009 all of the lands in Folio CK33776 were transferred to a company called Marino Hostels Company Limited, and it was registered as the sole owner of the lands on 14th September, 2009. Marino Hostels Company Limited was a company owned and controlled by the applicant and his wife.

9. On 27th January, 2010 Marino Hostels Company Limited transferred to the applicant the lands on which the dwelling house was built. The land area measured .056 hectares and a new folio was created, being Folio CK144415F. The applicant was registered as full owner of those lands on 8th February, 2010. The court notes that when the house and lands on which it was built were sold by his company to the applicant, they were classified as "*non-residential*". Stamp duty on the transfer was assessed on that basis. The court notes that the applicant and his wife signed the deed of transfer on behalf of Marino Hostels Company Limited.

10. In addition to transferring the lands to the applicant, Marino Hostels Company Limited also granted the following easements to the applicant:-

> *(1) A general right of way for all purposes over, through and along that part of the retained property on the said Folio as is coloured yellow on the said map and marked "C-D" together with the right, but without imposing an obligation, to keep, repair and maintain the surface thereof.*
>
> *(2) The right to place, keep and maintain a sewer pipe over, through and along the line coloured green on the said map and marked with the letters "N-M" together with the right to connect up to the chamber and treatment plant as is coloured green on the said map and together with the right to inspect, repair and maintain the said pipe and for that purpose to enter on to the retained property so affected with or without workmen and equipment but reinstating any damage caused in the exercise of such rights.*

11. At the time of the creation of these easements, the applicant controlled both the dominant and servient tenements, and therefore was at large in relation to the nature and extent of the easements which he created for the benefit of the dwelling house. The court notes, for example, that he conferred on himself the right but not the obligation to "*keep, repair and maintain the surface*" of the right of way, but did not create a similar right without obligation to keep, repair and maintain the treatment plant.

12. As of 8th February, 2010 Marino Hostels Company Limited owned that part of the lands which remained in Folio CK33776 and on which the hostel and wastewater treatment plant were situate, and the applicant personally owned the lands that had been carved from Folio CK33776 and put into Folio CK1444515F. The applicant's easements were registered as a burden on the hostel folio.

13. Sometime subsequent to that date a receiver appointed by Allied Irish Banks took possession of the lands in Folio CK33776 and on 18th February, 2016 the hostel lands were sold to the second named notice party, CPFM Limited. Some months after that occurred the applicant applied to Cork County Council for, in effect, a change of use from a caretaker's residence to that of a dwelling house with permanent use. CPFM Limited objected to the application by submission dated 2nd December, 2016 which was received by the planning department of Cork County Council on 6th December, 2016.

14. The second notice party's consultants, Brock McClure, contended that the application should be refused permission on a number of grounds one of which was:-

> *'The sewerage treatment plant is also within third party control, which therefore means that the applicant will not have ongoing control over its use. This could potentially jeopardise the continued sustainable use of the property as a residential unit and should also be considered by the local authority."*

15. It is reasonable to infer that the objection submitted on behalf of CPFM Limited prompted Cork County Council to seek further information from the applicant. It did so by letter dated 13th December, 2016. The letter states:-

> *"It is considered that the information submitted with the application is not sufficient to enable the Planning Authority to make a decision in this case, for the following reasons:*
>
> - *Concerns regarding the ownership of the existing treatment plant.*
>
> - *Concerns regarding right of way for continued parking"*

Both of these issues had been raised by Brock McClure on behalf of CPFM. The letter goes on:-

> *"Therefore to enable the Planning Authority give further consideration to your application, you are requested to submit six copies of the following further information:*
>
> *(1) You are required to adequately demonstrate that the existing treatment plant is within your ownership/control*

in order to properly maintain the unit on an ongoing basis."

Other information on the right of way was also sought and the applicant was informed that his planning application was deferred pending receipt of the information requested.

16. In response to the request for further information Daly Barry and Associates, agents for the applicant, wrote to Cork County Council on 19th January, 2017. Rather than making a substantive submission they simply enclosed a letter from their client, the applicant, dated 16th January, 2017. In response to the request that the applicant demonstrate that the existing treatment plant is within his ownership/control so as to ensure the units proper maintenance on an ongoing basis, the applicant merely stated in his correspondence that:-

> *"The treatment plant is on land owned by the objector and I have a legal right to the use of same which has been registered on the objector's title. "*

The court observes that the right to 'use' something does not ipso facto confer ownership or control of that thing on the user.

17. Somewhat bewilderingly there is on the Cork County Council planning file two contradictory planner's reports, both authored by the same planner and both dated 3rd February, 2017. One report recommends granting permission on the grounds that "*access to the private treatment plant is established* ". This report was exhibited by the applicant in his leave application. The second report of the same date by the same author recommends deferral of the application on the grounds that "*no legal confirmation of the applicant's right of way has been established, this relates to private parking space and particularly to access to the private treatment plant serving the dwelling, and it is not therefore possible to grant permission in a situation where the building may not be adequately serviced and could pose a potential risk to public health,…* "(Emphasis added). This report was not exhibited in the applicant's grounding affidavit.

18. The court again considers it reasonable to infer that the council chose to act on the second report because, three days later on 6th February, 2017, a further letter was sent to the applicant care of his agents. The portion of the letter relevant to this application reads:-

> *"Dear Sir,*
>
> *I refer to your planning application which was lodged with the Planning Authority on the 3/11/16 as amended on 20/01/17.*
>
> *It is considered that the information submitted is not yet sufficient to enable the Planning Authority to make a decision in this case, for the following reasons:-*
>
> • *Concerns remain regarding the ownership, and your access rights to the existing treatment plant. It is unclear as to whether you have a full and comprehensive legal entitlement to access the facility which is outside the boundary of the planning application area. The Planning Authority may not be in a position to grant permission if this entitlement is not forthcoming.*
>
> • *……*
>
> *Therefore, to enable the Planning Authority give further consideration to your application, you are requested by way of clarification to submit six copies of the following information:-*
>
> *1. You are required to adequately demonstrate that the existing treatment plant is within your ownership/control in order to properly maintain the unit on an ongoing basis. Legal evidence of this right of way and entitlement should be submitted as evidence to the Planning Authority.*
>
> *……*
>
> *Further consideration of your application is deferred pending receipt of the information requested."*

19. On 14th March, 2017 the applicant's agent, Daly Barry and Associates, replied to the request for further information. The letter states:-

> *"I now attach a letter dated 27th February, 2017 from Hennessy & Co. Solicitors with legal proof that our client has the right to access the existing treatment plant as well as the necessary right to inspect, repair and maintain the unit if required."*

The attached letter is from a solicitor, Dermot O'Flaherty, who is the applicant's partner in the firm of Hennessy & Co. Solicitors. The letter encloses a certified copy of the deed of transfer of ownership dated 27th January, 2010 from Marino Hostels Company Limited to the applicant, together with a copy of the marked map referred to in it. The letter goes on:-

> *"The Second Schedule details the legal easements which were granted by the Vendor to Mr Hennessy and these easements are:*
>
> • *A general right of way over the area coloured yellow on the map, and*
>
> • *The required easement to connect up to the treatment plant. This also included the necessary right to inspect, repair and maintain."*

The solicitor then points out that these rights of the applicant are registered as burdens on the title to the adjoining hostel property on Folio CK33776. He encloses a copy of that folio to confirm.

20. A comparison between the assertion made by the applicant's partner and the actual easement granted shows that the right to

repair and maintain is specific to the sewerage pipe connecting up to the treatment plant and is silent as to the treatment plant itself. This may be contrasted as already noted with the easement granting a right of way, which easement specifically confers "*the right, but without imposing an obligation, to keep, repair and maintain the surface thereof*." It is also worth noting that Mr. O'Flaherty's letter raises no claim to the existence of implied rights or ancillary rights.

21. It appears that this letter from the applicant's partner was sufficient to allay the concerns of Cork County Council because on 28th March, they granted permission for retention of the dwelling house with permanent use and revised site boundaries. In granting permission the planning authority referred to the application of the 3rd November, 2016 as amended on the 20th January, 2017 and as amended on 16th March, 2017. Both of those latter dates appear to refer to the clarifications sought in the course of the process. A condition relevant to this application was attached, being condition 5, which required that "*the developer shall inspect the existing septic tank and percolation area and ensure that the system is continuously maintained and functioning in a satisfactory manner*."

22. Underpinning the council decision appears to be a planner's report of 28th March, 2017. It refers to the deferral for clarification and to the fact that the applicant needed to adequately demonstrate that the existing treatment plant is within his ownership/control in order to properly maintain the unit on an ongoing basis. The report states:-

> *"The applicant has responded to the request and documentation relating to a right of way… to the treatment unit on the site allowing the applicant to inspect and maintain the unit has been submitted from the applicant's solicitors. This submission is now considered satisfactory and I therefore recommend permission."*

23. The planner's report contains conditions and reasons and he recommends at condition 6 a requirement that "*the developer shall inspect the existing septic tank and percolation area, and ensure that the system is continuously maintained and functioning in a satisfactory manner.*" In fact, in the notification sent to the applicant that condition appeared at condition 5.

24. In any event within the statutory period CPFM, through their agents Brock McClure, appealed the decision. The appeal came in the form of a seventeen-page report detailing what they considered to be the errors made by Cork County Council. The submission expands on the original third party observations lodged by them with Cork County Council. In the introduction they state:-

> *"We wish to highlight from the outset that our clients have had on-going concerns regarding the quality and accuracy of details submitted by the applicant throughout the planning process. We respectfully contend that the level of information depicted on the submitted plans is insufficient, particularly in relation to the level of servicing available to the site and the residential amenity of the subject property."*

The introduction continues:-

> *"Of most concern was the absence of appropriate details in relation to the appropriate servicing of the subject site from a water and sewerage point of view."*

25. Of relevance to this application is the fact that the notice party directly challenged the applicant's right to inspect or maintain the treatment unit itself, as opposed to the sewerage pipe connected to the treatment unit. At item 3 headed '*Proposed Development*' the notice party accepted that the applicant, pursuant to his easement, has '*a right to inspect repair and maintain a sewerage access pipe and not the septic tank itself*.' In their grounds of appeal at 7.3 the notice party stated:-

> *"Despite the applicant having a sewerage access pipe and a right of way associated with that…, the sewerage treatment plant itself is within third party control, which therefore means that the applicant does not have ongoing control over its use. The sewerage treatment plant was primarily related to the hostel/apartment building and since this has not been in use in recent times, the sewerage plant has not been maintained and is currently disconnected from a functioning electricity supply." [Emphasis added]*

Referring to the condition attached to the planning decision of Cork County Council, at condition 5 in the council's notification of the grant of the permission, which requires the developer to inspect the existing septic tank and percolation area and to ensure that the system is continuously maintained and functioning in a satisfactory manner, the appellant commented:-

> *"While the applicant has a right of way for a sewer access pipe they do not have a right of way to access or inspect the septic tank or percolation area and in fact they have no right to the ongoing operation of this tank either. This has very serious consequences for the suitability of the lodge as a residential dwelling and is sufficient grounds for the refusal due to the potential risk to public health caused by having no functional septic tank."*

26. In its conclusions the appellant stated:-

> *a. The existing right(s) of way allow access ……..to a sewerage pipe only. This is not adequate……. to ensure ongoing use of the septic tank that was primarily intended for use by the currently vacant hostel/apartment building.*
>
> *b. The subject development has not illustrated how independent access to wastewater treatment and access to water services can be achieved at the subject site."*

27. The applicant, in his grounding affidavit at para. 32, purports to exhibit at RH19 a copy of this document of appeal but did not in fact do so. Exhibit RH 19 is an undated copy of the respondent's order refusing permission and not a copy of the detailed appeal filed on behalf of CPFM. On the 25th April, 2017 a copy of the appeal was sent to the applicant's agents, Daly Barry & Associates . The letter reminded them that they had four weeks beginning on the date of the letter to make any submissions that they wished to make, and further informed them that any submissions made outside of the four-week period would not be considered. No submissions were made by the applicant within the statutory period. He attempted to lodge submissions outside of the statutory period but, as required by law, these were returned to him.

28. In his statement of grounds and in his grounding affidavit the applicant failed to advise the court that he had been sent a copy of the appeal and had been given an opportunity to make submissions in relation to it. He also failed to advise the court that he had made no observations or submissions to the Board on the appeal.

29. It was open to the applicant to make the arguments to the Board that he has sought to make for the first time to this court. It was open to him to submit that the submission of CPFM was erroneous. It was open to him to submit to the Board that the actual easement enjoyed by his dominant tenement carried a further implied grant of an easement which would allow the applicant to

inspect, maintain and repair the wastewater treatment plant. It was open to him to argue before the Board all of the matters which he has sought to raise before this court on a judicial review namely that he has an implied grant to inspect and maintain the treatment unit by reason of:-

(a) necessity;

(b) to give effect to the common intention of the parties;

(c) the doctrine of non-derogation from grant;

(d) s. 40(2) of the Land and Conveyancing Reform Act, 2009.

30. The court will not speculate as to what the Board might have done had he raised those issues in submissions on the appeal, but simply notes that he did not do so. The Board therefore was left with the uncontroverted evidence that, while CPFM, the notice party, accepted the applicant's right to connect to the treatment plant and to maintain and repair that connection, he had no right to access to the treatment plant for the purpose of inspection, repair or maintenance of same and further that the treatment plant was not currently being maintained, nor was it connected to an electricity supply.

31. On 24th July, 2017 an inspector appointed by the Board attended at the site and, without the assistance or benefit of any submissions from the applicant, prepared a detailed sixteen-page report. Section 1 deals with the site location and description and at 1.2 states:-

> *"The dwellinghouse is served by a treatment plant located outside the application site boundary, within the adjoining site, and which was exposed and apparently inoperable at time of inspection."*

Having set out the nature of the proposed development; the decision of the planning authority; the planning history; the policy context; the nature and extent of the appeal and the fact that neither the applicant nor the planning authority had made any response to the appeal, he sets out his assessment. This is found at Section 7 of his report. He deals with the issue of wastewater treatment at 7.2. He states:-

> *7.2.1 "The dwellinghouse is currently connected to a wastewater treatment plant serving the holiday apartment building, as was required by condition no.5 of permission W/00/1050 (this is the original permission for the construction of the dwelling). The applicant has made no proposal to alter the wastewater provisions for the dwelling. The situation thereby results that the independent dwellinghouse would be served by a private wastewater treatment plant located offsite and serving a neighbouring short let holiday apartments. I do not consider this to be desirable.*
>
> *7.2.2 The appellant submits that notwithstanding the right of way associated with the sewerage pipe access to the sewerage treatment plant, the plant is within 3rd party control and the applicant does not have ongoing control over its use. It is further submitted that the treatment plant, which is primarily related to the hostel/apartment building, has not been in use in recent times, has not been maintained and is not connection [sic] to a functioning electricity supply, which has serious implications for the ongoing operation of the lodge sewerage system and the lodge should be required to provide and maintain their own system if it is to be an independent residential dwelling.*
>
> *7.2.3 The applicant submitted as further information a copy of the property registration (plus map) pertaining to the application site and wider site, which grants the rights 'to place, keep and maintain a sewer pipe over, through and along' the line indicated, 'to connect up to the chamber and treatment plant' and 'to inspect, repair and main (sic) the said pipe'. The applicant's agents submit that the land registry document and letter from the applicant's solicitor (Hennessy & Co. received 16/03/17) is proof that the applicant has the right to access the existing treatment plant as well as the necessary right to inspect, repair and maintain the unit if required. It is my interpretation that the rights pertaining to the site under the land registry document (second schedule, point 2) provides the applicant with 'the right to inspect, repair and maintain' the pipe connecting to the chamber and treatment plant and 'the right to connect up to' same, but does not include any express right to inspect, repair and maintain the chamber and treatment plant itself. Furthermore, the wording of the letter from the applicant's solicitor does not state to the contrary.*
>
> *7.2.4 It is apparent that the dwellinghouse site is insufficient to accommodate an onsite wastewater treatment system for a single dwelling to the standard required by the EPA Code of Practice: Wastewater Treatment and Disposal Systems Serving Single Houses (p.e≤10) in terms of compliance (at least) with minimum separation distances. Ballylickey is not yet served by a public wastewater treatment plant and the Planning Authority has not indicated that provision of such a plant is proposed. There would seem to be no other option but for the dwelling to be served by the WWTP serving the holiday apartment development.*
>
> *7.2.5 ……*
>
> *7.2.6 I note that conditions attaching to the original permission for the hostel building…required (no.9) the capacity of the effluent treatment plant to be not less than 70 p.e. and (no. 10) to be operated and maintained in perpetuity to the satisfaction of the Planning Authority (with written evidence of a maintenance contract to ensure the continuous operation). In theory this should ensure that the WWTP is maintained for the subject dwelling, however this clearly is not currently the case and the applicant does not have sufficient rights over the system to ensure that it is suitably operational and therefore the occupation of the dwellinghouse is clearly prejudicial to public health.*
>
> *7.2.7 In the absence of the dwellinghouse having permanent access to a permanently operable wastewater treatment system, with sufficient rights to access, operate, maintain and take corrective action as necessary, I do not consider it consistent with the proper planning and sustainable development to grant permission for the dwellinghouse to be used independently from the amended hostel development of which it was permitted as a dependent part. The development would be prejudicial to public health, constitute substandard development and be contrary to the proper planning and sustainable development of the area."*

32. At a Board meeting held on 5th October, 2017 the submissions of the appellant, CPFM, and the inspector's report were considered and the Board decided to refuse permission, generally in accordance with the inspector's recommendation and for the reasons set out at the very beginning of this judgment, namely that "*the development is currently served by a wastewater treatment system located off-site, which has not been demonstrated to be available to the applicant, and therefore does not have access to a suitable*

private wastewater treatment system over which it has sufficient rights to operate, maintain and take corrective action as necessary." [Emphasis added]

The Proceedings
33. The applicant applied *ex parte* for leave to apply for an order of *certiorari* quashing the decision of the Board and for an order remitting the matter to the respondent to be determined in accordance with law.

34. The applicant was somewhat selective with the facts which he chose to put before the court both in his statement of grounds and in his grounding affidavit. For example, he exhibited the planner's report of Cork County Council of 3rd February, 2017 which is favourable to his position but failed to exhibit the report from the same planner of the same date which report is adverse to his position and which requires further information on his ownership/control of the treatment unit itself. More importantly, he did not exhibit the detailed submission by way of appeal to the Board from CPFM's agents. He purports to do so in RH19 but, as already noted, that exhibit is a Board document which simply refers to the appeal. Nor did he reveal in either his grounds or in his grounding affidavit that he was given full opportunity by the Board to respond to CPFM's submissions on the appeal but failed to do so within the statutory timeframe. In fact as already noted, he made submissions which were out of time and which as a matter of law could not be entertained and which were therefore returned to him.

35. In addition to being selective about the facts, the applicant also puts a certain gloss on other facts which in the courts view convey a wrong impression. He repeatedly conflates the right to connect to the treatment plant with the right to inspect, maintain and repair the treatment plant itself. On the facts, he enjoys the former, but to date has not demonstrated that he enjoys the latter.

36. At para. 22 of his grounds he asserts that the Board erred in law/or fact in determining that he did not have sufficient rights to operate and maintain the wastewater treatment plant located on the second notice party's lands and to take corrective action as necessary in respect of the wastewater treatment plant. To show that the Board had erred he recites the easement which is not in dispute, entitling him to place, keep and maintain and repair a sewerage pipe on the notice party's lands and the right to connect to the chamber and treatment plant also located on the notice party's lands. Having described this as an express right, he goes on in the same paragraph to state:-

> *"The Applicants[sic] lands enjoy an easement to inspect, repair and maintain the wastewater treatment plant located on the second notice party's lands by way of implication and/or quasi easement and/or pursuant to the provisions of section 40 and section 71 of the Land and Conveyancing Law Reform Act, 2009, and/or by implication and/or common intention and/or pursuant to the principle of non derogation from grant at common law."*

The impression created by the contents of this ground is that, at the time of its decision, the Board was fully aware or was, at a minimum, on notice that the applicant was claiming implied or ancillary easements which give him a right to inspect, maintain and repair the treatment plant itself as opposed to the sewer pipe and the connection to it and that, notwithstanding that knowledge, the Board refused his application.

37. On the evidence this impression is simply not true. From the outset of the planning process a major issue was the availability to the applicant of a functioning wastewater treatment plant. He was twice asked for clarification by Cork County Council as to his ownership/control of the treatment plant and never asserted the existence of implied or ancillary rights to inspect, maintain and repair the treatment plant. The letter from his partner of 27th February, 2017 refers only to his right to connect to the treatment plant and is at best ambiguous as to the extent of his right to maintain and repair. In the context of this application the court considers it reasonable to infer that the ambiguity was deliberate. One matter is certainly clear which is that there is no specific claim to implied or ancillary rights.

38. The applicant was served with the appeal by the notice party which clearly asserted that he had no right of access to the treatment plant and percolation area and further asserted that the treatment plant was not then being maintained. He did not contradict either of those assertions. Not having done so he, now by the mechanism of judicial review, seeks to introduce new arguments to challenge the decision of the Board; arguments which should have been addressed in submissions to the Board. That is not permissible. All sorts of mischief would ensue were parties permitted to advance in a judicial review arguments which they could have, but did not, advance to the decision maker. In its submissions the respondent relied on a passage from Lewis *Judicial Remedies in Public Law* (5th Ed., 2015) at page 368:-

> *"In a claim for judicial review, a court is concerned with reviewing the decision of a public body to ensure that the decision is not ultra vires. 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 courts 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. Thus, the courts could not consider fresh evidence as to the existence of a right of way in order to undermine a decision of a public body that no such right of way existed." (Emphasis added)*

That is a succinct statement of law which this court accepts and endorses.

Alleged failure to utilise section 131
39. Based on the false premise that the Board was or should have been aware of his claim for implied or ancillary easements, the applicant seeks to argue that the Board should have exercised its discretion under s.131 of the Planning and Development Act 2000, as amended, to seek further submissions or observations on the nature and extent of his easements. He criticises the analysis of the inspector contained at paragraph 7.2.3 of his report where the inspector states:-

> *It is my interpretation that the rights pertaining to the site under the land registry document (second schedule, point 2) provides the applicant with 'the right to inspect, repair and maintain' the pipe connecting to the chamber and treatment plant and ' the right to connect up to' same, but does not include any express right to inspect, repair and maintain the chamber and treatment plant itself. Furthermore, the wording of the letter from the applicant's solicitor does not state to the contrary."*

The applicant argued that, in making that determination the inspector and the Board, acting on his report, were purporting to resolve a matter of law as to the nature and extent of the applicant's easements and, in doing so, were acting ultra vires. He argues that the Board should instead have sought further submissions in respect of an issue of law which it had no competence to decide.

40. The court rejects that argument. Neither the inspector nor the Board purported to determine the applicant's legal rights. What the inspector did was conduct a textual analysis of the materials before him on the appeal for the purpose of ascertaining whether the applicant had demonstrated as he had repeatedly been requested to do, that he had sufficient control over the treatment unit to ensure its ongoing operation, maintenance and repair. On the basis of that textual analysis, he concluded that the applicant had not demonstrated that he had the necessary ownership/control of the treatment unit to ensure its ongoing availability for the service of his dwelling. That was a reasonable conclusion for him to have come to on the facts before him. Had the applicant made the arguments to the Board that he seeks to make for the first time in this judicial review, that he enjoys ancillary or implied rights to maintain and/or repair the wastewater treatment plant itself as opposed to merely the sewerage pipe and connection, then other considerations might have applied. The fact is that he did not do so. In those circumstances there was no obligation on the Board to invoke or deploy its powers under s. 131 of the 2000 Act.

Alleged failure to have regard to section 34(13)
41. The applicant further submits that the Board should have granted him permission and should have left the issue of his entitlement to maintain and repair the treatment plant to civil remedy. The applicant cites s.34(13) which provides "*a person shall not be entitled solely by reason of a permission under this section to carry out any development*."

That provision simply and expressly states that a grant of planning does not override a person's existing common law rights. Private law remedies remain open to an aggrieved neighbour. The applicant is suggesting that the Board should have granted him permission and that CPFM, if aggrieved, could assert such rights as it claims in civil law. The Board advanced a number of cogent arguments as to why such a course would not be appropriate in this case. The availability of suitable wastewater treatment is a core requirement of any planning application. Any proposed development which cannot show access to suitable wastewater treatment constitutes a risk to public health. This fact is underpinned by the Planning and Development Regulations 2001. Article 22(2)(c) of the 2001 Regulations requires that a planning application in which it is proposed to dispose of wastewater, other than to a public sewer, be accompanied by:-

> *"…information on the on-site treatment system proposed and evidence as to the suitability of the site for the system proposed."*

Thus the respondent argues that demonstrating access to a suitable, operable and maintainable waste treatment system is a key requirement of every planning application that is not connected to a public sewer. Where access is not demonstrably available then the Board is entitled to refuse permission on public health grounds.

42. Further, the Board maintains that leaving the issue of access to wastewater treatment to be resolved between the applicant and CPFM in private law proceedings is particularly inappropriate in this case. This is not an application for a new development where the issue of access to wastewater treatment would have to be resolved before development. Here the dwelling already exists and what is being sought is retention. Were the Board to grant permission for retention for permanent use, the house could be occupied without a suitable wastewater treatment solution being in place. This gives rise to a public health risk. The court agrees with the respondent that, on the facts, this is not a case where the Board could responsibly grant permission first and allow any legal issues to be determined in subsequent private law proceedings.

Alleged failure to have regard to conditions attached to previous grants
43. Finally, the applicant argues that in coming to its decision, the Board failed to have regard to the combined effect of two conditions attached to previous grants of planning permission. He refers to condition 9 attached to the original grant of planning for the construction of the hostel in 1996 which provided that:-

> *"The small treatment plant referred to in the above condition shall be operated and maintained in perpetuity to the satisfaction of the Planning Authority and before development commences, written evidence of a maintenance contract to ensure to continuous operation of the treatment plant shall be submitted and agreed with the Planning Authority.*
>
> *Reason: In the interest of public health"*

The applicant also sought to rely on condition 8 of the planning permission for the construction of the caretaker's lodge granted in 2000 which provided that:-

> *"Connection shall be made to the existing effluent treatment plant to the satisfaction of the Planning Authority.*
>
> *Reason: In the interest of orderly development."*

It is demonstrably incorrect to state that the inspector failed to have regard to these conditions. The inspector noted the contents of conditions 9 and 10 and stated at para. 7.2.6 as quoted above, that "*in theory this should ensure that the WWTP is maintained for the subject dwelling, however this clearly is not the case*." The inspector continued "the applicant does not have sufficient rights over the system to ensure that it is suitably operational" and, on this basis, the inspector concluded that occupation of the dwellinghouse was prejudicial to public health. The respondent argued, correctly in the court's view that it was not sufficient to consider the issue on a theoretical basis. The Board had to consider the situation on the ground. The situation on the ground in this case is that the wastewater treatment plant on which the applicant purports to rely is not on his land; is not being maintained; is apparently inoperable; and is not connected to an electricity supply. Furthermore despite repeated requests to do so, the applicant has not demonstrated that he has sufficient ownership or control of the wastewater treatment plant to satisfy the Board that a suitable wastewater treatment is or will be, available for the dwelling. If and when the applicant demonstrates that he has access and control over the wastewater treatment plant, to which his sewerage is connected, then an application for a change of use from its current status as a dependent dwelling to a new status as an independent residence, is likely to succeed.

Conclusion
44. The court is satisfied 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. The applicant having failed to participate in the appeal process cannot now seek to impugn that decision by introducing arguments that were never made to the Board. For the reasons set out in this judgment the court refuses this application.