

THE HIGH COURT

[2022] IEHC 220
[Record No. 2020/235 MCA]

BETWEEN

MANNIX COYNE AND SHEILA COYNE

APPLICANTS

AND

ENGINENODE LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 7th day of April, 2022

Introduction.

1. The applicants are husband and wife. They reside at Bracetown, Clonee, County Meath. They also carry on a small business venture at the property, of training horses.
2. The respondent is a company incorporated with limited liability. On 17th June, 2020, a decision was made by Meath County Council that they intended to grant planning permission to the respondent for a data processing centre on a site in the townlands of Gunnocks and Bracetown, County Meath. The site is immediately adjacent to the applicant's dwelling.
3. The development, which the respondent proposes to carry out at the site, is substantial. It comprises four two-storey data storage buildings, a single storey energy centre, a single storey MV-operations building and a two-storey office building. There will be four, 40m x 5m exhaust flues and a diesel generator, with a 22m high exhaust flue. The total floor area of the buildings is in the order of 102,000m². The EIAR submitted by the respondent with its planning application, indicated that the proposed development would be constructed on a phased basis over ten years, being eight years of construction, with two years for final landscaping. The cost of the base build is estimated in the region of €400/500m. Equipping the data centre will cost several hundred million more. When constructed, it will give employment for two-hundred and forty-five people. As a condition of the planning permission, the respondent has been ordered to pay contributions of just over €5m.
4. The present proceedings concern an application by the applicants for various forms of relief pursuant to s.160 of the Planning and Development Act 2000 (as amended). Their application is based upon the fact that in May/June 2020 and again in August/October 2020, the respondent carried out certain excavation works on the site. The applicant maintains that these works constituted the archaeological mitigation measures as outlined in the respondent's EIAR, which measures were incorporated under conditions three and eight attaching to the planning permission granted by Meath County Council. As the decision to grant planning permission had been appealed by the applicants to An Bord Pleanála, the applicants maintain that the works were done without any operative planning permission being in place and accordingly, they were unauthorised development.
5. The applicants also stated that other works in the form of the drilling of bore holes and the cutting down of hedges and the clearing of ditches, was also carried out during this period, without any permission for the carrying out of such works.

6. The respondent accepts that the works were carried out; however, it submits that it was only carrying out pre-planning testing to see if any significant archaeological remains were contained on the site, which might impede the carrying out of the development of the site; such information being relevant to whether the respondent would exercise its option to purchase the lands. As such, the respondent argued that the excavation works were solely for research and discovery purposes and therefore came within the regulations relating to exempted development.
7. In relation to the digging of bore holes, the respondent submitted that bore holes had been dug to ascertain if the soil was suitable for the construction of a particular building, which was required by a customer. It was submitted that the carrying out of such survey of the soil came within the exempted development regulations and in particular class 45 thereof. In relation to the cutting down of hedges and the clearing of ditches, the respondent stated that those works had been carried out by the owner of the lands, Mr. Ward, and that as he is a farmer, these works were also exempted development.
8. In addition, the respondent pointed out that the notice of motion had issued some ten days after the works had been completed and the site had been reinstated to its original condition; accordingly, it was submitted that there was no basis on which the court should grant any injunction pursuant to s.160 of the 2000 Act.
9. The key issue for determination by the court is whether the works constituted stand-alone archaeological testing, which was independent of the project and was therefore exempt development; or was, in fact, the archaeological mitigation measures mandated by the planning permission, which were carried out before the respondent had obtained an operative planning permission.

Chronology of relevant dates.

10. The dates on which various steps and actions were taken by the parties is relevant to the matters in issue between them. The relevant dates can be set out in the following way: -

April 2019	A non-invasive geophysical survey was carried out of the site, which revealed the existence of some archaeological remains of significance.
22/11/2019	Planning application lodged by the respondent for a data processing centre on the site.
8/1/2020	Objections lodged to the proposed development by the applicants and by their daughter, Ms. Amy Coyne.
20/4/2020	An application was lodged on behalf of the respondent for a licence pursuant to s.26 of the National Monuments Act 1930 (as amended) to conduct archaeological test excavations at the proposed development site.
7/5/2020	An excavation licence was issued by the National Monuments Service pursuant to s. 26 of the 1930 Act, for the period 18th May, 2020 to 26th

	September, 2020.
15/5/2020	Mr. Pat Keating, the Community Liaison Officer employed by the respondent, spoke to the first applicant on the telephone and informed him that archaeological excavation works would be commencing in the following week.
18/5/2020	Excavation of the site commenced. This phase continued until 12th June, 2020.
17/6/2020	Meath County Council made a decision of their intention to grant planning permission for the data processing centre on the site. It was subject to twenty three conditions.
14/7/2020	The applicants and their daughter appealed the grant of planning permission to An Bord Pleanála.
16/7/2020	A second application was made for a licence pursuant to s.26 of the 1930 Act.
21/7/2020	The respondent was notified by email that a second licence had issued. The timeframe for the licence was 6th August, 2020 to 27th November, 2020.
10/8/2020	The second phase of the works commenced.
24/9/2020	A letter was sent by the applicant's solicitor to the respondent calling on it to cease the works and threatening injunction proceedings if the works were not stopped.
28/9/2020	The respondent's solicitor responded, indicating that the works had been authorised by a licence issued by the National Monuments Service under the 1930 Act. They further indicated that the works would be completed by 7/10/2020.
6/10/2020	All works were completed on the land and the site was reinstated.
16/10/2020	Applicants issued the notice of motion herein seeking relief pursuant to s.160 of the 2000 Act.
5/7/2021	An Bord Pleanála granted planning permission for the development. That decision has been challenged by the applicants by way of judicial review proceedings. Those proceedings are currently before the High Court in the SID list.

The Works Carried On at the Site in 2020.

11. The archaeological excavation works consisted of the digging of a number of shallow trenches on the site. In total, two hundred and seven trenches were dug. They measured

approximately 8.25km in length. They were dug using a track digger with a 1.8m bucket. The test trenches were 1.8m wide and ranged between 0.2m and 0.8m in depth. The site is still used by the owner as a working farm. It is made up of eight fields. The test trenching was carried out during the first phase, in fields one to six, with the test trenching in the remaining two fields, being carried out in the second phase of the works, which commenced in August 2020.

12. As already noted, phase one of the archaeological testing in fields one to six occurred between 18th May, 2020 and 12th June, 2020. At the hearing there was some debate as to the level of information that had been provided by the respondent to the first applicant in advance of the commencement of the works. It was agreed that a telephone conversation had taken place between Mr. Keating, on behalf of the respondent, and the first applicant, on or about 15th May, 2020. The respondent maintained that Mr. Keating had indicated to the first applicant that there was going to be test trenching carried out on the site in the following week; to which the applicant responded, that that was fine and he was appreciative of the fact that a telephone call had been made to him.
13. The first applicant did not accept that as being a fair summary of the conversation. He accepted that he had been told that there was going to be some archaeological testing carried out, but it had not been indicated to him that that was going to be done by a mechanical digger, nor that it would involve excavating up to two hundred and seven trenches.
14. The court does not find it necessary to resolve any conflict of evidence that there may be in this regard. It is accepted that there was some communication between the respondent's agent and the first applicant in advance of the works being carried out. The content of that communication does not appear relevant to the court in relation to the issues which it has to determine on this application.
15. After the first phase of excavations had been carried out, Mr. Fintan Walsh, consultant archaeologist employed by Archaeological Management Solutions, who were acting on behalf of the respondent, sent an email to the licensing section of the National Monuments Service. In that email he gave an update on the works that had been carried out pursuant to the first licence. He indicated that the archaeological testing had been split into two phases to accommodate the land owner in regard to the management of his cattle herd on the lands. To that end, they had completed half of the overall testing, being phase one, with phase two to commence later in the year, subject to agreement and access with the land owner. Mr. Walsh went on to report that they had found seven small areas of archaeology during the phase one testing. In light of that, he proposed that they would do the following: complete a phase one testing report and submit same to the NMS; subject a method statement for archaeological resolution of archaeological areas one to seven, in tandem with the submission of the phase one report; and finalise the phase two testing when the phase one works were complete, including proposed excavations, subject to agreement with the NMS. He indicated that he would be in contact by telephone to discuss the matter further.

16. On 16th July, 2020, Mr. Stephen Hickey of AMS Consultancy, submitted a second application for an excavation licence pursuant to s.26 of the 1930 Act. In the previous application it had been indicated that the application for the licence was being made at the "pre-planning" stage. In the second application, it was indicated at section 14(a) that the application resulted from planning, or other development control conditions. These were identified as having been issued by Meath County Council. That referred to conditions three and eight in the planning permission that had issued on 17th June, 2020 by Meath County Council. Condition three, was in the usual form, requiring that all mitigation measures in the EIAR and other particulars submitted with the planning application, be implemented in full. Condition eight referred to specific archaeological mitigation measures, that had been set out at section 12.6 of the EIAR. The court will return to the significance of this application in more detail later in the judgment.
17. By email dated 21st July, 2020, the respondent was given a licence for the period 6th August, 2020 to 27th November, 2020. The second phase of the works commenced on 10th August, 2020. Essentially, it was made up of two distinct elements of archaeological investigation. Firstly, there was what is known as the "resolution" of the areas of interest that had been discovered as a result of the excavations carried out in the first six fields. "Resolution" means recording and preserving items of archaeological interest that are found in the course of excavation. For this phase of the works, there were seven archaeologists and the digger operator on site. The resolution of the phase one fields took place from 10th August, 2020 to 25th September, 2020. The second area of works, was the phase two testing of fields seven and eight, which commenced on 14th September, 2020 and concluded on 6th October, 2020.
18. In order to accommodate the additional numbers working on the site, a temporary portable office and a portable toilet were brought onto the site. These structures were removed at the conclusion of the archaeologists' work.
19. In addition, a piling rig was brought onto the site and various bore holes were dug. The court is not aware how many bore holes were dug. In his affidavits, Mr. Ronan Kneafsey, a Director of the respondent, indicated that it was necessary to dig the holes to obtain soil samples, so as to enable the respondent to ascertain whether the soil would be suitable for a particular building that may be required by one of its customers.
20. A number of hedges were cut down and a number of ditches were cleared. These works appear to have taken place between 7th February, 2020 and 13th March, 2020. The respondent stated that those works had been carried out by the owner of the lands, Mr. Ward. Two affidavits were furnished by Mr. Ward, in which he stated that he had carried out these works in the normal course of farming the lands.
21. The respondent stated that the entire site was reinstated to its original condition by 6th October, 2020. The court has viewed various photographs taken of the site since that time. The court is satisfied that the site has been reinstated to its original condition.

Relevant Legislative Provisions.

22. There are a number of legislative provisions that are relevant to the issues that arise on this application. It will be helpful to the reader to summarise these at this stage and to set out those that are of particular importance. As already noted, the respondent obtained two licences pursuant to s.26 of the National Monuments Act 1930 (as amended). That section provides that it will not be lawful for any person, otherwise than in accordance with a licence issued under that section, to dig or excavate in or under any land, whether with or without removing the surface of the land, for the purpose of searching generally for archaeological objects, or for searching for, or exposing or examining any particular structure, or thing of archaeological interest known or believed to be in or under the land, or for any other archaeological purpose. The section goes on to provide that a licence may be issued by the National Monuments Service for the carrying out of such archaeological excavations.
23. There are a number of provisions of the Planning and Development Act 2000 (as amended), which are of relevance to this application. Section 2 is the definition section. It defines "*unauthorised development*" as meaning in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use of the lands. "*Unauthorised works*" means any works on, in, over, or under land, commenced on or after 1st October, 1964, being development other than exempted development, or development which is the subject of an operative planning permission. "*Works*" is defined as including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal of a structure. "*Structure*" is defined as meaning any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined.
24. Section 4 of the 2000 Act deals with exempted development. In s.4(1), a number of classes of exempted development are set out. Section 4(2) provides that the Minister may, by way of regulations, provide for any classes of development to be exempted development for the purposes of the Act. Section 4(4) provides that development shall not be exempted development if an environmental impact assessment, or an appropriate assessment of the development, is required.
25. A number of the provisions of Part I of Schedule II to the Planning and Development Regulations 2001, as amended, are relevant to this application. That part of Schedule II sets out various classes that qualify as exempted development. Class 43 provides that the following shall be exempted development: -
- "The excavation for the purposes of research or discovery—*
- (a) *pursuant to and in accordance with a licence under section 26 of the National Monuments Act, 1930 (No. 2 of 1930), of a site, feature or other object of archaeological or historical interest, or*
- (b) *of a site, feature or other object of geological interest."*

26. Class 45 of the Schedule to the Regulations deals with drilling or excavation for the purpose of surveying. It is in the following terms: -

"Any drilling or excavation for the purpose of surveying land or examining the depth and nature of the subsoil, other than drilling or excavation for the purposes of minerals prospecting."

Submissions of the parties.

27. The applicant submitted that it had been clearly established in both European and Irish law, that it was not permissible for a developer to attempt to split a project, so as to avoid the necessity for the carrying out of an EIA on the entire project: see *Commission v. Spain* (Case C-227/01); *O'Grianna v. An Bord Pleanála* [2014] IEHC 632 and *Daly v. Kilronan Windfarm* [2017] IEHC 308.
28. The applicant submitted that what the respondent had attempted to do here was to dress up the fact that he had done the archaeological mitigation measures, as set out in its EIAR and as required under conditions three and eight of the planning permission that issued, as a standalone due diligence exercise of archaeological investigation, which it alleged was necessary before deciding whether to exercise the option to purchase the lands; when it was in reality, an attempt to carry out a preliminary part of the development works, prior to obtaining an operative planning permission.
29. It was submitted that, in effect, the respondent had "jumped the gun" by doing the archaeological mitigation measures in advance of obtaining an operative planning permission. This meant that it had avoided the pre-commencement conditions that were attached to the permission, such as the agreement with the planning authority of a CEMP. It was submitted that that was relevant, as it meant that the respondent had been able to carry out the archaeological mitigation measures, without having to cater for dust blow off into the water courses, which led into the Tolka River, which was a salmonid river. It was submitted that that was a significant advantage to the developer. Furthermore, the carrying out of such works in advance of obtaining an operative planning permission, meant that he could "hit the ground running" as it were, if and when he obtained an operative permission, without having to go through the preliminary works that would be necessary prior to embarking on the development of the data processing centre itself.
30. It was submitted that where a developer claimed that he came within the provisions of exempted development, he bore the onus of proving that he came "clearly and unambiguously" within the relevant exemption: see *Dillon v. Irish Cement Limited* (Unreported, Supreme Court, 26th November, 1986) and *South Dublin County Council v. Fallowvale Limited* [2005] IEHC 408.
31. In relation to the principles that should be applied when considering an application for relief under s.160 of the 2000 Act, it was submitted that the court should have regard to the principles set down by the Supreme Court in *Meath County Council v. Murray* [2018] 1 IR 189. It was submitted that the court should also have regard to the additional duty to ensure that there was strict compliance with the provisions of European environmental

law and that there could be no tacit acceptance of a situation where unauthorised development was permitted, which circumvented the requirements of such legislation: see *Cork County Council v. Slattery Pre-Cast Concrete Limited* [2008] IEHC 291 and *McCoy v. Shillelagh Quarries Limited* [2015] IEHC 838.

32. It was submitted that having regard to the purpose, nature and extent of the works that had been carried out by the respondent in 2020 in advance of obtaining an operative planning permission, and in circumstances where the respondent refused to accept that it was not entitled to have carried out such works and in the absence of any undertaking that there would be no repetition of such activity in the future; this was a case where the court should grant relief pursuant to s.160 of the 2000 Act.
33. In response, it was submitted on behalf of the respondent that what the applicant was trying to achieve in this application was a collateral attack on the planning permission that had been granted at first instance by Meath County Council and subsequently on appeal by An Bord Pleanála. It was submitted that that was clear from the initial correspondence from the applicant's solicitor on 24th September, 2020, which made it abundantly clear that as the applicant regarded the respondent as having engaged in unauthorised development where an EIA was required, which would necessitate the respondent seeking substitute consent from the planning authority. That argument had been run before An Bord Pleanála and had been rejected by it. The applicant was attempting to rerun that argument in this application. It was submitted that that was obvious when one had regard to the totality of the reliefs sought by the applicants in their notice of motion.
34. It was submitted that this application for a planning injunction should not be allowed to constitute a collateral challenge to the decision of An Bord Pleanála, which enjoyed the presumption of validity: see *Sweetman v. An Bord Pleanála* [2018] IESC 1 and *Weston Ltd. v. An Bord Pleanála* [2010] IEHC 255.
35. It was submitted that the true purpose of the applicant's application herein, was further manifest by the fact that the works in respect of which complaint had been made, had been completed and the lands had been reinstated to their original condition, ten days before the notice of motion issued. The applicant's solicitor had been informed by the respondent's solicitor on 28th September, 2020, that the works would be completed on or before 7th October, 2020. It was submitted that in these circumstances, there was no legal or logical basis on which the applicants could seek the reliefs that they sought in this application.
36. Without prejudice to those objections to the admissibility of the plaintiff's application, it was submitted that the works that had been carried out, had constituted standalone due diligence in relation to archaeological investigation of the site. It was submitted that having regard to the very extensive nature of the proposed development, it had been prudent of the respondent to carry out a due diligence investigation in relation to whether there might be archaeological remains of any significance on the site. The consequences for the developer, if any remains of significance were to be uncovered, in terms of the

delay that could be encountered, would be enormous having regard to the size of this project. It was submitted that in these circumstances, the respondent had been prudent to carry out extensive investigations to clarify this matter, prior to embarking on any development on foot of whatever operative planning permission it may ultimately obtain.

37. In this regard, counsel referred to the example of the archaeological finds that had been made in the area of Carrickmines Castle, which had held up the development of the M50 motorway in that area for a very considerable period of time.
38. It was submitted that the respondent had not engaged in project splitting, as there had been no attempt to avoid an EIA in relation to this project. The developer had submitted a comprehensive EIAR. Both Meath County Council and An Bord Pleanála had deemed that they had sufficient information to carry out the requisite EIA, which they had done. So there was no question of splitting the project, so as to avoid carrying out an EIA in respect of any part of it.
39. It was submitted that the respondent had acted entirely reasonably and responsibly. It had retained qualified archaeologists to carry out an investigation of the site. They had obtained all necessary licences to carry out the required archaeological excavations. The work had been carried out in two separate phases, over a relatively short period of time. It was submitted that the works were completely different to the works that were involved in the *O’Grianna* or *Daly* cases, where the connection of the windfarm to the electricity grid, was an integral part of the overall project. In the present case, the archaeological investigations were entirely standalone and were preliminary to the project concerning the construction of the data centre. They were, in effect, a preliminary step designed to protect the developer from uncovering something that might lead to a very considerable delay in the carrying out of his project. While there may be some overlap between the archaeological investigations that were carried out in 2020, and the archaeological mitigation measures in the EIAR, it could not be said that the overall project was in any way dependent upon those works.
40. It was submitted that in relation to the issue of whether the works were exempted development within the meaning of the regulations, that depended on the works themselves and not on any independent motivation that there may have been on the part of the developer: see *Cronin (Readymix) Limited v. An Bord Pleanála* [2017] 2 IR 658.
41. In relation to the bore holes that had been sunk in the second phase of the works, it was submitted that these came within the exemption provided for in class 45 of the regulations. The bore holes had been sunk so as to survey soil, to assess its suitability for the needs of a particular customer. It was submitted that that was clearly exempted development within the provisions of the regulations.
42. In relation to the hedges that had been cut down and the ditches that had been cleared, it was pointed out that Mr. Ward had accepted in his affidavits that he had carried out those works for his own purposes. They had been carried out in February and March 2020. They were not the responsibility of the respondent.

43. It was submitted that having regard to the archaeological excavation works that had been carried out over a relatively short period of time and having regard to the fact that the lands had been totally reinstated to their original condition, there was no basis to hold that such works were part and parcel of the project and therefore, there was no basis on which the court should grant any of the reliefs sought by the applicants in their notice of motion.

The law.

44. The principles which should be applied when the court is considering an application for an injunction pursuant to s.160 of the 2000 Act, were considered by the Supreme Court in *Meath County Council v. Murray*, where McKechnie J., having referred to the decisions in *Morris v. Garvey* [1983] IR 319 and *Wicklow County Council v. Forest Fencing* [2007] IEHC 242, noted that the interests of the public will be ever present on the enforcing side. He outlined the factors that should be considered by the court at para. 90:

"What, then, are the factors which play into the exercise of the court's discretion? From a consideration of the case law, one can readily identify, inter alia, the following considerations:

- (i) The nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;*
- (ii) The conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:*
 - Acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order;*
 - Acting mala fides may presumptively subject him to such an order;*
- (iii) The reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;*
- (iv) The attitude of the planning authority: whilst important, this factor will not necessarily be decisive;*
- (v) The public interest in upholding the integrity of the planning and development system;*
- (vi) The public interest, such as:*
 - Employment for those beyond the individual transgressors, or*
 - The importance of the underlying structure/activity, for example, infrastructural facilities or services.*
- (vii) The conduct and, if appropriate, personal circumstances of the applicant;*
- (viii) The issue of delay, even within the statutory period, and of acquiescence;*
- (ix) The personal circumstances of the respondent; and*

(x) *The consequences of any such order, including the hardship and financial impact on the respondent and third parties”.*

45. These principles were further considered by Baker J. in *McCoy v. Shillelagh Quarries* at paras. 62 eq seq. Having referred to the judgment of Clarke J. in *Cork County Council v. Slattery Pre-Cast Concrete Limited*, she summarised the position at para. 66: -

“Thus I consider that the court has discretion, that it must be exercised sparingly, that the imperative of Community law must be respected in the exercise of discretion, and that the court should have as its starting point the fact that a development is unauthorised and that it may not by the exercise of its discretion “tacitly accept” the breach to adopt the terminology of Clarke J. in Cork County Council v. Slattery Precast Concrete Ltd.”

46. Baker J. went on to consider the issue as to whether an injunction should be granted in respect of an unauthorised development where the requirement for an EIA may arise. She stated as follows at paras. 84 and 85: -

“84. I consider myself constrained further by the requirements of European Community law, and especially the EIA Directive and the Habitats Directive as each of these mandates that an Environmental Impact Statement is required in respect of the operation of this quarry.

85. Accordingly, were I to refuse injunctive relief or grant injunctive relief with respect to some or only of the operation, I consider that my decision would be one which could be characterised as a failure to respect the integrity of the environmental legislation, and allow the development to continue when it is unauthorised under Irish and when Irish law arises as a result of the obligations of Ireland and Community law.”

47. In *Daly v. Kilonan Windfarm Limited*, Baker J. held that where the breach engaged questions of environmental protection, it could not be seen as either a technical or trivial breach of the planning code: see para. 102. Likewise, in *Krikke & Ors. v. Barranafaddock Sustainability Electricity Limited* [2019] IEHC 825, where the rotator blades on a wind turbine had been constructed 13m longer in diameter than permitted under the planning permission, Simons J. held that the exercise of the court’s discretion under s.160 had to be informed by EU environmental law. He stated as follows at paras. 162 and 165: -

“162. As appears from the foregoing discussion, there are a number of discretionary factors which are in favour of the Developer. These have to be weighed against the factors which point towards the grant of relief. The principal of these is that the development project is of a type subject to the EIA Directive. The EIA Directive obliges a Member State to provide effective, proportionate and dissuasive penalties for breaches of national legislation. The importance of ensuring compliance with the EIA Directive has very recently been emphasised by the judgment of the CJEU in Case C-261/18, Commission v. Ireland (Derrybrien).

[...]

165. It would not, however, be appropriate to allow the operation of the wind turbines to continue uninterrupted pending the outcome of an application for leave to apply for substitute consent. This is similar to the approach which had been adopted by the Court of Appeal in Bailey v. Kilvinane Wind Farm. There has been a breach of EU law, and this court is obliged to ensure that there is an effective and dissuasive remedy for same."

48. In relation to the interpretation of the statutory provisions relating to exempted development, it was held in *Dillon v. Irish Cement Limited* that such provisions had to be strictly construed. Delivering the judgment of the Supreme Court, Finlay C.J. stated as follows: -

"...I am satisfied that in construing the provisions of the exemption Regulations the appropriate approach for a Court is to look upon them as being regulations which put certain users or proposed development of land into a special and, in a sense, privileged category. They permit the person who has that in mind to do so without being in the same position as everyone else who seeks to develop his lands, namely subject to the opposition or views or interests of adjoining owners or persons concerned with the amenity and general development of the countryside. To that extent, I am satisfied that these Regulations should by a Court be strictly construed in the sense that for a developer to put himself within them he must be clearly and unambiguously within them in regard to what he proposes to do..."

49. A similar statement of principle was stated by McKechnie J. in *South Dublin County v. Fallowvale Limited* at para. 70.
50. There was no real dispute between the parties in relation to the issue of "project splitting". Both European and Irish law are clear that a developer cannot attempt to split a project, so as to carry out a portion of the works without the requirement of an EIA, when the project as a whole would require an EIA: see *Commission v. Spain; Umweltanwalt von Karnten v. Karntner Landesregierung Daly v. Kilronan Windfarm Limited*.

Conclusions

51. The court accepts the fundamental argument made by the respondent, to the effect that it was possible for a developer to carry out preliminary investigation works on a site, without being deemed to have commenced the development works themselves. The court also accepts that it was prudent for the respondent to carry out some archaeological investigation of the site before it obtained an operative planning permission and before it commenced a very substantial development on foot of such permission.
52. In considering the present application, one has to look carefully at the chronology of events. In particular, one has to have regard to the fact that two licences were applied for pursuant to s.26 of the 1930 Act. In the first application, which was made on 20th April, 2020, a number of things were clearly stated in that application form. Firstly, it was

indicated that the reason for the excavation was "testing". At section 14(a) it was stated that the application was being made at the "pre-planning" stage. That was true, because while a planning application had been submitted on behalf of the respondent in the previous November, the application had not been determined by Meath County Council at the time that the application for a licence was made to the NMS.

53. If one looks at the method statement which accompanied that application, it was made clear that the purpose of the application for a licence was to conduct archaeological test excavations in light of the findings which had been revealed as a result of the non-invasive geophysical survey of the lands carried out in March 2019. It is clear that at that stage, the archaeological experts, who had been retained on behalf of the respondent, proposed to carry out the survey to ascertain whether the findings that had been indicated by the geophysical survey, were in fact correct. The court accepts that in carrying out those investigations, the respondent was not project splitting in the accepted use of that term, but was carrying out preliminary investigations to see whether or not there were archaeological remains under the soil, the possible presence of which had been indicated as a result of the geophysical survey.
54. The court is satisfied that the carrying out of phase one of the investigations cannot be seen as being an attempt to avoid an EIA, as the respondent had already submitted, as part of its planning application, a full EIAR. Both Meath County Council and An Bord Pleanála were satisfied that sufficient information had been provided to enable them to carry out an EIA of the project. Thus, the carrying out of phase one of the works cannot be seen as an attempt to avoid an EIA of the entire project.
55. The court is satisfied that phase one of the works came within class 43 of the regulations governing exempted development, because the excavation was for the purposes of "research or discovery". The fact that the respondent may have fervently wished that it would not discover anything of archaeological significance, which might hold up the development of the site for a prolonged period, does not alter the fact that the purpose of the excavation was to discover whether there were any significant archaeological remains under the lands.
56. The problem arises in relation to the second phase of the works. When one looks at the application for the second licence, which was submitted by Mr. Hickey on 16th July, 2020, a number of things are readily apparent. Firstly, the reason for the excavation is given as "monitoring". In section 14(a), it was indicated that the application resulted from planning conditions that had been issued by Meath County Council. When one looks at the method statement that accompanied that application, it is abundantly clear that that application, was being made on the basis of the planning permission that had issued from Meath County Council on 17th June, 2020. There is specific reference made to condition eight of that planning permission, which had required the respondent to carry out the archaeological mitigation measures, which had been set out in its EIAR. Indeed, condition eight was quoted in its entirety in the method statement itself. Furthermore, the planning

permission that had issued from Meath County Council formed an appendix to that application.

57. In the course of argument, it was suggested that in the second application for the excavation licence, the respondent had merely referred to the grant of planning permission that had occurred in the interim, since the first license had issued. The court does not accept that assertion. When one looks at the application form and the method statement for the second licence, it is clear that the planning permission was not merely referred to, it was, in fact, the basis on which the application was made. It was clear that the respondent had used the permission to carry out the works, that had been specifically mandated in the planning permission and in particular in condition eight thereof, as the basis for its second application for a license pursuant to s. 26 of the 1930 Act.
58. The method statement which accompanied the second application for a license, also noted that up to that date, extensive test excavation of the geophysically-identified features, along with other testing, had been carried out in phase one of the site. Those works had resulted in the identification and recommendation for excavation of archaeology areas one to seven. Preservation by record at those seven areas, would mitigate the impact of the development. It was also recommended that given the scale of the testing conducted on the site and following completion of the excavation works at areas one to seven, including all subsequent post-excavation requirements, that no further archaeological work was recommended for phase one of the proposed development site.
59. The method statement went on to describe the excavations that had taken place in phase one of the works. It stated that a total of seven areas of archaeological interest were identified during testing. Those sites were recorded in fields one, two and five and comprised: a ring ditch, four possible burnt mound sites and two pit sites. It was stated that each of those sites had undergone a preliminary investigation to establish their nature and extent, prior to being covered and subsequently back filled. The method statement went on to outline in detail what was proposed to be done to achieve full resolution of the site. It dealt with the finds retrieval strategy and conservation, concerning the identification and retrieval of archaeological objects during the course of the excavation. It stated that all archaeological objects/material would be retained, including those relating to relatively recent structures and historical events. It stated that finds would be housed temporarily on site and thereafter stored at the headquarters of the archaeology company in Kilrush, County Clare and ultimately, they would be transferred to the National Museum of Ireland.
60. The method statement went on to outline what would be done if human remains were found. It indicated that An Garda Síochána would be notified and that all relevant protocols would be followed. The method statement went on to deal with the sampling and analysis of soil. It stated that bulk soil samples would be retrieved from all archaeological contexts for subsequent environmental analysis and radio carbon dating. The statement provided that temporary secure accommodation would be provided for any finds, or samples, or other archaeological materials that may be recovered in the course

of the work. The material would then be stored at the company's head office, pending final deposition with the National Museum of Ireland.

61. At p.20 of the method statement, the consultants gave a detailed account of the planning decision that had been made by Meath County Council. A copy of that decision was appended to the method statement. The method statement provided that no further archaeological work was recommended for phase one of the proposed development site.
62. The nature of the works that were going to be carried out in phase two, which were the subject matter of that application, have to be seen in the context of the archaeological mitigation measures set out at section 12 of the EIAR. When one looks at that document, one sees that the works that were applied for under both licences and which were eventually undertaken, comprise the entirety of the archaeological mitigation works specified in the respondent's EIAR. Those archaeological mitigation works formed part of the subsequent permission that was granted, as they were contained in conditions three and eight thereof.
63. It is also significant that the respondent itself categorised the works as the complete archaeological mitigation measures for the development in its application to the NMS for the excavation licences, when it stated "*due to the extent of archaeological investigation across phase one site, it is recommended that following the full excavation (including all necessary post-excavation works) of the seven identified archaeology areas that the phase one area is considered archaeologically resolved and no further mitigating works are required*".
64. Taking all of these matters into account, the court is satisfied that in applying for the second licence and in proceeding to carry out the works as identified in the method statement accompanying the second application, which was effectively the resolution of the finds that had been made as a result of the test excavations carried out during phase one of the works, the respondent had effectively embarked on the development by carrying out the archaeological mitigation works, as required by conditions three and eight of the permission that had been granted by Meath County Council and which I understand were replicated in the permission granted by An Bord Pleanála. The court has not had sight of the decision of An Bord Pleanála.
65. In essence, the court is satisfied that in carrying out phase one of the works in May or June 2020, the respondent was doing no more than investigating what archaeological remains there may be beneath the surface of the lands. However, in proceeding to carry out the works under phase two, on foot of the second licence issued by the NMS, the respondent was effectively, through its archaeological agents, proceeding to carry out the archaeological mitigation measures that were required by condition eight of the planning permission. In doing that, while the matter was under appeal to An Bord Pleanála, the respondent effectively carried out unauthorised development. The court finds that in carrying out phase two of the excavation works in the period August to October 2020, the respondent was carrying out unauthorised development at the site.

66. It is also noteworthy that in proceeding to carry out the second phase of the works, the number of people onsite increased dramatically. During phase one, Mr. Kneafsey has stated that there were three archaeologists and a digger driver; whereas during phase two, there were seven archaeologists and a digger driver. A temporary office and a toilet were brought on site for phase two of the works. Thus, it is difficult to see how those works merely constituted a preliminary standalone due diligence exercise to ascertain whether there were archaeological remains under the surface of the lands.
67. It may well be that the error was made by the archaeological experts, whom the respondent had retained. Mr. Kneafsey has stated in his affidavits that he was advised by experts that the works would not require planning permission. It may be that the archaeological experts were not aware of the provisions of s.4(4) of the 2000 Act, which provide that while works may ordinarily be exempted from the need to obtain planning permission, if they are part of a project that requires an EIA, then they are no longer exempted works. In this case, it was accepted by all parties that the main project required an EIA. Once the excavation works which were carried out, were deemed to be part of that project, they could not avail of the exemption provisions in s.4 of the 2000 Act. The court is satisfied, for the reasons set out above, that the works carried out in phase two of the works were in fact part of the development project and were not a standalone due diligence exercise.
68. In the course of argument, counsel for the respondent emphasised the fact that at all times, the respondent had operated lawfully pursuant to a license issued by the NMS pursuant to the 1930 Act. The court accepts that at all material times the respondent had operated pursuant to licenses issued under s.26 of the 1930 Act. However, it is well settled that the mere fact that a party has a permission under one statutory code to do a particular act, does not entitle the party to ignore the provisions of another statutory code that may be applicable in the circumstances.
69. This point was made clear by McKechnie J. in *South Dublin County Council v Fallowvale Ltd*, where he stated as follows at paragraph 71:
- "The law on this point is relatively clear-cut. It is that mere compliance with one statutory regime does not absolve the effected party from compliance with a different regime unless such is expressly provided for."*
70. In support of that statement of the law McKechnie J. referred to the decision of Kelly J. (as he then was) in *Curley v Galway Corporation* (Unreported, High Court, 11th December, 1998), where the learned judge had stated that he could not conceive of a situation where the court could, in order to enable the respondent to comply with the statutory obligations under waste management legislation, permit them to breach obligations imposed upon them by another piece of legislation. In particular, the court could not permit the fulfilment of a statutory obligation, for example under the Waste Management Act, by the commission of offences under the planning legislation.

71. In the circumstances of this case, the position is made even more clear, because in the information and advice notes that were furnished to applicants at the time of their applications for a licences pursuant to the 1930 Act, it was specifically stated at item 14 thereof, that the issuing of a licence by the Minister under s. 26 of the 1930 Act, did not, except where expressly provided under law, provide any exemption from other statutory or legal obligations. The applicant was advised that it was the obligation of the applicant to ensure that all such statutory obligations were complied with. Accordingly, the court holds that the fact that the respondent held licences under the 1930 Act, cannot be seen as a defence to any assertion made by the applicants, that in carrying out such works, it carried out unauthorised development at the site.
72. In relation to the bore holes, the court is satisfied that these are exempt development in that they come within class 45 of the regulations. The court is satisfied that in sinking the bore holes and in taking soil samples, the respondent's agents were simply carrying out a survey of the soil to see if it was suitable for the needs of one of the potential customers of the data centre. The court is satisfied that that survey was something that was entirely preliminary to the development project itself. Accordingly, the court holds that the sinking of the bore holes and the taking of samples was exempted development.
73. The applicants are not entitled to any injunctive relief against the respondent in relation to the cutting of hedges and the clearing of ditches. That was done a considerable time prior to the excavation works. It was done by Mr. Ward, the owner of the lands. He is not a party to the proceedings.
74. As the court has found that the respondent carried out unauthorised development at the site in the period August to October 2020, and as the respondent does not accept that it has done so and as the respondent has not given any undertaking that it will not repeat such activity in the future, the court proposes to make an order in the terms of para.1 of the notice of motion. As the court is satisfied that the lands have been restored to their original condition, it is not necessary to make any order pursuant to para. 2 of the notice of motion. The court does not propose to make any of the other orders sought in the notice of motion as they do not arise in a s. 160 application. However, the parties can furnish written submissions on the terms of the final order.
75. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.