Neutral Citation Number: [2024] EWHC 625 (KB)

Case No: KB-2023-BRS-000041

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY

2 Redcliff Street
Bristol BS1 6GR

Date: 03/04/2024

Before :

HHJ RUSSEN KC

(Sitting as a Judge of the High Court)

- -

Between :

NATURAL ENGLAND	**Claimant**
- and -	
ANDREW COOPER	**Defendant**

- -
- -

Heather Andersen (instructed by **Browne Jacobson LLP**) for the **Claimant**
Andrew Cooper (the Defendant, in person)

Hearing dates: 16th and 17th November 2023 and 21st February 2024
(Draft judgment circulated to the parties on 19th March 2024)

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Approved Judgment

This judgment was handed down remotely at 2pm on 3rd April 2024 by circulation to the parties or their representatives by e-mail and by its release to The National Archives.

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HHJ RUSSEN KC

HHJ Russen KC:

Index Paragraph Number

Section	Sub-paragraphs	Paragraph Number
Introduction		1 to 12
Background		13 to 44
The Tenancy Agreement		45 to 55
Evidence at Trial		56 to 125
Alex Goodman	(62 to 71)	
Dawn Enright	(72 to 79)	
Michael Madgwick	(80 to 84)	
Andrew Cooper	(85 to 100)	
James Parry	(101 to 110)	
Kelly Bezer	(111 to 117)	
George Dunn	(118 to 125)	
Natural England		126 to 129
NE's Purposes		130 to 184
NERCA 2006	(131 to 142)	
The Explanatory Notes	(143 to 159)	
The Framework Document	(160 to 162)	
The 2006 Regulations	(163 to 176)	
The Guidance	(177 to 181)	
NE's approach	(182 to 184)	
NE's Powers		185 to 237
General	(185 to 200)	
NERCA 2006	(201 to 215)	
The Explanatory Notes	(216 to 217)	
The Framework Document	(218 to 219)	
The 2006 Regulations	(220 to 230)	

The Enforcement Paper	(231 to 237)	
Conclusions upon NE's Purposes and Powers		238 to 282
Functions not Purpose	(254 to 263)	
No Relevant Anchor	(264 to 276)	
Power to Prosecute	(277 to 279)	
Consequences	(280 to 282)	
Outcome		283 to 297
Disposal		298 to 299

Introduction

1. This claim arises out of a potential conflict between the statutory role of the claimant public body and the private rights of the defendant tenant farmer. Archaeological features on or under his farmland form the subject matter of the dispute.

2. The claimant, Natural England ("**NE**"), seeks to protect those features from what could well be the harmful activity of cultivating certain fields by seeking injunctive relief to prevent that. The defendant ("**Mr Cooper**") says that restraining him from cultivating the land, so that the fields must be kept as pasture, is an infringement of his rights under his tenancy and, he argues, also contravenes certain of his Convention rights protected by the Human Rights Act 1998. His private rights are expressly qualified by archaeological considerations under appropriate reservations in favour of his landlord, The National Trust ("**the NT**"). Under the tenancy, and consistent with its own, clear statutory purpose, the NT has reserved to itself any archaeological features on or under the ground.

3. Yet the NT is not a party to these proceedings and this is a dispute solely between NE and Mr Cooper. Mr Cooper's overarching point is that archaeology is not and (when it comes to consideration of the grant of discretionary injunctive relief) should not be recognised by the court to be of any proper concern of NE.

4. This is my judgment following an expedited trial of the claim. An early final determination of the issues between the parties was appropriate in the light of the interim injunctive relief which, as I explain below, I granted in May 2023.

5. NE makes its claim for final injunctive relief by reference to the risk that there will otherwise be ongoing breaches by Mr Cooper of the Environment Impact Assessment (Agriculture) (England) (No. 2) Regulations, SI 2006/2522 ("**the 2006 Regulations**"). NE says this risk is apparent from the history of the matter which I set out in the next section of this judgment. In essence, NE seeks an order restraining Mr Cooper from ploughing some of his farmland without first complying with provisions of the 2006 Regulations which require NE's consent to the land being cultivated.

6. Mr Cooper farms some 67 hectares at Croyde Hoe Farm, Croyde Hoe, Devon ("**the Farm**"). The Farm and surrounding land is owned by the NT. Mr Cooper is the tenant of the Farm under a Tenancy Agreement dated 26 August 1993 ("**the Tenancy Agreement**"), though he took up actual occupation on 29 September 1991. The tenancy was granted under the Agricultural Holdings Act 1986 and is a periodic tenancy which continues from year to year.

7. The final injunction now sought by NE relates to approximately 30 hectares of the Farm which is made up of 9 fields, most if not all of which were identified in the schedule to the Tenancy Agreement as "arable" land, albeit in some cases by reference to different field numbers than those now employed, as opposed to the "pasture" or "other" (which includes scrubland) which made up the remainder of the Farm.

8. NE seeks injunctive relief by reference to the 2006 Regulations in circumstances where Mr Cooper was convicted (following a guilty plea) at Exeter Crown Court in April 2021 for failing to comply with a stop notice served under the regulations and where his appeal to the Court of Appeal against that conviction was dismissed in June 2022. In the criminal proceedings, brought by NE, Mr Cooper was in June 2021 fined £7,500 and ordered to make a contribution of £24,000 towards the prosecution's costs.

9. NE alleges that Mr Cooper proceeded nevertheless to plough three of the fields in question in June 2021 and that in April 2022 he ploughed two more. It therefore considers that the only effective way to procure Mr Cooper's compliance with the 2006 Regulations will be by obtaining an injunction to which a penal notice may be attached so that, in the event of its breach, Mr Cooper is at risk of committal proceedings including, perhaps, a sentence of imprisonment if a contempt is established.

10. On 2 May 2023 I granted interim injunctive relief on NE's application which prevented Mr Cooper from carrying out any ploughing, sub-surface harrowing, discing or rotovating of the 8 fields unless done as part of a project covered by a screening decision under regulation 4 or with the consent of NE under regulation 9 of the 2006 Regulations. The language of the injunction differs from that which had been proposed by NE which was directed to preventing Mr Cooper from commencing (without first complying with the relevant provisions of the 2006 Regulations) any "uncultivated land project" or "restructuring project" or "significant project" within the meaning of the 2006 Regulations. In relation to the activity of harrowing, I was anxious to clarify the exact terms of the restraint upon Mr Cooper and, in particular, that he should not be restrained from carrying out chain harrowing. There was evidence before the court on the application (an expert report prepared by Mr Richard Jefferson, NE's Senior Grassland Specialist, for the purposes of the criminal prosecution) which supported the conclusion that chain harrowing is not "cultivation".

11. NE points to Mr Cooper's compliance with the May 2023 injunction in support of its position that it is only the grant of an injunction, breach of which carries the risk of contempt proceedings, which will compel his compliance with the 2006 Regulations.

12. Mr Cooper, on the other hand, argues that NE has no grounds for invoking the 2006 Regulations (he refers to it as acting *ultra vires*) and opposes the continuation of that injunctive relief on the basis that it conflicts with his rights under the Tenancy Agreement. It is because of the obvious potential impact upon his livelihood that an expedited trial was clearly appropriate. The need for one was reinforced by me being

persuaded by NE that its "law enforcement" role was such that it should not be required to give a cross-undertaking in damages under the terms of the interim injunction.

Background

13. Croyde Hoe is a coastal promontory on the southern side of Morte Bay which has Baggy Point at the end of it. The Farm is the only one on the promontory. The coast at Baggy Point is part of the Braunton to Baggy Point Coast Site of Special Scientific Interest. The 30 or so hectares which are the subject matter of these proceedings are adjacent to the SSSI.

14. Before 1992 this relevant land had been farmed by Mr Cooper as arable land. However, in that year he entered into the first of two agreements under the Countryside Stewardship Scheme ("**CSS**") which together ran continuously until 2012. The CSS was a government scheme which provided financial incentives to farmers to preserve and enhance the environment. The fields which had been designated as arable were turned into pasture and remained uncultivated for approximately 20 years. Mr Cooper received payments of approximately £200,000 under the CSS in return for the land remaining uncultivated during that period.

15. When the second agreement under the CSS came to an end, in May 2012, Mr Cooper applied to NE for a screening decision under the 2006 Regulations in respect of 9 fields. He wished to carry out mechanical and chemical cultivation of the fields. Under the regulations "*cultivated*" means by both physical and chemical means.

16. On 20 August 2012 NE provided its screening decision that all the fields were "uncultivated land" within the meaning of the 2006 Regulations because of their management under the CSS. After consultation with the Historic Environment Team at Devon County Council, the archaeological division of the National Trust, those representing the North Devon Area of Outstanding Natural Beauty and English Heritage (all of those being "consultation bodies" within the meaning of the regulations) the view of NE was also that the fields contained features of important historic interest of national significance. The position of NE, therefore, was that Mr Cooper not only required permission under regulation 4, for an uncultivated land project, but also NE's separate consent under regulation 9 for a "significant project", being one likely to have significant effects on the environment.

17. NE's letter dated 20 August 2012 explained its position by quoting extensively from an email dated 19 July 2012 from the Devon County Council's Archaeologist. That email referred to the following matters, said to support demonstrable national archaeological importance, in support of the view that cultivation of the fields either would or could potentially have a significant detrimental effect on the environment:

    i) the presence of numerous flint tool artefact scatters dating from the Mesolithic period (c. 10,000 to 6,000 BP ("Before Present")); and

    ii) the widespread survival of remains and structures from a World War II training area on Baggy Point which was used by US forces and closely associated with preparation for the D-Day landings.

18. The reference to WWII structures is to a number of concrete dummy pillboxes built by the US Army for training in preparation for D-Day. In one of them, above the level of the embrasure and written in the concrete when it was still wet, is the graffito '*A.A. Augustine*' written by Private Alfred Augustine of B Company, 146th Engineer Combat Battalion. Private Augustine was killed at Omaha Beach on 6 June 1944.

19. The County Archaeologist had also identified a Mesolithic pigmy (microlith) flint manufacturing site in the vicinity of the subject matter fields in observing that the area of archaeology had not been properly studied "*so the potential importance of its loss (in particular the potential for addition* [sic] *prehistoric archaeological features, within and below the current plough zone as indicated by retrieval of artefact scatters) cannot be fully gauged at this time*."

20. NE therefore required Mr Cooper to submit an environmental statement (within the meaning of regulation 12 of the 2006 Regulations) as part of his application under regulations 4 and 9. Mr Cooper responded by asking NE to provide its "scoping opinion" in relation to the information sought in support of the environmental statement.

21. NE responded to that request on 27 September 2012 by attaching the text of the County Archaeologist's email of 19 July and saying that Mr Cooper needed to address the impacts on the historic environment. NE went on to say that, concentrating in particular upon the archaeological heritage, the environmental statement should include a Desk-Based Assessment to establish an understanding of "the Historic Environment baseline" (with local, regional and national documentary and cartographic sources being identified for this purpose); an Earthwork Survey (identifying the location, extent and height of any upstanding archaeological remains and, therefore, so as to provide information predominantly on the military structures); and an Evaluation Survey (to assess the survival, depth, extent and vulnerability of the prehistoric remains).

22. NE recommended that the evaluation survey should be based on a series of test pits excavated across the site at locations agreed with the County Archaeological Service. The environmental statement should also describe the measures envisaged for preventing or reducing any significant adverse effects on the environment.

23. In October 2012 Mr Cooper appealed against NE's screening decision but that appeal was later dismissed by the Secretary of State ("**DEFRA**") in June 2013.

24. In the meantime, in April 2013, Mr Cooper had ploughed 3 of the fields affected by the screening decision of the previous August (fields 7251, 4861 and 4941).

25. In October 2013 Mr Cooper submitted his environmental statement to NE. This was his consent application for the purposes of regulation 12.

26. NE responded to the application by an email dated 18 December 2013 saying it was "*currently unable to determine a decision in your case*" due to a lack of information. In relation to matters of archaeological heritage, NE said it had been in contact with the NT. The email went on to say:

> "We understand they" – the NT – "have already undertaken a geophysical survey of the application fields and are also planning on conducting the following in order to assist with determining your application:
>
> - Completion of analysis of the geophysical survey
> - An Evaluation Survey including a programme of trial trenching/test pitting to evaluate features identified in the geophysical survey and to determine the level of survival of features/deposits below ground (i.e. those with the potential to be impacted by the plough zone)
> - An episode of field walking
> - Desk-based assessment
>
> It is NE's opinion that, once completed and interpreted, these surveys should provide sufficient evidence on which to base a decision in your case. Therefore, NE strongly recommends that you assist NT with this survey work (allowing access to your fields), so that this survey work can be completed quickly and a decision made. We understand that the NT will be [in] contact with you shortly to discuss this survey work further."

27. In March 2014 representatives of NE walked around the Farm with Mr Cooper to discuss its archaeological features.

28. The 3 fields ploughed in April 2013 were made the subject matter of a remediation notice (under regulation 27 of the 2006 Regulations) in April 2014. This required the reinstatement of the land to the condition it was in before the (unauthorised) uncultivated land project. The following month Mr Cooper appealed the remediation notice but in March 2015 DEFRA dismissed that appeal and extended the time for remediation until October 2015.

29. In May 2015, Mr Cooper made an application for judicial review of the original screening decision and the remediation notice but permission was refused in August 2015.

30. In March 2016 Mr Cooper ploughed and planted a cereal crop in a fourth field (field 5676). NE served a remediation notice in respect of that field the following month. Mr Cooper appealed that remediation notice in June 2016 but DEFRA dismissed his appeal in August 2017. The field was remediated the following month.

31. In September 2017 Mr Cooper ploughed and sowed another field within NE's screening decision (field 7770). The next month NE served a remediation notice in respect of that field and a stop notice (under regulation 25 of the 2006 Regulations) in respect of all 9 fields covered by the decision. In November 2017 Mr Cooper appealed against this latest remediation notice and the stop notice.

32. That appeal was later dismissed by DEFRA in December 2019. In the meantime, Mr Cooper had, in March 2018, ploughed one of the fields (field 7251) originally ploughed by him back in the Spring of 2013.

33. His doing so prompted NE to investigate suspected breaches of the stop notice. NE brought a criminal prosecution in Barnstaple Magistrates Court in respect of the activities of strip-grazing of field 7770 and the ploughing on field 7770 and field 7251. Two of the charges related to cultivation without obtaining a screening decision (an offence under regulation 22) and the third was for breaching the stop notice (an offence under regulation 26). Mr Cooper pleaded not guilty to the 3 charges in April 2019 and on one of them (the failure to comply with a stop notice which was triable either summarily or on indictment) he elected for a trial by jury. The two summary charges were adjourned pending the outcome of the Crown Court proceedings.

34. A visit to the Farm by NE in March 2020 confirmed that fields 7251 and 2857 had been cultivated.

35. Remediation notices were served in relation to those two fields in April 2020. Mr Cooper appealed against the remediation notices but DEFRA later dismissed the appeal in January 2021.

36. After Covid-19 delays and several postponements, Mr Cooper's trial was listed in Exeter Crown Court for 7 days beginning on 6 April 2021. Mr Cooper entered a guilty plea to failing to comply with the stop notice (the offence under regulation 26 of the 2006 Regulations) before the jury was sworn in. He received the sentence explained above in the introduction two months later. Mr Cooper's application for permission to appeal his conviction was refused on paper in December 2021 and then, on his renewal of it, by a panel of three Lords Justices in June 2022, on the basis that it was misconceived and without merit.

37. The stop notice which formed the basis of Mr Cooper's conviction was not in evidence on this claim. Mr Cooper told me that it relied in part upon the danger his cultivation presented to the remains of a potential Iron-Age hill fort. If that was the case then that seems unfortunate when the evidence given at the trial before me does not support a suggestion that any such fort was situated on the Farm. He also complained to me that the Crown Court judge would not let him put before the jury a Field Inspection Report dated 18 July 2012, which Mr Cooper relies upon to say that (as at that date) the relevant fields were already "cultivated", on the basis (so Mr Cooper says, with him quoting what he says were the words he recalls the judge using) "this would confuse the jury". He said it was this decision which caused him to plead guilty. I clarified with Mr Cooper that he had raised this point on his appeal against the conviction and he confirmed he did, as one would expect him to have done. He has been able to rely upon the Field Inspection Report in these proceedings and I have reached my own conclusions upon it: see paragraphs 69, 88 and 123 below.

38. In June 2021 Mr Cooper ploughed a further 3 fields (fields 3676, 2857 and 4861). NE served a remediation notice in respect of those fields in February 2022. Mr Cooper appealed that notice but DEFRA dismissed the appeal in February 2023. Mr Cooper's later challenge to that decision on an application for judicial review was conceded on the basis that DEFRA had failed to provide him with the necessary appeal documentation in proper time.

39. On 12 April 2021 NE had served a notice of withdrawal of the two summary charges before the Magistrates Court. Mr Cooper objected and the court determined that a hearing was appropriate. NE renewed its request for their withdrawal in June 2022 (after the refusal of permission to appeal the Crown Court conviction) and, following a hearing on 21 October 2022, the charges were withdrawn.

40. A visit to the Farm by NE in October 2022 confirmed that field 4861 and a strip along the northern boundary of Field 4941 had been planted with an arable crop.

41. NE issued its claim in these proceedings on 21 April 2023 and obtained the interim injunctive relief on 2 May 2023.

42. NE's visit to the Farm on 17 July 2023 confirmed that field 4861 had been returned to grass though the northern strip of field 4941 remained in arable production.

43. NE says that the matters summarised above show that, until these proceedings, Mr Cooper had challenged every decision made against him (including the criminal conviction resulting from his own guilty plea) instead of engaging with the need for further information identified by its email of 18 December 2013. It says the onus lies with him to secure the necessary consent under the 2006 Regulations and its stance on the resulting stalemate (and need for regulatory enforcement action) over the last 10 years is revealed by the following statement in its letter to Mr Cooper dated 24 April 2020:

> "NE gave you advice on the further archaeological survey work that would be required. Because you have consistently confirmed that you are not prepared to fund this, NE has been unable to determine your application."

44. Against that, it was clear from Mr Cooper's submissions and evidence at trial that he considers NE's position to be unjustified. He says he is being asked to prove a negative and asks rhetorically "*how do I prove the absence of archaeological artefacts in a 10 acre field using trial pits?*". This was a general observation and not one made by reference to what the 2006 Regulations (which I address in paragraphs 163 to 170 below) say about the information about the environmental effect (and the effect on any archaeological heritage) that may reasonably be required in an 'environmental statement' submitted in support of an application for NE's consent to a 'significant project' under regulation 13. It was also clear from certain questions Mr Cooper put to James Parry (an archaeologist with the National Trust responsible for the South-West region) that Mr Cooper was saying that the likely cost of the further work to be undertaken by the NT (the work identified in the email of 18 December 2013) had not been shared with him.

The Tenancy Agreement

45. At the interlocutory hearing in May 2023 Mr Cooper made the point in his skeleton argument that his landlord, the NT "*reserves all archaeological and heritage features from the agricultural tenancy both above ground and/or hidden.*"

46. However, at that hearing, only an extract of the Tenancy Agreement was in the bundle before the court: a single page containing clause 25 and part of clause 26. Mr Cooper relied upon the obligations of good husbandry in relation to the management and cultivation of the Farm and the rolling and harrowing of pasture land, for which those clauses respectively provided, to argue that NE should not be entitled to the injunctive relief sought.

47. It was immediately apparent to me that clause 57 of the Tenancy Agreement might be material because each of clauses 25 and 26 is prefaced with the words "subject to Clause 57 hereof." Mr Cooper was able to hand up to me on that occasion a full copy of the Tenancy Agreement as later included in the trial bundle. Clause 57 addresses the issue of 'Conservation'.

48. In particular, clause 57 of the Tenancy Agreement provides:

> "(a) Not to carry out any of the following works or acts without the having obtained the Landlord's prior approval in writing:
>
> ……..
>
> (viii) break the surface of the ground covering the sites of any archaeological or other monuments including those specified in Schedule 4(vii) hereto and not to deface or damage or permit to be defaced or damaged such monument whether buried or not and in particular to use his best endeavours to prevent damage by any burrowing animals."

49. Schedule 4(vii) to the Tenancy Agreement does not in fact specify further what is meant by "archaeological or other monuments" but simply repeats, in connection with "the areas cross-hatched orange on the attached plan", the same phraseology as is used in clause 57(a)(viii).

50. As Mr Cooper's position was and remains that it is the NT, not NE, which has an interest in any archaeological features on or under the Farm, I suggested at the May 2023 hearing that one way to advance matters, for the purposes of his defence of NE's claim, might be to seek to obtain the NT's consent under clause 57 to the cultivation of the fields in question. So far as I am aware that was not done, though the evidence of Michael Madgwick, which I address below, indicates that the NT would only consent to them being cultivated if Mr Cooper obtains the necessary consent from NE under the 2006 Regulations. It is also now clearer from the evidence which emerged at trial that (as explained above in the narrative of the background to the proceedings) any such consent by NE will depend upon the outcome of further investigation by the NT of the kind identified in the email of 18 December 2013.

51. Clause 56(a) of the Tenancy Agreement, identified by Mr Madgwick, requires Mr Cooper to:

> "obtain all licences permissions and consents and to execute and do all the works and things and to bear and pay expenses required or imposed by any existing or

> future legislation in respect of any works carried out by the Tenant on the holding or any part thereof …. ."

52. Although it might be argued that clause 56(a) is more clearly directed to works of construction or development, as indicated by the later references in the clause to the architect, surveyor and any planning inspection or approval, Mr Madgwick's evidence was that the NT regards it as an operative clause in relation to the annual or seasonal farming activity which is prohibited by the interim injunction by reference to the 2006 Regulations.

53. Having regard to the purpose for which NE invokes the 2006 Regulations in these proceedings, clause 11 of the Tenancy Agreement is the provision which Mr Cooper relies upon to say that it is the NT (only) which has an interest in archaeological and heritage features on the Farm. Alongside clause 57(a)(viii), clause 11 is a provision which encourages the thought (as I expressed it at the May 2023 hearing when I was not alive to the reliance placed by NE on the suggested further investigations by the NT) that the NT is perhaps the "elephant in the room" in these proceedings. The clause reserves to the NT:

> "All archaeological specimens and artefacts with the right to excavate and remove the same making payment to the Tenant reasonable compensation for all damage done and not reinstated by the Landlord in the exercise of the rights hereby reserved or any consequential loss from such damage."

54. Mr Cooper's position under the 2006 Regulations has been explored and tested since 2012. Ten years ago NE indicated its position that any grant of consent under the 2006 Regulations is likely to rest heavily on the further work then anticipated to be done by the NT. Mr Cooper has not succeeded in his challenges to various remediation notices and a stop notice issued by NE in reliance upon that position.

55. Mr Cooper's position under the Tenancy Agreement, and any reliance by the NT upon the stance of NE (resting as it does upon the involvement of the NT in relation to regulatory approval) has not been similarly tested. Any issue (at the private law level between landlord and tenant) as to whether clauses 11 and 57(a)(viii) of the Tenancy Agreement, possibly with any implied obligation against a derogation from grant as an additional consideration, are more relevant to the NT's interest in archaeological features than clause 56(a), identified by Mr Madgwick, is not for me to determine. I refer below to the evidence given by James Parry, of the NT, about the NT's general approach where a tenant seeks consent to cultivate land which contains or is likely to contain archaeological artefacts.

Evidence at Trial

56. NE called three witnesses at trial. They were Alex Goodman (of NE), Dawn Enright (of NE) and Michael Madgwick (of the NT). NE called Ms Enright as an expert witness.

57. Mr Cooper gave evidence himself and he also called two witnesses who had each responded to a witness summons. (Shortly before the trial I had acceded to part of NE's application by setting aside a third summons on the basis that I was not persuaded that the proposed witness would materially add to the evidence about the NT's position which NE proposed to adduce at trial.) The witnesses called by Mr Cooper were James Parry and Kelly Bezer of the NT.

58. There was also no objection by NE at the hearing in November 2023 to Mr Cooper relying upon the witness statement of Mr George Dunn being read as hearsay evidence. Mr Dunn is the Chief Executive of the Tenant Farmers Association. In his paperwork Mr Cooper had described Mr Dunn as an "expert witness". By an informal application, made by email about a month before the final day of the trial fixed for closing submissions, Mr Cooper sought permission to call Mr Dunn on that last day. I refused that application. The hearing in November 2023 had concluded on the basis that the evidence was closed. That hearing exhausted the two-day trial time estimate. The additional third day was to enable the parties to make their submissions about the evidence given and (the source of some of the 'legal' content of Ms Enright's evidence having been clarified at that earlier hearing) for NE to make more detailed submissions upon the important questions over NE's purpose and powers which I address below. Granting permission to Mr Cooper to call a witness whose statement was already admitted as hearsay would probably have led to the trial not concluding on 21 February 2024 when that date (the fixing of which was dictated by the availability of the court and the parties) was already late enough in the context of an expedited trial.

59. As might perhaps be expected in a case with such a well-documented history of "the dispute" between the parties, including successive reviews in and out of court of the parties' respective actions, I did not obtain from the testimony at trial much further illumination of the factual matters relevant to the determination of the claim.

60. Speaking in general terms, the evidence of NE's witnesses about the archaeological significance of the subject matter farmland did not really go much further than justifying the stance adopted by NE in December 2013 which really marks the start of the dispute. But in saying this I must recognise that NE's position was at that stage and remains that further surveys have to be undertaken to establish the true nature of the archaeological heritage of the farmland.

61. Against that, and expressing matters in similarly general terms, the evidence of Mr Cooper and Mr Dunn (and indeed of Ms Goodman whose testimony touched on the point) left me wholly uncertain about the likely financial impact of a final injunction having regard to any relevant successor schemes to the CSS. But then I must also recognise that, under the Tenancy Agreement, Mr Cooper has private law rights and obligations to cultivate the farmland (subject to clause 57, and possibly clause 56(a), so far as competing archaeological interests are concerned) and it is essentially up to him with his considerable farming experience to decide which farming activity best serves his interests. I think it is probably also safe to infer that Mr Cooper might not have a very firm idea of what financial support is available under the current schemes unless and until he applied for it.

Alex Goodman

62. Ms Goodman is NE's Senior Habitats Enforcement Officer. She is responsible for advising her colleagues in relation to enforcement action in relation to SSSI's and under the 2006 Regulations.

63. In her witness statement for the trial Ms Goodman produced a chronology of the events concerning NE and the Farm, the key aspects of which I have summarised above in providing the background to proceedings. Ms Goodman has written much of the correspondence to Mr Cooper from NE over the years. She said Mr Cooper's was the longest running enforcement case in which she had been involved.

64. Much of Ms Goodman's evidence (for both the interim application and the trial) was directed to the statutory material and guidance concerning NE's powers and its approach to enforcement, which I address below.

65. Ms Goodman explained that NE's concern was to protect the natural environment on the Farm. The material quoted and exhibited by her was relied upon to say "*[t]he natural environment includes landscape, which in turn includes the historic environment.*" In relation to matters of archaeological significance she relied upon the experts in that field. Her understanding, reflected in her email to Mr Cooper dated 18 December 2013, was that it was reasonable for NE to require further information before giving any consent to cultivation; and the NT would be undertaking the further surveys required.

66. It was Ms Goodman's evidence, supported by photographs and satellite imagery of Baggy Point, which explained that field 4861 and a strip of field 4941 had been cultivated before the grant of the interim injunction and that the latter had not been returned to grass when she visited the Farm in July 2023.

67. Her history of events (as events, rather than the stance adopted by NE over the years) was not controversial or challenged by Mr Cooper.

68. In cross-examination Ms Goodman accepted that a letter to Mr Cooper dated 21 February 2012, and written by NE in anticipation of the CSS coming to an end, focussed upon the fact that the Farm was on and adjacent to an SSSI and was written with a view to encouraging him to seek payments in respect of work "*towards recovering the SSSI to favourable condition*." Ms Goodman recognised that the letter had made no reference to historical artefacts. In re-examination, Ms Goodman recognised that use of chemicals on the land by Mr Cooper would probably not impact upon archaeological artefacts below the ground. She said that a screening decision by NE would probably not be required for such 'chemical cultivation' which is also within the scope of the 2006 Regulations. This aspect of her evidence serves to highlight that for the purposes of these proceedings NE's position, as it has developed since early 2012, is based firmly upon its concern for the historic environment rather than nature conservation or protecting biodiversity.

69. Ms Goodman's statement addressed one particular point which Mr Cooper had made by reference to the classification as "cultivated land" of 6 (or possibly 7 allowing for a

possible typographical error in identifying a further one) of the fields affected by NE's claim in a Field Inspection Report prepared by the Rural Payments Agency ("**RPA**") dated 18 July 2012. Mr Cooper (who had signed the report alongside a representative of the RPA) relied upon that classification in resisting NE's claim to an injunction preventing him from cultivating those fields. However, I am satisfied by Ms Goodman's evidence, given by reference to an explanation from the RPA in a letter dated 31 January 2019 which was not directly challenged by Mr Cooper, that this description of the land use in 2012 related to the use of those fields before the entry into the CSS in 1992.

70. Ms Goodman also gave evidence in more general terms, relying on the apparent financial viability of the Farm over the 20 years it was in the CSS, which was directed to Mr Cooper's apparent inability to benefit from alternative payments if he was to continue to be prevented from cultivating the affected fields. She mentioned payments to farmers available under the Environmental Land Management Scheme ("**ELMS**"), replacing the CSS, in respect of the Sustainable Farming Incentive ("**SFI**") and/or Countryside Stewardship ("**CS**"). Her understanding was that SFI and CS payments would be available to Mr Cooper in addition to payments under the Basic Payments Scheme ("**BPS**") which, she said, were made to every farmer. When Mr Cooper suggested to her in cross-examination that SFI payments cannot be claimed alongside CS payments, Ms Goodman said she did not know whether or not that was the case.

71. As with Mr Cooper's evidence on this aspect, which I address below, Ms Goodman's evidence leaves me uncertain about the value of payments that might be secured by Mr Cooper under ELMS, compared with those he received under the CSS, when considering the financial viability of the Farm if he is prevented from cultivating the affected fields.

<u>Dawn Enright</u>

72. Ms Enright gave her evidence in the form of two expert reports. She is a member of the Chartered Institute of Archaeologists and holds a degree in Archaeology from the Institute of Archaeology, University of London.

73. Ms Enright is employed by NE as its Principal Historic Environment Specialist, within NE's Science Directorate. The fact that an expert is employed by the party relying on her evidence does not go to its admissibility but may affect the weight to be given to it: see *Helical Bar Plc v Armchair Passenger Transport Ltd* [2003] EWHC 367 (QB), at [29], per Nelson J. Ms Enright's second report contained the necessary recognition of her obligations as an expert and her overriding duty to the court under CPR 35.

74. Ms Enright's first report in evidence before me, dated 13 March 2019, was in fact prepared in support of the criminal prosecution of Mr Cooper. That report also contained the appropriate expert's declaration and recognition of the relevant part of the Criminal Procedure Rules. I do not regard Ms Enright's employment by NE or her involvement in the earlier prosecution as having any significant effect upon the weight to be attributed to such expert opinion as she expresses for the purposes of this claim. I say this for the following reasons which are in addition to Ms Enright's express recognition of her duties as an expert. Firstly, Mr Cooper pleaded guilty in the criminal

proceedings. Secondly, he did so by reference to the documented events leading up to them which I have summarised above. The greater part of Ms Enright's first report was directed to that history – the facts of this case - and her expert opinion evidence within it was relatively brief and, on the evidence currently available, largely uncontroversial, as I explain below by reference to her second report. The last reason for me not being troubled by Ms Enright's particular alliance with NE lies in the fact that (just as her opinion evidence in the first report was built upon a factual narrative) much of her second report addressed the regulatory remit of NE, followed by a relatively succinct expression of her expert opinion. As with any analysis of the facts that may be required, the true scope of NE's remit is a matter for legal analysis by me (particularly when Mr Cooper is a litigant in person). I analyse NE's objects and powers in the next section of this judgment.

75. Ms Enright's second report, dated 29 August 2023 and prepared for these proceedings, explained the remit of NE (as she understands it and believes it to be) and also addressed what she described as complementary roles of NE and Historic England. Engaging with a point made by Mr Cooper as to who should be the proper claimant in these proceedings, she made the point that the focus of Historic England is upon designated heritage sites and Scheduled Monuments and the latter represent 5% of known archaeological sites. She said:

> "Not only is 95% of known heritage sites undesignated, 84% of all designated heritage sites are located on farmland. This represents a proxy for undesignated remains. Natural England, as the delivery-body for Government's agri-environment schemes, is the key body ensuring protection and enhancement of the majority of non-designated sites.
>
> Consequently, Natural England's and Historic England's roles are complementary. They benefit from close working relationships to ensure successful outcomes for nature and heritage. There are many areas of mutual interest but there is no overlap in duties or duplication of effort. It is Natural England and not Historic England who are tasked by the Government to apply the EIA 2006 Regulations."

76. Ms Enright explained that the DEFRA agri-environment schemes provide funding for farmers and other land managers in return for adopting certain environmental land management practices. She said a core objective of the schemes is to protect "the historic environment, including archaeological features and traditional farm buildings." Her evidence was that £300m had been spent under the schemes on historic environment options, which deliver benefits to nature alongside heritage, since 2006.

77. I imagine quite a bit of statute-based law underpins the quoted piece of evidence, so far as Historic England's role (and its own objects and powers) are concerned; and the parties have not invited me to engage with it. I have noticed that Historic England is one of the "consultation bodies" identified by the 2006 Regulations. However, in the light of this evidence I have thought it appropriate, for the purpose of the proper analysis required for this judgment, to work through the precise basis for and implications of Ms Enright's last sentence quoted above. Having done so, I can see that it is indeed the case that the 2006 Regulations entrust NE with the power to consider the impact of a

'significant project' upon 'assets' of 'archaeological heritage': see paragraphs 165 to 173 below.

78. So far as matters within her expertise are concerned, Ms Enright said she had visited the Farm once on a visit which lasted approximately 2 hours. Her opinion was based upon that visit and the empirical evidence available to her.

79. The key elements of Ms Enright's expert opinion, which I accept on these points, were as follows:

   i) The potential for the existence of remains of an Iron-Age promontory fort on Baggy Point, somewhere within the vicinity of the Farm. In testimony, Ms Enright explained that a rampart about 200 yards from the farmland, which she presumed was on land owned by the NT but not on the Farm, was one of a number of ramparts indicating that there might have been of such a fort. Although Ms Enright's first report had been expressed in language which could be read as supporting the existence of the potential Iron-Age fort on parts of the Farm itself (in particular the language she used in relation to field 5676 which is one of the 9 fields with which NE is concerned) I am not persuaded her testimony supported that inference. Her testimony was unclear as to precisely where on Baggy Point the remains of the fort might be. Mr Cooper said that if it was where she suggested at one point in her evidence then it would be in the sea. Further, in my judgment, Ms Enright's evidence about the potential fort was not supported by the suggestion that there might also be artefacts, most obviously pieces of pottery, from the Iron-Age period on the Farm. She suggested the (further) "potential" for this to the case but, although she was able to give the reference number for the historic records held by Devon County Council, she had not checked those records before giving evidence.

   ii) The abundance of lithic scatters on the Farm which have been worked by hand for use as tools or weapons during the much earlier Mesolithic period. These Mesolithic flint tools, or microliths, indicate the presence of a hunter-gatherer society at Baggy Point during the Stone-Age. Ms Enright said this provides the context for the potential existence of the remains of a fort from the later Iron-Age period.

   iii) The present ineligibility of such microliths for designation as a heritage site (under the Ancient Monuments and Archaeological Areas Act 1979) unless they are associated with structures such as pits, postholes, caves and rock shelters (including structures from later periods). Nevertheless, study of them allows archaeologists to reconstruct past mobility patterns (by identifying where the stone has been sourced and how far it has travelled), make comparisons between different sites (which can also inform studies about human movement) and to analyse the dates and duration of occupation and such matters as human advancements in tool manufacture and activities on site. If undisturbed, the soil around the flint scatters may also provide evidence of archaeological significance about the historic use of the land.

   iv) The vulnerability and fragility of the flint scatters on the Farm to modern methods of cultivation. The increase in mechanisation since WWII and the use of bigger and heavier farm machinery for tilling can lead to damage to buried

archaeological sites through both soil compaction and soil disturbance when lighter agricultural practices over earlier centuries may not have done so. Ms Enright said that the sheer quantity of flints on the surface indicates that it is the cultivation of the land on the Farm which has unearthed them.

v) The irreversible damage to the Mesolithic flints that can result from such cultivation. Ms Enright said that continued cultivation will result in significant dislocation and deterioration of the artefacts and eventually lead to the complete removal of the archaeological site.

vi) That 4 of an original 7 pillboxes, some with remains of associated slit trenches, built for training purposes during WWII still exist either on or at the boundary of the Farm. Although they are from the modern era Ms Enright said they should properly be regarded as archaeological features on the basis that archaeology is the study of things that people leave behind. She accepted that the remaining dummy pillboxes were robust structures, constructed of shuttered concrete, but that the associated earthworks are as vulnerable to damage and eventual destruction through land cultivation as any other archaeological earthwork.

Michael Madgwick

80. Mr Madgwick is the head of the NT's Regional Let Division for the South-West region.

81. Mr Madgwick's witness statement exhibited a letter dated 28 February 2013 from Kelly Bezer, the NT's Rural Surveyor, to DEFRA. This was written by way of the NT's representation on Mr Cooper's appeal from NE's screening decision dated 20 August 2012. It stated: "*It is the opinion of the National Trust that due to the high archaeological value of the fields in question the fields should stay in permanent grassland or equivalent. Returning to arable will only further degrade the regional/national significance of the site.*" The letter further stated the NT's opinion that the grassland status of the farmland under the CSS had prevented the negative impacts that arable cultivation would have had on the historic features. It concluded by saying that if Mr Cooper could demonstrate that a certain level of ploughing was required in order for the Farm to be sustainable then the NT would be happy to enter into discussions with him. A way forward would have to be agreed to ensure minimal impact to archaeological features.

82. Mr Madgwick was asked by Mr Cooper about the provisions of the Tenancy Agreement of which the letter dated 28 February 2013 had made brief mention. He accepted that the schedule to the Tenancy Agreement identified a number of fields on the Farm (including 4 affected by the present proceedings) as 'Arable' as opposed to 'Pasture'. He had not seen before a manuscript amendment to the schedule which indicated that two more fields (including one relevant to these proceedings) had been designated as arable rather than pasture, and could not comment on the revision.

83. Mr Madgwick recognised that archaeological features on the land were reserved to the NT under the Tenancy Agreement. He accepted there was no obligation upon a tenant farmer to explore the existence or significance of such features of his own volition but that it is Mr Cooper's responsibility to engage with NE and provide the information and

documentation said by NE to be required for it to consider an application for consent under the 2006 Regulations. Mr Madgwick said that the NT had tried to assist Mr Cooper in this regard by arranging for the geophysical survey to be done.

84. Mr Madgwick made the point that, although the NT's purpose was to preserve history and natural beauty, it lacked the enforcement powers available to NE. I have already mentioned Mr Madgwick's reliance upon clause 56(a) of the Tenancy Agreement, the NT's view that cultivation of the affected fields would be "works" within the meaning of that clause which require NE's consent, and that if NE gave its consent then any consent required of the NT under clause 57 would follow. Aside from that, he said the NT remained neutral in the present proceedings. Mr Madgwick said there was no record of Mr Cooper seeking clause 57 consent from the NT. If he did so then the NT could either refuse it, grant it or grant it conditionally (eg. in relation to certain areas of the Farm).

Mr Cooper

85. Mr Cooper's witness statement (headed 'Defence Statement') was a one page document which essentially challenged the lawfulness of NE's actions leading up to these proceedings on a number of suggested legal grounds. One of the points he made in it was that NE "*has allowed the NT undue participation and influence over the interpretation and implementation of the* [2006 Regulations] *to undermine the landlord and tenant relationship for undeclared purposes*."

86. So far as factual matters are concerned, Ms Andersen asked Mr Cooper about a number of matters in cross-examination.

87. The first concerned the consent which the Countryside Commission had given, by a letter dated 27 January 1994, to the "chain harrowing" of 3 specified fields under the CSS during the late summer or autumn. Mr Cooper said that he had agreed with Mr Jankiewicz (the author of the letter) that he was permitted to use a drag harrow instead in the interests of creating pastureland. Mr Cooper explained that his chain harrow had teeth of about 2½ inches in length whereas those on the drag harrow were 6 inches. The chain harrow was ineffective in removing moss which inhibited the growth of grass and it was for this reason that Mr Jankiewicz had said the deeper harrowing could be undertaken. Mr Cooper told me that Mr Jankiewicz had said "*you deal with it*". I accept this evidence of Mr Cooper even though I believe its significance in these proceedings is probably limited. It might be the case that the practice of drag harrowing of those 3 fields has thrown up to the surface more microliths than chain harrowing would have done, so that NE has more evidence about them than if the RPA had not agreed, but, since the May 2023 injunction, only chain harrowing of any of the subject matter fields has been permitted.

88. Ms Andersen also asked Mr Cooper about the RPA's Field Inspection Report of 18 July 2012 addressed by Ms Goodman. I have already said that I accept Ms Goodman's evidence that this categorised the arable land parcels *before* Mr Cooper's entry into the CSS. Mr Cooper said that was not so but if the entries reflected land use at any later date (between 1992 and 2012) that would throw into doubt the very basis on which Mr Cooper received substantial payments under the CSS. I am prepared to accept he may

be right to say that the relevant parts of the form indicating "cultivated land" were completed by a representative of the RPA rather than by him but the suggestion that something more of significance can be read into the report is at odds with his testimony that DEFRA made periodic inspections of the Farm in the period of the CSS and also what he says about the drag harrowing (and not just chain harrowing) permitted on three fields when the report identifies a further seven fields as cultivated land. Mr Cooper's own evidence was that during the period of CSS he only addressed the thistles and moss on the land, by spraying and drag harrowing, in the interests of promoting grass growth.

89. One of the points made by Mr Cooper in his testimony was that, if he is prevented in the future from cultivating the land with machinery, he would have to spray the old pasture in order to kill it off in the interests of promoting new grass growth. He made this point from his perspective that NE should only be concerned with the *natural* environment (excluding archaeological or historical features) when the use of chemicals is probably at odds with its preservation. I have already noted Ms Goodman's position that chemical cultivation would probably not require NE's consent.

90. So far as the position between 2012 and the commencement of these proceedings is concerned, Mr Cooper did not challenge Ms Goodman's chronology of events. He accepted that he had committed about 7 breaches of the 2006 Regulations, the first of those being before he submitted his environmental statement in October 2013.

91. Mr Cooper said his breaches reflected the actions indicated in the environmental statement. In that statement he had said the primary income of the Farm was from lamb and beef production. This required the conventional mixed farming practice of ploughing and cultivating the land in order to provide forage, fodder and cereals for the livestock during the winter. In it he said that in any given year 30 hectares of land will comprise 8 hectares of root crop, 8 hectares of cereal crop and 14 hectares of grassland; and that the cropping would be rotated with two years in grass, one year in a cereal crop and one in fodder beet. Referring to field 7251, he said this had been cultivated over the past 10 years; and that seven of those years it would have been grassland and the rest in arable crops.

92. Mr Cooper confirmed his awareness that such cultivation is a breach of the 2006 Regulations. His position (which is reflected by the numerous challenges he has made to NE's actions over the period) is that he does not accept that NE is entitled to the further information sought by Ms Goodman's email of 18 December 2013. He expressed forcefully the point that "*this is <u>hidden</u> archaeology*" and observed that "*without disturbing the soil, you would not find the flints*". He questioned how, through the digging of trial pits in a 10 acre field, he could be expected to prove the absence of archaeological artefacts, saying "*Natural England are asking me to prove a negative*". His understanding was that the digging of trial pits would cost an estimated £5,000 per field.

93. So far as the WWII pillboxes are concerned, Mr Cooper said these are located within the field boundary walls. He said he does not plough closer than 2 metres away from them as their concrete structure would damage his machinery. He also said that if the NT identified the location of any associated slit trenches then he would avoid these with his cultivation.

94. In relation to the position of his landlord more generally, when I reminded Mr Cooper of the point I had raised at the hearing in May 2023 about the potential involvement of the NT, Mr Cooper told me that he did not believe it was for him to seek the NT's consent to cultivate. Consistent with his point that it is not for him to prove the negative, he said he would only feel obliged to seek such consent if the NT expressed the view that he was breaching the Tenancy Agreement.

95. One of the points Mr Cooper had made in his environmental statement was this (with his underlining):

> "3. The total farm holding is 67 hectares. A small full time farming unit by UK standards. To refuse consent to farm 30 hectares or 45% of the holding as the tenant sees fit is obviously the end of a viable agricultural holding.
>
> Refusal of consent will directly result in the loss of the holding as an economically sustainable business, loss of house, home livelihood for a family of four. Children born and growing up, who have never known any other home than Croyde Hoe Farm; suddenly homeless."

96. The statement also referred to diminished financial support under what was by then the Higher Level Stewardship Scheme ("**HLSS**") when compared with that previously provided under the CSS.

97. In cross-examination Mr Cooper accepted that if he entered into a new scheme under ELMS then he would receive payments. However, he said it was a voluntary scheme and he did not want to enter into it. He said that, by the end of the CSS, the payments he was receiving under it were insufficient for a viable farming business.

98. The financial impact upon Mr Cooper of the injunction sought by NE is obviously an important factor to be considered in the exercise of the discretion whether or not to grant one. I was therefore anxious to establish with Mr Cooper his understanding of the subsidies potentially available to him if he was obliged to keep all of the Farm as pastureland.

99. Mr Cooper told me that his understanding is that the HLSS would continue alongside the SFI (replacing the CSS). He believes that SFI payments are greater in respect of arable land than pastureland (if 'green' farming practices are adopted by the arable farmer). Any SFI payments would be in addition to the BPS payment of £80 per acre per annum regardless of the farming use which he makes of the land. He told me that the BPS payments were being phased out.

100. As with Ms Goodman's evidence on this aspect, I have been left uncertain by the lack of clear evidence about the likely value of any scheme payments (in addition to the BPS) for which Mr Cooper might be eligible, if he is obliged to keep the 9 fields as grassland, using no machinery on them beyond a chain harrow, as compared to his likely income from the rotational farming he proposed in his environmental statement of October 2013. As I have already said, it would probably be expecting too much for comparative figures or forecasts to be given with great accuracy but this evidential deficiency thwarts any proper analysis of Mr Cooper's contention that the continuation of the injunction will, in effect, result in the Farm not being a viable economic unit. I certainly feel unable to say there is nothing in it. Equally, I cannot say that his

contention in relation to one factor going to the court's discretion to grant an injunction (albeit an important one) is incontrovertible.

James Parry

101. Mr Parry is the NT's archaeological expert for the South-West. He gave his evidence in response to the witness summons issued by Mr Cooper.

102. Mr Parry said he had visited the Farm on two occasions. One of these visits, in August 2013, was mentioned in an expert report of Cressida Whitton (an Historic Environment Officer with Devon County Council) upon which NE had relied in the prosecution of Mr Cooper. Mr Cooper described this as the main visit when he (and others) walked around some of the fields with Mr Cooper and a number of microliths were found. Mr Parry arranged for the geophysical survey of certain fields to be undertaken by the NT. He was copied into Ms Goodman's email of 18 December 2013 containing NE's response to Mr Cooper's environmental statement which stated that completion of the geophysical survey and further surveys and assessments needed to be undertaken.

103. I found Mr Parry's evidence to be the most useful evidence given at the trial about the archaeological interest in the Farm for the purpose of informing any consideration of NE's public regulatory role as against Mr Cooper's private rights (deriving from the NT).

104. Mr Parry said that the NT is interested in the archaeology that might be in the undisturbed soil ("the surviving horizon") beneath the plough zone ("the activity horizon"). Investigation of the surviving horizon might reveal "working horizons" from the relevant period such as pits or fires. He made it clear that the NT is neutral in any search for such archaeological features in the sense that it is not out to find something. Instead, its aim is to establish whether or not there is archaeology of significance which should be preserved. A blanket ban on cultivation might be appropriate until more is known about the archaeology within the surviving horizon.

105. In the case of the Farm, the potential for such features to be present is indicated by the intensity of the microliths on the surface. Mr Parry said a number in the hundreds would be regarded as "significant" when there were thousands on the Farm. This perhaps indicates the existence of a hunter-gatherer settlement from the Mesolithic period. He also said that some of the features identified in the geophysical survey might indicate a settlement from the later Neolithic period. He confirmed there was no evidence to indicate the presence of an Iron-Age settlement on the Farm (as opposed to elsewhere on Baggy Point).

106. Mr Parry confirmed Ms Enright's evidence that it is modern farming machinery which presents the danger to any archaeology within the surviving horizon. He said that horse-drawn ploughs would have turned over the soil to a depth of about 30cm but that modern heavy machinery can go much deeper. He believed that the surface flints he found on his visit in 2013 would have been unearthed by ploughing activity up to the 1990's, before Mr Cooper's entry into the CSS. Mr Parry confirmed what Ms Enright had said about such archaeology being a finite resource, saying "*once it's gone, it's gone*."

107. In the light of that answer I asked Mr Parry some questions with the NT's rights under clause 57 of the Tenancy Agreement in mind. Mr Cooper said that the position of the NT as landlord would be to find out more about the potential archaeology within the soil. He said that, if significant archaeological features were identified then the NT's actions might be preservative in nature as opposed to taken with a view to seeing the features revealed for public benefit. Depending on what was found, the NT might be able to consent to certain crop-growing activity which would not disturb the archaeology or be inconsistent with the rights over it reserved by the NT.

108. Mr Parry explained that the NT had funded the geophysical survey "*in good faith*" for the purpose of costing a further investigation of what he estimated to be about 1% of the affected fields. He did not regard it as unreasonable that Mr Cooper should bear the cost of the further work indicated by Ms Goodman's email of 18 December 2013 as it was Mr Cooper who was initiating the change (from the position under the CSS). Mr Parry told me that the further work was costed at around £10,000 and this would cover (1) assessing the findings in the geophysical survey; (2) reviewing relevant data; and (3) trial trenching and test-pitting. So far as the further evaluation survey was concerned, Mr Parry said that a requirement for extensive trenching over the fields would be too onerous so instead it was proposed there would be a relatively small number of trial trenches (2m wide and 25m long) and test pits (of 1m square and to the depth of the activity horizon).

109. Mr Parry said the brief for these works was prepared in April 2021. It was implicit in Mr Cooper's questions to Mr Parry about this brief that he (Mr Cooper) was saying he had not seen it. Mr Parry confirmed he had no direct dealings with Mr Cooper but said his understanding was that the costing was shared with both the NT's then North Devon General Manager and Kelly Bezer and that it would have been forwarded to Mr Cooper.

110. Whatever the reasons for matters not having progressed since NE's response to Mr Cooper's environmental statement in December 2013, Mr Parry's evidence essentially supported NE's position that more archaeological investigative work needs to be undertaken before consent for mechanical cultivation can be given.

<u>Kelly Bezer</u>

111. Ms Bezer is the NT's Rural Surveyor for the South-West region who has been involved with the Farm over the past 10 or 11 years. She also gave evidence in response to a witness summons.

112. Ms Bezer wrote the letter to DEFRA dated 28 February 2013 upon which Mr Madgwick relied in his evidence. When asked about this by Ms Andersen in cross-examination, Ms Bezer said she could not recall the purpose of it.

113. Ms Bezer also wrote a number of other letters to Mr and Mrs Cooper. One of them was dated 27 February 2014 which, following Ms Goodman's email of 18 December 2013, recommended that he arranged for the further work of physical assessment of the features identified in the NT's geophysical survey to be undertaken: evaluation trenches, test pitting and field walking. The letter concluded by saying:

> "Whilst these are the next steps the National Trust recommends, I confirm we will now leave the matter between yourself and Natural England et al to resolve as we have concluded the element we committed to undertake."

114. Another letter from Ms Bezer to Mr and Mrs Cooper, dated 23 July 2013, confirmed that, if they gave up their tenancy of the Farm whilst it remained in permanent pasture, the NT would not seek dilapidations by reference to the fact that the schedule to the Tenancy Agreement identified some of the fields as arable. This was stated by reference to "current legislation" and the fact that the Farm had been in the CSS for 20 years.

115. Ms Bezer was not able to assist much on the issues between NE and Mr Cooper over the matters of archaeology. She did say that the NT currently had no specific plans for the Farm on that front and that she thought Mr Cooper would "*complete the geophysical survey that was commenced 10 years ago*." She said she had no recollection of receiving the 2021 brief, for the further works costed at around £10,000, which Mr Parry had mentioned in his evidence.

116. In response to questions from Mr Cooper, Ms Bezer felt unable to confirm the location of the dummy pillbox containing the graffito of Private Augustine, whether that pillbox was located near the quarry within field 7770 and/or not within the boundary of the Farm, or whether the quarry had been used by the NT for the dumping of refuse.

117. As is the case with Mr Madgwick and Mr Parry, Ms Bezer's evidence confirmed that the NT's position is that Mr Cooper should pursue the process of obtaining NE's consent under the 2006 Regulations. That was the gist of what she had said in another letter to Mr Cooper dated 8 November 2012 and she confirmed in evidence that it remained the NT's position.

George Dunn

118. I have already explained that Mr Dunn is the Chief Executive of the Tenant Farmers Association ("**TFA**") and that his witness statement was read without him being called as a witness.

119. Mr Dunn has been Chief Executive of the TFA since 1997. Prior to that he was Rural Economics Adviser for the Country Landowners Association and before that he was an economist with the then Ministry of Agriculture, Fisheries and Food. He has also advised the Government on agricultural tenancy matters through his membership of the Tenancy Reform Industry Group facilitated by DEFRA and the Tenancy Working Group established by DEFRA.

120. Mr Dunn explained that, allowing for a gap in membership between October 2008 and March 2014, Mr Cooper has been a member of the TFA since October 1993.

121. Mr Dunn's witness statement addressed the principal terms of the Tenancy Agreement. I believe that I have identified the terms of the Tenancy Agreement which are material

to the present claim in my own analysis of it above. He did highlight that clause 60 of the Tenancy Agreement makes it clear that the NT has reserved rights to the quarry within field 7770. That field is covered by NE's claim for injunctive relief (and by the interim injunction) without distinguishing the quarry element.

122. Mr Dunn also referred to the provisions of the Agricultural Holdings Act 1986 which create exposure for a tenant farmer to a claim for dilapidations at the end of the tenancy where he has failed to observe obligations of good husbandry (compare clauses 25 and 26 of the Tenancy Agreement) and possibly also to the service of a Notice to Remedy, which if not complied with could lead to a Notice to Quit, during its currency. However, in my judgment the terms of Ms Bezer's letter dated 23 July 2013 either expressly or impliedly undermine any reliance upon this concern.

123. He also referred to the Field Inspection Report prepared by the RPA in July 2012 to say the categorisation of fields as arable was "informed by an RPA inspection of 2012 and the land has been shown as arable on the register ever since." However, Mr Dunn was not involved in that inspection or the preparation of the report and I have already explained by reference to the evidence of Ms Goodman and Mr Cooper why I do not consider it has the significance he attaches to it.

124. Mr Dunn's witness statement also said this:

> "It is also relevant to underline that in terms of [Mr Cooper's] ability to profit from the Holding, the size of the Holding, its location and the limitations set out in the [Tenancy Agreement], the inability of using the land for its stated purpose without compensatory element through an agri-environment scheme would be severely damaging to the viability of the Holding in the hands of a competent tenant, farming a system of agriculture suitable to the Holding."

125. As I have said above, the potential for continuing injunctive relief to produce significant financial harm to Mr Cooper cannot be ignored but the evidence on this aspect was very vague. To date, there has been no indication that Mr Cooper would benefit from one of the agri-environment schemes mentioned by Ms Enright and Ms Goodman and the amount of any other subsidy that might be paid if he is obliged to keep the land as pasture is unclear.

Natural England

126. The corollary of Mr Cooper's point about the NT's interest in archaeological features on the Farm was, he argued, that they should be of no concern to NE. This contention is at the heart of his point (as expressed in his Response to the Amended Particulars of Claim) that NE "*acts beyond its remit and* [is acting] *ultra vires*."

127. In his skeleton argument, Mr Cooper said:

> "The [2006 Regulations] are not designed for historic environment protection (that would be a Historic England remit). The [2006 Regulations] are essentially for

biodiversity, nature, plants and fauna. The clue is in the name of the statutory body."

128. Against that, NE points out that its statutory purposes extend to conserving and enhancing "the landscape". Two of NE's witnesses, Alex Goodman and Dawn Enright, said that the term extends to the historic environment and Ms Enright quoted from material (addressed below) which states that it is wider than the natural beauty of the landscape and can extend to sub-surface archaeological features which contribute to the landscape.

129. These competing submissions require an analysis of NE's statutory functions. As I explained to the parties at the start of the trial, having reflected upon the point made in Ms Andersen's skeleton argument that NE's claim for injunctive relief was appropriate in circumstances where Mr Cooper's criminal conviction had not deterred him from further breaches of the stop notice, it is also appropriate to consider NE's statutory powers; and whether or not it has the power to bring civil proceedings.

NE's Purpose

130. NE is a quango in that it is a non-departmental public body funded by the Government. NE is sponsored by DEFRA.

NERCA

131. NE was established as such by Part 1 of the Natural Environment and Rural Communities Act 2006 ("**NERCA**") which also provided that English Nature and the Countryside Agency were dissolved and their respective functions transferred to NE.

132. Section 1(5) of NERCA states that Schedule 1 to the Act contains provisions about NE's constitution and reference to that schedule establishes that it is a body corporate. NE consists of a chairman and between 8 and 15 members appointed by the Secretary of State.

133. Section 1(2) of NERCA provides that "*Natural England is to have the functions conferred upon it by or under this Act or any other enactment*".

134. Section 1(3) provides that, except where otherwise expressly provided, Natural England's functions are exercisable in relation to England only. Natural England is also the "conservation body" for England (and the provisions for nature conservation in the wider UK that are contained in Part 2 of NERCA) and has powers in relation to wildlife protection and SSSI's within England under Parts 3 and 4.

135. Section 2 of NERCA identifies NE's general purpose as follows:

"2. **General Purpose**

(1) Natural England's general purpose is to ensure that the natural environment is conserved, enhanced and managed for the benefit of present and future generations, thereby contributing to sustainable development.

(2) Natural England's general purpose includes–

(a) promoting nature conservation and protecting biodiversity,

(b) conserving and enhancing the landscape,

(c) securing the provision and improvement of facilities for the study, understanding and enjoyment of the natural environment,

(d) promoting access to the countryside and open spaces and encouraging open-air recreation, and

(e) contributing in other ways to social and economic well-being through management of the natural environment.

(3) The purpose in subsection (2)(e) may, in particular, be carried out by working with local communities."

136. Section 3 of NERCA imposes an obligation upon NE to keep matters relating to its general purpose under review and enables NE to conduct research and commission reports into such matters. The other '*advisory function*' of NE, alongside that one, is contained in section 4 which provides that NE must provide advice relating to its general purpose at the request of a public authority and may do so at the request of others or on its own initiative. NERCA confers '*other functions*' upon NE by sections 9 to 13. They include the incidental powers under section 13. This statutory provision, which I set out and address below in relation to NE's powers generally, is central to the analysis below of NE's power (if it exists) to bring a civil claim.

137. Under section 16(1) of NERCA the Secretary of State may give NE general or specific directions as to the exercise of its functions. Paragraph 19 of Schedule 1 to NERCA provides that NE may authorise a committee, member or employee of NE to exercise any of its functions, or it may exercise the function itself.

138. Sections 5 to 8 of NERCA contain a range of what are described as '*general implementation powers*' relating to the furtherance of the general purpose. These have no bearing on the scope of NE's purpose and powers for the purposes of the present claim, though they do provide some illumination in the process of construing the provisions which do: see paragraph 257 below.

139. It is therefore clear from section 2(1) of NERCA that the focus of NE is upon the 'natural environment' of England. The conservation, enhancement and management of the natural environment is NE's 'general purpose'.

140. At first sight, therefore, there appears to be some force in Mr Cooper's point that the preservation of historic or archaeological artefacts is not obviously within NE's remit. However, this is subject to consideration of the non-exhaustive list of subordinate purposes identified in section 2(2) and, in particular, what is included within the concept of landscape conservation. Section 2(2)(b) of NERCA provides that the general purpose includes "*conserving and enhancing the landscape*".

141. NERCA itself does not contain any definition of the term 'landscape' used in section 2(2)(b). Section 30 of NERCA does, however, define 'nature conservation' (per section 2(2)(a)) to mean "*the conservation of flora, fauna or geological or physiographical features*".

142. On this point, Ms Enright's report said (with her emphasis in bold):

> "Natural England's environment purpose is part of our business and relates directly to our duty to conserve and enhance England's landscapes. The NERCA Act (2006) is unambiguous about our role:
>
> > "…..Subsection (2)(b) sets out conserving and enhancing the landscape. This includes, but goes wider than, conserving the natural beauty of the landscapes. It could for example cover conserving field boundaries and dry stone-walls), and **monuments, buildings and sub-surface archaeological features** which contribute to the landscape. Natural England will be able to observe and conserve the English landscape for aesthetic, **cultural and historic purposes** as well as those carried out for habitat protection purposes."

The Explanatory Notes

143. My questions of Ms Enright at the trial revealed that Ms Enright was in fact quoting not from any provision of NERCA but instead from some explanatory notes on NERCA prepared by DEFRA ("**the Explanatory Notes**"). Paragraph 1 of the Explanatory Notes is careful to explain that they have been prepared:

> "…. in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament."

144. NERCA received the Royal Assent on 30 March 2006. The Explanatory Notes are not separately dated (so far as I can see) but are written in language which reflects the fact that the Act has been passed and that many of its provisions were to come into force at a later date. Since 1999 most public general Acts have been accompanied by explanatory notes prepared by the Government. The notes are published when a Bill is introduced in each House and again when it receives Royal Assent: see *Bennion, Bailey & Norbury on Statutory Interpretation* (8th ed) at 24.14.

145. In her closing submissions Ms Andersen drew my attention to the Second Report of the Select Committee on Modernisation of the House of Commons dated 9 December 1997 which recommended that, subject to some points of detail, the House of Commons should act on the proposal of the First Parliamentary Counsel that, at the Bill stage, such 'Explanatory Notes' should replace the existing 'Explanatory Memoranda and Notes on Clauses'. The paramount need was for the explanatory notes to be written in plain English.

146. It is well established by authority that "*explanatory notes may be used to shed light on the contextual scene of a statute, or the mischief at which it is aimed,* [but] *the courts have been at pains to point out that the notes must not be used to supplant the language of the legislation itself*": per *Bennion* op. cit. at para. 24.14. Paragraph 1 of the Explanatory Notes almost says as much.

147. One of the authorities cited in the textbook in support of that statement is *R. (on the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559, [37], where the Court of Appeal said:

> "37. In principle the Explanatory Notes to an Act of Parliament are an admissible aid to its construction: see *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38; [2002] 1 WLR 2956 , at para. 5 (Lord Steyn). However, as Lord Steyn said, this is in so far as the Explanatory Notes "cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed". We do not consider that the Explanatory Notes to the [Gender Recognition Act 2004] are inconsistent with what we regard as the correct interpretation of sections 9 and 12 but, in any event, if they were, those Notes could not alter the true interpretation of the statute. Our task is to construe what Parliament has enacted, not what the Explanatory Notes say it enacted."

148. In *R.(on the application of O (A Child) v Home Secretary* [2022] UKSC 3; [2023] AC 255, [29], Lord Hodge DPSC explained the approach to statutory interpretation as follows:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: "Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."."

149. Lord Hodge went on to explain:

> "30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. ……"

150. In her closing submissions Ms Andersen referred to the judgment of Lady Arden JSC in *O v Home Secretary*, at [60]-[63], where she agreed with Lord Hodge that Explanatory Notes may assist the court in ascertaining the meaning of a statute. I also note that, at [74], Lady Arden did not exclude the possibility that, because they are appended to published Acts of Parliament and are accordingly freely available online, Explanatory Notes might carry greater weight in the process of statutory interpretation than other secondary material of a pre-legislative kind.

151. The authorities therefore make it clear that the Explanatory Notes may be relied upon to resolve any doubt about the meaning of a particular word, phrase or section of NERCA but what they say clearly cannot be used to supplant or otherwise add to the language of the statute.

152. I have already noted that NERCA does not define the term 'landscape' used in section 2(2)(b).

153. However, I believe the word 'landscape' to be generally understood to comprise the *visible* features, or appearance, of the land in question when viewed from a certain distance. That is the plain meaning of the word. The Oxford English Dictionary defines it as "*a view or prospect of natural inland scenery, such as can be taken in at a glance from one point of view; a piece of country scenery*." Allowing for the point that landscapes can also be industrial in character (so that the view might take in buildings and development) the term embraces what the contours and shape of the land, and any surface features such as trees, hedges and walls, offer up to the viewer (and, for that matter, any "landscape artist").

154. I therefore see no difficulty at all in structures or features such as a WWII pillbox (whether dummy or real) or a natural or man-made trench being treated as part of the landscape, just as a drystone wall or hedgerow would be. Similarly, more ancient and sometimes less obvious man-made structures or workings (including what the Explanatory Notes refer to as "*sub-surface archaeological features which contribute to the landscape*") such as a barrow, tumulus or lynchet, which shape the land or impacts upon its contours, would in my judgment generally be treated as part of the landscape. Where such features exist, they are, for example, generally recorded as such in an

Ordnance Survey Map whose purpose includes identification of the physical features of the mapped land.

155. However, it is not at all clear to me that small and scattered sub-surface (or indeed surface) archaeological artefacts, which do not themselves have some material and visual impact on the topography of the land, can properly be regarded as part of the 'landscape'. If they do not have that impact for the viewer then it is difficult to categorise them as a landscape feature.

156. Small artefacts which lie under the surface are necessarily hidden from view (of the landscape). As with those on the surface, it is one thing to say that they form part of the land but something else again to suggest they are a landscape feature. Noting their presence would be a challenge for the cartographer. Even if it was permissible notionally to lump together these sub-surface and surface artefacts for categorisation as a significant element of the composition of the land, which I see no proper basis for doing in this exercise of statutory interpretation, there could still be difficulty in treating them as such. That is a fundamental difference between Mesolithic flint scatters and an archaeological monument which, or the remains of which, has some visual impact upon the landscape.

157. Importantly, given their potential influence in the interpretation of section 2, I do not read the Explanatory Notes as suggesting otherwise. In referring to sub-surface archaeological features *which contribute to the landscape* the Explanatory Notes appear to be consistent with my interpretation of the word 'landscape'. Archaeological features which do not so contribute are not part of it.

158. If Parliament intended that such topographically uninfluential archaeological features as the flint scatters should be regarded as part of 'the natural environment' (the conservation, enhancement and management of which is illustrated by the non-exhaustive list of functions identified in section 2(2)) then that intention is opaque.

159. Indeed, the inclusion of subterranean or surface Mesolithic flint scatters within the concept of the 'the natural environment' seems to be more questionable than, say, treating brash within the local soil as part of it. Under the definition of 'nature conservation' in section 30, noted in paragraph 141 above, such naturally occurring local stone could be said to be an aspect of the 'geological features' of the land, or part of the soil geography (which, I assume, is embraced by the phrase 'physiographical features') even if it is not any more obviously part of the 'landscape' than are flints fashioned by ancient human hand. On the same basis, I recognise the latter could also be said to be geological features. But NE is not concerned with their preservation as random bits of quartz but instead only because they were worked upon as tools or weapons some 6,000 to 10,000 years ago. Its claim focuses upon archaeology not geology.

The Framework Document

160. In addition to the Explanatory Notes, the trial bundle included the 'Natural England Framework document 2022' ("**the Framework Document**"). This was part of Mr Cooper's materials for the trial.

161. The Framework Document was agreed between NE and its sponsor DEFRA and (being prepared in accordance with HM Treasury's Handbook Managing Public Money) it has been approved by HM Treasury. It states that it "*does not convey any legal powers or responsibilities but both parties agree to operate within its terms*." Part 6 of the Framework Document identifies NE's "Aims" as follows:

> "6.1. Natural England's vision is of "thriving Nature for people and planet". This ambition is not just to improve Nature, but to see it thriving everywhere, because a healthy natural environment is fundamental to health, wealth and happiness.
>
> 6.2. The term "Nature" encompasses natural beauty, wildlife and geology that underpins landscape character as well as the habitats on which some of the most important species depend. "Nature" also encompasses the essential services it provides, in addition to the historic and cultural connections with the environment that people have - for example through art and literature and personal experience.
>
> 6.3. Natural England's mission is "building partnerships for Nature's recovery"[footnote 8]. This reflects the need to work with and through a wide range of stakeholders to rebuild sustainable ecosystems and to protect and restore habitats, species and landscapes.
>
> 6.4. Natural England's Board have agreed a set of 5-year aims for the organisation's work:
>
> - well-managed Nature Recovery Network across land, water and sea delivering resilient ecosystems rich in wildlife and character, enjoyed by people and widely benefiting society
> - people connected to the natural environment for their own and society's wellbeing, enjoyment and prosperity
> - Nature-based solutions contributing fully to tackling the climate change challenge and wider environmental hazards and threats
> - improvements in the natural capital that drives sustainable economic growth, healthy food systems and prospering communities
> - evidence and expertise is used by a broad range of partnerships, organisations and communities to achieve Nature recovery and enable effective regulation and accreditation
> - being a values-led organisation which delivers excellent service standards to all partners, organisations and communities engaged in achieving Nature's recovery
>
> 6.5. Natural England will deliver the above strategic aims in the context of the Defra Group Outcome Delivery Plan outcomes."

162. The Framework Document therefore does mention NE's vision extending to 'landscape character' and the geology (though not the archaeology mentioned in the Explanatory Notes) which underpins it. However, allowing for the reference to historical connections between a particular environment and people, including writers and artists, the Framework Document does indeed support Mr Cooper's observation that the clue is in NE's name. It really is all about "nature". I detect no element of "mission creep" when reading paragraphs 6.1 and 6.2 of the Framework Document alongside section 2 of NERCA.

The 2006 Regulations

163. The 2006 Regulations came into force on 1 October 2006, some 5 months after Chapter 1 of NERCA. They were not made under NERCA (section 104 of which conferred a power on the Secretary of State to make secondary legislation to give full effect to the Act) but instead under the relevant enabling powers conferred upon the Secretary of State under section 2(2) of the European Communities Act 1972. The same applies to the Environmental Impact Assessment (Agriculture) (England) (No. 2) (Amendment) Regulations 2017/593 ("**the 2017 Regulations**") which amended the 2006 Regulations with effect from 16 May 2017.

164. The 2006 Regulations implemented Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment ("**the EIA Directive**", as amended by Directive 2003/35/EC and later repealed by Directive 2011/92/EU with effect from 16 February 2012). Those included not just the more obvious types of construction project or industrial installation likely to have an impact upon the environment but also projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes "*where Member States consider that their characteristics so require*". The EIA Directive introduced the concept of an environmental impact assessment based upon the supply by the 'developer' (or equivalent) of the information specified in its Annex III.

165. Included within the information identified within Annex III to the EIA Directive was:

> "3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape, and the inter-relationship between the above factors."

166. The EIA Directive therefore identified 'archaeological heritage', separately from 'landscape', within the concept of the 'environment' (which is otherwise undefined by the Directive). The 2006 Regulations (which likewise do not define 'environment') replicated word for word, at Part 1 of Schedule 3, the language of Annex III of the EIA Directive, including that of paragraph 3 of Annex III quoted above.

167. That at least was the position between October 2006 and May 2017 and therefore at the time NE responded in December 2013 to the environmental statement Mr Cooper had submitted.

168. The 2017 Regulations changed the relevant language of Schedule 3 to the 2006 Regulations to the following:

> "4. A description of the factors specified in regulation 15A(2) likely to be significantly affected by the significant project: population, human health, biodiversity (for example fauna and flora), land (for example land take), soil (for example organic matter, erosion, compaction, sealing), water (for example hydromorphological changes, quantity and quality), air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage, including architectural and archaeological aspects, and landscape."

169. This later, current wording also identifies aspects of archaeological heritage (though it seems to do so by categorising it as part of a wider "cultural heritage" rather than as a "material asset" in its own right). As with the previous language, the phraseology used appears to recognise a distinction between "the landscape" and such archaeological heritage.

170. Regulation 2 of the 2006 Regulations defines an 'environmental statement' as a statement which contains "*at least in the information referred to in Part 2 of Schedule 3*" and "*as much of the information in Part 1 of Schedule 3 as is reasonably required to assess the environmental effects of the project and which the applicant for consent can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile*." Under Part 3 of the 2006 Regulations (specifically regulation 13) an applicant who seeks NE's consent to a 'significant project' must include an environmental statement. In setting out the background to the claim, I have explained that NE regards Mr Cooper's proposed cultivation of the relevant fields as a significant project for the purposes of the 2006 Regulations.

171. In her written closing submissions Ms Andersen relied upon the provisions of regulation 15A of the 2006 Regulations. That provision was also introduced by the 2017 Regulations and therefore well into the chronology of the dispute between NE and Mr Cooper. Ms Andersen relied upon regulation 15A to say that, since May 2017 at least, the factors which, following consideration of the environmental statement, NE must consider in reaching a conclusion upon the likely significant effects of a significant project are those upon "*material assets, cultural heritage and the landscape*." Any archaeological heritage aspects would fall to be considered if not as part of the landscape then as part of the wider cultural heritage under the current language of Schedule 3.

172. Any consideration by NE of an environmental statement submitted before May 2017 would have been under regulation 16 of the 2006 Regulation 16 which (then as now) required consideration of the environmental statement but did not reflect the need for NE (under the current regulation 15A) to reach a *conclusion* about the likely significant effects of the project upon any relevant archaeological heritage.

173. It is therefore the EIA Directive and the 2006 Regulations rather than NERCA (and its reference to NE's purposes focussed on the 'natural environment' with no reference to archaeology) which support the inclusion within an environmental statement of a description of any archaeological heritage likely to be significantly affected by the proposed project where current knowledge and methods of assessment reasonably require it. It is the secondary legislation which has extended NE's "mission" beyond conservation and enhancement of the natural environment (including its landscape) so as to cover an interest in archaeological heritage as part of the wider environment. In both its original and revised form, Part 1 of Schedule 3 to the 2006 Regulations confirms that, in an appropriate case, NE is indeed concerned with matters of archaeological heritage.

174. Despite not being the primary legislation, the 2006 Regulations are also clear in providing that it is NE which is to consider any application for a screening decision (regulations 8 and 9), provide any consent required for a significant project (regulations 10, 17 and 19) and which may serve a stop notice or remediation notice (regulations 26 and 28). I return to these provisions below when addressing the powers conferred upon NE by the provisions of NERCA.

175. I have noted above that the reference to the 'assets' of 'archaeological heritage', which derives from the EIA Directive, is separate from the reference to the 'landscape'. This is to be contrasted with the language of Part 2 of Schedule 2 to the 2006 Regulations (governing the criteria for a screening notice or screening decision) which links any archaeological features to the landscape. Using language with which the Explanatory Notes relied upon by Ms Enright are consistent (at least on my reading of them) this includes the following within the potential environmental sensitivity of a particular area and the selection criteria for a 'significant project' identified by regulation 9:

> "2(i) the absorption capacity of the natural environment, paying particular attention to the following areas -
>
> ……………
>
> (viii) landscapes of historic, cultural or archaeological significance."

176. What regulation 3 and paragraph 3 of Part 1 of Schedule 3 of the 2006 Regulations say about the potential content of an environmental statement means that the guidance published by NE in relation to applications for a screening decision or for consent for a significant project ("**the Guidance**") is unsurprising. My only caveat to that observation is in relation to the point mentioned below about the apparent need, in any event, for an archaeology assessment to support an application for a screening decision (and therefore before any application for NE's consent for a significant project which the screening decision made under regulation 9 might prompt).

<u>The Guidance</u>

177. The Guidance was relied upon and quoted in part by Ms Goodman in her witness statement. It is published online at https://www.gov.uk/guidance/eia-agriculture-regulations-apply-to-make-changes-to-rural-land.

178. I note that, in relation to an application for a screening decision, the Guidance arguably goes beyond the information required by regulation 8 of the 2006 Regulations and the selection criteria identified by regulation 9. In saying this I recognise that regulation 8(1)(d) contemplates that an applicant for a screening decision may wish to provide information beyond the plan which identifies the relevant land and "*brief description of the nature, extent and purpose of the project and of its possible effects on the environment*", both of which are mandatory. It is also clear that, under regulation 8(2), NE may require the applicant to supply additional information if it considers it does not have sufficient information to make a screening decision. However, the Guidance indicates that (even before the need for any environmental statement required on the basis that NE's screening decision is that it is a 'significant project') the applicant's desk assessment must include an 'archaeology assessment'.

179. The Guidance identifies an archaeology assessment separately from a 'landscape assessment' (and separately from any 'biodiversity assessment') which is required for an uncultivated land project. The Guidance appears to reflect the generally understood meaning of the word 'landscape' suggested in paragraph 153 above (and also my interpretation of the Explanatory Notes) when referring to the need for a landscape assessment for projects which "*redistribute earth or other materials*", "*change the structure of your agricultural landscape*" or which have an effect on the "*area's landscape qualities*" or on "*landscape characteristics*".

180. In relation to the archaeology assessment to support an application for a screening decision, the Guidance states:

> "**Archaeology assessment**
>
> Your assessment needs to verify the effects of the project on any areas of archaeological or historic interest on the site. A qualified person such as the county archaeologist can provide this information. You can also consult:
>
> - the protected landscape authority - National Park Authority (https://www.nationalparksengland.org.uk) or Area of Outstanding Natural Beauty (AONB) (https://www.national-landscapes.org.uk/about-aonbs/aonbs/overview)
> - Historic England (https://historicengland.org.uk)
> - archaeology data from the MAGIC website (https://magic.defra.gov.uk)
>
> Your consultations will verify:
>
> - any archaeology or historic environment features within or near the project area
> - the significance of the archaeology or historic environment
> - the project's effect on the archaeology or historic environment
> - how to best minimise the effect of the project"

181. For the reasons explained above, this particular part of the Guidance is in my judgment not clearly supported by any provision of NERCA (or by DEFRA's interpretation of the primary legislation in the Explanatory Notes, as I read them). It is, however, consistent with the secondary legislation which derives instead from the EIA Directive (and the European Communities Act 1972). By that I mean regulation 3 and paragraph 3 of Part I of Schedule 3 of the 2006 Regulations (assuming that a description of the archaeological heritage in the environmental statement is reasonably required on an application for NE's consent for a significant project) and not the provision of paragraph 2(i)(viii) of Schedule 2 quoted in paragraph 175 above. The latter, again on my interpretation of it, is concerned only with archaeology which influences the landscape; and only then in connection with the 'absorption capacity' of that particular aspect of the natural environment.

NE's approach in these proceedings

182. I have seen the letters written by DEFRA on the dismissal of Mr Cooper's appeals against NE's screening decision (in June 2013), remediation notices (in March 2015, December 2019, January 2021 and February 2023) and stop notice (also in December 2019). I do not know the reasoning behind the dismissal in August 2015 of Mr Cooper's application for judicial review of the screening decision and first remediation notice. As his appeals under the 2006 Regulations were based upon NE lacking the power to serve the relevant notice (or to include a particular requirement within it) or some alleged irregularity or defect, it is easy to grasp at the general level how Mr Cooper was likely to face considerable difficulty in challenging steps taken by NE when the power to issue the relevant decision or notice is one clearly provided for by the 'Enforcement' powers contained in Part 4 of the 2006 Regulations.

183. However, in the present proceedings, NE is not invoking any of the specific enforcement powers conferred by the 2006 Regulations. NE instead points to the 2006 Regulations (as well as the Explanatory Notes and the Guidance with the emphasis its witnesses have placed upon them) as supporting a regulatory remit which extends to the preservation of archaeological heritage. NE invokes the court's jurisdiction under section 37 of the Senior Courts Act 1981 to grant an injunction which protects archaeological features on the Farm by reference to the practical ineffectiveness of the specific powers conferred by and already exercised under the 2006 Regulations. NE relies upon its incidental powers under section 13 of NERCA to do so.

184. In my judgment, the question mark over NE's interest in archaeological features which are not landscape-forming, which the language of the primary legislation raises, must be a relevant factor on the exercise of a discretion which is framed by reference to what is just and convenient. I revert below to that central question, raised by the language of section 37, after considering NE's power to invoke the court's jurisdiction under that section.

NE's Powers

General

185. NE is a statutory corporation. In her written closing submissions, addressing the point about NE's standing to sue which I had raised at the start of the trial, Ms Andersen submitted that its status as a "body corporate" (per paragraph 1 of Schedule 1 to NERCA) meant it was able to bring proceedings and defend them. It followed that NE did not need to be given that power expressly by NERCA.

186. However, I questioned the soundness of that submission as it appeared to overlook the difference between a statutory corporation and a private limited company whose legal personality derives from its incorporation under the Companies Acts; and also the difference between a statutory corporation and a chartered corporation. I drew Ms Andersen's attention to the summary of the position in *Halsbury's Laws Vol. 24 (Corporations)* (2019) at para. 524:

> "524. **Statutory and chartered corporations**
>
> Corporations may be created either by statute or by royal charter, and a fundamental distinction exists in relation between the powers and liabilities of the two classes. Statutory corporations have such rights and may do such acts only as are authorised directly or indirectly by the statutes creating them; chartered corporations, speaking generally, may do everything which an ordinary individual may do, but are subject (in the manner of any individual) to any restriction imposed directly or indirectly by statute.
>
> When a corporation is created otherwise than by the authority of Parliament, all incidental powers and liabilities attach as of course. Thus generally, although there is no express power conferred to purchase land or to sue or be sued, the corporation may so purchase, or sue or be sued, as though all these necessary incidents had been expressly given. ……."

187. By a letter dated 26 February 2024 NE's solicitors confirmed their acceptance of this summary of the position in *Halsbury's Laws*.

188. NE's powers are therefore those conferred upon it by NERCA. However, as I explain below, the language of section 1(2) and section 13 of NERCA (with their reference to NE's "functions") means that the NERCA-based power may also derive from a function conferred upon NE by another statute or by secondary legislation.

189. NE does have specific enforcement powers under other legislation (as I note below when addressing NE's own paper on enforcement published in December 2011), and they extend to civil sanctions available to NE in the form of monetary penalties. NE relies only upon the provisions of NERCA and the 2006 Regulations in asserting it also has power (and therefore standing) to bring this civil claim.

190. In her skeleton arguments for the interim application in May 2023 and for the trial, having identified the relevant criminal sanctions under Part 4 of the 2006 Regulations, Ms Anderson referred to the provisions of section 13(1) of NERCA to submit that NE "*therefore has sufficient vires to seek an injunction, according to its incidental powers*

to prevent further cultivation by [Mr Cooper] *without obtaining the appropriate consent under the* [2006] *Regulations*." Section 13 is set out in paragraph 201 below.

191. Ms Andersen also relied upon the judgment of Lord Denning MR in *Attorney-General v Chaudry* [1971]] 1 WLR 1614, at 1624D, in support of her submission that the existence of criminal penalties under the relevant legislation has never been a bar to the court granting an injunction in an appropriate case. Lord Denning referred to cases where the respondent would otherwise "*have found it profitable to pay a fine and go on breaking the law*." The modern approach to the grant of an injunction in civil proceedings to restrain criminal behaviour is shown in another case relied upon by Ms Andersen in her closing submissions. In *Solicitors Regulation Authority v Khan and others* [2021] EWHC 3765 (Ch), at [55]-[56], Fancourt J said the foundation of the jurisdiction was a deliberate and flagrant flouting of the law which supports the inference that the unlawful operations will continue unless restrained. The judge said "*the jurisdiction is to be invoked and exercised exceptionally and with great caution*" and the court needed to be able to draw the inference that "*nothing short of an injunction will be effective to restrain them*."

192. There can be no doubt over the soundness of Ms Andersen's second submission about the availability of such civil relief in an appropriate case. However, my preliminary reading before the trial, and reflection upon NE's other powers under NERCA as well as the nature of the claim in *A.-G. v Chaudry*, led me to indicate to the parties that, as with the question over NE's interest in the conservation of archaeological features, I would benefit from further argument about her first submission before the trial concluded. At the start of the trial I provided Ms Andersen and Mr Cooper with a hastily prepared note of my initial thoughts about the approach to testing NE's power to bring civil proceedings so that they might reflect upon them further.

193. As the name of the case indicates, *A.-G. v Chaudry* was a relator action in which the Attorney-General was acting at the relation (i.e. at the instance) of the Greater London Council which, as the local authority, was entrusted with the certification of new buildings in relation to necessary fire precautions. The case of *A.-G v Harris* [1961] 1 QB 74, cited by Lord Denning in *A.-G. v Chaudry*, was also a relator action. Although the GLC in *A.-G. v Chaudry* had also sued in its own right, the analysis of Plowman J at first instance (of *A.-G. v Harris* and other authorities) shows that the court acceded to the Attorney-General's application for an injunction to restrain the use of a hotel without the necessary certification.

194. For local authorities acting in the planning context, the need for the Attorney-General (as an officer of the Crown representing the public interest) to lend his or her name to the relator in civil proceedings disappeared soon after the decision in *A.-G. v Chaudry.* Section 222 of the Local Government Act 1972 was passed so as to provide:

> "Where a local authority deem it expedient for the promotion or protection of the inhabitants of their area, they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name."

195. Now, under section 1 of the Localism Act 2011, the general power of a local authority is such that (subject to the boundaries to that power set by section 2) it "*has power to do anything that individuals generally may do*".

196. The question is whether NE, whose powers are not similarly unrestricted but instead constrained by the language of NERCA, is able to bring civil proceedings of the present kind in its own name.

197. Schedule 1 to NERCA provides that NE is a body corporate and (save in relation to land managed as a nature reserve and in which it is to be treated as a government department in relation to any interest it may have) is not to be regarded as a servant or agent of the Crown, or as enjoying any status, privilege or immunity of the Crown. I mention this for completeness because it is clear that the Crown Proceedings Act 1947 (specifically section 13 of that Act which provides that "*all civil proceedings by or against the Crown in the High Court shall be instituted and proceeded with in accordance with rules of court and not otherwise*") cannot even be of indirect significance in considering the extent of NE's statute-based powers.

198. When no other statutory power (or direction from the Secretary of State) is relied upon by NE in this claim, it is clear that any power in NE to bring civil proceedings in its own name, if it exists, is only to be found in NERCA.

199. As I explain below, the 2006 Regulations do not confer such a power. They do create the criminal offences of commencing or carrying out an uncultivated land project without the benefit of a screening decision (regulation 22), contravening a stop notice (regulation 26) and contravening a remediation notice (regulation 28). It is clear that not only is NE the decision-maker by reference to whom such criminal contraventions are considered but it is also 'the prosecutor" for the purposes of regulation 30 which governs the timing of any prosecution of such an offence: see section 12 of NERCA addressed below. Since 6 April 2020 NE has also had the power under regulation 30A to impose monetary penalties (fixed or variable) and to accept an enforcement undertaking according to the offence in question.

200. However, having regard to those provisions and relying upon them as the springboard for the grant of an injunction on the principle recognised in *A.-G. v Chaudry* and *SRA v Khan*, Ms Andersen submitted that the 2006 Regulations as well as NERCA give rise to the incidental power to bring a civil claim under section 13(1) of NERCA.

NERCA

201. Section 13 of NERCA is included within the 'other functions' of NE introduced by the heading to section 9. The section reads as follows:

"**13 Incidental powers**

(1) Natural England may do anything that appears to it to be conducive or incidental to the discharge of its functions.

(2) In particular, Natural England may–

(a) enter into agreements;

(b) acquire or dispose of property;

(c) borrow money;

(d) subject to the approval of the Secretary of State, form bodies corporate or acquire or dispose of interests in bodies corporate;

(e) accept gifts;

(f) invest money."

202. I suggested to Mr Andersen that the "anchor" for any incidental power in NE to bring civil proceedings for an injunction must, on this language, be one or more of its other 'functions'. Ms Andersen accepted that must be so.

203. As I have noted above in addressing NE's statutory purpose, section 1(2) of NERCA confirms that NE has the 'functions' conferred on it "*by or under [NERCA] or any other enactment.*"

204. Ms Andersen submitted that the 2006 Regulations constituted an "other enactment" within the meaning of section 1(2). In her closing submissions she made a passing reference to *Words & Phrases Legally Defined* (5th ed, 2023) to support the submission that an "enactment" may include delegated legislation. She did not produce the relevant passage but I have since referred to the book which confirms that can be so. The passage includes an extensive quote from the decision of HHJ Hodge QC in *Goenka v Goenka* [2014] EWHC 2966 (Ch), [2015] 4 All ER 123, at [45], [47]–[48] and [59] who interpreted the word in the particular statutory provision under consideration by him as extending to an act done pursuant to a statutory instrument. However, Judge Hodge QC recognised that statutory instruments are not, strictly speaking, "enacted" and that in some Acts the context may indicate that references to an "enactment" do not include subordinate legislation.

205. NERCA does not define the word "enactment" for the purposes of Part 1 of NERCA. This is in contrast to Part 2 where the word is defined so as to include an Act of the Scottish Parliament and Northern Ireland legislation (see section 37(4)) and also Chapter 2 of Part 8 (see section 97(3)). [So far as the Scottish legislation is concerned this is presumably to counter the effect of the Interpretation Act 1978 and its definition of 'enactment' mentioned in paragraph 208 below.] In addition to section 1(2), the word 'enactment' also appears in Part 1 in section 9 (in connection with NE's other duties and powers that may bear upon its function of providing information) and in section 11 (in connection with basis for the Secretary of State to make provision, by statutory instrument, for NE's charges).

206. It is clear from the approach to interpretation explained in *O v Home Secretary* that other provisions in a statute and indeed the statute as a whole may provide the relevant context for interpreting a particular statutory provision.

207. In Chapter 1 of Part 8 of NERCA (addressing agreements between the Secretary of State and a "designated body" and agreements between designated bodies) the Act distinguishes between "relevant enactments or subordinate legislation" for the purpose of identifying the relevant function to be performed: see section 83(2). The same distinction is drawn in Chapter 2 of Part 8 (see section 97(2)) and Part 10 (see section 104(2)). This indicates that the Parliament intended NERCA to distinguish between primary and secondary legislation. In my judgment the same distinction is also implicit in the language of section 1(2) itself. That language not only equates NERCA with any other relevant function-conferring "*enactment*" – such as the Countryside Act 1981 – but also expressly contemplates that such functions may be conferred upon NE "*by or under this Act or any other enactment*" (my emphasis).

208. Schedule 1 to the Interpretation Act 1978 (with language that now reflects the UK's withdrawal from the EU) defines 'enactment' to include "*any assimilated direct legislation but does not include an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament*". This is a non-exhaustive definition which otherwise leaves the term open to interpretation according to its natural meaning in the context in which it is used: see *Bennion* op. cit. at para. 19.4.

209. On this subsidiary question of statutory interpretation I am not persuaded that the 2006 Regulations can properly be regarded as an "enactment" as Ms Andersen submitted.

210. However, although Ms Andersen did not rely upon it, I have just emphasised the particular language of section 1(2) – "*by or under*" - which, in my judgment, expressly contemplates that a function may be conferred upon NE by secondary legislation. A statutory instrument made under (or pursuant to) a statute is the obvious means by which additional statutory functions might be conferred. Section 104 of NERCA provides for this to be done under NERCA.

211. At first sight, therefore, the 2006 Regulations (assuming they do confer additional 'functions' upon NE) would appear to fall within the scope of section 1(2) even though they are not themselves to be treated as an enactment. That said, the language of the subsection throws up a further question because (as also already noted above) the 2006 Regulations were not made under NERCA but instead under the European Communities Act 1972. The question, therefore, is whether the language of section 1(2), on its true interpretation, extends to a statutory instrument made under any other relevant enactment and not just one made under NERCA.

212. In my judgment, the plain and ordinary meaning of the language used in section 1(2) is that it does extend to functions conferred upon NE by secondary legislation made under other statutes. In circumstances where the draftsman has not limited those functions not referable to NERCA to functions which are conferred only "by" any other enactment (the language is not "by or under this Act or by any other enactment") there is no reason to read the provision disjunctively. On this basis, the 2006 Regulations are potentially relevant as the source of a 'function' to which a power to sue for injunctive relief might be anchored.

213. There might also be a basis for an alternative argument that, even though made under the 1972 Act, the 2006 Regulations are nevertheless a statutory instrument made by the Secretary of State within the meaning of section 104 of NERCA. However, Ms Andersen did not make this argument about the language of section 104 being wide

enough to embrace the 2006 Regulations (so that they can be said to be "under" NERCA) even though they were made pursuant to another statute.

214. I address the 2006 Regulations below in relation to their potential relevance as an anchor for the exercise of a section 13 incidental power.

215. Aside from its advisory functions identified in sections 3 and 4, NE has the "other functions" identified by the heading to sections 9 to 13 of NERCA. These include section 13 (set out in paragraph 201 above) and also:

> "**12 Power to bring criminal proceedings**
>
> (1) Natural England may institute criminal proceedings.
>
> (2) A person who is authorised by Natural England to prosecute on its behalf in proceedings before a magistrates' court is entitled to prosecute in such proceedings."

The Explanatory Notes

216. The Explanatory Notes do not contain much commentary upon sections 12 and 13 of NERCA; their paragraph 2 stating: "*they are not, and not meant to be, a comprehensive description of the contents of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.*" The Explanatory Notes say this about those sections:

> "**Section 12: Power to bring criminal proceedings**
>
> 78. This section provides that Natural England has the power to institute proceedings and the power to authorise persons other than barristers or solicitors to bring prosecutions on its behalf. This enables Natural England to have prosecutors on its staff in the same way as do organisations such as the Environment Agency and local authorities.
>
> **Section 13: Incidental powers**
>
> 79. Subsection (1) gives Natural England power to do anything conducive or incidental to the discharge of its functions. This includes but is not limited to the powers listed in subsection (2). The power to enter into agreements is not limited, and therefore can include working arrangements with persons in the private, public, voluntary and charity sectors."

217. The Explanatory Notes correctly state that the list of incidental powers in section 13(2) is not an exhaustive one. Nevertheless, the notes do not contain any express support for the view that a power in NE to bring civil proceedings can be implied.

The Framework Document

218. The Framework Document (at section 5) explains that NE has numerous duties and powers aside from NERCA. However, in relation to enforcement powers, the following paragraph mentions only the power to prosecute under NERCA:

> "5.7. In addition, Natural England has enforcement powers (under the Wildlife and Countryside Act 1981 and other enactments); and the power to bring criminal proceedings either directly or through a person authorised to prosecute on Natural England's behalf (section 12 of the NERC Act)."

219. As with the Explanatory Notes, the Framework Document does not support the idea that NE has the power to commence civil proceedings in its own name.

The 2006 Regulations

220. I have explained above the basis for concluding that the 2006 Regulations fall within the language of section 1(2) of NERCA and, on that basis, they might confer upon NE a relevant 'function' to which a power to bring a claim for injunctive relief can be considered (by NE) to be conducive or incidental.

221. It is particularly important to focus upon any relevant functions under the 2006 Regulations when, in addressing NE's purpose above, I have concluded that it is by the regulations, rather than the provisions of NERCA, that NE's regulatory remit is extended to items of 'archaeological heritage' that cannot properly be said to be part of the 'landscape' (or, to use the language of the Explanatory Notes, they do not "contribute to the landscape").

222. Unlike NERCA, the 2006 Regulations do not expressly confer upon NE any 'functions' as such (i.e. by the use of that term). This is in contrast to the identified 'function' of the Secretary of State of determining appeals under the regulations which is identified, by the use of that term, in regulation 31(11).

223. Nevertheless, the 2006 Regulations do entrust NE with doing certain things or, to express it another way, to perform or discharge certain functions. For example, NE is empowered (and sometimes directed) by the regulations in relation to the service of screening notices and the making of screening decisions (regulations 6 and 8), providing scoping opinions (regulation 10), reaching conclusions about environmental impact (regulation 15A), granting or refusing consent for significant projects (regulations 16, 18 and 19) and serving stop notices (regulation 25) and remediation notices (regulation 27).

224. So far as sanctions for offences under the 2006 Regulations are concerned, NE also has the powers of civil sanction identified in the table within regulation 30A. These complement NE's powers as a prosecutor under section 12 of NERCA. Since April 2010, when regulation 30A was introduced, and alongside powers to impose such civil

sanctions for other offences under the regulations, NE may impose a fixed or variable monetary penalty or accept an enforcement undertaking for the offence of cultivating without a screening decision or NE's consent (the regulation 22 offence for which Mr Cooper was charged in Barnstaple Magistrates Court) and it may impose a variable monetary or accept an enforcement undertaking for the offence of breaching a stop notice (the regulation 26 offence for which Mr Cooper was convicted in Exeter Crown Court).

225. The powers under regulation 30A derive from the Environmental Civil Sanctions (England) Order 2010/1157 ("**the 2010 Regulations**"). The 2010 Regulations were made by the Secretary of State under The Regulatory Enforcement and Sanctions Act 2008 which is mentioned in NE's Enforcement Paper addressed next (and which accordingly describes them as '**RES Civil Sanctions**'). NE is a 'regulator' under the 2010 Regulations.

226. Schedule 1 to the 2010 Regulations contains the provisions for fixed monetary penalties. They make it clear that they are an alternative to the offender being exposed to a criminal prosecution by NE. Schedule 2 addresses variable monetary penalties, with the same provision that there can be no criminal prosecution for the offence for which any such penalty is imposed.

227. Schedule 4 to the 2010 Regulations addresses enforcement undertakings. An enforcement undertaking is defined by paragraph 1 of Schedule 4 as follows:

> "**1.— Enforcement undertakings**
>
> (1) A regulator may accept an enforcement undertaking from a person in a case where the regulator has reasonable grounds to suspect that the person has committed an offence under a provision specified in Schedule 5 and the table in that Schedule indicates that an enforcement undertaking may be accepted in relation to that offence.
>
> (2) For the purposes of this Schedule, an "*enforcement undertaking*" is a written undertaking to take such action as may be specified in the undertaking within such period as may be so specified."

228. Paragraph 2 of Schedule 4 prescribes the contents of the undertaking which specify the nature of such action in the particular case. Paragraph 7 addresses the consequences of breach of an enforcement undertaking as follows:

> "**7.— Non-compliance with an enforcement undertaking**
>
> (1) If an enforcement undertaking is not complied with the regulator may either—
>
> > (a) serve a variable monetary penalty notice, compliance notice or restoration notice, or
> >
> > (b) bring criminal proceedings.

(2) If a person has complied partly but not fully with an undertaking, that part-compliance must be taken into account in the imposition of any criminal or other sanction on the person.

(3) Criminal proceedings for offences triable summarily to which an enforcement undertaking relates may be instituted at any time up to six months from the date when the regulator notifies the person that such person has failed to comply with that undertaking."

229. If, however, an enforcement undertaking has been accepted by NE then, unless there is non-compliance, the person giving it cannot be convicted of the offence which has given rise to it or be subject to any monetary penalty, compliance notice or restoration notice in respect of his previous act or omission.

230. The table within regulation 30A of the 2006 Regulations confirms that an enforcement undertaking is a sanction available to NE for the offences under regulations 22 and 23 (carrying out works without a screening decision or consent or doing so in breach of a condition of such consent) but not the other offences under the 2006 Regulations (which include the offence under regulation 26 of contravening a stop notice).

The Enforcement Paper

231. Ms Goodman exhibited to her witness statement a paper published by Natural England in December 2011 entitled 'Compliance and Enforcement Position': see https://www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england#natural-englands-compliance-and-enforcement-position ("**the Enforcement Paper**").

232. The Enforcement Paper addresses the range of enforcement powers available to NE under all the statutes under which it has duties and powers, and not just those under NERCA. Annex 5 to the Enforcement Paper contains a table which summarises a range of criminal and civil sanctions available to NE. These include its power, introduced by the 2010 Regulations, to impose civil sanctions under the 2006 Regulations (and also significant monetary penalties in respect of offences under the Wildlife and Countryside Act 1981). The table also refers to enforcement undertakings. So far as the facts of this case are concerned, the table reflects regulation 30A of the 2006 Regulations by confirming that an enforcement undertaking is an available sanction for the offence under regulation 22 but not the offence under regulation 26.

233. Annex 2 to the Enforcement Paper addresses the RES Civil Sanctions and contains the following guidance in relation to NE's attitude to the acceptance of enforcement undertakings (where available):

"**Will you always accept Enforcement Undertakings?**

6.5 We want to make the most of the opportunities that enforcement undertakings provide. However in some cases because of public interest factors, the behaviours

involved or the risks and consequences arising from the offence being committed; a Variable Monetary Penalty or Prosecution may be the most appropriate enforcement response. An undertaking may also be rejected if it does not meet the minimum requirements outlined above, or the restoration we expect as outlined in paragraphs 5.9 – 5.18 of the main part of this document. Where practical and appropriate we will speak to third parties directly affected by an offence about proposed enforcement undertakings before deciding whether to accept them."

234. The table at Annex 5 to the Enforcement Paper also identifies the 2006 Regulations (alongside other primary and secondary legislation under which NE has enforcement powers) as the basis for NE seeking "*Criminal Sanctions and Injunctions*". So far as this case is concerned, the offences created by 2006 Regulations of carrying out an uncultivated land project without a screening decision (regulation 22), contravening a stop notice (regulation 26) and contravening a remediation notice (regulation 28) are each said by the table to support a "*simple caution*", "*prosecution*" or "*injunction*".

235. So far as injunctions are concerned, Ms Goodman relied upon Part 3 of Annex 4 to the Enforcement Paper. As with other parts this is set out in a "Q and A" format and includes the following:

"**3 Injunction**

What is an Injunction?

3.1 An order of the Court directing an individual, company or organisation to stop or carry out a particular activity. Courts may grant Injunctions where there has been or is highly likely to be, a breach of a public law which constitutes a criminal offence. The Court's discretion to grant an Injunction is most likely to be exercised where there has been, or is highly likely to be, a blatant or deliberate breach of the legislation and there is a real risk or actual environmental harm.

What is the purpose of an Injunction?

3.2 To prevent serious damage to the environment, usually from ongoing offences.

What offences can an Injunction be used for?

3.3 All offences we are responsible for enforcing.

When will an Injunction be used?

3.4 We will apply to the Court for an Injunction as a last resort and only when all voluntary co-operation and enforcement mechanisms have been explored and exhausted. If we have access to RES Stop or Compliance Notices for the offences that are being committed we are likely to consider these first.

What standard of proof is required before an Injunction can be issued?

3.5 Balance of probabilities.

Who can authorise an Injunction?

3.6 Director Regulation in consultation with Head of Legal.

What is the process for obtaining an Injunction?

3.7 We apply to the Court.

…………..”

236. Paragraph 3.6 is clearly directed to the authorisation of *the application for* an injunction.

237. It is therefore clear that since 2011 at the latest NE itself has had no doubt about its ability, in an appropriate case, to commence civil proceedings for injunctive relief in its own name; and that it may do so in respect of any of the offences created by the 2006 Regulations which are relevant to this case.

Conclusions upon NE's Purpose and Powers

238. I must decide whether NE's assumption in the Enforcement Paper has a sound legal basis.

239. Ms Andersen drew my attention to the terms of an order made in Norwich County Court (by an unidentified judge) on 9 July 2010 which reveals that NE was the sole claimant in the proceedings. The injunction related to operations within the River Wensum SSSI and required the defendant's compliance with the Wildlife and Countryside Act 1981. I note that the order was made by consent and that the defendant later gave an undertaking in compromise of the claim. Ms Andersen also showed me the terms of an order made in Southampton County Court by HHJ Rudd on 24 May 2001 (also concerning an SSSI and the 1981 Act) in proceedings where English Nature (not NE) was the sole claimant. Likewise, on 31 March 1999, Mr Justice Jowitt granted an injunction in favour of English Nature in High Court proceedings in Nottingham District Registry which also concerned an SSSI and the 1981 Act. I was also shown an Environment Agency press release from 6 November 2008 reporting that the Agency had that month obtained ("*ultimately by consent*") in the High Court a final injunction against a repeat waste offender. The press release referred to the injunction being granted under section 37 of the Environment Act 1995 and section 187B of the Town and Country Planning Act 1990. I was provided with a copy of section 37 of the 1995 Act from which I see that it gave the Agency the power to bring criminal proceedings, incidental powers in language broadly equivalent to section 13(1) of NERCA (though arguably slightly wider in also referring to facilitative acts) and some specific conducive and incidental powers which equate with two of those in section 13(2).

240. Ms Andersen also relied upon the decision of Fancourt J in *SRA v Khan* in support of her submission that the court should recognise NE's standing to bring this claim for an injunction. In that case the defendant solicitor's practising certificate had been suspended as a result of the SRA intervening in her practice. The SRA issued applications to restrain the defendant from carrying on any reserved legal activity unless and until she had a valid practising certificate, including as an employee. These

applications were made in two separate claims in which the SRA had already obtained urgent without notice relief for access to her papers. The defendant's carrying on of legal activity without a practising certificate was a crime under the Legal Services Act 2007 and, even though the court had inherent jurisdiction over her as a solicitor, the question arose as to whether the SRA had standing to pursue the grant of injunctions.

241. That was the question identified by the judge, at [18], and Ms Andersen relied upon the judge's conclusion, at [60] and [67], that the SRA had standing to seek injunctive relief. As I pointed out to Ms Andersen at the hearing, this was in response to the defendant's argument (summarised at [55] and [67]) that the SRA should not be granted injunctive relief because it had adequate powers to enforce any non-compliance by means of the contempt application which it had issued in respect of her non-compliance with the earlier court orders and/or under the criminal law. As I also remarked, the defendant did not appear to have challenged the SRA's standing to sue (which, given her obvious appetite for resisting the SRA's actions, one might perhaps have expected to have led her to argue that the substantive claims should be struck out) and indeed her reliance upon the pending committal application in resisting the injunction appeared to reflect her recognition that it did.

242. Although this was not explored at the trial, I see that under the powers delegated to it by the Law Society the SRA clearly has standing to apply to the High Court following an intervention in a solicitor's practice. The provisions of Part II of Schedule 1 to the Solicitors Act 1974 (as amended by the 2007 Act) confirm as much. Paragraph 16 of that schedule states "*the Society may do all things which are reasonably necessary for the purpose of facilitating the exercise of its powers under this Schedule*."

243. In my judgment, the decision in *SRA v Khan* does not therefore provide even indirect support for Ms Andersen's submission in relation to NE's standing to sue, as opposed to the test to be applied to the grant of injunctive relief (see paragraph 191 above) if it does.

244. Reverting to the position of NE under NERCA, the fact that at least one other judge in other proceedings has made an order which supports NE's assumption in the Enforcement Paper obviously gives pause for thought, if only because there is no indication that anyone thought to question NE's standing to bring those proceedings (or English Nature's or the Environment Agency's standing in the other proceedings). However, it follows that, assuming there is a real question about its standing, these other cases do not assist in providing a reasoned answer to it.

245. I have applied what I hope is a common-sense check as to whether or not I am right to think that question does fall to be answered when NE's approach to these proceedings has not really countenanced it and I cannot expect Mr Cooper as a litigant in person to have raised it. In my judgment, the question about NE's power to bring civil proceedings for injunctive relief in its own name is one that plainly arises for consideration when section 12 of NERCA (which was not highlighted before the start of the trial) is expressly confined to criminal prosecutions; and where the 2006 Regulations (incorporating the 2010 Regulations) only expressly recognise the offences which may be prosecuted by NE and the extra-judicial RES Civil Sanctions under regulation 30A.

246. Ms Andersen relies upon the width of NE's power under section 13(1) of NERCA "*to do anything that appears to it to be conducive or incidental to the discharge of its functions*". That is indeed wide language and it is clear that is not limited to the particular incidental powers identified in section 13(2) which, when considered alongside the power to prosecute or (if it exists) the power to sue, are contrastingly transactional in nature. However, although there is a subjective element in section 13(1) it is clear that NE must be able to link the relevant power to the discharge of one or more of its functions.

247. The approach to determining the true meaning and effect of section 13(1), applying *O v Home Secretary*, involves considering its language in the context of the section as a whole and any other pertinent sections which provide the context for it. I have explained above why I consider (on the language of section 1(2) of NERCA) it is not only NERCA but also the 2006 Regulations which potentially contain a relevant 'function' to which a right to sue for injunctive relief might be anchored.

248. Aside from the Explanatory Notes the parties did not rely upon any authoritative material of the kind identified by Lord Hodge which might play a secondary role in helping to determine whether or not NE's powers under section 13(1) do extend to a power to bring civil proceedings in its own name, without the need for the Attorney-General to act at its relation, so that the essentially private law remedy of an injunction might be sought for the protection of the public interest. It is not suggested that the Secretary of State has made a direction under section 16(1) of NERCA that NE may bring civil proceedings (or civil proceedings of a certain type such as for injunctive relief) in the exercise of its functions.

249. The only other document relied upon, which clearly asserts the existence of such a power, is the Enforcement Manual which should probably be categorised as a self-serving document. On the approach to statutory interpretation laid down in *O v Home Secretary* the Enforcement Manual cannot properly be regarded as being of any assistance on the question.

250. The language of section 13(1) is wide but not unrestricted. In my judgment, the language itself is not ambiguous but uncertainty creeps in when it comes to identifying NE's "functions" for the purpose of identifying a relevant one to which a power to sue Mr Cooper for injunctive relief is regarded by NE as conducive or incidental.

251. By way of summary of my above analysis of the express provisions of the legislation which are relevant to that issue, I note that:

   i) Section 2(2)(b) of NERCA does not confer upon NE the purpose or function of conserving sub-surface Mesolithic flints or such flints scattered on the surface of the Farm's fields. They are not part of the landscape and, on that basis, do not form part of the natural environment for the purposes of section 2(1). On the other hand, the WWII dummy pillboxes and any remaining associated slit trenches are part of the landscape and can therefore be said to be part of the natural environment within the remit of NE's conservation powers.

   ii) The 2006 Regulations (both between October 2006 and May 2017 and from that later date to the present) extend NE's remit to the archaeological heritage of a particular environment. Such archaeological heritage includes Mesolithic flints

under and on the surface of the Farm's fields and also, on Ms Enright's evidence as to what constitutes archaeology, the dummy pillboxes and associated earthworks.

iii) The 2006 Regulations were made under an "*other enactment*" for the purposes of section 1(2) of NERCA (and might, as I say, even be argued to qualify as regulations under NERCA itself). Alongside NERCA, the 2006 Regulations are therefore the potential source of a 'function' to which NE may consider a power to sue for injunctive relief is conducive or incidental.

iv) Whether or not the provisions of NERCA (in relation to the WWII pillboxes) and/or of the 2006 Regulations (in relation to the microliths and the pillboxes) do support such a power involves identifying within them one or more statutory functions of NE capable of supporting it.

v) The subjective element of the language within section 13(1) ("*anything that appears to it*"), and also of section 13(2), gives NE a degree of discretion in relation to the *exercise* of the relevant incidental power. However, the *existence* of the relevant power rests upon what I have described as an anchor function. The objective support for a particular power which is not expressed must be on the basis that it is conducive or incidental to the exercise of a function (or functions) conferred by the legislation. This is unsurprising given NE's status as a statutory corporation.

252. With those points in mind, I have concluded that the language of section 13(1) of NERCA does not support a power in NE to bring these proceedings.

253. I have reached that conclusion for four reasons.

Functions not Purpose

254. In my judgment, support for an incidental power under section 13(1) must be found not by making a direct link to the general purpose in section 2 but instead to the "*discharge*" (or exercise) by NE of the functions that serve that purpose.

255. NERCA identifies a number of 'functions' to be discharged by NE: the '*Advisory functions*' of review and research (section 3) and giving advice (section 4) and the '*Other functions*' of providing and publishing information (section 9), providing consultancy services and training (section 10), charging for its services and licences (section 11) and prosecuting offenders (section 12). Section 13 itself is the last of these '*Other functions*'.

256. These headings form part of NERCA and, although they necessarily only provide a summary of the powers detailed below them, they do assist in an interpretation of Part 1 which points to a clear distinction between powers (or functions) and purpose. The two advisory functions are expressed in language of conditional obligation, rather than discretionary empowerment of NE, but in my judgment it is clear that sections 3 to 13 are addressing what NE may, or sometimes should, do in the pursuit of its general

purpose. In other words, those sections stipulate how NE is to function through the exercise of its powers.

257. Importantly, the incidental powers provided for by section 13 derive (as the title to the section indicates) not from NE's general purpose but from its other functions. Parliament has used language which makes these incidental powers a derivative of the other powers conferred by the earlier sections. This is clear from the language of section 13(1) – "*conducive or incidental to the discharge of its functions*" (my emphasis through underlining) – and is made even clearer by the language of the "*General implementation powers*" in sections 5 to 8. In each of those other sections NE is instead empowered to do things which further "*its general purpose*".

258. That is not the language of section 13(1). Section 13(1) identifies the incidental powers by reference to the means (the exercise of functions) rather than the end (the general purpose). It is on this basis that I have said the anchor for an incidental power must be one of NE's functions rather than its general purpose under section 2(1).

259. The illustrative incidental powers identified in section 13(2) can each be said to be potentially conducive or incidental to the other functions of NE identified in the previous sections (though, with the possible exception of entering into agreements, I think less obviously so in relation to its role as a public prosecutor).

260. In identifying this first reason against NE having the power to bring civil proceedings in its own name, without the need for a relator action, I have well in mind the risk of perhaps adopting too literal an interpretation of the word 'functions' in section 13 and, with that, overlooking a potential ambiguity in the language of the section.

261. However, for the reasons explained below, I believe the conclusion that NE has such a power would involve reading section 13(1) as if it did confer upon NE a power to do all such things as appears to it to be conducive or incidental to the achievement of its general purpose. If that was its language then one would have to question whether such a power was accurately described as 'incidental' when it would appear to rank alongside, if not dispense with the need to express, some of the other functions specified in Part 1.

262. Taking NE's general purpose as the relevant anchor for the incidental powers under section 13(1) would therefore involve ignoring the overall structure of Part 1. That part identifies NE's constitution, purpose and functions (as well as its 'general implementation powers' in sections 5 to 8 which are immaterial for present purposes) in a clear and unambiguous way. It would be a misinterpretation of that part as a whole to conclude that NE's (single) general purpose, facets of which are elucidated in section 2(2), can be equated with the various 'functions' which section 13 identifies as the source of any incidental power in NE.

263. NE is a statutory corporation, and not a private or public company registered under the Companies Acts. Nevertheless, the 'general purpose' identified in section 2(1) is the broad equivalent of the objects clause contained in an old-style memorandum of a commercial company which, since October 2009, now forms part of the articles. The aim or purpose identified in section 2 of NERCA is much more focused than the list of wide-ranging objects identified in the traditional 'long form' of such memoranda (and which often, by inclusion of a subjective objects clause, also introduced the concept of

ancillary objects so that the company's transaction was intra vires if it was part of a business that the directors considered to be ancillary to the company's general business). Section 13 of NERCA is not framed by reference to powers that are incidental or conducive to the attainment of all or any of the corporation's objects (or purpose). It is much more tightly drawn than the ancillary powers clause in a memorandum of incorporation with which it otherwise bears comparison.

No Relevant 'Anchor' Function

264. In my judgment a power to bring civil proceedings cannot be regarded as a corollary to any of the other functions specified in NERCA. Any such power cannot be said to be "*conducive or incidental*" to any of NE's 'functions' under NERCA or the 2006 Regulations.

265. Having noted above that sections 5 to 8 of NERCA (containing some of the powers headed '*General implementation powers*' rather than 'functions' as such) do confer power upon NE to do what appears to "*further its general purpose*", I should make it clear that I cannot see any basis for concluding that such a power derives from any of those powers in Part 1. They have nothing to do with NE's enforcement role under the 2006 Regulations.

266. Even applying the reasoning which supports the grant of injunctive relief in relator actions such as *A.-G. v Chaudry* (which might be summarised by saying it will be considered appropriate against those who consider that "crime pays") such civil proceedings cannot in my judgment be regarded as conducive or incidental to a criminal prosecution. Instead, they are brought because the criminal proceedings have not really worked, in the sense of stopping the offence. In no sense does the present civil claim "conduce" the earlier, concluded prosecution. Nor, in my judgment, can this claim properly be regarded as incidental to that prosecution. It would be more accurately described as "consequential", and quite distinct, reflecting as it does NE's perception that its exercise of the prosecution function has failed in this case to achieve its general purpose.

267. Therefore, in my judgment, the commencement of civil proceedings cannot be regarded as incidental to NE's function as prosecutor of offences under the 2006 Regulations whereas the gathering of evidence for a prosecution or (as mentioned in paragraph 78 of the Explanatory Notes) the employment of prosecutors on its staff plainly would be.

268. The more difficult question, to my mind, is whether or not the 2006 Regulations support the present claim for injunctive relief, especially when they extend NE's remit to the microliths (as "*archaeological heritage*") on which NERCA is itself silent (unless, of course, section 1(2) provides the link to a relevant anchor function in the regulations).

269. Ms Andersen submitted that, although not labelled as such, NE has the function of serving stop notices under regulation 25. She submitted that a power to sue for injunctive relief must properly be regarded as incidental to that function where the circumstances of the case show that a successful prosecution for the offence of breaching a stop notice will not, without more, deter the defendant from carrying on with the relevant land project. Although Ms Andersen did not make the point (indeed

her submissions did not address the availability or potential implications of the RES Civil Sanctions) I have already noted that an enforcement undertaking is not available to NE in respect of the offence under regulation 26.

270. This point about the 2006 Regulations giving NE standing has troubled me most of all. However, I have concluded that the regulations do not support a power in NE to bring civil proceedings. On the reasoning in *A.-G. v Chaudry* and *SRA v Khan* the limited effectiveness (as NE sees things) or Mr Cooper's prosecution under them is a powerful point on the merits of the claim for injunctive relief but it does not establish NE's standing to seek it.

271. In my judgment it is difficult to describe a power in NE to sue for injunctive relief as conducive or incidental to functions discharged by NE under the 2006 Regulations – which, materially, are the making of screening decisions, the giving of consent, the serving of stop and remediation notices – when the regulations themselves contain an exhaustive range of consequences for those who would seek to frustrate it (or, rather, the consequences of it) doing so.

272. Fundamentally, the point comes back to the complementary one I have made above in connection with section 12 of NERCA. Like section 12 of NERCA, the 2006 Regulations only expressly recognise NE's standing in the criminal courts. The 2006 Regulations address the criminal offences (and potential sentences) which arise in such circumstances and, in the light of those, it is difficult to make the link between the discharge of NE's functions, which provide the platform for the offences, and what on my analysis would not be a merely incidental power (to sue) but instead a free-standing one. The Secretary of State has not made a direction under section 16(1) of NERCA (by statutory instrument made under section 104) that NE may bring proceedings for injunctive relief.

273. As I have highlighted, the 2006 Regulations also provide for NE to impose RES Civil Sanctions under regulation 30A. To my mind, its power to do so also militates against it having any incidental power to sue in its own right for injunctive relief.

274. That is so even in cases where there has been an out-of-court undertaking – an enforcement undertaking – which has not achieved its purpose. The consequence of non-compliance with an enforcement undertaking is a prosecution. An enforcement undertaking might loosely be regarded as the closest thing recognised by the regulations to the injunction sought by NE on this claim. There would in my view be obvious difficulties in treating an application to court for injunctive relief as conducive or incidental to a function which involves NE's acceptance of an enforcement undertaking. However, the fact that the 2006 Regulations (importing the powers of sanction under the 2010 Regulations) only recognise the *criminal* consequences of a breach of the undertaking provides a strong pointer to the conclusion that a civil claim is something quite distinct from the discharge of NE's functions in relation to enforcement undertakings.

275. Although it is not a legitimate aid to statutory interpretation, I have noted that the Enforcement Paper (using language which resonates with the approach in *A.-G. v Chaudry* and *SRA v Khan* to injunctive relief) also only identifies the other RES Civil Sanctions and a criminal prosecution – and <u>not</u> civil proceedings injunctive relief – as

alternatives to NE's acceptance of an enforcement undertaking: see paragraph 233 above.

276. In my judgment, therefore, a power in NE to bring civil proceedings for injunctive relief is no more conducive or incidental to NE's functions under the 2006 Regulations than it is to NE's power to prosecute under section 12. The provisions of both highlight that bringing a civil claim would involve the exercise of an independent power or, to put it another way, the discharge of a free-standing function by NE. The language of section 13(1) does not provide for this.

The Power to Prosecute

277. In my judgment, that the conferment upon NE of an express power to institute criminal proceedings points against it impliedly having a power to bring its own civil proceedings.

278. Parliament chose not to include (as it did for section 222 of the Local Government Act 1972 quoted in paragraph 194 above) an express power in NE to bring civil proceedings.

279. If Ms Anderson is correct in her submission about the width of section 13 supporting a power to bring this claim for injunctive relief then a question immediately arises as to why Parliament thought it necessary to include the power to prosecute in section 12. Although it is desirable and probably unsurprising from a public law viewpoint that NE's standing to prosecute should not be subject to any doubt, the logical conclusion to NE's argument about section 13 must I think be that it would support NE's standing to prosecute even if section 12 did not expressly confirm it. Indeed, it seems to me that the argument that section 13 would otherwise impliedly support what section 12 clarifies would be a stronger one than the argument in favour of NE's right to sue for an injunction when the 2006 Regulations only create offences rather than causes of action.

Consequences

280. The fourth and last reason for concluding that NE does not have standing to bring this claim, in its sole name, does not strictly rest upon the process of statutory interpretation save perhaps in checking that the result produced by my above reasoning is not an absurd one.

281. Lord Hodge in *O v Home Secretary*, at [30], laid down a marker intended to steer the court away from construing a particular statutory provision in a way which produces an absurd result. In my judgment, it is important to recognise that it does not follow from my interpretation of section 13(1) that NE is entirely powerless in seeking injunctive relief in the light of what it regards (over the longer term) as an ineffective criminal prosecution of Mr Cooper. Instead, the absence from NERCA of a power equivalent to that given by section 222 Local Government Act 1972 means that NE must follow the

procedure previously adopted by local authorities (as illustrated by *A.-G. v Chaudry*) by asking the Attorney-General to lend her name to a relator action.

282. This is not a procedural requirement recognised by the Enforcement Paper but, if the Attorney-General can be persuaded to accept the request on that basis, it is one that meets mischief identified in Part 3 of its Annex 4. Indeed, it might be said that the express enforcement powers of NE (to prosecute under section 12 and to impose civil sanctions under regulation 30A) are such that the commencement of civil proceedings by NE should be subject to the filter of the relator action. Further, it might be said that this is a more orthodox outcome of the analysis of the powers of a public body than one which, on NE's argument on the effect of section 13 and having regard to its power under paragraph 19 of Schedule 1 to authorise others to exercise any of its functions on its behalf, would have enabled it to authorise one of its members or employees to sue Mr Cooper. Having said that, one must question whether Parliament contemplated that NE might delegate its prosecution function by relying upon that provision.

Outcome

283. With the inevitable hesitation that reflects the relative rarity of a party being non-suited at trial, I have therefore decided that this claim by NE for injunctive relief and an order for costs against Mr Cooper fails on the ground that NE does not have the power and standing to bring it.

284. My decision to grant interim injunctive relief against Mr Cooper in May 2023 was, both on that aspect and other issues going to the merits of NE's claim, of course decided by reference to the existence of a serious issue to be tried. NE's power to bring a civil claim in its own right was not then subject to scrutiny. The doubt over its ability to do so had been raised by me, rather than Mr Cooper as a litigant in person, as a result of my preliminary reading before the trial; and in particular my consideration of section 13 of NERCA in the context of Part 1 as a whole. Whether or not it can be said that interim injunction was wrongly granted, on the application of *American Cyanamid* principles, it obviously was granted on the basis of a claim which has ultimately failed.

285. Had I concluded that NE does have the power to bring the claim, I would have granted final injunctive relief. This would not have been on the basis that sub-surface or surface Mesolithic flint scatters are properly to be regarded as part of 'the natural environment' or 'the landscape' for the purposes of section 2 of NERCA. I am not persuaded they can be, though a WWII pillbox or trench which does have some topographical impact can in my judgment properly be regarded as part of the landscape.

286. Instead, I would have granted the injunction on the basis that, under the 2006 Regulations to which the relevant language of the EIA Directive was transposed, 'archaeological heritage' is deemed to be an aspect of the environment and, so the regulations presume in making NE the decision-maker under the regulations, part of the 'natural environment' for the purposes of section 2 of NERCA. It is through this language that NE is able, under regulations 3 and 13 of the 2006 Regulations, to require an environmental statement which addresses the potential impact of a significant project upon the archaeological heritage of the Farm. It is therefore this secondary legislation which has empowered NE to serve its notices and make its various decisions,

underpinned as they are by concerns about archaeological features, the effectiveness of which has survived Mr Cooper's various appeals and challenges.

287. In this regard, I should for Mr Cooper's benefit again make the general point about the "merits" of NE's claim for an injunction which I made when he made his closing submissions.

288. The context for making it is Mr Cooper's belief that NE has played "fast and loose" (my phrase used in summary of his points) with the 2006 Regulations. He says that NE should have reached a decision on his October 2013 application for consent under regulation 12, whether it was one of consent or refusal: see regulation 16(2). He says that, if it was a refusal, he could then have appealed it. He complains that (despite his resistance) NE withdrew the prosecution in the Magistrates Court under regulation 22 and that, by bringing this claim instead, they have circumvented the criminal burden of proof for which regulation 22(2) provides. He continues to feel aggrieved about the basis of his criminal conviction for the reasons I have mentioned above in providing the background to this claim.

289. I am not persuaded that any of these points stand up to scrutiny. Under regulation 13(1) NE was entitled to require additional environmental information from Mr Cooper, and he was obliged to provide it, before NE was obliged to give a decision under regulation 16(2). As to the onus of proof upon NE in a prosecution under regulation 22 (to prove beyond doubt that the land is uncultivated land) that legal burden of proof is only placed upon NE, as prosecutor, where the defendant discharges an evidential burden of adducing "*sufficient evidence …. to raise an issue that it is not uncultivated land.*" My own finding in relation to the RPA's Field Inspection Report of 18 July 2012, which is the document Mr Cooper has relied upon to say the land was not uncultivated land in 2012, indicates that he might not have discharged that burden or that, if he did, that NE would have met the higher stipulated standard of proof than that required for my own finding. As for Mr Cooper's complaints about the Crown Court conviction (which also involve the RPA report even though the regulation 22(2) was not directly relevant to the indictment under regulation 26) it is obviously not for me to doubt the fact or soundness of that conviction, particularly when it has been considered by the Court of Criminal Appeal. Mr Cooper told me in his closing submissions that he has now referred his conviction to the Criminal Cases Review Commission.

290. In any event, the basic point worth repeating here is that, although NE rely upon the apparent ineffectiveness of the 2021 conviction to seek an injunction which, in its interim form, has so far been more effective in preventing Mr Cooper from cultivating the fields, Mr Cooper does not have the consent to cultivate which he sought from NE in October 2013. Mr Cooper made it clear to me that he feels NE are seeking to make an example of him, when he believes his landlord, the NT, does not regard him as a law-breaker. However, the numerous notices and the outcome of his challenges to those notices in what I described as the "log jam" of the subsequent 10 years only serve to highlight that basic point. On the merits of NE's claim, the starting point is that the 2006 Regulations make it clear that Mr Cooper is not entitled to do what he wants to do. That has been the case since 2013 and, to that extent, much of the subsequent procedural history is irrelevant. This is a point I made to Mr Cooper when he sought to vindicate his position by pointing to the outcome of his latest challenge on a judicial review (see paragraph 38 above).

291. The more recent history of the dispute between the parties does however show that the past conviction would not prevent Mr Cooper from cultivating the affected fields without first complying with the 2006 Regulations. On that basis, NE would on the merits of an otherwise justified claim have been entitled to injunctive relief on the principle identified in *A.-G. v Chaudry* and *SRA v Khan* (as reflected in the "Q and A" section of Part 3 of Annex 4 to the Enforcement Paper). Mr Cooper was clear in his evidence that if the present injunction is discharged then he will recommence ploughing and mechanical crop cultivation.

292. As with the May 2023 interim injunction, I would have excluded chain harrowing from the prohibition upon certain farming activities in any final injunction. For the avoidance of any doubt, rather than because the evidence has clearly made out a case that they are under threat by Mr Cooper's proposed arable farming activity, I would also have "ring-fenced" for protection the remaining WWII pillboxes and trenches that might not otherwise be safeguarded by the general prohibition. I should note that Mr Cooper says that some of the pillboxes are not within his land. For example, the one bearing Private Augustine's signature is covered by the Stop Notice though Mr Cooper says it is on a parcel of land reserved from his tenancy. I would also have granted such injunctive relief on terms that the prohibition upon acts of cultivation in the specified fields should continue until either NE decided otherwise in accordance with the 2006 Regulations (as under the interim injunction) or the NT provided its consent to such acts under clause 57 of the Tenancy Agreement. In my judgment it is clear that the NT has a much more direct and obvious interest than NE in protecting archaeological features (such as the Mesolithic flints) and historical monuments (such as the WWII pillboxes) on the Farm.

293. As the court must be satisfied that the terms of any final injunction are just and convenient (see section 37 of the Senior Courts Act 1981) Mr Cooper's expectations and private rights as a tenant farmer for over 30 years, including those conditional upon the grant of clause 57 consent when required, are highly material to consideration of such terms.

294. Mr Madgwick's evidence, indicating that the NT would defer to the decision of NE in reliance upon clause 56(a) of the Tenancy Agreement, perhaps hints at an underlying conundrum that might require Mr Cooper to engage with the NT over whether it is clause 57 or 56 (or possibly both) which should govern the NT's position as his landlord. In this claim, to which the landlord is not a party, I would have attempted, at least, to prevent the forming of a Gordian knot by also including the provision that the injunction should cease if the NT provided clause 57 consent. There would have been some (though I recognise by no means irrevocably committed) support for this approach in the way that NE, in December 2013, made it clear that they would regard the NT's (completed) geophysical survey and evaluation survey as highly material to their decision under the 2006 Regulations. On the costing mentioned by Mr Parry in his evidence (but of which Mr Cooper says he was unaware until Mr Parry gave that evidence) it may be that the impasse of the last 10 years can be overcome at relatively modest expense compared with the legal costs incurred in these proceedings and the earlier prosecutions.

295. The inclusion within the terms of the injunction that it should cease if Mr Cooper either obtained the NT's clause 57 consent or NE's regulation 16 consent would have given Mr Cooper the opportunity to persuade the NT that it should "take ownership" of the

(potential) archaeology that is clearly reserved to it under the Tenancy Agreement in place of NE. If the NT's positions remained as explained by Mr Madgwick, and either was not challenged or survived any challenge Mr Cooper might make, then Mr Cooper would have been obliged to engage with NE's request for further information of December 2013. Doing so would mean that NE would then have needed to consider the social and economic impacts of any refusal of consent (see regulation 16(1)(d)) on which Mr Cooper relied to say that no injunction should be granted.

296. In my judgment, the grant of such injunctive relief would not have breached any of Mr Cooper's human rights. His claim that NE is acting unlawfully under section 6 of the Human Rights Act 1998, by acting in a way that is incompatible with a Convention right, is not well-founded.

297. His complaint about an infringement of his Article 6 rights seems to be directed to the withdrawal of the prosecution in Barnstaple Magistrates Court and what he considers to be NE's avoidance of a higher standard of proof. I am unpersuaded that this complaint can flow through to the present proceedings but in any event I have explained why there is no substance to it. His contention that NE has contravened the prohibition upon discrimination in Article 14 has not been explained and has no basis. Mr Cooper's real complaint, on which he bases his belief that NE are discriminating against him and (as he sees it) persecuting him, is based upon his rights under the Tenancy. However, his "A1P1" right (see Article 1, Protocol 1 of the Convention) to peaceful enjoyment of property is expressly made subject to the public interest, any conditions provided by the law and any laws controlling the use of that property in the general interest. The Farm is subject to the 2006 Regulations and no part of them has been declared to be incompatible with a Convention right. Further, Mr Cooper's rights under the Tenancy Agreement are qualified by the rights of the NT and I have just indicated that how the terms of any injunction would have fixed its duration by reference either to the consent of NE under the regulations or the consent of the NT under the Tenancy Agreement.

Disposal

298. As it is, however, I have concluded that no injunctive relief against Mr Cooper can be justified on this claim. NE's claim is dismissed.

299. This judgment has been handed down remotely by email circulation to the parties and filing with The National Archives. A further hearing will be fixed for the parties to address consequential matters. The handing down is also adjourned (for the purposes of CPR 52.12(2)(a)) so that the time for filing any appellant's notice is preserved in the meantime, and so that I may hear any application for permission to appeal (if one is made) at that next hearing and give a direction in relation to the time for filing an appellant's notice.