Neutral Citation Number: [2025] EWCA Civ 15

Case No: CA-2024-001070

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**HIS HONOUR JUDGE RUSSEN KC**
**[2024] EWHC 625 (KB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2025

**Before :**

**LORD JUSTICE COULSON**
**LORD JUSTICE MALES**
and
**LORD JUSTICE HOLGATE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **Natural England** | **Appellant** |
| **- and -** | |
| **Andrew Jonathan Chubb Cooper** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Richard Honey KC and Jonathan Welch** (instructed by **Natural England Legal Services**) for the **Appellant**
**The Respondent** appeared in person.

Hearing date : Tuesday 3 December 2024

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 10.30am on 16 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

**LORD JUSTICE HOLGATE :**

## Introduction

1. The central issue in this appeal is whether the appellant, Natural England ("NE"), has the power and standing as the regulator in relation to The Environmental Impact Assessment (Agriculture) (England) (No. 2) Regulations 2006 (SI 2006 No. 2522) ("the 2006 Regulations") to obtain an injunction to secure compliance with the consenting regime under those regulations.

2. NE was established on 1 October 2006 by the Natural Environment and Rural Communities Act 2006 ("NERCA 2006"). NE succeeded to the functions of English Nature, the Countryside Commission and the Rural Development Service ("RDS") of the Department for the Environment, Food and Rural Affairs ("DEFRA").

3. The Respondent, Mr Andrew Cooper, farms 67 hectares of land at Croyde Hoe Farm, Croyde Hoe, Devon. The farm and neighbouring land is owned by the National Trust ("the NT"). On 26 August 1993 the NT granted to Mr Cooper a yearly tenancy of the farm under the Agricultural Holdings Act 1986.

4. The claim for an injunction relates to 30 hectares of the farm, comprising 9 fields. It is common ground that the 2006 Regulations prohibit cultivation of that land unless Mr Cooper obtains consent under reg.9 to carry out that activity. In October 2013 he applied to NE for consent but that application remains undetermined. NE says that this is because Mr Cooper has failed to provide sufficient information on the potential archaeological interest lying under the surface of the land to enable them to reach a decision on the application. NE is concerned that ploughing and cultivation of the land would damage or destroy any archaeological artefacts.

5. Nevertheless, Mr Cooper has continued to plough and cultivate fields within the 30 hectare area. He has not been deterred by the service of statutory notices and criminal sanctions. He maintains that the protection of archaeological remains below the surface of the land does not fall within the statutory remit of NE.

6. On 21 April 2023 NE issued a claim against Mr Cooper seeking injunctive relief.

7. On 2 May 2023 HHJ Russen KC, sitting as a judge of the High Court, granted an interim injunction restraining Mr Cooper from ploughing or working the fields, save in compliance with the 2006 Regulations. He ordered an expedited trial of the claim.

8. The final trial took place before the same judge on 16 and 17 November 2023, with closing submissions on 21 February 2024.

9. The judgment was handed down remotely on 3 April 2024. The judge decided that NE had not justified the grant of a final injunction and the claim should be dismissed. He considered that NE lacked power and standing to bring the claim for an injunction in its own name. The claim could only have been brought as a relator action with the consent, and in the name of, the Attorney General. But the judge made it plain that, but for NE's lack of standing, he would have granted a final injunction to secure compliance with the 2006 Regulations [285] – [286].

10. The judge adjourned the hearing for hand down so that the terms of the court's order could be considered, along with an application for permission to appeal. On 23 April 2024 the judge made a formal order dismissing the claim. He also granted permission to appeal to this court and, pending the determination of the appeal, he stayed the dismissal of the claim and continued the interim injunction granted in 2023.

## Statutory framework

*Natural Environment and Rural Communities Act 2006*

11. Section 1(2) provides that NE "is to have the functions conferred on it by or under this Act or any other enactment." The 2006 Regulations were made under s.2(2) of the European Communities Act 1972 and confer "functions" on NE. Those regulations therefore fall within s.1(2).

12. Section 2 of NERCA 2006 sets out the general purposes of NE. Sections 3 and 4 set out "advisory functions". Section 5 to 8 contain "general implementation powers." Sections 9 to 13 set out "other functions" of NE, including the incidental powers in s.13. The "functions" of a body generally refers to its powers and duties. A "purpose" is neither a power nor a duty. Instead, a purpose clause may be inserted into a statute in order to provide guiding principles for interpreting the provisions to which it applies (Bennion, Bailey and Norbury on Statutory Interpretation (8th ed.) section 17.2).

13. Section 2 provides:

> "(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) … "

NE's general purpose is defined in broad terms which include "conserving and enhancing the landscape".

14. The functions which are conferred on NE by Chapter 1 of Part 1 of the 2006 Act are also expressed in broad terms. For example, NE *may carry* out proposals (s.5), give financial assistance to any person (s.6), or enter into an agreement with a landowner about the use or management of his land (s.7), if doing so appears to NE to "further its general purpose."

15. Section 12 confers on NE a power to institute criminal proceedings.

16. Section 13 confers incidental powers on NE:

> "**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."

By virtue of s.1(2) of NERCA 2006 (see [11] above), NE's functions under the 2006 Regulations fall within s.13(1).

*Environmental Impact Assessment Directive*

17. Council Directive 85/337/EEC of 27 June 1985 addresses "the assessment of the effects of certain public and private projects on the environment." It was amended by Council Directive 97/11/EC of 3 March 1997 and Directive 2003/35/EC of 26 May 2003. By para. 1 of Annex II to the Directive, those projects include:

> "(a) Projects for the restructuring of rural land holdings;
>
> (b) Projects for the use of uncultivated land or semi natural areas for intensive agricultural purposes; … "

18. A member state is required by Art. 1 and Art. 4(2) to determine whether a project falling within Annex II is likely to have significant effects on the environment. If so, it must be subject to a process of environmental impact assessment ("EIA") and a requirement for development consent, that is a decision by a competent authority entitling the developer to proceed with the project (Art. 2(1)).

19. There is no issue in this case about whether the UK has adequately transposed the Directive into domestic law. There is therefore no need to consider the provisions of the Directive other than part of the first recital and the sixth recital:

> "…. whereas they affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes; whereas to that end, they provide for the implementation of procedures to evaluate such effects;
>
> Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;"

20. The UK has given effect to the Directive by a number of statutory instruments dealing with different types of project and environment. The 2006 Regulations address the agricultural projects referred to in [17] above, which fall outside the scope of planning control. But it is important to bear in mind that the issue in the present case about the scope of the 2006 Regulations in relation to sub-surface archaeological interest is relevant more widely to the other regulations which require a project to be the subject of EIA in order to comply with the Directive.

*The 2006 Regulations*

21. Mr Cooper asked the court to note that we were provided with the current version of the 2006 Regulations, rather than the version as originally enacted. He did not identify any differences between the two or explain how they could affect the outcome of this appeal. But I have considered whether any differences between the original and current versions of the regulations might affect the issues we have to resolve.

22. The Explanatory Memorandum to the 2006 Regulations stated at paras. 7.8 and 7.11 that the regulations made NE the new regulator. Previously, the Secretary of State acting through the RDS had been the regulator under earlier regulations giving effect to the Directive.

23. By reg.3(1), the 2006 regulations apply to any "uncultivated land project" or "restructuring project". "Uncultivated land" means land which has not been "cultivated" in the previous 15 years. "Cultivated" refers to cultivation by physical means (including ploughing and harrowing) or by chemical means (including fertilisers). An "uncultivated land project" means a project to increase the productivity for agriculture of uncultivated land or a semi-natural area (reg.2(1)).

24. Part 2 of the 2006 Regulations deals with "screening". Regulation 4(1) prohibits a person from beginning or carrying out an uncultivated land project which is equal to or exceeds the relevant threshold in reg.5 unless he has first obtained "a screening decision permitting the project to proceed." An application for a screening decision must be

made under reg.7 to NE with descriptions of *inter alia* the location, physical characteristics and any likely significant environmental effects of the project.

25. Under reg.8(1) NE must issue a screening decision which determines whether a project "is likely to have significant effects on the environment." If that is so, it is treated as a "significant project" (see reg.2(1)) and consent for the project must be obtained under reg.9. If a project is screened as being unlikely to have significant effects on the environment, consent under reg.9 is not required. It is in that scenario that reg 4(1) refers to a "screening decision permitting the project to proceed."

26. A screening decision must be taken in accordance with the selection criteria in sched.2 (see reg.8(1)). The selection criteria fall into three categories: "characteristics of projects", "location of projects" and "type and characteristics of the potential impact". The location of projects refers to "the environmental sensitivity of geographical areas" likely to be affected by relevant projects with particular regard to *inter alia*:

> "(c) the absorption capacity of the natural environment, paying particular attention to the following areas—
>
> (viii) landscapes of historical, cultural or archaeological significance."

That is the version as originally enacted. The Environmental Impact Assessment (Agriculture) (England) (No. 2) (Amendment) Regulations 2017 (SI 2017 No. 593 - "the 2017 Regulations") inserted the words "and sites" into para.(viii) after "landscapes" with effect from 16 May 2017 (subject to the transitional provisions in reg.19). This was done in order to give effect to Directive 2014/52/EU of 16 April 2014.

27. Regulation 9 of the 2006 Regulations provides:

> "A person must not begin or carry out a significant project unless he has first obtained consent from Natural England."

28. By reg.12(1) an application for consent must be made to NE and must be accompanied by an environmental statement ("ES"). As originally enacted, reg.2(1) required the ES to include as much of the information in Part 1 of sched.3 as is reasonably required to assess the environmental effects of the project and which the applicant can reasonably be required to compile, having particular regard to current knowledge and methods of assessment. Paragraph 3 in Part 1 of sched.3 required:

> "**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 climactic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors."

Although sched.3 to the 2006 Regulations was also amended in 2017, it continued to refer to the likely significant effects of a project on "cultural heritage, including architectural and archaeological aspects, and landscape."

29. Regulation 12(3) to (5) requires NE to consult specified "consultation bodies" on an ES and to give the public an opportunity to make representations on the document. If, after

complying with that requirement, NE decides that it requires any additional environmental information in order to decide whether to grant or refuse consent under reg.9, it *must* notify the applicant of the information required, and the applicant *must* provide NE with that information (reg.13(1) in both the original and current versions of the 2006 Regulations).

30. Regulation 15A of the 2006 Regulations (which was inserted by the 2017 Regulations) requires NE to consider all the environmental information and representations received. It must then reach conclusions about the likely significant effects of the project on a number of matters, including "material assets, cultural heritage and the landscape." Those conclusions must then be taken into account in the decision under reg.16 whether to grant or refuse consent for the project.

31. Regulation 16 as originally enacted was to similar effect, in that NE, when deciding whether to grant or refuse consent, was required to consider all the "environmental information". Regulation 18 enabled NE to impose conditions on a grant of consent, having regard to that information.

32. Regulation 19 as originally enacted, required NE, when deciding to grant or refuse consent to notify the applicant and consultation bodies of the decision, and to make available to the public a statement about the content of the decision, the full reasons and considerations on which it was based, a description of the principal measures for avoiding, reducing or offsetting major adverse effects, a summary of representations made by the public, and information on the right to bring a legal challenge to the decision. The current version of reg.19 is to similar effect. Regulation 19 promotes the transparency of the EIA process for the public.

33. Part 4 of the 2006 Regulations deals with enforcement. By reg.22(1) it is an offence for any person to begin or carry out a project to which the 2006 Regulations apply in breach of reg.4 or reg.9.

34. Under reg. 25(1), if a person has begun a relevant project in breach of reg.4 or reg.9, NE may serve a "stop notice" prohibiting all or part of the work with immediate effect. A notice may be served on any person appearing to NE to be interested in the land or to be engaged in an activity prohibited by the notice (reg.25(2)). The stop notice ceases to have effect if it is withdrawn by NE, or if NE or the Secretary of State on appeal (see below) should decide that the prohibited work is not a significant project or grants consent for that work (reg.25(4)).

35. Under reg.26(1), a person who causes or permits a contravention of a stop notice commits an offence.

36. By reg.27, if a person has carried out a relevant project in breach of reg.4 or reg.9, NE may serve a "remediation notice" requiring the person to reinstate the land to the condition it was in before the project was commenced, or to take such other steps as NE thinks fit to return the land to "good environmental condition." The notice must state the period during which remediation is to be carried out. Any person who, without reasonable excuse, fails to comply with a remediation notice commits an offence.

37. These offences are punishable by fines.

38. Regulation 30A (inserted by an amendment made in 2010) provides for civil sanctions as an alternative to criminal sanctions. NE may impose a fixed or variable monetary penalty, or accept an enforcement undertaking.

39. Regulation 30 (in both its original and current versions) gives the Secretary of State or NE a power to enter and inspect land to investigate whether regs.4 or 9 have been breached or whether offences under Part 4 have been committed, to take copies of relevant records and to remove samples. It is an offence for someone to obstruct or impede intentionally any person acting pursuant to the powers conferred by reg.30.

## Factual background

40. Croyde Hoe is a coastal promontory on the southern side of Morte Bay. Baggy Point lies at the end of the promontory. Mr Cooper's farm is the only one on the promontory. The coast at Baggy Point forms part of the Braunton to Baggy Point Coast Site of Special Scientific Interest ("SSSI"). The land the subject of these proceedings lies adjacent to the SSSI.

41. Before 1992 Mr Cooper had farmed this land 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 treated as arable were turned into pasture and remained uncultivated for approximately 20 years. Mr Cooper received payments under the CSS of about £200,000 in return for the land remaining uncultivated during the period 1992 to 2012.

42. When the second agreement under the CSS came to an end in May 2012, Mr Cooper applied to NE under the 2006 Regulations for a screening decision in respect of his proposal to carry out a project on the 9 fields. He wished to carry out mechanical and chemical cultivation

43. On 20 August 2012 NE issued its screening decision. It stated that all the fields were "uncultivated land" within the meaning of the 2006 Regulations because they had been managed under the CSS for 20 years as grassland and had not been cultivated. Taking into account responses from a number of consultation bodies under the 2006 Regulations, namely the Historic Environment Team at Devon County Council, the archaeological division of the National Trust, the North Devon Area of Outstanding Natural Beauty team and English Heritage, NE concluded that the fields contained features of important historic interest of regional and national significance.

44. Accordingly, Mr Cooper's proposal was a "significant project" for the purposes of the 2006 Regulations, which could not be carried out without NE's consent under reg.9.

45. NE's letter dated 20 August 2012 relied upon an email dated 19 July 2012 from Devon County Council's Archaeologist, which referred to the following matters as indicating demonstrable national archaeological importance:

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

(2) 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.

46. The County Archaeologist also identified a Mesolithic pigmy (or microlith) flint manufacturing site in the vicinity of the subject matter fields, but said 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*."

47. NE therefore required Mr Cooper to submit an ES along with his application for consent under reg.12.

48. On 23 August 2012 Mr Cooper asked NE to provide under reg.10 its "scoping opinion" on the information which should be contained in the ES.

49. NE responded to that request on 27 September 2012 by attaching the text of the County Archaeologist's email of 19 July 2012 and saying that Mr Cooper needed to address the impacts on the historic environment. In relation to archaeological heritage, the ES should include a desk-based assessment of "the historic environment baseline" (identifying local, regional and national documentary and cartographic sources); an earthwork survey (identifying the location, extent and height of any upstanding archaeological remains, primarily military structures); and an evaluation survey (to assess the survival, depth, extent and vulnerability of prehistoric remains). 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 Archaeologist. The ES should also describe the measures envisaged for preventing or reducing any significant adverse effects on the environment.

50. In October 2012 Mr Cooper appealed against NE's screening decision. That appeal was dismissed by the Secretary of State in June 2013. NE's screening decision was upheld.

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

52. On 17 October 2013 Mr Cooper submitted to NE an application for consent under reg.9 in the form of a letter which contained his four page ES. Most of the letter described farming practices on the land and the need to use the 30 hectares for arable purposes in rotation. On archaeology, the letter referred to the WWII Remains adjacent to field boundaries and "various scattered flint fragments which have been found within the plough zone" from the Mesolithic period. Mr Cooper said that the archaeology was well-documented by a NT survey in 1999 and that the Trust was commissioning further survey work for its own records. The letter referred to a site meeting which had taken place on 9 August 2013 with the County Archaeologist (who had been the author of the Annex to NE's scoping opinion). Mr Cooper said that the County Archaeologist and the NT archaeologist had been unable to "pinpoint" any site worthy of excavation or any structures or earthworks that might be damaged by ploughing. He also said that they had agreed that working the plough zone would not affect any deeper archaeology.

53. NE responded to that application by an email dated 18 December 2013. In the meantime they had carried out the consultation required by reg.12 of the 2006 Regulations. NE said that it was "*currently unable to determine a decision in your case*" owing to a lack of information in the ES. Accordingly, NE requested additional information to enable them to fully assess the environmental impacts of the respondent's proposal to cultivate the land. In relation to matters of archaeological heritage, NE said that it had been in contact with the NT and continued:

> "We understand that 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."

NE warned Mr Cooper that if he cultivated the land before his application for consent was determined, he would be in breach of the 2006 Regulations.

54. In March 2014 representatives of NE walked around the Farm with Mr Cooper highlighting features of archaeological interest so as to make him aware of their significance. NE also discussed potential options that could enable the respondent to cultivate the land in an acceptable manner.

55. On 7 April 2014 NE again wrote to the respondent stating that further survey work needed to be carried out to enable a proper and adequate assessment to be made before any decision about alternative cultivation methods. The letter also gave specific advice about what information was required in respect of all the fields.

56. In April 2014 NE served a remediation notice under reg.27 of the 2006 Regulations in respect of the 3 fields ploughed in April 2013. The notice required the reinstatement of the land to the condition it was in before the unauthorised uncultivated land project. The following month Mr Cooper appealed against the remediation notice, but in March

2015 the Secretary of State dismissed that appeal, but extended the time for remediation until October 2015.

57. In May 2015, Mr Cooper made an application for judicial review of the original screening decision and the remediation notice. The High Court refused permission to apply in August 2015.

58. 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 against that remediation notice in June 2016, but DEFRA dismissed his appeal in August 2017. The field was remediated the following month.

59. In September 2017 Mr Cooper ploughed and sowed another field covered by NE's screening decision (field 7770). The next month NE served firstly, a remediation notice in respect of that field and secondly, a stop notice under reg.25 of the 2006 Regulations in respect of all of the 9 fields. In November 2017 Mr Cooper also appealed against this remediation notice and the stop notice. The appeal was later dismissed by the Secretary of State in December 2019.

60. In the meantime, in March 2018 Mr Cooper ploughed one of the fields (field 7251) he had previously ploughed in spring 2013.

61. This prompted NE to investigate suspected breaches of the stop notice. NE brought a criminal prosecution in Barnstaple Magistrates' Court in respect of the strip-grazing of field 7770 and the ploughing of fields 7770 and 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. On the charge of failing to comply with a stop notice (which was triable either summarily or on indictment) he elected trial by jury. The two summary charges were adjourned pending the outcome of the Crown Court proceedings.

62. NE's visit to the farm in March 2020 confirmed that fields 7251 and 2857 had been cultivated. In April 2020 remediation notices were served in relation to those two fields. Mr Cooper appealed against those notices but in January 2021 the Secretary of State dismissed the appeal.

63. As a result of Covid-19 delays and several adjournments, Mr Cooper's trial was listed in Exeter Crown Court for 7 days beginning on 6 April 2021. Shortly before the jury was empanelled, Mr Cooper entered a guilty plea to failing to comply with the stop notice. In June 2021 he was sentenced to a fine of £7,500 and ordered to pay a contribution towards the prosecution's costs of £24,000.

64. Mr Cooper applied for leave to appeal to the Court of Appeal against his conviction. He contended that the judge in the Crown Court had erred in law in ruling that he was unable to challenge the validity of the stop notice in that court, which erroneous ruling had left him with no option but to plead guilty. The application was refused on paper by a single judge in December 2021 and, on renewal, by the Full Court in June 2022. The application was held to be misconceived and without merit ([2022] EWCA Crim 922).

65. In June 2021 Mr Cooper had ploughed 3 fields (fields 3676, 2857 and 4861). NE served a remediation notice in respect of those fields in February 2022. The Secretary of State dismissed Mr Cooper's appeal against that notice in February 2023, but subsequently conceded his challenge to that decision on an application for judicial review because of a failure to provide him with the necessary appeal documentation in proper time.

66. Meanwhile, by letter dated 23 September 2022 NE warned Mr Cooper that unless he complied with the 2006 Regulations they would apply for an injunction to restrain him from committing any further breaches of the regulations.

67. Following a hearing in the Magistrates' Court on 21 October 2022, NE withdrew the two summary charges.

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

69. NE issued its claim for an injunction on 21 April 2023. They stated that Mr Cooper had given no indication that he would cease to contravene the 2006 Regulations. The more recent acts of cultivation, combined with the long history of breaches of the regulations, showed that the respondent would continue to contravene the regulations unless restrained by the court.

70. When NE visited the farm on 17 July 2023, they saw that field 4861 had been returned to grass, but the northern strip of field 4941 remained in arable production.

71. Before HHJ Russen KC, NE said that the history summarised above shoed that Mr Cooper had continued to breach the 2006 Regulations. He 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. The onus lay on him to obtain the necessary consent under the 2006 Regulations.

72. NE said that one cause of this longstanding stalemate had been referred to 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."

In addition, Mr Cooper has maintained that archaeology forms no part of NE's statutory remit.

73. The judge also referred to the funding issue in his judgment at [108]-[109] when summarising the evidence of Mr James Parry, the NT's archaeological expert for the south-west of England, evidence he found to be particularly useful [103]. Mr Parry said that NT had paid for the geophysical survey referred to in the email dated 18 December 2013 (see [53] above) for the purpose of costing a further investigation of about 1% of the relevant fields. NT considered it reasonable that Mr Cooper should bear the cost of the further work indicated in that email as he was the party seeking to initiate change from the position under the CSS. Mr Parry said that the cost of further work for (1)

assessing the findings of the geophysical survey; (2) reviewing relevant data; and (3) trial-trenching and test-pitting was around £10,000. It was proposed that there would be a relatively small number of trial trenches (2m wide and 25m long) and test pits (1m square). The brief for these works was prepared in April 2021. The cost is roughly a third of the total sum which Mr Cooper has had to pay for the fine and costs order in June 2021. The judge described the cost of the works as "a relatively modest expense" [294].

74. The judge concluded that Mr Parry's evidence supported NE's position that more archaeological investigative work needs to be carried out before consent for mechanical cultivation can be given [110]. At [108] the judge noted Mr Parry's opinion:

> "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..."

## The judgment in the High Court

75. Before the judge Mr. Cooper argued that the statutory functions of NE are concerned with the protection of the natural environment, which does not include archaeological interest. NE responded that its general purpose includes "conserving and enhancing the landscape", which is wider than the natural beauty of the landscape and includes sub-surface archaeological features. Bearing in mind that Mr. Cooper appeared as a litigant in person, the judge examined in some detail the scope of NE's statutory functions and its standing to apply for an injunction. His legal analysis, which began at [130], was wide-ranging. But in my judgment, whether NE is entitled to the injunction sought turns on only a few issues.

76. The judge devoted a substantial part of his analysis to NERCA 2006, beginning with its "general purpose". The focus of NE is upon the "natural environment" of England, which includes "conserving and enhancing the landscape" [139] to [140]. The statute does not define "landscape" [141], but the Explanatory Notes indicated that the term would include monuments, buildings and sub-surface archaeological features which contribute to the landscape. The judge said that while Explanatory Notes may be used to identify the context for a statute, they cannot be used to supplant or add to what Parliament has enacted [142] to [151].

77. Referring to the Oxford English Dictionary, the judge took "landscape" to refer to the visible features of an area of land when seen from a viewpoint [153]. Thus a feature such as a trench, or a man-made structure such as a pill-box, forms part of a landscape [154]. Sub-surface archaeological features, such as a burrow or tumulus, which shape the land or affect its contours would also be treated as part of the landscape [154]. But small, scattered artefacts, such as flints, whether on the surface or sub-surface, form part of the land, but not the landscape. They do not influence the topography [155] to [159].

78. The judge held that the 2006 Regulations extended NE's functions beyond conservation and enhancement of the natural environment (including its landscape) to include interest in archaeological heritage as part of the wider environment [163] to [176].

79. NE submitted to the judge that the 2006 Regulations gave NE a "regulatory remit" which included the preservation of archaeological heritage. Section 13 of NERCA 2006 conferred on NE an incidental power to seek an injunction under s.37 of the Senior Courts Act 1981 to protect the archaeological features of the farm, given the practical ineffectiveness of the 2006 Regulations in this case [183].

80. The judge referred to the line of authority which deals with injunctions granted in aid of the criminal law [191]. He said that a claim of that nature would need to be brought in the name of the Attorney General as a relator action, unless the claimant could rely upon a statutory power sufficient for that purpose, such as the power conferred on local authorities by s.222 of the Local Government Act 1972 [194]:

> "**222 Power of local authorities to prosecute or defend legal proceedings.**
>
> (1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—
>
> (a) 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, and
>
> (b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under any enactment.
>
> (2) …"

81. The judge said that any power which NE might have to bring civil proceedings in its own name could only be found in NERCA 2006, that is s.13(1), not in the 2006 Regulations [196] to [199].

82. By virtue of the 2006 Regulations NE has additional functions for the purposes of s.1(2) of NERCA 2006 [212] and [220] to [223]. Alongside NERCA 2006, the 2006 Regulations are the potential source of functions to which a power to sue for injunctive relief might be conducive or incidental ([251](iii)).

83. However, at [252] to [282] the judge identified four "bases" as to why he considered that s.13(1) of NERCA 2006 did not provide a power for NE to bring the claim for an injunction against Mr. Cooper. These lie at the heart of this appeal.

84. First, he found that s.13(1) can only apply to something which can be considered to be conducive or incidental to the discharge of one or more of NE's functions, not simply its "general purpose" as set out in s.2 [254] to [263].

85. Second, the judge concluded that the bringing of the claim for an injunction could not be regarded as conducive or incidental to a relevant function of NE [264] to [265]. The bringing of a relator action seeking an injunction in aid of the criminal law is not conducive or incidental to NE's power to bring a criminal prosecution. It is based upon the failure of criminal proceedings and sanctions to secure compliance with the 2006 Regulations. It is "consequential", rather than incidental, to NE's role as a prosecutor [266] to [267]. Instead, the 2006 Regulations create offences for contravening specific requirements, for example, to obtain a screening decision; to apply for, obtain and comply with consents; and to comply with stop notices and remediation notices. There is no link between NE's discharge of those regulatory functions, which provide the "platform" for the relevant offences and the obtaining of an injunction to ensure compliance with the 2006 Regulations. NE's claim involves reliance upon a freestanding, and not an incidental, power to apply to the court for an injunction [268 to 276].

86. Third, the judge considered that the express power to institute criminal proceedings conferred by s.12 "points against [NE] impliedly having a power to bring its own civil proceedings" [277]. Parliament chose not to include an express power for NE to bring civil proceedings in contrast to s.222 of the LGA 1972 [278].

87. Fourth, the judge considered that his interpretation of s.13(1) of NERCA 2006 did not render NE powerless to obtain an injunction to secure compliance with the 2006 Regulations. It could, and should, ask the Attorney General to give his consent for the bringing of a relator action. That would overcome the absence of an express power such as s.222 of the LGA 1972 [281] to [282].

88. As I have already mentioned, the judge made it clear that if he had concluded that NE had power and standing to bring the claim for an injunction, he would have granted a permanent injunction on the basis of NE's functions under the 2006 Regulations [285] to [286]. The history of the criminal proceedings showed why an injunction was necessary. Indeed, Mr. Cooper had made it plain that if the injunction were to be discharged, he would recommence cultivation [290] to [291]. But the judge also said that he would have altered the injunction so that the prohibition of cultivation would cease if the NT, acting as Mr Cooper's landlord, should grant its consent to that activity under clause 57 of the 1993 tenancy agreement.

89. The judge set out his reasons for rejecting Mr Cooper's various points as to why an injunction should be refused [288]. At [296] to [297] he explained why the grant of a permanent injunction would not interfere with any of Mr. Cooper's rights under the European Convention of Human Rights ("ECHR").

90. In his order made on 23 April 2024, the judge said that he was granting permission to appeal in the light of further submissions made and further authorities relied upon by junior counsel newly instructed by NE.

## The issues in this appeal

91. Under ground 1 NE advanced two alternative contentions. First, as a statutory corporation NE may, according to the common law, do anything which is reasonably incidental to its express powers (*Attorney General v Great Eastern Railway Company* (1880) 5 App. Cas. 473, 478, 481). Second, under s.13(1) of NERCA 2006 NE "may

do anything that appears to be conducive or incidental to the discharge of its functions" which includes its functions under the 2006 Regulations. It is submitted that on either basis, NE had an incidental power to apply for an injunction which was conducive or incidental to the discharge of its functions as the regulator of the scheme for environmental protection created by the 2006 Regulations. In addition, NE has standing to apply for an injunction in order to enforce these regulations, without needing to obtain the Attorney General's consent to bring a relator action.

92. During the hearing Mr. Richard Honey KC accepted on behalf of NE that s.13 cannot simply be linked to NE's general purpose in s.2 as a freestanding basis for obtaining an injunction. He also accepted that the common law principle does not materially add anything to s.13, at least for the purposes of the appeal. The court can therefore concentrate on s.13.

93. Under ground 2 NE submits that the judge erred in adopting an interpretation of "landscape" in s.2(2)(b) of NERCA 2006 which was too narrow. He wrongly excluded sub-surface archaeological features which do not have a material visual impact on the topography or surface of the land, such as the flints in this case. However, NE acknowledges that this issue is not determinative of the appeal, because the judge correctly held that NE's functions under the 2006 Regulations are functions for the purposes of s.1(2) and s.13(1) of NERCA 2006 and that those regulations control the effect of uncultivated land projects on *inter alia* archaeological heritage.

94. It is necessary to clarify the four "bases" upon which the judge decided that NE was unable to bring a claim for the injunction. The first (see [84] above) no longer arises. NE does not contend before us that it is entitled to an injunction as an incident to its "general purpose" in s.2(2)(b) of NERCA 2006, rather than one of its statutory functions.

95. Under the fourth basis, the judge decided that his construction of s.13(1) would not prevent NE obtaining an injunction to address the inadequacy of criminal sanctions against the respondent. They could do so by obtaining the Attorney General's consent to bring a relator action. But as a statutory body NE would still need to have a power to bring proceedings. The Attorney General's consent does not confer any such power. It only satisfies a procedural requirement that a claimant should have standing before the court to be able to bring certain types of claim. The two legal concepts are distinct and should not be confused. The judge's conclusion under basis 4 assumes that NE does have a power to claim the injunction sought. But that would contradict the reasons he gave under bases 1 to 3 for NE lacking a power to bring the claim. This contradiction is removed by treating basis 4 as being concerned solely with the issue of standing, not *vires.*

96. Mr Cooper did not serve a respondent's notice seeking to uphold the judge's decision on any ground other than *vires* and standing. But he did make a number of submissions which do not go to the issues raised by NE's appeal. He did so courteously, clearly and forcefully. I will return to those matters after having addressed the main issues.

**Whether NE has an incidental power to seek the injunction**

97. Section 13(1) of NERCA 2006 is similar to the incidental power conferred on local authorities by s.111 of the LCA 1972. Such provisions embody the common law

principles set out in the *Great Eastern Railway* case (see *Hazell v Hammersmith London Borough Council* [1992] 2 AC 1, 29). The word "functions" is used in a broad sense to embrace all the duties and powers, the sum total of the activities, Parliament has entrusted to NE (ibid).

98. To fall within s.13 an incidental power must be conducive or incidental to a "function". So in *Hazell* it was held that entering into interest rate swap agreements was not incidental to a local authority's power to borrow. In *R v Richmond London Borough Council ex parte McCarthy & Stone (Developments) Limited* [1992] 2 AC 48 the House of Lords held that the consideration and determination of planning applications is one of the functions of a local planning authority under the statutory scheme. On that basis, the authority had a power to give pre-application advice to developers which was incidental to *that function*. But a provision such as s.111 of the LGA 1972 does not confer a power to do something which is merely incidental to another *incidental* function, as opposed to a *function* of the authority (p.70 A-E). Accordingly, a planning authority did not have an incidental power to charge for giving pre-application advice.

99. Section 13(2) of NERCA 2006 gives NE specific powers *inter alia* to enter into agreements, acquire or dispose of property, and to borrow money. Plainly, NE must be able to sue and to defend itself in litigation regarding such matters. Section 13 confers on NE a power to litigate which is incidental or conducive to its statutory functions generally. The question is whether the present claim falls within an incidental power to litigate in relation to any of NE's functions under the 2006 Regulations.

100. I begin with reg.30 of the 2006 Regulations. This gives NE a number of default powers. For example, it may enter and inspect land to ascertain whether regs. 4 or 9 have been breached, or whether an offence has been committed under regs. 22 to 24, 26 or 28, in connection with land (reg. 30(1)). A person authorised by the Secretary of State or NE, with reasonable grounds for suspecting that a person has committed an offence under reg.24 may enter premises occupied by that person and take copies of any relevant records (reg.30(2)). Where a remediation notice has not been complied with, an authorised person may enter the land, take the measures required and recover the expenses of so doing (reg.30(3)). A person who intentionally obstructs a person acting under the powers conferred by reg.30 is guilty of an offence (reg.30(7)). A civil sanction is also available under reg.30A in the form of a variable monetary payment.

101. If a landowner obstructs the lawful use of the powers in reg.30 are the remedies available to NE limited to prosecution for a summary offence or a civil penalty, or can it obtain an injunction to remove and prevent that obstruction?

102. On the authority of *London County Council v South Metropolitan Gas Company* [1904] 1 Ch 76, which NE cited to the judge, the answer is plainly that it can. In that case legislation required gas companies to provide places for the testing of the illuminating power and purity of their gas supply by examiners appointed by the local authority. The companies were required to give access to the examiners for that purpose. The legislation imposed a penalty for any company obstructing an examiner in the exercise of his duties. The Court of Appeal held that the London County Council was entitled to an injunction restraining the gas company from excluding their examiners from the testing stations. The authority had a sufficient interest to obtain an injunction as the "controlling authority", entrusted with the control and management of the stations, so that it could perform its duties under the legislation (pp.84-86). There was no suggestion

that the Council had an express power to obtain an injunction in such circumstances. It must have had an incidental power to do so.

103. In *R (Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] Env. L.R. 27 the statutory procedure for the modernising of the conditions of an "old mining permission" failed to give effect to the requirement for EIA in accordance with the relevant EU Directive. The CJEU relied upon the principle that a member state, including every organ of that state, is required to nullify the unlawful consequences of a breach of Community law. Thus, it was for each state to take, within the sphere of its competence and subject to procedural autonomy, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to carry out EIA. Such measures could include the revocation of a consent already granted ([64] to [67]).

104. In England the legislature has entrusted to NE as "the controlling authority", or regulator, an integrated set of measures under the 2006 Regulations in order to comply with the EIA Directive. Parliament has imposed on NE responsibility for a number of key functions, including:

- determining whether such a project should be subjected to EIA;
- taking enforcement action where a relevant uncultivated land project or restructuring project is carried out without a screening decision;
- obliging NE to consult other bodies and to require the applicant to provide any further information it considers necessary;
- requiring NE to take into account and assess all the environmental information provided in deciding whether to grant consent for the project;
- deciding whether any consent for the project should be subject to conditions;
- taking enforcement action where a person carries out a relevant project without complying with the EIA process and obtaining consent;
- ensuring that decisions to grant consent comply with The Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) and reviewing consents previously granted for the same purpose (regs.17, 21 and sched.4);
- requiring NE to notify the public of its decision on an application for consent and the full reasons therefor, in the interests of transparency;
- taking enforcement action by serving remediation notices and stop notices where a person has begun a relevant project in breach of regs.4 or 9;
- taking enforcement action for breaches of remediation notices or stop notices;
- responding to appeals to the Secretary of State against its decisions.

105. In *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775 Lord Woolf MR said at [25] that it is rare for a statute to provide expressly that a particular public body

may institute proceedings to protect specific public interests. This is usually a matter of implication. If a public body is given responsibility for performing public functions in a particular area, it will usually be implicit that it is entitled to apply for an injunction to protect its special interest in the performance of those functions (see [123] below). *London County Council* was such a case.

106. In my judgment, this principle applies to the responsibilities for the protection of the environment under the 2006 Regulations which Parliament has entrusted to NE. Section 13(1) of NERCA 2006 confers an incidental power on NE to apply for an injunction to protect its interest in the discharge of those responsibilities, or functions.

107. At several points the judge considered NE's application as being for an injunction in aid of the criminal law, citing *Attorney General v Chaudry* [1971] 1 WLR 1614. At [266] he said that such an application cannot be regarded as conducive or incidental to a criminal prosecution because those proceedings have failed to prevent the commission of the offence. The prosecution has been concluded. The injunction would simply be "consequential."

108. I respectfully disagree with the judge. First, the basis accepted in *London County Council* and in *Broadmoor* for the grant of an injunction in the present type of case is not confined to providing support for the criminal law. It is a broader jurisdiction in support of a regulatory scheme. Moreover, an injunction in aid of the criminal law may be granted where the criminal offence does not form part of any regulatory scheme (see e.g. *Attorney General v Harris* [1961] 1 QB 74). Second, even where a claimant seeks an injunction in aid of the criminal law, it is no longer necessary to show a history of flagrant breaches. For example, an injunction may be justified because there is evidence that the defendant intends to persist in his offending unless restrained by the court, notwithstanding the possibility of criminal sanctions, or an injunction may be necessary in an urgent case to prevent serious, irreparable harm (*Kirklees Metropolitan Borough Council v Wickes Building Supplies Limited* [1993] AC 227, 269G to 270B). Third, NE's functions under the 2006 Regulations are not limited to taking enforcement action against past offences. Fundamentally they are concerned with securing compliance with the requirements for EIA and consent. Some of the functions are forward-looking, for example, screening decisions, screening notices (under reg.6), scoping opinions, the obtaining of adequate information for decision-making, stop notices, remediation notices and enforcement undertakings. To say that NE's claim was simply consequential upon a concluded prosecution, and therefore was not incidental to a function, involves far too narrow a view of the regulatory scheme. Even where previous prosecutions have failed to deter continued offending, the application for an injunction is designed to secure direct compliance with relevant statutory requirements in future, thereby discharging NE's regulatory function under the scheme created by Parliament.

109. Similarly, I am unable to accept the judge's assertion (at [271] to [274]) that because the 2006 Regulations provide what he describes as "exhaustive sanctions" for contraventions (namely criminal offences, civil sanctions and a power to accept an enforcement undertaking) a power to sue for an injunction could not be incidental to the functions of, for example, making screening decisions, granting consent and serving stop and remediation notices. That does not follow at all.

110. At [272] and [276] the judge said that NE's claim for an injunction assumed the existence of a "freestanding power". But that was simply the consequence of his earlier

conclusion that the claim was not incidental to any function of NE for the purposes of s.13(1) of NERCA 2006. With respect, his reasons for reaching that conclusion were unsound, and likewise his view that the claim assumed the availability of a freestanding power.

111. The judge's third basis for saying that NE had no power to bring the claim for an injunction was set out at [277] to [279].

112. At [277] the judge considered that the inclusion of an express power to institute criminal proceedings points against NE *impliedly* having "a power to bring its own civil proceedings". But the issue before the Court was only whether, by virtue of s.13, NE has a power incidental to one or more of its functions to claim the injunction sought against Mr Cooper. The judge has suggested that by implication NE has no power to bring "civil proceedings" at all because of the inclusion of s.12(1). That cannot possibly be right (see [99] above).

113. The judge thought it significant that Parliament chose not to confer on NE a power of the kind set out in s.222 of the LGA 1972 (see [80] above). But as I explain at [117] below, a power such as s.222 overcomes any issue about an authority's *standing* to bring a claim to enforce a public right, which would otherwise have to be the subject of a relator claim. Accordingly, it has nothing to do with the issue whether that authority has an incidental power to seek an injunction.

114. For all these reasons, I accept NE's submission that it had an incidental power under s.13(1) of NERCA 2006 to bring the claim for an injunction in this case.

**Whether NE has standing to seek the injunction**

115. Section 37(1) of the Senior Courts Act 1981 deals with the general power of the High Court to grant injunctions in these terms:

> "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

116. In *Gouriet v Union of Post Office Workers* [1978] AC 435 the House of Lords addressed the question of standing to obtain an injunction to enforce public rights. The starting point was that public rights are vested in the Crown and in general such rights can only be enforced by the Attorney General representing the public. A private individual could not do so unless either he could show special damage beyond that suffered by the public in general, or he brought a relator action with the consent of the Attorney General. This would apply, for example, to an injunction in aid of the criminal law or to restrain a public nuisance (pp. 481, 494, 508-511, 518-9).

117. *In Stoke on Trent City Council v B & Q (Retail) Limited* [1984] AC 754 the House of Lords considered the power of a local authority to obtain an injunction to restrain Sunday trading in breach of the prohibition in the Shops Act 1950 and the related statutory offences. Lord Templeman restated the position at common law that a local authority had no standing to claim an injunction to enforce public rights except by a relator action brought with the consent of the Attorney General (pp. 770-771). But Parliament has intervened in certain cases to give standing to local authorities to apply

for such an injunction by conferring an express power to bring a claim "in their own name," thus making it unnecessary for them to seek to bring a relator action. Section 222 of the LGA 1972 is one such example (pp. 771 to 774).

118. *In London Dockland Development Corporation v Rank Hovis Limited* (1986) 84 LGR 101 the Corporation sought an injunction to restrain the defendant from demolishing a listed building. The claimant had been established as an urban development corporation under the Local Government, Planning and Land Act 1980. Within their area the Corporation had most of the powers of a local planning authority, including listed building control. But it did not have the power conferred by s.222 of the LGA 1972, or any equivalent power. Instead, it relied upon its general power, in particular to "generally do anything necessary or expedient for the purposes of the object or for purposes incidental to those purposes." That object was expressed in broad terms: "to secure the regeneration of their area." The Court of Appeal held that whereas those provisions would be sufficient to give the Corporation power to bring a relator action with the Attorney General's consent, they did not suffice to enable it to bring a claim to enforce public rights in its own name (pp.106-107). Thus, there was a distinction between the authority's power to litigate and its standing before the court.

119. The Court also rejected the Corporation's alternative argument that it had standing over and above that of a member of the public as a statutory body with a sufficient special interest of its own, namely the specific responsibilities conferred on it by Parliament to further its statutory purposes. The Court held that those purposes were expressed in terms which were too general to give the Corporation a specific entitlement to enforce public rights, distinguishing *London County Council.* In the latter case the authority had a specific duty to control and manage the testing stations and a right of access to enable that duty to be performed (pp. 107-108).

120. Even before the Proceeds of Crime Act 2002 the courts had accepted that a Chief Constable had standing to obtain an injunction freezing the assets of an accused which were thought to represent property obtained by criminal conduct. The Chief Constable had a duty to use his best endeavours to recover stolen property and return it to its rightful owner and, in pursuance of that duty, a right to seize goods which he had reasonable grounds to believe were stolen. That gave him a common law right or interest in the property sufficient to justify the grant of an injunction to him in his own name. There was no need for a Chief Constable to seek to bring a relator action (*Chief Constable of Kent v V*. [1983] CB 34; *Chief Constable of Hampshire v A. Ltd* [1985] QB 132).

121. In the *Broadmoor* case the hospital authority sought an injunction preventing a convicted patient from sending out copies of a book about other patients and the institution and requiring him to deliver up the book and any copies. Ultimately, the claim failed in the Court of Appeal. The judges differed on whether the hospital had an implied power to interfere in relation to the book and, even if it did, whether there was any interference with that power. But on the assumption that there was such a power, they were broadly in agreement that the hospital had standing to apply for an injunction without needing to rely upon the Attorney General to consent to a relator action.

122. Lord Woolf MR stated at [20]:

> "20. Usually, and probably invariably, if a person is entitled to be granted an injunction he will have the necessary standing to claim an injunction. Thus a party to a contract who is entitled to rely on a contract has sufficient standing to bring an action based on his rights under the contract, to seek an injunction. The situation is the same in tort. It is also true in relation to equitable rights. If you have an equitable right an injunction is available in support of that equitable right. Thus in *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210, 256E-F Lord Diplock pronounced his well known dictum that an injunction is available "in protection or assertion of some legal or equitable right which [the High Court] has jurisdiction to enforce by final judgment." That valuable dictum has, however, to be applied with a degree of caution. It is far from being an exhaustive statement of the extent of the court's powers to grant an injunction or as a guide as to who is entitled to bring proceedings to claim an injunction. The correct position is succinctly summarised in *Spry, The Principles of Equitable Remedies,* 5th ed. (1997), p. 323 in the following terms:
>
> > 'The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.' "

He went on to endorse the proposition that the jurisdiction to grant an injunction should not be confined to exclusive categories by judicial decision. [21] to [22].

123. After referring to the "generous" approach taken to standing in judicial review, Lord Woolf continued at [24] to [25]:

> "24. The broad approach on an application for judicial review is in accord with the approach of Lord Goff and Lord Nicholls but it must be recognised that it does not yet reflect the position in ordinary private law proceedings in the courts. In particular without the assistance of the Attorney-General, Mr. Gordon is right to submit that in general a member of the public is unable to bring private law proceedings and obtain an injunction to uphold public rights or to enforce public duties or to enforce the

criminal law: see *Gouriet v. Union of Post Office Workers* [1978] A.C. 435. He submits that here we are in the area, if any right is involved, of public law rights. Again, however, it must be recognised that the general rule states how the jurisdiction of the court will be exercised in practice rather than defining that jurisdiction which is statutorily codified by section 37 of the Supreme Court Act 1981. There can therefore be situations where in private law proceedings there are situations where the courts will recognise the ability of an individual to obtain injunctive relief even though the courts will be intervening to protect a public duty. Thus, in *Chief Constable of Kent v. V* [1983] Q.B. 34 this court recognised the standing of the Chief Constable to obtain an injunction to prevent the dissipation of assets which the police had a public law duty to preserve pending the resolution of a criminal trial. Differing reasons were given by the members of the court for this conclusion and the approach of Lord Denning M.R. has been doubted in subsequent cases including *Chief Constable of Hampshire* v. A. Ltd. [1985] Q.B. 132. Nonetheless, the correctness of the result in that case has not been doubted. The justification for the decision in my view is the fact that the Chief Constable has a special responsibility for the enforcement of the criminal law.

25. *In Chief Constable of Kent v. V* [1983] Q.B. 34, the Chief Constable was not in a position to rely on any statute. A statute can expressly authorise a public body to bring proceedings for an injunction to support the criminal law. This is the position under the Local Government Act 1972: section 222. In relation to many statutory functions the power to bring proceedings can be implicit. The statutes only rarely provide expressly that a particular public body may institute proceedings in protection of specific public interests. It is usually a matter of implication. If a public body is given responsibility for performing public functions in a particular area of activity, then usually it will be implicit that it is entitled to bring proceedings seeking the assistance of the courts in protecting its special interests in the performance of those functions. The position is analogous to that which exists where a member of the public suffers special damage in consequence of a public wrong. Mr. Gordon submits this wider jurisdiction is confined to the grant of a declaration and it is correct that most of the examples where a statutory body has been granted relief are cases where what was being sought was a declaration. However, once it is recognised that the public body has standing, then I can see no reason why the remedy available to the public body should be confined to a declaration and not extend also to an injunction. Of course, the court may be more prepared to grant a declaration than an injunction as a matter of discretion but the decision will then not turn on a lack of standing or an absence of jurisdiction. I would therefore summarise the position by stating that if a public body is given a

> statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with its performance of its public responsibilities and the courts should grant such an application when 'it appears to the court to be just and convenient to do so.' "

124. At [26] Lord Woolf rejected the defendant's attempt to draw a distinction in this context between duties and powers. He said that the authority had duties for example to treat patients and maintain the security of the hospital. As a consequence it had implicit rights or powers. Once the authority has decided that it should exercise a power, it became under a duty to exercise that power and it had a right to do so. Although these were matters of public law, not private law, that did not affect the entitlement of the authority to seek an injunction or the court's jurisdiction to grant it.

125. On the issue of standing Morritt LJ (as he then was) said at [50]:

> "50. Had I reached a different conclusion on whether the requisite power could be implied I would, in agreement with Lord Woolf M.R. on this point, have concluded that it could be enforced by Broadmoor. 1 would have rested my conclusion on the simple ground that if Parliament is to be treated as having conferred the power then it must also have intended that Broadmoor might enforce it. In my view the power would be in the nature of a statutory right conferred on a particular person or class of person to be exercised as occasion required in the performance of their statutory functions. Powers have commonly been conferred on statutory undertakings, such as railway or canal companies, entitling them to go on the land of another for some purpose. So far as I am aware it has never been suggested, let alone decided, that such undertakings may not enforce such a right by injunction if necessary. By parity of reasoning if Broadmoor has the right to require the defendant to deliver up the manuscript of his book and all copies of it in his possession or control or to prevent publication of it and needs an injunction to enforce it I can see no reason for denying the requisite jurisdiction to grant it."

126. At [55] Waller LJ agreed with Lord Woolf's formulation on standing at the end of [25].

127. The decision in the *London County Council* case that the authority had standing to obtain the injunction granted, without having to resort to a relator action, is in line with the principles stated in *Broadmoor*. The same is true of the decision of Fancourt J in *Solicitors Regulation Authority v Khan* [2021] EWHC 3765 (Ch) at [18], [55] and [60].

128. Both the Privy Council and the Supreme Court have recently reviewed the ways in which the scope of the court's jurisdiction to grant an injunction has become broader over time (*Convoy Collateral Limited v Broad Idea International Limited* [2023] AC 389 and *Wolverhampton City Council v London Gypsies and Travellers* [2024] AC 983). In *Convoy* at [57] the Privy Council endorsed Lord Woolf's approval of the

passage he cited from Spry in *Broadmoor* at [20]. The Supreme Court did likewise in *Wolverhampton* at [17] and [148]. No doubt has been cast on the correctness of the principles on standing in *Broadmoor*.

129. In the present case NE does not stand in the same position as a member of the public, for example Mr. Gouriet seeking to enforce the criminal law by restraining the commission or repetition of criminal offences. Instead, Parliament has imposed on NE responsibilities as the regulator under the 2006 Act in a series of specific, interlocking provisions. NE has not brought its claim simply in order to give effect to a broad general purpose of the kind which in the *LDDC* case was found to be insufficient to provide standing. NE is responsible for securing that relevant EIA projects are subjected to the EIA process leading to a decision on whether they should be given consent to proceed. NE is also given specific responsibilities for enforcing that regime. The statutory scheme is sufficient to give NE standing to seek an injunction of the kind sought in the present case to secure compliance with the 2006 Regulations, without having to invoke the assistance of the Attorney General.

## Ground 2

130. In view of the conclusions I have reached on ground 1, it is unnecessary to decide ground 2. In particular, it is unnecessary to determine the overall ambit of the word "landscape" in s.2 of NERCA 2006. However, I am doubtful about the judge's approach to the meaning of the word "landscape". It seems to me that it was too narrow in that he excluded any sub-surface archaeology which has no visual effect on topography or the surface of the landscape.

131. NE's general purpose is concerned with the conservation, enhancement and management of the natural environment (s.2(1)). It includes "promoting nature conservation", which includes the conservation of geological or physiographical features (s.30(1)). NE's purposes are not, therefore, limited to what takes place on the surface of the land. Biodiversity may be affected by what is occurring below the surface. A purposive approach is often applied to language concerned with environmental protection.

132. The Oxford English Dictionary gives a range of meanings for the word "landscape", which include a tract of land with its distinguishing characteristics and features, especially (but not only) considered as a product of modifying or shaping processes and agents. Such agents may be natural or, as one example confirms, "the works of man may express themselves in the cultural landscape."

133. There is therefore a historical component to our understanding of landscape which does not have to be perceptible to the eye. For example, the site of a historic battlefield may have significance as part of the landscape without being visible as such.

134. In his evidence, which the judge accepted, Mr. Parry referred to the thousands of microliths on the surface of Mr. Cooper's land, which could indicate the presence of "a hunter-gatherer settlement from the Mesolithic period" (or the later Neolithic period) [105]. Investigation of "the surviving horizon" beneath the plough zone might reveal features from these periods such as pits or fires [104].

135. However, I do not think that it would be appropriate to determine ground 2 of this appeal without further argument.

**The respondent's submissions**

136. Mr. Cooper submitted that NE had not carried out its duties pursuant to the 2006 Regulations properly. A decision on whether to grant his application for consent should have been taken by 23 December 2013. Presumably he has in mind the timescale set under reg.16(4). By reg.16(5) NE is obliged to reach a decision within a reasonable period of time from the date on which it is given all the information it is required to consider. Mr Cooper says that NE was not entitled on 18 December 2013 to require him to provide more information under reg.13 once consultation under reg.12 had begun.

137. With respect to Mr. Cooper, this argument is incorrect. Regulation 13, whether in its original or current version, enabled NE to ask for additional information after initiating the consultation process in reg.12. There is no legal basis in this appeal for criticising NE in relation to the information it required Mr. Cooper to produce.

138. Mr Cooper appeared to complain that the costs of the survey work which NE requires him to undertake is unduly burdensome for a farmer operating a relatively small farm. This point does not appear to have been taken in the High Court, or decided by the judge. In any event, it is not the subject of a Respondent's Notice and has not been the subject of submissions. Whether this is a point which may be pursued, and if so by what route, is a matter which must be left to a case in which the issue arises.

139. Mr. Cooper submits that NE is acting improperly by seeking an injunction in order to bypass the 2006 Regulations. Instead, they should have prosecuted him under reg.22 for carrying out an activity without consent, in breach of reg.9. He says NE has not done so because it does not have a proper case upon which to base a prosecution. There is no merit in this point. NE has served remediation notices and a stop notice. His appeals against the notices have been dismissed. In this instance the notices were served on the basis of a breach of reg.9. Mr Cooper has been convicted under reg.26 for contravening a stop notice. The fact that a prosecution was not pursued under reg.22 is of no significance.

140. Mr. Cooper contends that the injunction should not be granted because it clashes, or is inconsistent, with the terms of his tenancy. Under clause 11 all archaeological specimens and artefacts are reserved to the NT as landlord. He points to the ability of the NT to grant its consent to certain works under clause 56 or clause 57. So, for example, the NT's consent is required if the tenant wishes to "break the surface of the ground covering the sites of any archaeological or other monuments…". This led to the judge saying that if he had granted a permanent injunction, the prohibition on cultivation would cease to apply in the event of, and in so far as, the NT granted a consent under clause 57(a)(viii) of the tenancy agreement to cultivation affecting archaeological remains.

141. With respect that approach is untenable. The terms of the tenancy agreement only create private rights as between landlord and tenant. The 2006 Regulations have been enacted in the public interest. They create public law obligations and rights. They are not subject to the provisions of any individual tenancy agreement, such as the one granted by the NT to Mr. Cooper. NE is entitled to an injunction for the purpose of enforcing the

consenting regime in the 2006 Regulations. Accordingly, there is no legal justification for making that order subject to any consent which might be granted under clause 57 of the tenancy agreement.

142. Mr. Cooper points to his obligations under the tenancy agreement to farm and manage his holding in accordance with good husbandry (clause 25) and to maintain any quotas available for the holding (clause 54). He says that the 67ha of land he farms is relatively small and that if 40% of that area cannot be put to arable use, the farm will not be viable. He stands to lose the farm that he has worked for many years, along with the family home.

143. It should be recalled that NE has not said that the survey work which Mr. Cooper has to carry out, so that his application for consent may be determined, will necessarily result in NE refusing that consent. According to NE, one possible outcome is that it may approve arable farming using particular techniques. In any event, the potential adverse consequences for the farm and Mr Cooper's family do not entitle him to defeat the enforcement of the requirements of the 2006 Regulations.

144. Ironically, Mr. Cooper goes on to say that NE should have applied for a mandatory injunction requiring him to carry out the surveys and provide the information which they require, rather than an injunction preventing cultivation. But the position remains that he is not entitled to cultivate the land without obtaining consent under reg.16 or on appeal under the 2006 Regulations. That process is dependent upon Mr. Cooper providing the information required by NE since December 2013.

**Exercising the discretion to grant an injunction**

145. But for his conclusion that NE lacked power and standing to obtain the relief sought, the judge would have granted a permanent injunction. That is undoubtedly the right outcome in all the circumstances of this case. Mr. Cooper has not advanced any point which could justify a refusal of an injunction by the court. The judge was entitled to find that Mr Cooper has made it plain that, in the absence of that injunction, he would persist in cultivating the land in breach of the 2006 Regulations, notwithstanding the availability of criminal sanctions (see [88] above). Accordingly, there is no need for this matter to be sent back to the High Court for a further hearing before a permanent injunction can be granted.

146. It also follows that there is no need to consider in the present case the principles which should guide a court when deciding whether a regulatory body such as NE should be granted an injunction in any particular case in order to give effect to its statutory responsibilities. We have not heard argument on this important point, which must await a case in which that matter needs to be decided.

**Conclusion**

147. For the above reasons, I would allow the appeal and grant the permanent injunction sought by NE.

**Lord Justice Males**

148. I agree.

## Lord Justice Coulson

149. I also agree.