IN THE UPPER TRIBUNAL **Appeal No. MISC/2242/2018**
ADMINISTRATIVE APPEALS CHAMBER

Appellant: **Natural England**

Respondent: **Julian Edward Warren**

DECISION OF THE UPPER TRIBUNAL

UPPER TRIBUNAL JUDGE K MARKUS QC

Date of decision: 2 October 2019

ON APPEAL FROM:

Tribunal: **The First-tier Tribunal (General Regulatory Chamber)**
Tribunal Case No: **NV/2018/0006**
Decision Date: **13 July 2018**

This front sheet is for the convenience of the parties and does not form part of the decision

IN THE UPPER TRIBUNAL **Appeal No. MISC/2242/2018**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber)(Environment)

Between:

NATURAL ENGLAND

Appellant

- and –

JULIAN EDWARD WARREN

Respondent

Before: Upper Tribunal Judge K Markus QC

Hearing venue: The Rolls Building
Hearing dates: 3, 4, 5 July 2019
Decision date: 2 October 2019

Representation:
Appellant: Mr James Maurici QC and Mr Carl May-Smith, instructed by Browne Jacobson LLP
Respondent: Mr Robert McCracken QC and Mr Sebastian Kokelaar, instructed by Birketts LLP

DECISION

The appeal is allowed.
The Respondent's cross-appeal is dismissed.

The decision of the First-tier Tribunal made on 13 July 2018 under number NV/2018/0006 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 **I set that decision aside and remit the case to the First-tier Tribunal for reconsideration** in accordance with the following directions.

Directions

Upon the Appellant undertaking not to prosecute Mr Warren for breach of the stop notice dated 5th January 2018 pending its variation by the First-tier Tribunal in accordance with the directions below, insofar as he limits his activities to those specified in direction 4 below:

1. The appeal is to be reconsidered by a judge and either one or two members with substantial experience of environmental matters.

2. The judge should not be the same judge who considered the appeal previously.

3. The papers in this appeal are to be placed before a judge of the First-tier Tribunal as a matter of urgency for consideration of case management directions for the progression of this appeal.

4. As soon as possible on receipt of these directions the First-tier Tribunal must vary the stop notice dated 5th January 2018, by adding the following to Schedule 1:

> Save that, until the determination of this appeal or further direction by the First-tier Tribunal, the following activities are permitted:
>
> a. The release of no more than 3,060 pheasants on the SSSI in any calendar year;
>
> b. The release of no more than 2,000 partridge on or within 500 metres of the SSSI in any calendar year;
>
> c. Carrying out of shooting activities on the SSSI on no more than 24 days per shooting season (a day meaning any part of a calendar day); and
>
> d. Use of vehicles on the SSSI for the purpose of shooting activities on no more than 24 days per shooting season and at no other times of the year, except insofar as is necessary for gamebird welfare and pest control related to the levels of activity above. Vehicles are to be used on existing tracks only.

REASONS FOR DECISION

Contents

Introduction

1. This is an appeal brought by Natural England against the decision of the First-tier Tribunal ('First-tier Tribunal') by Mr Julian Warren against a stop notice dated 5th January 2018 ('the stop notice') which was served on him by Natural England.

2. Natural England is the government's statutory adviser for the natural environment in England. It was established under the Natural Environment and Rural Communities Act 2006 ('the NERC'). Section 2(1) of the NERC provides that "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". Natural England has a number of enforcement functions including service of stop notices which, in bare outline, prohibit a person from carrying on a specified activity or activities which are believed to be seriously harmful to the environment.

3. Mr Warren runs a commercial shoot on the Blythburgh Estate at Walberswick in Suffolk ("the Estate"). He has held shooting rights on the Estate since 2005. A significant part of the Estate is comprised within the Minsmere and Walberswick Heaths and Marshes Site of Special Scientific Interest ("the SSSI"). A designated SSSI is recognised as a representative sample of the best sites for flora, fauna, geology and physiography in England, as explained further below.

4. Parts of the SSSI, including areas affected by Mr Warren's activities, are also within the Minsmere and Walberswick Heaths Special Conservation Area and the Minsmere – Walberswick Special Protection Area. These are "European Sites" as defined by the Habitats Regulations 2017 and are strictly protected under the Habitats and Wild Birds Directives both of which are discussed in more detail below. Other national and international designations also apply to the affected area, reflecting its environmental significance. Thus the site with which this appeal is concerned is of national, European and international importance in nature conservation terms.

5. Due to concerns held by Natural England regarding the impact of Mr Warren's activities on the site, and following various correspondence and meetings, Natural England served the stop notice. It was addressed to Mr Warren and read as follows:

> "Natural England reasonably believes that an activity carried on by you:
>
> - Is causing, or presents a significant risk of causing, serious harm to human health and/or the environment (including the health of animals and plants); and
> - Involves or is likely to involve the commission of a relevant offence.
>
> In that, the numbers of pheasant released within the Minsmere-Walberswick Heaths and Marshes SSSI and numbers of partridge released adjacent to but outside the boundary of SSSI presents a significant risk of causing serious harm to breeding and wintering bird assemblages, invertebrate assemblages and heathland vegetation communities that form part of the notified interest of the SSSI. Furthermore, the vehicle movements and shooting activity associated with the game shoot days within the SSSI are likely to result in disturbance to wintering bird assemblages and cause damage to vegetation communities forming part of the notified interest of the SSSI. This is likely to involve the commission of an offence under S28P Wildlife and Countryside Act 1981.
>
> Natural England has decided to stop you from carrying out these activities with immediate effect, until you have taken the steps to remove or reduce the harm or risk of harm specified in Schedule 1."

6. Schedule 1 specified the activities to be stopped: (i) release of pheasants within the SSSI; (ii) vehicle access and recreational activities (including game shooting) within the SSSI; and (iii) further releases of partridge within 500 metres of the boundary of the SSSI. The Schedule also specified the steps to be taken by Mr Warren to remove or reduce the harm or risk of harm. In respect of activities (i) and (ii) the steps were to "obtain Natural England's written consent to carry out, or cause of permit to be carried out any operation specified in the notification." In relation to activity (iii) the step was to "agree with Natural England the sustainable levels of partridge release and appropriate management of birds to avoid damage to the SSSI interest features".

7. Mr Warren's appeal to the First-tier Tribunal succeeded in part. The stop notice was varied to read as follows:

> **"A: The grounds on which Natural England relies in serving this stop notice are that:**
>
> (1) Natural England reasonably believes that some of the Appellant's activities present a significant risk of causing serious harm to the environment, in particular by harming the vegetation, invertebrates and other features of the heath and acid grassland habitats through impacts including (a) physical disturbance by birds and vehicles, and (b) soil enrichment by bird manure.
>
> (2) Natural England reasonably believes that some of the Appellant's activities are likely to involve the commission of an offence under s. 28P(6) of the Countryside and Wildlife Act 1981.
>
> **B: The Activities which must be stopped by virtue of this stop notice (until the Appellant obtains a Completion Notice, or the stop notice is withdrawn by Natural England) are:**
>
> (a) The release of pheasants within the SSSI over and above the previously agreed level of 3,060 birds per season;
>
> (b) Vehicular access within the SSSI which exceeds the previously agreed level of 24 days per season for game shooting, (but vehicular access on additional days is permitted where reasonably necessary for the purposes of securing the welfare of game birds and/or conducting predation control);
>
> **C: The steps to be taken to remove or reduce the harm or risk of harm are:**
>
> As soon as practicable, for the Appellant to make a formal application to Natural England under s. 28E of the Countryside and Wildlife Act 1981 for its consent to conduct any and all activities likely to impact the SSSI's notified features, other than those already permitted, as described above.

8. Natural England appealed to the Upper Tribunal on the following grounds:

> Ground 1: The First-tier Tribunal erred in deciding that the Habitats Regulations did not apply to it.
>
> Ground 2: The First-tier Tribunal failed to apply the precautionary principle to the test of significant risk of serious harm.
>
> Ground 3: The First-tier Tribunal erred in holding that the reasons specified in the stop notice were insufficient.

Ground 4: The First-tier Tribunal erred in holding that the steps specified in the stop notice were unlawful.

Ground 5: The First-tier Tribunal gave inadequate reasons for its decision.

9. Mr Warren disputed all grounds of appeal. In addition, he cross-appealed on the ground that the First-tier Tribunal ought to have found the stop notice to be a nullity. In that regard, he contended that the decision of the Upper Tribunal in *Forager Limited v Natural England* [2017] UKUT 0148 (AAC) is wrong.

10. The appeal was heard by me over two and a half days. I am grateful to all counsel for their clear written and oral submissions. Due to intervening holidays and other matters, it has taken me longer than usual to write this decision. At the end of the oral hearing, I had indicated to counsel that I would allow them to make written submissions as to disposal, and in particular as to the nature of any interim arrangements pending reconsideration by the First-tier Tribunal, should the appeal be allowed.

The legislative regime

Natural England

11. Natural England is established under the Natural England and Rural Communities Act 2006, section 2 of which provides:

> "**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,
>
> …
>
> (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.
>
> …"

Stop notices

12. The Regulatory Enforcement and Sanctions Act 2008 confers a power on Natural England to make stop notices. Section 46 provides:

> "46(1) The provision which may be made under this section is provision conferring on a regulator the power to serve a stop notice on a person.
>
> (2) For the purposes of this Part a "stop notice" is a notice prohibiting a person from carrying on an activity specified in the notice until the person has taken the steps specified in the notice.

(3) Provision under this section may only confer such a power in relation to a case falling within subsection (4) or (5).

(4) A case falling within this subsection is a case where–

(a) the person is carrying on the activity,

(b) the regulator reasonably believes that the activity as carried on by that person is causing, or presents a significant risk of causing, serious harm to any of the matters referred to in subsection (6), and

(c) the regulator reasonably believes that the activity as carried on by that person involves or is likely to involve the commission of a relevant offence by that person.

(5) A case falling within this subsection is a case where the regulator reasonably believes that–

(a) the person is likely to carry on the activity,

(b) the activity as likely to be carried on by that person will cause, or will present a significant risk of causing, serious harm to any of the matters referred to in subsection (6), and

(c) the activity as likely to be carried on by that person will involve or will be likely to involve the commission of a relevant offence by that person.

(6) The matters referred to in subsections (4)(b) and (5)(b) are–

(a) human health,

(b) the environment (including the health of animals and plants), and

(c) the financial interests of consumers.

(7) The steps referred to in subsection (2) must be steps to remove or reduce the harm or risk of harm referred to in subsection (4)(b) or (5)(b).”

13. Under s. 37(1)(a) and Schedule 5 of the 2008 Natural England is a designated regulator.

14. Section 38(1) provides that a “relevant offence” means an offence which

> “(a) in relation to which the designated regulator has an enforcement function, and
>
> (b) which is contained in an Act immediately before the day on which this Act is passed.”

15. The Environmental Civil Sanctions (England) Order 2010 is made under the above powers in the 2008 Act, Schedule 3 of which includes the following:

> “1. – Stop notices
>
> (1) The regulator may serve a stop notice on any person in accordance with this Schedule in relation to an offence under a provision specified in Schedule 5 if the table in that Schedule indicates that such notice is possible for that offence.

(2) A "stop notice" is a notice prohibiting a person from carrying out an activity specified in the notice until the person has taken the steps specified in the notice.

(3) A stop notice may only be served in a case falling within sub-paragraph (4) or (5).

(4) A case falling within this sub-paragraph is a case where

(a) the person is carrying on the activity,

(b) the regulator reasonably believes that the activity as carried on by that person is causing, or presents a significant risk of causing, serious harm to any of the matters referred to in subparagraph (6), and

(c) the regulator reasonably believes that the activity as carried on by that person involves or is likely to involve the commission of an offence under a provision specified in Schedule 5 by that person.

(5) A case falling within this sub-paragraph is a case where the regulator reasonably believes that—

(a) the person is likely to carry on the activity,

(b) the activity as likely to be carried on by that person will cause, or will present a significant risk of causing, serious harm to any of the matters referred to in sub-paragraph (6), and

(c) the activity as likely to be carried on by that person will involve or will be likely to involve the commission of an offence under a provision specified in Schedule 5 by that person.

(6) The matters referred to in sub-paragraphs (4)(b) and (5)(b) are –

…(b) the environment (including the health of animals and plants).

(7) The steps referred to in sub-paragraph (2) must be steps to remove or reduce the harm or risk of harm referred to in sub-paragraph (4)(b) or (5)(b)."

2.- Contents of a stop notice

A stop notice must include information as to—

(a) the grounds for serving the stop notice;

(b) the steps the person must take to comply with the stop notice;

(c) rights of appeal; and

(d) the consequences of non-compliance.

3.- Appeals

(1) The person on whom a stop notice is served may appeal against the decision to serve it.

(2) The grounds for appeal are—

(a) that the decision was based on an error of fact;

(b) that the decision was wrong in law;

(c) that the decision was unreasonable;

(d) that any step specified in the notice is unreasonable;

(e) that the person has not committed the offence and would not have committed it had the stop notice not been served;

(f) that the person would not, by reason of any defence, have been liable to be convicted of the offence had the stop notice not been served;

(g) any other reason.

4. – Completion certificates

(1) Where, after service of a stop notice, the regulator is satisfied that the person has taken the steps specified in the notice, the regulator must issue a certificate to that effect (a "completion certificate").

(2) The stop notice ceases to have effect on the issue of a completion certificate.

(3) The person on whom the stop notice is served may at any time apply for a completion certificate.

(4) The regulator must make a decision as to whether to issue a completion certificate within 14 days of such an application.

(5) The person on whom the stop notice was served may appeal against a decision not to issue a completion certificate on the grounds that—

(a) the decision was based on an error of fact;

(b) the decision was wrong in law;

(c) the decision was unfair or unreasonable;

(d) the decision was wrong for any other reason.

5.- Compensation

(1) A regulator must compensate a person for loss suffered as the result of the service of the stop notice or the refusal of a completion certificate if that person has suffered loss as a result of the notice or refusal and—

(a) a stop notice is subsequently withdrawn or amended by the regulator because the decision to serve it was unreasonable or any step specified in the notice was unreasonable;

(b) the operator successfully appeals against the stop notice and the First-tier Tribunal finds that the service of the notice was unreasonable; or

(c) the operator successfully appeals against the refusal of a completion certificate and the Tribunal finds that the refusal was unreasonable.

(2) A person may appeal against a decision not to award compensation or the amount of compensation—

(a) on the grounds that the regulator's decision was unreasonable;

(b) on the grounds that the amount offered was based on incorrect facts;

(c) for any other reason.

> 6. – Offences
>
> (1) Where a person on whom a notice is served does not comply with it within the time limit specified in the notice, the person is guilty of an offence and liable—
>
> (a) on summary conviction, to a fine not exceeding £20,000, or imprisonment for a term not exceeding twelve months, or both, or
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both.…"

16. The Schedule 5 offences (see Schedule 3, paragraph 1(4)(c) and 1(5)(c)) include offences contained in section 28P of the Wildlife and Countryside Act 1981 (as to which see below).

17. Article 9(c) of the Order provides that a regulator may "withdraw a … stop notice or amend the steps so as to reduce the amount of work necessary to comply with the notice".

18. Article 10 provides that an appeal under the Order is to the First-tier Tribunal. The powers of the Tribunal are set out in article 10(6) as follows:

> (6) The Tribunal may, in relation to…service of a notice—
>
> (a) withdraw the…notice;
>
> (b) confirm the…notice;
>
> (c) vary the…notice;
>
> (d) take such steps as the regulator could take in relation to the act or omission giving rise to the…notice;
>
> (e) remit the decision whether to confirm the…notice, or any matter relating to that decision, to the regulator."

The SSSI regime

19. The Wildlife and Countryside Act 1981 ('the 1981 Act') provides for SSSIs. Section 28(1) provides:

> "Where Natural England are of the opinion that any area of land is of special interest by reason of any of its flora, fauna, or geological or physiographical features, it shall be duty of Natural England to notify that fact-
>
> (a) to the local planning authority (if any) in whose area the land is situated;
>
> (b) to every owner and occupier of any of that land; and
>
> (c) to the Secretary of State.

20. Section 28(4) requires Natural England to specify in a notification any operations which it considers are likely to damage the flora or fauna by reason of which the land is of special interest. These operations are referred to as "operations likely to damage" or "OLDs".

21. Section 28E sets out the duties of the owner or occupier of land included in an SSSI. It includes the following provisions:

> "(1) The owner or occupier of any land included in a site of special scientific interest shall not while the notification under section 28(1)(b) remains in force

> carry out, or cause or permit to be carried out, on that land any operation specified in the notification unless—
>
> (a) one of them has, after service of the notification, given Natural England notice of a proposal to carry out the operation specifying its nature and the land on which it is proposed to carry it out; and
>
> (b) one of the conditions specified in subsection (3) is fulfilled.
>
> ...
>
> (3) The conditions are—
>
> (a) that the operation is carried out with Natural England's written consent;
>
> (b) that the operation is carried out in accordance with the terms of an agreement under section 16 of the 1949 Act, section 7 of the Natural Environment and Rural Communities Act…;
>
> (c) that the operation is carried out in accordance with a management scheme under section 28J or a management notice under section 28K."

22. There are also provisions for consent to be given subject to conditions or for a limited period, and for Natural England to withdraw or modify a consent. Reasons must be given for granting consent subject to conditions or for a limited period, for refusing consent or for withdrawing or modifying the consent.

23. Section 28F provides a right of appeal to the Secretary of State against a refusal of consent, or conditions upon or limitation of the period of a consent. By section 28F(2) if a consent application is not determined within four months, Natural England is treated as having refused consent and the appeal is determined on that basis.

24. Section 28P deals with offences, including the following:

> "(1) A person who, without reasonable excuse, contravenes section 28E(1) is guilty of an offence and is liable on summary conviction, or on conviction on indictment, to a fine;
>
> …
>
> (6) A person …who without reasonable excuse—
>
> (a) intentionally or recklessly destroys or damages any of the flora, fauna, or geological or physiographical features by reason of which land is of special interest, or intentionally or recklessly disturbs any of those fauna, and
>
> (b) knew that what he destroyed, damaged or disturbed was within a site of special scientific interest,
>
> is guilty of an offence and is liable on summary conviction, or on conviction on indictment, to a fine."

<u>The Habitats Directive and Habitats Regulations.</u>

25. An SSSI may also be a "European Site", which is defined in regulation 8 of the Habitats Regulations as including a Special Area of Conservation 'SAC') and a Special Protection Area ('SPA') within the Habitats and Wild Birds Directives respectively. Where a SSSI is also a "European Site" (as in the present case), there are further considerations in play.

The Habitats and Wild Birds Directives

26. The aim of the Habitats Directive (Council Directive 92/43 EC on the conservation of natural habitats and of wild fauna and flora) is set out in article 2:

> "1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.
>
> 2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.
>
> 3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics."

27. Articles 3 and 4 provide for the creation of a coherent network of special areas of conservation set up under the title Natura 2000 composed of sites hosting listed natural habitat types and habitats of species, to enable them to be maintained or restored at favourable conservation status in their natural range. Natura 2000 also includes special protection areas classified under Directive 2009/147/EC on the conservation of wild birds ('the Wild Birds Directive').

28. Article 6 of the Habitats Directive is of particular relevance in this appeal:

> "1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.
>
> 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is

protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

29. By virtue of Article 7, the obligations in Article 6(2), (3) and (4) also apply to SPAs classified under articles 4(1) or (2) of the Council Directive on the Conservation of Wild Birds, 79/409/EEC ('the Wild Birds Directive'). These are, in essence, areas subject to special conservation measures concerning their habitat for species that require protection.

The Habitats Regulations

30. The Habitats and Wild Birds Directives are transposed into domestic law by the Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations'). The Regulations refer to these as "the Directives" (Regulation 3(1)). The Regulations provide for classification and protection of "European sites", the definition of which includes special areas of conservation ('SACs') and special protection areas ('SPAs').

31. The Habitats Regulations impose obligations on various bodies: the "appropriate authority", "nature conservation body", "appropriate nature conservation body" and "competent authority. Regulation 3 defines the "appropriate authority" as the Secretary of State", and Natural England is the nature conservation body and appropriate nature conservation body in England. Regulation 7 defines "competent authority" as follows:

"7(1) For the purposes of these Regulations, "competent authority" includes—

(a) any Minister of the Crown (as defined in the Ministers of the Crown Act 1975(1)), government department, statutory undertaker, public body of any description or person holding a public office; …

(3) In paragraph (1)—

"public body" includes—

(a) the Broads Authority;

(b) a joint planning board within the meaning of section 2 of the TCPA 1990 (joint planning boards);

(c) a joint committee appointed under section 102(1)(b) of the Local Government Act 1972 (appointment of committees);

(d) a National Park authority; or

(e) a local authority, which in this regulation means—

(i) in relation to England, a county council, a district council, a parish council, a London borough council, the Common Council of the City of London, the sub-treasurer of the Inner Temple or the under treasurer of the Middle Temple;…

"public office" means—

(a) an office under the Crown,

(b) an office created or continued in existence by a public general Act or by legislation passed by the National Assembly for Wales, or

(c) an office the remuneration in respect of which is paid out of money provided by Parliament or the National Assembly for Wales."

32. Regulation 9 provides, so far as relevant:

> 9(1) The appropriate authority, the nature conservation bodies…must exercise their functions which are relevant to nature conservation…so as to secure compliance with the requirements of the Directives.
>
> (2) Paragraph (1) applies, in particular, to functions under these Regulations and functions under the following enactments—
>
> …(g) Part 1 (wildlife) and sections 28 to 28S and 31 to 35A of the WCA 1981 (which relate to sites of special scientific interest);
>
> …(k) the Natural Environment and Rural Communities Act 2006;…
>
> (3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions.

33. Natural England is one of the nature conservations bodies (regulation 5).

34. Regulation 10 imposes specific duties in relation to wild bird habitats having regard to the requirements of the Wild Birds Directive, without prejudice to the duty in Regulation 9.

35. Regulation 24 requires Natural England to assess the implications for European Sites of proposals for consent under section 28E of the Wildlife and Countryside Act, as follows:

> "24(1) Where it appears to the appropriate nature conservation body that a notice of a proposal under section 28E(1)(a) of the WCA 1981 relates to an operation which is or forms part of a plan or project which—
>
> (a) is likely to have a significant effect on a European site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> it must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.
>
> (2) In the light of the conclusions of the assessment, it may give consent for the operation only after having ascertained that the plan or project will not adversely affect the integrity of the site.
>
> …"

36. Regulation 63 provides for the assessment of implications for European sites in deciding whether to give any consent, permission or authorisation, as follows:

> "63(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

> (a) is likely to have a significant effect on a European site … (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
>
> (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.
>
> (4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site ….
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.
>
> …"

37. Regulation 64 permits the competent authority to agree to a plan or project notwithstanding a negative assessment, for imperative reasons of overriding public interest.

Background and the First-tier Tribunal's decision

38. Mr Warren holds shooting rights over an area of around 7500 acres, of which the Estate makes up between around 3500 and 4000 acres. 68% of the Estate is designated as an SSSI and also as a SAC and SPA. Mr Warren's evidence, as summarised in the First-tier Tribunal's decision, was that, across the whole area over which he enjoys shooting rights, he arranged 125 shooting days in each season, and released around 100,000 game birds over the entire area (60,000 red-legged partridges and 40,000 pheasants). He estimated that 75% of his shooting was done off the Estate. Mr Warren and his staff used vehicles to travel along farm tracks and by-ways which were also open to the public, and they also drove over heathland. However, as was pointed out in Mr Warren's skeleton argument for the hearing before me, his evidence in the First-tier Tribunal was that he drove over heathland only occasionally and his view was that it was done more often by others including Natural England staff.

39. There was a dispute between Natural England and Mr Warren as to whether there had been a dramatic increase in recent years in the number of birds released and consequently in activities such as shooting and the use of vehicles. The First-tier Tribunal explicitly did not resolve this dispute but noted that Natural England had consented to the release of 3060 birds and 24 shooting days. This was not in fact entirely accurate in that Natural England had not formally consented to those levels of activity, but the underlying point made by the First-tier Tribunal was correct in that Natural England's position was then and remains that those levels of activity were sustainable. Natural England's position before the First-tier Tribunal had been that it was nonetheless necessary to stop *all* levels of activity until consent had been obtained, in essence because it considered that Mr Warren could not be trusted to limit his activities to sustainable levels. However, by the time of the appeal in the Upper Tribunal Natural England accepted that there was no lawful basis on which it could prevent Mr Warren from carrying out what it accepted were sustainable levels of activity.

40. The SSSI notification relating to the Estate included the following "OLDs":

> "9 The release into the site of any wild, feral or domestic animal*, plant or seed.
>
> 10 The killing or removal of any wild animal*, excluding pest control.
>
> …
>
> 22 Storage of materials.
>
> 23 Erection of permanent or temporary structures, or the undertaking of engineering works, including drilling.
>
> …
>
> 26 Use of vehicles likely to damage the vegetation or disturb wildlife.
>
> 27 Recreational or other activities likely to damage the vegetation or disturb wildlife.
>
> 28 Changes in game and waterfowl management and hunting practice.
>
> * 'animal' includes any mammal, reptile, amphibian, bird, fish or invertebrate"

41. The substantive content of the stop notice served by Natural England is set out at paragraph 5 above.

42. The First-tier Tribunal hearing took place over two days before a judge sitting alone. The tribunal received a witness statement from Mr Warren and from an expert witness instructed on his behalf, Dr Draycott, who was an employee of the Game and Wildlife Conservation Trust ('GWCT') and had an MSc in Land Resource Management and a PhD in pheasant ecology and management. The Tribunal also received witness statements from four employees of Natural England: Emma Hay (Lead Conservation Adviser), Adam Burrows (Senior Reserve Manager), Ivan Lakin (Specialist Ornithologist) and Dr Isabel Alonso (Senior Heathland Specialist and a recognised expert on lowland heath in the UK). All of these witnesses had impressive expert credentials which were set out in their witness statements. The tribunal was also provided with a considerable body of documentary evidence including correspondence, maps, scientific

studies, legal documents and other materials. All of the witnesses gave oral evidence at the hearing.

43. The tribunal set out its approach to Natural England's witnesses' evidence at paragraph 43:

> "none of Natural England's witnesses has the status of an expert witness in this appeal. This is because they are employed by a party and so lack the requisite independence. Nevertheless, I readily acknowledge their professional standing and/or their knowledge of the SSSI in question. I am willing to admit their opinion evidence and I shall give such weight to it as I consider appropriate in the circumstances. Rule 15(2)(a)(i) permits me to admit evidence which would not be admissible in a civil trial."

44. The First-tier Tribunal explained that its approach in this appeal was that of its general approach in regulatory appeals, which was for the tribunal to stand in the shoes of the regulator and take a fresh decision on the evidence, giving appropriate weight to the original decision-maker's decision. This was the approach to stop notice appeals taken by the Upper Tribunal in *Forager* (see paragraph 9 above). The tribunal also noted that, in *Forager,* the Upper Tribunal had approved the following approach to the statutory threshold of "significant risk of serious harm":

> "We consider that the expression "serious harm" falls to be given its ordinary meaning. In deciding whether there is present a significant risk of serious harm it is plainly relevant to have regard to the nature of the object which is contended would be so harmed. The greater the importance of the object (as recognised by both domestic and international legislative criteria) the greater will be the scope for applying the "precautionary principle" in determining whether activities should be regarded as posing a material or significant risk of serious harm …"

45. As for the weight to be given to the original decision, the tribunal followed the approach of the Court of Appeal in *R (Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31:

> ""careful attention" should be paid to the reasons given by an original decision-maker, bearing in mind that Parliament had entrusted it with making such decisions. However, the weight to be attached to the original decision when hearing an appeal is a matter of judgment for the Tribunal, "taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given in the appeal"."

46. The tribunal summarised the evidence that it had seen and heard, and counsels' submissions, followed by its conclusions. It rejected the submission on behalf of Mr Warren that, if the notice were found to be deficient, it should be declared null and void, following instead the Upper Tribunal's decision in *Forager* that the First-tier Tribunal may cure a deficient stop notice by amending it.

47. The tribunal went on to find that the stop notice was deficient in two respects. First, it was insufficiently precise to meet the required standard of reasons. In this regard the tribunal said:

> "85. There is in my view some similarity to be found between a stop notice and the type of Notice served under Health and Safety legislation in *BT Fleet Ltd v*

McKenna [2005] EWHC 387 (Admin) [1][13] . In that case, Mr Justice Evans-Lombe considered that recipients of such notices were entitled to know what was wrong, why it was wrong, and that the notice itself had to be clear and easy to understand. Further, he concluded that where a statute provided an option for the statutory authority to prescribe how a recipient could comply with the notice, any directions given as to compliance formed an integral part of the notice and, if confusing, could serve to make the notice invalid.

86. I also note that in *R (Johnson) v Professional Conduct Committee of the Nursing and Midwifery Council* [2008] EWHC 885 (Admin), Mr Justice Beatson considered that Article 6 ECHR required that allegations of professional misconduct must be particularised sufficiently to enable the person charged to know, with reasonable clarity, the case they have to meet in order to prepare their defence. That seems to me to be an analogous situation to the service of the stop notice on Mr Warren.

87. I consider that the same basic principles of fairness should be applied to the drafting of a stop notice. Applying that standard, I find that the stop notice in this case was insufficiently precisely drafted to meet the test of clarity set out in the case law to which I have referred. In reaching that conclusion, I note the disparity between the details of the Respondent's case as to "*significant risk of serious harm*" given in the stop notice itself and that given in its pleadings to the Tribunal. I consider that the latter contains the appropriate degree of detail to meet the test of fair notice to the Appellant but that the former does not meet that test. It seems to me that a schedule should have been attached to the stop notice which made the Respondent's grounds for serving it sufficiently clear for the Appellant to understand the case he had to meet. I do not consider that it is sufficient to suggest that he knew about Natural England's the concerns from previous correspondence. I conclude that the stop notice served in this case was unreasonable in failing to specify sufficiently clearly the basis on which it was served.

48. The second deficiency found by the tribunal was that the steps required to be taken by Mr Warren were not reasonable. The tribunal said:

"88. I am also concerned about the drafting of the "steps" in this stop notice. I accept the basic thrust of Mr Kokelaar's submissions as to the unfairness of the drafting but I express the concern slightly differently. If the Appellant makes a formal application for consent to his activities, then Natural England must determine it, directing itself appropriately as the relevant statutory body. It will be open to Natural England to accept or reject the application for consent, but if it is rejected, then Mr Warren can exercise his right of appeal to the Secretary of State. That is the process established by Parliament. However, if the requirement is for Mr Warren "*to obtain Natural England's consent*" to his proposed activities, then a process entirely lacking in procedural formality is set in train. Imposing such a "*step*" in a formal notice, whilst perhaps well meaning, could place the Appellant in the Kafka-esque position of endlessly trying to obtain consent without being able to trigger Natural England's statutory duty to determine his application and so to engage his route of appeal to the Secretary of State. I do not regard the

"steps" in this stop notice as reasonable because they have the effect of depriving Mr Warren of due process and of his formal rights."

49. The tribunal concluded that there was no lawful basis to prohibit the activities which Natural England had (as the tribunal thought) consented to, that being the release of 3060 pheasants and 24 shooting days. It then went on to consider whether there was a significant risk of serious harm arising from the activities over and above those levels, and set out its reasoning and conclusions as follows:

"94. In considering whether there is a significant risk of serious harm in this case, I have considered all the evidence relating to activities over and above the historic levels agreed to by Natural England. I found the approach of Natural England's witnesses in many respects unsatisfactory. They did not apparently obtain the advice of their experts until after the stop notice had been served. The risks they described contained, in most respects, insufficient analysis of the conservation gains available as a result of the Appellant's activities. They repeatedly failed to differentiate the full range of possible contributing factors where a risk was identified, for example in relation to visitor numbers generally rather than only those associated with the shoot. They did not appear to have approached their calculations taking into account the factors which Dr Draycott identified as essential at paragraph [34] above.

95. In reviewing the weight of evidence, I also found it unhelpful that Natural England's witnesses frequently did not address themselves in their witness statements to the statutory threshold for serving a stop notice. Their assessments of the risk of harm were often put into colloquial terms which it is difficult to correlate to the statutory test, as follows: " *we suspect that…"* (Hay) *; "…potentially adversely affecting…"* (Hay); *"may ultimately affect the viability…"* (Burrows); *"may also be a contributory factor…"* (Burrows); *"I remain concerned that …is having an effect"* (Burrrows); *"I postulate that…"* (Lakin); *"on balance, a detrimental impact…"* (Lakin). I was concerned that Ms Hay appeared to be applying a reverse burden of proof at paragraph [54] above.

96. I am grateful to Dr Alonso for addressing so directly the statutory test in her evidence repeated at paragraphs [60] to [62] above. She very fairly acknowledged that there is a paucity of scientific studies directly concerned with the risk factors she had considered and that it had been necessary for her to reach her conclusions by extrapolating from studies which were designed to investigate different issues. Nevertheless, I found her opinion as the only heathland specialist to give evidence in this case cogent and compelling as to a significant risk of serious harm arising from the changes to the habitat brought about by disturbance and soil enrichment. She was able to supplement her evidence of the theoretical risk in these respects with first-hand evidence of the "*greening*" effect she had observed to be taking place in unit 20 outside of a pheasant pen and her own research into the "*critical load*" at the site. She also gave first-hand evidence of vehicle disturbance. I take int account the importance that she attributed to preserving the heathland, both for its intrinsic value as a primary reason for the notification of the site and also as a habitat for the species she identified. I also take into account here Mr

> Lakin's evidence about the importance of heathland as a habitat for the Nightjar and Woodlark populations. I note Dr Alonso's evidence was that the degradation of heathland may take time to become apparent and I am grateful to Mr Kokelaar for referring me to Case C-282/15 *Queisser Pharma GmbH & Co KG v Bundesrepublik Deutschland,* in which the ECJ approved the taking of protective measures in accordance with the precautionary principle without having to wait until the reality and seriousness of those risks were fully demonstrated, so long as the assessment of the risk was not based on purely hypothetical considerations. I consider that Dr Alonso's evidence of the risk of greening is consistent with this approach.
>
> 97. I note that Dr Draycott is not a specialist in heathlands. However, he did not disagree that the risks of disturbance and soil enrichment were present, although he said he could not assess their seriousness. In all other respects I prefer his evidence about the level of risk arising to the SSSI from the Appellant's activities to the evidence of Natural England's witnesses. I accept that there are risks, but, apart from Dr Alonso's evidence about the heathland, I am not persuaded that any of the risks identified by Natural England passed the statutory threshold for serving a stop notice. I conclude that the part of the Respondent's case which related to the risk of "*harm to vegetation, invertebrates and other features of the heath and acid grassland habitats through impacts including (a) physical disturbance by birds and vehicles (b) soil enrichment by bird manure*" is proven to the civil standard by Dr Alonso's evidence.
>
> 98. This conclusion leads me to the position of confirming the stop notice in one respect only, and varying it. In so doing, I consider that the *"precautionary principle"* is met in relation to this important and sensitive site. I am not persuaded that the Tribunal itself is bound by the Habitat Regulations. It seems to me that the *Hope and Glory* approach to appeals provides the answer to that issue in that I must give due respect to the decision of a primary decision-taker which is itself bound to consider those principles.
>
> 99. In considering how I should vary the stop notice, I have adopted the approach of making clear to the Appellant what the risk of harm is, what he must stop doing as a result, and how he can put things right. I have also adopted what I regard as a proportionate approach in allowing the Appellant access to the site for the purposes of game bird welfare (feeding, watering, medical attention) and predator control activities. I do not regard a blanket ban as reasonable where it is acknowledged that there is a conservation benefit in these activities continuing."

50. The stop notice as varied by the tribunal is set out at paragraph 7 above.

Discussion and conclusions

Ground 1: the applicability of the Habitats Directive and Regulations to the First-tier Tribunal

51. Mr Maurici accepted that, if Natural England's appeal succeeded on grounds 2 and 5, he did not need to rely on Ground 1. He submitted that I should nonetheless determine the ground because it involved an important point of principle on which the parties had prepared submissions and the Upper Tribunal

was in a position to address it. Mr McCracken did not dissent from this. I agree that there is an important point of principle involved which the tribunal is in a position to determine and is not dependent on the particular facts of this case, but moreover the issue is not entirely academic because, if the appeal is allowed and remitted to the First-tier Tribunal for a fresh decision, that new tribunal will need to know the answer to the question raised under this Ground.[2]

52. Ground 1 is concerned with paragraph 98 of the decision where the First-tier Tribunal said that it was not bound by the Habitats Regulations but that, in accordance with the "*Hope and Glory* approach to appeals" it must "give due respect to the decision of a primary decision-taker which is itself bound to consider those principles".

53. Mr Maurici submitted that, while First-tier Tribunal was correct to take the *Hope and Glory* approach to its decision-making, it was wrong to find that the Habitats Regulations (and also, therefore, the Directive) applied only to Natural England and to confine the tribunal's role to that of respecting the decision of Natural England. He submitted that if the tribunal had considered itself bound by Article 6(3) and Regulation 63, as it should have done, it would not only have been bound to apply the precautionary approach (as the tribunal purported to do) but also it would have placed the burden on Mr Warren to show that his activities would not adversely affect the integrity of the site. Amongst other things that meant that, where there were gaps in the evidence, the burden would have been on Mr Warren to fill them.

54. In considering this issue, I bear in mind the important principle set out by the Court of Justice in Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] E.C.R. I-7405 (*Waddenzee*'), that Article 6(3) should be interpreted in the light of its broad objective which is to provide a high level of protection of the environment, and that the second sentence of that provision "integrates the precautionary principle" which is one of the foundations of the high level of environmental protection pursued by Community policy.

55. In accordance with this underlying principle, in *R (Akester) v Department for Environment, Food and Rural Affairs* [2010] EWHC 2323 (Admin), [2010] Env LR 33 Owen J held at [76] that an action would be a plan or project within Article 6(3) simply because it could "potentially have an impact on the environment or on a European site". Moreover, the CJEU has given authoritative support to the breadth of the meaning of "plan or project" in joined cases C-293/17 and C-294/17, *Cöoperatie Mobilisation for the Environment UA, Vereninging Leefmilieu v College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland* (7th November 2018) at [59] to [73].

56. It seems to me that, in accordance with this approach, if the tribunal was a competent authority giving a consent within the meaning of Article 6(3) and Regulation 63, then it may well be said that the subject matter of the tribunal's determination was a plan or project within the meaning of the Directive and Regulations. However, I do not need to decide whether it was because I am clear that the First-tier Tribunal was not a competent authority and that its decision was not a consent or authorisation within those provisions.

57. By regulation 7(1) of the Habitats Regulations the term "competent authority includes …any…public body of any description". On its face, that is wide enough to include the First-tier Tribunal. I agree with Mr McCracken that it is surprising that, if courts and tribunals were intended to be included, they were not listed in regulation 7(3), but that is not determinative of my decision given the breadth of the primary definition.

58. Mr Maurici submitted that the nature of the jurisdiction of the First-tier Tribunal on a stop notice appeal clearly supported the view that it was to be seen as a competent authority consenting to or authorising an activity. The tribunal stood in the shoes of Natural England, which was a competent authority, making a fresh decision on the evidence and taking such steps as Natural England could have taken.

59. In addition, he relied on European Commission Notice C(2018)7621, "Managing Natura 2000 sites - The provisions of Article 6 of the Habitats Directive 92/43/EEC". I pause here to clarify that there are at least two versions of the Notice from which extracts were provided at the hearing. I here refer to what appears to be the final version, described as such on the Commission website and dated 21 November 2018. The Notice provides guidance but is not itself the law. As long as that qualification is not forgotten, it provides useful assistance particularly because much of what it contains is based on and summarises relevant decisions of the European Court of Justice.

60. One exception to this is paragraph 4.7.1 of the Notice which states that "A court can constitute a competent authority if it has the discretion to make a decision on the substance of a proposed plan or project for the purposes of Article 6(3)". The Commission cites the CJEU's decision in *Waddenzee* (the footnote reference there is incorrect) at [69] as authority for the proposition. On further inquiry, Mr Maurici accepted that the passage from *Waddenzee* referred to does not in fact provide authority for the proposition stated. I have not been shown any authority to support this statement by the Commission.

61. I accept that there may be more than one competent authority but there is nothing in the terms of the Directive which calls for a court or tribunal to be a competent authority so as to secure the objectives of the Directive. As Owen J observed in *Akester* at [92], it is for the individual Member States to determine the procedural requirements deriving from the Directive. Article 6(3) has been transposed into domestic law by regulations 24 and 63 of the Habitats Regulations. Along with the other legislative powers and duties of Natural England regarding consents, and in particular section 28E of the 1981 Act, those provisions ensure that decisions are made by Natural England in accordance with the requirements of Article 6(3).

62. Furthermore, many of the powers and duties of a competent authority in regulation 63 (and regulation 64 which qualifies it) are incompatible with the role of the First-tier Tribunal.

63. I first consider the requirement in regulation 63(1) for the competent authority to make an "appropriate assessment of the implications of the plan or project". I take into account that what is appropriate depends on "the task in hand" (*R (Champion v North Norfolk District Council* [2015] UKSC 52, [2015] 1 WLR 3710 at [41]), that an applicant must provide the necessary information to enable an assessment (regulation 63(2)), that the First-tier Tribunal has wide case

management powers to require the provision of evidence and that an expert member can be appointed to the tribunal if specialist expertise is called for. Even with all that in mind, this task does not sit comfortably with the judicial role of the tribunal. The nature of the assessment required by regulation 63 (and Article 6(3)) is far removed from a judicial determination made on the basis of expert evidence. Thus in *Cooperatie Mobilisation* the Court described the stringent assessment which is required by article 6(3), saying at [98] that it "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the plans or the projects proposed on the protected site concerned". At [101] and [104] the Court distinguished between the role of the competent national authority which carries out the assessment and the role of the national courts whose role is to carry out "a thorough and in-depth examination of the scientific soundness" of that assessment. According to this role, the courts do not carry out the assessment themselves.

64. Even though the First-tier Tribunal in a stop notice appeal stands in the shoes of the regulator and makes a fresh decision for itself, it is not suited to or even capable of carrying out a scientific assessment as envisaged by Article 6(3) and regulation 63. It must make the fresh decision on the basis of the evidence in the case, including the scientific evidence. If the tribunal decides that the stop notice as served was incorrect on some basis, but there is inadequate evidence for the First-tier Tribunal to make a fresh decision, under article 10(6)(e) of the Order it will remit the case to Natural England.

65. There are other powers and duties in regulation 63 which cannot be reconciled with the role of the tribunal. Regulation 63(3) requires the competent authority to "consult" the appropriate nature conservation body and have regard to its representations. On Natural England's case, on an appeal against a decision by a conservation body, the tribunal would be required to "consult with" a party to the appeal. Furthermore, regulation 63(4) requires the competent authority "if it considers it appropriate, to take the opinion of the general public". I acknowledge that this provision leaves it open to the competent authority to decide that it was not appropriate to consult with the general public but it would be required to consider whether it was appropriate to do so and that is wholly inconsistent with the role of a judicial body.

66. Regulation 64 qualifies the obligations under regulation 63. Notwithstanding a negative assessment under regulation 63, a competent authority may agree to a plan or project if it is satisfied that it must be carried out for imperative reasons of overriding public interest of a social or economic nature. Where it proposes to do so, regulation 64(5) requires the competent authority to notify the Secretary of State and, unless the Secretary of State notifies it that it may do so, the authority may not to agree to the plan or project for a period of 21 days. Further, by regulation 64(6) the Secretary of State may give directions to the competent authority in any such case prohibiting it from agreeing to the plan or project. Again, these powers and duties are wholly incompatible with the First-tier Tribunal being a competent authority.

67. Mr Maurici sought to meet these objections by saying that the First-tier Tribunal's rules of procedure and general case management powers were sufficiently flexible to carry out the functions of a competent authority where required to do

so, particularly in the light of the obligation of the person carrying out the activity (on Natural England's case, the person seeking the consent or authorisation) to provide relevant information to the tribunal. I disagree. Those considerations do not address all of the points addressed above and, in any event, the requirements imposed on a competent authority under regulation 63 and article 6(3) are of a fundamentally different character to the judicial tasks of the tribunal.

68. Natural England's position presents a further problem in the context of an appeal against a stop notice. The jurisdictional threshold for issuing a stop notice is the existence of a significant risk of serious harm. It is not compatible with the threshold for giving consent to a plan or project under Article 6(3)/regulation 63, which is (see *Waddenzee,* discussed further below) the certainty of no harm. The latter plainly sets a higher bar than the former. Mr Maurici sought to address this by saying that Article 6(3)/regulation 63 did not apply to the decision whether the statutory conditions for service of a stop notice are made out but that, once the tribunal is satisfied of those matters, its decision regarding withdrawal or variation of the notice involved the exercise of a discretion and so the obligations imposed by Article 6(3) and regulation 63 applied. If this was correct, a situation could arise in which the tribunal found that the threshold test for service of a stop notice was not met in respect of some or all of the activities prohibited by it, but was nevertheless precluded by Article 6(3)/regulation 63 from varying or withdrawing the stop notice because it could not be certain that the activities would cause no harm. That cannot be right.

69. Finally, Mr Maurici contended that the role of the First-tier Tribunal was akin to that of the planning inspector in planning appeals. The inspector exercises a quasi-judicial function and yet carries out the appropriate assessment based on the evidence provided by the parties, and he said that the inspector is generally acknowledged to be a competent authority. Mr Maurici did not cite authority to support the submission and I am not persuaded that the role of the inspector under the Town and Country Planning Act 1990 is comparable in this regard to that of the First-tier Tribunal in a case such as this, taking into account the above matters.

70. For the above reasons, I conclude that the First-tier Tribunal is not a competent authority. I now turn to consider whether a decision by the tribunal to remove or relax certain prohibitions in a stop notice is a "consent, permission or authorisation" within article 6(3) or regulation 63.

71. It was common ground that, where Natural England's consent was sought under section 28E of 1981 Act, the requirements of article 6(3) were implemented by way of regulation 24 of the Habitats Regulations. Mr Maurici said that this did not override the provisions of regulation 63. That may well be correct, but nothing turns on the point. Mr Maurici did not contend that Natural England was giving a consent, permission or authorisation within Article 6(3) or either regulation 24 or 63 when deciding to serve the stop notice. The decision to serve a stop notice was a decision to prohibit an activity, albeit founded (at least in part) on the absence of consent under section 28E. It followed that, if the First-tier Tribunal was giving consent, it was not because it stood in Natural England's shoes. Mr Maurici's submission was that a decision by the First-tier Tribunal to lift a prohibition in a stop notice amounted, on its own terms and not parasitic on Natural England's functions, to a "consent, permission or other authorisation". He

said the terminology was wide and captured any decision by a body which had the effect of allowing a person to do something which they would not otherwise have been permitted to do.

72. Even taking a broad approach to the provisions of Article 6(3), I am satisfied that the determination of the First-tier Tribunal was not a consent, etc. Standing in the shoes of Natural England, the tribunal was deciding whether to stop activities which required consent under a different statutory provision. The stop notice regime is a means of enforcing the statutory requirement for consent but the fact that the tribunal disagreed with Natural England in that regard did not turn its determination into a consent.

73. More particularly, Mr Maurici submitted that, where a stop notice was in place in relation to an activity which required consent under section 28E, carrying out the activity was prohibited by and a criminal offence under both section 28P of the 1981 Act and paragraph 6 of schedule 3 of the 2010 Order. It followed, he submitted, that in order to carry out the activity lawfully the person required not only consent under section 28E but also amendment or cessation of the stop notice. Accordingly, the First-tier Tribunal's decision to release a person from the stop notice was a component of a consent to carrying out the activity. In effect, he said that there was a multi-stage consent process akin to the grant of outline planning permission followed by approval of reserved matters and which required an EIA assessment at both stages: *Case C-290/03, R (Barker) v Bromley London Borough Council* [2006] QB 764.

74. I reject that analogy. *Barker* was concerned with the planning permission procedure whereby some issues were considered at one stage and others at a later stage, and so the assessment requirements applied to the procedure as a whole. In contrast, although the First-tier Tribunal's task in the present case was premised (in part) on the absence of consent from Natural England for the activities, that was a matter of fact but there was no question of the First-tier Tribunal's decision being a component of a procedure for giving consent. Moreover, there was nothing in *Barker* to suggest that the multi-stage consent process included decisions of the courts or tribunals.

75. Natural England's submission mischaracterises the tribunal's role, which was to adjudicate on the dispute between the parties. It suffers from the same objections as in relation to "competent authority", in confusing the role of the tribunal and that of the regulator.

76. For these reasons, Ground 1 fails. The First-tier Tribunal was not bound by the requirements of Article 6(3) of the Habitats Directive and Regulation 63 of the Habitats Regulations.

Grounds 2 and 5: the application of the precautionary principle and reasons

77. Under Ground 2 Natural England advanced a number of arguments as to why the First-tier Tribunal had failed to apply the precautionary principle in substance, despite claiming to have done so. Under Ground 5 Natural England submitted that the First-tier Tribunal failed to give reasons in relation to many of the same points. Given the overlap between these two grounds, they were addressed together in written and oral submissions and I do so here. Before addressing the

First-tier Tribunal's detailed reasoning, I address three preliminary issues of law which are relevant to the detailed grounds.

Whether the precautionary principle applied in this case.

78. Mr Maurici's position was that, even if, contrary to Natural England's case under Ground 1, the First-tier Tribunal was not bound by the provisions of regulation 63/Article 6(3), it was bound to apply the precautionary principle. That was the approach that the First-tier Tribunal had purported to apply, as is apparent from its reasons at paragraphs 96 and 98. However, Mr Maurici submitted, the First-tier Tribunal had failed in substance to apply the precautionary principle correctly and its reasons were inadequate to explain how it had done so.

79. Mr McCracken QC had submitted in writing that the precautionary principle was not an independent principle of domestic law, and so only applied if Natural England's case under Ground 1 succeeded, but he submitted orally that the First-tier Tribunal's decision was consistent with the precautionary principle. The position on behalf of Mr Warren as to the application of the precautionary principle in this case remained somewhat ambiguous, and the parties did not agree as to what the principle required of the First-tier Tribunal.

80. There was no fundamental dispute between the parties in this case that the Habitats and Wild Birds Directives embody the precautionary principle. This has been made abundantly clear in the case law of the CJEU.

81. The European Commission Notice, "Managing Natura 2000 sites" describes the framework provided by Article 6 as being "a key means of supporting the overall objectives of the two directives". At 3.2 the Notice states that the steps required by Article 6(2)

> "…go beyond the management measures needed for conservation purposes, since these are already covered by Article 6(1). The words 'avoid' and 'could be significant' stress the anticipatory nature of the measures to be taken. It is not acceptable to wait until deterioration or disturbances occur before taking measures…
>
> …Article 6.2…may concern past, present or future activities or events. If an already existing activity in a SAC or SPA is likely to cause deterioration of natural habitats or disturbance of species for which the area has been designated, it must be covered by the appropriate measures foreseen in Article 6(2) of the Habitats Directive or Article 4(4) of the Birds Directive respectively, when applicable. This may require, if appropriate, bringing the negative impact to an end by stopping the activity and/or by taking mitigation or restoration measures…"

82. At paragraph 3.3 the Notice summarises the following, established in European case law: a) Article 6(2) will be infringed even if provisions only come into play after the activities in question have commenced and so the deterioration has already occurred; b) merely bringing criminal proceedings or imposing fines may not be enough; c) Article 6(2) will be complied with "only if it is guaranteed that [the activity] will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives"; and d) Articles 6(2) and (3) should be construed together and are designed to afford the same level of protection, so assessment of deterioration should follow similar criteria and methods to those used in applying Article 6(3).

83. It follows that European case law as to the approach under Article 6(3) is relevant to that under Article 6(2). In Case C-323/17 *People Over Wind and another v Coillte Teoranta* [2018] PTSR 1668 the Court said at [30] that Article 6(3) of the Habitats Directive "integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites, resulting from the plans or projects".

84. In *Waddenzee* the Court of Justice said at [44] that

> "the precautionary principle… is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted".

85. Article 174(2) has since been replaced by article 191(2) of the Treaty on the Functioning of the European Union which reads:

> "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

86. As for the application of the precautionary principle at a domestic level, regulations 9 and 10 of the Habitats Regulations require Natural England to exercise its functions relating to nature conservation so as to secure compliance with the requirements of the Habitats and Wild Birds Directives. Serving a stop notice is not a function listed under regulation 9(2), but that list is not exhaustive of the functions to which the regulation applies. There can be no doubt that serving a stop notice on the basis of an actual or anticipated risk of harm to the natural environment, as in this case, is a function relating to nature conservation. Moreover, the stop notice was served in order to prevent activities which contravened the Wildlife and Countryside Act 1981 (activities taking place without consent under section 28E and/or which were or may have been an offence under section 28P) and in that regard was the exercise of a function listed under regulation 9(2). The duties under regulation 10(1) and (3) also apply to the exercise of Natural England's functions under regulation 9.

87. It follows that, in serving the stop notice in respect of a site which was an SAC and a SPA, Natural England was required to secure compliance with article 6(2) of the Habitats Directive (which, by reason of Article 7, applies to SPAs as well as SACs) and therefore to act in accordance with the precautionary principle.

88. The tribunal was bound to act consistently with the precautionary principle because the duties on Member States under Article 6(2) are binding on all authorities of a Member State including the courts: *Waddenzee* at [65] and [66].

89. Second, it was common ground that the tribunal stood in the shoes of Natural England and so was bound to apply the principles that governed Natural England's decisions. As I have explained, these included giving effect to the Habitats and Birds Directive (and therefore to the precautionary principle) in exercising its functions in serving the stop notice. That was in essence the approach which the First-tier Tribunal took in this case, at paragraphs 9-12 and

98. It was bound to give effect to the precautionary principle in its decision because, at the very least, it had to give due respect to the decision of Natural England which was itself bound by the precautionary principle.

90. In summary therefore, in considering the stop notice appeal relating to this European Site, the First-tier Tribunal was bound to apply the precautionary principle in deciding, first, whether there was a significant risk of serious harm and, second (if there was such a risk), what the content of the stop notice should be.

What the precautionary principle required of the tribunal.

91. Article 191 of the TFEU establishes that EU policy on the environment is to be based on the precautionary principle, but it does not define that principle. Mr McCracken submitted that it is commonly accepted that the precautionary principle means that "the absence of scientific proof does not preclude action which needs to be based on science". However, the precautionary principle does not permit an assessment of risk to be based on purely hypothetical considerations: See Case C-282/115, *Queisser Pharma GmbH and Co. KG v Bundesrepublik Deutschland* (19th January 2017) at [60]. See also *Forager* at [38].

92. I accept that, as far as it goes, but it is necessary to explore further what the precautionary principle means in the context of the application of Article 6(2).

93. Mr Maurici referred to a number of authorities explaining how the precautionary principle is to be applied in the context of Article 6(3). Although article 6(3) applies in narrower circumstances than article 6(2) and imposes specific constraints on the authorities' agreement to a plan or project as explained above, the case law makes it clear that the two provisions are to be construed as a whole and both provisions are aspects of the embodiment of the precautionary principle in the determination of risks to European sites. Thus Article 6(2) cannot sensibly require steps to be taken unless the relevant authority has determined that, without them, there is a risk of deterioration of habitats or disturbance of species. In addition Article 6(3) applies where a plan or project "is likely to have a significant effect" on a site. It follows that the guidance found in case law as to the assessment of risk under regulation 6(3) also assists in deciding whether steps are required under article 6(2).

94. In *Waddenzee* the European Court of Justice explained the approach to deciding whether there was a probability or risk that a plan or project will have significant effects on the site concerned:

> 41. …the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume -- as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled 'Managing Natura 2000 Sites: The provisions of Article 6 of the "Habitats" Directive (92/43/E EC)' - that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.
>
> …
>
> 43. It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the

implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned … Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.

…

53. None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

…

56. It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

57. So, where doubt remains as to the absence of adverse effect on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

58. In this respect, it is clear that the authorisation criteria laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle … and makes it possible effectively to prevent adverse effect on the integrity of protected sites as the result of the plans or project being considered. A less stringent authorisation criteria than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision."

95. In *R (Mynnyd y Gwynt Ltd) v Secretary of State for Business Energy and Industrial Strategy* [2018] EWCA Civ 231, [2018] PTSR. 1274 the Court of Appeal said:

"8 The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions:

(1) The environmental protection mechanism in article 6(3) is triggered where the plan or project is likely to have a significant effect on the site's conservation objectives: see *Landelijke Vereniging tot Behoud van de*

> *Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2005] All ER (EC) 353 , para 42 ("*Waddenzee*").
>
> (2) In the light of the precautionary principle, a project is "likely to have a significant effect" so as to require an appropriate assessment if the risk cannot be excluded on the basis of objective information: see *Waddenzee*, at para 39."

96. The above guidance is not concerned only with the specific requirements for giving consent in the second part of Article 6(3) but also with the question whether an activity "likely to have a significant effect", and so is equally applicable to the assessment of risk under Article 6(2).

97. Mr McCracken accepted that the precautionary principle meant that the absence of scientific proof did not prevent action being taken, but he was concerned that Mr Maurici argued for an approach which would involve a reversal of the burden of proof, so that harm or risk of harm would be assumed unless Mr Warren could prove to the contrary. That was not Mr Maurici's submission under this ground (as compared to Ground 1) and it is not the approach which I take. The precautionary principle sets a standard for decision-making. The condition for taking action is in the 2010 Order: whether there is a significant risk of serious harm. Where such a risk is identified, then action should be taken "if it cannot be excluded, on the basis of objective information" (*Waddenzee)*.

The duty to give reasons

98. There was a difference in emphasis between the parties in their submissions as to the nature of the tribunal's duty to give reasons. Mr Maurici relied on the judgment of the Court of Appeal in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 and in particular the following passage at page 382:

> "(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject-matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
>
> (4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

99. I agree with Mr McCracken that this reasoning should be understood in the light of the Court of Appeal's subsequent consideration of it in *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409. At paragraphs 1 and 2 the Court explained that *Flannery* had inspired a "cottage industry" in appeals on grounds of inadequate reasons, and that there was

uncertainty as to the requirements of adequate reasons which the Court of Appeal in *English* sought to dispel. The Court set out the rationale for the requirement that judges give reasons for their decisions as follows:

> "16. We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost."

100. The Court agreed with the observation in *Flannery* that the adequacy of reasons depends on the nature of the case. It said:

> "19 … the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.
>
> 20. The first two appeals with which we are concerned involved conflicts in expert evidence. In *Flannery* Henry LJ quoted from the judgment of Bingham LJ in *Eckersley v Binnie* (1988) 18 Con L.R. 1 at 77-8 in which he said that 'a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal'. This does not mean that the judgment should contain a passage which suggests that the Judge has applied the same, or even a superior, degree of expertise to that displayed by the witness. He should simply provide an explanation as to why he has accepted the evidence of one expert and rejected that of another. It may be that the evidence of one or the other accorded more satisfactorily with facts found by the Judge. It may be that the explanation of one was more inherently credible than that of the other. It may simply be that one was better qualified, or manifestly more objective, than the other. Whatever the explanation may be, it should be apparent from the judgment.
>
> 21. When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision."

101. The Court of Appeal also said at [26] that if, in the light of the evidence and submissions, it is apparent why the decision was reached and it is a valid basis for the judgment, the appeal will be dismissed.

The First-tier Tribunal's approach to Natural England's evidence

102. Mr Maurici raised three specific errors in the First-tier Tribunal's approach to the evidence as a whole. I agree with those submissions. I address them before

turning to the challenges to specific aspects of the tribunal's decision on the evidence.

103. The first error is that the First-tier Tribunal incorrectly said at paragraph 43 that none of Natural England's witnesses had the status of an expert witness because they were employed by Natural England. In *Forager* the Upper Tribunal rejected a similar submission, saying that it "confuse[d] the concepts of "independent" and "expert". As long as the fact that a witness is employed by one of the parties is disclosed, it is open to the First-tier Tribunal to take into account that kind of lack of independence of witnesses in deciding what weight to give to their expertise." That approach is fully supported by the Court of Appeal in *R (Factortame Ltd) v Secretary of State for Transport (No. 8)* [2002] EWCA Civ 932, [2003] QB 381 at [69]-[70].

104. The First-tier Tribunal acknowledged the witnesses' professional standing and/or knowledge of the SSSI and said that it would "admit their opinion evidence and … give such weight to it as I consider appropriate in the circumstances". Unfortunately, apart from Dr Alonso, the First-tier Tribunal did not then explain how the witnesses' expertise and standing was factored into the assessment of their evidence. One is left with a suspicion that the tribunal's erroneous view of their status influenced its approach to their evidence and led the tribunal to afford less weight to their evidence than it would otherwise have done.

105. The second error is that the First-tier Tribunal's approach to the evidence manifests a failure to appreciate what the precautionary principle required of it as a result of which it failed in substance to apply the precautionary principle. This is apparent in a number of aspects of the tribunal' reasoning.

106. At paragraph 95, the tribunal's criticism of Natural England's witnesses (other than Dr Alonso) for having failed to address the statutory threshold for serving a stop notice was not consistent with the application of the precautionary principle. The witnesses' phraseology of suspicion, concern, or possible harm for which the First-tier Tribunal criticised them was consistent with a precautionary approach of finding a likely significant effect if it could not be excluded on the basis of objective evidence. The witnesses' opinions were not merely speculative. They were backed up both by their own observations and expertise, and also by such evidence as was available. For example, Mr Lakin set out and summarised the conclusions found in literature as to the effects of shooting, release of birds and other activities. He acknowledged, as did the literature, the gaps in current evidence and the need for more work to be done, but he explained how he was able to extrapolate his opinion as to risks from the available evidence and his conclusions were thoroughly referenced to scientific literature. This is but one example. Natural England's response to Mr Warren's closing submissions in the First-tier Tribunal summarised (at paragraph 35) the considerable body of detailed evidence, based on available scientific evidence and evidence from the site including of existing harm, as to how the identified risks would take effect and their impacts. Against this body of evidence, the witnesses' phraseology was not inappropriate. At the very least, an explanation was required as to how the tribunal reached the conclusion at paragraph 95 in the light of that evidence.

107. In any event, it was incorrect to state that none of the witnesses addressed the statutory test in terms: Mr Lakin did so at section 8.3 of his first statement and section 2.1 of the second.

108. The tribunal's comment that "Ms Hay appeared to be applying a reverse burden of proof at paragraph [54] above" was a reference to her evidence that Mr Warren had not provided evidence in support of his activities and that she was "not aware of any other information that would satisfy me that there was not likely to be an adverse effect on site integrity if these activities were permitted". That was not a reasonable assessment of Ms Hay's evidence in the light of the precautionary principle and putting her evidence in context. Natural England had provided extensive evidence in support of its opinion as to likely harm, and it was entirely reasonable to expect that Mr Warren should provide cogent evidence to the contrary in support of his case. It was of course for the tribunal to decide whether Mr Warren had provided such evidence, but even if he had (as the tribunal concluded) that did not mean that Ms Hay was applying a reverse burden of proof.

109. The failure to apply the precautionary principle in substance was apparent in other aspects of the First-tier Tribunal's decision-making. The First-tier Tribunal found there to be a significant risk of serious harm in one respect as explained at paragraph 96 of the decision. It decided that the risk of greening was consistent with the precautionary principle as explained in *Queisser.* In my judgment, despite referring to the correct test in *Queisser,* the tribunal's reasoning shows that its actual approach was to require direct evidence of harm having already occurred in order to find a significant risk of serious harm. For example, at paragraph 96 the tribunal accepted Dr Alonso's evidence of greening because she had supplemented her evidence of the "theoretical risk" with "first-hand evidence of the "greening" effect she had observed to be taking place…and her own research into the "critical load" at the site", as well as her "first-hand evidence of vehicle disturbance". The clear implication is that the tribunal thought that, absent observations of actual effects, the evidence of risk was "theoretical". This was despite the fact that (as Natural England had noted in its closing submissions in the First-tier Tribunal), Dr Draycott himself had acknowledged that "the process of extrapolating conclusions from the available studies was a necessary one where studies directly addressing suspected impacts are not available".

110. The third error relates to the remaining reasons given for rejecting the entirety of Natural England's evidence as to risk, save for that of Dr Alonso with regard to heathland. Aside from the reasons given at paragraph 95 which I have already addressed, the only other brief reasons given for rejecting that evidence were at paragraph 94. These reasons must, of course, be read in the context of the decision as a whole including the tribunal's summary of the evidence found earlier in the decision. Even taking that into account, there are a number of problems with the reasoning.

111. First, the timing of Natural England obtaining expert advice was not relevant to the quality of its witnesses' evidence.

112. Second, and more significantly, the tribunal criticised the witnesses for having failed to analyse "in most respects" the conservation gains resulting from Mr Warren's activities but there was no explanation as to what the tribunal made of

the evidence of Mr Lakin who addressed in some considerable detail the asserted gains of predator management (his first statement at paragraph 7.2.2, 7.3.2) and woodland management (his second statement at paragraph 2.4 and 2.9). The tribunal's discussion of Dr Lakin's evidence at paragraphs 65 to 70 does not shed further light on this. Nor did the tribunal balance its assessment of Natural England's approach to conservation gains against Dr Draycott's agreement that at least some of these were unquantified.

113. Third, the tribunal's decision to "prefer" the evidence of Dr Draycott to the other witnesses only makes sense where they disagreed. There was a number of significant respects where the witnesses were in agreement. One example is, as mentioned above, as to the gains of predator management. Another is as to the risk of harm to wintering birds created by shooting. Dr Draycott acknowledged a variety of risks presented not only by gamebird releases but also by shooting and vehicle use, and he acknowledged a lack of certainty as to the risks. It is impossible to say, in the absence of reasons, what the First-tier Tribunal made of that evidence in particular when considered in conjunction with Natural England's evidence to similar effect. The First-tier Tribunal did not explain why it rejected the witnesses' evidence as to such risks in the light of the common ground.

The specific grounds of challenge

a) Partridge releases

114. The stop notice served by Natural England prohibited the release of partridges within 500 metres of the boundary of the SSSI. The reason given was that "partridge released adjacent to but outside the boundary of the SSSI presents a significant risk of causing serious harm to breeding and wintering bird assemblages, invertebrate assemblages and heathland vegetation communities that form part of the notified interest of the SSSI."

i. Whether partridge releases could be subject to a stop notice

115. Before considering the First-tier Tribunal's decision and reasons regarding partridge releases, I must address a preliminary issue as to whether Mr Warren's activities regarding partridge release were capable of being made the subject of a stop notice. The partridge pens were not kept on the SSSI, but on locations close to the site. The risk with which Natural England was concerned was the risk of partridges entering the SSSI and causing environmental harm on the site.

116. Prior to the service of the stop notice Natural England had told Mr Warren that consent under section 28E(1) was not required for partridge releases because they did not take place on the SSSI. In consequence, the stop notice required consent only for pheasant releases, vehicle access and shooting, and it required Natural England's agreement (rather than consent) for sustainable levels of partridge releases. In the First-tier Tribunal, Natural England indicated that its position had changed and that allowing gamebirds to be released so close to the SSSI that they would enter into the SSSI did require consent under section 28E of the 1981 Act. Alternatively, it said that partridge releases were likely to amount to an offence contrary to section 28P(6). These matters were not raised in oral argument which may explain why the First-tier Tribunal did not address them in its decision. However, if Mr Warren is correct that the stop notice could not as a matter of law encompass the release of partridges off the site, the First-tier Tribunal's failure to address the issues and any deficiency in its decision on the

facts relating to partridge releases would not be material. It is therefore necessary to determine that question.

117. Section 28E(1) requires consent "to carry out, or cause or permit to be carried out, *on that land* any operation specified in the notification" (my emphasis). The list of operations likely to damage this site ('OLDs') notified by Natural England included "The release into the site of any wild, feral or domestic animal, plant or seed". The question is whether releasing birds into the site from pens located on land outside the site is an operation *on* the site.

118. Giving the legislative words their ordinary meaning, the phrase "on that land" is clear. It does not mean "adjacent to that land". It is a question of fact as to where an operation is carried out. The release of birds from a pen involves opening the pen so that the birds can leave. As a matter of fact that is an activity that takes place wherever the pen is and not the place or places where the birds go once released.

119. Turning then to the legislative context, the provisions of section 28 and section 28E create a scheme whereby an owner or occupier of protected land may not carry out activities which Natural England has notified as likely to damage the flora or fauna on that land unless Natural England consents. The Act distinguishes between an operation and the consequences of an operation. Section 28(4) defines an operation which may be the subject of a notification by reference to the consequences of the operation, and the words of the provision are sufficiently wide to enable notification of operations taking place both on the land and elsewhere. However the legislature has chosen to limit the application of section 28E(1) by inclusion of the words "on that land", a phrase which does not appear in section 28(4). Those words must have been included for a reason. They define more precisely the operations which are prohibited. This is important, as criminal consequences follow if those operations are performed without consent. It follows that the phrase "on that land" should be construed so that its application is clear.

120. Moreover, a section 28 notification is given to the owner and occupier of land within the SSSI. Section 28E(1) applies to the owner or occupier of the same land. It would be anomalous if section 28E(1) applied to activities taking place on neighbouring land only if the owner or occupier of the neighbouring land happened also to be the owner or occupier of the land within the SSSI.

121. In support of Natural England's case, Mr Maurici gave the example of a pen which was set up directly adjoining the SSSI with the release gate positioned so that birds would be released from the pen directly into the site. He said that it would be absurd if this were not an operation *on* the site and, if so, there was no logical reason to treat matters differently where a pen was positioned only a short distance from the site so that the birds were likely to enter the site when released.

122. The difficulty with this approach is that it would mean that whether an activity which took place on land outside the SSSI was an operation *on* land included in the SSSI would depend on the degree of likelihood of that activity affecting the land itself. This introduces a considerable degree of uncertainty as to what is prohibited by section 28E, even though breach of that prohibition can lead to criminal liability. Mr Maurici did not say what degree of likelihood was required for the activity to be caught. The example given by him involved birds inevitably

being released into the site. The greater the distance of the pen from the site, the less likely it would be that birds would enter the site, but his approach did not provide a means of identifying at what distance the release of birds would not be caught by section 28E(1).

123. Mr Maurici argued that it would significantly undermine the regime for the protection of SSSIs created by the 1981 Act if it did not apply to activities carried out close to a site and which harm the protected features *on* the site. He said that it would mean that such activities could not be controlled under that Act in advance of their occurring, but could only be addressed after the event by way of prosecution for an offence under section 28P(6). Even if he was right as to this, that is a consequence of the terms of the legislation and my analysis shows that there are sound reasons for limiting its application in this way. In any event, some potentially harmful activity emanating from other land could be controlled in advance because Natural England has the power to issue a stop notice if commission of a criminal offence under section 28P(6) is believed to be likely. Indeed this was what occurred in the present case. In its submission to the First-tier Tribunal Natural England had relied on the likely commission of an offence under section 28P(6) arising from releases of partridges off-site.

124. Consequently, although I have decided that the release of partridges from pens located off the site did not require consent under section 28E, that activity was capable of being made subject to a stop notice where commission of an offence under section 28P(6) could be relied on. What, if any, risks to the environment on the SSSI arose from those releases was relevant, both as a factor in establishing the likelihood of a criminal offence under section 28P(6) and in establishing a reasonable belief in release of partridges causing or being likely to cause a significant risk of serious harm. It follows that, despite the conclusion that I have reached regarding the application of section 28E to the release of partridges, the First-tier Tribunal was required to address the risks associated with that activity.

ii The First-tier Tribunal's treatment of partridge releases.

125. The stop notice served by Natural England prohibited the release of partridges within 500 metres of the boundary of the SSSI until agreement had been reached with Natural England as to sustainable levels and appropriate management, because "partridge released adjacent to but outside the boundary of the SSSI presents a significant risk of causing serious harm" to the sensitive features of the site. The stop notice as amended by the First-tier Tribunal removed any prohibition on partridge releases. The core complaint by Natural England in this appeal was that the First-tier Tribunal made no factual findings regarding the risks presented by the release of partridges within 500 metres of the SSSI and in particular there was no finding that unlimited partridge releases within 500 metres of the SSSI would not be likely to give rise to a serious risk of significant harm. Moreover, there was no attempt by the tribunal to address the likelihood of an offence under section 28(6) in that context. It is impossible, therefore, to know why the First-tier Tribunal decided to remove the prohibition on partridge releases.

126. Mr McCracken referred to a number of passages of the evidence which he submitted made it clear that the risk presented by partridge releases simply did not meet the statutory threshold of risk required for service of a stop notice and

so the First-tier Tribunal did not err materially by failing specifically to address the evidence or resolve the dispute.

127. I reject Mr McCracken's submission in this regard. There had been a significant dispute between the parties as to the risks arising from partridge releases. Natural England's case as to risk was supported by Dr Draycott who was Mr Warren's witness. Dr Draycott said that the GWCT's *strong* recommendation was that partridges should be released more than 500 metres from sensitive sites or, where that was not possible, that steps should be taken to reduce their potential impact. As the First-tier Tribunal noted in its decision, Mr Warren did not accept that recommendation. Amongst other things, he said that his management of the partridges and the land meant that they were unlikely to stray onto the SSSI.

128. I acknowledge that there was also material in Dr Draycott's evidence to support Mr Warren's position in this regard. For instance, Dr Draycott said that soil enrichment tended to be very localised and restricted to release and feeding sites, and that gamebird numbers reduced considerably during sensitive times of the year. However Dr Draycott's recommendation was made despite those considerations and, as the First-tier Tribunal noted, despite his opinion that Mr Warren's practice of early release of birds meant that the damage he might have expected to see to the ground flora in other circumstances was not present. Moreover Dr Draycott maintained in oral evidence that there was a risk presented by release of partridges closer than 500 metres from the site. When asked in cross-examination whether the risk was "real or fanciful", he answered "It is a risk".

129. Furthermore, the First-tier Tribunal set out and accepted the main aspects of Dr Alonso's evidence regarding the risks of damage from both pheasants and partridges as a result of disturbance and soil enrichment to heathland, leading it to uphold the stop notice in respect of the release of pheasants within the SSSI. Dr Alonso explicitly said in her second witness statement that partridges released within 500 metres of the site presented those same risks. The tribunal did not explain whether and, if so, why it accepted her evidence regarding pheasants but not partridges. It is true that Dr Alonso had only observed soil enrichment outside a pheasant pen, and this was consistent with GWCT research that enrichment was very localised. However, as with Dr Draycott, this did not cause her to qualify her assessment of risk. Moreover there was evidence before the tribunal that partridges entered the site: in his second witness statement Dr Burrows had noted that some of the partridge release pens were as close as 20 metres to the SSSI and that partridges had been observed on the site.

130. The tribunal did not address this evidence, it reached no conclusions on the key factual matters, and it provided no other explanation for the removal of restrictions on partridge releases. It did not address Dr Draycott's recommendation that, if partridges were to be released within 500 metres, other protective steps should be taken. I take into account the guidance given in *English Emery* but the complexity of the evidence and issues in regard to this matter and the fact that (as I have explained above) this was not a case in which the tribunal could simply determine the issue by preferring the evidence of one side to that of the other, on a careful review of the evidence and submissions before the First-tier Tribunal it is impossible to discern why it decided to remove

any prohibition on partridge releases or impose no condition regarding steps to be taken to protect the SSSI from them. Even if one were to disregard all the evidence of Natural England's witnesses save that of Dr Alonso regarding heathlands, one cannot tell why the First-tier Tribunal said nothing about partridges in the light of her evidence and that of Dr Draycott.

b) Removal of any prohibition on shooting activities.

131. The original stop notice prohibited vehicle movement and shooting activity. The First-tier Tribunal removed the prohibition on shooting activity.

132. The evidence before the First-tier Tribunal on both sides had been that shooting activity gave rise to a risk to wildlife. The First-tier Tribunal had noted that Dr Draycott had been unable to calculate from the evidence the negative impact of shooting on wintering birds, but he had concerns over the potential harm to wildlife owing to the frequency of shooting and recommended that individual drives were undertaken no more than once a week. All of Natural England's witnesses (except Dr Alonso, who did not specifically discuss the effects of shooting rather than of activities associated with shooting, such as vehicle disturbance and trampling) testified to the risks to birds as a result of shooting. Mr Lakin agreed with Dr Draycott's recommendation regarding a maximum rate of shooting, but recommended even fewer shoots if a precautionary approach was taken.

133. The First-tier Tribunal did not reach any conclusions as to shooting. The First-tier Tribunal's summary of the witnesses' evidence does not explain or shed light on its view on the impact of shooting activities. The tribunal observed at paragraph 100 that the parties were agreed that further assessment of the impact of shoots was required, but that could not of itself explain why it removed all limitations on shooting. All one is left with therefore is the tribunal's preference for Dr Draycott's evidence but, as I have said, preferring his evidence did not make sense in relation to the matters as to which the witnesses were in agreement and his recommendations. Even if (and this is not clear) Natural England's evidence about the impact of shooting was one of the respects which the tribunal found to be unsatisfactory, the fact that Dr Draycott (whose evidence the First-tier Tribunal accepted save in relation to heathland) concurred at least in part as to the risk from shooting had the potential to reinforce Natural England's evidence in that regard. Moreover, Mr Lakin specifically addressed Dr Draycott's evidence, agreed with his advice as to recommended rates of shooting and, on that basis, was able to predict that the proposed shooting rates would result in significant disturbance to birds and other wildlife (paragraph 2.11 of Mr Lakin's second report). The tribunal's view of the shortfalls in Mr Lakin's evidence as explained at paragraphs 68 and 69 of its decision does not explain its approach to the evidence on this issue.

134. Moreover, given the common ground that shooting gave rise to some risk, the precautionary principle required the First-tier Tribunal to decide whether there was a likelihood of real harm to the protected interests should the risk materialise. If so, protective measures could be taken without having to wait for the risks to be fully demonstrated (*Queisser* at [57] and [59]). Even if the First-tier Tribunal accepted Dr Draycott's position that the evidence was insufficient to determine with certainty the extent of the alleged risk, this was not a case in

which the First-tier Tribunal was being asked to take action on a purely hypothetical basis.

c) Varying the steps in the stop notice.

135. The original stop notice required Mr Warren to obtain Natural England's consent or agreement to the activities in question. The Notice as amended by the First-tier Tribunal simply required him to make a formal application for consent.

136. The effect of the varied stop notice was that Mr Warren could submit an application for consent to any of the specified activities and, regardless of the level of activity or the risk that it would present, he would be entitled to a completion certificate without waiting for Natural England's decision and even if Natural England's ultimate decision was to refuse consent. Even in relation to the risks which were accepted by the First-tier Tribunal, the stop notice would fail to provide adequate protection.

137. Events since the First-tier Tribunal's decision have borne this out. Mr Warren made an application for consent to levels of activity which were higher than those that Natural England had previously considered to be environmentally sustainable. Natural England applied for the First-tier Tribunal's decision to be suspended pending this appeal, although this was subsequently withdrawn because agreement was reached with Mr Warren as to the levels of activity which he would undertake in the interim. If this appeal is dismissed, however, Mr Warren would be entitled to a completion certificate solely on the ground that he had sought Natural England's consent to the proposed increased levels of activity.

138. Mr McCracken submitted that the removal of the requirement to obtain consent was a logical and necessary consequence of its acceptance of Mr Warren's argument that a requirement to obtain consent could not be a lawful step in a stop notice. I address and dismiss the premise of that argument under Ground 4 below.

139. Mr McCracken also submitted that the amended stop notice did provide protection against the proven risks. Although Mr Warren would be able to apply for a completion certificate once a valid application for consent had been made, he would not be able to resume any of the prohibited activities unless and until consent was granted.

140. That is not a substitute for an effective stop notice. The First-tier Tribunal had found that a stop notice was justified in relation to certain activities but imposed a step that would deprive the Notice of any effect as soon as an application for consent was made, which could be the very next day. It follows that the step imposed by the First-tier Tribunal did not "remove or reduce the harm or risk of harm" arising from activities taking place without consent. I acknowledge that there would be other means of preventing the activities taking place without consent, either by way of criminal prosecution or a civil injunction. But, as was common ground, the stop notice regime was introduced as an alternative to both those procedures. The notice as amended by the First-tier Tribunal was ineffective and pointless.

d) Other risks.

141. Under this heading, Natural England submitted that in regard to a number of other risks the First-tier Tribunal had failed in substance to apply the precautionary principle or adopted an irrational approach to the evidence. I have addressed this in the discussion above of the First-tier Tribunal's approach to the evidence.

e) Removal of references to offences.

142. A necessary condition for service of a stop notice is that the regulator reasonably believes that the activity involves or is likely to involve the commission of an offence under Schedule 5 of the 2010 Order: Schedule 3 paragraph 1(4)(c). Schedule 5 includes offences under section 28P(1) and 28P(6) of the 1981 Act. The stop notice as served relied on the likely commission of an offence contrary to section 28P. It did not specify which subsection was relied upon but was clearly capable of including offences under both subsections (1) and (6), as was Natural England's case in the First-tier Tribunal.

143. The Notice as amended by the First-tier Tribunal referred only to section 28P(6). The First-tier Tribunal did not explain the removal of any reference to section 28P(1). Even if the release of partridges could not have constituted an offence under section 28P(1), the other activities could have. On behalf of Mr Warren it was submitted that the reason was obvious. It had been common ground that no consent to the historic level of operations was necessary, the First-tier Tribunal had not been able to reach a conclusion as what the historic levels of activity were, Natural England's position was that the historic levels were acceptable, and so the First-tier Tribunal could not find that Mr Warren was likely to commit an offence under section 28P(1).

144. Natural England's closing submissions in the First-tier Tribunal had explained that there was no extant consent to any level of activity. The First-tier Tribunal had misunderstood this but that itself was understandable as the factual issue was not straightforward and previously Natural England had suggested that no consent had been required to the historic levels of activity. The point was not, as was suggested by Mr McCracken, entirely hypothetical as it was possible that an offence under section 28P(1) would arise in relation to all of Mr Warren's activities which were operations on the SSSI, even those within what Natural England had considered to be acceptable limits. However, I do not consider any such error to have been material. On the information presently available, it is difficult to see that it would have been reasonable to include within the stop notice a prohibition of the acceptable levels of activity on the ground that consent was required but would be given if sought. As to the other activities, reliance on section 28P(1) would have made no material difference to the effect of the Notice.

145. For the above reasons, these grounds succeed.

<u>Ground 3: Natural England's reasons for service of the stop notice.</u>

146. The First-tier Tribunal found that Natural England had failed to give adequate reasons for service of the stop notice. The tribunal's reasoning is at paragraphs 85-87 of the decision.

147. Mr McCracken submitted that Natural England's challenge to that aspect of the decision was academic because the tribunal had upheld the stop notice in part and provided amended reasons. It followed, he submitted, that the tribunal's conclusion as to the adequacy of Natural England's reasons was immaterial. I disagree. The finding may be relevant to compensation under the 2010 Order. Moreover, the tribunal's approach to the requirements of a lawful stop notice raise issues of wider importance which this Tribunal should address.

148. Paragraph 2 of Schedule 3 of the 2010 requires a stop notice to include "information as to…the grounds for serving the stop notice". The grounds are those falling within paragraph 1(4) or (5). The Order does not state what "information" is to be provided other than the grounds themselves, but the requirement for provision of "information as to…the grounds" envisages that the notice should include something more than the bare grounds. Moreover, the First-tier Tribunal correctly identified that fairness required the provision of sufficient detail to enable a person to understand the case against them, in particular because the consequences of the stop notice may be very significant (as in this case, affecting Mr Warren's livelihood) and carrying potentially serious criminal consequences for non-compliance.

149. The stop notice served by Natural England identified the activities said to be causing harm (release of pheasants and partridges, shooting and vehicle use) and where they were occurring (within the SSSI in the case of pheasant release, vehicle movement and shooting activity, and adjacent to it in the case of partridge release). It identified the ways in which these were said to cause a significant risk of serious harm: in the case of bird releases, impact on breeding and wintering bird assemblages, invertebrate assemblages and heathland vegetation; and in the case of shooting and vehicle use, disturbance to wintering bird assemblages and damage to vegetation communities. The stop notice clearly stated what activities Mr Warren must stop. On its face, therefore, the notice provided more information than the bare statutory grounds relied on. It showed the essential factual basis for Natural England's conclusion that the grounds were satisfied.

150. I conclude that the First-tier Tribunal's decision that insufficient reasons were provided is flawed on two principal bases.

151. First, the tribunal assessed the stop notice against an unjustifiably high standard. It decided that Natural England's pleadings contained "the appropriate degree of detail to meet the test of fair notice" and the stop notice failed to satisfy that standard. As the First-tier Tribunal noted at paragraph 21 of its reasons, Natural England's pleadings as to its assessment of risk were contained in 24 paragraphs. It is unrealistic to require a stop notice to provide such extensive reasons. To do so would make the stop notice regime overly cumbersome and would be incompatible with the urgency with which stop notices may need to be served. Indeed, in practice the First-tier Tribunal did not give anything like the level of detail which it said Natural England should have given. The amended stop notice contained some, but barely, greater detail than the original notice. Nor was it necessary for the notice to contain that level of detail. The information set out above made it clear to Mr Warren what activities must be stopped and what he must do to be permitted to undertake them. He knew sufficient to be able to challenge the notice. The fact that further information was provided for

the purpose of the appeal was a necessary component of putting all the issues and evidence before the tribunal to enable it to make a decision, but does not manifest an error in the notice itself.

152. Second, if further information was required, the tribunal was wrong to refuse to take into account the information provided to Mr Warren in the course of his detailing with Natural England prior to service of the stop notice. The proposition that the fairness of the notice was to be assessed only on the basis of the content of the notice itself is not supported by authority. Adequacy of reasons is to be judged as a matter of substance and is dependent on the context. The broad proposition that a person must know with reasonable clarity they have to meet in order to prepare their defence is correct, but takes Mr Warren's case no further. The decision in *R (Johnson) v Professional Conduct Committee of the Nursing and Midwifery Council* [2008] EWHC 885 (Admin) was a decision on its facts concerning the particularity required in respect of specific charges of misconduct.

153. Mr McCracken relied on *East Riding County Council v Park Estate (Bridlington) Ltd* [1957] AC 223, which was concerned with the content of a planning enforcement notice. Lord Morton said at page 239 that, whether or not a person knew the relevant facts, they should know what the authority alleged against them. However, the point being made there was that the relevant facts would not necessarily identify the allegations relied on by the authority, where the notice had failed to specify the conditions which had been breached as required by the legislation. The case was not about the adequacy of reasons but about validity of the notice.

154. Unlike the *East Riding* case, in the present case the stop notice did specify the statutory grounds relied on. There was no reason why Mr Warren should not take into account other information provided by Natural England as long as it was sufficiently clear. I take into account that stop notices are intended to be used in urgent circumstances where previously the regulator was limited to seeking an injunction to prevent harmful activity, and the level of detail required to be given in the stop notice itself should not confound the very purpose of the legislation. Ms Hay had summarised the detailed exchanges that she had had with Mr Warren prior to the service of the stop notice. Mr McCracken did not submit that, if that material had been taken into account, it would have made no difference to the tribunal's conclusion as to the adequacy of reasons.

155. This ground of appeal is allowed.

Ground 4: obtaining consent as a step

156. A stop notice prohibits a person from carrying on the specified activity until the person "has taken the steps specified in the notice" (paragraph 1(2) of Schedule 3 of the 2010 Order). By paragraph 1(7) these "must be steps to remove or reduce the harm or risk of harm" relied on in the notice. By paragraph 2 the notice must include "information as to…the steps the person must take to comply with the notice".

157. In relation to pheasant releases, vehicle access and recreational activities, the steps in the notice as served were to obtain Natural England's written consent to the matters specified there. In relation to the release of partridges, the step was

to obtain Natural England's agreement. Natural England's position at the time of service of the stop Notice was that it could not require consent under section 28E to the release of partridges off the SSSI. As I have explained, by the time of the hearing Natural England had changed its position but, as I have found, the change position was wrong: Natural England could not require consent for the release of partridges. Fortuitously, the stop notice correctly differentiated between the activities which took place on the SSSI and which could be subject to consent, and those that took place elsewhere and could not be subject to consent. I consider separately each of the requirements of consent or agreement.

158. The First-tier Tribunal addressed the requirement to obtain consent as a step at paragraph 88 of its decision. It is evident that the First-tier Tribunal approached the notice as requiring Mr Warren to obtain some form of non-statutory consent. That was the basis for its conclusion that it was unfair to include obtaining consent as a step. This was a plain misreading of the notice. It is difficult to understand why the tribunal would have read "consent" as meaning anything other than statutory consent. The pleadings made it clear that the requirement was to obtain consent under the 1981 Act. This was clearly stated in Natural England's response to the grounds of appeal, its skeleton argument and closing submissions, and was the basis on which Mr Warren's closing submissions in the First-tier Tribunal were formulated. It had not been suggested on behalf of Mr Warren that the requirement for consent related to anything other than consent under the 1981 Act. There was no suggestion that the word "consent" was open to misunderstanding, and I am satisfied that it was not. Moreover, given what it said in the third and fourth sentences of paragraph 88, the tribunal appeared to have had no difficulty with a stop notice imposing a requirement to obtain statutory consent as a step.

159. Mr McCracken submitted that this misapprehension by the First-tier Tribunal was immaterial because the decision was correct in the result: a requirement to obtain consent under the Wildlife and Countryside Act could not lawfully be imposed in a stop notice. I reject this, for the following reasons.

160. There is no statutory limitation in the 2010 Order on what can comprise a step as long as it is "to remove or reduce the risk of harm". Obtaining consent under the 1981 Act can remove or reduce the risk of harm because that will enable Natural England to assess the implications of the activities and either to refuse consent or, if it gives consent, where appropriate to impose conditions so as to reduce or remove the risk of harm.

161. According to paragraph 1(2) of schedule 3 the steps must be ones that can be taken by the person served with the notice. There is no reason why the person must be able to comply unilaterally. The step specified in this case was that Mr Warren obtains Natural England's consent. That was a step which was to be taken by him. It would involve making an application, providing relevant information and taking any other actions which were necessary in order to obtain consent. If consent was given, the fact that the ultimate decision was taken by Natural England (or, on appeal, the Secretary of State) would not mean that Mr Warren had not obtained consent. This is consistent with the ordinary meaning of "obtain". For example, a student will obtain specified A'level grades in order to gain admission to university even though the examination board decides what

grades the student achieves. A charity will obtain a grant of funds even though the decision whether to make the grant is that of the donor. Closer to the present context a contract for the sale of land might include a condition that the buyer obtains planning permission, a matter that is decided by the planning authority not the buyer.

162. Nor is there anything intrinsically unfair or vague in requiring consent to be obtained. There is a clear procedure by which the regulator must determine an application for consent. If consent is refused, appeal lies to the Secretary of State. If the regulator makes no decision, after 4 months it is deemed to have been refused: section 28F(2). Indeed, the First-tier Tribunal clearly thought that it was unobjectionable to specify a step requiring consent under the 1981 Act to be obtained.

163. The statutory regimes under the 2010 Order and the 1981 Act are designed to operate together in that a stop notice can only be served where one of the offences listed in schedule 5 of the Act is or is likely to be committed, including offences under section 28P(1). The effect is that a stop notice is intended to be used to prevent activities being undertaken without consent where the Act requires consent, and it is entirely consistent with this that the prohibition in a stop notice should be lifted once consent is obtained.

164. I note that my analysis is consistent with that of the Upper Tribunal in *Forager Ltd v Natural England* MISC/1101/2018, albeit that that was only a determination of permission to appeal. Following the Upper Tribunal's decision on the main *Forager* appeal, the case had been remitted to the First-tier Tribunal which decided that the only steps which would ensure protection of the site was to obtain Natural England's consent to the activity. Indeed, in that case Forager was also required to obtain owner/occupier status or the cooperation of the owner/occupier. In dismissing Forager's application for permission to appeal the Upper Tribunal rejected a contention by Forager similar to that of Mr Warren in this case, saying:

> "22. … the specified steps must be steps to remove or reduce the relevant harm or risk of harm. There is no other limitation on what steps may be specified. The First-tier Tribunal is clearly entitled to take the view that in any particular case, steps that merely require the relevant party to request or apply for something are not likely to reduce or remove the relevant harm or risk. To hold otherwise would itself undermine the "sense" of the provisions and effectively leave matters in the hands of the bodies whose activities are to be controlled under the scheme of the legislation.
>
> 23. For the above reasons I cannot see that an appeal has any realistic prospect of success and permission to appeal to the Upper Tribunal is refused."

165. I have decided that the consent regime could not apply to the release of partridges, and there was no statutory process for obtaining Natural England's agreement to the release of partridges. This was the situation which the First-tier Tribunal addressed at paragraph 88. As the First-tier Tribunal rightly concluded in that regard, if Natural England's agreement was not forthcoming, no completion certificate would be issued. However, I do not agree with the tribunal that Mr Warren would have no right of appeal and would be left in limbo, subject only to the option of judicial review. Under paragraph 4 of schedule 3 of the

2010 Order, a person may apply for a completion certificate "at any time" and may appeal against a decision not to issue a certificate on a number of grounds including that it was unfair or unreasonable, or that it was wrong for any other reason. If Natural England did not give its agreement, Mr Warren could nonetheless apply for a completion certificate and appeal against the refusal. The right of appeal is sufficiently wide to include a claim that the decision not to issue a completion certificate was unfair, unreasonable or wrong because Natural England had wrongly refused to provide its agreement to the activity.

166. If I am wrong in this conclusion, so that the First-tier Tribunal was correct in its decision that a bare requirement to obtain Natural England's agreement to the release of partridges was unreasonable, I conclude that the First-tier Tribunal was in error because it failed to address submissions made by Natural England the step relating to partridge releases could be varied in order to address the perceived difficulty. One suggested variation was to add to the step that Natural England's agreement would not be unreasonably withheld. This would have meant that, if Mr Warren felt that agreement was being withheld unreasonably, he could apply for a completion certificate and appeal against a refusal to the First-tier Tribunal. The First-tier Tribunal did not address this before deciding to remove the requirement for Mr Warren to obtain agreement and, instead, to replace it with a requirement which, as I have decided, would be ineffective to prevent the harm in question.

167. Mr McCracken submitted that, in any event, the First-tier Tribunal was correct to hold that the steps (whether to obtain consent or agreement) were unlawful because they were uncertain in their scope. He said that a) the meaning of "associated activities" was unclear; b) the requirement to obtain consent or agreement was open ended and so it would be impossible to determine when Mr Warren had completed the step; c) it was not clear what constituted "sustainable levels of partridge release" or "appropriate management of birds" and there was no clear procedure for resolving this disagreement. This was not the basis on which the First-tier Tribunal decided this aspect of the appeal but in any event I reject Mr McCracken's submissions in this regard, essentially for the reasons outlined in Natural England's closing submissions to the First-tier Tribunal. Consent applications involve consideration of both the core activity and associated activities, in order to determine the overall impact of the proposal. Moreover, in this case the stop notice grounds gave a clear indication of what was meant, referring to "vehicle movements and shooting activity associated with the game shoot days". The requirement to obtain consent was not open ended. If Natural England did not give consent within 4 months, consent would be treated as having been refused and an appeal would lie under section 28F. Finally, if there was disagreement about sustainable levels of activity or other considerations specified in the step, these could be addressed on appeal.

168. Mr McCracken referred to *Kaur v Secretary of State for the Environment* (1991) 61 P&CR 249, where a planning enforcement notice which required agreement to be reached with the local authority as to the work to be done was held to be bad for uncertainty. However in that case, unlike in the present case, there was no clear procedure for establishing a firm position in the event of disagreement. *Payne v National Assembly for Wales* [2006] EWHC 597, [2007] 1 P&CR 4 takes matters no further as the Court was there concerned with whether a notice which did not comply with statutory requirements was a nullity, and it

accepted the inspector's conclusion that the notice was uncertain without itself determining that matter.

169. My conclusions on this ground are, therefore, in summary,

> a. The tribunal wrongly concluded that a requirement to obtain Natural England's consent or agreement could not lawfully be imposed as a step.
>
> b. If a bare requirement to obtain Natural England's agreement could not lawfully be imposed as a step, the proposed alternative requirement of obtaining agreement which would not be unreasonably withheld was not intrinsically unlawful and the First-tier Tribunal erred in failing to consider it.

170. Accordingly, this ground of appeal succeeds.

Cross-Appeal: Nullity

171. Mr McCracken submitted that, if the steps specified in the original stop notice were not lawful "steps" within the meaning of the Order, then the stop notice failed on its face to comply with the relevant statutory requirements and so was a nullity. In the light of my conclusions on ground 4, this does not arise for determination. Because the issue is of wider importance and it has been fully argued here, I briefly set out my views. The premise of the discussion which follows is that Mr Warren was correct that a requirement to obtain Natural England's consent or agreement was not capable, as a matter of law, of being a "step" within Schedule 3 of the 2010 Order.

172. This is not the first time the point has been considered. In *Forager* the stop notice failed to specify any steps at all. The Upper Tribunal addressed the judgment of the Court of Appeal in *Miller-Mead v Minister of Housing and Local Government* [1963] 2 AB 196, on which Mr McCracken has relied in this appeal, and in which Upjohn LJ said that an enforcement notice (in the planning context) would be bad on its face and so a nullity, rather than merely invalid, if it failed to specify some matter which legislation required. However, in *Koumis v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1723 the Court of Appeal said that that approach should be confined to cases where the failure to comply with the particular statutory requirement was apparent on the face of the enforcement notice itself. The Upper Tribunal in *Forager* rejected an argument similar to that now advanced by Mr McCracken here, saying:

> "31. It is implicit in Mr Hart's argument that if the situation is incapable of remedy, then a stop notice cannot be anything other than a nullity. That cannot be correct. The whole structure of the civil sanctions regime, and the power of the First-tier Tribunal to increase the amount of work required by a stop notice, argue against regarding a stop notice as a nullity in the sense referred to above. Certainly it is invalid, and possibly unenforceable until steps are specified – but specifying steps is precisely the power given to the First-tier Tribunal by Article 10(6) of the 2010 Order."

173. If *Forager* is correct (and the First-tier Tribunal was bound by that decision) it could not possibly be said that a stop notice which specified steps which had

subsequently been found to be unlawful was a nullity. Mr McCracken argued that *Forager* was wrong in this regard. I bear in mind the guidance given in *Dorset Healthcare NHS Trust v MH* [2009] UKUT 4 (AAC) at [37] that a single judge of the Upper Tribunal is not bound by a decision of another single judge of the Tribunal but would normally follow it in the interests of comity and to avoid confusion on questions of legal principle.

174. Mr McCracken submitted that in *Forager* the Upper Tribunal had overlooked that the requirement to specify steps was in primary legislation (section 47 of the 2008 Act). The power to vary a notice could not be used to override or ignore a requirement mandated by primary legislation. The court must insist on "strict and rigid adherence to formalities" in a case where a notice encroaches on private rights and potentially exposes the recipient to criminal liability (*East Riding* at pg 233). Moreover, in *Miller-Mead,* the fact that the Secretary of State had the power to vary a planning enforcement notice did not save the notice from being a nullity and so the Upper Tribunal had been wrong to distinguish *Miller-Mead* on that basis. He submitted the reasoning at paragraph 31 of *Forager* was inconsistent with that in *Payne* which decided that an enforcement notice which failed on its face to comply with mandatory statutory requirements was a nullity and so could not be varied by the inspector.

175. The Upper Tribunal is bound by the Court of Appeal's decision in *Koumis* and so must confine *Miller-Mead* in the way that that Court decided. That approach is consistent with and reflects the modern approach in public law which deprecates nullity in general, subject to limited exceptions where its retention is justified. As explained in *De Smith's Judicial Review*, 8th Edition at 4-062 to 4-066, the courts are concerned with whether a decision is lawful and, outside of rare exceptions (none of which is applicable here), "decisions may be unlawful whether or not they exceed a public authority's jurisdiction in the narrow sense, or are flawed by an error of law within the public authority's jurisdiction or an error of law on the face of the record". There are limited situations where "nullity" and the distinction between jurisdictional and non-jurisdictional error survives including in limited respects in planning law. But the Court of Appeal in *Davenport v City of Westminster* [2011] EWCA Civ 458 declined to return to "the bad old days" (see Munby LJ at [57]) of the arid distinction between nullity and invalidity. Munby LJ then said:

> "71. …I have assumed throughout this judgment that the concept of nullity as explained in *Miller-Mead* is still part of the law. For my own part I share Sullivan LJ's doubts in *Trott* as to whether it is still appropriate to draw the traditional distinction between mere invalidity and nullity. But what is clear, in my judgment, is that, even assuming (without deciding) that *Miller-Mead* remains good law on this point, the circumstances in which an enforcement notice can ever be a nullity are likely to be fairly few and far between. At most, arguments of nullity will arise only in cases – which given the amplitude of the power conferred by section 176(1) are likely to be comparatively rare – where the defect, error or misdescription in the enforcement notice is so gross that it cannot be corrected without causing injustice."

176. Closer to home, that approach is consistent with the decision of the Upper Tribunal in *Information Commissioner v Malnick* [2018] UKUT 72 (AAC) at [91]-[95].

177. Mr Warren's legal team served a short Note after the hearing submitting that, as a planning enforcement notice is suspended pending appeal but a stop notice is not, the *Miller-Mead* approach should apply *a fortiori* to a stop notice. There was no good reason for this submission not to have been made at the hearing and I would not have admitted it had it risked causing any unfairness. However, they add little to the submissions already made.

178. It is clear that to extend the principle of nullity beyond the arena of planning decisions would be inconsistent with the general position in public law that, if *Miller-Mead* applies, it should be confined narrowly. The principle has no place outside of the planning context nor where, as here, the tribunal has wide powers to amend a notice and amendments can be made without causing injustice.

179. Therefore the cross-appeal is dismissed.

Disposal

180. Following receipt of the draft of this decision, the parties made written submissions as to the disposal of the appeal.

181. The Upper Tribunal's powers of disposal are set out in section 12 of the Tribunals Courts and Enforcement Act 20017:

> 12 (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal—
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
> (b) if it does, must either—
> (i)remit the case to the First-tier Tribunal with directions for its reconsideration, or
> (ii) re-make the decision.
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also—
> (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;
> (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal—
> (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
> (b) may make such findings of fact as it considers appropriate."

182. The parties were agreed that this appeal should be remitted to the First-tier Tribunal for reconsideration (subject to one caveat by Mr Warren, which I address below). They did not agree on the interim position pending the First-tier Tribunal's reconsideration or what if any other directions should be given to the First-tier Tribunal.

Disposal and the interim position: the parties' submissions

183. It follows from section 12(2) that the Upper Tribunal may remit the matter only if the First-tier Tribunal's decision is set aside. Although in most circumstances this would be uncontroversial, it was controversial in this case because the consequence of setting aside the tribunal's decision would be to restore the stop notice in its original form. That stop notice imposed a blanket prohibition on all Mr Warren's activities but, as explained in this decision, Natural England has agreed that it was not appropriate to prohibit activities which it considered were sustainable. The First-tier Tribunal agreed (see its decision at paragraph 91) and Natural England has not sought to challenge that. Indeed Natural England's position as to disposal of this appeal was that, pending the First-tier Tribunal's redetermination of the appeal, Mr Warren should not be prohibited from carrying out activities at those previously consented or agreed levels, those being:

> a. The release of no more than 3,060 pheasants on the SSSI in any calendar year;
>
> b. The release of no more than 2,000 partridge on or within 500 metres of the SSSI in any calendar year;
>
> c. Carrying out of shooting activities on the SSSI on no more than 24 days per shooting season (a day meaning any part of a calendar day); and
>
> d. Use of vehicles on the SSSI for the purpose of shooting activities on no more than 24 days per shooting season and at no other times of the year, except insofar as is necessary for gamebird welfare and pest control related to the levels of activity above. Vehicles are to be used on existing tracks only.

184. The restrictions in paragraphs a and d are the same as those imposed by the First-tier Tribunal in the varied stop notice. Those in paragraphs b and c were excluded from the varied stop notice with the effect that there was no prohibition or limitation on those activities. In this part of the decision, I refer to them as the "excluded activities"; Natural England wanted those activities to be subject to the above prohibitions but Mr Warren wanted to continue to be free from any such prohibitions. He submitted that, pending re-determination of the appeal by the First-tier Tribunal, the position should be governed by the terms of the stop notice as varied by the First-tier Tribunal. Alternatively, he submitted, the original stop notice should be suspended. This would have the effect that there would be no restrictions on Mr Warren's activities.

185. In summary, Mr Warren submitted that Natural England had been content with that position during the present appeal, that I have not concluded that there was no proper evidential basis for the First-tier Tribunal's decision to exclude certain activities from the ambit of the stop notice, and that it would be inappropriate for the Upper Tribunal to impose a more restrictive regime than that in the varied stop notice without considering the evidence of the risks posed by the activities which are in issue. He also submitted that, as the shooting season had started or was about to start and all pheasants and partridges had been released from their pens, imposing greater restrictions on shooting was likely to result in larger numbers of game birds being present on the SSSI for a longer period of time and so exacerbate the risks alleged by Natural England. Finally, Mr Warren said that

he had not had an opportunity to plan for a more restrictive interim regime and this could have very serious implications for his business.

186. As for the powers of the Upper Tribunal, Mr Warren submitted that section 12(3)(b) of the 2007 Act, and/or the general case management powers in Rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008, allowed the Upper Tribunal to direct that the setting aside of the First-tier Tribunal's decision should not take effect until the First-tier Tribunal had reconsidered the appeal. Alternatively, the decision of the First-tier Tribunal could be set aside with a direction that the original stop notice was suspended pending reconsideration of his appeal by the First-tier Tribunal, or a direction that the original stop notice is suspended pending redetermination of the appeal. He submitted that, if it was necessary to do so, the Upper Tribunal should construe its section 12 powers compatibly with his Convention rights pursuant to the duty in section 3 of the Human Rights Act 1998. It was accepted that the original stop notice interfered with the exercise of his shooting rights and, as these were protected by Article 1 of the First Protocol to the ECHR, an order reviving that notice would be incompatible with those rights. Mr Warren said he would undertake not to seek a completion certificate pending the outcome of the redetermination. If, however, the Upper Tribunal considered that it was not able to make any form of order that would prevent revival of the original stop notice, Mr Warren submitted that the Upper Tribunal should re-make the decision itself and not make any order on the appeal pending a further hearing.

187. Natural England submitted that the Upper Tribunal had no power to vary or suspend the stop notice in advance of the First-tier Tribunal's reconsideration of the appeal. However, Natural England was prepared to give an undertaking not to take enforcement action for breach of the stop notice in advance of the First-tier Tribunal's reconsideration of the appeal, insofar as Mr Warren limited his activities as requested by Natural England. Alternatively, pursuant to Article 10 of the 2010 Order the First-tier Tribunal had power to vary a stop notice pending appeal and the Upper Tribunal could direct the First-tier Tribunal to consider any application by Mr Warren for interim variation.

188. Mr Warren contended that an undertaking by Natural England not to prosecute was unworkable or unlawful because it would not adequately protect him from criminal liability. There were other potential prosecutors who would not be bound by Natural England's undertaking. Moreover, if Natural England prosecuted on the basis that the limits set by the undertaking had been breached, the court may still be obliged to convict even if it found that those limits had not been breached because the stop notice prohibited any level of certain activities.

Conclusion on disposal

189. I am clear that it is not appropriate for the Upper Tribunal to remake the decision. There will need to be a complete rehearing involving extensive expert and factual evidence. That is a task pre-eminently suited to the First-tier Tribunal rather than the Upper Tribunal. In the Upper Tribunal the case would be decided by a single judge with no possibility of appointing a member with experience in environmental matters, unlike the position in the First-tier Tribunal. I consider that this case would benefit from the experience of such a member. Moreover, a party aggrieved by a decision of the Upper Tribunal would be subject to the much

more limited right of appeal (see section 13(6) of the 2007 Act and the Appeal from the Upper Tribunal to the Court of Appeal Order 2008, SI 2008/2834) as compared to the right of appeal under section 11(1) from a decision of the First-tier Tribunal. In my view the Upper Tribunal should be cautious about taking on what is in essence a first instance decision-making function in the light of the consequence for the losing party's appeal rights.

190. I have decided, therefore, that this matter should be remitted to the First-tier Tribunal for reconsideration. As section 12(2) makes clear, the case cannot be remitted to the First-tier Tribunal for reconsideration unless the decision under appeal is set aside. The effect of setting aside that decision is to revive the stop notice in its original form. That is the correct position in principle, as there has been no lawful decision justifying any departure from the terms of that notice.

191. The Upper Tribunal does not have the legal power to suspend setting aside the First-tier Tribunal's decision pending reconsideration of the appeal. Setting aside the decision is a precondition for its remittal. If the setting aside is suspended, there can be no remittal.

Conclusion on the interim position

192. The Upper Tribunal does not have power to vary or suspend the original stop notice pending reconsideration of the appeal. This is not in the nature of a "procedural direction" within section 12(3)(b). It is a form of interim substantive relief. Mr Warren relies on the Upper Tribunal's case management powers under rule 5. These are powers relating to the conduct or disposal of proceedings in the Upper Tribunal not the First-tier Tribunal. And, even if such powers could cover interim relief as sought by Mr Warren, they do not enhance the limited powers available to the Upper Tribunal under section 12.

193. On the other hand, the First-tier Tribunal does have power to suspend or vary the original stop notice pending its redetermination of the appeal. The power arises not in the First-tier Tribunal's rules of procedure but pursuant to Article 10 of the 2010 Order. Under Article 10(5) the tribunal has discretion to suspend or vary a stop notice. This is in contrast with the automatic suspension pending appeal of all notices, save for stop notices, provided by Article 10(4). Article 10(6) lists the tribunal's full range of powers on appeal. Although not expressly stated, it is clear that these are powers which arise on conclusion of the appeal: none of the powers set out there, save the power of variation in Article 10(6)(c), could apply at any other stage of the proceedings. Given the power of variation in Article 10(6)(c), Article 10(5) would be superfluous unless the discretion in the latter was to be used at a different stage of the proceedings. Moreover, the discretion in Article 10(5) allows not only for variation but also for suspension of a stop notice. That measure would not be appropriate at the conclusion of the appeal (and it is not included in the powers in Article 10(6), thus reinforcing the view that those powers relate to the conclusion of the appeal), a further indication that the Article 10(5) is concerned with the tribunal's powers pending appeal.

194. I am also satisfied that it is open to the Upper Tribunal to direct the First-tier Tribunal to suspend or vary the stop notice. Pursuant to section 12(2)(b)(i) the Upper Tribunal can, on remittal, give directions to the First-tier Tribunal for the reconsideration of the appeal. The breadth of this power, which is not limited to "procedural directions" as in section 12(3)(b), permits the Upper Tribunal to give directions as to interim variation or suspension of the notice. These are part of

the First-tier Tribunal's function on reconsideration of the appeal, as is clear from the terms of Article 10 of the 2010 Order.

195. I agree with Mr Warren that an undertaking by Natural England not to prosecute may not be sufficient to protect him from prosecution. The interim position should be governed by either variation or suspension of the stop notice. If I were to direct the First-tier Tribunal to consider an application for an interim variation of the stop notice, even if it was considered urgently, there may be some delay before such an application can be addressed. I consider that it is more appropriate, and in Mr Warren's interests, for the Upper Tribunal to decide what the interim position should be and direct the First-tier Tribunal accordingly. This does not prevent Mr Warren from making a further application to the First-tier Tribunal for variation, with appropriate evidence, but at least in the meantime he may take advantage of such variation as I direct.

196. I turn then to consider what the interim position should be in this case. I reject Mr Warren's submission that in this case the position should be governed by the terms of the amended stop notice. Although Natural England had not sought to suspend the effect of the amended stop notice pending the appeal to the Upper Tribunal, the position is now different as a result of my decision in this appeal. There is now no justification for the interim position being governed by the erroneous decision of the First-tier Tribunal. I have found specific fundamental errors in the First-tier Tribunal's decision not to prohibit the two excluded activities and, in the light of those errors, there is no proper basis for permitting Mr Warren to continue with those activities in the interim. Indeed I agree with Natural England's submission that, in the light of the errors which I have found in the First-tier Tribunal's decision including its failure correctly to apply the precautionary principle, maintaining the terms of the amended stop notice would permit potentially harmful activities to take place without adequate consideration of the risks and inconsistently with the precautionary principle.

197. Mr Warren submitted that the Upper Tribunal could not make an order imposing an interim regime which is more restrictive than the amended stop notice, without considering the evidence as to the risks posed by the excluded activities and expressing a view on that. But the Upper Tribunal is not deciding to impose a more restrictive regime. The original stop notice revives because the First-tier Tribunal's decision has been set aside. The question that I have to decide is whether and how to lift some of the restrictions imposed by that notice pending a determination by the First-tier Tribunal of the risks posed by the activities.

198. I am not in a position to decide what the consequence to the site will be of imposing greater restrictions than under the First-tier Tribunal's amended stop notice. I have only Mr Warren's brief assertion as to the consequence and that is not accepted by Natural England. There is nothing in the First-tier Tribunal's decision to assist in this regard.

199. Similarly, I have no information to enable me to assess the likely impact on Mr Warren's business of a more restrictive regime. I have only an assertion by Mr Warren as to the likely impact. Moreover, even if I was persuaded that there was a risk of a serious impact on Mr Warren's business, that would not have persuaded me that the excluded activities should be permitted pending the First-tier Tribunal's redetermination of the appeal. Mr Warren has always known that

the outcome of the appeal to the Upper Tribunal would (or could) be reversal of the variations made by the First-tier Tribunal. Yet there is no indication in his brief submission on this point that he made any contingency plans. Indeed, his claim that the more restrictive regime would prevent him from carrying on his business "in accordance with plans/arrangements made after the FTT decision but before the outcome of the UT hearing was known" suggests that he did not.

200. Finally, suspending the original stop notice is out of the question. Save for the previously consented or agreed activities, I cannot say that the original stop notice was unlawful. That is a matter for the First-tier Tribunal to decide. The reasons that I have given above as to the importance of ensuring that the site is protected pending the tribunal's reconsideration and the lack of evidence to support Mr Warren's case as to the effects of imposing a more restrictive regime than that under the amended stop notice, apply with greater force in relation to suspension of the stop notice.

201. For the above reasons, I am satisfied that the original stop notice should be varied to permit the activities agreed by Natural England. This respects the underlying position that the original stop notice revives, but subject to the as yet unchallenged decision of the First-tier Tribunal that Mr Warren should be permitted to continue to carry out activities at previously consented or agreed levels, while providing adequate interim protection to the site. I therefore direct that the First-tier Tribunal vary the stop notice accordingly, pending the determination of the appeal.

202. There will inevitably be a short delay before the First-tier Tribunal complies with this direction. It will only be short, however, as the variation can be made by the First-tier Tribunal without further consideration of the evidence or an oral hearing. In the light of the undertaking by Natural England not to prosecute activities which are within the agreed limits, I am satisfied that there is no realistic risk of prosecution of Mr Warren.

Other directions

203. Mr Warren submitted that the appeal should be heard by the judge who had previously heard the appeal. There has been, rightly, no suggestion that the judge is actually biased. However, she has formed a view as to the quality of the evidence of the witnesses, made detailed findings of fact and reached firm conclusions on the merits which I have found to be fundamentally flawed. There is a danger that even an experienced and skilled judge will find it difficult to approach the evidence on a rehearing with a completely open mind and without a risk of confirmation bias influencing her considerations. I consider that to remit the case to the same judge would give rise to reasonably perceived unfairness to the parties and risks damaging public confidence in the process. The appeal will need to be determined afresh by a different judge who has not previously reached a concluded view on the evidence and the merits of the case.

204. Natural England submitted that it was appropriate for this Tribunal to direct that the appeal be reconsidered by a judge and one or two other members with environmental expertise in accordance with the Practice Statement on the composition of Tribunals in the General Regulatory Chamber. Mr Warren submitted that the composition should be determined by the First-tier Tribunal. I have no doubt that, given the complexity of the evidence, the tribunal would benefit from the assistance of an expert member, in particular in determining

environmental risk and what if any steps are required and in taking a precautionary approach to the task. I have left it to the First-tier Tribunal to decide whether to appoint one or two experienced members as this may involve considering a range of factors, including the benefits of having two members against other matters such as availability and delay, which the First-tier Tribunal is better placed to address.

205. Natural England has suggested that the appeal should take place at such time as a decision can be made before Mr Warren must take delivery of game birds for release in 2020. I do not have sufficient information to make such a direction. This is a matter that will have to be addressed at an early stage by the First-tier Tribunal.

206. Natural England has also made detailed submissions as to the scope of the First-tier Tribunal's reconsideration of the appeal in the light of the decision of this Tribunal and those elements of the original First-tier Tribunal decision which were not challenged. I have decided that it is not appropriate to constrain the next First-tier Tribunal. The last decision has been set aside. The appeal is to be reconsidered afresh. This decision is binding on the parties and the next tribunal, and it will not be open to either party to re-argue before the First-tier Tribunal any points which this Tribunal has decided. However, seeking to limit the issues for determination by the next tribunal risks unduly complicating matters and constraining the parties and the tribunal in a way which may ultimately be unhelpful or even unfair. It is not appropriate to give directions which may preclude either party from arguing points that were not resolved by this Tribunal.

Signed on the original
on 2nd October 2019

K. Markus QC
Judge of the Upper Tribunal