DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision

1. I give Forager Limited, the appellant company, permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal, on the basis of the substituted application of 11th October 2016 from counsel on its behalf.

2. This appeal succeeds to a limited extent. In accordance with the provisions of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set aside the decision of the First-tier Tribunal made on 25th November 2015 under reference NV/2015/0002 after a hearing in London on 21st July 2015. I refer the matter to the same panel in the General Regulatory Chamber of the First-tier Tribunal and direct that it maintain the decision to uphold and continue the Stop Notice issued on 30th April 2015 in respect of the relevant activities of the appellant company but that it vary the Notice to specify the steps to be taken by the appellant company, pursuant to the First-tier Tribunal's powers under article 10 of the Environmental Civil Sanctions (England) Order 2010 (see below). In connection with such variation it may receive and consider any relevant evidence.

Hearing

3. I held an oral hearing of this appeal on 7th February 2017 at Field House (London). Forager Limited, was represented by David Hart QC, Professor Richard Macrory (Hon QC), and Jessica Elliott of counsel instructed by the Environmental Law Foundation. Natural England (the respondent regulator) was represented by James Maurici QC, instructed by Browne Jacobson LLP, solicitors. I am grateful to them all for their assistance, particularly as this is the first appeal to the Upper Tribunal in the relevant jurisdiction.

The Legal Framework - General

4. Natural England is listed as a designated regulator under section 37(1)(a) of and in Schedule 5 to the Regulatory Enforcement and Sanctions Act 2008 ("the 2008 Act") and is responsible for regulating the matters to which this appeal relates. Section 36(1) of the Act authorises a Minister of the Crown to make various provisions by order, including the provision as to stop notices specified in section 46. Section 46 provides as follows:

> **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 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).

5. Pursuant to the above powers the Secretary of State made the Environmental Civil Sanctions (England) Order 2010 ("the 2010 Order"). Article 3 of the Order states that Schedule 3 makes provision for stop notices. Schedule 3 provides as follows:

1. (1) The regulator may serve a stop notice on any person in accordance with this Schedule in relation to an offence under a provision 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 on 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 subparagraph (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 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 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 subsection (6), and

(c) the activity as 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 –

(a) human health,

(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. 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.

6. Paragraphs 4 and 5 of the Schedule deal with what happens after the specified steps have been taken and with compensation available in certain circumstances.

7. Article 9(c) of the 2010 Order provides that:

> **9**. A regulator may at any time in writing –
>
> (c) withdraw a compliance notice, restoration notice or stop notice or amend the steps so as to reduce the amount of work necessary to comply with the notice.

The Legal Framework – Criminal Offences

8. Paragraph 6(1) of Schedule 3 to the 2010 Order creates a criminal offence of failing to comply with a stop notice within the specified time limit, punishable by fine and/or imprisonment not exceeding two years.

9. Schedule 5 to the 2010 Order lists a number of relevant criminal offences for the purposes of applying paragraph 1 of Schedule 3. These include offences under section 28P(6) of the Wildlife and Countryside Act 1981. Schedule 5 indicates that a stop notice is possible for any such offence.

10. Section 28 of the Wildlife and Countryside Act 1981 ("the 1981 Act") provides for the designation of any area of land as a site of special scientific interest, in specified circumstances. Section 28P(6) of the Act provides as follows:

> **28P**(6). A person (other than a section 28G authority acting in the exercise of its functions) who without reasonable excuse –
>
> (a) intentionally or recklessly destroys or damages any of the flora, fauna, or geological or physiological features by reason of which land is of special interest, or intentionally or recklessly disturbs any of those flora, 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 … to a fine.

The Legal Framework - Appeals

11. Paragraph 3 of Schedule 3 to the 2010 Order provides as follows:

> **3.** (1) The person on whom a stop notice is served may appeal against the decision to serve it.
>
> (2) The grounds of appeal are –
>
> (a) that the decision was based in 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.

12. The powers on appeal are specified in Article 10 of the 2010 Order (not in the Schedule), which provides (my emphasis):

> **10**(1) An appeal under this Order is to the First-tier Tribunal.
>
> (2) In any appeal (except in relation to a stop notice) where the commission of an offence is an issue requiring determination, the regulator must prove that offence according to the same burden and standard of proof as in a criminal prosecution.
>
> (3) In any other case the tribunal must determine the standard of proof.
>
> (4) All notices (other than stop notices) are suspended pending appeal.
>
> (5) The Tribunal may suspend or vary a stop notice.
>
> (6) The Tribunal may, in relation to the imposition of a requirement or service of a notice –
>
> (a) withdraw the requirement or notice;
>
> (b) confirm the requirement or notice;
>
> (c) vary the requirement or notice;
>
> (d) take such steps as the regulator could take in relation to the act or omission giving rise to the requirement or notice;
>
> (e) remit the decision whether to confirm the requirement or notice, or any matter relating to that decision to the regulator.

Background and Procedure

13. This appeal relates to a dispute between a limited company and the regulator over the commercial activities of the company. It does not involve ownership of the relevant land and no landowner in the relevant area is a party to these proceedings.

14. In 2006 areas of Dungeness, Rye Bay and Romney Marsh were designated as a site of special scientific interest. This was because of the presence of a number of important habitats and significant geomorphological features. The First-tier Tribunal described the site as containing "the largest and most diverse area of shingle beach in Britain" (paragraph 1 of its written decision). The habitats are of European significance and the site has also been designated as a Special Area of Conservation

under the EU Habitats Directive and as a Special Protection Area under the EU Birds Directive. Dungeness and Rye Harbour provides habitat for annual vegetation of drift lines, which occurs on naturally functioning shingle beaches. The frontage is one of the most important areas in the country for shingle habitat. As put by the First-tier Tribunal (paragraph 3):

> "The coastline is accreting, in that shingle is thrown up onto the foreshore by wave action, forming shingle ridges running parallel to the foreshore. Each ridge represents a period of growth, with its flora reflecting the age and stability of each ridge".

The habitat is important for sea kale, a plant. The older more permanent shingle ridges support well established plants, while the younger ridges enable younger plants to start to colonise.

15. Forager Limited forages wild plants and fruits for supply to restaurants, and this has included harvesting sea kale at Dungeness. Natural England regarded these activities as damaging the site and constituting a criminal offence. It contacted the company and its director on a number of occasions about this but they declined to cease the sea kale harvesting at Dungeness. In 2009 and 2012 Forager Limited had contacted Natural England to seek consent to such harvesting but consent had been refused. Nevertheless the company continued these activities. On 10th October 2014 Natural England wrote to the company with a final warning and a request for a written assurance that it would undertake no further such activities. No such assurance was forthcoming.

16. On 30th April 2015 Natural England issued to Forager Limited a stop notice under the provisions of the 2010 Order. The notice stated that Natural England reasonably believed that an activity likely to be carried on by the company would cause, or would present a significant risk of causing, serious harm to the environment (including the health of animals and plants); and would involve or would be likely to involve the commission of a relevant offence. The notice recited that on 11th June 2014 employees of Forager Limited were seen collecting parts of sea kale plants within the site of special scientific interest and that between 48 and 50 individual plants were affected from a 280 to 300 metre stretch of one particular shingle ridge. Between 5 and 10 leaves were cut at the base of the stem from one half of each plant. The notice further recited as follows:

> "Sea kale is part of the supralittoral sediment community, a notified interest feature of the [site of special scientific interest].
>
> Sea kale is an early successful species that colonises shingle ridges that lie close to the coastline which makes colonisation potential limited. Sea kale acts as a keystone species, in that it is associated with a particular stage of shingle colonisation, and can be the dominant vegetation. Once sea kale is established it provides opportunities for a range of other specialised coastal plants to form the successional communities. This is particularly well demonstrated at Dungeness.

> The activity of Forager Limited has been targeted where sea kale grows on the accreting shoreline on the east coastline particularly on the most seaward ridges. This is where the youngest plants occur. It takes 4 – 5 years for sea kale to flower and so this targeting increases the scale of the damage. However, commercial harvesting of kale anywhere in the [site of special scientific interest] is an activity which in turn could lead to damage and/or destruction of existing shingle vegetation or preventing plants from colonising the open shingle, through trampling and possible vehicular access.
>
> The taking of seed from sea kale reduces its fitness as the plant produces large seeds which are not plentiful. As the plant puts a lot of reproductive effort into this, taking seed significantly reduces the plants ability to spread.

17. The notice reproduced the terms of section 28P(6) of the Wildlife and Countryside Act 1981 and stated "Natural England has decided to stop you from carrying out these activities with immediate effect, until you have taken steps to remove or reduce the harm or risk of harm specified in Schedule 1 [to this notice]".

18. Schedule 1 consists of two columns. The first column is headed "Activity/activities to be stopped" and beneath this heading is stated:

> "Sea kale harvesting, including the cutting of sea kale plants, and the collection of parts of sea kale plants including leaves and seeds".

The second column is headed "Steps to be taken to remove or reduce the harm or risk of harm (including any relevant time scales)". Beneath this heading is stated "N/A".

19. On 8th May 2015 Forager Limited appealed to the First-tier Tribunal against the issue of the stop notice. The First-tier Tribunal considered a great deal of written evidence and heard several witnesses in person at its hearing on 21st July 2015. Closing submissions were given in writing and the First-tier Tribunal decision was issued on 25th November 2015. The tribunal considered the whole matter afresh, was satisfied that the requirements for the issue of a stop notice had been met and upheld its issue unamended.

20. On 29th February 2016 The President of the GRC chamber of the First-tier Tribunal refused Forager Limited permission to appeal to the Upper Tribunal against that decision. On 29th March 2016 the appellant renewed direct to the Upper Tribunal its application for permission to appeal and on 29th April 2016 I directed that there be an oral hearing of the application. At the same time I refused an application by Forager Limited to suspend the effect of the decision of the First-tier Tribunal. The hearing was fixed for 6th July 2016 but on 31st May 2016 I postponed it at the request of both parties. It was then fixed for 25th October 2016 but at some stage Forager Limited instructed counsel (who had not been acting previously) and fresh grounds of appeal were submitted. For this reason, on 13th October 2016 I again postponed the hearing. On 26th October 2016 I agreed to hold what the parties have insisted on referring to as a "rolled up hearing". There is no such expression in the Tribunal Procedure (Upper Tribunal) Rules 2008 but it is a way of exercising the power of the Upper Tribunal given by rule 22(2)(c), whereby if permission to appeal is given and the parties agree, the tribunal may proceed to a decision on the appeal without

obtaining further written submissions. The hearing finally took place on 7th February 2017.

21. By the time of the hearing at the Upper Tribunal Forager Limited had identified five heads of appeal. Natural England agreed that the First-tier Tribunal had gone wrong in law in respect of one of those matters, but the parties disagreed over the consequences of that error.

The Notice

22. In summary Forager Limited argued that the First-tier Tribunal was wrong to decide that the stop notice was valid when it did not specify any steps to be taken. Paragraph 1(2) of the 2010 Order defines a "stop notice" as a notice prohibiting a person from carrying on the specified activity "until the person has taken the steps specified in the notice". Paragraph 2 provides that a stop notice must include information as to the steps to be taken to comply with the stop notice. A stop notice that did not specify the steps to be taken was not valid. It was wrong to issue a stop notice that was incapable of remedy. The regulator could use other mechanisms, such as making bye-laws or prosecuting (or taking various other steps), but it could not issue a stop notice that did not specify steps to be taken. To do so made it impossible for a completion certificate to be issued under the paragraph 4(2) of the 2010 Order.

23. Mr Maurici's written submissions of 15th December 2016 on behalf of Natural England stated (paragraph 20) that "It is conceded that the Stop Notice ought to have contained steps required to be taken by Forager to comply with the Stop Notice. It did not". However, that did not render the notice invalid. Natural England, the First-tier Tribunal and (on allowing an appeal) the Upper Tribunal all had the power to amend such a notice by specifying steps. He went on to invite the Upper Tribunal to vary the notice and suggested a number of steps to be specified.

24. In its written submissions and skeleton argument of 18th January 2017 Forager Limited argued that the stop notice was unlawful and a nullity and should be withdrawn. Some effort was spent analysing and criticising the steps suggested by Mr Maurici. In further written submissions of 3rd February 2017 Mr Maurici also expended a great deal of effort in defending them. I do not find it necessary to consider these arguments. Mr Maurici stated that the issue as to steps to be specified was never raised before the First-tier Tribunal (paragraph 8) but in my opinion that cannot go as to whether the stop notice was a nullity (per Forager Limited) or curable (per Natural England), and in fact there were references to the issue tucked away in the multitude of papers before the First-tier Tribunal.

25. I do not find helpful the suggestion that Natural England could have sought to control the activities that it regarded as harmful by enacting bye-laws. That would have gone much wider than dealing with the specific mischief with which it was concerned in this case. Nor do I find it all persuasive that a better remedy was prosecution. The whole purpose of the civil enforcement legislation and regime is to avoid unnecessary criminalisation. These matters do not persuade me that the stop notice was a nullity.

26. The appellant referred to the decision of the Supreme Court in Regina (Lumba) v Secretary of State for the Home Department [2011] UKSC 12. That case concerned the lawfulness of detention pending deportation of foreign nationals who has completed sentences of imprisonment in the United Kingdom. Lord Dyson pointed out (paragraph 66) that "in the present context" there was in principle no difference between a detention which was unlawful because there was no statutory power to detain and a detention which was unlawful because although authorised by statute it was made in breach of a rule of public law (there, the application of a blanket policy which was inconsistent with the published policy). However, the context of the present appeal is totally different, the error derives from a wrongful reading of the rules as to the content of the stop notice rather than a breach of a rule of public law, and there is undoubted power to vary the contents of the notice.

27. In oral argument Mr Hart also referred to the decision of the Court of Appeal in Koumis v Secretary of State for Communities and Local Government [2014] EWCA Civ 1723. That case concerned a refusal by an Inspector of planning permission for redevelopment of a residential site and a decision, in the same letter, to dismiss the developer's appeal against an enforcement notice and to uphold the notice with a correction and variations. There was a broad power under the relevant legislation to correct errors in and vary the terms of an enforcement notice. The Court of Appeal reviewed a number of cases in which enforcement notices were "defective on their face" (paragraph 73). One of these was Miller-Mead v Minister of Housing and Local Government [1963] 2QB 196, in which Lord Justice Upjohn said (cited in paragraph 69 of Koumis):

> "Now, I think is to draw the distinction between invalidity and nullity. For example, supposing development without permission is alleged and it is found no permission is required, or that contrary to the allegations of the notice, it is established that in fact the conditions in the planning permission have been complied with, then the notice may be quashed … The notice is invalid and it is not a nullity because on the face of it [the notice] appears to be good and it is only on proof of facts … that the notice is shown to be bad: the notice is invalid and, therefore, it may be quashed. But supposing that the notice on the face of it fails to specify some period as required by [the legislation]. On the face of it the notice does not comply with the section: it is a nullity and is so much waste paper".

28. In Koumis Lord Justice Sullivan (with whom the other judges of the Court agreed) said that this approach should be confined to those cases where the failure to comply with the particular statutory requirement is apparent on the face of the enforcement notice itself (paragraph 80).

29. Clearly, Mr Hart's suggestion here was that stop notices under the 2010 Order should be treated in the same way and that the defect here was apparent on the face of the notice.

30. Mr Maurici pointed out that Forager Limited had accepted in its written skeleton argument of 18th January 2017 that although Article 9(c) of the 2010 Order limits the power of the regulator to amend a stop notice (only so as to reduce the amount of work necessary), under Article 10(6) the First-tier Tribunal has wider powers to

"vary" the requirement or notice. This is correct and in my opinion the First-tier Tribunal has power to increase the amount of work required.

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 that does not specify steps 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.

32. As I have indicated above, Mr Maurici suggested that the Upper Tribunal itself specify steps, a number of which he suggested. I do have power to do this under section 12(b)(ii) and 12(4) of the Tribunal, Courts and Enforcement Act 2007. However, the First-tier Tribunal panel will include an expert member and the parties ought to have a further opportunity to present evidence and argument on the appropriate steps to be specified. As will be seen below, I do not accept that the First-tier Tribunal's decision involved any other error of law and therefore, in accordance with the power of the Upper Tribunal under section 12(b)(i) of the 2007 Act to give directions, I make the directions given in paragraph 2 above.

Standard of Proof

33. As indicated above, article 10(3) of the 2010 Order provides that on an appeal in relation to a stop notice it is for the First-tier Tribunal to determine the required standard of proof. Article 10(2) creates a general rule that where the commission of an offence is an issue requiring determination, the regulator must prove that offence according to the same burden and standard of proof as in a criminal prosecution, but this does not apply in relation to a stop notice. Forager Limited stated that "The evidential standard to be applied was not, however, explicitly addressed by the [First-tier Tribunal], or apparently raised by the parties, though it would seem the civil standard was being applied" (paragraph 44 of the substituted application of 11th October 2016).

34. The appellant argued that the criminal standard should apply because the issue of a stop notice creates potential criminal liability if it is not complied with. It relied on the decision of the House of Lords in R (McCann and others) v Crown Court at Manchester and another [2002] UKHL39, [2003] 1 AC 787. This concerned the making of anti-social behaviour orders (ASBOs). The legislation provided for a relevant authority to apply for an ASBO if it appeared that a person has acted in a manner that caused or was likely to cause harassment, alarm or distress and that such an order is necessary to protect persons in the area from further such acts by that person (section 1 of the Crime and Disorder Act 1998). It was held that since applications for such orders were initiated by the civil process of complaint and did not charge the defendant with any crime, and the making of such an order was preventive not punitive and was not a conviction and resulted in no [other] penalty, the proceedings were civil under domestic law and for the purposes of article 6 of the European Convention on Human Rights. However, given the seriousness of the matter involved, the court should be satisfied to the criminal standard of proof that a

defendant had acted in an anti-social matter before making such an order. I note that that applied to the question of whether the person had acted in a particular way in the past. In relation to what was necessary for the future Lord Steyn said "The inquiry [whether] such an order is necessary to protect persons from further anti-social activities by him, does not involve a standard of proof: it is an exercise of judgment or evaluation" (paragraph 37).

35. There was also some reference in that decision to what has been called "the heightened civil standard" but the use of that concept has been "repudiated" (per Mr Maurici) and I make no further reference to it.

36. Forager Limited argued that because all the critical questions in the present case are factual (presumably as contrasted with being matters of judgment or evaluation), the criminal standard should apply. Mr Maurici pointed out that a stop notice may be issued if the conditions in paragraphs 1(4) or (5) of Schedule 3 to the 2010 Order are satisfied. 1(4) relates to where a person is carrying on an activity and to the reasonable belief of the regulator as to the effects of that activity. 1(5) relates to the reasonable belief of the regulator as to what is likely to happen. He argued that these are matters of judgment or evaluation, rather than proof, just like the situation in McCann in relation to what was necessary for future protection in an ASBO application. I agree, except in relation to paragraph 1(4)(a). That requires the establishment of a fact – is a particular activity actually being carried on by the relevant person. Article 10(3) provides the answer – it is for the First-tier Tribunal to decide the relevant standard of proof. In the ASBO situation there was no legislative or regulatory provision as to the required standard of proof.

Significant Risk of Causing Serious Harm

37. Article 1 of Schedule 3 to the 2010 Order enables the issue of a stop notice where, if other conditions are satisfied, the regulator reasonably believes that an activity being carried on is causing or presents a significant risk of causing, serious harm or (as in the present case) that the activity as likely to be carried on will present a significant risk of causing serious harm.

38. The First-tier Tribunal stated (in paragraphs 108 and 109 of its Decision):

> 108. Importantly, the expression "significant risk" does not mean that the serious harm must be shown to be more likely than not to occur. A "significant risk" is demonstrated if the evidence shows discloses a risk that is more than trivial, fanciful or hypothetical (Balfour Beatty etc v HSE [2014] EWCA Crim 2684, paragraph 46).
>
> 109. 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 …

39. Forager Limited argues that this test under-estimates the degree of risk required to amount to "significant risk", referred to its analysis of the use of such terms in other environment legislation, and suggested that the First-tier Tribunal had been inconsistent in its approach to interpretation. In reply, Mr Maurici cited other legislative contexts and authorities.

40. In my opinion it is wrong to overcomplicate this matter. I agree with the way in which the First-tier Tribunal has formulated the test(s) and the fact that Balfour Beatty related to a different jurisdiction does not mean that the First-tier Tribunal's formulation in this case was wrong.

Mens Rea of the Section 28P(6) Offence

41. As explained above, if other conditions are satisfied, a stop notice may be issued where the regulator reasonably believes that the activity will involve or will be likely to involve the commission of an offence under section 28P(6) of the 1981 Act, which is committed by a person who without reasonable excuse:

> (a) intentionally or recklessly destroys or damages any of the flora, fauna, or geological or physiological features by reason of which land is of special interest, or intentionally or recklessly disturbs any of those flora, and
>
> (b) knew that what he destroyed, damaged or disturbed was within a site of special scientific interest.

42. In paragraphs 152 and 153 if its decision the First-tier Tribunal said:

> 152. Turning to section 28P(6), it is important to observe that this Tribunal is not required to decide whether any of the future carrying out of the activities proscribed by the Stop Notice will necessarily involve the commission of the relevant offence. It is sufficient if we find that it will be likely to involve the commission of such an offence. We have approached the matter on that basis.
>
> 153. If the appellant were to repeat the activities carried out in June 2014, we are in no doubt that it would be likely to commit an offence under section 28P(6). The appellant would plainly be intentionally removing leaves and it would necessarily require its employees to trample the shingle ridges as they worked the line of sea kale plants which are on them …

43. Forager Limited argued that the First-tier Tribunal wrongly attached the intention to the proximate act which is said the constitute damage, whereas the required intention or recklessness relates to "destroys or damages". Again reference was made to decisions by courts dealing with differently defined criminal offences in different contexts. I agree with Mr Maurici that the offence would be committed by intentionally or recklessly destroying or damaging any of the relevant flora and fauna etc. The First-tier Tribunal could have expressed its reasoning more broadly but there can be no possible doubt that, on the evidence, the First-tier Tribunal was entitled to conclude that the activities would be likely to involve the commission of the relevant offence.

Evidence and Natural Justice

44. There was some discussion about whether the Upper Tribunal should consider fresh expert evidence, and the effect of the Court of Appeal decision in Ladd v Marshall [1954] 1 WLR 1489.

45. The right of appeal to the Upper Tribunal from the First-tier Tribunal under section 11(2) of the Tribunals, Courts and Enforcement Act 2007 is limited to "any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision" (section 11(1)). The Upper Tribunal can only interfere with a decision if it "finds that the making of the decision concerned involved the making of an error of law" (section 12(1)).

46. I cannot see how the contents of any further expert or other evidence in this case can go to whether there was an error of law, except for evidence relating to what happened at the First-tier Tribunal (which this is not) or in the context of whether the evidence was wrongly excluded or should have been admitted by the First-tier Tribunal. In refusing permission to appeal in the First-tier Tribunal the Chamber President pointed out that Forager Limited had ample time to gather evidence, and had two months after the hearing to submit closing written submissions, during which time no indication was made of an intention to adduce further evidence, and in which there was no reference to any such evidence.

47. There is also a complaint that that some evidence was not provided to the company's director until five days before the First-tier Tribunal hearing. He did not at that stage have legal representation and did not apply for an adjournment. I do not accept that there was any procedural irregularity or breach of the rules of natural justice. Forager Limited is a commercial business. It must have chosen not to appoint legal representation and it knew that bulky documentation was involved (including its own). It also had the two months in which to make further written submissions.

H. Levenson
Judge of the Upper Tribunal

6th April 2017