Ref: CA/2023/000229

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY TRUSTS AND PROBATE LIST (ChD)
SIR JULIAN FLAUX C [2023] EWHC 35 (Ch)

B E T W E E N:

(1) ALEXANDER DARWALL
(2) DIANA DARWALL

Claimants/Respondents

-and-

DARTMOOR NATIONAL
PARK AUTHORITY

Defendant/Appellant

-and-

OPEN SPACES SOCIETY

Intervener

INTERVENER'S SKELETON
ARGUMENT DATED 30 MAY 2023

Introduction

1. This is the skeleton argument of the Intervener, the Open Spaces Society ("**OSS**"). The background to the OSS is explained in the witness statement of Hugh Craddock ("**HCWS**") at paras 3-4. The OSS supports the Appellant ("**DNPA**") on Grounds 1 and 2: that the Chancellor misconstrued s10 of the Dartmoor Commons Act 1985 ("**the Act**") and that the right conferred by s10(1) includes camping. This skeleton argument deals with the construction of s10(1) by reference to well-established tools of statutory interpretation, then deals with camping as open-air recreation, camping as ancillary to or part-and-parcel of walking, the importance of a clear and workable interpretation of s10(1) given that similar phrasing is used in a number of Acts, and finally the issue of alleged interference with proprietary rights and statutory interpretation. The OSS supports, but does not reiterate here, the DNPA's arguments in its skeleton argument of 31 January 2023.

2. Permission for the OSS to intervene was granted by Lewison LJ on 22 May 2023 by written submissions (this skeleton argument), witness evidence, and oral submissions of up to 30 minutes subject to the discretion of the constitution hearing the appeal.

The claim and the judgment on appeal

3. The claim was brought under CPR Part 8 by the Respondents against the DNPA. The Respondents own an area of common land within Dartmoor National Park which is subject to the Act and byelaws made under it. The claim arose from a consultation by the DNPA on amendments to those byelaws, which include controls on public camping (J6). The Respondents sought a declaration from the Court that the right granted by s10(1) of the Act "does not extend to a right for the public to camp or wild camp".

4. The Chancellor of the High Court allowed the claim and granted a declaration in the following terms:

> "(1) on its true construction, section 10(1) of the Dartmoor Commons Act 1985 does not confer on the public any right to pitch tents or otherwise make camp overnight on Dartmoor Commons. Any such camping requires the consent of the landowner.
> (2) there is no local custom of camping which has the force of law despite section 10(1) of that Act".

5. The effect of the Judgment was therefore to make camping of any kind unlawful on the Dartmoor commons, reversing a long-held understanding of the effect of the Act, reflected both in the management of the land and the 1989 byelaws. The Chancellor relied in particular on the position prior to the Act being enacted (J73-76)[1] and what he said was a "clear and unambiguous" reading of s10: "it confers the right to roam on the Commons, which does not include, whether as a matter of construction or of necessary implication, a right to wild camp without permission" (J84).

[1] References in the form J# are to paragraphs of the Chancellor of the High Court's judgment of 13 January 2023.

6. The Chancellor also considered the similar statutory formula in the National Parks and Access to the Countryside Act 1949 ("**NPACA 1949**") under which access agreements have been made, including on Dartmoor. He held that NPACA 1949 "drew a clear distinction between the enjoyment of opportunities for open-air recreation on the one hand and facilities for that enjoyment on the other" (J79). He considered that, like the Act, NPACA 1949 does not confer a right to wild camp without permission (J83).

7. While other statutory provisions were cited before the Judge – including s193 of the Law of Property Act 1925 ("**LPA 1925**"), the Countryside and Rights of Way Act 2000 ("**CROWA 2000**") and the Malvern Hills Act 1995 – the Judge did not express any conclusions on those provisions (either in their own terms or in relation to their implications for the interpretation of s10(1)) save to note that LPA 1925 s193 only applies to metropolitan commons (J73).[2]

8. The Judge considered that the 1989 byelaws provided "no support" as byelaw 6 says nothing[3] about wild camping "let alone whether it is lawful without the consent of the landowner" and that they "could not confer on the public a right to wild camp without the landowner's permission which was not given by the words of the statute" (J82).

9. At J85 the Chancellor invoked "the principle against expropriation" as an additional reason for his interpretation of s10(1) (albeit not one that he needed to rely upon).

10. The Judge rejected a subsidiary argument made by the DNPA (that does not arise on appeal) as to whether a customary right of camping had been established (J86-91). He also rejected the argument that the Court should not exercise its discretion to grant a declaration, stating at J92 that "this case is quintessentially a private law dispute".

11. The primary – if not the sole – issue on appeal is the construction of s10(1) of the Act. However, that requires consideration of the wider statutory context.

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[2] In fact, s193 applies to metropolitan commons and also manorial waste and other categories of common land (depending on their history and the existence of rights of common over them) as defined in s193(1).

[3] Byelaw 6 is quoted at J5. It does refer to camping and tents and, among other things, prohibits camping on the same site for more than two consecutive nights.

Legal framework for statutory interpretation

12. The Supreme Court in *R (PRCBC) v SSHD* [2022] UKSC 3; [2022] 2 WLR 343 at paras 28-30 described the process of statutory interpretation as follows. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. The courts in conducting statutory interpretation are seeking the meaning of the words which Parliament used. Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.

The meaning of the phrase in s10(1) of the 1985 Act

13. The phrase of which the Court must seek the meaning is contained within s10(1) in Part III of the Act. This says: "the public shall have a right of access to the commons on foot and on horseback for the purpose of open-air recreation". This confers on the public a right of access,[4] to certain land (the Dartmoor commons), by certain means (on foot and on horseback), for a certain purpose (open-air recreation).

14. Properly construed, this is a right of access to land for the purpose of open-air recreation, with the right being exercised – the access being taken – by certain means (on foot and on horseback).

[4] The heading and side note to s10 make it clear that s10 deals with "public access to commons". Section 11(1) refers to s10(1) as giving "a right of access", as does s10(4) ("the right of access of the public"). That the right is a right of access to the commons is confirmed by the Act's long title ("to regulate public access to the commons") and the preamble ("it is expedient that the public be afforded a right of access to the said commons").

15. This is reinforced by s10(4)(b), which refers to the suitability of the commons for "recreation", not merely walking and horse-riding.

16. It is too narrow a reading of the statutory words to take s10(1) as merely conferring a right of access to the commons for walking and horse-riding, which the Chancellor referred to as a "right to roam" (J78, 84). Section 10(1) confers more than a right to walk or horse-ride recreationally.

17. It is necessary to read the phrase in s10(1) as a whole and to give proper effect to all parts of the phrase used in s10(1). There is a strong presumption that every word in a statute must be given some effective meaning and that there is no 'surplusage'.[5]

18. Here, construing the s10(1) right as a "right to roam" does not give any or any real effect to the phrase "for the purpose of open-air recreation". All walking and horse-riding on the Dartmoor commons likely to be undertaken pursuant to the s10(1) right of access would in practice be recreational.[6] So, on the Chancellor's interpretation, the phrase "for the purpose of open-air recreation" would be otiose.

19. Moreover, the second part of s10(1) declares that a person who enters or is on the commons "for that purpose" – i.e. the purpose of open-air recreation – "shall not be treated as a trespasser on the commons or incur any other liability by reason only of so entering or being on the commons." The scope of a person's entitlement to be on the commons is therefore not limited to their being on foot or horseback – i.e. 'roaming' in the sense described by the Chancellor. It extends to their being on the commons for the purpose of any open-air recreation available to them and not otherwise excluded.

20. Where a right is expressed to be for a particular purpose, the proper interpretation is that the right enables that purpose to be achieved; the statutory language should not be divided up into watertight compartments.[7] The scope of the access right in s10(1) must

[5] *McMonagle v Westminster City Council* [1990] 2 AC 716 at 726 D-E.
[6] For example, commoners walking on the Dartmoor commons in connection with grazing their animals would be accessing the land pursuant to the rights of common.
[7] See, by analogy with regard to rights of entry, *Earl of Plymouth v Rees* [2020] EWCA Civ 816; [2020] 4 WLR 105 per Lewison LJ at paras 68-70.

be conditioned by the purpose for which it has been granted. It is a right of access for a particular purpose, and that purpose is open-air recreation. The right is subject to the statutory safeguards in s10(1) for the protection of the landowner from any damage which may result from the exercise of that right, namely that access becomes trespassory where a person breaks or damages "any wall, fence, hedge, gate or other thing" or where land is accessed otherwise than on foot or horseback.[8]

Other provisions in the 1985 Act

21. Guidance to the meaning of the phrase is also found elsewhere in Part III of the Act.

22. First, the above reading of s10(1) is confirmed by s14, which clearly refers to the exercise of the s10(1) right. Section 14 refers to entry "upon the commons for the purpose of open-air recreation on foot or on horseback". This makes it clear that the substance of the s10(1) right is access for the purpose of open-air recreation, and that being on foot or on horseback is the means by which one can access the commons for that purpose.

23. Second, echoing s10(4)(b), s4(1) requires the Commoners' Council to have regard to the use of the commons "as a place of resort and recreation for enjoyment by the public". This supports the construction of s10(1) as affording a right of access for the purpose of recreation and not merely a right of access for walking and horse-riding.

24. These two provisions in Part III of the Act confirm the reading of s10(1) as conferring a right of public access for the purpose of open-air recreation, with the reference to "on foot and on horseback" relating to how access is taken and not limiting the right of access simply to walking or horse-riding on the commons. The substance of the right of access is for the purpose of open-air recreation. Providing that members of the public are accessing the commons on foot or on horseback, they can undertake on the commons any activity which falls within the purpose of open-air recreation and is not expressly excluded.

[8] See, by analogy, *Risegold Ltd v Escala Ltd* [2008] EWCA Civ 1180; [2009] 2 P&CR 1 per Mummery LJ at paras 14-18.

25. The Chancellor appeared to accept that the s10(1) right would allow fishing and rock climbing (J78, 80),[9] but these activities would not appear to fall within the ambit of a right of access to the commons for walking and horse-riding – the Chancellor's "right to roam". Neither fishing nor rock climbing could be said to be within the ambit of recreational walking or horse-riding. The Chancellor's description in J80 of access for rock climbing would apply at least equally well to access for camping.[10] The Chancellor's apparent approach of including fishing and rock climbing within the scope of the s10(1) right, but not camping, makes no logical sense. It reflects his misinterpretation of s10(1).

Contemporary exposition: the 1989 byelaws

26. It is well-established that contemporary exposition is a legitimate aid to statutory interpretation.[11] This covers how a statute was understood by those responsible for the enactment and those to whom a statute was addressed. In this case, that was Devon County Council as both the promoter of the Act and the regulator under the Act (prior to the existence of the DNPA).[12] The 1989 byelaws provide an administrative contemporary exposition of the meaning of the Act. They therefore offer a reliable guide to the meaning of the Act and tend to confirm the meaning of s10(1) set out above.

27. The promoter of the Act, in the first set of byelaws made under the Act (also made under s90 of NPACA 1949), and soon after the Act was passed, covered camping (see J5). The byelaws are predicated on the proposition that camping is permissible "on the access land" and go on to regulate that activity. The "access land" in the byelaws is defined as the Dartmoor commons identified in s2 of the Act, plus other land included

[9] Although fishing is restricted by paras 1(d) and 1(f) of Sch 2 to NPACA 1949, applied by s10(3)(a) of the Act.

[10] "One can readily see that rock climbing could be categorised as open-air recreation, so that someone who walked onto the Commons in order to engage in rock climbing could be said to be gaining access on foot for the purpose of open-air recreation" (J80).

[11] See e.g. *Hanlon v Law Society* [1981] AC 124, at 193H-194C, where regulations made under an Act, and 2-3 years after the Act, were used to interpret a section of the Act.

[12] See HCWS at paras 77 and 100.

in a schedule to the byelaws. This is a strong indication that camping on the Dartmoor commons was intended to be permitted by s10(1).

Other statutes on the same subject

28. It is well-established that, to understand the meaning and effect of a provision in an Act, it is relevant to take into account previous and later law on the same subject matter.[13]

Previous statutes

National Parks and Access to the Countryside Act 1949

29. In this case, s10(3) of the Act expressly cross-refers to, and applies to the Dartmoor commons, certain provisions in Part V of NPACA 1949 on access to open country.[14] Section 60 of NPACA 1949 is titled "[r]ights of public where access agreement, order in force" and s60(1) provides that "a person who enters upon land comprised in the agreement or order for the purpose of open-air recreation" shall not be treated as a trespasser. That is subject to a number of ancillary provisions, of which key ones are expressly carried over to the right in s10(1) of the Act. In particular, (i) the right does not apply to the excepted categories of land set out in NPACA s60(5)(b)-(g)[15] and (ii) the right does not apply (or ceases to apply) to a person who does certain activities on the land, as set out in para 1 of Sch 2 to NPACA 1949. Those activities include lighting a fire (para 1(b)), but not camping *per se*. There is accordingly a strong connection between the Act and NPACA 1949 and it provides important context.

30. There is no reason to think that a narrow definition of the term "open-air recreation" was intended in NPACA 1949, or that camping was excluded. As is noted below, the 1947 Hobhouse Report that informed NPACA 1949 referred to camping as a form of recreation. Moreover, as is explained in HCWS paras 71-72, many of the access

[13] See e.g. *Goodes v ESCC* [2000] 1 WLR 1356 per Lord Hoffmann at 1360H.
[14] Express cross-reference indicates that the two statutes should be read together: *R v Thames Metropolitan Stipendiary Magistrate ex p Horgan* [1998] QB 719 per Pill LJ at 724H.
[15] The right in s10(1) may, however, be exercised on "agricultural land" (excepted by NPACA s60(5)(a)) and "land to which section one hundred and ninety-three of the Law of Property Act 1925, for the time being applies" (s60(5)(h)) – see below.

agreements made pursuant to NPACA 1949 expressly excluded camping. This would not have been necessary if the access to land "for the purpose of open-air recreation" envisaged under NPACA 1949 had not been capable of encompassing camping in the first place. The statutory regime and the provisions of access agreements are explained in HCWS at paras 63-69.

31. The Chancellor was accordingly wrong to conclude that NPACA 1949 does not confer a right to camp (or wild camp) without the separate permission of the landowner (J83). Provided that the particular activity is not on excepted land (s60(5)) and is not prohibited under an access agreement (or the general restrictions in para 1 of Sch 2), s60 of NPACA 1949 entitles a member of the public to be on land for any form of open-air recreation.

32. The reliance of the Chancellor on s12 of NPACA 1949 (at J79) is also misplaced. Section 12 is in a different part of NPACA 1949 – Part II relating to National Parks – and empowers relevant authorities to make provision for facilities, including accommodation, camping sites and parking places in National Parks. Such facilities should not be conflated with the activity of camping as an informal recreational activity, just as the provision of formal catering facilities (see s12(1)(a), and the proviso to s12(1)) is different from, say, informal recreational picnicking.

Law of Property Act 1925

33. Section 193(1) of LPA 1925 provides a public right of access to certain common land "for air and exercise". This is subject to a proviso in s193(1)(c) that the right of access shall not include any right to camp on the land. That would not have been necessary if the right of access for air and exercise did not encompass camping. The exclusion in s193(1)(c) would be otiose if the public were not allowed to camp at all in the exercise of the right of access for air and exercise (see the analogous reasoning in *R v SSETR ex p Billson* [1999] QB 374 per Sullivan J at 391H-392B).

34. The Respondents' argument in the High Court appears to have been that a right of access "for air and exercise" *includes* camping, but that it was excluded by the separate provision in s193(1)(c) – this, said the Respondents, was "a different drafting

technique" that achieved the same end (at least as regards camping). The argument is flawed. There is no sensible reason on the face of it to consider that a right of access for the purposes of "air and exercise" is broader than one for "open-air recreation". If anything, air and exercise is narrower in scope than open-air recreation as it could be said that there are forms of recreation that are neither "air" nor "exercise". In reality, the two terms appear to have been used interchangeably, as may be seen from the examples of enactments providing for public access to common land at HCWS Annexe B, where the right has over time been expressed as use for "recreation", "recreation and enjoyment", "exercise and recreation", "air exercise and recreation", "air and exercise" and "open-air recreation". On any view, the distinction maintained by the Respondents does not exist. If a right of access for "air and exercise" includes camping (as the Respondents accept), the same must apply to a right of access for "open-air recreation". The drafting technique is to start with a widely drawn right and to apply exclusions – for example, to camping – either in the measure itself or under subsidiary provisions such as byelaws. However, that does not assist the Respondents in this case because camping is not excluded by the Act or the byelaws made under it (although it is regulated by the latter).

Other previous statutes

35. Earlier prescribed schemes under the Commons Act 1876 and Commons Act 1899 took a similar approach: i.e. to grant a privilege of recreation, subject to restrictions. As is explained in HCWS at paras 39 and 45-50, those restrictions have sometimes included prohibitions on camping, which again would not have been necessary if camping was considered not to be a form of recreation.

36. The Act built upon previous statute on the same topic and there is no reason to think that previous statutes sought to distinguish between a "right to roam" (in the Chancellor's understanding of the expression) and other forms of recreation, or otherwise took a restrictive interpretation of "recreation" or "open-air recreation". In fact, it is clear that an unrestricted (general) interpretation of the scope of the right, immunity or privilege was intended, including camping, and that, where considered appropriate, camping was specifically prohibited.

Subsequent statutes

37. A number of more recent statutes also confer rights of access to land "for the purpose of open-air recreation". To the extent that there is any doubt about the meaning of s10(1), these Acts, being on the same subject matter and containing provisions along similar lines, may be referred to in order to inform the meaning given to s10(1).[16]

Countryside and Rights of Way Act 2000

38. Of most obvious significance, essentially the same phrase as that in s10(1) is used in s2(1) of CROWA 2000, under which "[a]ny person is entitled … to enter and remain on any access land for the purposes of open-air recreation". Sch 2 to CROWA 2000 contains restrictions on persons exercising the right of access, including at para 1(s) where that person "engages in any organised games, or in camping, hang-gliding or paragliding". Again, it would not have been necessary – and would have been otiose – for Parliament to have expressly excluded camping, if the right of access for the purpose of open-air recreation did not encompass camping. Moreover, camping is included with other forms of recreation, such as paragliding. This confirms that, in an Act passed by Parliament relatively soon after the Act, the right of access for the purpose of open-air recreation included camping.

39. It is noteworthy that, under CROWA 2000, the general restrictions in Sch 2 may be lifted or amended in three ways. First, they may be amended by the Secretary of State (para 3). Second, any particular exclusion or exclusions may be removed or relaxed by the relevant authority (with the consent of the landowner) (para 7). Third, a landowner can under s16 'dedicate' land as falling within the s2(1) right of access by means of an instrument which may remove or relax any of the Sch 2 restrictions. There are accordingly a number of different mechanisms by which the full extent (or a fuller extent) of the right of access under s2(1) may be exercised.

40. This all points towards the underlying right in s2(1) – access for open-air recreation – being broad in extent, i.e. "to include any lawful activity undertaken for open-air

[16] See e.g. *Cape Brandy Syndicate v IRC* [1921] 2 KB 403 per Lord Sterndale at 414.

recreation that would otherwise be covered by the restriction" (see the Defra guidance quoted at HCWS para 83). Camping – as one of the activities excluded – may therefore be brought in scope: see also page 22 of the guidance at HC1/44.[17] HCWS para 84 gives the example of High House Waste in Dartmoor where the owner has lifted restrictions on camping and riding by a dedication instrument: such dedication would be pointless if the right conferred by s2(1) does not even potentially include camping.[18]

Other subsequent statutes

41. Essentially the same phrase as that in s10(1) is also used in s15(1) of the Malvern Hills Act 1995[19] and s11(1) of the Greenham and Crookham Commons Act 2002. The 1995 Act also provides a right of access on foot and on horseback for the purpose of open-air recreation. Under that regime, camping is excluded by means of byelaws (J24).[20] The 2002 Act provides a right of access on foot[21] for the purposes of open-air recreation and applies Sch 2 of CROWA 2000,[22] which expressly excludes camping. Again, neither exclusion would have been necessary if the right of access granted did not encompass camping.

42. In all these instances (see also the examples in HCWS Annexe B), a right of access for the purpose of open-air recreation has a wide ambit and is only restricted in its operation by means of additional, express provisions which exclude or limit activities which would otherwise fall within its scope, including camping.

[17] Referring to the amendment that became Sch 2 para 7 in Standing Committee, the Minister of State, Michael Meacher, stated "[t]he intention behind the paragraph is to allow a wider range of activities to be exercised on land in pursuit of a statutory right of open-air recreation, rather than by mere toleration of the owner. For example, the restriction in paragraph 1(t) might be partially lifted to permit people to camp on the land as well as to walk on it" (House of Commons Countryside and Rights of Way Bill Standing Committee B, Tuesday 11 April 2000).
[18] See also HC1/50.
[19] "the public shall have a right of access to the Malvern Hills on foot and on horseback for the purpose of open-air recreation".
[20] Section 10(1)(a) of the Malvern Hills Act 1930 expressly allows byelaws to prohibit the erection of any tent.
[21] The right of access on horseback is, at least initially, confined to paths: s11(2).
[22] Section 11(4).

Camping and open-air recreation

43. "Open-air recreation" falls to be given a broad interpretation, in the same way that "recreation"[23] has been given a broad interpretation by the courts.[24]

44. Camping is a form of open-air recreation. A recreation is an activity or pastime pursued for the pleasure or interest it gives. Recreation includes the ideas of refreshment, restoration and reinvigoration – physical, mental and spiritual. It is easy to imagine how 'wild' camping on the Dartmoor commons would have this effect, with the tranquillity and solitude, and connection to nature which it offers. The Respondents have accepted that wild camping is a pleasurable activity in itself (J26, 72). Such camping is a legitimate form of open-air recreation for the purposes of s10(1).

45. Whilst some people have always lived by camping (out of choice or necessity), camping has long been a recreational activity.[25] Mr Craddock explains some history of camping as a recreation, referring to *The Camper's Handbook* (1908) and the Hobhouse Report (1947) (see HCWS paras 9-19). The Hobhouse Report, for example, said: "camping is an adventure in itself… bringing campers into close touch with Nature, and in opening to them a way of escape from the cares and complexities of everyday existence into the simple life of the nomad" (para 168, page 37). Most recently, the Government's review of National Parks recommended a "night under the stars in a national landscape for every child" – something which happens with wild camping on Dartmoor, and which could be prevented by the Chancellor's decision (HCWS paras 17-19).

[23] Within the meaning of arts 7 and 8 of the Greater London Parks and Open Spaces Order 1967, scheduled to the Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces) Act 1967.

[24] See *R (Muir) v Wandsworth LBC* [2017] EWHC 1947 (Admin) per Lang J at paras 98-100. The Court of Appeal in *Muir* ([2018] EWCA Civ 1035; [2018] 4 All ER 422) upheld the High Court but did not provide any further guidance into the meaning of "recreation".

[25] The phrase "recreational camping" is used for example by the inspector in *Gorston v Sevenoaks UDC* (1962) 13 P&CR 449 at 451 to describe an element of the use of the land. See also the references to camping as a recreational activity in *Credit Suisse v Allerdale BC* [1996] 4 All ER 129 at 146h.

46. The Chancellor drew support for his exclusion of camping from references in the Hobhouse Report to recreation in National Parks including fishing and rock climbing but not – he said – camping (J78). That was erroneous, as the Hobhouse Report did refer to camping as a recreation. For example, at page 88, the Hobhouse Report said "walking, rock-climbing and camping will always be the principal recreations in the Lake District" (HCWS para 13).

47. The broad interpretation of the word "recreation" is supported by the fact that, in Scotland, wild camping is permitted as part of the access rights granted by s1 of the Land Reform (Scotland) Act 2003. That arises uniquely from the grant of the rights to be "on land" and "to cross land" "for recreational purposes" (s1(3)(a)). There is no other provision in the 2003 Act which indicates that camping falls within the scope of "recreational purposes", save for the consequential amendment of the Trespass (Scotland) Act 1865, by para 1, Sch 2 to the 2003 Act, to exclude access land from the scope of the offence of camping without permission.

Camping as ancillary to or part-and-parcel of walking

48. The Chancellor considered, and rejected, there being a "right to wild camp" as an "implied right ancillary to the right of access" (J81). The Chancellor's Order dated 13 January 2023 declared that s10(1) "does not confer on the public any right to pitch tents or otherwise make camp over-night on Dartmoor Commons". In making this Order, the Chancellor was necessarily rejecting the proposition that a long-distance hiker who pitches a tent to sleep on the Dartmoor commons over-night as part of a multi-day or long-distance hike was acting within the right of access under s10(1). This was on the narrow interpretation of s10(1) adopted by the Chancellor, i.e. as a right to roam.

49. Even if the s10(1) right is confined to a "right to roam" on foot and horseback, it is necessary to consider the substance of that right and how it could be exercised in practice. The right must cover all types of walking. The right must also cover at least[26]

[26] In *DPP v Jones (Margaret)* [1999] 2 AC 240 it was held that lawful uses of the highway extended beyond what was merely "ancillary" to the right of passage, including to demonstrations, provided that did not unreasonably obstruct other highway users; see 255H-

activities that are ancillary to or part-and-parcel of walking, such as stopping to rest or to eat.[27] It may well be part-and-parcel of long-distance or multi-day walks – especially in areas such as Dartmoor (HCWS paras 17-19 and 28) – to camp over-night along the route. Such over-night camping in this respect is part-and-parcel of the long-distance walking.

50. The Chancellor therefore erred in limiting his consideration of whether or not camping might be ancillary to the (admitted) "right to roam" to "the test for necessary implication" (J81). He ought to have considered the substance of the right itself. By failing to do so, he excluded camping that is intimately connected with walking from the scope of s10(1). Such camping would be part of the s10(1) right even if narrowly construed as a "right to roam" (in the Chancellor's understanding of the expression).[28] The s10(1) right will include over-night camping in at least some circumstances, where the camping is part of the walking activity or where there is a combined activity of walking during the day and camping during the night. In this regard, the Chancellor's Order went too far on any analysis.

256A and 257D per Lord Irvine of Lairg LC; 266E, 279D-E, 280C and 281E-F per Lord Clyde, and 292F-293A per Lord Hutton.

[27] The Respondents accept that a right to roam would include implied ancillary rights (J26).

[28] The Chancellor's understanding of a "right to roam" as the right to undertake the *activities* of walking and riding over the common land does not accord with the use of that expression in public policy: see e.g. Government guidance on *Rights of way and accessing land* (available at https://www.gov.uk/right-of-way-open-access-land/use-your-right-to-roam, accessed on 26 May 2023) describing access rights under the Countryside and Rights of Way Act 2000 and the Marine and Coastal Access Act 2009, which says that the right to roam includes the use of "access land for walking, running, watching wildlife and climbing". See also the way that access rights in Scotland under s1 of the Land Reform (Scotland) Act 2003 are described – see e.g. *Gartmore House v Loch Lomond and Trossachs National Park Authority* [2022] CSIH 56; 2023 SCLR 195 at para 1: "The Land Reform (Scotland) Act 2003 introduced new rights of public access to land. The new right comprises the right to be on land for recreational, educational and non-commercial purposes, and the right to cross land (s 1). This is known as the right to roam".

The wider importance of a clear and workable interpretation

51. As noted above, similar phrasing to s10(1) is used in a number of local Acts – see HCWS paras 87-93 and Annexe B. As well as s10(1), and s15 of the Malvern Hills Act 1995, the same phrase is used, for example, in s11(1) of the Greenham and Crookham Commons Act 2002. Rights of access for the purpose or purposes of open-air recreation are also conferred in similar terms in nationally-applicable legislation in NPACA 1949 and CROWA 2000, and for recreational purposes in the Land Reform (Scotland) Act 2003.[29] Given the wide use of phrasing similar to s10(1) in other legislation and access provisions, it is important for the meaning adopted by the Court to be consistent, workable and clear. Among other things, it is important for people planning and undertaking open-air recreation to know where they stand, whether in relation to camping or other recreational activities.

52. While the judgment below relates only to camping on the Dartmoor commons, its impact is wider in at least two respects.

53. First, the decision affects whether camping may be allowed in other contexts. Generally, camping in locations other than Dartmoor is prohibited by statute or byelaw. However, according to the logic of the Chancellor's decision, access agreements made under NPACA 1949 may not allow for camping. Similarly, if there is no right to camp under s10(1) of the Act, it casts doubt on whether there could be a right to camp under s2(1) of CROWA 2000 if the restriction in Sch 2 para 1(s) (insofar as it concerns camping) were lifted. The various statutes (local and national) relied upon by the OSS all concern the same essential matter – access to open land – and are cast in similar, if not always identical, terms. It is important that a consistent approach is taken that is clear and workable across all contexts.

54. Second, the decision potentially affects other activities. Activities such as bird watching and fishing often involve staying in one place for as long as an over-night camper would, and the use of tents or equivalent, even if people do not usually sleep over night. People walking or rock climbing on Dartmoor might well have tents with

[29] See also HCWS para 106.

them and want to use them to take shelter if poor weather unexpectedly closes in (see HCWS para 28). Interpreting the s10(1) right of access for the purposes of open-air recreation simply as a right only to walk or horse-ride recreationally is not only too narrow an interpretation, but it also creates uncertainty, especially when read with what the Chancellor said about activities such as fishing and rock climbing (J78, 80).[30] The interpretation of s10(1) proposed by the DNPA and supported by the OSS provides greater clarity and certainty.

55. The Chancellor was also wrong to say that "this case is quintessentially a private law dispute" (J92). It involves the interpretation of statute conferring an important right on the public. It is submitted that, by approaching the interpretation of s10(1) as merely being relevant to two parties to "a private law dispute", the Judge did not consider the implications of his decision or the wider public interest,[31] and erred in his approach to the interpretation of s10(1).

Interference with proprietary rights and statutory interpretation

56. As to the principle against expropriation, first, the Act clearly does have the effect of creating a public right of access to the Dartmoor commons for the purposes of open-air recreation. Second, the effect of s10(1) is not to appropriate or deprive the Respondents of their property. There is no dispropriation. There is therefore no place for the principle in this case for either or both of these reasons.

57. The Chancellor referred at J18 to *Methuen-Campbell v Walters* [1979] QB 525 as supporting the proposition that a "dispropriatory" Act is to be construed in favour of the party who is to be dispropriated and expressed the view that he would have found the principle to be engaged in this case (J85). *Methuen-Campbell* related to clearly

[30] See also the questions posed in HCWS para 110.
[31] The Chancellor's approach can be contrasted with the approach taken by Lightman J in *Betterment Properties (Weymouth) Limited v Dorset County Council* [2007] EWHC 365 (Ch), which concerned the construction of provisions of the Commons Registration Act 1965 and CROWA 2000, in the context of a claim for an order under s14 of the 1965 Act to deregister land as a town or village green. The Judge directed that an advertisement be placed in a local newspaper informing readers of the proceedings and inviting them to make representations to him in writing or orally without any risk of incurring any liability for costs (para 9).

dispropriatory provisions providing for enfranchisement under the Leasehold Reform Act 1967, however, even in that context, the approach has not been followed in subsequent decisions.[32]

58. With regard to any suggestion[33] that s3 of the Human Rights Act 1998 requires a restrictive interpretation of s10(1), in order to protect the Respondents' rights under Article 1 of Protocol 1 to the European Convention on Human Rights, there is no such conflict that could justify the application of the interpretative obligation. A similar approach applies to that taken by the House of Lords in the context of the registration of a town and village green on the basis of use for "lawful sports and pastimes" under the Commons Act 2006; it was held in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 that registration was not inconsistent with Article 1 of Protocol 1. As Lord Hoffmann (with whom Lord Walker and Lord Rodger agreed) stated at para 59: "first, the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation and, secondly, the system of registration in the 1965 Act was introduced to preserve open spaces in the public interest".

59. To the extent that the principle against expropriation is relevant, the effect of the s10(1) was over-stated by the Chancellor in J85, as it was not judged in context. There are six points to make here.

60. The first is to bear in mind the character of the commons as waste land, of no or very limited real value to their owner (see HCWS at paras 21, 24 and 29-32).

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[32] Millet LJ summarised the position in *Cadogan v McGirk* [1996] 4 All ER 643 at 647j-648b. After noting that subsequent decisions of the House of Lords and Court of Appeal had attributed minimal weight to the dispropriatory nature of the Leasehold Reform Act, he indicated his agreement. Millet LJ held that it would be wrong to disregard that fact that, while the Act might to some extent be regarded as dispropriatory, it was passed for the benefits of tenants. It was "the duty of the Court to construe the Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy" (at 648b).

[33] As submitted on behalf of the Respondents in the High Court: see their skeleton, para 23.

61. The second is to judge the effect in the context of the landowner's limited rights to use common land, given the rights of commoners to which the land is already subject (see HCWS at paras 20, 24 and 29).

62. The third is to consider the whole effect of the Act, which relieved landowners of considerable burdens and added powers to regulate the use of the land (see HCWS at paras 102-103). The 1974 Policy Review cited in J32 expressly recognised that wild camping happened on the Dartmoor commons and that it would be beneficial for landowners to regulate this use. The Act introduced this benefit of regulatory powers for landowners.[34]

63. The fourth is to consider the restrictions on the right imposed by s10(3) of the Act, through the application of the Second Schedule to NPACA 1949 and the exclusion of excepted land from the s10(1) right pursuant to s60(5) of NPACA 1949. The right conferred by s10(1) is significantly constrained.

64. The fifth is to consider the public right of access to the commons for open-air recreation in the context of the statutory provision for such access, which demonstrates that it is not unusual for common land to be subject to public access rights (see HCWS at paras 33, 37, 41, 54, 58, 65, 79 and 87).[35]

65. The final point is to have regard to the current, minimal practical impact of wild camping on the interests of landowners.[36]

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[34] Section 10(2) of the Act also reduces the liability of any occupier of the Dartmoor commons to those entering in pursuance of the s10(1) right of access, effectively to that owed to a trespasser. Section 11(1) enabled the DNPA to appoint wardens for the Dartmoor commons, and s14 enabled the DNPA to make good any damage caused by those exercising the right of access.

[35] Indeed, were the Dartmoor commons not subject to the Act, they now would generally be subject to the right of access conferred by CROWA 2000, without any provision for compensation, but with the right to camp expressly excluded (see ss1(1) and 15(1)(b) of CROWA 2000).

[36] The witness statement provided by Mr Darwall in the High Court referred to concerns such as fire risk, littering, anti-social behaviour, the incongruous appearance of tents and public liability risks from danger posed by roaming cattle (which he acknowledges would be unlikely to arise). He does not give any evidence of actual incidents experienced, other than

66. Overall, there is no, or no significant, degree of expropriation caused by camping that requires s10(1) to be interpreted so as to exclude camping as a form of open-air recreation. Against that, the clear purpose of the Act is to establish rights of open-air recreation on private land, subject to a number of safeguards and limitations, but not excluding camping. It would be wrong in those circumstances to pray in aid the principle against expropriation to limit the categories of open-air recreation further than is already provided.

Conclusion

67. For the reasons given in this skeleton argument, and those given by the DNPA, the OSS respectfully asks for the DNPA's appeal to be allowed on Grounds 1 and 2.

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30 May 2023

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an event which took place outside Stall Moor. These are all concerns that can and are regulated by the byelaws issued by DNPA and are not particular or unique to camping – they could also arise in the case of other activities that the Chancellor found to fall within the scope of the right in s10(1), including walking, picnicking and rock-climbing.