Neutral Citation Number: [2023] EWCA Civ 927

Appeal No: CA-2023-000229
Case No: PT-2022-000194

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST
Sir Julian Flaux, Chancellor of the High Court
[2023] EWHC 35 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2023

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE UNDERHILL,
Vice President of the Court of Appeal (Civil Division)
and
LORD JUSTICE NEWEY

BETWEEN:

ALEXANDER DARWALL
DIANA DARWALL

Claimants/Respondents

and

DARTMOOR NATIONAL PARK AUTHORITY

Defendant/Appellant

and

OPEN SPACES SOCIETY

Intervener

Timothy Straker KC and Vivienne Sedgley (instructed by **the County Solicitor**, **Devon County Council**) for the **appellant/defendant** (the Authority)

Timothy Morshead KC (instructed by **Irwin Mitchell LLP**) for the **respondent/claimant** (the landowners)

Richard Honey KC, Ned Westaway, and Stephanie Bruce-Smith for **the Open Spaces Society** (the Open Spaces Society)

Hearing date: 18 July 2023

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JUDGMENT

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

1. This appeal raises a short point of statutory construction. The question is as to the proper meaning of the words "the public shall have a right of access to the commons on foot and on horseback for the purpose of open-air recreation" in section 10(1) (section 10(1)) of the Dartmoor Commons Act 1985 (the 1985 Act).

2. The landowners submit, and Sir Julian Flaux, Chancellor of the High Court (the Chancellor), held at [78], that the "right of access" in question was "the statutory formula which [was] being used to describe the right to roam on the [Dartmoor] Commons". Accordingly, the Chancellor declared that section 10(1) did "not confer on the public any right to pitch tents or otherwise make camp overnight". The landowners argue that the right of access was to be exercised "on foot or on horseback", and in any event, sleeping, whether in a tent or otherwise, was not a recreation.

3. The Authority, supported in this court (but not below) by the Open Spaces Society, submits that the important question is as to the meaning of the words "open-air recreation", and that the natural understanding of those words includes what has been referred to as "wild camping". Section 10(1), according to the Authority, permits the public to roam the Dartmoor Commons and to erect a tent and sleep within it overnight, so long as they do no damage to walls, fences, hedges and gates.

4. Both sides say that they are advancing the clear and unambiguous meaning of section 10(1). Indeed, the Chancellor held at [84] that the landowners' construction was just that. Both sides submit that their construction is supported by the statutory history and, to some extent, by common understanding. The landowners pray in aid, in case the words of section 10(1) should be held to be unclear or ambiguous, three well-known principles of construction. First, they say that the 1985 Act should not be construed so as to expropriate or reduce the value of private property. Secondly, they say that private acts (like the 1985 Act) should be construed against their promoter, which here was the Authority's predecessor, the Devon County Council. Thirdly, they rely on materials from Hansard to support their construction, which they claim to be admissible under the principles enunciated in *Pepper v. Hart* [1993] AC 593 at 634-5 per Lord Browne-Wilkinson (*Pepper v. Hart*).

5. I have concluded with some reluctance, bearing in mind the clear and opposite view reached by the Chancellor, that the words of section 10(1) are indeed clear and unambiguous. They allow the public to engage in open-air recreation on the Dartmoor Commons provided they proceed on foot or on horseback. Open-air recreation includes wild camping, although such an activity must be conducted in strict accordance with the applicable byelaws, which were made by the Authority and confirmed by the Home Secretary in October 1989 (the Byelaws).

6. I shall proceed in this judgment to set out briefly (i) the relevant statutory history, (ii) the factual background so far as material, (iii) a summary of the Chancellor's reasoning, and (iv) discussion of my reasons.

<u>The relevant statutory history</u>

The Law of Property Act 1925 (the 1925 Act)

7. Section 193 (section 193) of the 1925 Act is a crucial starting point for the statutory history. It provided "rights of access for air and exercise" to metropolitan commons (which obviously did not include the Dartmoor Commons) as follows:

> 193. - **Rights of the public over commons and waste lands**.
>
> (1) Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts, 1866 to 1898, … in manner hereinafter provided:
>
> Provided that –
>
> (a) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any other statutory authority; and
>
> (b) the Minister shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent of the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected …; and
>
> (c) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon; … [underlining added].

The National Parks and Access to the Countryside Act 1949 (the 1949 Act)

8. The long title to the 1949 Act provided that it was an Act to "make provision for National Parks" and "to make further provision for the … improvement of public paths and for securing access to open country". The 1949 Act provided the statutory foundation for the establishment of the Dartmoor National Park.

9. The following sections of the 1949 Act are included in Part II concerning "National Parks":

> **Section 5 – National Parks.**
>
> (1) The provisions of this Part of this Act shall have effect for the purpose–
>
> (a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and
>
> (b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.

(2) The said areas are those extensive tracts of country in England ... as to which it appears to Natural England that by reason of —

(a) their natural beauty, and

(b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population,

it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection.

Section 12 – Provision of accommodation, meals, refreshments, camping sites and parking places

(1) A local planning authority whose area consists of or includes the whole or any part of a National Park may make arrangements for securing the provision for their area (whether by the authority or by other persons)–

(a) of accommodation, meals and refreshments …;

(b) or camping sites; and

(c) of parking places and means of access thereto and egress therefrom,

and may for the purposes of such arrangements erect such buildings and carry out such work as may appear to them to be necessary or expedient …. [Underlining added].

10. The following sections of the 1949 Act are included in Part V concerning "Access to Open Country":

Section 59.— Provision for public access to open country.

(1) The provisions of this Part of this Act shall have effect for enabling the public to have access for open-air recreation to open country—

(a) to which the provisions of the next following section are applied by an agreement under this Part of this Act (hereinafter referred to as an "access agreement") or by an order under this Part of this Act (hereinafter referred to as an "access order"),

(b) acquired under this Part of this Act for the purpose of giving to the public access thereto.

(2) In this Part of this Act the expression "open country" means any area appearing to the authority with whom an access agreement is made or to the authority by whom an access order is made or by whom the area is acquired, as the case may be, to consist wholly or predominantly of mountain, moor, heath, down, cliff or foreshore (including any bank, barrier, dune, beach, flat or other land adjacent to the foreshore).

Section 60 – Rights of public where access agreement, order in force.

(1) Subject to the following provisions of this Part of this Act, where an access agreement or order is in force as respects any land a person who enters upon land comprised in the agreement or order for the purpose of open-air recreation without breaking or damaging any wall, fence, hedge or gate, or who is on such land for that purpose after having so entered thereon, shall not be treated as a trespasser on that land or incur any other liability by reason only of so entering or being on the land:

Provided that this subsection shall not apply to land which for the time being is excepted land as hereinafter defined.

(2) Nothing in the provisions of the last foregoing subsection shall entitle a person to enter or be on any land, or to do anything thereon, in contravention of any prohibition contained in or having effect under any enactment.

(3) An access agreement or order may specify or provide for imposing restrictions subject to which persons may enter or be upon land by virtue of subsection (1) of this section, including in particular, but without prejudice to the generality of this subsection, restrictions excluding the land or any part thereof at particular times from the operation of the said subsection (1); and that subsection shall not apply to any person entering or being on the land in contravention of any such restriction or failing to comply therewith while he is on the land.

(4) Without prejudice to the provisions of the last foregoing subsection, subsection (1) of this section shall have effect subject to the provisions of the Second Schedule to this Act as to the general restrictions to be observed by persons having access to land by virtue of the said subsection (1). [Underlining added]

11. It will be noted that Part V of the 1949 Act seems to have introduced for the first time the concept of enabling the public to have access to certain parts of the open country (rather than the metropolitan commons) for the purpose of "open-air recreation". These words were later repeated in the 1985 Act.

12. Section 90 of the 1949 Act allowed a local planning authority in respect of land in a National Park to make byelaws "for securing that persons resorting thereto will so behave themselves as to avoid undue interference with the enjoyment of the land … by other persons". Such byelaws could, under section 90(3), restrict traffic, prohibit litter, regulate fires, and relate to the whole or part of the land.

13. Section 114 of the 1949 Act provided that "open-air recreation" did not include organised games.

14. Schedule 2 to the 1949 Act provided for "General restrictions to be observed by persons having access to open country or waterways by virtue of Part V of Act" including the following:

> [section 60(1)] shall not apply to a person who, in or upon the land in question, —

(a) drives or rides any vehicle;

(b) lights any fire …;

(c) takes, or allows to enter or remain, any dog not under proper control;

(d) wilfully kills … or disturbs any animal … or takes … any eggs …;

(e) bathes in any non-tidal water in contravention of a notice …;

(f) engages in any operations of … hunting, shooting, fishing, …;

(g) wilfully damages the land or anything thereon or therein;

(h) wilfully injuries, removes or destroys any plant, shrub, tree …;

(i) obstructs the flow of any drain or watercourse …;

(j) affixes or writes any advertisement, bill, placard or notice;

(k) deposits any rubbish or leaves any litter;

(l) engages in riotous, disorderly or indecent conduct;

(m) wantonly disturbs, annoys or obstructs any person engaged in any lawful occupation;

(n) holds any political meeting or delivers any political address; or

(o) hinders or obstructs any person interested in the land, or any person acting under his authority, in the exercise of any right or power vested in him.

15. It will be noted that none of the detailed restrictions (listed in schedule 2 to the 1949 as being excluded from the rights of access granted) referred to camping, wild or otherwise, notwithstanding that the only relevant previous legislation, namely the 1925 Act had, by section 193, expressly excluded camping from the rights of access granted by it.

The 1985 Act (the Dartmoor Commons Act 1985)

16. The long title of the 1985 Act made clear that it was enacted, amongst other things, to "regulate public access to the commons" and "to confer powers on … [the Devon County Council] with reference to those commons".

17. The recitals to the 1985 Act made it clear that Dartmoor was designated as a national park under the 1949 Act, and that the Devon County Council exercised powers under the 1949 Act for "promoting [the Dartmoor National Park's] enjoyment by the public". The recitals also stated that "some two-fifths of the area of the [Dartmoor National Park was] registered as common land under the names of various commons pursuant to the Commons Registration Act 1965", and that it was "expedient that the public be afforded a right of access to the said commons as by this Act provided". The recitals also

recorded that the 1985 Act had been promoted by the Devon County Council under section 239 of the Local Government Act 1972.

18. Section 3 of the 1985 Act constituted the Dartmoor Commoners' Council, and section 4(1) required the Commoners' Council in discharging its duties to "have regard to the conservation and enhancement of the natural beauty of the commons and its use as a place of resort and recreation for enjoyment by the public".

19. Part III of the 1985 Act was entitled "Provisions concerning public access to commons". Section 10 was headed "Public access to the commons" and provided as follows:

> (1) Subject to the provisions of this Act and compliance with all rules, regulations or byelaws relating to the commons and for the time being in force, the public shall have a right of access to the commons on foot and on horseback for the purpose of open-air recreation; and a person who enters on the commons for that purpose without breaking or damaging any wall, fence, hedge gate or other thing, or who is on the commons for that purpose having so entered, 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. …
>
> (3) (a) The provisions of … [the 1949 Act] and Schedule 2 to that Act (which relate to land excepted from any access agreement or access order, the effect of such an agreement or order on rights and liabilities of owners and maps) shall apply and have effect with respect to subsection (1) above and the exercise of the right afforded under that subsection, as those provisions apply and have effect with respect to section 60(1) of that Act and any access agreement or order. … [Underlining added]

20. Section 11 of the 1985 Act provided for the power of the Authority to make byelaws as follows:

> (1) The powers of the Park Authority to make byelaws and to appoint wardens under sections 90 and 92 of the Act of 1949 shall apply to the whole area of the commons to which under section 10(1) of this Act a right of access is given or such part thereof as may be specified in the byelaws as if the commons were land comprised in an access agreement in force under Part V of that Act.

The Byelaws

21. I asked at the hearing whether any byelaws affecting the Dartmoor National Park (or elsewhere) had been made under section 90 of the 1949 Act before the Byelaws that were made in October 1989 specifically in relation to the Dartmoor Commons. The parties have been unable to establish that any such byelaws were ever made. I have, therefore, assumed that there were no such byelaws. I asked the question because I thought it would have been significant if (for example) the promoters of the 1985 Act had known that some existing byelaws under section 90 of the 1949 Act made any kind of provision in relation to camping.

22. The Byelaws were made under section 90 of 1949 Act and section 11 of the 1985 Act in 1989. [1] provided for the Byelaws to apply to the Dartmoor Commons covered by the 1985 Act and to land within the Dartmoor National Park to which the public had access by virtue of the Authority having an interest (called "access land").

23. [3] and [4] of the Byelaws referred to restrictions of rights of access for vehicles and the parking of caravans and trailers.

24. [6] of the Byelaws under the heading "Camping" provided as follows:

> 1. No person shall knowingly use any vehicle, including a caravan or any structure other than a tent for the purpose of camping on the access land or land set out for the use or parking of vehicles except on any area which may be set apart and indicated by notice as a place where such camping is permitted.
>
> 2. No person shall knowingly erect a tent on the access land for the purpose of camping: (a) in any area listed in Schedule 2 to these byelaws; (b)within 100 metres of any public road or in any enclosure.
>
> 3. No person shall camp in a tent on the same site on the access land for more than two consecutive nights, except on any area which may be set apart and indicated by notice as a place where such camping is permitted. [Underlining added]

25. Schedule 2 to the 1985 Act set out specified areas of the access land (including parts of the Dartmoor Commons) where camping was prohibited. The landowners' land was not specified in that schedule.

26. The remainder of the Byelaws made detailed provisions restricting other activities on the access land including fires, controlling dogs, feeding animals, training racehorses, protecting wildlife, using firearms and metal detectors, flying real and model aircraft and kites, playing music and holding shows or concerts. The Byelaws make the restricted activities a criminal offence.

The Malvern Hills Act 1995 and the byelaws made thereunder

27. All parties referred to the Malvern Hills Act 1995 which provided by section 15(1) for public access to the Malvern Hills, within an area of outstanding natural beauty, in a similar way to section 10(1). The difference for our purposes, however, is that [14] of the applicable 1999 byelaws provides under the heading "Camping" that "[n]o unauthorised person shall camp on the [Malvern] Hills or erect or permit to remain on the [Malvern] Hills any building, shed, tent, or other structure".

The Countryside and Rights of Way Act 2000 (the 2000 Act)

28. The 2000 Act was, according to its long title, an Act "to make new provision for public access to the countryside". It does not, however, apply to the Dartmoor Commons, because they are excluded from section 1(1) by section 15(1)(b) as land already accessible to the public by virtue of a private Act (the 1985 Act) under which "members of the public have a right of access to it at all times for the purposes of open-air recreation".

29. For land within the 2000 Act, section 2(1) gives people the right to "enter and remain on any access land for the purposes of open-air recreation", if and so long as they do so without breaking or damaging any wall, fence, hedge, stile or gate, and they observe the general restrictions in Schedule 2 …".

30. Schedule 2 to the 2000 Act was headed: "Restrictions to be observed by persons having rights of access" and provided that section 2(1)(s) of the 2000 Act did not entitle a person to be on any land if, in or on that land, he "engages in any organised games, or in camping, hang-gliding or para-gliding".

The factual background

31. The following is taken from [3]-[15] of the Chancellor's judgment.

32. Dartmoor was designated as a National Park under section 5 of the 1949 Act in 1951. The Dartmoor Commons are areas of unenclosed moorland which are privately owned, but on which other locals have the right to put their livestock. The Commons comprise some 37 per cent of the National Park and 75 per cent of the moorland.

33. The landowners are farmers, landowners and commoners. They have owned and lived at Blachford Manor, an estate on Dartmoor, since 2013. Part of their farm includes Stall Moor, an extensive area of open land in a remote section of the Dartmoor Commons, where the landowners keep their cattle, sheep and deer. They have become concerned about the potential harm of camping, especially wild camping or backpacking, on the Dartmoor Commons near Stall Moor.

34. The Authority is the National Park Authority for Dartmoor, having taken over that function from Devon County Council. It was the Devon County Council that promulgated the Byelaws in 1989. In Autumn 2021, the Authority consulted the public on amendments it proposed to make to the Byelaws. The landowners' solicitors wrote to the Authority on 1 November 2021 asserting that the right of access granted by section 10(1) did "not extend to a right for the public to camp or wild camp". The Authority disagreed. These proceedings were then commenced on 7 March 2022 seeking a declaration that section 10(1) did not grant the public a right to camp on the Dartmoor Commons.

35. The Chancellor dealt with three issues, only the first of which is now before us. They were: (i) whether, on its true construction, section 10(1) gave the public a right to camp overnight on the Dartmoor Commons, (ii) whether there was nonetheless a local custom of camping on the Dartmoor Commons which had the force of law, and (iii) if not, whether the court should nevertheless decline to exercise its discretion to grant declaratory relief. All questions were answered by the Chancellor in the negative.

The Chancellor's judgment

36. The Chancellor set out uncontentious principles of statutory construction at [16]-[18] as follows:

> 16. The correct approach to statutory interpretation has recently been authoritatively stated by Lord Hodge DPSC in *R (Project for the Registration of Children as British Citizens) v. Secretary of State for the Home Department* [2022]

UKSC 3; [2022] 2 WLR 343 [*Project*] at [29] to [31] as summarised by Lord Stephens JSC at [13] of *R (Coughlan) v. Minister for the Cabinet Office* [2022] UKSC 11; [2022] 1 WLR 2389 [*Coughlan*]:

> "In [*Project*], Lord Hodge DPSC in his leading judgment, with which all in the majority concurred, reiterated, at para 29, that the primary source by which meaning is ascertained is by way of conducting an analysis of the language used by Parliament. Lord Hodge DPSC stated, at para 31, that "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." Lord Hodge DPSC also stated, at para 30, that external aids to interpretation therefore must play a secondary role. He continued by stating:
>
> > "Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation* , 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.""

17. Lord Stephens went on at [14] to reiterate, by reference to the speech of Lord Browne-Wilkinson in [*Pepper v. Hart*], the circumstances in which reliance can be placed on statements made in Parliament by ministers or promoters of Bills in construing the eventual legislation:

> "However, such references are not a legitimate aid to statutory interpretation unless the three critical conditions set out by Lord Browne-Wilkinson in [*Pepper v. Hart* at] 640 are met. The three critical conditions are (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering."

18. Where there is doubt as to the way in which to interpret the language used in what Buckley LJ in *Methuen-Campbell v Walters* [1979] 1 QB 525 [*Methuen-Campbell*] termed a "dispropriatory" Act (there the Leasehold Reform Act 1967), it is to be construed in favour of the party who is to be dispropriated: see p 542. In *Bennion* at [27.6] pp 857-8, the principle is stated thus:

> "Even in cases where some degree of interference with a person's proprietary rights is clearly intended, legislation will be construed as interfering with those rights no more than the statutory language and purpose require … Perhaps the

> most severe interference with property rights is expropriation, where the courts are particularly likely to impose a strict construction. … The principle against expropriation or other interference with the enjoyment of property rights is likely to carry particular weight in cases where no compensation is payable."

37. The Chancellor dealt at length with the arguments before him. I mention only one aspect of context that he mentioned at [39]-[40] as follows:

> 39. The third aspect of the context was the reports and debates which led to the 1949 Act. Two reports of committees under the chairmanship of Sir Arthur Hobhouse were described by the responsible minister Lewis Silkin MP as having had a "very great influence" on the proposed measures which became the 1949 Act and said the Government had "accepted them as to some 90 per cent". As Mr Morshead KC said, this may have been an exaggeration because the most radical proposal of the Hobhouse reports was to give a public right to roam on open land, but this was rejected in favour of the scheme of access agreements contained in the 1949 Act. The first report was that of the National Parks Committee of July 1947. There were numerous references to camping but always on the basis that it would be regulated and indeed a fee would be payable. Consistently with that, the report does not include camping in the list of sports and recreation and other activities in which it was envisaged the public would take part.
>
> 40. The second report was the Report of the Special Committee on Footpaths and Access to the Countryside of September 1947. This advocated conferring on the public a general right of access to open land, but Mr Morshead KC pointed out that nowhere does the report suggest that this right, if conferred, would include a right to camp. As he said, in the conclusion, the aspiration was expressed in terms of conferring on the public a right to "wander harmlessly over moor and mountain, over heath and down, and along cliffs and shores, and to discover for themselves the wild and lonely places, and the solace and inspiration they can give to men who have been 'long in the city pent'".

38. The Chancellor dealt with the issue we have to decide at [73]-[86] of his judgment. He started by saying that he was applying the principles he had stated from *Project* and *Coughlan*. It was important to have regard to the context in which section 10(1) was enacted. The starting point was that, before the 1985 Act, there was no legal right to roam on the Dartmoor Commons. Section 193 applied only to metropolitan commons and prohibited camping. Section 60 of the 1949 Act only applied where there was an access agreement with the landowner. Only some 5% of Dartmoor was ever subject to an access agreement. Therefore, in the run-up to the 1985 Bill, there was no legal right of access to most of the Dartmoor Commons. There was, therefore, at that time no right to wild camp without the consent of the landowner. The contemporaneous material and the evidence predominantly supported that position.

39. The Chancellor mentioned that pre-1985 there were some authorised and unauthorised camp sites on the Dartmoor Commons. He continued at [76] as to the mischief at which the 1985 Act was aimed as follows:

> … it is clear from the submissions and evidence put forward by [the Authority] (or its predecessor) in promoting the 1980 Bill [which seems to have failed on the evidence before us because it did not allow for access on horseback], that the

> mischief which it was seeking to address was, amongst other things, such unauthorised or unregulated sites and the pressure and harm they caused, which needed to be regulated and controlled. However, as is clear from the materials cited at [55] to [57] above, what was seen by the promoters as requiring regulation and control if the public was now to have a legal right of access to the land was what might be described as mass camping: caravans, dormobiles and large brightly coloured tents on unlicensed campsites. Wild camping by backpackers was not seen as a problem which needed to be addressed by such regulation or control. It follows that, even if [the Authority] were right that landowner's consent in relation to mass camping was to be replaced by [the Authority] control through byelaws, that is of no relevance to wild camping, which was not regarded as part of the mischief which the statute was seeking to address and was not intended to be the subject of control by byelaws. Indeed, it is striking in that context that [the Byelaw] eventually passed in 1989, byelaw 6 …, does not address wild camping as such.

40. The Chancellor then said at [77] that the question was, therefore, whether section 10(1) conferred a right to wild camp without permission. The Authority had argued that wild camping was (i) part of the open-air recreation for the purpose of which access on foot or on horseback was being provided and (ii) an implied right ancillary to the right of access.

41. As I have said, he rejected the first argument at [78] on the basis that "the phrase "right of access to the commons on foot and on horseback for the purpose of open-air recreation" [was] the statutory formula which was being used to describe the right to roam". The Chancellor also said that "[t]he phrase "for the purpose of open-air recreation" [was] used in section 60 of the 1949 Act … as the statutory formula to describe the right to roam". The Chancellor then said this at [78]:

> It is true that the recreation in which the member of the public might engage when on the land the subject of an access agreement (in the case of the 1949 Act) or the [Dartmoor] Commons (in the case of the 1985 Act) could include other activities in addition to walking or horse riding. These could include having a picnic, walking a dog or observing wildlife, all of which can clearly be said to be ancillary to the right to roam. The first Hobhouse Committee report also identified a number of recreational activities such as motoring and cycling (essentially not permitted on the [Dartmoor] Commons by virtue of [Byelaw] 3) fishing and rock climbing (both of which do take place on Dartmoor but it is unclear whether they take place on the Commons). It is noticeable that the recreational activities identified in the report do not include camping, which the report contemplated would be regulated and even that a fee would be payable.

42. The Chancellor said at [79] that the 1949 Act drew a clear distinction between the enjoyment of opportunities for open-air recreation and the facilities for that enjoyment. Section 12 of the 1949 Act treated camping as one of those facilities, not as itself open-air recreation. The 1949 Act was thus consistent with the landowners' case. Camping was not open-air recreation, but a facility for its enjoyment. Whilst one could readily see that rock climbing could be categorised as open-air recreation, it was a distortion of language to say that someone on a long hike who pitches a tent to sleep for the night had gained access for the purpose of wild camping. The open-air recreation in which they were engaged was the hiking not the wild camping. The wild camping was a facility to enable the person to enjoy the open-air recreation of hiking. It is perhaps

worth explaining that rock-climbing was introduced as an example, because it is a recreation that is not really undertaken on foot and certainly not on horseback.

43. The Chancellor rejected the second argument (that wild camping was an implied right ancillary to the right of access) at [81]. It was not an implication which necessarily followed from the express provisions of the statute construed in their context and having regard to their purpose (see *R (Morgan Grenfell) v. Special Commissioners of Income Tax* [2003] 1 AC 563 per Lord Hobhouse at [45] as qualified by Lady Hale in *R (Black) v. Secretary of State for Justice* [2017] UKSC 81; [2018] AC 215 at [36]). A walker wanting to wild camp can seek permission from the landowner or use a licensed campsite.

44. Neither the Byelaws nor the list of prohibitions in schedule 2 to the 1949 Act (incorporated into the 1985 Act by section 10(3)) included camping. The 1949 Act clearly did not confer a right to wild camping without permission on land which was the subject of an access agreement. The fact that the list of prohibitions does not include camping tells one nothing one way or the other about whether wild camping was within the right of access.

45. The Chancellor, therefore, concluded at [84] that the meaning of section 10(1) was clear and unambiguous. It conferred the right to roam, but no right to wild camping without permission. If the *Pepper v Hart* criteria were satisfied, which they were not, a statement of Mr Steen MP clearly supported the construction he considered was correct. Mr Steen's statement, which he set out at [34]-[35], showed that section 10(1) was only intended to confer a right to walk or ride. Mr Steen had said that "[t]he second part of the Bill aims to give the public a right to walk and ride over the common land" and that it set "an important precedent". Moreover, the Chancellor said that the effect of section 10(1), if it had given a right to wild camping without permission, would be that "the landowner would have suffered a loss of control or a usurpation of his rights over his own land". He said this:

> If necessary, I would have concluded that there would be sufficient interference with the claimants' property rights without compensation if [the Authority's] construction were correct, so that the statute should not be construed in that way unless it clearly had that effect, which for the reasons I have given, it does not.

Discussion

46. The critical words of section 10(1) that are to be construed provide that:

> the public shall have a right of access to the commons on foot and on horseback for the purpose of open-air recreation; and a person who enters on the commons for that purpose without breaking or damaging any wall, fence, hedge, gate or other thing, or who is on the commons for that purpose having so entered, 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.

47. The principles enunciated by the Chancellor and set out at [38] above show that we must conduct an analysis of the language used by Parliament so as to reach an objective

assessment of the meaning which it was seeking to convey in using the words under consideration. A consideration of other materials is secondary. Nonetheless, I will start with a brief consideration of the other statutory provisions concerning public access to land, of which Parliament must be taken to have been aware.

48. Section 193 was enacted 60 years before the 1985 Act. It gave the public "rights of access for air and exercise" to certain common land, not of course including the Dartmoor Commons. It provided for such rights of access to be subject to byelaws, and to be on the basis that they "shall not include" any right to drive a vehicle on the land or to camp or to light fires. On one analysis, therefore, at that stage, the legislators must have thought that "rights of access for air and exercise" might otherwise have been construed as including a right to camp. Certainly, an unqualified "right of access" might, were it not for the express provision, have included a right of access by vehicle and a right to light fires.

49. Part V of the 1949 Act undoubtedly granted a right to the public "to have access for open-air recreation to open country", again not including the Dartmoor Commons. The scheme of the 1949 Act was to allow such access where a specific access agreement or access order was brought into effect. The right was granted "for the purpose of open-air recreation without breaking or damaging any wall, fence, hedge or gate", and was restricted by the provisions in schedule 2 of the 1949 Act. That schedule was employed again by section 10(3) of the 1985 Act, and mentioned a whole host of sensible restrictions (see [14] above), but made no mention of camping. The right of access granted by the 1949 Act was "for the purpose of open-air recreation" which are the very words used in section 10(1) which we have to construe. It is true, as the Chancellor pointed out, that section 12 of the 1949 Act makes express provision for facilities to be provided including accommodation, camping sites and parking. I do not see, however, why provision of formal camping sites, which must be taken even in 1949 to have included permanent facilities such as running water and toilets, should be taken to inform the proper understanding of the right of access granted quite separately by sections 59, 60, 114 and schedule 2. Section 114 expressly excluded "organised games" from the meaning of "open-air recreation", and schedule 2 imposed restrictions on the exercise of the right of access, but otherwise the meaning of "open-air recreation" was, as it seems to me, at large. Specific further restrictions, again excluding an express mention of camping, could be provided for by byelaws etc. under section 90, even though we know of none having been promulgated.

50. It is true that the Hobhouse Report of the National Parks Committee 1947 makes frequent reference to camping, but does not seem to address the question of wild camping in any way that informs the legislation. The Hobhouse Report on Footpaths and Access to the Countryside makes no significant reference to camping at all.

51. With that introduction, I come to the words of section 10(1). The meaning of "recreation" is obviously central. The Shorter Oxford English Dictionary says that "recreation" in the sense it is used in section 10(1) means "an activity or pastime pursued, especially habitually, for the pleasure or interest it gives". "Open-air" seems to me fairly clearly to refer to the outside air and to something done outside a building or structure.

52. The Chancellor, I think, concentrated on the words saying that "the public shall have a right of access to the commons on foot and on horseback" before addressing the

meaning of the words "for the purpose of open-air recreation". In my judgment, the right of access granted is stated to be for the purpose of open-air recreation. The access can only be achieved on foot or on horseback, but it does not seem to me that the words of section 10(1) naturally limited the kind of open-air recreation to those undertaken on foot or on horseback. That is why I disagree with the Chancellor when he said at [78] that the "right of access" in question was "the statutory formula which [was] being used to describe the right to roam on the [Dartmoor] Commons". The 1985 Act said nothing about the "right to roam". Section 10(1) was doing neither more nor less than granting to the public "a right of access to the commons on foot and on horseback for the purpose of open-air recreation". The latter part of section 10(1) simply provides that someone who exercises that right of access without breaking any wall, fence, hedge, gate or other thing shall not be treated as a trespasser.

53. Accordingly, the critical question as to the interpretation of the words in section 10(1) is whether "open-air recreation" should properly be taken to include wild camping.

54. Many examples were posited in the course of argument ranging widely. I am not sure that I find it particularly helpful to answer the question of whether wild camping is properly to be regarded as "open-air recreation" by answering questions as to whether rock-climbing or football are to be regarded as "open-air recreation". The only thing we do know for sure is that organised games were not regarded as open-air recreation for the purposes of the 1949 Act, but that otherwise neither schedule 2 to the 1949 Act nor schedule 2 to the Byelaws excluded wild camping. Schedule 2 to the 1949 Act was expressly applied to section 10(1) by section 10(3) and makes no mention of camping. [6] of the Byelaws does not prohibit wild camping. It allows for pitching a tent by saying that "[n]o person shall knowingly use any vehicle, including a caravan or any structure **other than a tent** for the purpose of camping on the access land" (emphasis added). [6] also restricts where tents may be erected and for how long.

55. So I return to the central question. I start by asking whether a walker who lies down for a rest without pitching a tent would be present for the purpose of open-air recreation. It seems to me obvious that they would. The resting is obviously a necessary part of the recreation. If that walker keeps his eyes open and remains awake, the pastime he is enjoying may include simply resting in the open-air in the peace of the countryside. I have then asked myself whether it makes any difference if the putative walker falls off to sleep. The only argument suggesting it might is that recreation is something one does when one is awake and sentient. It seems to me that that argument proves too much. A walker resting by sleeping is merely undertaking an essential part of the recreation of a lengthy walk.

56. The next question, as it seems to me, is whether it affects the conclusions in the previous paragraph if the walker rests or sleeps on a plastic sheet to prevent the damp, or in a sleeping bag to protect from the cold, or under a tarpaulin or in an open tent or in a closed tent to protect from the rain. The fact that a tent is closed rather than open cannot convert the wild camping from being an open-air recreation into not being one. In my judgment, that walker is still resting by sleeping and undertaking an essential part of the recreation. Nor, in my judgment, does it matter if the walker has not walked far when he rests or sleeps in the manner I have mentioned. Of course, whatever people do in exercise of the right of access under section 10(1), they must travel only on foot or on horseback and must abide by the restrictions in the Byelaws and in schedule 2 to the

1949 Act. I might mention also that I do not think it matters that there was no byelaw made under the 1949 Act.

57. I, therefore, conclude that the grant to the public of "a right of access to the [Dartmoor Commons] on foot and on horseback for the purpose of open-air recreation" does allow members of the public to rest and sleep, whether by day or by night, whether on the ground or in a tent. I do not think that the use of the word "open-air" means that a tent cannot be used for the necessary incidents of walking that I have described. In this context, it is of interest, if not conclusive that [6] of the Byelaws promulgated 4 years after the 1985 Act, did not restrict wild camping.

58. I can deal briefly with the ancillary arguments of the landowners. I do not agree with the Chancellor that *Pepper v. Hart* assists them, even if the conditions were satisfied. Mr Steen MP made no mention of whether or not the right being granted by section 10(1) did or did not include wild camping.

59. Secondly, since the words of the 1985 Act have a clear meaning, that meaning cannot be altered by the fact that the landowners' property rights are to some extent infringed by that meaning. A statute may limit the rights of property owners and that is what has happened by granting the rights of access to the public under the 1985 Act. As Millett LJ said in *Cadogan v. McGirk* [1996] 4 All ER 643 at 647-8:

> It would, in my opinion, be wrong to disregard the fact that, while the [Leasehold Reform, Housing and Urban Development Act 1993] may to some extent be regarded as expropriatory of the landlord's interest, nevertheless it was passed for the benefit of tenants. It is the duty of the court to construe the 1993 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.

60. Finally, I get no assistance from the principle that a private act should be construed against its promoter, since I do not think, on analysis, that section 10(1) is ambiguous in the respects I have mentioned.

Conclusions

61. For the reasons I have given, I would allow the appeal. In my judgment, on its true construction, section 10(1) of the Dartmoor Commons Act 1985 confers on members of the public the right to rest or sleep on the Dartmoor Commons, whether by day or night and whether in a tent or otherwise, provided that the other provisions of the 1985 Act and schedule 2 to the 1949 Act and the Byelaws are adhered to. I would be prepared to make a declaration to that effect, but would invite written submissions from the parties as to whether that is an appropriate course.

Lord Justice Underhill:

62. I agree that this appeal should be allowed. I will briefly state my reasons in my own words but I do not believe they differ substantially from those of the Master of the Rolls.

63. I start with the structure of section 10 (1). The first part, down to the semi-colon, grants "a right of access" to the commons, subject to the various qualifications identified. The second part (arguably unnecessarily but no doubt in order to be explicit) spells out the corollary of such a right, namely that a person exercising it is not liable for trespass. The right so granted is a right both to enter the commons and to be on any part of them: that is the natural meaning of the phrase "right of access", but it is in any event confirmed by the language of the second part, which refers both to entering the commons and being on them. The right is limited by reference to both the means of access employed (only on foot or on horseback) and the purpose of accessing them (open-air recreation) and is subject to compliance with the other provisions of the Act and the applicable byelaws and other rules.

64. Thus as a matter of drafting structure section 10 (1) does not as such confer a right to engage in open-air recreation distinct from the right of access: rather, a purpose of open-air recreation is the necessary condition for the grant of the right of access. The landowners say that it follows that the open-air recreation being referred to can be no more than the recreation derived from, or consisting in, the right of access itself – that is, the recreation of being on any part of the commons in the open air (whether walking or riding or simply sitting or lying down). That is what I understand the Chancellor to mean by saying that the right conferred by the section is limited to the right to roam. On that basis the section confers no right to engage in any recreation not inherent in, or at least "ancillary to", being on the commons.

65. I see the formal attraction of that submission, but I have come to the conclusion that it takes too narrowly literal an approach to the structure and language of section 10 (1). In my view the formulation "right of access for the purpose of open-air recreation" is more naturally to be construed as a composite phrase conferring not merely the right of access but also a positive right to engage in the open-air recreation for the purpose of which the right of access is granted. The result of the landowners' construction would be that people accessing the commons who wished to engage in a particular recreation over and above that of simply being there – for example birdwatching, or sketching the landscape, or flying a kite, or walking a dog, or having a family game of kick-the-can or a picnic – would either not be entitled to do so at all or would have to argue that the activity in question was ancillary to the right of access. I do not think it likely that Parliament intended either situation. It does not accord with ordinary notions of access to open country that those exercising it are entitled to engage in no activity beyond their mere presence (whether ambulatory or stationary). That was tacitly recognised by the Chancellor in his reference to the right of access extending to "ancillary" activities, but that raises a question about which recreational activities can be regarded as ancillary and which can not, for which there is no clear touchstone either in the Act or elsewhere; and I do not think it likely that Parliament can have intended to create so uncertain a situation.

66. It is in my view more likely that Parliament's intention was to confer a general right to engage in open-air recreation on the commons, <u>subject to</u> restrictions of the various kinds specifically provided for in the opening words of section 10 (1), in particular:

    (a) restrictions in the Act itself, which include the general prohibitions in Schedule 2 to the 1949 Act, incorporated by section 10 (3); and

(b) restrictions imposed by byelaws made under section 90 of the 1949 Act, incorporated by section 11, "for the preservation of order, for the prevention of damage to the land …, and for securing that persons resorting thereto will so behave themselves as to avoid undue interference with the enjoyment of the land … by other persons".

Those restrictions provide a workable structure whereby a proper balance can be preserved between the rights of those accessing the commons and the rights of the owners of the land (and others).

67. The County Council, which was the promoter of the 1985 Act, clearly understood that to be the scheme of the Act. The 1989 byelaws prohibit, or place restrictions on, a number of specific activities including camping (byelaw 6), dog-walking (byelaw 9), using metal detectors (byelaw 15), and flying kites (byelaw 18). Those provisions clearly proceed on the basis that the activities in question fall within the scope of the right created by section 10 (1) but that they require regulation for one or more of the purposes identified in section 90 (1) of the 1949 Act. Even though this is not government legislation, that fact may be admissible as an aid to the construction of section 10 (1) as a form of *contemporanea expositio*: see, most recently, para. 45 of the judgment of Lord Sales in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28[1]. I would not myself rely on it for that purpose, not only because of the rather shaky conceptual foundation for the use of subordinate legislation in this way (see *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed, at sec. 24.18, n. 9) but also because of the significant time-lag between the passage of the Act and the making of the byelaws. (It would be another matter if there were at the time of the passage of the Act similar byelaws in place under section 90 of the 1949 Act, given the explicit relationship between the two statutes; but, as the Master of the Rolls records at para. 21 above, none were drawn to our attention.) But the areas covered by the 1989 byelaws do at least demonstrate that on my preferred construction the authorities would have the tools to impose reasonable restrictions on the broad right to engage in open-air recreation on the commons which I believe section 10 (1) creates.

68. Once that point is reached, the question simply becomes whether "wild camping" – a modish phrase which I understand to mean camping overnight in a place which is not a dedicated campsite – falls within the definition of "open-air recreation". In my opinion it plainly does. Many people take pleasure in the experience of sleeping in a tent in open country, typically, though not invariably, as part of a wider experience of walking across country, and perhaps engaging in other open-air recreations such as birdwatching, during the day. It is a perfectly natural use of language to describe that as a recreation, and also as occurring in the open air, notwithstanding that while the camper is actually in the tent the outside air will be to some extent excluded.

69. I have already noted that the 1989 byelaws treat "camping" (which plainly includes wild camping) as an activity permitted by section 10 (1): see para. 67 above. For the reasons there given, I prefer not to take that fact into account as a form of *contemporanea expositio*. But it gives some support to my conclusion that wild camping can naturally be regarded as a form of open-air recreation.

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[1] This decision was reported since the argument before us, but we were referred to the earlier decision in *Hanlon v The Law Society* [1981] AC 124.

70. We were referred in some detail by both parties and the Intervener to the approach taken to camping under the legislation covering other forms of commons or elsewhere in national parks. On examination, none of the individual cases or types of case appears to lend conclusive support to either side. For example, evidence adduced by the Intervener shows that a large number of access agreements made under the 1949 Act (though by no means all) contained restrictions on the right to camp; that might in principle evidence a common understanding that the right of access for the purpose of open-air recreation referred to in section 60 (1) includes such a right, and that might in principle cast light on the intention of Parliament when using the same language in the 1985 Act. But the restrictions in question might have been inserted only out of caution; and in any event where the dates of the agreements in question are given they all post-date 1985. I accordingly prefer to reach my conclusion on the basis set out in the previous paragraphs. Having said that, I believe that that conclusion does gain some limited support from section 193 of the 1925 Act (see para. 7 of the Master of the Rolls' judgment). The section creates a right of access to metropolitan and other commons "for air and exercise", but subject to a proviso that it does not include a right to camp (among other things). I do not think that that necessarily means that the right to such access would otherwise include a right to camp. But the drafters of the 1985 Act were aware of the provisions of the 1925 Act (section 4 refers to section 194 of the 1925 Act), and it might be thought that if they had intended an absolute prohibition on camping – that is, without the landowners' consent – they would have provided for it.

71. I need not add to what the Master of the Rolls has said about the landowners' ancillary arguments at paras. 58-60 above.

72. The question for this Court is simply what the language of the 1985 Act means. My conclusion that it confers a right to engage in wild camping does not mean that I do not have real sympathy with the landowners in having to deal with the consequences of the irresponsible exercise of this right: we were shown some shocking examples in the evidence. Byelaw 6 already contains some restrictions on wild camping, including listing a number of parts of the commons where erecting a tent is not permitted at all and a prohibition on camping in a tent for more than two nights in the same place. It may be that further restrictions are required in order to try to address the increased level of problems being reported by landowners. But whether that is so is a matter not for the Court but for the Authority, to whom Parliament has entrusted the responsibility for making the byelaws.

Lord Justice Newey:

73. I agree with both judgments.