Neutral Citation Number: [2023] EWHC 35 (Ch)

Case No: PT-2022-000194

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

13/01/2023

Before :

THE CHANCELLOR OF THE HIGH COURT

- -

Between :

(1) ALEXANDER DARWALL **(2) DIANA DARWALL**	**Claimants**
- and - **DARTMOOR NATIONAL PARK AUTHORITY**	**Defendant**

- -
- -

Timothy Morshead KC (instructed by **Irwin Mitchell LLP**) for the **Claimants**
Timothy Leader (instructed by **the County Solicitor**, **Devon County Council**) for the **Defendant**

Hearing dates: 13 and 14 December 2022

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 10:30am on Friday 13 January 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

Sir Julian Flaux C :

Introduction

1. The principal issue in this case is whether section 10(1) of the Dartmoor Commons Act 1985 ("the 1985 Act") confers on the public a right not only to walk or ride a horse on the commons but also to camp there overnight.

2. The sub-section provides as follows:

> **Section 10 – Public access to the commons**.
>
> (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.

Factual and procedural background

3. The Dartmoor National Park in Devon ('Dartmoor') was designated as such in 1951 under section 5 of the National Parks and Access to the Countryside Act 1949 ("the 1949 Act"). Within it, the Dartmoor Commons ('the 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.

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

5. The Defendant ('DNPA') is the National Park Authority for Dartmoor, having taken over that function from Devon County Council. In 1989, the Council promulgated byelaws under section 11 of the 1985 Act and section 90 of the 1949 Act, respectively, which remain in force. Byelaw 6 regulates camping. It provides:

> "6 Camping
>
> 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 [Schedule 2 contains a list of areas on the Moor and commons where camping is prohibited];
>
> (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."

6. In autumn 2021, DNPA consulted the public on amendments it proposed to make to the byelaws. By letter dated 1 November 2021, the claimants' solicitors asserted that the right of access granted by section 10(1) of the 1985 Act 'does not extend to a right for the public to camp or wild camp'. DNPA disagreed. By claim form issued on 7 March 2022, the Claimants commenced a claim under CPR Part 8, seeking a declaration that section 10(1) does not grant the public a right to camp on the Commons.

7. DNPA initially made an application to transfer the claim to the Administrative Court on the grounds that it was a public law claim which should be pursued by way of judicial review. However that application was abandoned and DNPA agreed to a Consent Order made by Master Clark on 6 July 2022 which gave directions towards the present trial.

Additional relevant legislation

8. In addition to section 10(1) of the 1985 Act, section 10(3) provides as follows:

> "(3)
>
> (a) The provisions of sections 60(5)(b) to (g), 66, 68 and 78 of the Act of 1949 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.
>
> (b) In their application for the purposes of this subsection the provisions of the said section 60(5)(e) shall have effect as if after the words therein in the first parenthesis there were inserted "or the processing of such minerals including the disposal of waste therefrom or activities ancillary thereto".

9. Section 11 of the 1985 Act provides as follows:

> "**Section 11 – Byelaws under Act of 1949 and wardens.**
>
> (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."

10. Section 193 of the Law of Property Act 1925 provides as follows:

"**Section 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, or manorial waste, or a common, which is wholly or partly situated within an area which immediately before 1st April 1974 was a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided:

[…]

(4) Any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck, or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the Minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding £20 for each offence."

11. Relevant provisions of the 1949 Act are as follows:

Section 1 – The National Parks Commission (as originally enacted)

There shall be a National Parks Commission which shall be charged with the duty of exercising the functions conferred on them by the following provisions of this Act –

(a) for the preservation and enhancement of natural beauty in England and Wales, and particularly in the areas designated under this Act as National Parks or as areas of outstanding natural beauty;

(b) for encouraging the provision or improvement, for persons resorting to National Parks, of facilities for the enjoyment thereof and for the enjoyment of the opportunities for open air recreation and the study of nature afforded thereby,

and of exercising such other functions as are conferred on the Commission by this Act

Section 5 – National Parks.

(1) The provisions of this Part of this Act shall have effect for the purpose–

(c) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and

(d) 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 11A – Duty of certain bodies and persons to have regard to the purposes for which National Parks are designated.

(1) A National Park authority, in pursuing in relation to the National Park the purposes specified in subsection (1) of section five of this Act, shall seek to foster the economic and social well-being of local communities within the National Park and shall for that purpose co-operate with local authorities and public bodies whose functions include the promotion of economic or social development within the area of the National Park.

(2) In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in subsection (1) of section five of this Act and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park.

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) […]

(b) or camping sites; and

(c) […]

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 […].

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).

Section 90 – Local authority byelaws.

(1) A local planning authority may, as respects land in their areas belonging to them and comprised either in a National Park or area of outstanding natural beauty, or as respects land or a waterway to which the public are given access by an agreement or order, or in consequence of acquisition, under Part V of this Act, make byelaws for the preservation of order, for the prevention of damage to the land or waterway or anything thereon or therein, and for securing that persons resorting thereto will so behave themselves as to avoid undue interference with the enjoyment of the land or waterway by other persons.

(2) [repealed]

(3) Without prejudice to the generality of subsection (1) of this section, byelaws under that subsection–

> (a) may prohibit or restrict the use of the land or waterway, either generally or in any manner specified in the byelaws, by traffic of any description so specified;
>
> (b) may contain provisions prohibiting the depositing of rubbish and the leaving of litter;
>
> (c) may regulate or prohibit the lighting of fires;

> (d) may be made so as to relate either to the whole or to any part of the land or waterway, and may make different provisions for different parts thereof.

12. Section 2 of the Countryside and Rights of Way Act 2000 provides:

> "**2 Rights of public in relation to access land.**
>
> (1) Any person is entitled by virtue of this subsection to enter and remain on any access land for the purposes of open-air recreation, if and so long as—
>
> (a) he does so without breaking or damaging any wall, fence, hedge, stile or gate, and
>
> (b) he observes the general restrictions in Schedule 2 and any other restrictions imposed in relation to the land under Chapter II."

13. Schedule 2 is headed: "Restrictions to be observed by persons having rights of access" and provides, so far as relevant:

> "….section 2(1) does not entitle a person to be on any land if, in or on that land, he—
>
> …
>
> (s) engages in any organised games, or in camping, hang-gliding or para-gliding,"

The issues

14. On the pleadings and skeleton arguments, the following issues arise for determination by the Court:

    (1) On its true construction, does section 10(1) of the 1985 Act grant the public a right to camp overnight on the Commons?

    (2) Is there nonetheless a local custom of camping on the Commons which has the force of law despite section 10(1) of the 1985 Act?

    (3) If the answer to (1) and (2) is no, should the court nevertheless decline to exercise its discretion to grant declaratory relief in the terms sought?

15. In the event, Mr Timothy Leader on behalf of DNPA did not pursue in his oral submissions his case of custom, but I will deal with it briefly. He also did not pursue the third issue as to discretion with any great vigour orally, but I will deal with it nonetheless.

Principles of statutory interpretation

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 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:

> "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, 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* [1993] AC 593, 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* [1993] AC 593, 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 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 p542. 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 passage from Buckley LJ's judgment is then cited]. 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."

19. The rights conferred by an Act include rights which are necessarily implied. A necessary implication is one which necessarily follows 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]; see also the discussion in *Bennion* at [11.5] p 404.

20. Mr Leader for DNPA advanced the proposition that there was a settled practice that section 10(1) conferred a right to wild camp and that the statute should be construed in accordance with that settled practice. As a principle of statutory interpretation, this is somewhat controversial. Mr Leader relied upon an *obiter dictum* of Carnwath LJ in *Isle of Anglesey County Council v Welsh Ministers* [2009] EWCA Civ 94; [2010] QB 163 at [43]:

> "It is unnecessary in my view to attempt a general reconciliation of these various conflicting strands of authority or to explore the full breadth of the principle which they illustrate. My own respectful view is that Lord Blackburn's more liberal view is supported by considerations of common sense and the principle of legal certainty. Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without risk of it being upset by a novel approach. That applies particularly in a relatively esoteric area of the law such as the present, in relation to which cases may rarely come before the courts, and the established practice is the only guide for operators and their advisers."

21. As Lord Carnwath JSC, he was prepared to apply the same principle in *R (on the application of ZH) v London Borough of Newham* [2014] UKSC 62; [2015] AC 1259. Starting at [93] he dealt with customary meaning of the words of a statute, then at [94] with legal certainty and settled practice, saying at [95]:

> "In my view this case provides an opportunity for this court to confirm that settled practice may, in appropriate circumstances, be a legitimate aid to statutory interpretation. Where the statute is ambiguous, but it has been the subject of authoritative interpretation in the lower courts, and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts. This should not necessarily depend on the degree or frequency of Parliamentary interventions in the field. As in the *Anglesey* case, the infrequency of Parliamentary intervention in an esoteric area of the law may itself be an added reason for respecting the settled practice. On the other hand it may be relevant to consider whether the accepted interpretation is consistent with the grain of the legislation as it has evolved, and subsequent legislative action or inaction may be relevant to that assessment."

At [96] Lord Carnwath said that this would not be new law but received strong endorsement from the House of Lords decision in *Otter v Norman* [1989] AC 129. He then quoted a passage from the speech of Lord Bridge of Harwich at 145-6.

22. However, none of the other Justices in a seven Justice Supreme Court would have dismissed the appeal on the basis of the settled practice principle. Lord Neuberger PSC had considerable reservations about any rule as to statutory construction of customary meaning or settled practice, saying at [148]:

> "I have even greater reservations about the so-called "customary meaning" rule. As just mentioned, a court should not lightly decide that a statute has a meaning which is different from that which the court believes that it has. Indeed, so to decide could be said to be a breach of the fundamental duty of the court to give effect to the will of parliament as expressed in the statute. Legal certainty and settled practice, referred to by Lord Carnwath in paras 94-97 are, as I see it, an aspect of customary meaning. Although Lord Bridge expressed himself as he did in *Otter v Norman* [1989] AC 129, 145-6 (as quoted by Lord Carnwath in para 96), neither *Barras* nor *Farrell* was cited to him, and he relied on the fact that "for many years, many landlords and tenants have regulated their relationships on [the] basis that" observations in an earlier decision of the Court of Appeal were right. Even on that basis, I would wish to reserve my position as to the correctness of Lord Bridge's *obiter* observations."

Baroness Hale of Richmond DPSC shared Lord Neuberger's reservations at [168].

23. For reasons I will develop later in this judgment, it is not necessary to decide whether or not there is a settled principle rule applicable to statutory interpretation, because the material before the Court falls a long way short of there being a settled practice that there has been a right to wild camp without the landowner's consent since the 1985 Act was passed.

The parties' submissions

24. On behalf of the claimants, Mr Timothy Morshead KC made submissions as to the ordinary meaning of the words used in section 10(1) of the 1985 Act. He noted that the statutory formula had not been used before the 1985 Act, although the same wording was subsequently used in section 15 of the Malvern Hills Act 1995. However, the byelaws of the Malvern Hills Conservators of 1999, in contrast with the Dartmoor byelaws, expressly provide that no unauthorised person may camp on the Hills. Mr Morshead KC submitted that the statutory formula was being used to describe the right to roam: "the public shall have a right of access to the commons on foot and on horseback…" The following words: "for the purpose of open-air recreation", which had previously been used in section 60 of the 1949 Act, were describing the purpose for which the right might be exercised, namely open-air recreation. This meant that the public could have access onto the Commons for that purpose without having to show any other justification for being there. They were free to stray away from footpaths and wander around, thus having a *jus spatiandi* rather than a mere right of way.

25. This right to roam on Dartmoor and its Commons had not previously been granted to the public. Section 193 of the Law of Property Act 1925 only gave a right of access to land

which was a metropolitan common, not to any land which was subsequently designated a National Park under the 1949 Act and only two small areas of the Commons nearest to the towns were ever designated metropolitan commons. Section 60 of the 1949 Act only precluded a member of the public from being a trespasser if they entered land "for the purpose of open-air recreation" where that land was the subject of an access agreement or order. Only a very small area of Dartmoor was ever the subject of access agreements; some 5,000 acres out of a total of 96,000 acres.

26. Mr Morshead KC accepted that, applying the principle refined in *Black*, referred to in [17] above, the right to roam conferred by section 10(1) of the 1985 Act included ancillary rights such as the right to walk a dog, to sit down and have a picnic or to stop and enjoy the view. However, camping was not such an ancillary right. He submitted that it simply did not satisfy the test of necessary implication. No part of Dartmoor is situated more than five miles from a public road, a walker or rider could always get to one of the campsites and, in any event, if they wanted the pleasure of wild camping, they could always ask the landowner for permission or take their chances and run the risk of being moved on, a point to which I will return below. Mr Morshead KC pointed out that the case that camping was an implied right derived from the right to roam was not pleaded by DNPA or mentioned in its skeleton argument.

27. Mr Morshead KC submitted that the rights under section 10(1) were conferred on "the public", the corollary of which was that no single member of the public should have any greater right of "access" than anyone else. Camping is intrinsically incompatible with this, since it involves occupation of the land on which the tent stands, so that land is unavailable for access by any other member of the public. He also submitted that DNPA's interpretation of the sub-section treated it as if it were conferring a right of "open air recreation" on the Commons. However, the words of the sub-section expressly distinguish between the right conferred (a right of access on foot or on horseback) and the purpose for which the right might be exercised (open-air recreation). DNPA's construction ungrammatically elided the two.

28. In relation to DNPA's reliance on other parts of the 1985 Act and specifically the power to make byelaws under section 11, which included a power to regulate camping (byelaw 6), Mr Morshead KC submitted that the power to make byelaws empowered DNPA to control activities of the prescribed kind, whether or not they would otherwise be lawful. This said nothing one way or the other about whether, apart from prohibition under a byelaw, any particular activity would be lawful. He submitted that there was no question of the claimants' case being a collateral attack on the byelaws. Properly construed, byelaw 6 told one nothing about whether wild camping was permitted and, in any event, section 11 of the 1985 Act and section 90 of the 1949 Act did not give DNPA power to expand through byelaws on whatever rights the public have under the respective statutes.

29. DNPA also relied upon the fact that section 10(3) of the 1985 Act incorporates Schedule 2 to the 1949 Act, the list of prohibitions under which does not include camping. Mr Morshead KC submitted that this too said nothing one way or the other about whether a right to camp is within the right of access on foot or horseback conferred on the public by section 10(1). The legislative history, taken with the fact that camping is not mentioned in section 10(1), confirms how remote from the legislative programme was any thought that a public right of access on foot or on horseback would confer a right to camp without the landowner's consent. When there were discussions about camping, it was being thought of as a facility so that people could go on to the land, something to

help them enjoy recreation. Accordingly, Mr Morshead KC submitted that the meaning of section 10(1) was clear: it conferred the right to roam, but not a right to camp on land without the consent of the landowner.

30. Mr Morshead KC also relied on the principle against expropriation referred to at [16] above. At the time of the 1985 Act, to camp on Dartmoor required the permission of the landowner. This was well-understood, widely known and uncontroversial, as is evident from DNPA's predecessor, the National Parks Authority's, own publication: "The Dartmoor Visitor Information for 1982" which stated:

> "…all land in the National Park, like land anywhere in Britain, has an owner and his or her permission is required before stopping for the night. This is nothing more than common sense and courtesy on enclosed land, but you may not realise that it also applies on the open moor. However, if it is solitude and wide open spaces that you want, landowners do not in practice normally raise objection to a single tent pitched on unenclosed land for a night out of sight of houses and roads. But if you are asked to move on, you will have to do so."

31. He submitted that this negatived the DNPA suggestion that there was a custom of camping. As Mr Morshead KC put it, a custom which requires consent is no custom. Other materials demonstrated that there was no such custom. In an earlier publication in October 1966 from the Dartmoor Preservation Association headed "Dartmoor and the Law", the section headed "Access and Trespass" stated:

> "The public generally has no *legal* right to enter upon common land without the landowner's consent. But on commons designated under the Law of Property Act 1925 s 193 (on Dartmoor Spitchwick and Hayter Down Commons) commons lying wholly or partly in Borough or Urban Districts…a statutory or *de jure* right of access for air and exercise exists….On the remaining commons in the National Park, the public has for very many years enjoyed implied or *de facto* access. This was formally recognized when the area was so designated in 1951…"

In the section headed "Camping" it stated:

> "Permission of the landowner is the legal requirement. In 'open country' in the National Park, for individual walkers or for small parties on adventure or similar expeditions camping for a night, permission is deemed to exist owing to practical difficulties and long custom."

It is not suggested in that section that this custom or deemed permission applied to the Commons at that time.

32. There was a Policy Review in 1974 which talked about camping, recognising that the problem at that time was the large numbers of motorised campers. In relation to "wild camping", [14.18] of that document states:

> "The practice of 'camping wild', that is on open land where no facilities exist, calls for no action where such campers are few in number and well-dispersed, but where concentrations of such campers occur in particular places, primitive means of rubbish disposal and sanitation may become

> objectionable. In such circumstances, the park authority should seek, in cooperation with landowners, to regulate this use of the land."

33. Mr Morshead KC submitted that, taking these documents as a whole, at the time that the 1985 Act was enacted, there was no appetite for conferring on the public a right of camping. As the Visitor Information from 1982 made clear, the consent of the landowner was required. The effect of section 10(1) of the 1985 Act, enlarging as it did the public's rights over the land of another, was to erode the landowner's rights without any provision for compensation. Accordingly, the principle against expropriation was engaged and the Court should interpret the sub-section in the way for which the claimants contend rather than any other, if the Court accepts that the claimants' interpretation is a possible one.

34. Even if the meaning of the sub-section for which the claimants' contend was not clear but was ambiguous, that meaning was confirmed by what was said by the promoter of the Bill (which was a private member's Bill), one of the local MPs, Mr Steen, in introducing it to the House of Commons for its second reading on 25 June 1984:

> "The second part of the Bill aims to give the public a right to walk and ride over the common land. That is clause 10. It sets an important precedent. The 1980 Bill gave the right only to walkers, but this Bill extends it to horse riders, who have enjoyed riding over the moor for centuries."

The reference to the 1980 Bill was to an earlier Bill promoted in 1979/1980 which went quite a long way through the legislative process, but as Mr Morshead KC said, ultimately did not have enough support to become law, partly because it contained a controversial power of improvement and because it would have been limited to walking.

35. Mr Morshead KC submitted that what was said by Mr Steen MP was admissible under the principle in *Pepper v Hart*, as it fulfilled all three of the criteria laid down by Lord Browne-Wilkinson. He submitted that it was clear that Mr Steen was talking about the right to roam. What Mr Steen said was not ambiguous and did not lack clarity. No-one in Parliament can have thought that they were being asked to sanction a right to camp. Mr Morshead KC also relied upon a passage slightly later in Mr Steen's speech where he referred to the petition from the Country Landowners Association, who, whilst not opposed to the Bill, were suggesting that each of the 55 landowners on Dartmoor should be deemed to have entered into an access agreement with the County Council as opposed to the granting of a statutory right to roam. He said that in practice the best illustration of the difference between the two was that, if there were a statutory right and a landowner confronted a walker across the moor and asked him to leave his land, the walker could say; "Parliament has by law given me the right to walk or ride across your land and I am going to do just that." If there was a deemed access agreement, the walker could say: "Although I have no right to be here, I am not a trespasser and you have no right to throw me off". Mr Steen said that there was therefore virtually no difference between the two other than the words, except that deemed access had the potential for restriction and confusion. Mr Morshead KC submitted that there was no suggestion here that what was being granted was a statutory right to camp on the landowner's land without permission. It was beyond doubt that it was only a right to roam that would be granted.

36. Mr Morshead KC also submitted that the context of the 1985 Act and the mischief at which it was directed also supported the interpretation for which the claimants contend and could be considered, applying the principles in *Coughlan*. He focused on four aspects

of the context. First was enclosure and section 193 of the Law of Property Act 1925. He noted that the old Enclosure Acts as well as awards under the 1845 Enclosure Act sometimes included allotments of land for recreation, but this was never considered to include camping whether by the public or limited to those living in the locality.

37. Whilst section 193 of the 1925 Act conferred an ostensibly wide right of access to metropolitan commons for "air and exercise" there was a list of restrictions which had the effect of limiting access to pedestrian access and which prohibited camping. He submitted that the 1985 Act used a different drafting technique. The list of restrictions does not prohibit camping but it did not need to do so because the right conferred on the public at the outset is less wide, being only a right of access on foot or on horseback.

38. The second aspect of the context was section 60 of the 1949 Act. During the passage of the 1985 Act through Parliament, it was said by Sheila Cameron QC, counsel for the promoters, to have borrowed from section 60 of the 1949 Act the reference to "open-air recreation", but as Mr Morshead KC put it, the comparison is not exact, because of the unique drafting of section 10(1) of the 1985 Act. Under the 1949 Act a public right of access to land was subject to the terms of an access agreement. Section 1 of the 1949 Act as originally enacted, and as it stood when the 1985 Act was enacted, set up what was initially the National Parks Commission and distinguished expressly in (b) between "the enjoyment of the opportunities for open air recreation and the study of nature afforded thereby" on the one hand and "the facilities for the enjoyment thereof" on the other. Mr Morshead KC submitted that within that bifurcation, section 12 of the 1949 Act treats camping as a facility for recreation, camping sites being grouped with accommodation, meals and parking places, rather than as an aspect of the recreation which the public might have a right to enjoy over land covered by an access agreement. Accordingly, he submitted that the 1949 Act was consistent with the claimants' case and inconsistent with DNPA's.

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'".

41. Mr Morshead KC submitted that the same distinction between recreation and the facilities for recreation was observed in the Parliamentary debates. He submitted that there was no suggestion before Parliament in 1949 that it should confer a public right of camping on any land, anywhere. The mischief at which the 1949 Act was directed was a perceived lack of a public right to roam, not a perceived lack of a public right to camp.

42. The fourth aspect of the context is the legislative history of the 1985 Act itself. The parties had assembled a body of material which Mr Morshead KC recognised was not admissible under the principle of *Pepper v Hart*, but which was admissible to indicate the purpose of the 1985 Act and the mischief at which it was directed. He submitted that this material demonstrated that: (i) at no point did anyone suggest that Parliament should remove the requirement of the landowner's consent for camping, which was the position before the Act; and (ii) those involved in promoting the Bill and in the process recognised and assumed that that requirement would continue as before. He referred to the Promoters' Statement in support of the Second Reading of the 1980 Bill which, in dealing with the right of access and the power of the DNPA to make byelaws under what is now sections 10 and 11, noted that the power would enable the DNPA to prohibit roadside and off-site camping and caravanning but continued: "[this] is not to affect permanent, authorised camping and caravanning sites or the use for those activities of enclosed land on the commons with the leave of the owner or of lands upon the environs of common land."

43. The Petition of the Caravan Club Limited in relation to the 1980 Bill expressed concern about this power to make byelaws to prohibit camping and said at [8] and [9]:

> "8. Much of the commons is in private ownership and the public are not entitled to access to them for the purpose of camping without the permission of the landowner concerned…
>
> 9. Many of your Petitioners' members and others frequently camp on the commons and your Petitioners instruct their members always to obtain from the landowner concerned permission so to camp. Your Petitioners would not condone or approve camping without the prior permission of the landowner."

44. Mr Morshead KC also referred to the evidence taken before the House of Lords Committee on the Dartmoor Commons Bill in June and July 1979 and specifically to the cross-examination of Mr Mercer, the National Park Officer, by Mr Robin Purchas, counsel for the petitioners the Caravan Club Limited and the Camping Club Limited, as well as for the British Horse Society and the Ramblers Association. Mr Morshead KC submitted that the relevant passage was all predicated upon camping on the Commons requiring the permission of the landowner. It included this exchange:

> "Q. By clause 10(3)(b) do you seek to prohibit that the owner of the farm or the smallholding who today may lawfully allow a camper and caravanner on his land occasionally from continuing to permit that practice?
>
> A. With common land in his ownership, yes.
>
> Q. Can you just tell me this for a moment. If a byelaw is made in accordance with…clause 10 that prohibits camping, whether in caravans or otherwise, that is going to affect, is it not, the owner of that part of the commons so far as his …ability to allow that camper or caravanner to go upon that land?

> A. That is right.
>
> …
>
> We are asking that there shall not be a situation in which any agent shall be capable of giving permission for the erection of a tent or the placing of a caravan on the common land of Dartmoor because of the problems that arise from that fact and the problem that immediately arises…is that some owners [are] willing to give permission and some owners [are not] willing to give permission."

45. Mr Morshead KC submitted that there was no relevant change when the Bill came back as the 1984 Bill, other than in relation to the right of access on horseback, so that one could read across this material from the earlier Bill.

46. He asked the Court to note that in the Countryside and Rights of Way Act 2000, Parliament had enacted a programme which came closer to the ambitions of the Hobhouse reports than was achieved by the 1949 Act. However it still contained a restriction against camping in Schedule 2.

47. In relation to DNPA's case of a custom of camping as of right, Mr Morshead KC submitted that there was incontrovertible evidence in the Visitor Information that there was no reputation of a custom of camping as recently as 1982. The petition of the Caravan Club Limited also contradicted any idea of a custom. None of the extensive material before the Court supports the alleged custom. As for the position after the 1985 Act was enacted, there was no evidence from DNPA as to what publicity the provision in section 10(1) had received after it was enacted.

48. On behalf of DNPA, Mr Leader's general submission was that wild camping was an accepted part of Dartmoor, a necessary incident of the right to roam. The relevant mischief at which the 1985 Act was directed was the absence of regulation of open-air recreation, of which camping was one aspect. The right conferred by section 10(1) was a right of access for a purpose, open-air recreation, which was not restricted to any extent except by reference to Schedule 2 to the 1949 Act and was to be interpreted widely. He submitted that the claimants focused excessively on the words "rights of access" without recognising that they were attached to that purpose of open-air recreation. As a matter of pure interpretation of the words of section 10(1) there was no restriction at all on the right of access on foot or on horseback for that purpose. Sections 10 and 11 read together were clear: the access was for a wide range of recreational activities, including camping, provided one went about them in a civilised way.

49. Relying on the *Isle of Anglesey County Council* and *ZH* cases, Mr Leader submitted that the 1985 Act had been interpreted for the past thirty six years on the basis that wild camping on Dartmoor, including the Commons, was permitted. There was thus a settled practice. He submitted that DNPA's approach to wild camping was well-advertised. He relied on the evidence of Dr Kevin Bishop who has been Chief Executive of DNPA since 2007. Although, as he admits, he was not employed by DNPA when the 1985 Act was passed or the 1989 byelaws were made, he expresses the view that the right of access for the purpose of open-air recreation has been interpreted historically by DNPA, the landowners, commoners and the public as including wild camping.

50. Mr Leader submitted that the mischief at which section 10(1) was directed was *de facto* access to the Commons without lawful authority for a wide spectrum of recreational uses, which created pressure and harm and which could not be controlled. There was a chaos of eight million visitors with untrammelled access making a mess, including camping. He submitted that the purpose of the 1985 Act was to extinguish landowners' objections to access and therefore the need for permission. The access for the purpose of open-air recreation is controlled by the Act by means of regulation through the byelaws and the employment of wardens to enforce them.

51. He referred to a number of the materials before the Court to support this case, which he submitted were admissible, under the principles summarised in *Coughlan*, to illuminate the mischief and purpose of the 1985 Act and to support a purposive construction. He relied first on the Hobhouse Committee reports. In the summary of recommendations in the first report was a recommendation that Park Committees should draw up plans showing areas and sites in National Parks where camping in tents and caravan camping were permitted either generally or on selected sites and should attach the necessary conditions to the use of land for these purposes. The body of the report emphasised that camping and caravanning should be encouraged in National Parks subject to such planning control as was necessary to safeguard amenities and prevent abuses.

52. Mr Leader next relied on the 1949 Act. Section 5(2)(b) talks about the opportunities the National Parks and the countryside provide for open-air recreation. He asked rhetorically to what extent the Act seeks to curtail the enjoyment of that recreation and the access for that purpose provided by section 60. The answer was that the right was not constrained other than by the Interpretation section, section 114, which provides that "open-air recreation" does not include organised games. The only restriction on activity on land where access was given otherwise was in Schedule 2, under which camping is not forbidden. Mr Leader submitted that where camping took place other than on a camp site, there had to be some degree of control, which was achieved by byelaws made under section 90 of the 1949 Act. In relation to the Dartmoor Commons specifically, he noted that, although there was no legal right of access under the 1949 Act other than in the two areas, people did exercise a *de facto* right of access and there were large numbers of visitors; hence the need for regulation and one of the purposes of the 1985 Act stated in the preamble was to regulate public access to the Commons.

53. Mr Leader relied upon another Hansard extract from the debate on 25 June 1984, where Mr Steen explained that the problem for the promoters was that some 40 of the landowners on Dartmoor believed that a statutory right was perfectly acceptable. He continued:

> "For hundreds of years people have travelled over the moor by horse and on foot and no-one has objected to it. It is only because of the legislation that the matter has raised its head. The question is whether the landowner should have his right extinguished by an Act, or whether he should have some agreement with the county council that affords the walker or rider the same protection, but gives him the freedom to say that it is his land. The only snag is all the ramifications involved."

Mr Leader submitted that what was contemplated was plainly that the right of the landowner to object to persons coming onto their land for the purpose of open-air recreation should be extinguished. Both limbs of the requirement of permission [i.e. to

access the land and to wild camp there] were extinguished so there could be no question of camping continuing to require the landowner's consent.

54. He pointed out that the claimants had singled out camping because they alleged that it constituted more extensive interference than other matters, occupation of the land rather than use. He said that someone could have all sorts of reasons for putting up a tent, such as bird-watching or star gazing, which would not constitute camping.

55. Mr Leader said he would make good the basis on which he sought to establish the mischief at which the 1985 Act was directed, by reference to material available publicly and spoken to by officers of the promoters. He referred to the proof of evidence of Mr Mercer for the Committee stage of the 1980 Bill. He emphasised two passages. First [12] where Mr Mercer said:

> "Having created a Commoners' Council with National Park Authority representation, to produce the discipline and management of the commons which both the social and economic well being of Dartmoor and the maintenance of its natural beauty demand, the Bill then proposes a right of public access on foot and it carefully places the control of the consequences of that right on the National Park Authority…"

Second, [15] where Mr Mercer said:

> "…the essence of this Bill is a management and access agreement between the National Park Authority and all those farmers depending upon the common land of Dartmoor in the interests of the better management of the National Park, and an enhanced opportunity for recreation and enjoyment of natural beauty, space and solitude which Dartmoor can offer. If the parties concerned can regard themselves as joint stewards of Dartmoor's future, this Bill tries to set up a framework for that stewardship."

56. Clause 10 of the 1980 Bill (the right to make byelaws) would have given DNPA power to make byelaws prohibiting camping. Mr Leader submitted that this was concerned with the regulation of camping permitted by landowners on authorised sites, which was irrespective of the right of others to wild camp. Mr Leader relied on the explanation of Clause 10 given to the House of Lords Committee by Mr Vandermeer QC, counsel for the promoters:

> "There are a number of sites where people go because they are popular; they are unauthorised in the sense that they have not been set up on licensed sites, and damage is done-of course-litter is left, amongst other things- pollution is actually feared…notwithstanding that there is no right upon Dartmoor except in very special circumstances, there is considerable *de facto* use, pressure and harm; and it is for that reason…that it is thought right , if the public are now to be permitted, as a matter of law, to go onto the common, that there should be proper regulation of those activities."

Mr Leader submitted that the notion of consent by landowners was replaced by the notion of consent by the Park Authority, controlling access through its own byelaws. This was confirmed by a letter from the Devon County Council (which had originally been the Park Authority) read by Mr Vandermeer QC during Mr Mercer's evidence.

57. However, a backpacker roaming with a tent was not generally perceived as a problem as Mr Mercer made clear, saying:

> "This is not normally a problem. The only time it can become a problem is when nightfall comes at the edge of the road, and then the innocent backpacker starts a camp site, and is joined by other people-the British people have a tendency to join together in that sort of situation, they think 'that must be a good place' and they go there. That is the only time. It is the policy of the National Park Authority and its predecessor that back-pack camping is an obvious use of the high plateau on Dartmoor."

Mr Leader submitted that, whilst such back-pack camping would previously have been without permission, the 1985 Act gave them permission and it was within the contemplation of the promoters that back-pack camping ought to be permitted.

58. He submitted that it was abundantly clear from all this material that the mischief addressed by the 1985 Act was that *de facto* use was giving rise to pressure and causing harm. The purpose of the Act was to impose control. Having regard to the mischief and purpose, the literal meaning of section 10(1), which permitted wild or back-pack camping, was not changed at all.

59. Mr Leader submitted that wild camping did not amount to expropriation because occupation for a short period contemplated by the byelaws ought not to be regarded as unreasonable interference with the landowners' rights. The notion that wild camping got in the way of agriculture did not bear scrutiny and it was unreal to contend that anyone would be squabbling over a few square feet of land. The claimants' case that camping was sedentary rather than ambulatory, resulting in the occupation of land, was focusing on the wrong thing. Read literally, the Act provided for a broad range of recreation and the key consideration was one of interference. Permitted recreation could not interfere with the landowner's rights. The claimants' approach glossed over a number of recreational pursuits which the Hobhouse reports contemplated would be permitted if public access were granted, which were no more ambulatory than camping. Mr Leader gave the example of a possibly large group rock climbing, who would be occupying the land as much as campers.

60. The singling out of camping was wholly arbitrary. If it was accepted, as it was by the claimants, that the right to roam included sedentary things such as having a picnic, he asked what the problem was with wild camping, whether the problem was just the erection of a tent. He also submitted that there would be practical difficulties with walkers having to get permission. Dartmoor would become a place for short walks by day trippers which cannot have been what Parliament intended. Anyone wanting to go for a long walk would need to take a tent. Whether this was interference with land was a question of judgment to be determined by the byelaws.

61. In relation to the claimants' suggestion that camping was a facility, Mr Leader submitted that the 1985 Act did not make provision for a camping facility on the Commons and, in any event, what the Act did was to permit control through the byelaws.

62. In relation to the issue of whether the Court should exercise its discretion to grant declaratory relief, Mr Leader submitted that the claimants' case threatened good administration and many people whose rights were being affected were not before the

Court. There had been considerable delay in bringing the claim. He relied on the decision of the Court of Appeal in *Credit Suisse v Allerdale Borough Council* [1997] QB 306. However, as I pointed out in argument, it is difficult to see how that case helps DNPA. In his reply submissions, Mr Morshead KC drew attention to the classic distinction drawn by Hobhouse LJ in that case between private law and public law at 356H-357B:

> "Private law issues must be decided in accordance with the rules of private law. The broader and less rigorous rules of administrative law should not without adjustment be applied to the resolution of private law disputes in civil proceedings. Public law, that is to say, the law governing public law entities and their activities, is a primary source of the principles applied in administrative law proceedings. The decisions of such entities are the normal subject matter of applications for judicial review. When the activities of a public law body, or individual, are relevant to a private law dispute in civil proceedings, public law may in a similar way provide answers which are relevant to the resolution of the private law issue. But after taking into account the applicable public law, the civil proceedings have to be decided as a matter of private law. The issue does not become an administrative law issue; administrative law remedies are irrelevant."

Mr Morshead KC submitted that, applying that distinction, there was no decision of DNPA which was challenged in these proceedings. DNPA had taken one view on the issue of construction of section 10(1) of the 1985 Act and the claimants had taken another. This was a private law dispute.

63. In support of his case that the Court should exercise its discretion against granting declaratory relief, Mr Leader relied upon the analysis of Marcus Smith J in *Bank of New York Mellon v Essar Steel India Limited* [2018] EWHC 3177 (Ch), particularly at [21], as to when it was appropriate to grant declaratory relief. He submitted that it was not necessary to grant a declaration in this case. The claimants could in effect be left to pursue a case in trespass against any backpacker camping on their land without their permission.

64. In his reply submissions, Mr Morshead KC said that he agreed with Mr Leader that the mischief at which the 1985 Act was directed was *de facto* use of the land causing pressure, which needed to be controlled. He submitted that with camping the relevant problem was not that the public had insufficient ability to camp. The problem was that the Park Authority had no power to regulate. He agreed that the purpose of the Act was to impose such control.

65. He referred again to the passages in Mr Mercer's evidence quoted at [44] above and to a passage from Mr Vandermeer's submissions, which he submitted showed that the promoters were not saying that the public should have a right to camp without consent, but that, on the Commons, it was necessary to get the consent of the commoners as well as the landowners. As for Mr Leader's submission that the purpose of the Act was to replace the consent of the landowners with control by the Park Authority, Mr Morshead KC submitted that this was mere assertion. There was no part of the material relied upon where the promoters were saying that the public should have a right to camp save where the Parks Authority had regulated it.

66. Mr Morshead KC submitted that, in relation to customary meaning or settled practice, Mr Leader's submissions went beyond the evidence. The evidence did not establish that

everyone had thought that wild camping was permitted by the 1985 Act without the landowners' consent. The evidence was consistent with everything having continued as before. Nobody was behaving as if the Act had changed public rights in relation to camping.

67. DNPA had placed considerable reliance on the evidence of Dr Bishop, but he had only been with DNPA since 2007. Mr Morshead KC submitted that, as far as one could tell, there had been no search or investigation by DNPA into its corporate memory in the aftermath of the 1985 Act. Whilst it was clear from Dr Bishop's evidence what view DNPA took now of section 10, as was also made clear by its website, there had been no internet in 1985 and the Court was not told in the evidence when DNPA first formed the view it now holds of section 10 nor, critically, when it first communicated that view to the public.

68. Mr Morshead KC submitted that the only non-hearsay evidence DNPA had called about the position since the Act came into force was from its witness Mr Howell who is chairman of the Board of Trustees of the Dartmoor Preservation Association and, inter alia, a local officer of the Ramblers Association. He speaks of having regularly wild camped on Dartmoor between 1976 and 1987, about thirty times. He says that when wild camping he spoke to landowners on about seven or eight occasions. There was only one conversation when he and his then girlfriend were challenged, in 1986 or 1987, and following the discussion he decided to find an alternative location a short distance away to camp.

69. Mr Morshead KC referred in reply to the Third Reading of the 1980 Bill where it was stated:

> "The camping and caravan clubs asked the Select Committee to delete the Park Authority's bye-law making powers to control camping on common land. While the back-pack camper causes no problems those in caravans, dormobiles and highly coloured frame tents do. The Park Authority have actively encouraged the opening of new sites sometimes in cooperation with a camping organisation. There are now sufficient sites in and around the National Park to meet the demand and there is no need for casual camping by the roadside or on open common land. Such camping spoils the enjoyment of the open landscape for others, gives rise to a risk of disease in commoners' animals and injury from certain types of litter. The Committee made no amendment."

70. Mr Morshead KC submitted that this demonstrated that there was not perceived as being any problem with wild camping. One can see why when one reflects on the guidance in the Visitors Information in 1982, which was that you need permission to wild camp and if you are asked to move on, you must do so, but because Dartmoor is so remote, you might get away with it. There was no need to give a right to wild camp. The claimants' witness Mr Howell (a different person from the DNPA witness) was an example of a landowner who has recently withheld consent. Mr Morshead KC submitted that even if the Court assumed in DNPA's favour that the law is as stated by Lord Carnwath in *ZH*, DNPA was nowhere near showing that there was a settled practice.

71. In relation to the issue of expropriation, Mr Morshead KC submitted that DNPA had not sought to challenge the principle of interpreting a statute against expropriation, but what

was argued was that usurping the landowner's rights was not an unreasonable interference. He submitted that what mattered is whether the interference leaves the landowner with less than before, which it did since the loss of control has land management and economic consequences. For example in relation to the latter, if consent is required, the landowner might want to charge for camping on their land.

72. Finally in reply, Mr Morshead KC dealt with the literal meaning of the words of section 10(1). He noted that it was DNPA's repeated theme that there were no express words excluding the right to camp, which was true, but assumed what needed to be demonstrated. He submitted that the argument that wild camping was an implied right derived from the right to roam was impossible, as it failed to grapple with the test of necessity. Any walker could always get to a campsite or, if they wanted the pleasure of wild camping, they could ask the permission of the landowner or take their chances.

Discussion

73. Applying the principles of statutory construction recently summarised in the *Project for the Registration of Children as British Citizens* and *Coughlan* cases as set out at [16] above, it is important to have regard to the context in which section 10(1) of the 1985 Act was enacted. The starting point is that, prior to the statute being enacted, there was no legal right to roam on Dartmoor or, specifically, the Commons. The right conferred by section 193 of the Law of Property Act 1925 applied only to metropolitan commons. Only two small areas of the Commons were designated as such and, in any event, section 193(4) prohibited camping. Similarly, the rights conferred by section 60 of the 1949 Act only applied where there was an access agreement with the landowner and only slightly over 5% of Dartmoor was ever subject to an access agreement. Therefore, at the time that the 1980 Bill came before Parliament and, likewise, when the 1984 Bill, which became the 1985 Act, came before Parliament, whatever *de facto* use was being made of the Moor and Commons, other than in those very limited areas, there was no legal right of access.

74. So far as camping is concerned, since there was no legal right of access or to roam, it seems to me impossible to argue that, before the 1985 Act was passed, there was a right to wild camp without the consent of the landowner. If you were not legally allowed to be on the land, how could it possibly be the case that you could camp, whether on a site or not, without the landowner's permission. That such permission was required is borne out overwhelmingly by the contemporaneous material, such as the Visitor Information for 1982 quoted in [30] above, the petition of the Caravan Club referred to in [43] above and the evidence of Mr Mercer referred to at [44] above. In addition to the petition, the Camping Club of Great Britain and Ireland Ltd wrote a letter of 4 January 1980 to Lord Sandford which stated:

> "As you know, we have been objecting to Clause 10 of the…Bill on the grounds that the byelaw powers sought could take away the rights of landowners enjoyed under public legislation to permit their land to be used for camping and caravanning."

Although both in the petition and in that letter what was being complained about was the removal of permission from landowners for members of the Club to camp on their land, there is a clear recognition in both that any camping on land on Dartmoor required the

permission of the landowner. There is no hint that the position was somehow different for wild camping.

75. The only document which hints at a different position is the Camping Section of the Dartmoor and the Law document from October 1966 referred to at [31] above which refers to permission being deemed to exist for walkers in "open country" owing to practical difficulties and long custom. However, as I said, there is no suggestion that this custom or deemed permission applied on the Dartmoor Commons. The existence of such a custom or deemed permission on the Dartmoor Commons would be completely inconsistent with the earlier section of that document headed "Access and Trespass" also quoted at [31] above, which makes it clear that there was, before the 1985 Act, no legal right to enter the common land without the landowner's consent, from which it necessarily follows, as I have said, that there was no right to camp without the landowner's consent.

76. At that time in 1980 (and 1984), there were evidently some authorised camp and caravan sites, as well as unauthorised sites set up by certain landowners and it is clear from the submissions and evidence put forward by DNPA (or its predecessor) in promoting the 1980 Bill, 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 DNPA were right that landowner's consent in relation to mass camping was to be replaced by DNPA 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 quoted at [5] above, does not address wild camping as such.

77. Accordingly, in my judgment, the context in which section 10(1) was enacted is that there was previously no legal right of access to the Dartmoor Commons and equally no right to wild camp on the Commons without, in either case, the permission of the landowner. The question then is whether, on the correct construction of the sub-section, it conferred a right to wild camp without permission. DNPA's case on construction is essentially put in two ways: (i) that wild camping is part of the open-air recreation for the purpose of which access on foot or on horseback is being provided and (ii) that wild camping without permission is an implied right ancillary to the right of access.

78. So far as the first of these contentions is concerned, it seems to me that there are a number of difficulties with it. I consider that Mr Morshead KC is right that the phrase "right of access to the commons on foot and on horseback for the purpose of open-air recreation" is the statutory formula which is being used to describe the right to roam on the Commons. The phrase "for the purpose of open-air recreation" is also used in section 60 of the 1949 Act, again as the statutory formula to describe the right to roam. 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 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 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.

79. Furthermore, as set out at [38] above, the 1949 Act 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. Section 12 treated camping as one of those facilities, not as itself open-air recreation. The 1949 Act is thus consistent with the claimants' case on the meaning of the 1985 Act, which uses the same statutory formula "for the purpose of open-air recreation", that camping is not open-air recreation, but a facility for its enjoyment.

80. Mr Leader focused in his submissions on rock climbing, which he identified as another activity which, unlike walking or horse riding, was not ambulatory. It seems to me that the attempt to argue that camping should also be permitted is misconceived. 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. However, it seems to me to be a distortion of language to say of someone who has gone on a long hike on Dartmoor, taking more than a day and who pitches a tent to sleep for the night, that they have gained access for the purpose of wild camping. The open-air recreation in which they are engaging is the hiking not the wild camping. The wild camping is, as Mr Morshead KC correctly categorised it, a facility to enable the person in question to enjoy the open-air recreation of hiking.

81. So far as the contention that the right to wild camp without the consent of the landowner is an implied right ancillary to the right of access is concerned, I agree with Mr Morshead KC that this contention fails the test of necessary implication set out at [19] above. Any walker who wants to wild camp can always seek the permission of the landowner or, if in a remote place, take their chances on pitching a tent without the landowner knowing, whilst being prepared to move on if asked to do so. Alternatively, any walker can use one of the licensed campsites. It simply cannot be said that the right to wild camp without permission necessarily follows from the express provision in section 10(1) giving the right to roam on the Commons.

82. I also agree with Mr Morshead KC that DNPA gets no support for its construction from the other provisions of the 1985 Act. The byelaws made under section 11 of the 1985 Act and section 90 of the 1949 Act, specifically byelaw 6 dealing with camping, do not deal with wild camping and say nothing about it one way or another, let alone about whether it is lawful without the consent of the landowner. The fact that the byelaw does not deal with wild camping simply demonstrates that, when the byelaws came into force in 1989, wild camping was not seen as a problem which needed to be regulated or controlled. In any event, Mr Morshead KC is correct that the byelaws 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.

83. Likewise, it is nothing to the point that the list of prohibitions in Schedule 2 to the 1949 Act incorporated into the 1985 Act by section 10(3) does not include camping. The 1949 Act clearly did not confer a right to wild camp without permission on land the subject of an access agreement, although it would have been open to the landowners of the small areas of the Commons covered by access agreements to include permission to camp in any agreement. I agree with Mr Morshead KC that the fact that the list of prohibitions does not include camping tells one nothing one way or the other about whether a right to wild camp is within the right of access conferred by section 10(1).

84. In my judgment, the meaning of section 10(1) is clear and unambiguous: 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. It was never the purpose of the statutory provision to give more than that right to roam. Given that I do not consider the provision is in any sense ambiguous, it is not strictly necessary to consider the Hansard extracts under the principle in *Pepper v Hart*. However, even if I were wrong and the provision were ambiguous, so that the *Pepper v Hart* criteria were satisfied, the statement of Mr Steen MP clearly supports the construction which I consider to be correct. The passages from his statement set out at [34] and [35] above demonstrate clearly that the only right which was intended to be conferred by section 10(1) was the right to walk and ride over the common land, not a right to wild camp. As Mr Morshead KC said, no-one in Parliament who heard Mr Steen's statement can have thought that they were being asked to sanction the right to wild camp. Nothing in the additional extract from his statement relied upon by Mr Leader, set out at [53] above, gainsays that conclusion. In so far as Mr Leader also relied upon material from submissions of counsel and the evidence given before the House of Lords Committee in relation to the 1980 Bill, even if that material were admissible under the principle of *Pepper v Hart*, which must be debateable, none of it demonstrates that anyone involved in the legislative process either for the 1980 Bill or what became the 1985 Act considered that the right of access or the right to roam which was going to be conferred would include a right to wild camp without the permission of the landowner.

85. Because I have concluded that section 10(1) does not confer a right to wild camp without permission, it is not strictly necessary either to consider whether the principle against expropriation should lead to the same conclusion. However, given that, as I have found, the position before the 1985 Act was enacted was that members of the public did not have the right to camp on the Commons without the permission of the landowner, who could refuse such permission and ask walkers seeking to camp to move on, the effect of the statute giving a right to wild camp without permission would be that the landowner would have suffered a loss of control or a usurpation of his rights over his own land. Although Mr Leader sought to argue that this was not unreasonable interference, it is apparent from the claimants' evidence that some wild campers on their land do cause problems in relation to livestock and the environment. If necessary, I would have concluded that there would be sufficient interference with the claimants' property rights without compensation if DNPA's construction were correct, so that the statute should not construed in that way unless it clearly had that effect, which for the reasons I have given, it does not.

86. Perhaps in view of the clear evidence, to which I have referred, that at the time the 1985 Act was enacted, there was no right to wild camp without the landowner's permission, Mr Leader did not press in oral submissions a case that there was a custom to that effect

at the time the 1985 Act was enacted. As Mr Morshead KC said, a custom that requires consent is no custom and the evidence before the Court points overwhelmingly to it having been the position at the time that the 1985 Act was enacted that there was no right to wild camp on the Commons without the consent of the landowner.

87. However, Mr Leader did pursue the case that there had been a settled practice in the thirty seven years since the 1985 Act was enacted that there was right to wild camp on the Commons without permission. Although the dicta of Lord Carnwath upon which he relied are entitled to considerable respect, I share the serious reservations of Lord Neuberger and Baroness Hale in *ZH* about the "customary meaning" or "settled practice" principle. It seems to me inappropriate to decide that a statute has a different meaning from the one which the Court considers it has, merely because people have conducted themselves for years on the basis that it had a different meaning, particularly since they may just have been wrong. However, it is not necessary to decide whether there is such a principle, since the material before the Court comes nowhere near establishing the settled practice for which DNPA contends.

88. DNPA placed considerable emphasis on the evidence of Dr Bishop but, as Mr Morshead KC pointed out, he has only worked for DNPA since 2007 and was not there in 1985. Whilst he expresses a firm view that section 10(1) confers a right to wild camp, which is reflected on DNPA's website, DNPA has produced no material, internal or external, to show what the attitude of DNPA was to wild camping from the time the Act was enacted or what it conveyed about wild camping to the public. It has not produced any equivalent of the 1982 Visitor Information for the years after the 1985 Act was enacted.

89. So far as the other witness statements of DNPA are concerned, Kate Ashbrook is the vice-president of the Ramblers Association and herself a landowner of seventeen acres on Dartmoor. She was a research assistant for Mr Steen MP at the time that the 1985 Act was enacted and gives general evidence of seeing people wild camping on Dartmoor, though she has never done it herself. Though she talks of always having believed there was a right to wild camp on Dartmoor, it appears from the fact that her statement is silent on the matter that she does not know whether or not the consent of the landowner is required. As Mr Morshead KC pointed out, it is striking that the one witness for DNPA who had regularly wild camped on Dartmoor, both before and after the 1985 Act was enacted, Mr Howell, speaks of having been challenged by a landowner once in 1986 or 1987 (so after the Act was enacted) when wild camping on their land and of having moved on to another location. It is equally striking, if the 1985 Act had conferred the right for which DNPA contends and there was a settled practice that there was a right to wild camp without permission, that Mr Howell did not say so and refuse to move on.

90. The Ten Tors Challenge and similar organised walks for young people of which Lieutenant Colonel Clark speaks in his witness statement, which involve wild camping, are well-publicised organised events which are completely different from the case of the casual backpacker walking across the Moor or the Commons. The fact that wild camping is an integral part of those organised events tells one nothing about whether the casual backpacker who wishes to wild camp requires permission from the landowner to do so.

91. Overall, in my judgment, the material before the Court does not establish the settled practice for which DNPA contends.

92. I turn finally to the issue whether the Court should exercise its discretion not to grant declaratory relief if otherwise minded to do so. It is fair to say that this point was not pressed hard by Mr Leader in his oral submissions. There was some suggestion that this was a public law claim which should have been pursued by way of judicial review but, as Mr Morshead KC pointed out, DNPA's application to transfer the case to the Administrative Court was abandoned. Furthermore, applying the distinction between public law and private law claims articulated by Hobhouse LJ in *Credit Suisse*, this case is quintessentially a private law dispute. The claimants are not challenging any decision by DNPA as a public body. The parties simply disagree about the correct interpretation of section 10(1) of the 1985 Act.

93. In his skeleton argument Mr Leader contended that the claimants had acquiesced in the public having a right to wild camp and were guilty of inordinate and inexcusable delay in seeking relief, though this point was not really pursued orally. As Mr Morshed KC said in his skeleton argument, since it is not contended that the alleged acquiescence has produced substantive legal consequences, this is in reality also a complaint of delay. However, this is not a claim for judicial review, there is no limitation period and DNPA has not relied on the doctrine of laches. In my judgment the claimants explain in their evidence perfectly satisfactorily how wild camping has become more of a problem for them in the recent past and it does not seem to me that there has been inordinate or inexcusable delay in bringing the claim such as should lead the Court to refuse declaratory relief.

94. Although Mr Leader relied upon [21] of the judgment in *Bank of New York Mellon*, as Mr Morshead KC pointed out, the matters relied on by DNPA do not really engage with the relevant considerations set out by Marcus Smith J. It seemed to me that the only one which DNPA really addressed was the sixth, whether a declaration is the most effective way of resolving the dispute. Mr Leader submitted that it was not and a declaration was not necessary. Rather the claimants could in effect be left to pursue a case in trespass against a backpacker wild camping on their land without permission. Quite apart from the impracticality of pursuing a claim in trespass after someone has left the land, in my judgment it would be quite wrong to impose a burden on an individual backpacker in that way. It is far better that a declaration is granted so that DNPA and all walkers and riders on the Commons know where they stand and what rights they have.

95. There is also nothing to the suggestion that the rights of many people who are not before the Court are being affected or that the claim is somehow inimical to good administration. DNPA has been an effective representative body to put forward the case for a right to wild camp. Other interested organisations, both national and local (including the Ramblers Association), have evidently assisted DNPA in presenting its case and provided witness statements, so that there has been full argument of the issues. An appropriate declaration will assist good administration rather than the reverse.

Conclusion

96. In my judgment, on the first issue set out at [14] above, the claimants are entitled to the declaration they seek that, on its true construction, section 10(1) of the 1985 Act 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.

97. So far as the second issue is concerned, there is no local custom of camping which has the force of law despite section 10(1) of the 1985 Act.

98. In relation to discretion, as I have already made clear, in my judgment it is appropriate to exercise my discretion to grant the declaratory relief sought.