clerks@ftbchambers.co.uk 020 7643 5000

Darwall v Dartmoor: open-air recreation re-defined?

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On 13 January 2023, the High Court held that the right to access Dartmoor Commons for 'open-air recreation' under the Dartmoor Commons Act 1985 did not include a right to camp there overnight. Many, including the National Parks Authority for Dartmoor ("the DNPA"), had long considered that such a right existed.

The case was brought by Mr and Mrs Darwall, owners of an estate on Dartmoor, following a public consultation by the DNPA on potential amendments to byelaws under the 1985 Act, including the byelaws regulating camping. The Darwalls sought a declaration from the High Court that section 10(1) of the 1985 Act (which provides that "the public shall have a right of access to the commons on foot and on horseback for the purpose of open-air recreation") does not extend to a right for the public to camp or to wild camp.

Anyone who has ever awoken to a flooded tent, lain awake shivering on cold, hard ground or experienced the frustration of claustrophobic canvas the morning after such a sleepless night, might well be sympathetic to the Court's finding – on the basis that camping is not a form of open-air "recreation" but something much, much worse. Needless to say, this was not the approach taken by the Court. Rather, the Court came its conclusion by reference to the first Hobhouse report of 1947, the National Parks and Access to the Countryside Act 1949 and what it considered an ordinary use of language.

It is this reasoning, in response to the DNPA's argument that wild camping is part of the open-air recreation permitted by section 10(1), that is the focus of this blog.

(1) The "noticeable" absence of wild camping from the first Hobhouse Report

The Court appeared to place considerable emphasis on the absence of any mention of wild camping in the first Hobhouse Committee report. This was a 1947 report of the National Parks Committee of England and Wales, whose mandate was to consider proposals on the areas to be selected as National Parks, and the measures necessary to secure the aims of National Parks.[1] Having found that 'open-air recreation'

could include activities such as "having a picnic, walking a dog or observing wildlife, all of which can clearly be said to be ancillary to the right to roam",[2] the court continued:

"The first Hobhouse Committee report also identified a number of recreational activities such as motoring and cycling […] fishing and rock climbing […]. 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"[3]

First, it is worth noting that the report recognises that camping plays a dual role, being both a form of budget accommodation and "an adventure in itself which has the greatest educational value, in developing qualities of self-reliance and initiative, in brining campers into close touch with Nature, and in opening to them a way of escape from the cares and complexities of everyday existence into the simple life of the nomad".[4] The report also takes unashamedly broad approach to sport and recreation:

"There is perhaps a tendency to regard rambling as the only important recreation in National Parks. Yet there must be many who most enjoy wild country when its beauty forms the setting for other forms of sport and recreation – many whose cherished memories of Exmoor, the Lake District or the Broads are associated with the feel of a keen horse or a well balanced trout-rod or the kick of a racing tiller; and there must be a still larger number in whom a fuller appreciation of the country would be awakened by the opportunity to enjoy these pursuits."[5]

It is therefore questionable whether in fact the report points against the finding that camping is not a form of 'open-air recreation'. In any case, one might query whether much weight should be given to the mention (or absence) of activities in a 1947 report in interpreting the meaning of 'open air recreation': the fact that an activity was not considered an open-air pursuit in the late 1940s would not appear to be a good reason to exclude it from the definition of 'open-air recreation' in the 1985 Act.

For an indication of what an ordinary understanding of the term might be today, reference to the planning context may be of use. In Fordent Holdings Limited v Secretary of State for Communities and Local Government,[6] an Inspector had considered that use as a caravan and camping site "would amount to an outdoor sport and recreational use", a conclusion that was not challenged by the Secretary of State as part of an appeal against that decision.[7] Although the precise term in that case was 'outdoor' rather than 'open-air' recreation, the Inspector's conclusion and the absence of any challenge to such a finding, strongly suggests that an ordinary understanding of 'open-air recreation' may legitimately include camping.

(ii) Camping as a "facility" for the enjoyment of open-air recreation

The Court's second observation was that the 1949 Act draws a distinction between (i) enjoyment of opportunities for open-air recreation and (ii) facilities for that enjoyment, and that such a distinction supports the Claimants' position that "camping is not open-air recreation, but a facility for its enjoyment".[8]

It is not clear whether it was raised in argument that camping (or wild camping) might conceivably be both a form of open-air recreation and a "facility" to enjoy other recreational activities (not unlike the approach taken in the first Hobhouse report) – and indeed, that whether it is considered a form accommodation or recreational activity might well depend on the individual. In any case, the sections of the 1949 Act relied upon by the Claimants' (namely Sections 1 and 12) seem to suggest a literal meaning of "facilities" – in the sense of services – rather than with the use of the term "facility" seemingly adopted by the Claimant and ultimately the court, i.e. a synonym of "way" or "means".

Section 1(b) of the 1949 Act, as originally enacted, establishes the National Parks Commission as the body responsible 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".

Section 12(1) of the 1949 Act ('Provision of accommodation, meals, refreshments, camping sites and parking places') provides:

> "(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 in their area (whether by the authority or by other persons)—
>
> (a) of accommodation, meals and refreshments (including intoxicating liquor);
>
> (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 […]"

Read together, the focus seems to be on the provision of "facilities" in a literal sense of the term: in section 12(1), campsites are contrasted with other forms of accommodation or meal provision and listed among other services such as parking. As the reference in section 12(1) is to "camping sites" (clearly a facility or a collection of facilities, such as drinking water, toilets, etc.), rather than camping generally, neither section would appear to assist in the correct approach to 'camping' as an activity. Further, since wild camping by definition takes place outside of a campsite, it is difficult to see how either section can reasonably assist in understanding whether wild camping constitutes a form of open-air recreation or not.

(iii) Distortion of language

The Court's third and final point was that it would be a "distortion of language" to say that someone has gained access for the purpose of wild camping:

> *"[I]t seems […] 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-open air recreation in which they are engaging is the hiking and 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".[9]*

Yet, it is not clear why, in such circumstances, the primary open-air activity must in all cases, and for all persons, be "the hiking and not the wild camping". Hiking coupled with wild camping could conceivably be considered as a form of open-air activity, as distinct from hiking and staying at local hotels or campsites. For example, people who wish to 'reconnect with nature' or 'get away from it all' in today's world may choose to wild camp as part of this experience – and if so, might not a hike-cum-wild-camping-trip be an open-air activity in and of itself?

Conclusion

The High Court's finding on what was thought to be a longstanding right to wild camp on the Dartmoor

Commons has unsurprisingly gained considerable attention. The judgment has sparked a renewed debate on rights of access to open spaces more generally and raises many more points of interest not covered in this blog (including, for example, limited discussion in the judgment on the purposes of common land). The DNPA has since confirmed that it will seek permission to appeal the judgment, so this is unlikely to be the final word on this issue. In the meantime, for those seeking to make the most of improving weather to go wild camping (or - use an open-air facility to enjoy long-distance hiking), the DNPA has secured permissive agreements with several landowners across Dartmoor such that wild camping remains possible in much of the National Park.

Stephanie Bruce-Smith is a Pupil Barrister at Francis Taylor Building.

[1] Report of the National Parks Committee (England and Wales), July 1947 ('the first Hobhouse Report'), Paragraph 1
[2] *Darwall v Dartmoor National Park Authority* [2023] EWHC 35 (Ch) at [78]
[3] Darwall at [78]
[4] Hobhouse Report, Paragraph 168
[5] Hobhouse Report, Paragraph 204
[6] *Fordent Holdings Limited v Secretary of State for Communities and Local Government* [2014] 2 P.& C.R. 12; [2013] EWHC 2844 (Admin)
[7] Fordent at [9]
[8] Darwall at [79]
[9] Darwall at [80]