



Neutral Citation Number: [2026] EWHC 626 (Admin)

Case No: AC-2024-LON-002896

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**PLANNING COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/03/2026

**Before :**

**MR JUSTICE MOULD**

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**Between :**

<b>WILD JUSTICE</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>DARTMOOR COMMONERS' COUNCIL</b>	<b><u>Defendant</u></b>
<b>-and -</b>	
<b>NATURAL ENGLAND</b>	<b><u>Interested</u></b>
	<b><u>Party</u></b>

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**David Wolfe KC & Jake Thorold** (instructed by **Leigh Day**) for the **Claimant**  
**Matthew Fraser & Edward-Arash Abedian** (instructed by **Foot Anstey LLP**) for the  
**Defendant**

Hearing dates: 15-16 July 2025  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on Tuesday 17 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MOULD

## MR JUSTICE MOULD :

### Introduction

1. The Claimant is a not-for-profit company established in 2018 with a view to furthering nature conservation in the United Kingdom, encouraging public participation in nature conservation issues and ensuring that UK laws, policies and practices protect wildlife. The Claimant seeks to use the UK legal system to further nature conservation objectives. The main issue raised by the Claimant in this case is whether the Defendant has unlawfully failed to discharge its statutory responsibilities under the Dartmoor Commons Act 1985 [**“the 1985 Act”**].
2. The Defendant has statutory responsibilities under Part III of the 1985 Act for regulating the Dartmoor Commons [**“the commons”**] –
  - (1) Under section 4 of the 1985 Act, the Defendant is under the duty to take such steps as appear to them to be necessary and reasonably practicable for the maintenance of the commons and the promotion of proper standards of livestock husbandry thereon (including the assessment of the number of animals which can properly be depastured on the commons from time to time). In discharging that duty, the Defendant is required to have regard to the conservation and enhancement of the natural beauty of the commons.
  - (2) Under section 5 of the 1985 Act the Defendant is required to make regulations to ensure that the commons are not overstocked and, for that purpose, may fix or provide for the fixing of the numbers of livestock which a commoner may depasture on the commons.
  - (3) Regulations made by the Defendant under section 5 of the 1985 Act were approved and sealed on 10 January 1990 [**“the 1990 Regulations”**]. Regulation 9 of the 1990 Regulations empowers the Defendant to issue a *“limitation notice”* stating the maximum number of livestock which may be depastured on a unit of commons for a specified period.

### The Claimant’s grounds of challenge

3. The Claimant’s case is that the Defendant is in dereliction of its statutory duties under sections 4 and 5 of the 1985 Act, as well as other statutory duties relating to the protection of the environment. In support of its case, the Claimant advanced the following grounds of challenge in its statement of facts and grounds –
  - (1) The Defendant is in breach of its duty under section 4 of the 1985 Act in failing to exercise its powers under section 5 of the Act and regulation 9 of the 1990 Regulations either to issue or to consider the issuing of limitation notices to control overgrazing of the commons; and thereby to fulfil its responsibility to have regard to the conservation and enhancement of the natural beauty of the commons, including the preservation of their flora, fauna and ecological value.
  - (2) The Defendant is in breach of its duty under section 4 of the 1985 Act in failing to make any meaningful assessment of the number of animals which may properly be depastured on the commons from time to time, having regard to the conservation

and enhancement of the natural beauty of the commons, including the preservation of their flora, fauna and ecological value.

- (3) In breach of its duty under section 4 of the 1985 Act, the Defendant has failed to have regard to the conservation and enhancement of the natural beauty of the commons.
  - (4) The Defendant is in breach of the duty imposed under section 28G of the Wildlife and Countryside Act 1981 [**“the 1981 Act”**].
  - (5) The Defendant is in breach of the duty imposed by regulation 9(3) of the Conservation of Habitats and Species Regulations 2017 [**“the 2017 Regulations”**].
  - (6) The Defendant has acted outside its powers under the 1985 Act and for an improper purpose in failing to fulfil its statutory responsibilities as regulator of the commons under that Act.
4. In summary grounds of defence, the Defendant contested each of these grounds of challenge. In addition (and without prejudice to its intention to contest those grounds), the Defendant held meetings on 4 December 2024 and 22 January 2025 to consider whether it should now exercise its powers under the 1985 Act and the 1990 Regulations to issue limitation notices to reduce stocking numbers, having regard to the various duties relied on by the Claimant in support of this claim. The Defendant contends that in the light of the resolutions passed at the conclusion of the meetings held on 4 December 2024 and 22 January 2025, grounds (1) to (5) have been overtaken by events and become academic.
  5. On 21 February 2025 the Claimant filed an amended statement of facts and grounds [**“ASFG”**] which both maintained its original pleaded grounds of challenge, contended that the errors contended for under those grounds had been repeated in the Defendant’s decision making at its subsequent two meetings and added further grounds –
    - (7) The Defendant’s resolutions of 4 December 2024 and 22 January 2025 were vitiated by the appearance of bias.
    - (8) The Defendant’s resolutions of 4 December 2024 and 22 January 2025 constituted an unlawful fettering of its discretion in the discharge of its regulatory functions under sections 4 and 5 of the 1985 Act and the 1990 Regulations.
  6. On 2 October 2024, Lang J ordered that the Secretary of State for Environment, Food and Rural Affairs [**“the Secretary of State”**] and Natural England [**“NE”**] should be joined as interested parties to the claim. Both NE and the Secretary of State filed acknowledgments of service and summary grounds in response. NE stated that it did not intend to contest the claim. The Secretary of State stated that his position in response to the claim was one of neutrality.
  7. On 4 February 2025 Lang J granted permission for the claim to proceed. She released NE and the Secretary of State from any further participation in the claim. On 29 April 2025 Lang J made a further order permitting the Claimant to file and serve its ASFG and removing the Secretary of State as an interested party to the claim.

8. The Claimant was represented by David Wolfe KC leading Jake Thorold of Counsel. The Defendant was represented by Matthew Fraser and Edward-Arash Abedian, both of Counsel. I am grateful to them all for their very helpful oral and written submissions. I am also very grateful to those supporting them in the preparation of the bundles and other arrangements for the hearing of this case.

### **Dartmoor commons and protected habitats**

9. The Dartmoor National Park was designated in 1951 pursuant to the National Parks and Access to the Countryside Act 1949 [**“the 1949 Act”**]. Since that date, Dartmoor has been visited and enjoyed by generations of people both for its wild natural beauty and as a place of recreation. Dartmoor is also a place of great nature conservation value. It is recognised as such both through notification of Sites of Special Scientific Interest [**“SSSI”**] under the 1981 Act and the designation of the Dartmoor Special Area of Conservation [**“SAC”**] in accordance with Council Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna [**“the Habitats Directive”**].
10. There are many SSSIs on Dartmoor. Their land coverage is very extensive. Six SSSIs together encompass some 23,000 hectares of land. They are North Dartmoor, South Dartmoor, East Dartmoor, Tor Royal Bog, Dendles Wood and Wistman’s Wood SSSIs [**“the SSSIs”**]. Dartmoor SAC extends to some 23,160 hectares in area. The land within Dartmoor SAC overlaps with the SSSIs, with which it shares, wholly or in part, the following important types of habitats: Northern Atlantic wet heaths with Cross-Leaved Heath, European dry heaths, blanket bogs and old sessile oak woods with Holly and Hard Fern.
11. Dartmoor is, however, by no means a pristine wilderness, untouched by humankind. Over the centuries since prehistoric times, Dartmoor’s landscape and ecology has been much influenced by human activity, especially pastoral agriculture. This claim concerns a traditional form of pastoral agriculture which has long been practised on the commons. The commons are privately owned, extensive areas of unenclosed moorland within the National Park on which members of the local community, the commoners, have the right to graze and depasture livestock.
12. Dartmoor National Park covers an area of 95,000 hectares, of which 46,000 hectares are moorland within which are approximately 36,000 hectares of common land. There are 92 separate registered commons on Dartmoor, mostly bordering the central high ground of the Forest of Dartmoor, which is the largest common on the moor at 11,200 hectares. The great majority of commons lack physical boundaries. Without shepherding, depastured animals may therefore move freely between commons.
13. Based on a *“Dartmoor Factsheet”* [**“the Factsheet”**] published in 2006 by Dartmoor National Park Authority, the Independent Review of Protected Site Management on Dartmoor chaired by David Fursdon (2023) [**“the Fursdon Review”**] reported that there are 54 owners of commons on Dartmoor and approximately 850 registered commoners. The Factsheet stated that on Dartmoor, rights of grazing exist for some 145,000 sheep, 33,000 cattle and 5,450 ponies and 12,330 other potential “grazing units”. In practice, the number of livestock actually depastured on the commons is considerably fewer. The Fursdon Review estimates that less than 20% of registered commoners actively depasture animals on the commons. The commoners of most commons or groups of commons on Dartmoor have formed management associations,

known as local commoners' associations, which are grouped in the historic north, south, east and west quarters of Dartmoor.

14. 62% of all common land in Dartmoor lies within areas nominated as SSSI. Of the six SSSIs, the majority of the land designated as forming the North Dartmoor, South Dartmoor and East Dartmoor SSSIs is common land. Dendles Wood, Tor Royal Bog and Wistman's Wood SSSIs are outside of common land.
15. NE is the statutory body responsible for the management and conservation of the natural environment in England. Among NE's statutory functions are the administration of the statutory scheme for the notification, management and protection of SSSIs in England enacted by Part 2 of the 1981 Act.
16. NE carries out periodic assessments of the condition of SSSIs against a series of categories of "*condition status*". Those categories include favourable, unfavourable but recovering, unfavourable with no change or declining and partly or wholly destroyed. An SSSI is considered to be in a favourable condition where its habitats and features are in a healthy state and being conserved by appropriate management. An SSSI is considered to be in an unfavourable condition but in recovery, where the site will recover over time if current management measures are sustained. An SSSI is considered to be in an unchanged or declining unfavourable condition where its special features are not being conserved or are being lost, with the result that the site will never reach a favourable or recovering condition without appropriate management. An SSSI is partly or wholly destroyed in a case where there has been fundamental damage and special features have been permanently lost, with the result that it may no longer be restored to a favourable condition.
17. At the time of the Fursdon Review in 2023, NE's assessment was that the condition of almost 50% of the area of the six SSSIs was unfavourable but recovering, almost 40% was unfavourable with no change, and just under 8% was in an unfavourable and declining condition. 6.6% of the area of the six SSSIs was assessed as being in favourable condition.
18. NE has produced assessment sheets for each of the six SSSIs which identify, in respect of each SSSI, operations which NE considers are likely to damage its special scientific interest. For each SSSI, NE has identified grazing and changes in the grazing regime, including type of stock, intensity or seasonal pattern of grazing and cessation of grazing as one such operation. In its summary response to this claim, NE stated its position to be that "*inappropriate grazing levels are impacting the ecological condition of protected features of SSSIs and SACs on Dartmoor*".
19. The Fursdon Review reported that –  
  
*"Many commons are only part designated [as SSSI], but the absence of any physical barriers between SSSI and non-SSSI areas means there is significant potential for sites to be damaged by stock straying from adjacent areas. This is considered explicitly by NE when carrying out a [Habitats Regulations Assessment] under the SAC. For this reason, the influence of the protected site designation extends significantly beyond the area of the sites themselves."*

## Habitats – statutory protection

### SSSIs

20. The notification of SSSIs is now governed by sections 28 to 28S of the 1981 Act. By virtue of section 28 of the 1981 Act, where NE are of the opinion that any area of land is of special interest by reason of any of its flora, fauna or geological or physiographical features, NE are under a duty to notify that fact to the local planning authority, to every owner and occupier of any of that land and to the Secretary of State. When notifying the owners and occupiers of the land, NE are required to specify those ecological, geological and physiographical features which cause the land to be of special scientific interest; and any operations which appear to NE to be likely to damage those special features. NE must also provide a statement of its views about the management of the land, including any views NE may have about the conservation and enhancement of those special features.
21. Section 28E(1) of the 1981 Act imposes duties on owners and occupiers of land included in an SSSI in respect of which a notification remains in force. The owner or occupier of any such land is under a duty neither to carry out any specified operation nor to cause or permit a specified operation to be carried out on that land, unless they have given prior notice to NE that they propose to do so and one of three conditions stated in subsection 28E(3) applies. One of those conditions is that the operation is carried out with NE's written consent, which may be given unconditionally or subject to conditions, and for a limited or unlimited period. Section 28F of the 1981 Act provides an appeal system in relation to NE's refusal or conditional grant of consent under section 28E.
22. By virtue of section 28P of the 1981 Act, it is an offence punishable with a fine for any person to contravene section 28E(1) without reasonable excuse. NE is the prosecuting authority in relation to that offence: see subsection 28P(10). Section 46 of the Regulatory Enforcement and Sanctions Act 2008 and the Environmental Civil Sanctions (England) Order 2010 confer powers on NE to serve stop notices prohibiting persons from carrying on an activity which NE reasonably believes is likely to cause or risk causing serious harm to the environment. The prohibition lasts until the person served with the stop notice has taken the steps specified in the notice. Non-compliance with a stop notice is a criminal offence and may also be enforced by civil sanction: see section 49 of the Regulatory Enforcement and Sanctions Act 2008 and article 3 of and schedule 3 to the Environmental Civil Sanctions (England) Order 2010.
23. Section 28G of the 1981 Act imposes a general duty on any authority to which it applies [**"a section 28G authority"**] in the following terms:
  - “(1) An authority to which this section applies (referred to in this section and in sections 28H and 28I as “a section 28G authority”) shall have the duty set out in subsection (2) in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest.*
  - (2) The duty is to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora,*

*fauna or geological or physiographical features by reason of which the site is of special scientific interest”.*

24. By virtue of subsection 28G(3) of the 1981 Act, both NE and the Defendant are section 28G authorities.

25. The 2017 Regulations have transposed the Habitats Directive into the law of England and Wales. Regulation 9 of the 2017 Regulations enacts the following duties in relation to compliance with the Habitats Directive –

*“9(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.*

*(2) Paragraph (1) applies, in particular, to functions under these Regulations...*

*(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions”.*

26. NE is the appropriate nature conservation body for England: regulation 5 of the 2017 Regulations. NE is required to exercise its functions under sections 28 to 28S of the 1981 Act so as to secure compliance with the requirements of the Habitats Directive. By virtue of regulation 7 of the 2017 Regulations, the Defendant is a competent authority. In exercising its functions, the Defendant must have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.

27. Regulation 24 of the 2017 Regulations provides -

*“(1) Where it appears to the appropriate nature conservation body that a notice of a proposal under section 28E(1)(a) of the [1981 Act] relates to an operation which is or forms part of a plan or project which –*

*(a) is likely to have a significant effect on a European site (either alone or in combination with other plans or projects), and*

*(b) is not directly connected with or necessary to the management of that site,*

*it must make an appropriate assessment of the implications for that site in view of that site’s conservation objectives.*

*(2) In the light of the conclusions of the assessment, it may give consent for the operation only after having ascertained that the plan or project will not adversely affect the integrity of the site”.*

## The Dartmoor Commons Act 1985

### *Background*

28. Traditionally, commoners have pastured their livestock on the commons on a seasonal basis. In days gone by, such seasonal pasturing tended to be confined to the summer months. The animals, principally cattle, would be returned to their home holdings over the winter. The Factsheet states that from medieval times officials appointed by the landowners, known as reeves, would check abuses of common rights. However, by the middle of the last century the traditional system was under pressure. There were problems of overgrazing and undergrazing, of poor animal health and husbandry, of the incorrect use of grazing by rights holders and widespread abuse of grazing rights. There was increasing pressure from uncontrolled public access and increased recreational use of Dartmoor.
29. By the 1960s changing social and economic conditions across England and Wales had given rise to pressure for legislation to regulate the extensive areas of common land over which rights of common had come to be enjoyed. The Commons Registration Act 1965 [**“the 1965 Act”**] introduced a scheme of registration of rights of common. Following the coming into force of that registration scheme, many such rights were registered over the commons.
30. Under the provisions of the 1949 Act as they were in the early 1980s, Devon County Council was the local authority with principal responsibility for the Dartmoor National Park, able to exercise its powers for the statutory purposes of conserving and enhancing the natural beauty of the National Park and of promoting its enjoyment by the public. However, there was no statutory body whose purpose was to regulate the commons.

### *Preliminaries*

31. Against that background, the Factsheet records that after a lengthy period of gestation the 1985 Act was enacted on 30 October 1985 with two principal purposes: firstly, to provide for the regulation of grazing rights, including a local registration scheme; and secondly, to provide for the control of public access onto the moor.
32. The 1985 Act is a local Act whose Long Title is –  
  
*“An Act to constitute the Dartmoor Commoners’ Council for the maintenance of and the promotion of proper standards of livestock husbandry on the commons in and about the Dartmoor National Park; to regulate public access to the commons; to confer powers on that Council and on the County Council of Devon with reference to those commons; and for connected and other purposes”.*
33. The recitals to the 1985 Act stated that some two-fifths of the area of the Dartmoor National Park had been registered as common land under the names of various commons pursuant to the 1965 Act. Those lands and other registered common lands in the environs of the National Park were suitable for regulation. The commons register was stated to include details in each case of the nature of the right enjoyed and the common land over which the right was exercisable. The registered rights were said to derive from *“venville rights and otherwise”*. A venville right is a particular species of right of common local to Dartmoor.

34. The 1985 Act recitals then stated –

*“And whereas for the better use of all the said commons for purposes of livestock husbandry it is expedient that there be constituted a council to be called the Dartmoor Commoners' Council, and that there be conferred on that Council and the county council powers with reference to those commons as by this Act provided”.*

35. Section 2(1) of the 1985 Act includes the following definitions –

*“ “commoners” means the respective persons entitled to exercise rights of common upon the commons, being rights registered (whether for the time being provisionally or finally) under the Act of 1965 or registered under the Land Registration Acts 1925 and 1936*

*“commoners' association” means each of the bodies of commoners specified in Part I of Schedule 3 to this Act but without prejudice to Part II of that Schedule; and “the commoners' associations” means all those associations*

*“the commons” means subject to any addition, extinction, exchange or variation as respects any part thereof effected under or by virtue of any enactment authorising the acquisition of land, so much of the land in the districts of South Hams, Teignbridge and West Devon in the county of Devon as is on the passing of this Act registered in the register of common land maintained by the county council of Devon under the Act of 1965 and lies within the areas edged in pink on the plan of which five copies have been signed by Mr. Ivor Stanbrook the chairman of the committee of the House of Commons to whom the Bill for this Act was referred and deposited respectively at—*

*[locations (a)-(e)]*

*Provided that there shall be excluded from the commons any land which is provisionally registered for the purposes of the Act of 1965 until its registration has become final and any land which may, for the time being, be excepted land for the purposes of section 10 of this Act*

*“the Commoners' Council” means the Dartmoor Commoners' Council constituted by this Act*

*“livestock unit” means one horse, one cattle beast or 5 sheep*

*“the register” means the register prepared and kept under section 7 of this Act.”*

36. Section 2(3) of the 1985 Act states that references in that Act to the conservation of the natural beauty of any area –

*“shall be construed as including references to the conservation of its flora, fauna, ecological, archaeological and geological and physiographical features”.*

#### *The Dartmoor Commoners' Council*

37. Section 3 of the 1985 Act makes provision for the establishment of *“the Dartmoor Commoners' Council for the purpose of exercising the functions assigned to them by this Act”*. On the appointed day, 30 June 1986, the Defendant was constituted as a

statutory body for the purpose of exercising the functions assigned to them under the 1985 Act.

*Functions of the Commoners' Council*

38. Part III of the 1985 Act is headed "*Regulation of the Commons*". It is in two sections. Section A is headed "*Regulation of common rights by Commoners' Council*". It comprises sections 4 to 9 inclusive. Section B is headed "*Provisions concerning public access to commons*" and comprises sections 10 to 14 inclusive. Part IV of the 1985 Act comprises financial and general provisions. Schedule 1 to the 1985 Act makes detailed provision for the appointment of members of the Commoners' Council. Schedule 2 makes a series of incidental provisions with respect to that Council. Schedule 3 makes arrangements for commoners' associations.
39. Section 4 of the 1985 Act enacts the functions of the Commoners' Council. Subsection 4(1) states –

*"(1) Subject to this Act, it shall be the duty of the Commoners' Council to take such steps as appear to them to be necessary and reasonably practicable for the maintenance of the commons and the promotion of proper standards of livestock husbandry thereon (including the assessment of the number of animals which can properly be depastured on the commons from time to time); and in discharging that duty the Commoners' Council shall have regard to the conservation and enhancement of the natural beauty of the commons and its use as a place of resort and recreation for enjoyment by the public"*.
40. By virtue of subsection 4(2) of the 1985 Act, the Commoners' Council are given powers to protect the commons and assist any commoner in maintaining his rights of common; to burn heather, gorse, grass and bracken on the commons to such extent as they judge to be desirable for purposes of livestock husbandry; to plant clumps of trees of native species not exceeding one acre in extent for the protection of animals depastured on the commons; and to enter into grazing management agreements with owners of common lands. The Commoners' Council also have power to do any thing (whether or not involving the expenditure, setting aside, borrowing, investment or lending of money, or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.
41. The powers to burn vegetation and plant clumps of trees require the consent of the owner or owners of the relevant land under subsection 4(3) of the 1985 Act.
42. Subsection 4(5) of the 1985 Act states –

*"(5)(a) In the performance of their functions under this Act, the Commoners' Council shall not less than 28 days before undertaking, or giving permission to others to undertake, any relevant operation, give notice in writing to the Nature Conservancy Council of that intention; and in this subsection "relevant operation" means an operation which in the opinion of the Nature Conservancy Council might be detrimental to the flora, fauna or geological or physiographical features of any land to which this subsection applies and in relation to which written notice of that opinion has previously been given by the Nature Conservancy Council to the Commoners' Council.*

*(b) This subsection applies to any land notified as an area of special scientific interest under section 28 of the Wildlife and Countryside Act 1981”.*

43. Subsection 4(6) empowers the Commoners' Council to arrange for the discharge of their functions by commoners' associations or a local authority –

*“The Commoners' Council may, without prejudice to the continued exercise by them of their functions under this Act and on such terms and conditions as they think fit, arrange for the discharge of any of their functions (other than functions relating to the regulation and control of the finance of the Commoners' Council and the making of regulations under section 5 of this Act) by a commoners' association, association of commoners' associations or any local authority within the meaning of the Act of 1972 whose area includes any part of the commons”.*

44. Subsection 5(1) of the 1985 Act states (in part) -

*“(1) For the purpose of fulfilling their functions under section 4 of this Act, the Council*  
-

*(a) shall make regulations for the following purposes -*

*(i) to ensure the good husbandry and maintenance of the health of all animals depastured on the commons;*

*(ii) to ensure that the commons are not overstocked and, for that purpose, may fix or provide for the fixing of the number of animals or animals of any description which from time to time may be depastured on the commons by virtue of a right of common or of any other right or privilege;*

*(iii) to ensure that all animals depastured on the commons are from their introduction duly hefted or flocked and permanently marked for the purpose of identifying their ownership;*

...

*(vii) to regulate or prohibit the burning of heather, gorse, grass and bracken on the commons;*

*(b) may make such other regulations, in relation to the whole or any part of the commons, as they think fit and without prejudice to the generality of the foregoing, regulations may be made for all or any of the following purposes –*

*(i) to exclude from grazing on the commons, for such periods as appear reasonably necessary, all animals or animals of a particular description where the Commoners' Council are satisfied that those exclusions are necessary for the maintenance of the commons or for the promotion of proper standards of livestock husbandry;*

*(ii) generally to regulate the exercise of rights of common of all kinds and rights or privileges having a similar subject matter as rights of common (including rights of grazing deriving otherwise than from rights of common) over the commons and to prohibit the use of the commons for similar purposes by persons purporting to*

*exercise rights in excess of their entitlement or by persons not entitled to such rights either as commoners or otherwise”.*

45. Subsection 5(2) qualifies the purpose stated in subsection 5(1)(a)(ii) in relation to overstocking as follows –

*“(a) Any regulation under subsection (1) (a) (ii) above, so far as it varies the number of animals which by virtue of a right of common or of any other right or privilege may be depastured under that right or privilege, shall so far as is reasonably practicable impose on all holders of the like rights or privileges held in respect of the same unit of the commons a proportionately similar variation.*

*(b) Subject as otherwise provided in section 4 of this Act and this section, regulations under this section shall not—*

*(i) alter the area over which any right of pasturage may otherwise be exercised;*

*(ii) so reduce the entitlement of a commoner to depasture animals on the commons as in any circumstances to preclude his depasturing less than two animals;*

*(iii) impose restrictions or obligations respecting the exercise of any such rights or other rights or privileges, so as to discriminate between rights of the same class or character; nor*

*(iv) increase the number of animals which a commoner may depasture on the commons to a number exceeding that recorded in the register maintained under the Act of 1965 as the entitlement in respect of the right which he exercises.*

46. Regulations made under section 5 may authorise the detention and sale of animals pastured on the commons in contravention of their requirements. Provision may also be made for offences for contravening the regulations.

47. Regulation 5(5) requires that provision be made to enable a person aggrieved by a limitation on the number of animals he may depasture on a common to have the right of appeal against that limitation to an arbitrator.

48. Regulations made under section 5 of the 1985 Act require confirmation by the Secretary of State –

*“(6) Any regulation made in pursuance of this section and any alteration or revocation thereof shall not have effect unless and until it shall have been confirmed by the Secretary of State, who shall determine the date on which the regulation, alteration or revocation shall come into operation”.*

49. Regulation 5(7) requires the Commoners' Council to consult with the Park Authority (formerly, Devon County Council, since 1997 the Dartmoor National Park Authority) before making regulations. Provision is also made for affected owners to be given the opportunity to make written representations to the Secretary of State before confirmation of the regulations. Regulation 5(7) requires the Secretary of State to consider whether any such representations as remain outstanding should be heard at a local inquiry or a hearing.

50. Section 6 of the 1985 Act requires the Commoners' Council to appoint reeves who are to enforce or secure compliance with regulations made under section 5; and generally to carry into effect the Council's powers and duties under the Act.
51. Section 7 of the 1985 Act provides for the preparation and maintenance of a register by the Commoners' Council, with effect from 30 June 1986. Subsection 7(3) provides for the contents of that register –
- “(3) There shall be recorded in the register the following particulars -*
- (a) the name and address of each person who, by virtue of a right to do so, normally grazes or depastures an animal or animals on the commons from time to time during the year;*
- (b) the name and address of every other person who is a commoner and who applies to have his name entered in the register;*
- (c) as respects each person within the description of paragraph (a) above, the number of animals which for the time being he grazes on the commons and the mark by which the ownership of those animals may be identified; and*
- (d) such other particulars as to the Commoners' Council seems fit”.*
52. Section 7(5) imposes duties on those claiming grazing and depasturing rights on the Commons to provide the Commoners' Council with the information needed to compile the register. Section 7(6) enacts a complaints procedure for any person aggrieved by an entry or refusal to make an entry on the register. Section 7(7) provides for any such person to appeal to a magistrates' court if dissatisfied with the outcome of his complaint. Section (8) of the 1985 Act requires that the register be open to inspection at all reasonable times and to transcription without payment by any interested person.
53. In Darwall v Dartmoor National Park Authority [2025] AC 1292 the Supreme Court considered section 10 of the 1985 Act, which concerns the public's right of access to the Commons on foot or on horseback for the purpose of open-air recreation. It was not necessary in that case for the Supreme Court to consider those provisions of the 1985 Act with which this case is concerned, namely the functions exercised by the Defendant as Commoners' Council under sections 4, 5 and 7 of that Act.

#### *The 1990 Regulations*

54. The 1990 Regulations made by the Defendant pursuant to section 5 of the 1985 Act include the following regulations –
- “1. No person shall depasture on the commons any animal in respect of which he does not have an entitlement and for which he has not registered the intention to graze with the Council.*
- 2. No person having the right to license another person or arrange for any other person to depasture animals on the commons shall enter into any such licence or arrangement without giving to the Secretary of the Council notice of the number of animals involved in any such licence or arrangement.*

...

8. No person shall depasture a prohibited animal on the commons or a designated unit thereof during a prohibited period. A prohibited period shall be a period designated by the Council in accordance with advice concerning animal health or other matter or because of any outbreak of infection or of notifiable disease or in response to such locally prevailing circumstances as cause the Council to consider that the commons should not be stocked during that period and may apply either to all the commons or to such unit or units thereof as the Council decides. A prohibited animal may be an animal of any description as the Council may decide.

When the Council has determined that a prohibited period is necessary and the appropriate extent thereof the Secretary of the Council shall send to the Secretary of all those Commoners' Associations whose commons are affected by the prohibition notice of the prohibited period and the prohibited animal or animals together with the reason for the prohibition and shall advertise notice of such prohibition in a newspaper circulating in the area of such commons.

9. No person shall depasture on any unit of the commons animals in excess of the number contained in a Limitation Notice under Section 5(2)(a) of the Act. Whenever the Council shall consider it expedient to prescribe the maximum number of any description of animal that any person may from time to time depasture on any unit of the commons (whether by reason of the quality of the pasturage or otherwise) the Secretary of the Council shall send a Limitation Notice in accordance with Section 5(2)(a) of the Act to the owner or tenant of that land and to each person registered in accordance with Section 7 of the Act as having rights to the pasture on that unit of the commons specifying the common land so restricted, the period of the limitation and the maximum number and description of animals that an owner, tenant or other person may depasture on that unit of the commons for that duration and shall send a copy of each such notice to the Secretary of the Commoners' Association to whose area the restriction applies.

...

13. The Arbitrator to be appointed in accordance with Section 5(5) of the Act to determine an appeal by an owner or his tenant or other person against the number of animals he may depasture as prescribed in a Limitation Notice issued by the Council under Regulation 9 above shall be appointed annually by the President of the Royal Institute of Chartered Surveyors. Unless both parties agree to submit written representations to him the Arbitrator shall arrange a hearing at which the appellant and a representative of the Council may address him orally and shall before he makes an award make an inspection of that part of the commons to which the dispute relates. The costs of, and incidental to, the arbitration and award shall be in the discretion of the Arbitrator who may direct by whom the costs or any part thereof are to be paid.

14. No person having a right registered under the Commons Registration Act 1965 or right or privilege having a similar subject matter as rights of common (including rights of grazing deriving otherwise than from rights of common) shall do anything or cause or allow any act to be done which in the opinion of the Council shall cause the natural beauty of the commons to be damaged.

15. *The Council may require the removal of stock from the commons or from a particular part of the commons by stock are being grazed or fed in contravention of any Code of Guidance approved by the Council or in order to prevent or limit damage to the commons.*

...

20. *In accordance with section 4(6)(a) of the Act the Council may from time to time authorise any local Commoners' Association, Association of Commoner's Associations or any Local Authority within the meaning of the [Local Government Act 1972] whose area includes any part of the commons subject to and with the prior consent of that Association, Associations or Local Authority to exercise on its behalf all or any of its powers under the foregoing Regulations and to enforce any of such Regulations on behalf of and as an agent of and in the name of the Council".*

55. By virtue of regulation 21, it is an offence to contravene any of the 1990 Regulations.

### **Agri-environmental schemes**

#### *ESA Agreements*

56. By the middle of the last century, the practice of leaving livestock to graze on the commons over the winter had become well established. Following the United Kingdom's accession to the European Economic Community (later the European Union) in the 1970s and under the operation of the Common Agricultural Policy, stocking levels began to increase and to include larger numbers of both cattle and sheep grazed on Dartmoor throughout the year.

57. The Fursdon Review describes the consequences of the operation of the CAP in the following passage –

*"After the UK's accession to the then European Economic Community, the operation of the Common Agricultural Policy became a further significant de-stabilising factor on Dartmoor. In particular, the introduction of headage payments for sheep (first the Ewe Premium and then the Sheep Annual Premium) and then for cattle (through the Suckler Cow Premium and more latterly the Beef Special Premium) encouraged increased stocking on Dartmoor's commons. This is now recognised by both farmers and environmentalists to have resulted in significant environmental and ecological damage. In a version of the 'tragedy of the commons', graziers responded rationally to the incentives they were being offered as individuals, but the overall impact on the commons was negative, with increased swaling (burning of vegetation to stimulate the growth of palatable grass) and high year-round stocking rates being maintained through environmentally damaging practices".*

58. The legislative response was the enactment of the Agriculture Act 1986 [**"the 1986 Act"**] which provided the statutory framework for agri-environmental schemes [**"A-E schemes"**].

59. Section 18 of the 1986 Act provided for the designation and management of environmentally sensitive areas [**"ESAs"**]. The relevant provisions are as follows –

*“(1) If it appears to the Minister that it is particularly desirable—*

*(a) to conserve and enhance the natural beauty of an area;*

*(b) to conserve the flora or fauna or geological or physiographical features of an area;*  
*or*

*(c) to protect buildings or other objects of archaeological, architectural or historic interest in an area,*

*and that the maintenance or adoption of particular agricultural methods is likely to facilitate such conservation, enhancement or protection, he may, with the consent of the Treasury and after consulting the persons mentioned in subsection (2) below as to the inclusion of the area in the order and the features for which conservation, enhancement or protection is desirable, by order designate that area as an environmentally sensitive area.*

*(2) The persons referred to in subsection (1) above are—*

*(a) in the case of an area in England, Natural England; ...*

*...*

*(3) If the Minister considers that any of the purposes mentioned in paragraphs (a) to (c) of subsection (1) above is likely to be facilitated in a designated area by doing so, he may make an agreement with any person having an interest in agricultural land in, or partly in, the area by which that person agrees in consideration of payments to be made by the Minister to manage the land in accordance with the agreement.*

*(4) An order under this section designating an area may specify -*

*(a) the requirements as to agricultural practices, methods and operations and the installation or use of equipment which must be included in agreements under subsection (3) above as respects land in the area; ... ”.*

#### *The ESA Order*

60. By virtue of article 3 of the Environmentally Sensitive Areas (Dartmoor) Designation Order 1994 [**“the ESA Order”**], Dartmoor was designated as an ESA with effect from 6 April 1994. Article 4 of and schedule 1 to the ESA Order specified the requirements as to agricultural practices, methods and operations and the installation and use of equipment which must be included in an ESA agreement made pursuant to subsection 18(3) of the 1986 Act. Those specified requirements included the following –

*“5. As regards all moorland which is the subject of an agreement –*

*(1) the farmer shall maintain the land and shall not excavate, plough, level, reseed, chain harrow, roll or otherwise cultivate;*

*(2) the farmer shall not graze with livestock so as to cause poaching, overgrazing or undergrazing;*

...

*(7) within two years of the start of the agreement the farmer shall agree with the Minister a programme of any necessary burning or cutting of moorland vegetation;*

*(8) the farmer shall not increase existing total stocking levels or cattle stocking levels and in any event shall not exceed 0.225 livestock units (excluding ponies) per hectare;*

*(9) the farmer shall not exceed a total stocking level (excluding ponies) of 0.17 livestock units per hectare from 1st November in any year until the following 15th April inclusive;*

*(10) the farmer shall not increase his existing pony stocking level and in any event shall not exceed a pony stocking level of 0.04 livestock units per hectare. He shall not graze with ponies other than those which are hardy so as to require supplementary feeding only in emergency conditions;*

*(11) the farmer shall not provide supplementary feed for livestock except that in emergency conditions he may provide hay. When he provides supplementary feeding, the farmer shall ensure that any physical damage to moorland is kept to a minimum;*

*(12) the farmer shall ensure adequate stock management so as to achieve even grazing over the whole grazing unit and to prevent other livestock straying onto the land;*

*(13) the farmer shall not erect any temporary fencing without the Minister's prior written approval".*

61. By virtue of article 6 of the ESA Order, an ESA agreement must include provisions which entitled the Minister to give notice of termination of the agreement for breach of its specified requirements and to recover payments made to the farmer under the agreement.

62. Article 7 of the ESA Order specified the annual amounts payable under an ESA agreement. They included a payment of £40 per annum for each hectare of moorland (defined under article 2(1) as land covered by semi-natural upland vegetation which is generally unenclosed except along ownership boundaries). That annual payment per hectare would increase to £55 in the case of an ESA agreement which included the additional requirements specified in schedule 4 to the ESA Order –

*"As regards any moorland which is the subject of an agreement -*

*(1) the farmer shall not exceed existing total stocking levels or cattle stocking levels and in any event he shall not exceed 0.17 livestock units (excluding ponies) per hectare;*

*(2) the farmer shall not graze with cattle from 1st November in any year until the following 15th April inclusive;*

*(3) from 1st November in any year until the following 15th April inclusive the farmer shall not exceed a sheep stocking level of 0.08 livestock units per hectare or a pony stocking level of 0.04 livestock units per hectare".*

63. An ESA agreement was entered into between the Secretary of State for Environment, Food and Rural Affairs, the Duchy of Cornwall as landowner and the Forest of

Dartmoor Commoners' Association. The agreement is recorded in a letter dated 6 August 2002 from the Secretary of State to the Forest of Dartmoor Commoners' Association, which has been signed on behalf of both the Duchy and the Commoners' Association. The letter records the Secretary of State's acceptance of the Commoners' Association's application to join the ESA Scheme. The letter required commoners to abide by certain management practices, known as "*prescriptions*" in farming their land. The letter included the following –

*“EU rules require that where agreements involve grazing, all grassland on your farm should be managed so that environmental deterioration from overgrazing or under utilisation is prevented. This will apply to all land within the ESA boundary. Details of the field numbers and areas of permanent grass fields, the total area of temporary grass and the agreed maximum stocking density level are set out in the attached Grassland Management Schedule which forms part of the agreement and which you need to sign”.*

### *HLS agreements*

64. By the early 2000s, the majority of commons had become subject to A-E schemes under ESA agreements pursuant to the 1986 Act and the ESA Order. In 2005, a new form of A-E scheme known as Higher Level Stewardship [**“HLS”**] agreement came into operation under the Environmental Stewardship (England) Regulations 2005 [**“the 2005 Regulations”**]. The 2005 Regulations were enacted under section 98 of the Environment Act 1995, which created the power to make grants to persons who gave undertakings to the appropriate Minister, that they would do *“anything which in the opinion of that Minister is conducive”* to the conservation or enhancement of the natural beauty or amenity of the countryside (including its flora and fauna and geological and physiographical features). The 2005 Regulations established the Environmental Stewardship scheme, comprising of three elements. The third element was HLS. More complex and high environmental value areas, including Dartmoor, became the subject of HLS agreements. HLS agreements included negotiation of further significant reductions in stocking rates. HLS agreements are administered with advice from DEFRA. HLS agreements remain in place today.
65. Since Brexit, DEFRA has been in the process of replacing Environmental Stewardship schemes with new Environmental Land Management schemes. However, the Secretary of State has decided to offer existing English HLS scheme members the opportunity to extend their agreements for up to 5 years beyond the expiry of their current terms.

### **The Fursdon Review**

66. In his summary grounds, the Secretary of State says that the Fursdon Review was commissioned with the objective of supporting farmers and those living and working on Dartmoor to join together with the appropriate statutory bodies to safeguard and improve its long-term management, especially the areas with greatest environmental value. The intention was to draw on the best available evidence to provide an independent perspective on the management of the protected sites on Dartmoor.
67. The Fursdon Review reported on 12 December 2023.
68. In reporting their findings on the condition of SSSIs on Dartmoor, the Fursdon Review identified limitations in the evidence base. There was in many areas a lack of hard,

empirical data. The Panel had been unable to determine the actual condition of SSSIs at the point they were designated and had a very incomplete set of monitoring records for the sites. The Panel stated –

*“It has also proved impossible to establish, with any degree of certainty, the total number and breakdown of livestock grazing on the moor at any time”.*

69. The Panel reported that although NE had the target of carrying out condition assessments at least every six years, some assessments had been outstanding for more than 10 years. Some SSSI notifications were now over 50 years old. There was no consistent record of condition monitoring over time. It was therefore impossible to know whether SSSIs had been in favourable condition when they were notified, whether they had achieved that status at anytime since notification and what the trend now was. The Panel stated –

*“We suspect that many of the SSSI units have been in a poor condition for a long time, so we are dealing with a chronic problem rather than something that has arisen recently”.*

70. The Panel said that NE’s condition monitoring was intended only to be a rapid appraisal tool. Further experimentation was needed to arrive at a fully informed view of what is happening to Dartmoor SSSIs. More scientific monitoring and evaluation was required to assess the condition of SSSIs and to understand the influences impacting upon them.

71. The Fursdon Review reported that *“Dartmoor is not in a good state”*. In a chapter headed *“Dartmoor’s current vegetation and grazing management”*, the Panel provided their analysis of some of the environmental challenges facing Dartmoor. They include (1) poor hydrology resulting from historic peat cutting; (2) reduced access to various parts of the moor due to encroaching scrub, resulting in increased erosion to more intensively used land which remains accessible; (3) the dominance of *Molinia* (a deciduous purple moor grass which is out-competing other vegetation and causing deterioration of the landscape); (4) the encroachment of gorse and bracken; and (5) the poor condition of heather and dwarf shrub communities (in respect of which localised over-grazing by sheep plays a part). The Panel reported the differing views held by NE and the commoners as to the means whereby these problems might be addressed and protected sites restored to favourable condition.

72. As to NE’s approach, the Fursdon Review reported –

*“NE continues to put much faith in managing and often reducing grazing stock numbers, especially over-wintered sheep, but also cattle and ponies, particularly in the winter. It believes that in many cases further, radical, reductions in stocking numbers will be required to bring Dartmoor’s protected sites back into favourable condition”.*

73. As to the position of the commoners, the Fursdon Review reported –

*“The commoners are adamant that the possible need for further stocking rate cuts was not explained to them when the HLS agreements were entered into. They view NE’s current stance as reinforcing an already failed strategy. They have no confidence that it will achieve the required objective of bringing SSSI into favourable condition and bringing about the recovery of heather and dwarf shrubs. It also threatens to reduce*

*stock numbers below the critical point where graziers will expend the time and resources needed to maintain animals out on the commons”.*

74. The Panel said that the reduction in stocking rates was undoubtedly causing significant livestock management problems for graziers. How to keep animals in place on the open moorland was a key issue for the successful conservation grazing of Dartmoor. The physical environment of the moor was extremely challenging, particularly to any mechanical operations: one of the “*unique attributes*” of the commoners was their familiarity with that environment, their ability to work in it and to move across it. The Panel found –

*“The problem with vegetation management on Dartmoor is as much one of under-grazing as much as over-grazing and there is a danger of a vicious cycle developing. The area of Molinia, gorse and scrub expand because there are insufficient cattle and ponies to graze and trample them at critical times of the year (late spring and early summer). This encourages animals, and particularly sheep, to search out heather and dwarf shrubs to graze in preference to the unpalatable Molinia. This in turn prompts further reductions in stocking rates as a policy response to the loss of heather. The Molinia expands again, triggering yet further stocking reductions. So, the cycle continues”.*

75. The Fursdon Review noted that farming in Dartmoor is “*economically extremely marginal*”. Independent survey figures for Dartmoor showed an annual net loss of £348.90 per cow and £16.90 per ewe. The Panel said that these figures illustrated why Dartmoor farmers are concerned and uncertain about their future. The Panel found that NE’s demand for some reductions in stocking rates as a pre-condition for the extension of HLS agreements had struck a particularly raw nerve with commoners. Whilst there was a risk of an unwelcome stand-off developing with NE, that was unnecessary -

*“The submissions we have received (including from NE itself) recognise the important role that grazing should play in the management of Dartmoor. It should therefore be possible to design a scheme, or schemes, that:*

- protects Dartmoor’s SSSIs and SAC*
- has the support and confidence of Dartmoor’s key stakeholders*
- rewards commoners fairly for delivering a balanced package of public benefits”.*

76. The Panel stated -

*“However, there is no reason why [the Dartmoor farmers’] traditional role can’t be combined with carrying out conservation grazing and stewarding Dartmoor to a high, professional, standard. In future, A-E schemes will pay for achieving challenging environmental outcomes and providing other public benefits. Farmers everywhere are recognising that their businesses will have to alter significantly to benefit from this. Dartmoor’s farmers are no exception, but this challenge offers opportunities as well as threats”.*

77. The Fursdon Review characterised the Defendant as a statutory body with a “*key role to play on Dartmoor*” –

*“It has a broad range of legal powers to carry out its functions and it is well served by its officers, who work hard to further the interests of Dartmoor's commoners. It is also mostly well supported by the commoning community, who value it as a democratically elected forum in which they can debate issues and as a body which represents their views. However, a significant number of engaged and well-informed commoners believe that Dartmoor needs a further body to take on many of the functions that are currently the responsibility of the council. To a significant extent, this view reflects frustration at the slow pace at which the council is able to make progress at times and the extent to which it gets bogged down in revisiting the same issues multiple times. This, in part, is an inevitable consequence of Dartmoor's small and closely knit community and the difficult nature of some of the issues that the council considers. However, it also reflects the inherent tension from the council being both a democratic discussion forum and a statutory enforcement body. We will make recommendations about the future role of the council in our conclusions”.*

78. The Fursdon Review made a substantial number of recommendations and conclusions at paragraphs 18.1 to 26.1 of their report, including -

- (1) Dartmoor needs a Dartmoor-wide, landscape-level, vision, supported by a clear delivery strategy.
- (2) Dartmoor’s governance should be reinforced by the creation of a Land Use Management Group [“LUMG”]. This should be independently chaired and have both key stakeholder organisations and commoners’ representatives in the membership, including government agencies and bodies such as NE. The LUMG should develop a plan to improve SSSI condition and deliver government targets on Dartmoor. In addition to this, the LUMG would be responsible for identifying areas where Dartmoor-specific data needs to be collected, and further research and experimentation is required. The output of that process should be fed into both the development of protected site management strategies and A-E scheme prescriptions.
- (3) The absolute top priority for Dartmoor is improving its hydrology and re-wetting its blanket bogs. The second priority should be controlling *Molinia* through a combination of active management practices, supported by specific research into Dartmoor’s habitat and control, including grazing.
- (4) The relationship between A-E scheme prescriptions and the management of protected nature conservation sites must be made more transparent and an agreed balance struck between achieving different objectives.
- (5) Dartmoor needs more cattle to carry out conservation grazing, particularly of *Molinia*, and A-E schemes should encourage farmers to maintain cattle herds for this purpose. Ponies are invaluable for conservation grazing. Sheep are an important part of Dartmoor’s hill farming system. A holistic strategy should be implemented to increase the grazeable area of the moor and reduce the amount of *Molinia* and gorse. This will increase the palatable area available for grazing by sheep and therefore reduce the amount of localised over-grazing of heather and dwarf shrubs.

(6) A 2 plus 3 year (or 3 plus 2) period for HLS extensions will give sheep keepers the opportunity to demonstrate that they can shepherd their flocks to protect vulnerable heather and dwarf shrubs.

79. In respect of the Defendant, the Fursdon Review concluded and recommended –

*“The Dartmoor Commoners Council plays an invaluable role in the management of Dartmoor and must continue to do so. However, its current structure and operation should be reviewed to identify ways of reinforcing its effectiveness. One option should be to:*

- *retain the present council to give strategic oversight and provide a forum in which commoners can debate issues of concern*
- *delegate its enforcement and operational activities to a smaller group with strength and independent input.*

*Its working relationship with the [LUMG] will also need to be developed”.*

### **The government’s response to the Fursdon Review**

80. On 11 April 2024 the Secretary of State published the government’s response to the Fursdon Review. In the short-term, the government committed to creating the proposed LUMG to be led by an independent chair appointed by him. The LUMG’s primary responsibility would be developing a multi-functional land use framework and land use plan for Dartmoor. The LUMG would also be responsible for overseeing other recommendations in the government’s response, under a series of themes: vision and governance, protected site management; land use, ecology and biodiversity; future of A-E schemes; grazing and vegetation management; rollover of HLS agreements; NE’s future operations on Dartmoor; and Dartmoor statutory bodies.

81. In relation to grazing and vegetation management, the government responded that –

*“We agree with the Review’s assessment, including the observation that under-grazing can be as much of a problem as over-grazing. The key is getting the right grazing (in terms of grazing load and species mix) in the right location at the right time of year; a challenge which is compounded by grazing on open moorland with animals straying. A conservation grazing regime should aim to restore and sustain heathland vegetation and diversify plant communities, such as those over-represented by a single species, for example, Molinia. It would also need to explore how shepherding can be used to even out grazing pressure and address the continuing effect of historic peatland drainage”.*

82. In relation to A-E schemes, the government recognised –

*“The challenge of reconciling the needs of commoners to allow grazing of animals and farmers’ livelihoods, with the need to improve the condition of protected sites to allow nature recovery. The government agrees that a single approach is needed to reduce Molinia and gorse growth. However a single overarching scheme or agreement may not be practicable or deliverable. Dartmoor has a diverse landscape with opposing needs, and a single agreement’s scope will not sufficiently cover all requirements.”.*

83. The government decided to offer a 2 plus 3-year extension arrangement for existing HLS scheme members. Negotiations between parties were to be conducted sensitively, to support sustainable land management alongside traditional farming practices and uphold the overall condition of protected sites -

*“We have written to agreement holders to set out proposals for agreeing further annual extensions to HLS agreements going up to 2025. We will work closely with agreement holders over the next period to help them prepare to apply for a new [A-E scheme] agreement, when the time is right for them to do so. We also want to work with agreement holders who want to agree further HLS extensions, with a plan of action and trajectory for further improvement of SSSI site condition.”*

84. The government noted that NE was now carrying out a programme of SSSI monitoring and resurveying on Dartmoor, to be completed by the end of 2024. That evidence would help guide negotiations for future A-E scheme agreements.

85. In relation to the Fursdon Review’ recommendation in respect of the Defendant, the government said –

*“The Dartmoor Commoners’ Council is working at capacity to further the interests of Dartmoor’s commoners. While it is well supported by Dartmoor’s commoners, many think it could work more effectively or that Dartmoor needs a further body to share some of the functions. It is for the commoners and the Dartmoor Commoners’ Council to consider how they are constituted. However, we agree that it is essential that the commoners’ council is as effective as possible. We will work with the commoners’ council to support any review they think is necessary”.*

86. The Secretary of State’s summary grounds confirm that his department’s response to the Fursdon Review remains the policy of government.

### **The Defendant and the Fursdon Review**

87. Prior to the proceedings of the Fursdon Review, on 16 October 2023 the Defendant submitted its written response to the Review’s call for evidence. The Defendant said that it was necessary to recognise that trust and engagement between commoners and NE had unfortunately almost completely broken down. The Defendant questioned the reliability of NE’s methodology and evidence base for assessing the condition of protected sites on Dartmoor. The whole of the Dartmoor commons required assessment. Further reductions in grazing numbers would be likely to affect a number of active commoners. All commons needed active grazing as part of the solution to improving the condition of protected sites. Under-grazing would have a negative impact on the commons.

88. The Defendant stated that each common is different. The solutions could not be “one size fits all”. Time needed to be taken to identify the problems on the specific common. The Defendant submitted that –

*“At present NE have a veto on any management of protected sites - this needs to change. We suggest that, **as the one statutory body specifically charged with determining grazing levels on all of Dartmoor’s commons, the management of Dartmoor should be***

*entrusted to Dartmoor Commoners Council who would engage directly with the RPA, enabling collaboration in any decisions”.*

(My emphasis)

89. In response to the consideration of recent trends in numbers and types of grazing animals on Dartmoor and the influence that this has had on its ecology, the Defendant stated –

*“Council does not hold data on actual numbers of livestock grazing the Commons or active commoners. We understand others are supplying information for individual areas”.*

90. In relation to the existing ecological evidence base, the Defendant stated –

*“Council had not commissioned any ecological surveys. Information is best applied across commons by engaging Commoners in examples of best practice, through commons management days, involving all interested parties (which were held routinely until some 5 years ago)”.*

91. On 13 March 2024, the Defendant published its response to the Fursdon Review’s report. The Defendant said that it supported the findings of the Review and looked forward to enabling a better working environment for all parties across Dartmoor. There was a strong desire to create the LUMG to reinforce Dartmoor’s governance. The Defendant stated that it supported -

*“a holistic grazing strategy, utilising cattle, sheep and ponies to deliver better vegetation management that ensures stakeholders recognise the implicit value of grazing livestock as part of Dartmoor commons’ environmental schemes. It is accepted that NE has a statutory duty regarding SSSIs. However, Council has concerns that poor condition of SSSIs is not necessarily as a result of commoners’ actions. Council will therefore welcome opportunities to explore alternative methodologies.... It would be constructive if NE were obliged to consult with Dartmoor Commoners’ Council on matters relating to commons management as in the past”.*

92. The Defendant welcomed the Fursdon Review’s acknowledgment that –

*“Dartmoor Commoners’ Council plays an invaluable role and must continue to do so”.*

93. The Defendant said that it would conduct its own internal review of its structure and operation to identify ways of reinforcing its effectiveness. On 19 June 2024, DCC adopted a document entitled “Reinforcing Council’s Effectiveness”, which sets out DCC’s progress in their internal review. One of the items for consideration is the setting up of specific sub-committees and working groups for the efficient carrying out of DCC’s duties and functions. One such group would focus on livestock husbandry, management and issues including illegal grazing; another group would look at commons issues such as fencing; and another group would consider landscape conservation, e.g. peat restoration, swaling and engagement on LUMG matters.

## **Natural England's response to this claim**

94. In its summary grounds, NE's stated position is that inappropriate grazing levels are impacting the ecological condition of protected features of SSSIs and SACs in Dartmoor. It is NE's view that changes to grazing regimes are likely to be needed in certain parts of the Dartmoor commons at certain times of year to achieve favourable condition in the long term. NE says that the impact the grazing may have on the protected features of Dartmoor SSSIs is recognised by the inclusion among listed operations likely to damage those features and therefore requiring NE's consent, of grazing or changes in the grazing regime (including type of stock or intensity or seasonal pattern of grazing and cessation of grazing).
95. Nevertheless, NE records its acceptance that grazing is not the only reason for the decline in condition of protected sites on Dartmoor. NE says that the nature and location of any changes in grazing in order to achieve favourable condition of sites is fraught with practical difficulty and is contentious. In practical terms, the Dartmoor commons are large, generally unfenced, areas that require more or less grazing with appropriate stock depending on the area and time of year. Achieving that, whether by agreement or regulation is challenging. NE will need to work with graziers to agree how they can achieve the right animals in the right place at the right time of year. This will take time and a partnership approach given the multiple demands that farm businesses on Dartmoor face.
96. In order to illustrate the contentious nature of proposals to reduce grazing levels in some areas of Dartmoor, NE refer to the threatened issue of a stop notice relating to Willingswall and Hentor Common (Unit 61 of South Dartmoor SSSI) in 2023. NE sought to prohibit grazing on that common between 1 November and 30 April. The Defendant responded contesting the propriety of the proposed prohibition on a number of grounds. NE says that contentious proposal had been the chief trigger for the government's decision to establish the Fursdon Review.
97. NE confirms that it supports the conclusions of the Fursdon Review; in particular, that further work is needed to address the issues facing Dartmoor through updated A-E schemes and a more collaborative approach. NE expresses its commitment to work with the LUMG. NE points out that the points raised in the Fursdon Review and the government's response, whilst providing important context, do not directly address the issues raised by the present claim, since the Defendant's fulfilment of its statutory responsibilities under the 1985 Act did not form part of the remit of the Fursdon Review.

## **The Land Use Management Group**

98. On 28 January 2025 the LUMG held their inaugural meeting. On the 22 members of the LUMG, seven are commoners, of whom three are also members of the Defendant. A second meeting was held on 21 February 2025. At the meeting held on 28 January 2025, the LUMG minutes record that members stressed that Dartmoor's landscape and ecology needed to be considered at an eco-system level, rather than focusing too closely on the management of individual sites and land units.

## December 2024/January 2025 resolutions

99. On 4 December 2024, the Defendant held a meeting in which it considered whether it was appropriate to issue limitation notices under the 1990 Regulations to reduce livestock numbers on the commons. In order to inform the Defendant's consideration of that issue, the Chairman provided a report [**"the Chairman's Report"**] which set out his view. Following a detailed analysis, the Chairman recommended against the issue of limitation notices for the reasons contained in the Chairman's Report. The minutes of the Defendant's meeting on 4 December 2024 record that the Defendant passed the following resolution –

*"The Council has considered its power to issue limitation notices to limit the number of livestock depastured on any unit of the commons pursuant to Regulation 9 of the Regulations Prepared Under Section 5 of the Dartmoor Commons Act 1985 and its duties pursuant to sections 4(1) and 5(1) of the Dartmoor Commons Act 1985, sections 28G(1) and 28G(2) of the Wildlife and Countryside Act 1981 and Regulation 9(3) of the Conservation of Habitats and Species Regulations 2017 and has RESOLVED to not issue any limitation notices at this time for the reasons contained in the Report prepared by the Chairman of Dartmoor Commoners' Council dated 28 November 2024".*

100. The minutes record that the Defendant emphasised the importance of collaborative efforts through the LUMG and with NE to address environmental and agricultural concerns in a balanced and informed manner.
101. At the Defendant's subsequent meeting held on 22 January 2025, members of the Defendant were asked to confirm that they had considered the Chairman's Report, the appended documents and all of the written comments received by members of the public in relation to the question whether limitation notices should be issued. Following further discussion, the Defendant again resolved not to exercise its powers to issue limitation notices.

## The evidence

102. Evidence in support of the claim is given by Dr Mark Avery. Dr Avery was a director of the Claimant. He is a scientist with a long track record of over 40 years' involvement in nature conservation. For 25 years he was a senior member and director of the Royal Society for the Protection of Birds. He has published a number of books and papers on birds and nature conservation. He has worked as a consultant for a variety of non-governmental environmental organisations.
103. Dr Avery provides an analysis of the very great importance of Dartmoor to nature conservation. He demonstrates that there is considerable overlap between statutorily protected nature conservation sites on Dartmoor, both SSSIs and SAC, and the existing area of the commons. He draws on published sources to examine the condition of protected areas on Dartmoor and concludes that commons management (and mismanagement) should be seen as an important factor influencing the condition of those areas. Dr Avery gives particular consideration to the role of grazing in affecting the condition of SSSIs and the SAC. He says that high levels of grazing, so high as to damage the vegetation that SSSI designation seeks to protect, have long been an issue on Dartmoor. He says that the powers to limit overgrazing given to the Defendant under the 1985 Act were enacted in order to address that long standing issue. Dr Avery then

considers NE's published assessments and gives his judgment that 16 SSSI units across the North, South and East Dartmoor SSSIs are suffering from overgrazing.

104. Evidence in response to the claim is given by the then Chairman of the Defendant, Mr Layland Branfield. Mr Branfield has been farming on Dartmoor since 1987. He has been a commoner for over 31 years. Since 1993 he has been entitled to depasture 245 livestock units on the Forest of Dartmoor. In 2011, he acquired a further right to depasture 11 livestock units on the Whitchurch commons. Mr Branfield has taken an active role in the management of the commons for over 25 years. In 1999 he was appointed as Dartmoor representative and Chairman of the National Farmers Union's South West Hill Farming Committee. Thereafter he held a number of posts within the NFU. In 2000 he was appointed to the Forest of Dartmoor Commoners' Association Committee. In August 2006 he became a Council member of the Defendant. He was elected Vice-Chairman of the Defendant in August 2007 and on 31 July 2024, as Chairman. In January 2025 he was appointed as a member of the LUMG, along with two other Council members, Tracy May and Anne Willcocks.
105. Mr Branfield says that over the many years of his experience, he has seen the nature and business of farming on Dartmoor change significantly for commoners.
106. He says that the establishment of the Defendant under the 1985 Act was the outcome of a long-running debate around that time over access, livestock welfare and abuses of commons rights on Dartmoor. The Act gave the Defendant various powers, including the power to make regulations to prevent the overstocking of the commons, which the Defendant duly exercised in making the 1990 Regulations.
107. Mr Branfield says that the process of change to farming on Dartmoor really began in the early to mid-1990s when in accordance with regulation 15 of the 1990 Regulations, the Defendant approved a Code of Guidance for Prevention of Winter Damage to the Commons of Dartmoor to stop the out-wintering and feeding of large herds of cattle on many areas of the commons. That code of guidance was most recently issued on 5 April 1995. Around that time, the Defendant also began to use its powers under regulation 14 of the 1990 Regulations to prevent individual actions causing damage to the natural beauty of the commons.
108. Mr Branfield says that during the 1990s, subject to any restrictions set by the Defendant, the number of livestock that a commoner would depasture at any point in time would generally be limited by three factors: firstly, how many units of livestock their rights of common entitled them to depasture; secondly, the number of livestock that they could physically cope with on their private holding over winter; and thirdly, what size of flock or herd that commoner could commercially afford.
109. However, things changed from 1999 onwards following the introduction of A-E schemes, under which farmers on Dartmoor were offered the opportunity to receive payments in return for environmentally positive actions, including stock reductions. In 2002, after a lengthy period of complicated negotiations with government, the Forest of Dartmoor Commoners' Association (like most other Commoners' Associations around that time) entered into an ESA agreement, which required commoners to reduce their livestock numbers on the Forest of Dartmoor from historic grazing levels to a level set by English Nature (NE's predecessor) in return for financial compensation. The stocking rate was set at a level that English Nature considered would achieve the overall

aim of the ESA agreement set out at the Dartmoor ESA Management Plan, to maintain and enhance the landscape character, wildlife and archaeological and historical features of the Forest, through appropriate grazing and other management carried out by the Commoners. Grazing on SSSI land required the consent of English Nature, which was in practice given in conjunction with an ESA agreement. The ESA agreement itself was entered into between DEFRA and the Forest of Dartmoor Commoners' Association. It set a monthly stocking limit on a unit per hectare basis across the whole common.

110. The Management Plan to which Mr Branfield refers in his evidence was entitled “*Dartmoor Environmentally Sensitive Area Management Plan for the Forest of Dartmoor*” published by DEFRA in January 2004. Consultees on the Plan included the Forest of Dartmoor Commoners Association and the Defendant. The summary of the Management Plan included the following passage –

*“The aims and objectives for the maintenance and enhancement of the habitats and species of major importance is set out. Conservation and enhancement of the Blanket Bog is sought through control of stocking rates and the provision of elements for the protection of the Blanket Bog from damage by uncontrolled fires. The conservation of dwarf shrub heath, an increase in its overall extent and quality is sought through control of stocking levels and a programme of controlled burning. Strategies are put in place for the conservation of other habitats and where appropriate their enhancement.”*

111. The Management Plan stated that much of Dartmoor Forest was covered by SSSI and SAC designations. Three SSSIs covered Dartmoor: the North Dartmoor SSSI, the South Dartmoor SSSI and the East Dartmoor SSSI. To each of these was appended a list of operations likely to damage the special interest of the sites. The strength of the protection had been further deepened by a designation of these SSSI areas as SACs –

*“Under the Countryside and Rights of Way Act 2000 occupiers, including commoners, now have an obligation to obtain consent from English Nature before proceeding with an ‘Operation Likely to Damage’ an SSSI. It also gives [NE] new powers to achieve the Government target for ‘favourable condition’ by formulating management schemes and serving management notices requiring owners and occupiers to carry out work in accordance with a management scheme”.*

112. The aim and objectives of the Management Plan were as follows –

*“OVERALL AIM*

*To maintain and enhance the landscape character, wildlife and archaeological and historical features of the Forest, through appropriate grazing and other management carried out by the Commoners.*

*OBJECTIVES*

- 1. To maintain the extent of all Blanket Bog currently in favourable condition and to increase the area that is in favourable condition by 25% (approximately 2000 hectares) within the life of the plan, in line with the UK Biodiversity Habitat Action Plan Target for Blanket Bog.*

2. *To maintain the extent of all dwarf-shrub heath currently in favourable condition and to increase the area that is in favourable condition by 10% (approximately 70 hectares) within the lifetime of the plan, in line with the UK Biodiversity Action Plan Habitat Targets for Upland Heath. Further, to maintain at least 5% of the mature heather stands excluding them from any burning regime.*
  3. *To protect the hydrological integrity of the valley mires and to enhance their condition where possible.*
  4. *To maintain the populations of scarce species and in particular the Biodiversity Action Plan Species present on The Forest, enhancing those populations where indicated within the Action Plans”.*
113. Mr Branfield says that following completion of the ESA agreement, the Forest of Dartmoor Commoners' Association then entered into downstream agreements with individual commoners to require them to reduce stocking numbers on a proportionate basis, which (in simple terms) was calculated by looking at the number of livestock historically depastured by each commoner. The practical impact of the ESA agreement was that the total number of livestock being depastured on the Forest of Dartmoor was reduced by around fifty per cent. Via the Rural Payments Agency, DEFRA compensated the Forest of Dartmoor Commoners' Association for this stocking reduction, calculated on a profit foregone basis. The Association then distributed the funds to commoners proportionately based on their individual stocking reductions. This framework was broadly replicated across many of the commons of Dartmoor, with each commoners' association entering into an ESA agreement with DEFRA to reduce stocking numbers in return for compensation for loss of profits.
114. Mr Branfield then refers to the change around 2005 onwards from ESA agreements to HLS agreements. HLS agreements operated in a similar way in practice. Each commoners' association would enter into an agreement to cap stocking numbers at a certain level each month in return for compensation on a unit per hectare basis which would then be passed on to individual commoners proportionately based on their individual stocking reductions. For the Forest of Dartmoor, the payment was turned into a grazing payment as it was not considered right to continue to pay commoners for having removed stock years before. The only removal payments were for additional stock removal compared to the previous ESA agreement. In addition, in order to ensure that commoners kept enough livestock on the Forest to fulfil the agreement, a minimum stocking rate was added to each grazing schedule.
115. Mr Branfield refers to his own experience to illustrate how commoners have been affected by operation of ESA and HLS agreements. Under the ESA agreement, his cattle numbers were reduced by around 70% from a summer monthly average of 45.2 livestock units per month to 13.75 livestock units per month. His sheep were reduced by around 55% from a monthly average of 203 ewes to 91 ewes. In return, he received an annual payment of £5,106 covering grazing and stock removal. Under the HLS agreement, he received only a positive grazing payment to keep the number of livestock required to fulfil the agreement in the sum of £3,983.
116. Having farmed on Dartmoor almost every day for the last 37 years, Mr Branfield states from experience that the reductions in stocking levels brought about by A-E scheme agreements have contributed to an intensification of grazing on some parts of the

commons. Since 2000, the dramatic reduction in livestock numbers on the commons has meant that foliage usually kept under control by sheep, cattle and ponies eating and trampling over it has been given much greater opportunity to grow. Naturally dominant species such as Molinia, bracken and gorse have grown and spread significantly, often forming large areas of monoculture, where previously they would have been kept in check in smaller disconnected patches by livestock. As this foliage becomes increasingly widespread and dense, it is grazed less frequently by livestock, as they cannot easily access it and prefer to graze more easy-to-reach foliage. Ultimately, the result is a polarisation. Some parts of the commons are becoming increasingly inaccessible to livestock as they are overtaken by foliage. Those parts which remain accessible become more intensively grazed. Mr Branfield considers that this trend will continue unless there is both a drastic increase to livestock numbers on the commons and human intervention to cut back or burn large swathes of foliage. Even then, reversing the overall trend is likely to take a number of years, as there needs to be consistent, widespread and coordinated pressure from grazing, burning and/or other human interventions across Dartmoor to achieve sustained improvement to its condition.

117. Mr Branfield's evidence is that further widespread livestock reductions across the commons would be counterproductive, given the vital role that grazing plays in protecting Dartmoor's natural environment. Livestock numbers have already been reduced dramatically over the past 20 years, and ultimately if they continue to be capped at ever lower levels, farming on the commons will reach a point where it is no longer commercially viable. Commoning requires specific knowledge and skills which take many years of experience to build, and if large numbers of commoners stop working on Dartmoor because it is no longer viable for them to do so, he fears that traditional practices would be unable to continue and would simply die out. Without commoning, the whole farming system on large parts of Dartmoor would simply collapse and with it, the single most important mechanism for managing Dartmoor's natural environment for the benefit of everyone.
118. Mr Branfield expresses his hope that the establishment of the LUMG will be a positive step in the management of Dartmoor's land and natural environment. He states that there is no simple solution to Dartmoor's problems. It is his strong belief that the best future for Dartmoor lies not in the Defendant, NE or any other body acting independently in silos, but collaboratively and by consensus.
119. In paragraphs 23 to 33 of his witness statement, Mr Branfield gives a detailed account of the work of the Defendant. He says that one of the main purposes of the Defendant has been to act as an effective referee between commoners. The Defendant has powers under the 1985 Act and the 1990 Regulations to take regulatory action against individual commoners. However, the Defendant has always sought to take a collaborative, constructive approach through dialogue to deal with issues, rather than taking formal enforcement action. Very often in his experience, it has proved to be sufficient simply to write to a commoner and ask them to change their behaviour. Mr Branfield says that he is aware of only one case in which it was necessary for the Defendant to pursue legal proceedings against an individual commoner for breach of the 1990 Regulations.
120. Mr Branfield says that the Defendant has only limited resources, being primarily funded by means of contributions payable by its members under section 16 of the 1985 Act.

The majority of its Council members are unpaid volunteers. The Defendant holds regular Council meetings around eight times per year to discuss issues that have come to its knowledge or been raised in correspondence since the previous Council meeting. The Defendant relies considerably upon the significant knowledge and expertise of Council members, many of whom are both experienced commoners and longstanding members of the Defendant. At Council meetings there is regular discussion of the latest information and evidence produced by NE. Individual Council members meet often with NE officers. Council members both read widely around the practice of hill farming and actively participate in wider initiatives and organisations serving the hill farming community both nationally and internationally. Where necessary and appropriate, the Defendant will also seek advice from external consultants and experts.

121. Mr Branfield states that whilst for both principled and pragmatic reasons the Defendant will follow a collaborative approach in its dealings with commoners, it has been prepared to exercise its statutory powers to take enforcement action where it has judged that to be necessary and appropriate. Mr Branfield cites three examples of such formal action in 1993, 1996 and 1999. More recently, in November 2024 the Defendant implemented sheep prohibition periods on South Moor and North Moor.
122. Mr Branfield says that all Council members are familiar with the Defendant's power to issue limitation notices under regulation 9 of the 1990 Regulations. He points to practical issues that would arise following the issue of such a notice. In particular –

*“The key issue stems from the fact that many common land units are not enclosed, and therefore if a limitation notices issued over a particular unit then this will create a vacuum that encourages livestock to stray onto it from neighbouring units. It is vital for managing livestock on common land that animals are not encouraged to stray in order to ensure that they maintain their hefting instinct; if that instinct is weakened or lost, it can make it much more difficult for commoners to manage their animals and can lead to disputes between commoners as their animals begin to compete with one another for food”.*

123. Both parties have applied for permission to admit further evidence. The Claimant seeks to admit the witness statement of Anthony Whitehead dated 14 May 2025. The Defendant seeks to admit the witness statement of Theresa May dated 13 June 2025. The principal subject matter of both witness statements is more recent condition surveys and assessment work carried out by NE in relation to Dartmoor SSSIs. Theresa May also provides a brief account of recent meetings of the LUMG. I shall admit both witness statements, albeit I did not find that they either added materially to or affected the evidence already before the court.

### **The parties' cases in summary**

124. The Claimant's essential contention is that the Defendant has failed to act lawfully in relation to its duties under the 1985 Act and 1990 Regulations. The Defendant has failed lawfully to regulate livestock numbers on Dartmoor's common lands. The Claimant's central complaint is that overgrazing of livestock on Dartmoor is causing considerable ecological harm. In the face of the continuing degradation of the protected nature conservation sites on Dartmoor resulting from overgrazing, the Defendant is acting unlawfully in failing to take regulatory action under the statutory powers with which it has been invested.

125. The Claimant's evidence is that important features of the nationally and internationally recognised habitats which comprise the Dartmoor SSSIs and SACs are in an unfavourable and degraded condition. The Claimant's case is that high levels of grazing on Dartmoor have long been and remain a cause of damage to the moorland vegetation and ecology that SSSI and SAC designation seeks to protect and enhance.
126. The Claimant contends that sections 4 and 5 of the 1985 Act place a statutory duty on the Defendant to regulate the exercise by commoners of their grazing rights over the commons; and, in particular, to control overgrazing and excessive stock levels on commons which jeopardise the conservation status of protected habitats. In order lawfully to discharge that statutory duty, it is now necessary for the Defendant to act by exercising its power to issue limitation notices under the 1990 Regulations. The 1985 Act imposes a specific requirement that, in discharging its statutory duty, the Defendant must have regard to the conservation and enhancement of the natural beauty of the commons, which embraces the conservation of the flora, fauna and ecological features of the Dartmoor National Park. Moreover, in failing to act in accordance with its duty under sections 4 and 5 of the 1985 Act, the Defendant is in breach of its duties under section 28G of the 1981 Act and as competent authority under regulation 9(3) of the 2017 Regulations.
127. On 17 May 2024 the Claimant made a request under the Environmental Information Regulations 2004 for information about regulatory action taken by the Defendant to control grazing and stocking levels on the commons, in the exercise of its powers and duties pursuant to the 1985 Act. On 24 June 2024 the Defendant responded to that request. The Claimant contends that the Defendant's response demonstrates that the Defendant has failed to discharge the regulatory responsibilities with which it is entrusted by Parliament under the 1985 Act.
128. The Claimant denies that the Defendant's resolutions of 4 December 2024 and 22 January 2025 have remedied its unlawful failure to fulfil its regulatory responsibilities and statutory duties. Moreover, those resolutions are themselves vitiated by the appearance of bias and by a fettering of the Defendant's discretion. Finally, it is evident that in failing to act and to discharge its regulatory responsibilities, the Defendant has been motivated by an improper purpose.
129. The Claimant emphasises that it is not for the court to determine whether the commons are in fact overstocked or overgrazed. The Claimant's case is that the court should now require the Defendant to comply with its statutory obligations, including assessment of livestock numbers on the commons to enable compliance with the Defendant's statutory duty to act, by issuing limitation notices or otherwise, where overstocking is identified.
130. For its part, the Defendant denies that it has failed to discharge its responsibilities under the 1985 Act. The premise of the claim is strongly contested. The Defendant argues that the evidence does not establish that the deterioration in the condition of Dartmoor's natural environment has been caused by overgrazing. Nor does the evidence before the court establish that livestock numbers on the commons need to be reduced by issuing limitation notices.
131. The Defendant relies upon matters which were agreed at its meetings held on 4 December 2025 and 22 January 2025, in the light of the concerns raised by this claim which had been begun on 28 August 2024. At its meeting on 4 December 2024, the

Defendant had decided that it should not at that time take action under the 1985 Act to require reductions in livestock numbers on the commons. That decision was founded on consideration of the Chairman's Report. That report found no clear evidence upon which to conclude that any specific part of the commons was currently overstocked to the point where action under the 1985 Act to limit or reduce numbers was justified. Looking forward, the Defendant accepted the recommendation of the Chairman's Report that negotiations over existing and future A-E Schemes, together with any further work undertaken or outcomes recommended by the LUMG, provided a fairer and more effective solution to any evidenced problems of overgrazing of commons, than limitation notices issued under the 1985 Act.

132. The Defendant contends that in light of the resolutions passed at the 4 December 2024 and 22 January 2025 meetings, in which DCC expressly considered its power to issue limitation notices to reduce stocking numbers in the context of its statutory duties, the Claimant's initial grounds of challenge are now academic. Where a claim has become academic since it was issued, it is generally inappropriate to pursue the claim. That is the position in the present case.
133. In any event, the Defendant submits, its actions in regulating the commons under the 1985 Act must be considered in the context of other regulatory mechanisms for controlling levels of grazing activity on Dartmoor in the interests of nature conservation. The Defendant's day-to-day work (as explained by Mr Branfield), full participation in the Fursdon Review, its response to the Fursdon Report and its ongoing work as part of the LUMG (which is currently implementing the recommendations of the Fursdon Report) mean that in substance all of the matters required by the various duties cited by the Claimant have been complied with. Moreover, the Defendant's role on Dartmoor, and the assessment of its compliance with its statutory duties, needs to be seen and understood in the broader context of how grazing levels are managed on Dartmoor through A-E schemes and agreements; and through regulation by NE pursuant to the 1981 Act.
134. In short, it was and remains reasonable for the Defendant not to consider it expedient to issue limitation notices at this time, while the future management of Dartmoor is being addressed in a nuanced and holistic way under current government policy to ensure it has the support, and takes into account the interests, of all the key stakeholders involved.
135. The Defendant contends that it has acted consistently within its statutory purpose under the 1985 Act. The Defendant's statutory functions extend beyond its role as regulator. Those functions extend to assisting commoners in the maintenance of their rights of common. The Fursdon Review was correct to see the Defendant's proper role as providing a forum to represent the interests of commoners.
136. The Defendant argues that the new allegations of bias and unlawful fettering of discretion advanced in the Claimant's ASFG are unsustainable.

## **Ground (1) – breach of section 5 of the 1985 Act**

### *The issues*

137. The Claimant raises two issues under this ground. Firstly, it is submitted that section 5(1)(a)(ii) of the 1985 Act imposes a duty on the Defendant not only to make regulations for the purpose of ensuring that the commons are not overstocked; but also to take enforcement action under those regulations when overstocking has been identified. The Claimant contends that the Defendant has failed to discharge that duty. Secondly and in any event, it is submitted that the Defendant is in breach of its duty under section 5 of the 1985 Act for failing even to consider whether it should take enforcement action by issuing limitation notices or otherwise in the exercise of its powers conferred by the 1990 Regulations.

### *First issue – the Claimant’s submissions in summary*

138. The Claimant submitted that the duty imposed on the Defendant by section 5(1)(a) of the 1985 Act has not been discharged merely by the making of the 1990 Regulations. Properly construed in the context of sections 4 and 5 of the 1985 Act, section 5(1)(a)(ii) imposes a duty on the Defendant to exercise its powers so as to ensure that the commons are not overstocked. In other words, the Defendant is under an obligation to achieve a stated outcome. By making the 1990 Regulations, the Defendant has provided itself with the regulatory and enforcement powers by which it is able to achieve that stated outcome. The Defendant is obliged to exercise those powers for the purpose of ensuring that the commons are not overstocked. When faced, therefore, with evidence that the commons are overstocked, the Defendant cannot lawfully decide not to exercise those powers on the grounds of expediency.

139. It was submitted that read together, sections 4 and 5 of the 1985 Act clearly supported the Claimant’s interpretation of section 5(1)(a)(ii). Section 4(1) imposed the overarching duty on the Defendant to take such steps as appear to it to be necessary and reasonably practicable for the maintenance of the commons. The duty to make regulations is imposed by section 5(1) of the 1985 Act expressly for the purpose of fulfilling the Defendant’s functions under section 4. The stated purpose of ensuring that the commons are not overstocked is essential to their maintenance. The enforcement powers conferred on the Defendant under the 1990 Regulations are the means whereby that purpose is to be achieved and the overarching duty under section 4(1) of the 1985 Act to be fulfilled.

### *First issue - discussion*

140. The first issue is essentially a question of statutory interpretation. The correct approach to statutory interpretation was stated by Lord Hodge at [29] in R(O) v Secretary of State for the Home Department [2023] AC 255 –

*“The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated: “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.” (R v Secretary of State for the Environment, Transport and the*

*Regions, Ex p Spath Holme Ltd [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, 397: “Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament”.*”

141. The task, therefore, is to seek to understand the meaning of the words which Parliament has used in section 5(1)(a)(ii) of the 1985 Act, read in the context of that section and its wider context. There is no doubt that section 5(1)(a) imposes a duty on the Defendant to make regulations for a series of stated purposes. That section 5(1)(a) imposes a duty to do so is clear when set against the language of section 5(1)(b), which confers a power upon the Defendant to make such other regulations “*as they think fit*”.
142. The Defendant’s duty and power to make regulations under section 5(1)(a) and 5(1)(b) respectively is stated to be for the purpose of fulfilling its functions under section 4 of the 1985 Act. It is clear that those functions include the Defendant’s duty under section 4(1) to take such steps which they consider to be necessary and reasonably practicable for the maintenance of the commons. Those functions also extend to consideration of the number of animals which can properly be depastured on the commons from time to time; and of the conservation and enhancement of the natural beauty of the commons. The purpose stated in section 5(2)(a)(ii) of ensuring that the commons are not overstocked is, accordingly, properly to be understood as being directed towards the fulfilment of those functions.
143. Section 5(2)(a)(ii) of the 1985 Act does not, however, impose a duty on the Defendant to make regulations imposing limits on stock numbers. Section 5(2)(a)(ii) leaves to the Defendant the choice of regulatory framework to be imposed for the purpose of ensuring that the commons are not overstocked. The Defendant may by regulation fix the number of animals which from time to time may be depastured on the commons. Alternatively, the Defendant may by regulation fix the number of animals of any description that may be so depastured. As a third alternative, the Defendant may make regulations which themselves provide for the fixing of the number of animals, or any description of animals, that may be so depastured.
144. It is the third of those alternatives which the Defendant has followed in promulgating regulation 9 of the 1990 Regulations. It is the enactment of regulation 9 which discharges the Defendant’s duty under section 5(1)(a)(ii) of the 1985 Act to make regulations for the purpose of ensuring that the commons are not overstocked. By providing for the issue of a limitation notice fixing the maximum number of animals of any description that may from time to time be depastured on a unit of commons, regulation 9 enables the Defendant to fulfil that purpose, and in so doing to fulfil its functions under section 4 of the 1985 Act.
145. Contrary to the Claimant’s submissions, it does not follow from that analysis that regulation 9 of the 1990 Regulations must be interpreted as imposing a duty on the

Defendant to issue a limitation notice in any case where there is evidence of overstocking. The terms of regulation 9 are clear: it is for the Defendant in any case to consider whether it is expedient to issue a limitation notice and, if so, in what specified terms. In determining whether it is expedient to issue a limitation notice, the Defendant will need to have well in mind the statutory purpose of ensuring that the commons are not overstocked as well as its functions under section 4 of the 1985 Act. Each case, however, will turn on its own facts.

146. Where there is clear evidence of significant overstocking of a unit of commons resulting in problems of animal husbandry and poor maintenance of the commons, the expediency of issuing a limitation notice may be straightforward to determine. Conversely, in a case where the evidence of overstocking is marginal and there is no immediate harm, the Defendant may reasonably decide that it would be inexpedient to issue a limitation notice. Mr Branfield's reference to cases where a collaborative approach to resolving commons management issues has proved to be sufficient is in point. In my view, in reserving an element of discretionary judgment to the Defendant in any given case, the power to issue limitation notices conferred by regulation 9 of the 1990 Regulations fulfils the purpose of section 5(1)(a)(ii) of the 1985 Act. The existence of that discretionary judgment is also consistent with the Defendant's duty to make regulations for the purpose of ensuring that the commons are not overstocked.

*Second issue - discussion*

147. I turn to the second issue under this ground. The question is whether the Defendant is in breach of its duty under section 5 of the 1985 Act for failing to consider whether it should issue limitation notices under regulation 9 of the 1990 Regulations. That question falls to be answered on the basis of the evidence before the court. (I note that the Claimant refers to "*other action*" under the 1985 Act. However, the focus of both the oral and written submissions was upon the power to issue limitation notices).
148. The starting point is to ask whether the evidence before the court points to the existence of circumstances which engaged the need for the Defendant, acting reasonably, to consider whether it was expedient to issue a limitation notice, or limitation notices, under regulation 9 of the 1990 Regulations.
149. In addressing that question, it is essential to have in mind that the focus of the inquiry under regulation 9 is upon a commoner's use of a specific unit of commons. The Defendant is required to consider the expediency of limiting the maximum number of any description of animals that any person may from time to time depasture on any unit of commons. In order properly to exercise the power to issue a limitation notice in any given case, the Defendant must be in a position to specify the limits of the common land to which the restriction applies, the period of the limitation and the maximum number and description of animals that may be depastured on that land under the terms of the notice. Each of these matters will need to be established in the particular circumstances of the individual case. The need for the Defendant to base its determination whether it is expedient to issue a limitation notice on such case specific information is essential, if the Defendant is to be in a position to defend its decision following an appeal brought in accordance with regulation 13 of the 1990 Regulations.
150. The evidence before the court does not point to any particular unit of commons in respect of which the existence of overstocking was sufficiently evidenced as to require

the Defendant, acting reasonably, at least to consider whether it should exercise its powers under regulation 9 of the 1990 Regulations. In its pre-action letter of 12 July 2024, the Claimant asserted that “*the condition of the Dartmoor SAC and the SSSIs which comprise it is declining as a result of overstocking*”. However, that assertion was not supported by any information or evidence pointing to particular units or areas of common in which overstocking was said to have arisen and to require action by the Defendant in the exercise of its powers under regulation 9 of the 1990 Regulations. Instead, the Defendant was “*requested to issue limitation notices to control overstocking in any SSSIs in which the level and/or period of grazing is adversely affecting their features of special interest*”.

151. As I have already mentioned, in his evidence Dr Avery carries out an analysis based upon NE’s assessments which led him to judge that 16 SSSI units on Dartmoor were suffering from overgrazing. I cannot accept that Dr Avery’s work, carefully carried out though it was, provides a sufficient evidential basis for the Claimant’s contention. It is pertinent to recall that NE’s response to this claim acknowledged that the nature and location of any changes to grazing in order to achieve favourable condition of protected sites is “*fraught with practical difficulty*”.
152. The Claimant submits that the Defendant’s failure to issue any limitation notices in at least the last ten years, in circumstances where NE has consistently highlighted its concern that parts of the commons are overstocked, constitutes a breach of the Defendant’s duty under section 5(1) of the 1985 Act. That submission, however, fails to grapple with the fundamental problem which I have already identified. There is simply insufficient evidence before the court to sustain the argument that the Defendant has unlawfully failed to consider the expediency of issuing a limitation notice or notices in circumstances which required the Defendant, acting reasonably, to engage with that question.
153. I was referred to Stovin v Wise [1996] AC 923, 950B where Lord Hoffmann said that a public body almost always has a duty to consider whether it should exercise its powers. Where, however, a claim is advanced on the ground that a public body has unlawfully failed to consider whether to do so, the claimant bears the burden of establishing that the circumstances demanded that the public body now give consideration to exercising its powers. In this case, the Claimant has failed to do so.
154. Following the commencement of these proceedings, Mr Branfield prepared his Chairman’s Report. In paragraph 5.6 of that report, Mr Branfield offered the following advice to his fellow Council members –

*“[The Defendant] should of course only issue limitation notices if it concludes that a specific part of the common land is overstocked, given that limitation notices can only be used to lower (rather than raise) a specific commoner’s stocking numbers. [The Claimant] claims that parts of the commons are overstocked (without precisely referring to any particular areas of common land that it says are overstocked) and relies on evidence produced by NE to support this argument. The Fursdon Review is critical of NE’s evidence base for assessing stocking levels on Dartmoor and notes that both over- and under grazing is having a negative impact on Dartmoor’s natural environment. The fact that undergrazing is having a negative impact on the natural environment of various parts of the commons is supported by the firsthand experience of Council members, many of whom have worked the commons of Dartmoor on a daily*

*basis for much of their lives and continues to do so. The Chairman's view is that, in light of the Fursdon Report's criticisms of the reliability of NE's evidence base, there is no clear evidence to conclude that any specific part of the commons is presently overstocked to the point that [the Defendant's] legal duties to take steps to reduce stocking numbers through the issue of limitation notices against specific commoners have been triggered".*

155. That advice is, in my judgment, both founded upon a correct understanding of the legal basis upon which the Defendant should determine whether to exercise its powers under regulation 9 of the 1990 Regulations; and a fair and accurate assessment of the sufficiency of evidence before the Defendant to engage its powers under regulation 9 of the 1990 Regulations.
156. Finally, the Claimant requested the court to make a prospective order requiring the Defendant to issue limitation notices in respect of any area of Dartmoor commons where, following assessment, the number of animals being depastured is found to exceed the level that can properly be depastured without damage being caused to the natural environment. That request is misconceived. Any such order would necessarily involve the court interfering with the Defendant's own determination whether to exercise the power conferred by regulation 9 of the 1990 Regulations, in the circumstances of any given case in which that question may arise in future. That is not the proper function of the court.

### *Conclusion*

157. For the reasons I have given, I must reject ground (1).

### **Ground (2) – failure to assess stocking levels**

#### *The parties' submissions in summary*

158. The Claimant's submission was that the assessment of the number of animals which can properly be depastured on the commons from time to time is fundamental to the Defendant's discharge of its functions under the 1985 Act. In particular, it is through such assessment that the Defendant is able to reach a meaningful and evidence-based judgment on the need for action to control overstocking for the proper maintenance of the commons. The need for such assessment to be carried out was beyond reasonable argument, given the evidence that overgrazing was a significant contributor to the poor state of substantial parts of the protected nature conservation sites across Dartmoor. The Defendant had failed to make the necessary assessment. It was reasonably practicable to do so. Consideration in the Chairman's Report of the need for the Defendant now to assess the number of animals which can properly be depastured on the commons was wholly inadequate, particularly given the nature conservation matters to which the Defendant was required to have regard in deciding whether to make that assessment.
159. On behalf of the Defendant, it was submitted that it was for the Defendant to judge both the need for and reasonable practicability of assessment of livestock numbers on the commons. In judging whether assessment was necessary, it was reasonable for the Defendant to take account of the existence of HLS agreements, under which grazing levels on the commons were already subject to control based on the advice of NE. The issue of overgrazing had been considered by the Fursdon Review and now fell within

the remit of the LUMG. NE had now undertaken further SSSI condition assessments in light of the criticism of their evidence base by the Fursdon Review.

160. The Defendant submitted that the question whether it was reasonably practicable to make an assessment under section 4(1) of the 1985 Act was essentially an issue of the sensible use of its limited resources. There was no prescribed method or frequency of assessment under the 1985 Act. The Defendant was entitled to take account of the day-to-day experience which commoners were able to draw on, as Council members, in assessing from time to time whether the condition of the commons was being adversely affected by overstocking. In that context, reliance was placed upon a report entitled “*The State of the Commons on Dartmoor: A Common Perspective*” which had been compiled by members of the Defendant between 2019 and 2021 and remained a live document. That report had considered livestock numbers and management. When set alongside the controls on livestock numbers under A-E scheme agreements, the Fursdon Review, the condition assessment work carried out by NE and the forthcoming work of the LUMG, the Defendant was entitled reasonably to conclude that it was neither necessary nor reasonably practicable to have made an assessment pursuant to section 4(1) of the 1985 Act.
161. In any event, it was submitted that at its meeting on 4 December 2024 the Defendant had now given further and specific consideration to the need for and reasonable practicability of making such an assessment. Paragraph 5.8 of the Chairman’s Report states –

*“As set out above, Section 4 of the 1985 Act places a duty on [the Defendant] to “take such steps as appear to them to be necessary and reasonably practicable for the maintenance of the commons and the promotion of proper standards of livestock husbandry thereon”. This is to include “an assessment of the number of animals which can properly be depastured on the commons from time to time”. In discharging that duty, [the Defendant]” shall have regard to the conservation and enhancement of the natural beauty of the commons and its use as a place of resort and recreation for enjoyment by the public”. The other duties set out at section 3 above apply as well and must be considered by members. Members will be invited to bring their own experience and assessment of stocking numbers on the commons to the meeting. The Chairman's own assessment, based on his own knowledge and experience of Dartmoor, is that there are not too many livestock being depastured on the commons. [The Defendant] can only carry out such an assessment that is consistent with its very limited resources, and it must rely on interested persons to bring any relevant evidence concerning individual parcels of common land to [the Defendant] for consideration. The question of whether or not to issue limitation notices should properly be undertaken on a site-by-site basis. The current programme of monitoring and resurveying by NE (referred to above) will be useful information to [the Defendant] for its own periodic assessment under section 4 of the 1985 Act. However, as explained above, even if that further work by NE reveals specific evidence concerning particular areas of common land where there is overgrazing, the Chairman's view is that the solution to any such problem lies in HLS negotiations and the future of ELM agreements, together with any further work undertaken or outcomes recommended by the LUMG. It would not lie in the issue of limitation notices”.*

*Discussion*

162. This ground of challenge is concerned with the duty imposed on the Defendant by section 4(1) of the 1985 Act. That duty is to take such steps as appear to the Defendant to be necessary and reasonably practicable for the maintenance of the commons and the promotion of proper standards of livestock husbandry on the commons. One such step is then specified for the Defendant to consider: i.e. the assessment of the number of animals which can properly be depastured on the commons from time to time.
163. In discharging its duty under section 4(1) of the 1985 Act, the Defendant is required to have regard to the conservation and enhancement of the natural beauty of the commons and its use as a place of resort and recreation for enjoyment by the public. Those mandatory material considerations correspond to the statutory purposes for designation of the Dartmoor National Park: see section 5 of the 1949 Act. References to the conservation of the natural beauty of the commons are to be construed as including references to the conservation of the commons' flora, fauna, ecological, archaeological and geological and physiographical features: section 2(3) of the 1985 Act.
164. I accept the Claimant's submission that the assessment of the number of animals which can properly be depastured on the commons from time to time is fundamental to the Defendant's discharge of its functions under the 1985 Act. A core function of the Defendant under sections 4 and 5 of the 1985 Act is to regulate common rights with the objective of the maintaining the commons and promoting proper standards of livestock husbandry on the commons. One of the stated objectives of the 1985 Act is that the commons should not become overstocked. It is through periodic assessment of the number of animals that can properly be depastured on the commons from time to time that the Defendant is able to reach a meaningful and evidence-based judgment on the need for action to control overstocking for the proper maintenance of the commons.
165. The Defendant's case to the Fursdon Review was that it was the one statutory body specifically charged with determining grazing levels on all of Dartmoor's commons. Relying on that core statutory function under sections 4 and 5 of the 1985 Act, the Defendant contended to the Fursdon Review that it should be entrusted with the management of Dartmoor. Although the Fursdon Review ultimately made the recommendation for the establishment of the LUMG, later accepted and acted upon by the Secretary of State, neither the Fursdon Review nor the Secretary of State sought to interfere with the Defendant's core function under section 4 and 5 of the 1985 Act. The Defendant was and remains the statutory body specifically charged with determining grazing levels on all of Dartmoor's commons.
166. It is correct to say that section 4(1) of the 1985 Act gives the Defendant a significant measure of discretion as to the steps that it should take for the purpose of maintaining the commons and promoting proper standards of husbandry. Nevertheless, it is clear from the purpose stated in section 5(1)(a)(ii) that the control of stock numbers and the avoidance of overstocking is central to the achievement of those purposes. It is a core regulatory function of the Defendant. It is for that reason that the assessment of the number of animals which can properly be depastured on the commons from time to time is identified in section 4(1) as a specific step to be taken by the Defendant, in the fulfilment of its duty to maintain the commons and to promote proper standards of livestock husbandry.

167. In truth, there appears to be little if any dispute between the parties about those matters. In paragraph 5.8 of the Chairman's Report, Mr Branfield specifically acknowledges the need for the Defendant to make "*its own periodic assessment*" under section 4 of the 1985 Act. It is wholly unsurprising that he should do so, given the Defendant's assertion to the Fursdon Review that as a statutory body it is charged with determining grazing levels on the commons. Returning briefly to my discussion under ground (1) above, a meaningful and recent assessment of grazing levels on the commons is likely to be an essential prerequisite to effective regulation of overstocking under regulation 9 of the 1990 Regulations. Again, the Chairman recognised that fact in paragraph 5.8 of the Chairman's Report.
168. The issue, therefore, is whether the Claimant is correct in its contention that the Defendant has failed unlawfully to carry out an assessment of the number of animals that can properly be depastured on the commons from time to time. In the terms used by the Defendant itself, has the Defendant done what the 1985 Act charges it to do and sought to determine grazing levels on Dartmoor's commons?
169. In my judgment, the Claimant has established that the Defendant has not done so. Assessment of the number of animals that may properly be depastured on the commons at any given time necessarily implies both quantitative and qualitative analysis. The question for the Defendant is whether stocking levels exceed the capacity of the commons properly to accommodate them. In order to address that question, among the matters which the Defendant needs to interrogate are the numbers of livestock which commoners are entitled to depasture on the commons, the numbers that are actually depastured in reliance on rights of common, the areas of common in respect of which those rights are enjoyed and exercised, seasonal variations, and so on. Some of that quantitative information may be available from the commons register compiled under section 7 of the 1985 Act. Some may need to be obtained through survey or other forms of inquiry. Qualitative elements of the assessment will include the assembly and evaluation of evidence of the physical state of the commons, the capacity of the commons wholly or in part to provide grazing for the animals that may be depastured on them and the impact of current grazing numbers on the maintenance of the commons, taking account of the objective of conserving and enhancing their natural beauty and use as a place of resort and recreation for the public.
170. I accept the Defendant's submission that section 4(1) of the 1985 Act does not prescribe either the method or frequency with which the assessment is to be carried out. I also accept that the Defendant is able to judge whether, at any given time, it is necessary or reasonably practicable to carry out assessment; and if so, how that assessment should be undertaken. Nevertheless, as the Defendant asserted to the Fursdon Review and as was accepted in the Chairman's Report, the Defendant must make an assessment periodically of grazing levels on the commons if it is to discharge its core functions under sections 4 and 5 of the 1985 Act.
171. In paragraph 5.8 of the Chairman's Report, the Defendant purported to rely upon individual members' own knowledge and experience of stocking numbers on the commons as a sufficient basis for meaningful assessment of the number of animals which may properly be depastured on the commons from time to time. I was offered no explanation as to how such essentially anecdotal evidence could sensibly found a determination by the Defendant that the commons were overstocked, at sustainable stock levels or indeed understocked. In my judgment, that is not a legally sufficient

basis for meaningful assessment by a regulatory body in support of performance of its core statutory functions. The Defendant is a regulatory body performing public law duties. To rely solely on anecdotal information, as the basis for the Defendant's assessment of the number of animals which may properly be depastured on the commons from time to time, is insufficient to fulfil the Defendant's duty of reasonable inquiry under the *Tameside* principle: Balajigari v Secretary of State for the Home Department [2019] 1 WLR 4647 at [70].

172. Ms Willcocks' report does not assist the Defendant in responding to this ground of challenge. The report does not purport to carry out an assessment of the number of animals which can properly be depastured on the commons from time to time. It does not concern itself with the Defendant's statutory functions under sections 4 and 5 of the 1985 Act. It does not attempt any meaningful assessment of the question which the Defendant is charged as regulator to determine, which is whether the commons are overstocked. Its stated purpose is quite different. It is a plea for management practices on Dartmoor to be improved by working with and listening to active commoners. That was a central theme and a recommendation of the Fursdon Review.

### *Conclusion*

173. As the Defendant itself stated in its evidence to the Fursdon Review, it is for the Defendant to determine grazing levels on the commons. The Defendant's assessment of the number of animals which can properly be depastured on the commons from time to time is central to the performance of its regulatory functions under sections 4 and 5 of the 1985 Act. As the Chairman's Report acknowledges, there is a need for the Defendant to make its own periodic assessment under section 4 of the 1985 Act. It is not for NE or for the LUMG to carry out that assessment, it is for the Defendant to do so. It is for the Defendant to decide how to undertake that assessment within the limits of its resources. Nevertheless, the Defendant is a regulatory body fulfilling statutory functions. The method which it adopts for the purposes of making the assessment must be reasonably fit for its purpose; and such as to discharge the Defendant's *Tameside* duty of reasonable inquiry in fulfilment of its functions under sections 4 and 5 of the 1985 Act. I accept the Claimant's submission that the Defendant's purported assessment in paragraph 5.8 of the Chairman's Report fails those requirements. It is not a legally adequate assessment for the purposes of discharging the Defendant's duty under section 4(1) of the 1985 Act.

174. For these reasons, ground (2) succeeds.

### **Ground (3) – failure to have regard to a material consideration**

175. As pleaded in the ASFG, the Claimant's contention under this ground is as follows: the Defendant's failure to consider issuing limitation notices to control overstocking of the commons pursuant to regulation 9 of the 1990 Regulations necessarily results in a failure to have regard to the mandatory material consideration stated in section 4(1) of the 1985 Act - the conservation and enhancement of the natural beauty of the commons.
176. I have rejected the Claimant's argument under ground (1) that the Defendant has acted unlawfully in failing to consider whether to issue limitation notices to control the overstocking of commons. In the light of my conclusions on ground (1), ground (3) falls away. It does so because under section 4(1) of the 1985 Act, the obligation to have

regard to the conservation and enhancement of the natural beauty of the commons is engaged only in the Defendant's discharge of its duty under that provision - to take steps for the maintenance of the commons and the promotion of proper standards of livestock husbandry thereon. The Claimant's essential complaint in relation to limitation notices is that the Defendant should at least have considered whether to issue them to address overstocking but has failed to do so. I have explained why I do not consider that complaint to be well-founded. The Claimant is, therefore, unable to point to any action on the part of the Defendant under section 4(1) of the 1985 Act which engaged its obligation to have regard to the conservation and enhancement of the natural beauty of the commons.

177. Conversely, when Mr Branfield came to consider whether the Defendant should now issue limitation notices in the light of these proceedings in the Chairman's Report, he recited section 4(1) of the 1985 Act and in paragraph 5.8 reminded the Defendant's members of the need to have regard to that mandatory material consideration in discharging their statutory duty under that enactment. There is no merit in the Claimant's argument that the Chairman's Report did not specifically refer to section 2(3) of the 1985 Act.
178. Looking forward, by virtue of section 4(1) of the 1985 Act it will be necessary for the Defendant to have regard to the conservation and enhancement of the natural beauty of the commons when it makes a lawful periodic assessment of the number of animals which can properly be depastured on the commons. That the Defendant must do so is recognised in paragraph 5.8 of the Chairman's Report.
179. Ground (3) is rejected.

#### **Ground (4) – section 28G of the 1981 Act**

180. By virtue of section 28G(1) of the 1981 Act, the section 28G(2) duty is engaged when a section 28G authority exercise a function or functions, the exercise of which is likely to affect the flora, fauna or geological or physiographical features by reason of which an SSSI is of special interest. In order, therefore, to judge whether a section 28G authority has fulfilled the section 28G(2) duty, it is necessary to identify the function or functions by the exercise of which that duty was triggered.
181. In the present case, the Defendant is a section 28G authority. The exercise of its functions under sections 4 and 5 of the 1985 Act is capable of triggering the section 28G(2) duty. However, in order to make good the argument that the Defendant has failed to fulfil that duty, it is necessary for the Claimant to identify which of the Defendant's functions it has exercised so as to engage the duty and thus place itself under the obligation stated in section 28G(1) of the 1981 Act.
182. As pleaded in the ASFG, the contention is that it is the Defendant's failure to consider issuing limitation notices to control overstocking of the commons pursuant to regulation 9 of the 1990 Regulations which has engaged its section 28G(2) duty. The Claimant submits that in failing even to consider issuing limitation notices in relation to those commons which fall within one of Dartmoor's SSSIs, the Defendant has failed in its duty to take reasonable steps under section 28G(2) of the 1981 Act.

183. In the light of my conclusions under ground (1), that argument is misconceived. The Claimant has been unable to establish that the Defendant acted unlawfully in failing to consider whether to issue limitation notices. It follows that the premise for the Claimant's argument under this ground is demonstrably a false one. The Defendant has not been shown either to have exercised, or unlawfully to have failed to exercise, that function upon which the Claimant seeks to found its argument. The duty imposed on the Defendant by section 28G(1) of the 1981 Act has simply not been engaged in the way contended for by the Claimant.
184. In these circumstances, further consideration of what might be required of the Defendant in order to discharge its section 28G(2) duty in the context of the exercise of its powers under the 1990 Regulations is more appropriately left to a case in which that question has arisen on the facts. In the meantime, the guidance given by Hickinbottom J at [132]-[133] in R(Friends of the Earth) v Welsh Ministers [2016] Env LR 1, to which the Secretary of State referred in his summary grounds, is of general application. Ground (4) is rejected.

#### **Ground (5) – Breach of regulation 9(3) of the 2017 Regulations**

185. Essentially the same analysis applies to the Claimant's argument under this ground.
186. As with section 28G of the 1981 Act, the duty imposed by regulation 9(3) of the 2017 Regulations is engaged when on a competent authority exercises a function or functions the exercise of which may affect the requirements of the Habitats Directive. In order to judge whether a competent authority has fulfilled its obligation under regulation 9(3) to have regard to the requirements of the Habitats Directive as a mandatory material consideration, it is necessary to identify the function or functions by whose exercise that authority has affected those requirements.
187. It is not in dispute that the Defendant is a competent authority. The exercise of its functions under sections 4 and 5 of the 1985 Act is capable of affecting the requirements of the Habitats Directive. The relevant question is whether the Defendant has either exercised or omitted to exercise those functions so as to affect the requirements of the Habitats Directive.
188. As with ground (4), the pleaded contention under this ground is that the Defendant's failure to consider issuing limitation notices to control overstocking of the commons pursuant to regulation 9 of the 1990 Regulations has engaged its duty as competent authority under regulation 9(3) of the 2017 Regulations. The Claimant argues that the Defendant has thereby actively avoided taking appropriate steps to avoid the deterioration of protected habitats within the SAC by failing to limit the damage caused by overstocking of those protected features.
189. However, my conclusion under ground (1) is that the Claimant has been unable to establish that the Defendant acted unlawfully in failing to consider whether to issue limitation notices. It follows that the premise for the Claimant's argument under this ground also is demonstrably false. The Defendant has not been shown either to have exercised, or unlawfully to have failed to exercise, that function upon which the Claimant seeks to found its argument. The duty imposed on the Defendant as competent authority by regulation 9(3) of the 2017 Regulations has simply not been engaged in the way contended for by the Claimant.

190. I was referred by both parties during argument to R(Harris) v Environment Agency [2022] PTSR 1751, particularly for the discussion at [80]-[88] in Johnson J's judgment. That case, however, is clearly to be distinguished from the present case on its facts. There was no issue that the Environment Agency had exercised its functions in deciding that it would not expand an investigation into the effect of water abstraction licences. Nor was it in issue that the Environment Agency's duty as competent authority under regulation 9(3) of the 2017 Regulations was engaged by that decision. In my view, more detailed consideration of the impact of the Defendant's duty as competent authority under regulation 9(3) upon its decision making under the 1990 Regulations is, again, more appropriately left to a case in which that question has arisen on the facts.
191. Ground (5) is also rejected.

### **Ground (6) – Ultra vires/improper purpose**

192. The Claimant's argument under this ground was that the Defendant had acted over the years predominantly as a representative body largely preoccupied with the concerns of its members. It had thereby acted outside the powers conferred upon it under the 1985 Act and for purposes other than those stated in section 3(1) of the 1985 Act, namely, for the purposes of exercising the functions assigned to the Defendant by that Act. The Defendant had acted not as a regulatory body discharging its statutory functions and duties under sections 5 and 6 of the 1985 Act, but as a representative body for those whom it was established to regulate, that is say, the commoners.
193. The Claimant sought to substantiate that argument by reference to minutes of the Defendant's meetings, including those held in October 2015, February 2021, February 2022 and March 2023. Reference was made to a particular event recorded in the minutes of the Defendant's meeting held on 1 October 2020. That was argued to demonstrate that the Defendant had subjugated its regulatory responsibilities under the 1985 Act to taking on an advocacy role on behalf of a commoners' association in a dispute with NE. I was also shown a letter dated 22 September 2023 in which the Defendant had written to NE challenging NE's intended issue of a stop notice in respect of a unit of South Dartmoor SSSI. As the Defendant pointed out, that dispute was described by NE in its summary grounds as the "*chief trigger*" for the Fursdon Review.
194. The Claimant also referred to the Defendant's response to the Fursdon Review which stated –
- "Dartmoor Commoners Council will continue to work tirelessly to support the role of the grazing commoner and continue to endorse the value of grazing livestock".*
195. The Claimant relied on the Defendant's website which states –
- "Under the Dartmoor Commons Act 1985, the Dartmoor Commoners Council is established to represent the commoners, make regulations about most matters, which concern the management of the commons and the welfare of the stock depastured on the commons, and to enforce the Dartmoor Commoners' Council Regulations".*
196. The Claimant submitted that the 1985 Act makes no reference to the Defendant acting as a representative body for commoners.

197. In my judgment, there is no substance in the Claimant's complaints under this ground. The Claimant acknowledges that it is plainly lawful for the Defendant to take the interests of commoners into account as a material consideration when discharging its statutory functions under the 1985 Act. I agree. The Claimant contends that the Defendant's legal error has been –
- “to make the interests of the commoners its primary purpose, in circumstances where it is not discharging - or apparently even attempting to discharge - the statutory duties in sections 4 and 5 of the 1985 Act”.*
198. I cannot accept that the evidence, such as it was, upon which the Claimant relies is capable of substantiating that contention. I do not accept that the evidence supports the assertion that the Defendant has made the interests of commoners its primary purpose, at the expense of discharging its statutory functions under sections 4 and 5 of the 1985 Act. Essentially, that assertion was made in order to reinforce the Claimant's contentions under ground (1) in respect of the Defendant's alleged failure to take any action to control overstocking of the commons. As I have not found those contentions to be substantiated, any force that there might have been in the wider complaint under this ground largely disappears. The Defendant's legal error under ground (2) should not be seen in itself as evidence of any broader misunderstanding of or failure to fulfil its responsibilities under the 1985 Act.
199. I remind myself of Mr Branfield's evidence that one of the main purposes of the Defendant has been to act as an effective referee between commoners. The Defendant has powers under the 1985 Act and the 1990 Regulations to take regulatory action against individual commoners. However, the Defendant has always sought to take a collaborative, constructive approach through dialogue to deal with issues, rather than taking formal enforcement action. Very often in his experience, it has proved to be sufficient simply to write to a commoner and ask them to change their behaviour.
200. My understanding of the documents to which the Claimant refers is that the Defendant has in fact sought to reconcile the interests of commoners with the proper management and regulation of the commons in accordance with its statutory functions. Understandably, that has not always been easy to achieve, but it involves no improper purpose nor action outside the powers conferred on the Defendant by the 1985 Act. The short statement of the purposes of the Defendant published on its website is, in my view, a neat and legally unobjectionable summary. Likewise, the extract from the Defendant's response to the Fursdon Review is legally innocuous.
201. The legislative purpose of the 1985 Act as recorded in the recitals is to secure the better use of the Dartmoor commons for purposes of livestock husbandry. The constitution of the Defendant and the conferment of powers with reference to the commons are stated to be expedient for that purpose. For the Defendant to see its role as one of seeking to represent the best interests of commoners at the same time as discharging its functions under part 3 of the 1985 Act is consistent with that legislative purpose. I accept the Defendant's submission that section 4(2)(a) of the 1985 Act, which empowers the Defendant to protect the commons and render assistance to any commoner in the maintenance of his rights of common, is an express indication of Parliament's intention that, in fulfilling its statutory functions, the Defendant should represent the obvious interests of commoners in making better use of the commons for the purposes of livestock husbandry.

202. Ground 6 is rejected.

### **Ground (7) - Bias**

203. The Claimant contends that the Defendant's resolutions of 4 December 2024 and 22 January 2025 were vitiated by apparent bias. This ground of challenge arises out of the fact that the Defendant's resolutions at its meetings on 4 December 2024 and 22 January 2025 were made in response to the Chairman's Report. The Claimant points out that the Chairman's report was prepared in response to the present claim. It made several references to the issues raised in the claim. It appended the claim documents and a draft of the Defendant's proposed summary grounds of defence, which Council members were invited to endorse. The fair minded observer would read the Chairman's Report and perceive a real risk that the discussion whether to exercise the Defendant's powers under the 1990 Regulations was motivated by the wish to avoid the possibility of judicial review being granted, rather than an untrammelled consideration of the expediency of issuing limitation notices to control overstocking of the commons. The Claimant also drew attention to an email dated 4 November 2024 from the Defendant's Secretary giving notice of the forthcoming meeting to discuss the Chairman's Report –

*“As part of the mitigation required for the above-mentioned case, Council needs to issue a report dealing with all the duties which are subject to the claim and then hold a meeting to discuss those duties and make a decision about whether any limitation notices should be issued. This is for the purpose of the legal argument cited in the summary grounds”.*

204. The Claimant relied on R(Carlton-Conway) v Harrow London Borough Council [2002] 3 PLR 77. In that case, permission had been granted to bring a claim for judicial review of a planning permission granted under delegated powers. The local planning authority's planning committee passed a resolution that they would have been minded to grant planning permission, had the planning application been placed before them for determination. Having allowed the claim for judicial review, the Court of Appeal declined to refuse relief on the basis of the planning committee's resolution. At [27]-[28], Pill LJ said –

*“27. I reject the argument on discretion. In my judgement, the appellant is entitled to a fresh consideration of the application by the planning committee. There is a real risk that, in taking the decisions they did in October 2001, there was a potential motivation, as would be perceived by a fair minded member of the public, that who wish to support their chief planning officer and to avoid the possibility of judicial review were factors that led to the relevant decisions. I stressed that it is a potential risk. There is no evidence that there was improper motivation.*

*28. In my judgment, an appellant who has established what this appellant has established is entitled to a fresh consideration by a committee that is not burdened by the possibility of the extraneous factors to which I have referred”.*

205. The Claimant submits that the same analysis applies to the Defendant's resolutions in December 2024 and January 2025. The fair-minded observer would perceive a real risk that in making those resolutions, the Defendant was motivated by a wish to nullify this claim for judicial review and the Claimant's primary case that the Defendant should

issue limitation notices to address overstocking of the commons. The test for apparent bias was met: see Porter v Magill [2002] 2 AC 357 at [103].

206. The Defendant accepted that the meetings held on 4 December 2024 and 22 January 2025 were prompted by the present claim and considered the issues raised by claim – in particular, the question whether the Defendant had acted unlawfully in failing to issue or consider issuing limitation notices to address overstocking of the commons. However, that those meetings were prompted by the claim did not give rise to the appearance of bias in the Defendant’s resolutions. The Chairman’s Report had been transparent in acknowledging the litigation context. Members were provided with the claim papers. The Chairman’s Report was, however, firmly and correctly rooted in the statutory framework set by the 1985 Act, the 1990 Regulations and the duties imposed by section 28G of the 1981 Act and regulation 9(3) of the 2017 Regulations. The discussion in section 5 of the Chairman’s Report responded to that statutory framework and to the evidence which was relevant to the Defendant’s determination of the merits of exercising its powers under regulation 9 of the 1990 Regulations. The same was true of members’ deliberations during the course of the two meetings, as was evident from the minutes. Members were reminded by the Chairman that they should exercise their own individual judgment. Members were provided with and considered representations received from members of the public. The minutes record that 12 members voted in favour of the resolutions, but that six members abstained.
207. In the light of these matters, the fair-minded observer would detect no real possibility that the Defendant was biased in its resolutions declining to exercise its powers to issue limitation notices. In particular, the fair-minded observer would be confident that although members were aware of the context set by the present claim, they nevertheless approached the determination of the question whether to issue limitation notices on the basis of the evidence and on the merits.
208. In my view, in addressing these competing contentions, it is vital to have well in mind the particular complaint which forms the basis of the present claim and the remedy which the Claimant sought when it brought these proceedings. That complaint was that the Defendant had unlawfully failed to take action in accordance with its statutory duties under the 1985 Act to address overstocking of the Dartmoor commons and the resulting harm to protected nature conservation areas. The remedies sought by the Claimant were declarations to that effect and mandatory orders requiring the Defendant to take the necessary action in accordance with its duties under the 1985 Act to address that problem.
209. This case is, therefore, quite different from *Carlton-Conway*. This is not a case in which the Defendant faced a claim for judicial review of an administrative decision and purported to review that decision on its merits in the course of the judicial review proceedings. On the contrary, in its claim form, the Claimant described the decision challenged as being the Defendant’s “*ongoing failure to act lawfully*” in relation to its statutory duties. It was the absence of a decision which formed the primary subject matter of the present claim.
210. In R(Raja) v Redbridge London Borough Council [2020] PTSR 2129 at [19], Fordham J said –

*“The conventional approach to judicial review, reflected in the design of Form N461, identifies and impugns a specific "decision", with a specific date. This brings focus and discipline, including on the question of whether the claim is sufficiently prompt. Often, the claimant says there is an error of approach in a reasoned decision and seeks a quashing order. But there are lots of variations from this model. A claimant may impugn inaction or a failure or refusal, and seek a mandatory remedy. The conduct under challenge, and the alleged default, may be of a continuing nature. Sometimes a defendant authority is 'functus' once a decision has been made and lacks jurisdiction to reconsider. More usually, the defendant public authority is able to review, reconsider and react. It is important that they should. Open-mindedness is a virtue. At the letter before claim stage, and after proceedings are commenced, a defendant may reflect and reconsider. Court proceedings and court hearings, and the costs associated with them, should be avoided if possible. Circumstances can change. There may be further exchanges of information and representations. New requests may be made and new responses written. If a new decision is adverse to the claimant, questions can arise as to whether a claimant needs to, and should be permitted to, amend the claim and grounds to challenge it. The case, for which the Court gave permission for judicial review, may be reshaped, narrowed or expanded. Issues can become 'water under the bridge' and there can be a lack of practical utility in analysing the past”.*

211. That analysis is apposite to the present case. I have referred earlier to the Claimant’s pre-action letter of 12 July 2024, in which the Claimant asserted the Defendant’s past failure to act and asked the Defendant to issue limitation notices to control overstocking in SSSIs where the level of grazing was causing harm. In my judgment, the Chairman’s Report, the Defendant’s meetings on 4 December 2024 and 22 January 2025 and the resolutions passed by the Defendant following those meetings would be seen by the fair-minded observer as the Defendant’s conscientious and open-minded response to the Claimant’s request. In those circumstances, and essentially for the reasons given by the Defendant which I have summarised above, I reject the argument that the Defendant’s resolutions of 4 December 2024 and 22 January 2025 are vitiated by apparent bias.

#### **Ground (8) – Abdication of statutory responsibility/fettering of discretion**

212. This ground is founded upon the following passage in the Chairman’s Report –

*“5.3 Furthermore, given that NE takes active steps to assess what it considers to be the correct stocking levels on SSSI-designated commons land, it seems unlikely that NE would consent to the issue of limitation notices which alter these approved stocking levels. Consequently, the Chairman's view is that it would be impracticable and inappropriate for [the Defendant] to seek to issue limitation notices in relation to any part of the commons which falls directly or indirectly into any SSSI designations”.*

213. The Claimant submitted that the Defendant is not able lawfully to fail to fulfil its statutory duties under sections 4 and 5 of the 1985 Act on the basis that another public body with different statutory powers and duties may take action. The Defendant has unlawfully fettered its own discretion to issue limitation notices under the powers conferred by regulation 9 of the 1990 Regulations, as is evident from paragraph 5.8 of the Chairman’s Report –

*“...even if that further work by NE revealed specific evidence concerning particular areas of common land where there is overgrazing, the Chairman's view is that the solution to any such problem lies in HLS negotiations and the future of ELM agreements, together with any further work undertaken or outcomes recommended by the LUMG. It would not lie in the issue of limitation notices”.*

214. In my view, the Claimant reads too much into the passage relied on in paragraph 5.3 of the Chairman's Report. Essentially, all that was said in that passage was that changes to the grazing regime on any common lands which also formed part of an SSSI were likely to require the prior consent of NE on an application made in accordance with section 28E of the 1981 Act. That seems to me to be correct as a general proposition. Indeed, as I have already noted, NE made essentially the same point in its summary grounds in response to this claim. The need for NE's prior consent to be obtained to changes in stocking levels would be capable of being a material consideration to the Defendant's determination whether it was expedient to issue a limitation notice in the circumstances of any given case. The Chairman's expression of his view on how NE might react to such an application cannot determine how the Defendant may choose to proceed, in a case in which it must decide whether it is expedient to issue a limitation notice. The practical difficulty of proceeding to issue a limitation notice, in circumstances where NE declines to agree to the required change in grazing levels on the affected unit of common land, is also at least potentially relevant to such a determination.
215. Essentially the same analysis applies to the passage relied upon in paragraph 5.8 of the Chairman's Report. *Ex hypothesi*, the question whether the view expressed by the Chairman in that passage would provide a proper basis for a decision that it was inexpedient to issue a limitation notice would be for the Defendant to judge in the context of the given case.
216. In neither passage relied upon in support of this ground, did the Chairman say that in the light of the factors that he mentions, the Defendant would or even should now decide that it will no longer in future be prepared to exercise its powers under regulation 9 of the 1990 Regulations. At the meeting on 4 December 2024, he was specifically asked to confirm that was not his advice. He did so, as the attendance note records.
217. For these reasons, ground (8) is not made out.

### **Disposal**

218. The claim succeeds on ground (2). The remaining grounds have not been made out. I shall now hear counsel on the question of relief in the light of my decision. I invite them to agree a proposed timetable for written submissions on that question and any other consequential matters.