

WHAT IS A MINERAL?

By Jonathan Gaunt QC

1. The origin of Mineral Rights

1.1 The starting point is that a freehold owner is entitled to all the mines and minerals under his land down to an unlimited depth except:

- gold and silver;
- petroleum;
- coal.

One consequence is that if a person sinks a shaft or a well or a pipe **at any depth** under my land, he commits trespass and can be sued for an injunction and/or damages.

1.2 The title to the minerals and to the surface can, however, be severed by:

- exception/reservation in a conveyance;
- grant;
- an inclosure award;
- enfranchisement of copyhold land;
- compulsory purchase of the surface (e.g. for railways or canals).

1.3 There is a distinction between a reservation/grant of “mines” and of “minerals”. If “mines” are excepted, the transferor keeps a stratum of the land. If he extracts the minerals underground, the tunnel is his. If he does not, the stratum is his. If anybody else enters or penetrates the tunnel or the stratum, that is trespass.

1.4 When the mines and the surface are severed, at common law the surface will enjoy an inherent right of support (subject to the terms of the grant) and the buildings on it or on adjacent land may acquire an easement of support by prescription if they have been there for 20 years.

1.5 Typically the grant or reservation of mines and minerals will contain:

- specified working rights;
- provisions as to subsidence (e.g. a right to “let down” the surface);
and
- provisions as to compensation for subsidence or damage to buildings.

The working rights may limit working to underground working or to surface working and may permit the working of the minerals to cause subsidence or prohibit it or provide for compensation for it.

2. Severance by Statute (Railways and Canals)

When land was acquired for railways or canals, “*any mines of coal, ironstone, slate or other minerals*” were excepted – so the undertaker did not have to pay for them - but, if later the mine owner wants to work the mine, he can serve a notice or approach; if the undertaker serves a counter-notice, he has to pay compensation, if he does not, the mine owner can work the mine; the common law rights of the surface owner are superseded. This is the effect of the “Mining Code”.¹

¹ Sections 77 to 85 of the Railway Clauses Consolidation Act 1845 as amended by the substitution of sections 78 to 85E by Part II of the Mines (Working Facilities and Support) Act 1923.

3. **Severance by Statute - Inclosure**

By a series of Acts of Parliament known as Inclosure Acts land within a manor which was the waste of the manor and therefore common land was converted into arable land and apportioned among the inhabitants of the district. The Act would appoint Commissioners who would implement it by an award under the powers conferred by the Act. Typically the mineral rights will have been reserved to the Lord of the Manor and will have devolved from him. His working rights may also be specified in the award. Precisely what substances have been reserved will depend on interpreting the Act and the Award.

4. **Severance by Enfranchisement**

4.1 Copyhold was a form of tenure by which land was held from the Lord of the Manor according to the custom of the manor. Copyhold land could be enfranchised and turned into a freehold by agreement between copyholder and lord or pursuant to statute. The last traces of copyhold were abolished by Part V of the LPA 1922, which enfranchised all remaining copyholds **BUT** preserved the mineral rights of the Lord of the Manor.

4.2 Copyhold is odd in that:

- (a) the copyholder was entitled to possession of the surface and the minerals; but
- (b) title to the minerals was in the lord.

So neither lord nor copyholder could work the minerals without the agreement of the other.

4.3 This predicament was addressed by the Mines (Working Facilities and Support) Act 1923 which enabled a mineral owner to apply for the grant of

ancillary working rights in return for paying compensation to the surface owner. The relevant Act is now the Mines etc Act 1966 which enables the Court to grant ancillary rights and award compensation. Compensation is assessed on compulsory purchase principles (including the Pointe Gourde rule) and so does not include any ransom value.

- 4.4 The other thing to note about enfranchised copyhold land is that:
- (a) the mineral rights of the Lord are very widely defined specifically to include limestone, lime, clay, stone, gravel, pits and quarries as well as any mines and minerals, with wide working rights; but
 - (b) the surface owner is expressly empowered to disturb or remove the soil for making roads, drains, erecting buildings or obtaining water.²

5. **Construing “Other Minerals” in a Statute or a Deed**

5.1 What minerals and rights are reserved or conferred depends on the words of the Deed or the Statute, which will often contain a list of specified substances followed by “*and other minerals*”. The question then is what is meant by “*other minerals*”? There is a large body of law on this which essentially says that it all depends on context. There are three major tests which are equally applicable to statutes and deeds:

- (1) the Exceptionality Test;
- (2) the Vernacular Test;
- (3) the Working Rights Test.

² LPA 1922, Schedule 12, para (5).

5.2 Historic examples:

Not a mineral;

brick clay;
 sandstone;
 natural gas;
 sand and gravel;
 oil and natural gas
 (in 1880 and 1935 grants).

A mineral:

China clay;
 Fire clay

 Oil and gas
 (1936)

5.3 A modern example of the application of these tests:

Coleman v Ibstock Brick Limited [2008] EWCA Civ 73.

6. Common Problems

6.1 *Foundations, drains, site levelling:*

If there is a mineral stratum near the surface which does not belong to the surface owner, the penetration of that stratum will be a trespass which can prima facie be restrained by injunction. The developer will therefore have to do a deal with the mine owner who will hold out for a cut of the development profit. This will raise in an acute form the question – “Is it a mineral?”.

6.2 *Directional drilling:*

If I drill from my land into my neighbour’s at whatever depth, that is a trespass. This was established by the House of Lords in Bocardo v Star Energy [2011] 1 AC 380. That posed an insuperable problem for fracking and resulted in sections 43 to 48 of the Infrastructure Act 2015, which gives a person a right to use deep level land (at least 300 metres below the surface) for exploiting petroleum³ or deep geothermal energy.

³ Defined to include natural gas.

6.3 *Who owns the hole?*

It is well settled that a mine owner owns the space created by the underground extraction of minerals. But suppose he was entitled to work and has worked minerals from the surface by quarrying, leaving a pit? Who owns the pit?

- Is it the surface owner, because the surface is now the bottom of the pit and he owns the air space above it? Or
- Is it the mine owner because he owns the space from which the minerals have been extracted and, until the hole is filled, there is no surface?
- Or do both have an interest in the hole?

6.4 *Minerals in solution*

There is no property in underground water flowing in undefined channels. A person may therefore sink a well in his own land and extract as much water as he likes, even if that leads to subsidence of his neighbour's land, or drains it, or deprives it of a source of water. Likewise he cannot object if his neighbour sinks a well in his land and subjects him to the same consequences.⁴

6.5 If a person sinks a well in his own land and extracts brine which contains salt or some other valuable mineral, the same rule applies. It does not matter if the brine flows from beneath his neighbour's land or contains in

⁴ *Gale on Easements*, 20th Ed, para 6-27; Chasemore v Richards (1859) 7 HLC 376; Stephens v Anglia Water Authority [1987] 1 WLR 1381 (CA) where the Court of Appeal stated: "As the law stands, the right of the landowner to extract subterranean water flowing in undefined channels beneath his land established by Chasemore v Richards and Bradford Corporation v Pickles [1895] AC 507 appears to us ... to be exercisable regardless of the consequences, whether physical or pecuniary to his neighbours."

solution a mineral which, before it was dissolved, belonged to his neighbour.⁵

6.6 It would probably be otherwise if the landowner were to pump down water in order to dissolve and extract mineral deposits existing under his neighbour's land. That would probably amount to trespass both to land and goods.⁶

30th January 2018

⁵ The Salt Union Limited v Brunner, Mond and Co [1906] 2 KB 822.

⁶ See The Salt Union case at page 831.