Free to frack?

Paul Stafford examines the consequences of the Act for landowners, including the significant loss of common law rights

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The Infrastructure Act 2015 (the Act) came into force in the closing weeks of the coalition government. The scope of the Act was broad and included transport, housing development and nationally significant infrastructure projects. Towards the end of the long title appeared the words:

> ... to make provision about maximising recovery of petroleum in the United Kingdom... [and] to make provision about onshore petroleum.

While attention has understandably focused on the statutory principal objective of maximising the economic recovery of UK petroleum, which will now be promoted through the Oil and Gas Authority created by the Energy Act 2016, there appears to have been relatively little notice given by Parliament or the press to the impact which the onshore petroleum provisions would have on common law rights, which the courts have long recognised as entitling landowners to sue in tort for trespass, nuisance and that aspect of nuisance based on *Rylands v Fletcher* [1868]. That impact is significant. The provisions are designed to help energy companies advance hydraulic fracturing (fracking) operations free of the more onerous legal restraints that the common law would otherwise have imposed. That freedom has been conferred at the expense of landowners, great or small, and occupiers of land adjacent or close to the site of operations.

Before the Act: the position at common law

This can best be understood from the Supreme Court decision in *Star Energy Weald Basin Ltd v Bocardo SA* [2010]. The facts of *Bocardo* did not concern fracking but involved the technology of directional drilling that, crucially, will be used by energy companies in fracking operations after the initial stages of drilling for shale gas or shale oil. Directional drilling occurs when a pipe is sunk vertically from a surface site and then, at a certain level beneath the ground, the pipe is extended horizontally or at an angle from the vertical section so that it travels beneath land owned or occupied by persons other than the owner of the surface site where the drill rig is located. With government licensing consents, Star Energy had over a period of years used directional drilling deep underground to extract oil from beneath Bocardo's land. It had done this without Bocardo's permission but, according to the trial judge, its operations made not one iota of difference to Bocardo's use and enjoyment of its land. The judge found, however, that the process of extracting the oil through pipes beneath Bocardo's land amounted to trespass, and the Supreme Court agreed. Lord Hope said at para 27h that:

> ... the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of them by a conveyance, at common law or by statute to someone else.

A trespasser to land may often be required to compensate the innocent party in damages. While the judge had awarded £621,180 to Bocardo as 9% of the value of the oil extracted, the Supreme Court reduced that figure to £1,000 by way of nominal damages. It did so on the basis that fair and reasonable statutory compensation to Bocardo as (unwilling) grantor of

access to the land under s8(2) of the Mines (Working Facilities and Support) Act 1966 should be approached in the same way as compensation for compulsory land acquisition. This was to be measured not by what the energy company was gaining but by what Bocardo was losing. Since Bocardo had never owned the oil because the Petroleum Production Act 1934 vested all UK oil and gas in the Crown, it had lost nothing. Hence it was entitled to no more than nominal damages.

However favourably disposed the *Bocardo* decision may be to the use of deep-level directional drilling to extract oil, it raised a major problem for energy companies intending to extract shale gas or shale oil through fracking operations. The Supreme Court had rejected the argument that a pipe entering land 800ft below its surface did not amount to trespass. The failure to dislodge the finding of trespass meant that directional drilling would always involve trespass on another's land as soon as a pipe entered strata underlying the surface of that land, no matter how deep that pipe was laid. No matter that the damages were nominal, the trespass would remain unlawful. The consequence would be that a landowner who could establish that the path of directional drilling would run or was likely to run beneath their land could apply to court for a prohibitory injunction preventing an energy company from trespass by sending its pipe in that direction. The uncertainty which such an application could create for an energy company, particularly when neighbouring landowners worked together to create a subterranean no-go area around the drilling site, would render the commercial exploitation of fracking unattractive or impossible.

There was also a second problem for energy companies not raised by the trespass finding in *Bocardo*. This was the issue of nuisance. *Bocardo* had involved the relatively simple process of directional drilling to extract oil from an underground reservoir beneath neighbouring land – but no fracking. However, when fracking is involved, the lateral or angled pipes required for directional drilling are used for high-pressure release of fracking fluid intended to disturb the surrounding shale strata to release shale gas (or oil) for collection within those same pipes. This will normally take place beneath the surface of land adjacent to or near the drilling site, and in most cases that land will be owned by those who have not given their consent to the fracking activity going on below.

The nature of fracking and its impact on neighbouring land and landowners made the energy companies vulnerable to prohibitory injunctions based not only on trespass but on nuisance as well. Such injunctions could also be directed against the owners of land who had agreed to allow energy companies to conduct fracking operations from their land. The evidence in support of the injunction could, in principle, include the US experience of fracking, where there have been instances of it causing significant environmental damage to nearby land and injury to people on that land. The reported damage included contamination of water, leakage of methane, and seismic activity (ie minor earthquakes). The injury associated with the damage included nosebleeds, rashes and respiratory problems. While that evidence could be criticised on the basis that it mostly came from the US and from the early years of the century when US fracking was lightly regulated, it could not be dismissed altogether.

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Before the Act: the government's approach

In September 2011 there were two minor earthquakes, measuring 1.8 and 2.3 on the Richter scale, which took place near Blackpool following drilling in the Lancashire Bowland shale by the energy company Cuadrilla. This generated widespread public concern and led to a government moratorium on fracking operations pending the outcome of expert investigation into the Blackpool incident and the safety of procedures used. That investigation was conducted by the Royal Society and the Royal Academy of Engineering. In their June 2012 report entitled *Shale gas extraction in the UK: a review of hydraulic fracturing*, they concluded that:

> ... the health, safety and environmental risks associated with hydraulic fracturing (often termed 'fracking') as a means to extract shale gas can be managed effectively in the UK as long as operational best practices are implemented and enforced through regulation.

See www.legalease.co.uk/shale-gas.

After the report, the government decided that fracking should continue. The government did not accept that the US experience was a reliable guide to what would happen in England and Wales and concluded that fracking is a low-risk activity. It gave two main reasons to support this conclusion. First, experience and technology had developed to the point where fracking could be considered safe. Second, England and Wales have in place an effective regulatory framework to which energy companies would be subject and which would consider all relevant risks in the pre-fracking process.

In May 2014, the Department for Energy and Climate Change issued a consultation paper seeking responses to a proposal to grant a right of underground access to land below 300m from the surface to companies exploring and/or extracting oil, gas or geothermal energy. (The extraction of deep geothermal energy takes place through drilling pipes into aquifers to extract hot water from deep-level land. This may involve directional drilling but not fracking.) The consultation drew 40,647 respondents, 99% of whom opposed the proposal to grant access. The 1% supporting the proposal included the energy companies. Unsurprisingly, the government maintained that existing procedures were 'costly, time-consuming and disproportionate for [the oil and gas]

industries' and introduced legislation that became the Act.

The right to use 'deep-level land'

The provisions concerning energy are set out at Part 6 of the Act at ss38-53. Critics may well come to regard ss43 and 44 as a frackers' charter. Under s44(8), both sections bind the Crown, which means that the Crown is in the same position as any other landowner who, but for those sections, would otherwise have been able to claim their land was subjected to trespass or that they suffered loss or damage to their land as a result of fracking operations.

Section 43(1) introduces a new right 'to use deep-level land in any way for the purposes of exploiting petroleum or deep geothermal energy'. Deep-level land is defined by s43(4) as 'any land at a depth of at least 300 metres below surface level' and must, by s43(2), be 'within a landward area'. The right is granted to 'a person', which in practice is likely to mean an energy company, and deep-level land within a landward area can be used to exploit petroleum or deep geothermal energy 'outside a landward area' – in other words beneath the seabed: see s43(3). (For the purpose of deciding whether land is deep-level land, provisions about measurement are given at s48.)

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The effect of s43 is to reduce common law rights incidental to surface ownership by a far-reaching limitation of the circumstances in which the surface owner can claim trespass and pursue injunctive relief and/or damages. The finding of trespass in *Bocardo* could not be made again against an energy company whose pipes pass beneath another's land at a depth of 300m or more. However, trespass can still occur at a depth of less than 300m – with the consequence for energy companies that they will need to allow a sufficient margin of error in their assessment of the depth of lateral or angled pipes to ensure that they are well below 300m at all times. Trespass can also occur if fracking liquid ejected from those pipes rose upwards to a depth of less than 300m. Accurate monitoring of the depth of pipes, and of fracking liquid ejected from those pipes, will be of critical importance both for the energy company and for neighbouring landowners in the event of any dispute where trespass is alleged.

How the right to use deep-level land may be exercised

Subsections 44(1) and (2) describe the ways in which the right of use may be

exercised and for what purposes. The right of use is confined to deep-level land and the list of ways and purposes is not exhaustive. If at some future date other ways or purposes outside the list emerge, it will be arguable whether they are sufficiently close to the described ways and purposes as to come within the scope of the two subsections. It is not easy to predict what approach a court may take to such a question because the two subsections already cover a broad range of ways and purposes and a court may be reluctant to extend them further in circumstances where extension would involve cutting down the common law rights of affected landowners.

The ways listed in s44(1) include drilling, boring, fracturing or otherwise altering deep-level land; the installation, keeping, use and removal of infrastructure; and putting any substance into deep-level land and subsequently removing it. The government's explanatory notes to the Bill for the Act add:

> This allows, for example, for a company to drill and use a well in deep-level land for the purpose of exploiting petroleum or deep geothermal energy, pass substances through that well and remove any substances that are put into it.

Section 44(2) purposes include searching for petroleum or deep geothermal energy, assessing the feasibility of exploitation, preparing for that exploitation and decommissioning.

The scope of the right of use is further extended by s44(3) to include the right to leave the deep-level land in a different condition from the one it was in before the right was exercised. Thus the energy company can leave infrastructure or any other substance in the deep-level land after drilling operations cease. This extension in s44(3) is followed by a limitation in s44(4) to the effect that the scope of the right of use is no different from a right granted by a person, such as a landowner, who is legally entitled to grant it. The explanatory notes attempt to cast further light on this otherwise bemusing provision by saying that energy companies must comply with all applicable planning and regulatory regimes.

Statutory exemption for landowners from tortious liability

While the provisions in s43 and in s44(1)-(4) deal with the right of use given to the energy company, s44(5) deals with the position of a landowner who co-operates with the energy company by leasing their land to the company so that it can search, drill, bore and get petroleum or deep geothermal energy. Section 44(5) provides as follows:

> A person ('L') who owns land (the 'relevant land') is not liable, as the owner of that land, in tort for any loss or damage which is attributable to the exercise, or proposed exercise, of the right of use by another person (whether in relation to the relevant land or any other land).

The statutory exemption extends to any loss or damage 'in tort'. It therefore encompasses different causes of action, although it appears principally aimed at nuisance. But for the Act, and without any negligence on their part, a landowner could at common law be liable to neighbouring landowners or anyone suffering damage as a result of escape from their land of a non-natural substance which they have allowed to accumulate there. The liability arises under the rule in *Rylands*, which is an aspect of the law of private nuisance. The non-natural substance escaping from the landowner's land would be the fracking fluid injected from the wellhead for release at points along the pipe where the fluid could fracture the surrounding strata. That fracture (ie the fracking) would cause shale gas to be released, and while some if not all of it would be taken back into the pipe, some of it would rise upwards through the strata to the surface of land owned by others. (The US experience was that such operations could result in methane emissions at the surface or entering water in aquifers and polluting water on the surface.) The landowner accommodating the wellhead, who could otherwise have been liable under *Rylands* for damages or, perhaps, have been respondent to an application for injunctive relief to prohibit the fracking, will be free of such sanctions due to s44(5).

However, there is a qualification to the s44(5) exemption under the two following subsections. Under s44(6) and (7), the landowner will not escape liability if they deliberately decide not to do an act or not to allow another person to do an act, and the circumstances at the time of that decision were such that they would not have had to bear 'any of the costs incurred' in doing or allowing that act. In other words, if the landowner must spend money taking steps to prevent loss or damage to another, they will not be liable if that loss or damage occurs and they have not taken those steps.

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Conclusion for practitioners

At the time of writing, fracking in England has mostly progressed from explorational drilling to planning decisions by local authorities with further operational activity yet to come. The courts will soon need to determine disputes between energy companies and landowners, large and small, involving issues of trespass and nuisance arising from proposed or actual fracking activities. Insofar as they relate to exemption from liability for trespass, nuisance and possibly other torts, it remains to be seen how effective the Act's provisions turn out to be. But it seems likely that they will provoke fierce argument and that there will be real uncertainty about their application. ■

Rylands v Fletcher
[1868] UKHL 1

Star Energy Weald Basin Ltd & anor v Bocardo SA
[2010] UKSC 35