THIRD PARTY MINERAL RIGHTS

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1. This paper is the published version of a talk given to solicitors invited to a breakfast briefing at the Supreme Court on 29 June 2018. It addresses current features of the land registration system in relation to third party mineral rights - i.e. the situation where A is the registered proprietor of a given plot of land while B is the owner, or claims to be the owner, of rights to minerals beneath the surface of A's land.[1]

2. The material considered includes the following:

    - Law Commission Consultation Paper 227 *Updating the Land Registration Act 2002* (published early 2016) ('CP 227')
    - Responses from the Law Society and the Bar Council to CP 227
    - Land Registry Practice Guide 65 (edition April 2018) ('LRPG 65')

3. Although the term 'mines and minerals' occurs repeatedly throughout this paper, the focus will be on minerals.

The meaning of 'minerals'

4. There is no precise definition of the word 'minerals' in English law. Whenever the question of third party mineral rights arises, there will be a document in which the word 'minerals' will appear. The meaning of the word will be a question of fact. The document will need to be construed in accordance with the line of authority starting with *ICS v West Bromwich BS* [1998] 1 WLR 896. There is a host of case law about the meaning of the word 'minerals' in different contexts.[2]

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[1] Shortly before this paper was completed, Mr James Maxwell of Farrers kindly provided me with the published version of his lecture entitled *"Underground Overground" Minerals and Profits* given on 18 June 2018 as part of the Blundell Lectures. It is an important contribution to our understanding of recent developments in this area of the law and will be widely appreciated by practitioners in the field.

[2] This has been comprehensively analysed by Mr Martin Dray in his lecture *The Interpretation of Minerals* also given as part of the 2018 Blundell Lectures.

The problem

5. In the words of the Law Commission:

> It is often difficult to ascertain who owns the mines and minerals below a given plot of land. (CP 227, para 3.35)

6. Responding to the Consultation Paper on behalf of solicitors, the Law Society agreed and noted:

> The law relating to mines and minerals is complicated and there is a general lack of understanding of it by practitioners who do not encounter it on a regular basis (LS Response to CP 227 at para 19)

7. Although practitioners may not encounter mines and minerals on a regular basis, there is the potential for most transfers of land to be affected by third party mineral rights. Those rights are something which every practitioner should consider when acting or advising in relation to every surface transfer.

Current registration arrangements for estates in minerals

8. The features set our below are not a comprehensive list, but they help explain why solicitors often find the subject of minerals law to understand. As important, and perhaps more worrying, they suggest that current land registration arrangements for minerals are not fit for purpose.

9. First, most estates in mines and minerals held apart from the surface are unregistered and there is no requirement that they must be registered: see Land Registration Act 2002, s 4(9).

10. Second, on the surface title there is normally no mention that the title includes mines and minerals.

11. Third, the surface title will not refer to any subterranean title involving mines and minerals, and if there is a subterranean title it will almost certainly be no more than a qualified title.

12. What do solicitors make of this? The Law Society has said that where there is absence of an express entry on the registered title, practitioners have tended to assume mines and minerals are automatically presumed to be included in the surface title.

> There is little or no appreciation on their part that the presumption of subterranean strata being included in the surface title is capable of being rebutted post registration of the surface title; that there is no compulsory registration requirement for mines and minerals titles nor that the Land Registry does not make a note of a conditional mines and minerals title on the corresponding surface title. (LS Response at para 20)
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> About 15 months ago there was correspondence passing between members of the Association of Property Support Lawyers, … about the lack of any notation on the surface title of a registered qualified mines and minerals title beneath it. These letters illustrate the lack of understanding amongst conveyancers. It generated a lot of interest in the topic.

13. Fourth, the Land Registry's own uncertainty about minerals ownership is reflected in the fact that it rarely registers absolute title to mines and minerals. A qualified title does not prejudice the enforcement of rights existing before the date the qualified title is first registered and recognises that ultimate ownership lies elsewhere.[3]

14. Fifth, Land Registry's current practice is to notify surface owners of an application to register an estate in mines and minerals under their land only if it is proposed to register absolute title to the mines and minerals. This means that a qualified title to mines and minerals can be registered without the knowledge of the surface owner, and thus the surface owner is given no chance to object to this registration. As noted above, it is more likely that mines and minerals will be held as a qualified title and therefore notice will not usually be given under current practice. This contrasts with the position where a unilateral notice is entered on the register of the surface title to protect an interest in mines and minerals which comprises a manorial right, when the registered proprietor will be automatically notified.[4]

15. There is nothing I have seen in the current edition of LRPG 65 to suggest that the practice has changed. If so, it is a remarkable state of affairs because a landowner could discover that they do not own all the strata beneath their land at a time when they may be marketing the property or using it as security for funding.

16. And sixth – the sting in the tail - in relation to mines and minerals, the scope of the LRA 2002 indemnity is very limited. Paragraph 8 of Schedule 2 provides:
No indemnity is payable under this Schedule on account of – (a) any mines or minerals, or (b) the existence of any right to work or get mines or minerals, unless it is noted in the register that the title to the registered estate concerned includes the mines or minerals.

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3 CP 227, para 3.24; LRPG 65, para 2.2.

4 CP 227, para 3.39.

17. So if you buy land and the surface title is silent about mines and minerals, and there is no note in the register that title is included, you get no indemnity from the LR if someone later comes along and applies to register a separate title to mines and minerals. (LC 227, para 3.34) Or if you find that there is a separate, qualified title to the minerals beneath the surface title. That has clear implications for Professional Indemnity insurance. It may be sensible not only to inform clients of the uncertainties connected with mineral rights registration but also to advise some clients to get title insurance when purchasing a plot. That will probably not be necessary in every case, but wherever significant development of the plot is in prospect then it may be sensible to seek such insurance so that the client is protected from loss arising from a subsequent claim to mineral rights affecting their surface title.

Why is it often difficult to find out who owns minerals?

18. Part of the answer is simply that an unregistered estate in mines and minerals held apart from the surface of the land can be [5] but does not have to be registered. [6] The reason for that is past unwillingness by legislators and lawyers to tackle the problem, or perhaps a failure to appreciate how significant the problem can be. But another part of the answer is that the Land Registry's procedures are surprisingly unhelpful in terms of notifying surface owners, or prospective surface owners, that the land that they own or are intending to buy is or may be affected by mineral rights vested in or claimed by others.

19. According to the Land Registry, most of the problems surrounding the registration of minerals (and mines) relate specifically to estates in minerals [7] as opposed to rights in mines and minerals flowing from easements or profits a prendre (such as the grant of a right to enter on land and extract minerals). These are not classified as an estate in fee simple and therefore cannot be registered with their own title. [8] As LRPG 65 points out, such a right may be registered if it is in gross,[9] and it must be registered where the grant is out of registered land (except where the right can be registered under the Commons Registration Act 1965). But the non-registration of a right in gross may cause similar confusion to the non-registration of an estate.

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5 'Mines and minerals' is 'land' for LRA 2002 purposes: see s 132(1).

6 LC 227, para 3.22; s 4(9) LRA 2002.

7 (LC 227, para 3.20)

8 LRA 2002 s 3(1)(a).

9 See LRPG 16 on Profits a Prendre.

20. A further element of confusion may result from the potential for misunderstanding of the Supreme Court decision in *Bocardo v Star Energy* [2011] AC 380; UKSC 35. Lord Hope said that the proposition that the surface owner owns all the strata beneath his plot and the sky above it still has value in English law albeit as an imperfect guide. But the qualification that it does not apply to the land beneath the surface, the substrata, because it may be owned by someone else or claimed by someone else, was perhaps not spelt out as clearly as it could have been. The proposition is therefore no more than a rebuttable presumption, with the burden of rebuttal lying with the party claiming the minerals.

How mineral rights are created

21. Mineral rights can arise in different ways, most commonly by express grant or reservation. LRPG 65 lists what the different ways are. There are three broad categories, and the first of these presents no difficulty.

(1) Minerals belonging to Crown and public bodies

- Crown grants, usually with reservations in favour of the Crown
- Gold and silver
- Coal - vested in Coal Authority
- Oil and gas – by s 1 of Petroleum Act 1998 (in the same terms as s 1(2) of Petroleum Production Act 1934)

(2) Rights deriving from manorial ownership and copyhold

There is a series of historic or manorial tenures which could give the owner of land the right to minerals beneath it:

- Ancient demesne
- Ancient freehold
- Customary freehold
- Tenant Right
- Copyhold

Discussion of the first four of these tenures is beyond the scope of a paper on minerals and they will only occasionally be encountered. If any of them apply then, as LRPG 65 says, it is difficult to know which one. But by far the most important is copyhold. As LRPG explains, copyhold was a form of tenure affecting **large areas** of the country that was abolished on 1 January 1926 by the Law of

Property Act 1922. The most common situation governing the ownership of mines and minerals under copyhold land was that the property in the minerals was with the lord of the manor but the lord could not work them without the consent of the copyholder.

Although copyhold was abolished in 1926, enfranchisement – i.e. the process by which copyhold was converted into freehold – had been operating for hundreds of years before that. Land could be sold out of a manor as freehold or possibly leasehold, and in the deed of grant effecting that sale there would almost certainly be a reference to ownership of mines and minerals. On enfranchisement of the copyhold, whether under the Copyhold Acts of 1841, 1852, 1858 and 1894, or the LPA 1922, the position of the lord and tenant regarding mines and minerals was generally preserved by way of appropriate reservations implied by the relevant Act. Occasionally, however, the position regarding mines and minerals was specifically dealt with by the parties on enfranchisement. On enfranchisement at common law the mines and minerals usually passed to the copyholder but might be dealt with otherwise in the deed of enfranchisement. It is not always apparent from deeds of enfranchisement whether the enfranchisement was at common law or under one of the Copyhold Acts.[10]

So in every case the source of the rights is either a deed made at common law or pursuant to one of the Copyhold Acts; or the source is the statutory enfranchisement of the 1922 Act, which expressly preserved the lord's right to mines and minerals.

The manorial system has been in progressive decline since 1290 with the end of sub-infeudation and the right to free alienation of land enacted by the statute of *Quia Emptores*, which remains in force today. Land sold by a lord out of a manor went out of the manor for ever, and there may be instances of land grants where the right to mines and minerals was given to the grantee. But in every case, it will be a question of construing the instrument in the context of the facts.

(3) Inclosure

From an evidential point of view, this particular head is closely linked to the previous one because records about it are likely to be found in the same place as manorial records. As LRPG 65 puts it:

> Where land was the subject to an Inclosure Act or Award the ownership of the mines and minerals may be dealt with by that Act or Award. The inclosure may have taken place as long ago as the 1700s and may not be referred to in later deeds but will still determine questions of ownership.

10 LRPG65 at 3.2.

This rather brief statement in the LRPG 65 makes no allusion to the difficulty of identifying a relevant Inclosure Act and Award and the even greater difficulty in understanding it. The Parliamentary enclosure movement covered a period of over 300 years, and there were some 5341 private acts in England and 229 in Wales. Most, though not all these Acts, were followed by Awards which redistributed lands held within a manor, sometimes including waste, and allotted it as freehold, leasehold or copyhold. Reading the text of an 18thC award, understanding its plans and annotations, and matching those plans and annotations to modern maps or plans, is a time-consuming business.

The extent of the problem

22. If, as the Law Commission say, it is often difficult to ascertain who owns the minerals beneath a given plot of land, so what? Does it really matter?

23. The Law Society was in no doubt that it mattered a good deal. The lack of visibility of mines and minerals titles is having an adverse effect on the development of land. This is what it said:

> [31] Since the reported decision of *Bocardo SA v Star Energy* [2010] UKSC 353 developers and their funders have become wary of the prospect of challenges by third parties alleging that ground investigations, subterranean services or foundations have resulted in a trespass on their mines and minerals title.
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> [32]. With mines and mineral titles largely unregistered, when faced with a surface title that is silent on whether or not it includes mines and minerals, developers and their funders are tending to err on the side of caution and developments are being put on hold whilst a comprehensive ground survey is undertaken in an attempt to identify whether or not there are any mines and minerals under the surface and an assessment made of the prospect of another party claiming ownership of them.
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> [33]. Whilst indemnity insurance may provide some financial comfort, the reality is that if a claim creeps out of the woodwork the resultant delay to the development is on average between 12 to 24 months whilst the parties try to reach a commercial settlement.
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> [34]. The issue here is the uncertainty and the additional costs and delays resulting from the invisibility of mines and minerals titles.

24. In addition to the adverse effect on the development of land, there has also been a second feature – namely that the 2002 Act has been to give mineral rights much greater prominence than they had before in terms of their presence on the register.

25. Section 117 of the LRA is headed 'Reduction in unregistered interests with automatic protection'. The unregistered interests concerned were those which override registered dispositions or first registration. They included manorial rights and certain rights to mines and minerals created where the surface title had been registered before 1926. The Act gave 10 years, ending on 13 October 2013, for such rights to be registered whether as unilateral notices or cautions against first registration. If not registered, they would lose priority on a registered disposition or first registration.

26. This created difficulty for large landowners The Land Registry in 2013 had to employ additional staff to deal with a huge increase in applications from those who claimed manorial or mineral rights to register cautions and unilateral notices. In the case of the notices, the owners of the titles affected were informed by letters from the Land Registry in language which most of them found incomprehensible. A group from Anglesey, with another from Hertfordshire, complained to their AMs or MPs which in turn led to the House of Commons Justice Select Committee starting an enquiry into the law of manorial rights. I was invited to give evidence to that enquiry in circumstances where political and academic pressure was growing for the abolition of manorial rights. Fortunately, in my view, the Committee's report accepted my evidence that alarm had been caused unnecessarily by the language of the Land Registry letters and that manorial rights were not the last bastion of feudal privilege but property rights protected by Article 1 Protocol 1 of the Human rights Act 1998.

27. So the position now is that mineral and manorial rights are much more strongly represented on the register even though 'existing titles to estates in mines and minerals are often unregistered and the land registration system allows this to remain the case'. [11] The greater prominence of mineral rights on the register as a result of s 117 has already led to major litigation where a large landowner in possession of a mineral rights estate has brought a substantial claim against a government agency which has been extracting those minerals over many years without payment to the owner. There is no reason why other large landowners should not have similar claims.

28. What I hope by now to have persuaded you of is that the current system of land registration of mineral rights has very serious deficiencies. It is no exaggeration to say that it is barely fit for purpose. Reading between the lines of CP 227, I think the Law Commission recognise that too. They say that problems concerning questions of ownership of mines and minerals go beyond their remit of a review of the LRA 2002 but nevertheless suggest some modest improvements to Land Registry procedures that will provide better information on the register. Both the Law

11 CP 227 at 3.36.

Society and the Bar Council in their responses to the consultation welcomed those suggestions.

29. I understand that the Law Commission's final report on its review of the LRA 2002 is due to be published within weeks. It will be of particular interest to see what it says about the registration of mineral rights.

Challenging minerals title

30. Whenever anyone claims title they can be put to proof. There is a burden of proof not only for title but also for claiming that a particular substance is a mineral that falls within the grant or reservation or other source of the claimed right. That burden rests with the claimant.

31. For anyone faced with an unwelcome claim to mineral rights where there may be a caution or notice, the claim can be challenged by asking the claimant to produce sufficient evidence relating to the grant, reservation, enfranchisement of copyhold, or inclosure act or award. Many mineral rights claims are based on manorial title of some kind, and that also provides a further line of interrogation. I have written extensively about challenging manorial title in an article published in the *Property Law Journal* in June 2011 which is posted on the Ten Old Square website.

32. Where there is a qualified title, a similar process of interrogation can be made because the title is not absolute. If the title cannot be challenged, the identity and extent of the minerals may still be questioned, and that can lead to negotiation and settlement.

33. There are two things to take away from this paper: (1) Be very careful with minerals. (2) Keep in mind that this is likely to be a growing source of work!

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