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Digging deep

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Venetia Taylor explores the rights of landowners in the England and Wales when minerals are found beneath their property

Coal miners in 19th-century Cornwall were aware of the presence of lithium in the Cornish geothermal brines but were not interested in mining it as it had no value (except as a mood stabiliser) at the time. Today, lithium is suddenly more valuable than it has ever been before, used in the production of mobile phone and car batteries. Modern-day land and mineral owners above Cornwall's geothermal granites could be in for a windfall, if this previously uninteresting mineral is now reachable, as any mining operations will require their consent and cooperation to dig. Landowners in England and Wales are presumed to own the air above their land and the soil beneath it, *usque at coelum et ad infernos* ('up to heaven and down to hell', *Bury v Pope*),¹ absent evidence to the contrary. Theoretically, it would be a trespass for anyone to make incursions not only to the surface but also to the air above it at any height and soil beneath it at any depth.

This simple maxim has been eroded by statute and the common law so that it is not a trespass for aircraft to fly over your land, a crane to overhang it² or for a third party to drill for oil beneath it.³

Certain parts of the substructure are reserved to the Crown, such as gold, silver, petroleum in its natural state and buried treasure. Coal is reserved to the UK Coal Authority. Further exceptions occur where an earlier vendor has withheld ownership of the underground minerals on a conveyance of the surface, or where the land remains subject to certain manorial rights (if it was former copyhold, for example). Copyhold tenure was similar to a modern leasehold; the copyholder was in occupation of the land, but held it subject to the interests of the lord of the manor. All copyholds were gradually converted to freeholds in the 19th century, but rights retained to this day by the lord of the manor could include ownership of underground minerals.

Minerals have potential value. Even if the minerals themselves are worthless, the ability to prevent others accessing the substructure can be leveraged. The owner of the minerals beneath a proposed development site must be paid compensation for the 'disturbance' caused by laying foundations, for example.

¹ (1587) Cro Eliz 118

² *Pickering v Rudd* (1815) 4 Camp 216

³ *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35 and s.43(4) of the *Infrastructure Act 2015*

Despite these qualifications, the general presumption remains that, unless mineral rights have been actively separated from the surface ownership, they remain with the landowner.

Registration

Ownership of mines and minerals is registrable at the Her Majesty's Land Registry (the Registry). Where they have been registered, it will be immediately obvious to a surface owner on a purchase of land. If the minerals ownership has not been separately registered, it may be clear on the face of the title to the surface, as the Registry will often state that, by an earlier conveyance, the mines and minerals are reserved.

If the Registry has not noted any minerals reservation on the registered title, the minerals owner can enter a notice on the title unilaterally. Following a change in the treatment of mineral rights by statute, under the *Land Registration Act 2002*, any minerals owner who has not noted their interest will lose it if it is not noted before the land is next transferred at market value. This is in order to give landowners certainty that the registered title records all interests to which their ownership is subject. The owner of land transferred at market value since 12 October 2003, with no notice of minerals interests on his title, can be certain that they own the minerals beneath his land.

Mineral rights over unregistered land can be protected by a caution against first registration (by reference to a plan). This would ensure that the interest is noted on the title when registration occurs. Until then, anyone attempting to go onto the land to mine for the minerals would have to undertake certain searches that would reveal the caution.

What are minerals?

Everything turns on the wording of the reservation, which all too often refers simply to 'mines and minerals' or 'all mineral substances'. These terms are 'susceptible of limitation or expansion according to the intention with which they are used'.⁴ The correct interpretation will vary widely depending on local geology and custom. In determining the extent of the reservation, a court will ask what the term would have meant to those who drafted it (without reference to any scientific definition). It is presumed that whatever is being reserved is not the 'ordinary soil of the district' but substances 'exceptional in use, in value and in character'.⁵

In *Alan Coleman v Ibstock Brick Ltd*,⁶ the England and Wales Court of Appeal had to decide whether a reservation for 'ironstone and other metals and minerals' included brickshale and fireclay. It was decided that neither substance was a 'mineral' according to the vernacular of the time; they were not valuable substances or exceptional in any way, as they were 'ubiquitous in the area'.

Furthermore, unless the wording of the reservation specifically states that the rights to enter the surface land and dig are included, the minerals' owner will not be able to extract them. Surface owners are entitled to support for the surface land in its actual position and in its natural condition without disturbance by mining operations.⁷ Surface

⁴ *Glasgow v Farie* [1888] 13 App. Cas. 657

⁵ *Waring v Foden*[1932] 1 Ch 276

⁶ [2008] EWCA Civ 73

⁷ *Butterknowle Colliery Company v Bishop Auckland Co-operative Society* [1906] A.C. 305

owners concerned that their land will be injured or destroyed by underground workings can seek an injunction to prevent works from going ahead.⁸

Even if a court decided lithium was not a 'mineral' for the purposes of a particular reservation, a minerals owner would be due compensation for the disturbance of other minerals as a side effect of the lithium mining. Such owners would be invited to enter option agreements with the mining company. These might offer one-off premiums or an amount per tonne of lithium extracted.

This is a very brief introduction to mineral rights and option agreements. No two mineral reservations act in the same way, so thorough research and good professional advice are advised in all cases.

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⁸ *Hext v Gill* [1872] 7Ch App 699