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Dealing with uncertainty: minerals and land registration

Blundell Lecture - James Maxwell

Dealing With Uncertainty – Minerals And Land Registration

"... several things dovetailed in my mind, & at once it struck me, what quality went to form a Man of Achievement especially in Literature & which Shakespeare possessed so enormously--I mean Negative Capability, that is when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason--Coleridge, for instance, would let go by a fine isolated verisimilitude caught from the Penetralium of mystery, from being incapable of remaining content with half knowledge..."

Letters of John Keats, December 21, 27 (?), 1817

1. That "irritable reaching after fact and reason"; that striving for certainty. This excerpt from one of Keats' letters often seems to me to describe my own professional life as a property lawyer. We are not, unlike Shakespeare, generally content with half knowledge; instead, we crave certainty, particularly about what third party rights might subsist over land being acquired by a client. Buyers want this certainty; developers want this certainty; their funders definitely want this certainty.

The Mirror Principle

2. One of the ways in which the 1925 legislation sought to promote certainty in conveyancing was to bring in a system of land registration. One of the fundamental principles of a land registration system is the "Mirror Principle". This is the idea that the land register provides a complete and accurate reflection of the property rights that affect a piece of land. What could be more helpful for the conveyancing process than a single register, which sets out all the burdens affecting the land which the purchaser will be bound by? The mirror principle is backed up by an insurance principle, which acts as a state guarantee that the register is correct and allows for compensation to those who suffer loss if it is not.[1]

3. Yet when it comes to the ownership of minerals in land, there are some obvious cracks in the mirror. Mines and minerals owned and held separately from the surface come in a number of legal forms. They can constitute a corporeal estate in land (for example, freehold minerals reserved to the transferor on a transfer of freehold land) or an incorporeal right to take minerals from someone else's land (for example, a profit a prendre). Whilst an unregistered freehold estate in minerals owned separately from the surface is capable of registration, it need not be registered; the transfer of it (or the creation of it by grant out of an unregistered estate) is not a disposition that triggers compulsory first

[1] See Sections 28 and 29 LRA 2002 and Schedule 8 LRA 2002.

registration.[2] Consequently, most severed mineral titles will remain unregistered until such time as these estates come within the scope of mandatory registration.

4. Furthermore, it is very rare for the Land Registry to indicate on a registered title that the title definitely includes the minerals[3]; commonly they are noted as being excluded. Where, as is often the case, the register is *silent* about mineral ownership, it is not certain that the registered title includes the minerals. There may be a presumption that it does[4], but that will always be vulnerable to the possibility that someone may rebut that presumption, and deduce title to an earlier severance (eg by conveyance or inclosure award) as part of an application to alter the register[5]. These uncertainties, these cracks in the mirror principle, are reflected in the fact that the Land Registry indemnity does not generally extend to mineral ownership.[6] This makes conveyancing difficult when it comes to establishing the ownership of minerals. The register is rarely conclusive.

5. There is, however, another large crack in the mirror principle: overriding interests.[7] Overriding interests are, briefly put, interests that bind successors in title to registered land, notwithstanding that they have not been noted on the registered title to that land. They therefore fly in the face of the idea that the register should be a complete and accurate record of interests affecting a plot of land. Overriding interests have existed since the dawn of land registration in 1925 because, for policy reasons, it was thought from the outset that there were certain interests which it would be unreasonable to expect the owner to register to ensure enforceability. One category of overriding interests set out in the Land Registration Act 1925 was 'manorial rights of all descriptions'.[8]

6. An important objective of the Land Registration Act 2002 was to reduce the impediment to conveyancing presented by overriding interests.[9] Its aims included *"phasing out the overriding status of the more obscure interests after 10 years and allowing them to be entered on the appropriate register without charge in the interim"*[10] Note that word "obscure". Thus section 117 LRA 2002 provided that a

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[2] 'Mines and minerals, whether or not held with the surface' fall within the definition of land in Section 132(1) LRA 2002. Where they constitute an estate in land they may be voluntarily registered under Section 3(1)(a) LRA 2002, but are excluded from compulsory registration by Section 4(9) LRA 2002. An incorporeal right to take minerals can sometimes be registered as a profit a prendre in gross under Section 3(1)(d) LRA 2002.

[3] Under Rule 32 LRR 2003

[4] Consider the effect of Section 58 LRA 2002 and note *Bocardo FA v Star Energy UK Onshore Limited* [2010] UKSC35 [2011] 1 AC 380 ("Bocardo v Star Energy")

[5] LRA 2002 Schedule 4

[6] LRA Schedule 8 paragraph 2 – no indemnity is payable unless it is noted in the register that the title includes the mines or minerals

[7] For convenience I will use the phrase 'overriding interests', although it is not used in the LRA 2002, which sets out in Schedule 3 the interests that override registered dispositions and in Schedule 1 the interests that override first registration.

[8] LRA 1925 s 70 (1)(j)

[9] Law Com No 271 – Land Registration for the 21st Century: a Conveyancing Revolution - Para. 2.24 – *"Overriding interests therefore present a very significant impediment to one of the main objectives of the Bill, namely that the register should be a complete a record of the title as it can be, with the result that it should be possible for title to land to be investigated almost entirely on line."*

[10] ibid. paragraph 2.25.

"manorial right"[11] would cease to be an overriding interest after 13 October 2013, with the result that those rights needed to be protected by a unilateral notice on the register of the surface title (or a caution where the land was unregistered) or they would be extinguished by a registered disposition for valuable consideration taking effect after that date.

What are Manorial Rights?

7. But what is a "manorial right"? The LRA 2002 gives no definition. If we look behind the Act to the Law Commission report that introduced the Bill for the Act, we are told that *"the meaning of 'manorial rights' was a precise one: the rights in question were listed in some detail in paragraphs 5 and 6 of Schedule 12 of the Law of Property Act 1922".*[12] These were the rights preserved in perpetuity following the automatic enfranchisement of all remaining copyhold tenure on 1 January 1926 pursuant to the Law of Property Act 1922. In summary, these are:

    - The Lord of the Manor's sporting rights in the former copyhold land;
    - The Lord's or Tenant's rights to mines and minerals in the former copyhold land;
    - The Lord's right to hold fairs and markets;
    - The Tenant's rights of common;
    - The Lord's or the Tenant's liability for the construction, maintenance and repair of dykes, ditches, canals and other works.

    The focus of this paper is the Lord's rights to minerals in former copyhold land. It is widely recognised that these mineral rights are very extensive across the country and have very considerable economic importance (they are not always "obscure" to their owners). Hidden within these two words, 'manorial right', are hundreds of thousands of acres of mineral ownership. Law Com 271 states that "*the list found in Schedule 12 of the 1922 Act is a comprehensive statement of these rights*".[13] But is that all there is to be said?

A Short Introduction to Copyhold Tenure

8. To try and answer this I must attempt a brief introduction to copyhold tenure for those unfamiliar with the concept. Most practitioners are aware that since 1066 all land has been and remains held directly or indirectly from the Crown. In the period following the Conquest the King granted land to his barons (his tenant's in chief) in return for (usually military) services; in turn his barons granted land to tenants in return for other services. The reciprocal relationship whereby land was granted for services was known as *tenure (*from the latin, *'to hold').* Until 1290 any alienation of land was by a *grant* (known as a sub-infeudation) with the grantor

[11] Paragraph 11 of Schedules 1 and 3 LRA 2002.
[12] Law Com 271 para. 8.41.
[13] Ibid. footnote to para. 8.41.

maintaining his place within the feudal pyramid and a new layer being added to the bottom. This meant that many layers of tenure could subsist in relation to the same plot of land. At the top was the King, then his tenant in chief, then various intermediate owners (or *mesne lords)* and finally at the bottom the tenant in actual occupation (the *tenant in demesne*). The main social and administrative unit of society in this feudal period was the Manor. The lands embraced by the Manor included land owned by the Lord (his demesne) the land held of the Lord by free tenants (eg by common socage or knight service) and land held of the Lord by the unfree tenants or villeins (ie by villeinage, later called copyhold). In 1290 the Statute of *Quia Emptores* had the effect that thereafter any alienation of a fee simple took effect as a *substitution* not a sub-infeudation (in simple terms, the grantor drops out of the picture rather than staying in place in the feudal pyramid). Alienation by sub-infeudation was prohibited, except (importantly) by the Crown. Quia Emptores still governs modern day conveyancing. Back in 1290, it brought to an end the growth in the pyramidal structure of tenures, but the system still exists today in a much attenuated form, with all land being assumed to be held in tenure of the Crown (except in cases where a mesne freehold is known still to exist, as with the Duchies of Cornwall and Lancaster).[14]

9. In the high feudal period there were a variety of different tenures, but the one that concerns us today is copyhold tenure (originally called villeinage) which was the tenure of the unfree tenants, or villeins, of the Lord of the Manor. This was the tenure of common labourers, the lowest people in the social hierarchy. The Lord held a fee simple estate in the land; the copyhold tenant held the land from the Lord and had no rights at common law or in the King's courts. Over time that changed, but it remained the case that the copyhold tenant held his land at the will of the Lord and in accordance with the custom of the manor. The Lord of Manor retained significant rights in the copyhold land, including the sporting rights and the property in the timber and the minerals within the land. The reason for this is that it was the villein's job to till the soil; sporting, minerals and timber were not his business. The Lord's freehold estate extended to the minerals. It gave him the *property* in them, but the *possession* lay with the copyhold tenant. In the absence of special custom of the manor, the general custom was that the Lord had no right of entry to win and work the minerals. There was thus a mutual veto on the working of the minerals.[15]

10. Copyhold survived the Tenures Abolition Act 1660 and remained a significant form of tenure well into the 20th century, but it was an anachronism; from the

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[14] For a succinct account of the history of Tenures and Estates see Megarry & Wade, Law of Real Property, Chapter 2.

[15] See *Eardley v Granville* (1876) LR 3 ChD 826 and *Commissioners for Inland Revenue v Joicey* (No.2) [1913] 193 2KB 580 and at 586:
"The relative rights of the Lord and the copyholder in general are well settled. The copyholder has possession not only of the surface, but everything below the surface, including minerals. But the property in the minerals is in the lord. The result is that, in the absence of special custom, neither the lord nor the copyholder can work the minerals, but the concurrence of both is necessary. In other words, the lord cannot get that which is his property without the copyholder's consent. Those rights may, however, be varied by special custom in the manor, but, except insofar as they are varied, the general rule prevails".

early 19th century we see copyhold tenants and the Lord of the Manor joining together in common law Deeds of Enfranchisement to convert the copyhold into a fee simple. This was done by a *conveyance* of the fee simple from the Lord to the copyholder. The ability to enfranchise was placed on a statutory footing with the Copyhold Act 1841, which was followed by the Copyhold Act of 1852 and the Copyhold Act of 1896. The deeds that effected these enfranchisements would set out the compensation the Lord of the Manor would be paid for foregoing the manorial rights that the Lord enjoyed as incidents of copyhold tenure. By virtue of the Law of Property Act 1922 all remaining copyhold land was automatically enfranchised on 1 January 1926.[16] Within the ten years following that date, the Lord of the Manor and the former copyhold tenant would enter into compensation awards to record the compensation payable to the Lord for the extinction of manorial interests. Deeds of enfranchisement (whether common law or statutory) and compensation awards (pursuant to the LPA 1922) often *expressly* record that mineral and sporting rights are preserved in perpetuity to the Lord of the Manor. Importantly, even where *statutory* deeds of enfranchisement and compensation awards are silent, the provisions of the relevant statutes imply that the mineral and sporting rights are preserved to the Lord in perpetuity.[17] The same does not apply to common law deeds.

11. Whilst Law Com 271 refers to the rights preserved by Schedule 12 Paragraph 5 and 6 of the Law of Property Act 1922 as being comprehensive of "manorial rights", it must surely be the case that mineral, sporting and other rights of like nature preserved to the Lord of the Manor under enfranchisements by the saving provisions of the 19th century Copyhold Acts are not excluded from the definition. But there is no authority for this; nor in relation to the diverse other statutes by which enfranchisements were sometimes carried out in the 19th century.[18] Another pressing question is whether common law deeds of enfranchisement that *expressly* except mines and minerals to the Lord of the Manor are reserving "manorial rights". Since a common law deed of enfranchisement takes effect as a conveyance of the Lord's freehold to the copyholder (and thus as a substitution not a sub-infeudation) it is strongly arguable that these are not "manorial" in any sense. The Lord of the Manor drops out of the picture; 'his lordship is gone'.[19] If the minerals are excepted and

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[16] Section 128 Law of Property Act 1922.

[17] Section 48 Copyhold Act 1852; Section 23 Copyhold Act 1894; Schedule 12 paragraph (5) Law of Property Act 1922

[18] For example enfranchisements of copyhold land to redeem Land Tax under the Land Tax Redemption Act 1802 or the enfranchisement of conventionary tenements in assessionable manors under the Duchy of Cornwall (No. 2) Act 1844. See John Scriven – A Treatise on the Law of Copyholds (Seventh Edition – 1896) pages 360-373 ("Scriven").

[19] See B W Adkin "Copyhold and Other Land Tenures of England" 3rd Edition (1919) p209: *"When a copyhold is enfranchised at common law, the lord having conveyed to the tenant the freehold of the Property, the tenant will hold it in free and common socage. Furthermore, owing to the effect of the Statute of Quia Emptores, 1290, the tenant will hold it not of the enfranchising lord, but of the superior lord; that is, in most cases, the Crown. The Lord cannot reserve any rents or other services to himself, as his lordship is gone … The customs of the manor will cease entirely, and common law rules prevail … The freehold of the land, and all above it and below it, become the property of the tenant, and so all mines and minerals pass to him, unless they are expressly reserved by the lord."*

reserved to the Lord then surely that is achieved by excepting an estate in land to the 'Seller' in the same way that any freehold conveyance does.

12. The possibility the minerals reserved by common law enfranchisements are not a "manorial right" for the purpose of Section 117 LRA 2002 is not an esoteric concern; there is a practical problem for conveyancing. Enfranchisements at common law continued well into the 20th century. I see as many of them coming across my desk as statutory ones. If they preserve to the Lord a freehold estate in the minerals (which is not a 'manorial right') then that estate need not need be registered to bind a purchaser of the surface. And yet these documents are barely distinguishable (either in form or practical effect) from statutory enfranchisements that preserve "manorial rights" which must be registered to bind purchasers of the surface.

What is the legal status of Manorial Minerals?

13. A related uncertainty is what precisely happens on a statutory enfranchisement of copyhold land and (where the document is silent as to minerals) what is the legal status of minerals preserved by the saving provisions of those acts. Briefly put, there are three views:

- The Lord transfers the freehold to the copyholder but retains an incorporeal right in the minerals within the former copyholder's freehold – this appears to be the Land Registry view.
- The Lord retains a freehold estate in the severed minerals registrable in its own right.
- The Lord continues to own a superior freehold and the minerals comprise part of that freehold.

14. The Land Registry and its advisers take the view that minerals rights preserved to the Lord of the Manor on a statutory enfranchisement of former copyhold land do not constitute an estate in fee simple, but an incorporeal right in someone else's land: that is, they fall within the LPA 1925 section 1(2)(a) not section 1(1)(a).[20] This follows from the Land Registry's view of what occurs on a statutory enfranchisement. This view holds that the enfranchisement causes the vesting of the Lord's freehold in the copyhold tenant. With the LPA 1922 this was an automatic statutory vesting, but with the earlier copyhold Acts it was by a deed in the prescribed form. Whichever Act, the relevant statutory provisions[21] are to be interpreted as a 'reservation' of the Lord's rights. Following a strict distinction between exceptions (which preserve existing rights) and reservations (which grant back newly-created rights), these statutory reservations therefore create incorporeal rights that benefit the Lord of the Manor and burden the newly acquired freehold estate of the former copyholder. This interpretation is

[20] Land Registry Practice Guide 65, section 1.
[21] Section 48 Copyhold Act 1852; section 23 Copyhold Act 1894; schedule 12 paragraph 5 Law of Property Act 1922.

consistent with the scheme of the LRA 2002 which allows such incorporeal rights to be protected by notice or caution pursuant to section 117.

15. Another view is that because the relevant terms of the statutory enfranchisement are that it "shall not affect" the Lord's "estate" in or "right" to minerals (the wording of the relevant provisions varies) the Lord of the Manor should enjoy after enfranchisement precisely what he did before enfranchisement; since before enfranchisement the Lord possessed a freehold in the minerals, he does so afterwards. [22]

16. A third view is that the pre-existing legal estate in fee simple owned by the Lord of the Manor (from which the copyhold tenant holds his land) is not extinguished by enfranchisement, but survives as a superior freehold to the newly-minted freehold granted to the copyhold tenant which he holds from the Lord of the Manor. Statutory enfranchisement therefore takes effect as a statutory sub-infeudation. In this view, what is retained by the Lord on enfranchisement is a superior estate in fee simple and the mines and minerals preserved on enfranchisement constitute part of that fee simple.[23]

17. If we adopt either of these latter two views, does it therefore follow that copyhold minerals are substantively registrable with their own title under section 3(1)(a) LRA 2002?[24] This was certainly a debate my firm had with the Land Registry prior to October 2013 on behalf of clients attracted by the advantages of substantive registration over mere notices/cautions. These conceptual arguments may be something of an academic rabbit hole, but their existence explains why many copyhold mineral rights are protected not simply by Section 117 notices/cautions against the surface, but by substantive titles and sometimes a combination of both.[25]

A Brief History of Inclosure

18. There is another way in which large areas of mineral rights were commonly severed from the surface ownership: that is, by inclosure. Again, this requires a short introduction for those unfamiliar with the subject. Before about 1750 most

[22] See Christopher Jessel, Concurrent Fees Simple and the Land Registration Act 2002 LQR 587 (2014) for this view.
[23] See Edward Nugee, The Feudal System and the Land Registration Acts LQR 586 (2008) for this view. Also, T Cyprian Williams, The Fundamental Principles of the Present Law of the Ownership of Land, The Solicitors' Journal Vol.75 843 (1931) for how the retention of the right to the surviving forms of escheat informs this analysis.
[24] This interpretation is inconsistent with the scheme of LRA 2002 which considers these to be overriding interests affecting someone else's land protectable by notice or caution. Consider also s.15(3) LRA 2002.
[25] The Land Registry will not award a substantive title (with title absolute) to copyhold minerals unless they can be persuaded that the interest constitutes an estate in land (s.3(1)(a) LRA 2002) (perhaps because the copyholder has in the instrument expressly and exhaustively released all mineral rights to the Lord) or that it may be treated as a profit a prendre in gross (s.3(1)(d) LRA 2002) (because there is a demonstrable special custom of the Manor allowing the Lord a right of access to win and work the minerals, as in County of Durham). Very occasionally, you see qualified titles expressed only to have effect insofar as the interest protected constitutes an estate in land or a profit a prendre. These may co-exist with a caution or a notice on the surface title.

of the land cultivated in England was farmed in the open field or village system. The open arable fields of the Manor were farmed in strips, with tenants of the Manor (and the Lord of the Manor himself), possessing strips scattered disparately throughout the fields. Following the harvest the open fields were grazed in common. Beyond the arable fields, vast areas of common land or waste of the manor was pasture grazed in common by the villagers. Inclosure began to gather pace in the 17th century. Inclosure discharged the land being inclosed of all previous rights and divided and allotted it into individually-owned fields with exclusive possession. By the 17th century that was sometimes being achieved by private informal agreements, but increasingly inclosure was initiated by Acts of Parliament. Between the first inclosure act in 1604 (for Radipole in Dorset) and 1914 it is believed that 5341 inclosure acts were passed in England. In the mid 18th century it was adopted as the principal method of inclosure in the English Midlands, spreading rapidly to other areas, as a means of enclosing the pasture commons and wastes of the manor as well as arable land. It is believed about 6.8 million acres of land in England was subject to inclosure acts.[26]

19. Before 1845, Parliamentary Inclosure began with a petition to Parliament, followed by an Act of Parliament providing for inclosure of the lands within a particular manor and the appointment of commissioners to oversee the process.[27] Where a common or waste was being inclosed, prior to inclosure the Lord of the Manor was owner of the 'soil' of the common and everything underneath it; various commoners were entitled to rights of common over the land. The commissioners would appoint a surveyor to visit and survey the land, value the respective interests and decide how and to whom the new inclosures would be allotted, and where such things as boundaries, roads and quarries would lie. These decisions would eventually be set out in a comprehensive Inclosure Award. The general rule was the new parcels of land would be allotted to new owners in proportion to value of the rights that they previously enjoyed in relation to the common. So the Lord of the Manor would be allotted lands in lieu of giving up his interest in the "soil" of the common; others would be granted allotments for the rights of common that were being stripped off the land.

20. For our purposes it is important to be aware that many Inclosure Acts and Awards contain saving provisions that provide for the Lord of the Manor to continue to enjoy the same rights in relation to the inclosed land as were enjoyed prior to inclosure. It was common for Inclosure Acts to contain comprehensive provisions to the effect that the Lord would enjoy all mineral rights *"in as full, ample and beneficial manner as if the current Act had not been made"* (or similar words). There might follow long descriptions setting out the rights of entry enjoyed, the rights to win and work, to let down the surface, and the obligation to pay

[26] John Chapman, A Guide to Parliamentary Enclosure in Wales, p.4.

[27] These early private acts varied greatly in form. The Inclosure (Consolidation) Act 1801 provided standard clauses to promote uniformity and reduce the expense of Inclosure. As the pace of inclosure decreased, the Inclosure Act 1845 was passed to encourage the process and it established the Inclosure Commissioners as a central body to receive petitions and oversee a simplified inclosure procedure whereby the awards of that body were sanctioned by Parliament (often in batches) after the award was made.

compensation. Where such words occur it is clear that the Lord of the Manor retains extensive (and often invasive) mineral rights over the newly created freehold allotments. Consequently, hundreds of thousands of acres of land across the country have the minerals in the separate ownership of the Lord of the Manor by virtue of Parliamentary Inclosure. Very often surface owners have lost sight of this; there is no mention of the severance in the unregistered title deeds or their registered title.

21. Are mines and minerals preserved in freehold allotments 'manorial rights' for the purposes of the LRA 2002?[28] Law Com 271 makes no mention of inclosure; it states that the meaning of the phrase is a precise one and limited to the rights in former copyhold land. But might a court find the phrase has a wider meaning that encompasses mines and minerals (or sporting rights) preserved to the Lord of the Manor on inclosure?[29] Certainly, this was a concern in the lead up to 2013 that caused many Lords of the Manor to seek to register such rights. Everything would depend on the construction of each individual Act, but one can imagine how an argument could be made, especially if it could be shown that the freeholders to whom land was allotted remained freehold tenants of the manor (much like those allotted copyhold lands) with the Lord retaining a superior freehold.[30] Where we deduce title to Inclosure Act mines and minerals in practice to this day we do so by providing an epitome of title to the unregistered Manor itself, which might suggest these rights appertain to the Manor, are part and parcel of it and are conveyed along with the Manor without express words.[31] Furthermore, the mischief at which the LRA 2002 was aimed was to phase out "obscure" interests. Rights preserved to a Lord of the Manor by Inclosure Acts are surely as obscure as those preserved on enfranchisement of copyhold land. However, depending on the construction of any given Act, it is equally possible that a court would find that they cannot be described as manorial rights that have ceased to be overriding interests under Section 117 LRA but are in fact estates in land that bind the world without the need for registration. And that leaves a major problem for rural conveyancing.

2013 and the Rush to Registration

22. The simple fact that all these mineral rights were originally 'manorial rights' in the eyes of many put them all at risk and in need of protection (whatever the Land

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[28] Where land was allotted copyhold the ownership of minerals would most likely continue to follow the custom of the manor and one must look to later enfranchisement deeds to establish ownership. (See Scriven p.407).

[29] Note that Section 70(1)(j) LRA 1925 refers to 'manorial rights of all descriptions'.

[30] See Scriven. On page 3 Scriven notes that the effect of the statute of Quia Emptores is that sub-infeudation is generally prohibited. However, he goes on to point out statutory exceptions to this rule. *"It must not be forgotten, … that under the provisions of a general Act (such as, e.g. … the Copyhold Act 1984), and … under the provisions of a particular or special Act of Parliament, lands may still be granted in fee simple to hold as of the granting lord, so as to preserve (e.g.) the lord's right of escheat. Also copyhold allotments (made under the provisions of the General Inclosure Act, 1845 …) may … when they are declared freehold by the Commissioners, be directed to be held as of the lord of the manor out of whose waste they were allotted". Cf pages 35-36 and 406-408 Ibid.*

[31] Section 62(3) LPA 1925. See also Scriven pages 4 and 5 on what passes with a 'devise' of the manor.

Registry view). The end of the overriding status of 'manorial rights' on 13 October 2013 led to a rush to register minerals rights in the lead up to that deadline. According to House of Commons Justice Committee about 90,000 applications were received from 142 applicants in the year before the cut off.[32] It is possible that those who framed the Land Registration Act 2002 underestimated the geographical extent and economic value of manorial mineral rights across the country. The fact is that historic landowners such as the Church Commissioners, the Crown Estate and the two Duchies are the Lords of many hundreds of Manors and consequently the owners of many thousands of acres of mineral rights. Adopting a low risk approach, they sought to register not only minerals in former copyhold land, but also those retained in land subject to an inclosure award. Some did this by applying for substantive titles, some by notices and cautions, some by a combination of both. Their registration programmes were well-resourced, professional and costly[33]. They took considerable care to mitigate the potential bad PR arising from the registration programme, usually excluding residential areas from their applications and also providing explanatory letters in plain english to complement the near-incomprehensible notice letters received by surface owners from the Land Registry.

23. Not all minerals owners took such a careful approach. I was involved in a registration programme in South Wales where I received instructions to register large areas of manorial minerals with only one month to go to the deadline. We were using 19th century plans to identify the areas affected, with no time to exclude from the applications the sprawl of 20th century housing development now spread across those areas. Thus it was that, a few days after the deadline, I was manning the phone as hundreds of Land Registry letters hit the doormats of suburban South Wales, informing householders that a unilateral notice had been entered against their title and inviting them to call Farrer & Co for more information. I have considerable sympathy for the predicament this process placed them in. Unilateral notices are entered without the consent of the registered proprietor. Whilst there is a duty not to do so "without reasonable cause", there is no need to satisfy the Registrar that the claim is valid nor to support the application with evidence.[34] Registered proprietors were informed of the entry without opportunity to object; if they chose to apply for cancellation of the entry,[35] the beneficiary of the notice could object but was not obliged to produce any evidence in support of the notice[36] until the Land Registrar was forced to refer the matter to the First Tier Tribunal when the parties failed to settle the matter by agreement. Householders therefore found themselves heading towards litigation in order to challenge incomprehensible notices entered against

[32] House of Commons Justice Committee, Manorial Rights, Fifth Report of Session 2014-15, 13 January 2015, page 3.
[33] One unforeseen aspect of Section 117 procedure was that, although there was no charge to enter a notice on a surface register, there was a substantial cost to obtaining the surface title information to allow you to identify the relevant surface title numbers against which to register notices and to create maps of unregistered surface for cautions.
[34] See Land Registry Practice Guide 19 paragraph 2.3.3 and also section 77 LRA 2002 for the duty to act reasonably.
[35] Under Section 36 LRA 2002.
[36] See Section 73 LRA 2002.

their titles without their consent and without the production of evidence. Understandably, many householders gave up in the face of the cost and litigation risk. Following recommendations by the HCJC the Law Commission is formulating proposals to build in to the unilateral notice procedure a requirement to produce evidence in support of claimed rights.[37]

Mineral Trespass?

24. In the last 5 years or so increasing attention has focussed on the risk of "mineral trespass". A developer investigates title to a site at the Land Registry and finds a third party mineral interest registered, either with its own title or a notice on the surface title. If it can be shown that the sinking of foundations will intrude into the third party owned mineral strata then this may constitute an actionable trespass.[38] At least in theory the possibility of the mineral owner obtaining an injunction to prevent the trespass (and thus construction) looms over the project, although one would expect courts to be very sceptical of request for an injunction where damages would appear to be a sufficient remedy. In addition, and perhaps more importantly, the mere existence of historic third party rights (especially if these include invasive rights of entry) are unattractive and discomforting to developers, their funders and potential purchasers of residential units. Mineral owners are keen to assert their rights and negotiate release fees for a transfer of the minerals to the surface owner to provide a clean title. Mineral surveyors who specialise in such negotiations have become a feature of the landscape.

25. The first thing a surface owner or developer should do in those circumstances is interrogate the mineral ownership. There are many questions to ask, even if there are rarely any clear answers.

- Who is the mineral owner? If it is unknown, you may not want to find out. In some circumstances a surface owner may need to avoid alerting a third party to their claim to rights (as doing so might prevent the surface owner from obtaining title indemnity insurance).

- Very often the mineral owner is shown on the register, knows development is on the cards and is already knocking at the door. In those circumstances, it is important to put the mineral owner to the test on their title. Remember, a unilateral notice or caution does not guarantee the validity or existence of an interest; it merely confers priority insofar as that interest exists.[39] It is quite possible no evidence was produced to the Land Registry on registration of

[37] See Law Com 227 – Updating the Land Registration Act 2002, A Consultation Paper Paragraphs 9.82 and 9.127.
[38] Trespass is the unlawful presence of one person on land in the possession of another. See Halsbury's Laws of England Vol. 97 (2015) 5(1)(i) 563: *"A person may be in possession of minerals even though he is not in possession of the surface and has no actual occupation of the minerals."* Ibid. 575. See also Bocardo v Star Energy which held that *"as the owner of paper title to the strata the claimant had the prima facie right to possession of them and, in the absence of evidence to the contrary, was deemed to be in actual possession"* (at 381 E).
[39] See Land Registry Practice Guide 19 Paragraph 2.1.

the unilateral notice/caution (in contrast to where a substantive title has been awarded). Putting the beneficiary of the notice to the test may involve asking them to produce (a) evidence that the Lordship has devolved down to them and (b) enfranchisement or inclosure documents that link a mineral reservation to a particular plot of land identifiable on a document plan. Not all mineral owners will be able to produce these goods.

- Also ask yourself, "What is the legal nature of the reserved right?" Remember some mineral ownerships do not straightforwardly allow a Lord of the Manor to claim a trespass.[40] Also note that implied reservations of mineral rights under the Copyhold Act 1894 and Law of Property Act 1922 do not allow the Lord of the Manor to prevent the surface owner from disturbing or removing "the soil" so far as that is necessary or convenient for development.[41]

- It is also important to ask "Precisely which minerals have been reserved here, do they exist in the ground and will they actually be encroached upon by the foundations?"[42] Trespass requires an intrusion across a boundary, but mineral boundaries are radically uncertain.

Thus a combined analysis of the title, the scope of the mineral reservation and a physical survey of the presence of such minerals in the site (and the risk of foundations encroaching on those minerals – whatever they may be) may strengthen a developer's bargaining position.

26. However, such investigations are unlikely to produce the certainty that housing developers and their funders desire. In the end, the unattractive historic mineral rights (with invasive rights of entry perhaps) will continue to exist and sit on the title causing concern to potential purchasers. For this reason, ultimately, a negotiated release is the usual end point of such discussions, as that provides a clear title and certainty. The price for this certainty often relates less to the intrinsic value of the minerals, their viability for extraction or the risk of trespass, and more to their *nuisance* value (and the price tends to increase the more the developer <u>needs</u> the clean title: ie the closer they get to obtaining planning permission). For this reason payment for the purchase of minerals in residential development sites has settled into something broadly accepted by developers, with a going rate of between £1,000-2,000 per residential unit being an accepted range for the price of the release. Developers are able to budget for these costs and they often end up being cost-neutral to the developer, since the price usually comes off what would otherwise have gone to the surface owner.

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[40] *"The subject matter of trespass to land must be real and corporeal property … a mere incorporeal right … does not confer standing to sue for trespass to the land if such a right does not give exclusive possession."* Halsbury's Laws of England Vol. 97 (2015) 5(1)(i)571. Note that the mineral rights retained by the Lord impliedly by the action of the statute on a statutory enfranchisement of copyhold do not generally include "possession" of the minerals (although they can do if the tenant expressly releases that right to the Lord in the deed or compensation award).

[41] See the provisos to Section 23 Copyhold Act 1894 and Schedule 12 Paragraph 5 LPA 1922. Does "soil" mean soil or any material required for making foundations?

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

The Crack in the Mirror

27. The purchaser or developer of land is faced with this question - "How can I be certain that I will be buying land free of ancient and obscure mineral rights?" The risk that a buyer must countenance is that only a narrow category of mineral rights are 'manorial minerals' from which he will take free (assuming there is no mention of them on the register) and there remain a number of other types of unknown mineral rights which will continue to bind the purchaser notwithstanding the silence of the land register.

28. Let us consider an example from my own practice. I am buying a 2000 acre rural estate in the Home Counties. The proposed use in the short term will be agricultural and residential, but I know my client has longer term plans to promote large areas for development - in the order of thousands of houses. Knowing the extent to which mineral owners can cause a nuisance and extract payments when development is on the cards, as a purchasing solicitor how can I assure myself and my client that the absence of any mention of third party ownership of minerals on the title registers is conclusive that a buyer will own the minerals. The simple answer is I cannot. Whilst I may be safe as regards certain forms of statutory copyhold enfranchisement, I cannot discount the possibility that minerals were severed from the surface in old conveyances as yet unseen by the Land Registry or deeds of enfranchisement that took effect at common law. I certainly cannot discount the possibility that large areas of the estate might have been subject to a 200 year old Inclosure Act and Award that preserved the mineral rights in the former common to the Lord of the Manor (along with extensive rights of entry and express rights to let down the surface) and that the local Lord of the Manor will surface in a few years' time with all the necessary paperwork to prove his interest.

29. How do I as a purchasing solicitor investigate this risk? With difficulty. There are no registers to search. I must first look at Tate's Domesday of English Inclosure Acts (or John Chapman's – A Guide to Parliamentary Enclosures in Wales) to see if there is an Act of Inclosure that deals with the area in question. If I can identify one, I source the Act from Parliamentary Archives. But how do I obtain a copy of the Award that attaches plans showing the areas that were inclosed, so that I can be sure whether it affects the land being purchased? One might eventually track down the Inclosure Award in the local records office, or maybe National Archives, but the practical reality is that the dynamics and economics of large transactions of rural land do not allow for that sort of time-consuming and often fruitless research. One is left with uncertainty on the point and an element of risk to explain and quantify to the buyer. Where there is risk and uncertainty, there is always an insurer waiting nearby, but obtaining insurance against this risk is by no means straightforward, especially pre-planning permission and if development is some way off (and insurance is in any event a very unsatisfactory solution).

30. To my mind the ending of the overriding status of "manorial rights" brought about by section 117 has had an unintended consequence: rather than solving the mischief at which it was aimed, by leaving the job half done it has exacerbated it.

The whole process of mineral registration, put in train by the provisions of the 2002 Act, has heightened public awareness of the three-dimensional nature of land. We have become more conscious of the extent of "obscure" unregistered mineral interests that still bind surface owners without notice.[43] The publicity given to manorial rights registrations and the increased assertiveness of mineral owners on development sites has stimulated uncertainty and nervousness about severed mineral ownerships that the Act does little to assuage. And the surface owner or buyer must deal with this uncertainty through purchasing certainty from the mineral owners or such comfort as they can from insurers.

The Future

31. That section 117 did not solve the problem it sought to is perhaps not surprising. The Act was framed in the 1990's at a time when many historic mineral owners had not paid serious attention to their mineral ownerships for many years. It is notable to compare the care with which Estates recorded their mineral assets in mineral terriers before the nationalisation of coal and other hydrocarbons to the amnesia that had set in by the end of the century. At the time, mineral rights were just not the economic asset they once were, being confined largely to the extraction of construction aggregates. In that context, it is perhaps not surprising that minerals were not the focus of attention for those who framed the 2002 Act.

32. But things are changing. It is not just house owners and house developers who are conscious of mineral ownership. From potash to lithium, new technologies and a new entrepreneurial spirit is making the extraction of minerals an interesting economic prospect again. The ownership of mineral rights has potentially much more economic value than the nuisance value that might be extracted from developers; we must not forget the intrinsic value of minerals themselves as a long term economic asset.

33. Minerals surveyors are fond of pointing out that if we look about at the consumer goods we live with day-to-day (our cars, our I-phones), it is fair to say that if the materials that make them do not ultimately derive from a plant, animal or other living thing, then we had to dig them out of the ground. Minerals underpin our material world yet our system for recording their ownership is not working. Given the long term economic value of mines and minerals, it seems to me that our system of land registration must adapt to provide more certainty as to the ownership of the ground deep beneath our feet.

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[43] For this reason, the Law Commission is consulting on bringing dispositions of unregistered freehold estates in minerals within the ambit of compulsory first registration. See *Updating the Land Registration Act 2002: A Consultation Paper* Paragraphs 3.57/3.57 on the need to balance the benefits of a more complete register against the burden on minerals owners.

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