Neutral Citation Number: [2020] EWHC 1924 (Ch)

Case No: PT-2018-000155

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 27/07/2020

Before:

MRS JUSTICE FALK

- -

Between:

(1) DAVID HENEAGE WYNNE-FINCH
(2) RICHARD WILLIAM KENDRICK PRICE
(3) RUPERT THOMAS MEAD **Claimants**

- and -

NATURAL RESOURCES BODY FOR WALES **Defendant**

- -

Fenner Moeran QC and Paul Stafford (instructed by **Forsters LLP**) for the **Claimants**
Mark Wonnacott QC and Harriet Holmes (instructed by **Hugh James**) for the **Defendant**

Hearing dates: 17, 18 ,19, 22, 23, 24 and 26 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE FALK

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Monday 27 July 2020.

Mrs Justice Falk:

Introduction

1. This case relates to a claim that the Claimants, acting in their capacity as trustees of the Williams-Wynn 1987 Settlement (the "1987 Settlement"), own everything below the surface of large tracts of land in rural northern Wales. The area concerned is in the former county of Montgomeryshire, and is now part of Powys.

2. The Defendant is a public body that was formed in 2012 to fulfil the Welsh devolved functions of the Environment Agency and the Forestry Commission. The particular claim the subject of these proceedings affects 40 freehold titles that are managed by the Defendant as statutory successor to the Forestry Commission. The land is used for forestry purposes. In most cases the claim relates to the whole geographic area covered by the registered title.

3. The registered owner of each of the titles is the National Assembly for Wales, and the Defendant manages the land on its behalf. It is convenient to refer to the Defendant throughout this judgment as if it, rather than the National Assembly for Wales, was both the registered owner and occupier. This was the approach that both parties took in submissions, and it was not suggested that any relevant distinction should be drawn between the two bodies.

4. The Claimants' case is that the property in question was formerly nearly all rough open pasture and formed part of the Manor of Arwystli[1] or the Manor of Cyfeiliog (the "Manors"). The Manors have been owned, the Claimants say for several centuries, by or on behalf of members of the Williams-Wynn family. Most of the land formed part of the "wastes and commons" of the relevant Manor. By a process that started with awards made under the Arwystli Enclosure Act 1816 (the "1816 Act"), continued with a series of private enclosure agreements and culminated in sales made by the estate shortly after the First World War, the Claimants say that the surface land was disposed of by the family but what was beneath it, including in particular all stone under the surface, was retained and is now held by them[2].

5. Both parties on occasion used the term "Wynnstay Estate" to refer to the Claimants. Strictly, this expression refers to the property interests held by a number of individual family members and trustees of family settlements, of which the 1987 Settlement is one.

6. The Claimants are not themselves seeking access to the sites to exploit the rights that they claim to have. The dispute arose following an approach by the Defendant to the Claimants' agent in September 2016 enquiring whether it could acquire stone by licence. This resulted in the Claimants becoming aware that the Defendant had previously extracted what the Claimants say is a considerable volume of stone from the property. The Claimants say that they were prepared to agree terms for future use

[1] Sometimes referred to as "Arustley".

[2] The means by which the 1987 Settlement became entitled to any such rights is not now in dispute. Very briefly, it originates in a settlement under the will of Sir Watkin Williams-Wynn, 5th baronet, on his death in 1840, followed by a Marriage Settlement in 1884 and a re-settlement in 1918, at which point the property was still entailed. It appears that the entail was barred only in the 1980s, probably following the death of the 10th baronet, and the property is now held by the 1987 Settlement under a trust of land.

of stone, but only if they were compensated for stone that had been taken in the past. The Defendant refused and now maintains that the Claimants have no rights to the stone, or that if they ever did then those rights have long been barred by adverse possession, a stance which the Claimants say is inconsistent with past actions.

7. The Claimants are seeking a declaration of their rights and damages for trespass and for breach of their property rights under the Human Rights Act 1998 ("HRA"). This decision follows a trial on liability only.

8. The trial was conducted on a "hybrid" basis, with only leading Counsel and one other legal representative for each party (a solicitor for the Claimants and junior Counsel for the Defendant) physically present in the court room with me. All other participants took part through videoconferencing, other than one witness, the Third Claimant, who gave evidence in the court room and participated remotely for the remainder of the trial. The hearing was conducted in public, not only because the court room was open to the public (subject to social distancing requirements in force at the time) but also because the court permitted identified members of the press and public remote access through a link.

9. The trial was conducted in this manner because I had concluded that, given the nature of the trial and the documentary evidence, which included a large number of historical documents and plans, it was not in the interests of justice to attempt to conduct the trial on a wholly remote basis (as most hearings were being conducted at the time, as a result of the Covid-19 pandemic). I had also concluded that it was not in the interests of justice to postpone the trial. Instead, a balance needed to be struck which allowed an effective trial to be conducted in the circumstances whilst ensuring that most participants were able to take part remotely. Those participants included a significant number based in Wales, including most witnesses and all of the Defendant's solicitor team, for whom it would have been practically difficult or impossible to attend court in London given the lockdown arrangements still in place. In allowing members of the public (as well as press) remote access in the way described, I was also conscious of the legitimate interest in this case that other landowners and manorial rights holders might well have, and that physical presence in London was likely to be difficult or impossible for many of them.

10. The structure of this decision is as follows:

Evidence

11. I heard evidence from nine witnesses of fact, two for the Claimants and seven for the Defendant. There were also two expert witnesses, one for each party.

12. The Claimants' two witnesses of fact were Rupert Mead and Ralph Collins. Mr Mead is a solicitor and a partner in the Claimants' solicitors, Forsters LLP. He became a

trustee of the 1987 Settlement in 2016, and in that capacity he is the Third Claimant. He specialises in advising landed estates on trusts, capital tax planning and succession issues. He does not have a conveyancing specialism, but he is clearly interested in historical sources and has obviously spent a great deal of time considering the issues raised by this case. His witness statement included a schedule which sets out in detail the basis of the Claimants' claim in respect of each title.

13. Mr Collins is a chartered surveyor and partner in Carter Jonas LLP, who have acted as land agents for the Wynnstay Estate since 1995. Mr Collins specialises in rural estate management and has been involved in work for the Wynnstay Estate since he joined Carter Jonas as a partner in 2007. Mr Collins, like Mr Mead, has obviously done a great deal of work researching the Wynnstay Estate's mineral rights. His evidence also included the results of mapping exercises undertaken by Carter Jonas staff which sought to indicate the geographical relationship between the rights claimed and the Defendant's registered titles.

14. The Defendant's witnesses of fact were all current or former employees of the Defendant. They were Kirsty Lees, John Griffith, Mark Trumper, William Parry, Antony (Glyn) Fletcher, Antony Wallis and Mari Sibley. Ms Lees and Ms Sibley are both qualified surveyors, Mr Trumper and Mr Griffith are specialist civil engineers, Mr Fletcher is a land management senior officer and Mr Parry is a site supervisor. Mr Wallis is a retired senior staff member who is also a chartered surveyor and chartered forester. Before his retirement Mr Wallis became head of corporate assets for the Defendant (a role which did not cover the property in dispute), but before that he held the role of Country Land Agent for Wales at the Forestry Commission.

Witnesses of fact

15. To the extent that the witnesses' evidence covered matters of fact, I accept that evidence subject to minor corrections identified during the course of the trial. (For the avoidance of doubt, this includes evidence given by the Defendant's witnesses about the level of extractions made from the disputed sites.) However, some of the evidence is more properly categorised as expressions of opinion rather than statements of fact. This is not particularly surprising given the nature of the dispute, particularly in relation to the Claimants' case which essentially turns on the construction and effect of historical documents. For example, Mr Mead's opinion about the effect of the 1578 feoffments discussed below is properly a matter for submissions rather than evidence.

16. Potentially more importantly, the mapping exercises undertaken by Carter Jonas relate to issues which should properly be addressed by expert evidence in the event of a dispute. I should therefore make clear that, in case it becomes relevant, I have not accepted the accuracy of those mapping exercises. Although in many cases there may be no real dispute, for example where the Land Registry plan for the Defendant's title shows boundaries clearly marked by the same physical features as shown on the plans forming the basis of the Claimants' claim (or where the extent of the claim clearly extends beyond the relevant boundary), there are a number of instances where that is not the case. It is accepted, for example, that old enclosure agreements were not intended to provide a scale representation of the area of land in question. Any plans are also obviously only two dimensional. Added to this is the difficulty that plans can become distorted through copying. Where there is doubt, the precise relationship between the area claimed and the boundaries of the Defendant's title will be a matter

of opinion on which mapping expertise would assist the court. In the absence of this, and of evidence from those who actually did the mapping work, the court is not really able to test the evidence, for example to understand the methods used by Carter Jonas staff and their approach to determining areas of doubt.

17. A further point to make is that some of the factual evidence, particularly that of the Defendant's witnesses, related to past dealings regarding actual or potential mineral rights holders, and in particular related to the Defendant's understanding of the mineral rights position and the actions it took as that understanding developed. Following an objection from Mr Wonnacott (which at Mr Moeran's request I heard in private, so as not to risk prejudicing cross-examination), cross examination of the Defendant's witnesses was restricted on one aspect, namely that Mr Moeran was not permitted to ask questions about the witnesses' knowledge of the Claimants' rights.

18. The background to this was pre-trial correspondence in which Forsters, the Claimants' solicitors, agreed that the claim for breach of human rights was not dependent on proving that the Defendant knew (or should have known) that the material claimed was owned by a third party. Based on this correspondence the Defendant understood that knowledge was not in issue in the proceedings, and did not search for documents relevant to that issue, whether helpful or unhelpful to its case.

19. Mr Moeran did not seek to raise the issue at trial in a human rights context. Instead it was raised as part of a defence to the Defendant's claim of adverse possession, in relation to the need to establish not only a subjective intention to possess but a sufficiently clear objective manifestation of it, and specifically in relation to a distinction that the Defendant's staff appeared to have drawn between roads and quarries. I prevented cross-examination on the question of knowledge of the Claimants' rights on fairness grounds. The Defendant had understood that knowledge would not be a relevant issue and had not searched for documents relevant to it. That was also a reasonable understanding to have, because knowledge of a breach of the paper owner's rights is not a necessary ingredient of adverse possession. In any event, as discussed further below, I did not accept Mr Moeran's submissions as to its relevance (see [158] to [169] below).

Expert witnesses

20. Expert evidence was provided by Alastair Duncan for the Claimants and Michael Sherratt for the Defendant. Both Mr Duncan and Mr Sherratt are Chartered Mineral Surveyors. Mr Duncan is also a registered minerals valuer and fellow of the Institute of Quarrying, and Mr Sherratt is a qualified mine surveyor and an incorporated engineer. Both experts were asked to consider questions relating to material found at and extracted from the sites, including its nature, potential uses and commercial value. The Claimants' expert was also asked to report on additional matters relating to the wording and effect of the disputed minerals reservations, which to an extent strayed beyond his area of expertise and were more properly a matter for submissions. Subject to that qualification, there was little material dispute between the experts in matters within their expertise.

Concepts: manors and enclosure

21. It is probably helpful to start with a brief explanation of some of the relevant concepts.

22. In broad terms, and as described by Lord Templeman in *Hampshire County Council v Milburn* [1991] 1 AC 325 at 338, the land of a manor can be divided into three parts, namely (1) the land held by the lord of the manor for his own use or occupation (or sometimes leased to third parties), known as "demesne" land; (2) land in the possession of tenants of the lord of the manor[3]; and (3) the "waste" of the manor.

23. "Tenants" as used here does not refer to leasehold interests, but instead either to copyhold tenure (referred to originally as unfree or villein tenure), or to some form of freehold tenure as discussed further below. The term copyhold tenure refers to title that could be conveyed by surrender and admittance recorded on the manorial court roll (the tenant held "by copy of the court roll"): *Megarry & Wade, The Law of Real Property* (9th ed) ("*Megarry & Wade*") at 2-013. Copyholds were enfranchised to freeholds following the Law of Property Act 1922.

24. The "waste" of the manor was defined by Watson B in *Attorney-General v. Hanmer* (1858) 27 L.J.Ch. 837 at 840 as follows:

> "The true meaning of 'wastes' or 'waste lands,' or 'waste grounds of the manor,' is the open, uncultivated, and unoccupied lands parcel of the manor… other than the demesne lands of the manor."

25. The waste could be subject to various rights of tenants of the manor, such as rights of pasture (grazing rights), estover (the right to take wood), piscary (fishing rights) and turbary (the right to dig peat). As Lord Templeman explained, these are in the nature of profits à prendre: they are rights over land rather than ownership of an estate in land. Waste over which such rights exist is referred to as "commons". The phrase "wastes and commons" is frequently used, but the latter is in fact a sub-part of the former.

26. Some rights over waste were held by individual tenants rather than collectively. Of particular relevance to the area in question is "sheepwalk", a form of right that existed in various parts of Wales that was considered in *Attorney General v Reveley* (1868-69)[4] and again by Vinelott J in *Crown Estate Commissioners v Morgan Brothers* [1990] Lexis Citation 1232. A right of sheepwalk was an exclusive right for a tenant to graze sheep in a specific area of waste, normally adjacent to the tenant's farm.

27. Enclosure (or inclosure) refers to the process under which open land was divided up and allotted to individual holders, typically being enclosed by fencing or walls. The process started in the later part of the medieval period and subsequently accelerated, particularly in the latter part of the 18th century and first part of the 19th century. In the context this case is concerned with it refers to the allotment of waste among the tenants and lord of the manor, with a view to enclosing it to allow improved land use,

[3] This is referred to by Lord Templeman as copyhold, but freehold tenure existed as well.
[4] A Court of Exchequer case that is unreported in the Law Reports but reported in a special report prepared by junior counsel for the Crown, a Mr Karslake.

in particular cultivation.[5] Awards were typically made under powers granted to "Commissioners" under a private Act of Parliament. The Arwystli Enclosure Act 1816 is such an Act. The proportions of land allotted to tenants and to the lord would be specified in the Act. For example, in this case the Act specified that the lord would receive a one fourteenth share of land occupied in common and a one twentieth share of land where there had been sole use for grazing (the latter would have applied to sheepwalk).

The Manors and the events of the 1570s and 1629

28. The history of the Manors of Arwystli and Cyfeiliog is marked by events in the Tudor (and to some extent Stuart) periods that are not only fascinating historically but also relevant to matters that I need to decide.

29. In around 1571 Queen Elizabeth I conveyed the Manors to the 1st Earl of Leicester, Robert Dudley (often referred to as a favourite of the Queen). Whatever steps the Earl took in relation to his tenants resulted in them petitioning for a compromise (composition) as to the arrangements between them, in exchange for a payment to the Earl of £6,000. In 1576, the Queen granted the Earl a licence to subinfeudate, that is a licence to grant new tenures, enabling the composition to be put in place. A licence from the Crown was necessary because subinfeudation had otherwise been prohibited pursuant to the statute Quia Emptores 1290.[6]

30. This was followed by three feoffments[7] made by the Earl in 1578 to four individuals. The originals are now lost, but were seen in the 19th century by a Victorian solicitor and Welsh antiquarian called Morris Charles Jones, who summarised their terms, "omitting some of the legal verbiage", in a study entitled *The Devolution of the Manors of Montgomeryshire*[8]. The parties' pleadings were based on this summary, but shortly before the trial the Defendant's advisers tracked down what they say is a full copy among the papers of the Earl of Powys, which they had translated from Latin to English by the Regius Professor of Civil Law at the University of Cambridge, David Ibbetson. The Claimants' position is that this document is not reliable, because it is a draft prepared two years earlier and intended to be in favour of an individual tenant, rather than the four individuals. They also disagree with the Defendant about the effects of the feoffments.

31. The Defendant's case is that the 1578 grants resolved earlier uncertainties by re-granting tenants their lands afresh to be held in "free and common socage" under English law, along with the rights they needed over manorial wastes (including sheepwalk), subject to the reservation of certain rights, including specified mineral rights and rents. The four individuals covenanted to pay the rents, effectively as guarantors of the tenants, and then had responsibility to fragment the land out

[5] Typically, open fields previously cultivated in strips would be enclosed as well, but it is unlikely that this is relevant to much if any of the land in dispute in this case.
[6] *Megarry & Wade* at 2-015. The statute is still in force.
[7] A feoffment was a form of conveyance of a freehold estate that was typically completed by the grantor delivering possession of the land (a livery of seisin), but that could be created under the Statute of Uses 1535 by declaring that the grantor held the property to the use of the grantee: *Halsbury's Laws of England, the Law of Real Property* at 245 and 92-95 respectively.
[8] (1870) Montgomery Collections Vol 3 pp29, 33-35. This also records the events leading to the compromise with the Earl.

amongst the tenants, no doubt once they had paid their share of the £6,000. Free and common socage was a form of freehold tenure, and the closest to what we would understand as a freehold today.[9]

32. The Claimants' case is that the arrangement created some form of trust, which Mr Moeran's skeleton argument maintained was a trust in favour of the Earl, which subsequently fell away, and that rather than establishing new tenures the documents simply recorded existing customs. In particular, rather than holding land in the form of what was understood in England as free and common socage, the nature of the interests held by tenants was and continued to be customary freehold, a form of privileged copyhold, and as such only allowed tenants to deal with the surface, reserving all sub-surface rights to the lord.

33. Based on the evidence available there is no doubt that the feoffments expressly conveyed the tenants' land "in free and common socage". It is also clear that the documents were intended to implement the compromise that had been reached. I infer that it proved more convenient to the Earl to leave the detailed allocation of property amongst the tenants to the four individuals, rather than deal with it himself, and this is why the feoffments took the precise form that they did. Those individuals effectively acted as intermediaries so that the Earl did not need to deal directly with the tenants. That accounts for the difference between the draft that the Defendant managed to locate and the executed versions summarised by Morris Jones. I accept that the draft provides the best guide available to the detailed drafting, insofar as that is not set out by Morris Jones, and in particular contains the best available evidence of the content of the minerals reservation, which is simply expressed as "mines, etc" in the Morris Jones summary.

34. What was conveyed by the 1578 feoffments was the land occupied by the tenants, excluding the wastes and a certain forest, subject to a limited minerals reservation (set out at [182] below). I accept the Defendant's case that free and common socage meant what it said in the English sense. The context included the Laws in Wales Acts 1535 and 1542, passed in the reign of the Queen's father Henry VIII, which specifically provided that Welsh land should be held in accordance with the laws of England, as well as the fact that the concept of free and common socage was a well understood concept in England[10]. No form of copyhold was created, and indeed there is no evidence of copyhold existing in the Manors[11]. The rents reserved under the 1578

[9] Other forms of freehold tenure were knight's service, serjeanty and spiritual tenures, in particular frankalmoign. As explained in *Megarry & Wade* at 2-004, socage was the commonest tenure and originally involved agricultural services. That obligation disappeared over time and "common socage" is the tenure by which most freehold owners hold land today.

[10] *C. Jessel, The Law of the Manor*, (2nd edn.) p 74: "Common socage was socage according to the common law rather than custom" (and so not according to the custom of the manor, which would be the case for copyhold land: see also p 76); *Sir Edward Coke, The Compleat Copyholder* s.XVIII, p13: 'Liberum Socagium [free socage] is, where any tenant holds of any lord by paying a yearly sum of money in lieu of tillage, and such like services, and not by escuage [military service]; and this is termed sometimes common socage.' In other words, free and common socage did not prevent a rent being charged in lieu of services (sometimes called a quitrent). The lord could also charge double the rent on inheritance.

[11] The Claimants' former solicitor, Mr Tudor Davies, swore a statutory declaration in August 2013 where he records that he had been unable to find any evidence of copyhold, despite having perused a large quantity of the Manors' manorial court rolls. This is consistent with the evidence given to the Royal Commission referred to in the next paragraph, to the effect that there were no copyholds in Montgomeryshire (p 337). The reference to customary freehold on the same page appears not to be being used in the sense of any form of copyhold.

feoffments were not inconsistent with free and common socage.[12] The feoffments were expressly made with reference to the 1576 licence, which would not have been required if new tenures had not been created. If there was a trust at all it was not in favour of the Earl. There would have been little point in the creation of such a trust, even if it could be done.[13]

35. This analysis is consistent with findings made in a report of a Royal Commission on land in Wales and Monmouthshire published in 1896. That refers at p 139 to the feoffments as being the means by which English lawyers secured the tenants' position, and describes there still being "numerous survivors of these quasi freeholders paying the old quitrents as freeholders of the manors, and regarded to all intents and purposes as freeholders".

36. As far as the wastes and commons were concerned, the feoffments made clear that what was granted to the tenants was rights of pasture in accordance with earlier practice (which would have included sheepwalk), together with certain other rights of common, for example to take wood. Ownership remained with the lord.

37. A couple of years after the 1578 feoffments the Earl swapped the Manors for others held by the Crown, and the Crown remained lord of the Manors until they were granted by Charles I to Sir Thomas Middleton in 1629. It was not disputed that these transactions had no effect on the terms of tenure, other than that in 1629 the Crown retained the right to exploit any gold and silver.

38. It is important to clarify that the 1578 feoffments were not relied on as directly determining the terms on which the land in dispute is held.[14] Those feoffments conveyed tenanted land rather than land forming part of the demesne or wastes of the Manors.[15] However, the Defendant did rely on the feoffments in determining what it says was the effect of awards made under the 1816 Act, and maintained that the feoffments also established the nature of the right of sheepwalk. The Claimants' case also relied to some extent on their interpretation of the arrangements, although Mr Moeran submitted that the point was ultimately unimportant.

The four categories of claim

39. The 40 titles in dispute were divided into four categories in the Amended Particulars of Claim:

[12] Manorial rents of this kind were finally extinguished under the Law of Property Act 1922.

[13] Morris Jones suggests in his paper, at p 36, that there was a trust, but in favour of the tenants and not the Earl. This is echoed in the Royal Commission report referred to in the next paragraph. It is not necessary to decide whether this was correct, or indeed whether it was possible at the time. The wording relied on by Mr Moeran as supporting a trust is consistent with the subinfeudation permitted by the licence.

[14] This is accurate as at trial, although the case as originally pleaded did rely to an extent on the saving for mines and minerals on the statutory enfranchisement of copyholds under the Law of Property Act 1922, on the basis that what was owned was a form of copyhold.

[15] It is quite possible that some of the land conveyed in 1578 did find its way into category A, because tenants' land might have been bought back by the lord of the relevant Manor, or have come back by escheat (reversion on death without heirs), and subsequently have been sold by the estate, but there was no evidence of this in relation to any of the titles, and no reliance was placed on it potentially having occurred. In respect of categories C and D it was accepted at trial that they both comprised land that was formerly waste.

Category A: conveyances by the Claimants' predecessors in title with an express exception and reservation (titles A1 to A11);

Category B: the 1864 Crown grant (title B12);

Category C: contractual enclosure agreements (titles C13 to C35); and

Category D: awards under the 1816 Act (titles D36 to D41[16]).

40. In fact there are some points of detail about the correct categorisation of parts of a few of the titles. Points of note or dispute relevant to particular individual titles are addressed in the Appendix to this decision. For the purposes of this decision references to the different categories should, in relation to individual titles, be read subject to any comment in the Appendix about the correct classification of all or part of the title in question.

Category A: conveyance by the estate with an express exception and reservation[17]

41. This part of the claim relates to conveyances made by the Claimants' predecessors in title following the end of the First World War, and in particular following an auction of land in 1919. So far as the exceptions and reservations in dispute are concerned the conveyances are in materially similar form, which is also reflected in the conditions of sale provided with the auction particulars. A typical example is most easily read from a 1926 abstract of title in respect of property A1. That states the form of conveyance in the following way:

> "GRANTED and conveyed unto the Purchaser his heirs and assigns
>
> ALL and SINGULAR the hereditaments and premises specified in the First Schedule …
>
> EXCEPTING AND RESERVING unto the vendor and his heirs and his successors in title under the said settlement and his and their assigns (a) All mines beds and[18] quarries of coal and ironstone and all other metals stone and minerals within[19] and under the hereditaments and premises thereby conveyed.
>
> TOGETHER with all necessary or proper powers rights and easements for searching for mining working getting and carrying away the same whether by underground or surface workings including the right to let down the surface whether built upon or not proper compensation being paid to the

[16] The claim to title D40 was withdrawn before the trial.
[17] Strictly, an exception means excluded from the conveyance, so preserving existing rights, whereas reservation refers to the granting back by the acquirer of new rights. A retention of ownership over a stratum would be an exception, whereas a grant of a right to take material would involve a reservation. A power to work would also involve a reservation. Both terms were routinely used in conjunction. See *Megarry & Wade* at 27-009.
[18] In some conveyances the word "and" is omitted here.
[19] Sometimes "in". The term "within" has been held to authorise quarrying specifically, *Midland Railway Co v Checkley* (1867) L.R. 4 Eq. 19 at 25.

> Purchaser his heirs or assigns for all damage done to the surface or the buildings thereon and for the occupation of the surface in or about the exercise of such rights and powers the amount of such compensation in case of dispute to be settled by arbitration…"

Category B: the 1864 Crown grant

42. Category B relates to a conveyance made by the Crown out of the Manor of Croyddin to Sir Watkin Williams Wynn, the 6th baronet, on 5 August 1864. The context was a boundary dispute, which the conveyance was intended to resolve.

43. The conveyance dealt with two parcels of land separated by a stream. The southern parcel consisted of about 408 acres. In relation to that parcel the Crown conveyed the "Mines and Minerals within upon and under" the land. This parcel is the only part of the property in dispute that is properly categorised as a type B title. It now forms part of title B12 and (to an extent) title C13.[20]

44. The second parcel, of around 201 acres, falls within title C13 only and is correctly categorised as type C rather than type B. This is because the Crown grant conveyed an undifferentiated freehold title to the whole of this parcel, and the Claimants' claim to reserved rights derives from a subsequent enclosure agreement. The terms of this part of conveyance were as follows:

> "… all the Mines Minerals and Substrata within upon or under and also all the estate right and interest of the Queen's Majesty in and to the soil and surface of the piece or parcel of open common or waste land…"

Category C: contractual enclosure agreements

45. The claim in respect of this category of titles relates to land that was not enclosed pursuant to the 1816 Act but instead under a series of private enclosure agreements entered into from the 1850s onwards.[21] It is agreed that land in category C was formerly the waste of the Manor, either of Arwystli or Cyfeiliog.

46. The text of the enclosure agreements generally followed a standard printed format, with individual details added in handwriting. An example of the relevant text, entered into with a Mr Morgan in 1861,[22] reads:

> "Whereas the said Sir Watkin Williams Wynn is Lord of the Manor of Arwystley[23], and as such is entitled to the soil of all the Waste of the said Manor. And Whereas the said Richard Hughes Morgan is the Owner of certain Freehold Tenements, Farms and Lands, situate in the said Manor, that is to say [X] and as such is entitled to the right of Sheepwalk on the pieces

[20] A very small part also falls within C29: see the Appendix.
[21] Mainly between the 1850s and 1870s, although there are also two that date from 1903 and 1904 respectively. As discussed in the Appendix, agreements have not been located for all C titles.
[22] This relates to part of title C14, referred to as Monachlog.
[23] Some agreements recited that he was Lord of the Manor of Cyfeiliog.

or parcels of land and hereditaments hereinafter particularly described, being part of the Waste of the said Manor. And Whereas the said Sir Watkin Williams Wynn has consented to an Inclosure of the said Sheepwalks… on the terms hereinafter mentioned.

Now these Presents Witness, and the said Sir Watkin Williams Wynn to the intent, and so as at all times hereafter, so far as he rightfully can or may, to bind all and every persons and person for the time being interested in the pieces or parcels of land or Sheepwalks hereinafter mentioned or referred to, but no further, for himself, his heirs, executors, administrators, and assigns, Doth hereby Agree that the said Richard Hughes Morgan may maintain such Fences as are now existing, and such others as he may deem it expedient to erect upon, and may plant or convert into tillage, as he thinks fit, the pieces or parcels of land or Sheepwalks situate [Y]…

And saving and reserving to the said Sir Watkin Williams Wynn, his heirs, assigns, and his successors … all mines, minerals, stone, and other substrata, lying within or under the said pieces or parcels of land or Sheepwalks, or any part thereof, whether opened or unopened, with full liberty to and for him or them, and all persons employed by him or them, from time to time and at all times for ever hereafter, by any temporary or permanent occupation or use of any part of the surface or of any part of the said pieces or parcels of land or Sheepwalks, and by all usual and convenient ways and means, to work, procure, win, separate, smelt, refine and take away the said mines, minerals, stone, and other substrata, or the produce thereof, and for that purpose to construct and use all convenient engines, works, rail and other roads, water-courses, matters, and things, in the same manner in all respects as is usually done by the Owners or Lessees of similar mines and minerals, stone, or substrata, in any part of England and Wales, or either of them, but always making and paying reasonable compensation for all damages and losses to be occasioned thereby… [the agreement went on to retain sporting rights, seignories and other Manorial jurisdictions]

And the said Richard Hughes Morgan to the intent, and so as at all times hereafter, so far as he rightfully can or may, to bind all and every persons and person, for the time being interested in the said pieces or parcels of land or Sheepwalks, but no further, for himself, his heirs, executors, administrators, and assigns, agrees, that he and all and every other persons and person interested, and to become interested, in the matter, will accept the privilege of inclosure of the said pieces or parcels of land or Sheepwalks upon the terms above stated…

> And it is further expressly agreed between and by the said Parties to this Agreement … that, except as regulated and controlled by these Presents, the rights and interests of the Lord of the said Manor in and in respect of the soil and the mines, minerals, stone, and other substrata… and the rights and interests of the Tenant in the herbage and pasturage… shall, notwithstanding any adverse enjoyment… or any act, omission or matter whatsoever, for any … period… be continued and enjoyed in the like manner, in all respects, as if no such adverse enjoyment… or other act, omission, or matter, had taken place or existed, or these Presents had not been made."

Category D: awards under the 1816 Act

47. Category D also relates solely to former waste of the manor, in this case the Manor of Arwystli. The recitals to the 1816 Act refer to the common and waste lands within the Manor of Arwystli and state that Sir Watkin Williams Wynn is Lord of the Manor and "as such is or claims to be entitled to the Soil of all the said Common and Waste lands", in respect of which other proprietors of property within the Manor have a right of common or other rights. The recitals go on to explain that the land has little value in its present state, but that it would be of benefit for it to be divided and allotted among them.[24] It was not disputed that the reference to the lord's entitlement to the "soil" in the recitals is a reference to the entirety of the land, including substrata.

48. The recitals also refer to the Inclosure Consolidation Act 1801, which contained some common provisions for incorporation into enclosure Acts.

49. The minerals reservation in the 1816 Act reads as follows:

> "Provided always, and be it Enacted, That nothing herein contained shall prejudice, lessen or defeat any Right, Title or Interest which the Person who shall or may hereafter be entitled as Lord or Lords of the said Manor, now have or hath, or shall hereafter have in or to any Mines, Ores, Coals, Metals or Minerals whatsoever, in or under the said Waste Lands within the said Manor of Arustley, or any part or parcel thereof; but that it shall be lawful to and for the said Lord or Lords, in and upon the said Waste Lands within the said Manor, and the future Lord or Lords of the said Manor, in and upon the said Waste Lands, at any time or times hereafter, according to their respective Rights therein, to delve, search for, get up, make merchantable, and take and carry away, with all or any manner of Carriages, to their own respective uses, the said Mines, Ores, Coals, Metals and Minerals, or any part thereof; and to make, erect and use any Roads, Ways, Sumps, Levels, Warehouses, Smithies, Engines, Machines, and other Conveniences and Erections, and to do any other acts which shall be necessary or proper for all or any of those purposes, and the same Warehouses, Smithies, Engines, Machines and other

[24] Land in one parish, Llangerrig, is excluded.

> Conveniences or Erections, or any of them, at any time or times to alter, take down, remove, re-erect and take and carry away at their respective pleasures, the Lord of the said Manor, and the future Lord of Lords thereof respectively, making full Satisfaction from time to time to the respective Owners and Occupiers of the said Allotments of the said Waste Lands, for the Spoil and Damage which shall be done or occasioned thereon by the exercise of all or any of the said powers."

50. As mentioned at [27] above, allotments were made to the lord of either a one fourteenth or one twentieth share of the land allotted. In the former case the Act provided for the allotted land to be fenced. The clear indication is that this was generally the more suitable land for cultivation, as opposed to grazing.[25] Other provisions worth noting are the inclusion of provision for part of the waste in each parish to be allocated for use for getting peat, building stone, gravel and sand for buildings, and for repairs of roads, within the parish.

51. A further important provision dealt with the tenure of allotted land. It states:

> "And be it further Enacted, That all and singular the Lands and other Premises which shall be allotted under or by virtue of this and the said recited Act[26], shall immediately after such Allotments are made be held under and subject to the same Tenures, Customs, Heriots, Rents and Services, as the several and respective Messuages, Buildings, Lands, Tenements and Hereditaments, in respect of which such allotted Lands shall be made, are now subject, or such of them as are applicable thereto."

52. Finally, immediately following the minerals reservation is a savings provision for manorial rights, which reads:

> "Provided always, and be it further Enacted, That nothing herein contained shall extend or be construed to extend to give unto the Lords of the said Manor any future or other Manorial Right, Title, or Interest than those they now respectively have or are entitled unto, nor to defeat, lesson, prejudice or affect their Right, Title or Interest, of, in, or to the Rents, Services, Courts, Perquisites and Profits of Courts, Goods and Chattels of Felons and Fugitives, Felons of themselves and put in Exigent, Deodands, Waifs, Estrays, Forfeitures, Fisheries and Game, with the privilege, power and authority of Hunting, Coursing, Hawking, and Fowling, for the same and all other Royalties, Jurisdictions, Privileges and Appurtenances whatsoever incident, belonging or appertaining to the said Manor (other than and except those meant and intend to be barred, destroyed, or extinguished by virtue of this Act) but that the same and

[25] There is specific provision for keeping sheep away from the area for seven years, which it seems was to allow fencing to be established. Fencing in this context was obviously to keep animals out, not in.
[26] This must refer to the Inclosure Consolidation Act 1801.

> every of them shall remain and be enjoyed by the said Lord or Lords of the said Manor, in as full, ample and beneficial manner, to all intents and purposes, as they could or might have held and enjoyed the same respectively, in case this Act had not been passed."

53. Section 14 of the Inclosure Consolidation Act 1801 provided:

> "And be it further enacted, That the several Shares of and in any Lands or Grounds which upon any such Division be assigned, set out, allotted, and applied, unto and for the several Persons who shall be entitled to the same, shall, when so allotted, be and be taken to be in full Bar of and Satisfaction and Compensation for their several and respective Lands, Grounds, Rights of Common, and all other Rights and Properties whatsoever, which they respectively had or were entitled to, in and over the said Lands and Grounds, immediately before the passing of such Act…"

54. Section 35 of that Act provided that the awards and allotments made under the Act would be "binding and conclusive" in the absence of provision to the contrary, both among the proprietors and other interested persons.

55. Section 40 also had a saving of manorial rights, in a shorter form than the one set out in the 1816 Act, providing that the rights of any lord of the manor, other than the property intended to be barred by the relevant Act, will remain "in as full, ample, and beneficial" manner as they might have been held or enjoyed before the Act or if it had not been made.

The scope of the minerals reservations: the facts

The terrain

56. The land in dispute is, as is obvious from Ordnance Survey maps, hilly. It is now all or virtually all forested, with access by forest roads and tracks as discussed below, having been acquired by the Forestry Commission or a predecessor body from the 1930s onwards. Before that it was generally used for grazing. However, woodland did exist. The area was described as "well wooded" in Tudor times, and it is also clear that there was some woodland in the Manors in the early twentieth century. One of the lots sold at the 1919 auction comprised woodland. The evidence also included a newspaper report from 1907[27] of a dispute between the county council and Sir Watkin Williams-Wynn over use by the council of stone from his estate for road building (consent to which he had revoked), which included reference to the need for the council to ensure that the road could accommodate the baronet's apparently material timber-hauling requirements.

57. Throughout the area in question the geology of the bedrock (the solid rock) is sedimentary rock of a significant depth, predominantly comprising Silurian mudstone with some interbedded sandstone and shales. It is possible that there may be pockets

[27] The Montgomeryshire Express and Radnor Times, 5 February 1907.

or seams of other materials, but the experts agreed that the common rock of the district is mudstone. Although none have been identified within the land in dispute, there is evidence of old mine workings in the area, including evidence of lead mining in particular. There is also a disused slate mine just outside the area of one of the titles.

58. In a number of places there are exposed outcrops of the bedrock at the surface (Mr Duncan described the landscape as "dotted" with outcrops). Otherwise there is generally a thin layer of top soil and other organic material, in depths that will vary but will be no more than a few inches thick, the thicker areas tending to be found in the valleys. Mr Duncan's evidence suggested depths of between 2 and 9 inches (so up to about 20 cm). Below that is subsoil, and occasional deposits of peat or boulder clay. The subsoil tends to comprise a mixture of organic matter and broken mudstone in the upper layers, with what Mr Sherratt described as regolith below that and immediately above the bedrock. As used by Mr Sherratt, regolith refers to a loose deposit on top of the bedrock, comprising broken (weathered) bedrock that may be mixed with other non-organic material transported during geological processes. References below to "subsoil" should be read as including regolith.

59. The broken mudstone is the same material as the bedrock, though it would have a higher moisture content. Whilst it is possible that the chemical composition could also be altered by acidity in rainfall, I understood this not to be a material factor for this type of rock (in contrast to limestone strata).

60. The total thickness of the topsoil and subsoil above the solid bedrock will obviously vary. However, Mr Sherratt's report records depths of around 1 metre in a number of instances where seen in quarried areas, and in some cases rather less or more.

Mudstone and its uses

61. Sedimentary mudstone comprises fine grained clays and silts originally laid down under water. It is a material that has limited uses. It is susceptible to degradation and flaking through the effects of weather: it is not particularly "competent" (meaning strong, not liable to disintegration), and when weathered it can often be broken by hand. However, mudstone available in the area in dispute can be and is used by the Defendant in a coarsely crushed form to build and maintain the forest roads and tracks. It is more suitable than some other material for this purpose because its lack of hardness, and the "fines" produced by its tendency to granulate, means that the material can bind together to create a relatively smooth and well drained surface. But its quality varies. The more useful type of local rock for the Defendant's needs is a form that contains a higher proportion of sandstone interbedded with the mudstone, because sandstone is harder and stronger. The less useful would tend to have greater quantities of shale and be more prone to flakiness (it is less competent). The relative quantities of mudstone, sandstone and shale in the bedrock varies between quarries, and indeed within an individual quarry.

62. Until 2012, when a review of mineral ownership was completed, the mudstone used for forest roads and tracks would invariably have been sourced from quarries or borrow pits (see below) on the Defendant's land, and as close as possible to where it was needed. This takes account not only of environmental considerations and the outcropping of the rock that makes access easy, but also compelling economic

considerations. Mr Duncan's evidence in cross examination was that transport costs are currently in the region of £1 to £1.50 per tonne-mile. Over any appreciable distance, this cost will dwarf the cost of the material itself, which Mr Duncan suggested might currently be in the region of £5 per tonne at the quarry gate (that is, extracted and crushed, but without the provision of any transport)[28]. Mr Duncan also confirmed that there was probably not a rock that would cost much less.

63. It was clear from the evidence that the material extracted from quarries on the disputed land is not typical of material produced by modern commercial quarrying, which generally aims to produce material which will sell at a higher price. As Mr Duncan explained in his report, the nature of the material is consistent with "low-grade aggregate and construction fill" that would not be suitable for higher quality applications such as surfacing of public roads or ready mixed concrete. Although the Defendant is currently sourcing material similar to some of the better material available on its own estate from a commercial quarry, Tan y Foel (because it has ceased taking material from its own quarries pending resolution of the dispute), the primary product of that quarry is a superior material with a high PSV (polished stone value) that is suitable for making concrete and for surfacing public roads. It is unclear to what extent the material being bought by the Defendant must in any event be quarried to access the superior material, but it is likely that this will be the case at least to some extent.

64. Mr Duncan's understanding was that the Defendant is paying around £15 to £16 per tonne for the material that it is acquiring from Tan y Foel, including transport costs. This was confirmed by Mr Fletcher, who gave a figure of about £15 per tonne for stone that he sourced. Given that Mr Duncan's report stated that the quarry was around 20 to 30 miles away, that when put together with his estimate for transport costs rather suggests a negative cost for the material itself.

65. Apart from use for forest roads and tracks, crushed mudstone may be used as a bulk fill material in some construction work, and for uses such as field gateways.

66. In the past quarried mudstone would also have been used to construct mine infrastructure in the area. The miners would, in practice, have had to use the local stone for this purpose. Mr Duncan confirmed that the miners would have sought out the more competent mudstones and preferably sandstones that were available close to the mine site. The same must also have applied to other construction work, in particular cottages and farm buildings.

Forest infrastructure: roads and tracks

67. There are a mixture of forest roads and tracks. Mr Sherratt had been informed by the Defendant that there were around 103 miles of forest roads, but it was unclear how much of this was located on the titles in question. However, as can be seen from the Land Registry plans (which are based on Ordnance Survey maps[29]) there are also a

[28] Other relevant factors now include the non-application of Aggregates Levy to material that the Defendant sources from its own land for its own use, and the fact that quarrying on forestry land to create forest roads can be permitted development for planning purposes.

[29] The maps used would generally be those available at first registration, so around 2005. In some cases maps may be updated subsequently.

significant number of other tracks. The Land Registry plans for all but one title show at least one road or track, and in many cases multiple tracks.[30]

68. Both roads and tracks are used for forestry processes. Whilst in some cases it was possible by comparing newer and older plans and maps to get a sense of the extent to which roads and tracks had been added in recent years (or at least since the land started to be forested), the overall position could not readily be determined from the maps and plans available.

69. In any event, whether roads or tracks have been added does not tell the whole story. It was clear from the evidence that, even with a mature forest, work on forestry roads and tracks is routine, not only in the form of repairs and maintenance but also upgrades to existing ones. So, for example, even if a road or track existed previously it is quite possible that it could require widening or strengthening to accommodate the heavy machinery used in forestry operations, particularly for harvesting. In addition, areas may be required for turning vehicles or stacking cut timber. Ramps are also typically constructed to facilitate harvesting.

70. Mr Sherratt stated in his report that it was "apparent" that the majority of the roads were constructed to serve forestry operations. This was not based on detailed observations that he made (he viewed the roads on a site visit only when travelling between the quarries and borrow pits referred to below), but on an impression given by the Defendant's staff to that effect, together with his own impression of the size and standard of the roads. This was also consistent with Mr Trumper's evidence, which described a vast network of roads which he understood had generally been built decades earlier when areas were developed for planting, and then maintained for thinning and harvesting. Mr Fletcher's understanding was that some of the road network dated from the significant amount of tree planting that occurred in the 1950s and 1960s. By the time he joined the Forestry Commission in 1987 most of the road network had been developed, but new or upgraded roads could still be required for harvesting.

71. Mr Trumper also explained in oral evidence that, to him, forest roads and tracks are interchangeable terms. However, "harvester tracks" are also constructed. These are shorter lengths of track that weave in and out of trees to aid harvesting and processing. This was consistent with Mr Fletcher's evidence, which referred to building both stone tracks and ramps for harvesting. Mr Trumper explained that harvester tracks are also constructed with mudstone, but more roughly than the "main" roads or tracks, using bulkier material of the lowest grade. Mr Fletcher explained that, where possible, stone available on site would be used for the tracks and ramps. I also understood from Mr Fletcher's evidence that additional tracks may be required at an earlier stage, for thinning. Thinning usually occurs around 20 years after planting, and harvesting at around 50 years.

72. Bearing in mind that the area had previously been used mainly for farming, in particular grazing, and has generally been forested only since the Forestry Commission (or another statutory predecessor) acquired it, mainly in the mid 20th

[30] The one exception appears to be C25, which is a relatively small strip. However, C25 is adjacent to A3, which has a track very close to the boundary.

century and so before the advent of the scale of machinery often seen today,[31] I conclude that the forest roads and tracks will in virtually all cases have at least been widened and upgraded since the date of acquisition. A significant number, and on a balance of probability the majority in terms of overall length, will also have been built from scratch. In addition to roads and tracks required for planting, further tracks are routinely required for harvesting, together with an upgrade of existing roads and tracks and the creation of ramps. All of these activities, together with routine maintenance, not only require stone to be used but as described further below will have caused at least some disturbance to mudstone in situ. None of the areas are newly forested, with most initial planting having occurred in the mid 20th century, so there are unlikely to be areas where no harvesting activity has been undertaken.

73. These conclusions gain some support from Mr Collins' evidence. He confirmed in cross examination that the purpose of forest roads is to reduce costs, and so increase profitability. Whilst he suggested that the means of working and machinery available today has reduced the minimum level of road density that is essential for forestry, I understood his evidence to be that profitability is likely to be enhanced if the road and track network is good.

74. Although he had no direct knowledge of the sites in dispute, Mr Wallis's evidence is also of some relevance to this issue. He said that in a fully roaded mature forest, the roads with their bends, junctions, banks and un-planted verges would be deemed to account for 15% of the forest area. Although this obviously includes unplanted areas on either side of the road, it gives some idea of the likely scale of the road and track network.

75. So far as I could tell from the available maps, and as might be expected, the roads tend to run broadly along contour lines (in other words, round a hill rather than directly up or down). This is consistent with Mr Fletcher's evidence that the maximum gradient permitted for a forestry road under the guidance within which the civil engineering department worked was 10%. It follows that, depending on the steepness of the slope, the required width of the road (or track) and the depth of the subsoil, it will have been necessary to cut to a greater or lesser extent into the bedrock. Looking along a hillside road, this effectively involves cutting out a roughly triangular section on the upslope side. Material dug out will generally be used as fill material on the downslope side.

76. Depending on the depth of the road or track, it might also be necessary to dig into bedrock to construct the road surface. In other areas the road will have been constructed on the bedrock, or on more competent (strong) subsoil containing weathered bedrock or superficial deposits, or possibly even directly over thicker deposits of peat.

77. There was no evidence of the precise extent to which it had been necessary to cut into the bedrock on the titles in dispute. Mr Sherratt suggested that in most cases it would be necessary to dig into the bedrock to some degree. Bearing in mind the hilly terrain, the thinness of the soil and subsoil and the need to accommodate heavy machinery, I accept Mr Sherratt's evidence.

[31] Ignoring earlier periods of forestation. The evidence indicated that before the 1940s planting was done without the benefit of mechanisation, tractor ploughing only being introduced at that time.

Quarries and borrow pits

78. There are six quarries on the titles that have been used in recent years (Nanty, Sunken, Dolgau, Dolydd, Allt y Genlli, and Aerospace) together with a further one described as a borrow pit (Horeb Old Borrow Pit). All of these were originally created a significant time ago. Mr Trumper described them as "well established from decades of extraction" when he joined in 2009. His understanding was that they were all originally created to construct the forest road network.

79. Mr Duncan described all of the quarries as "pocket handkerchief" quarries and, in fact, as borrow pits. He explained that the term borrow pit refers to generally small-scale quarrying activity for a specific purpose, commonly developed to help build infrastructure. He confirmed that the quarries in this case are very small-scale, Aerospace being a possible exception, and that there was nothing to indicate extraction from them for any purpose other than maintaining the forest estate. This was confirmed by Mr Wallis's evidence that none of the quarries in the disputed areas had been identified as quarries that had been used to supply stone to a third party.

80. In addition to these quarries or borrow pits, there is evidence of additional old borrow pits, generally adjacent to roads or tracks. Mr Duncan confirmed that ones he saw adjacent to a road would probably have been dug originally to create the road. Just as the roads were cut into the sides of hills, quarrying generally took the form of cutting into the hillside, often from the side of a road. As already mentioned, in the past quarried stone would also have been used to construct mine infrastructure in the area and, no doubt, for other local building and construction work.

Wind turbines and telecommunications masts

81. There is one wind turbine and one telecommunications mast on the land in dispute. In both cases, digging occurred to create a void to contain the foundations. It is unclear how far it was necessary to dig into the bedrock for this purpose, but it will have occurred at least to some extent. The experts' view was that the mudstone extracted was not used to make the foundations, which were instead constructed from concrete brought in for the purpose. However, mudstone available at the site, including potentially what was extracted, is likely to have been used to backfill and level areas, and for access tracks.

82. There are currently no wind farms on the disputed titles, plans for one not having proceeded. There are however other wind farms in the area, and Mr Duncan referred to one at Nant-y-Moch where a requirement of over one million tonnes of material was identified for its construction. His evidence was that mudstone was suitable for the purpose.

The scope of the minerals reservations: relevant case law and the parties' submissions

Introduction

83. There is a very helpful summary of the authorities on the meaning of "mines and minerals" in Slade J's decision in *Earl of Lonsdale v Attorney General* [1982] 1 WLR

887, at pp 924-925.[32] This takes the form of eight principles, of which the first seven are relevant:

> "(1) Though the wide sense given to the phrase 'mines and minerals' by Lord Romilly M.R. in *Midland Railway Co. v. Checkley*, L.R. 4 Eq. 19 and by Mellish L.J. in *Hext v. Gill*, L.R. 7 Ch.App. 699 is a sense which the phrase is capable of bearing and can still be attributed to it in a proper context see, for example, *O'Callaghan v. Elliott* [1966] 1 Q.B. 601, it cannot now properly be regarded as a primary or literal sense which is always to be applied in the absence of a sufficiently clear contrary context: see, for example, the *Budhill* case [1910] A.C. 116 and *Waring v. Foden* [1932] 1 Ch. 276 .
>
> (2) The phrase 'mines and minerals' is not a definite term, but is one that is capable of bearing a wide variety of meanings: see, for example, the *Budhill* case [1910] A.C. 116, 130 per Lord Gorell and the *Glenboig* case [1911] A.C. 290, 299 per Lord Loreburn L.C. One possible meaning that had been attributed to the word 'minerals' in *Darvill v. Roper*, 3 Drew. 294 and other pre-1880 authorities was 'all such substances as are dug out of the earth by means of a mine.' This remains a possible meaning in a proper context.
>
> (3) Unless the meaning is clear from the four corners of the relevant instrument itself, the first duty of the court in construing a grant of mines and minerals is to try to ascertain what the phrase meant in the vernacular of 'the mining world, the commercial world and landowners at the time of the grant,' in accordance with the test suggested by James L.J. in *Hext v. Gill*, L.R. 7 Ch.App. 699, 719 and approved by the House of Lords in the *Budhill* case [1910] A.C. 116 . The common link between the three categories of persons referred to by James L.J. is, I think, that they are all persons who may ordinarily be expected to have both some knowledge of mines and minerals and also some experience of dealing with them in the course of commerce in this country.
>
> (4) The meaning of the phrase in this vernacular sense may be derived either from direct evidence as to the vernacular meaning at the relevant time or by inference drawn by the court, as in *Barnard-Argue-Roths-Stearns Oil and Gas Co. Ltd. v. Farquharson* [1912] A.C. 864. If there is clear evidence as to the vernacular meaning at the date of the trial, then, in the absence of evidence to the contrary, the court may be justified in assuming that there was a similar vernacular usage at the date of the grant: see the *Glenboig* case [1911] A.C. 290 , 299 per Lord Loreburn L.C.

[32] Referred to with apparent approval by the Court of Appeal in *Coleman v Ibstock Brick* [2008] EWCA Civ 73 at [50].

> (5) Where it is clearly established that, at the date of the grant, a particular vernacular meaning was attributed to the phrase 'mines and minerals' by 'the mining world, the commercial world and landowners,' the court will be predisposed to adopt that meaning. The vernacular test, however, is not a rigid test to be applied without regard to all the other terms of the instrument in question and the circumstances in which it is used: *see Borys v. Canadian Pacific Railway Co.* [1953] A.C. 217 , 223 per Lord Porter. The court must never overlook the commercial background and apparent commercial purpose of the transaction.
>
> (6) One pointer to the parties' intentions may be to consider whether or not the substances in question are exceptional in use, in value and in character: see for example *Waring v. Foden* [1932] 1 Ch. 276 , 294 per Lawrence L.J. Another pointer is the evidence as to the general state of knowledge of the relevant substance at the date of the grant and the way in which it was then regarded and treated as a commercial matter; see, for example, *Barnard v. Farquharson* [1912] A.C. 864, 869 per Lord Atkinson. A third, significant pointer may be derived from any express powers of working that are conferred by the instrument in question: see for example the same case at p. 869 per Lord Atkinson.
>
> (7) In considering whether a grant or reservation of mines and minerals includes a specified substance, it is irrelevant that the parties did not actually have that substance in mind. The test of their intention is an objective one: see for example the *Rearon-Smith* case [1976] 1 W.L.R. 989 , 996 per Lord Wilberforce."

Case law relied on by the Claimants

84. Mr Moeran emphasised the importance of the background to the document, giving *Hext v Gill* (1872) LR Ch App 699 as an example. In that case "minerals" was found to include china clay despite James LJ commenting at p 719 that "no one at the time would have thought of classing clay of any kind as a mineral".[33] The context was a sale by the lord of the manor of the freehold to a copyholder with a minerals reservation, and the fact that under a copyhold tenement the lord was entitled to all minerals in the widest sense (Mellish LJ at pp 711 to 713). Mr Moeran submitted that this applied a fortiori to waste, which was owned and possessed entirely by the lord, subject only to rights of common. The general purpose of enclosure legislation was to allow improved use of the surface through cultivation, and that was the relevant context for the enclosures in this case.

85. Mr Moeran also relied on stone being accepted as a mineral, for example in *Midland Railway Co v Checkley* (1867) LR 4 Eq 19.

[33] In fact the surface owner still obtained an injunction to restrain the mineral owner from getting at the material in a way that destroyed or seriously injured the surface, because the power to work was not sufficiently clear.

86. In relation to minerals reservations in enclosure legislation, Mr Moeran relied in particular on *Wainman v The Earl of Rosse* (1848) 154 ER 714[34] ("*Wainman*") and *Micklethwaite v Winter* (1851) 155 ER 701[35]. Although these cases related to different enclosure legislation, Mr Moeran submitted that because enclosure legislation was "of a common form" they should be followed. He relied on *Consett Waterworks Company v Ritson* [1922] 2 Ch 187 at pp 188-189, where Lord Esher MR said that "the Courts would be doing wrong if after a canon of construction has been laid down with regard to [enclosure legislation] it should not be followed".

87. *Wainman* concerned enclosure legislation passed one year before the 1816 Act, with a minerals reservation which Mr Moeran submitted was very close in its terms to the wording of the 1816 Act. The Act provided that:

> "…nothing herein contained shall extend, or be construed to extend, to defeat, lessen, or prejudice the right, title, or interest of the [lord]… in or to the seigniories and royalties incident or belonging to the said manor … but that the said [lord] shall and may, from time to time for ever hereinafter hold and enjoy all rents, services … [there follows a list of other manorial rights] and all mines and minerals of what nature or kind so ever, lying and being within or under the said commons and waste grounds, in as full, ample, and beneficial manner, to all intents and purposes, as he could or might have held and enjoyed the same, in case this act had not been made."

Full powers to work were included, with reference to carrying away "the lead ore, lead, coals, iron-stone and fossils" and another reference to "in as full, ample, and beneficial a manner, to all intents and purposes, as they might or could have done in case this act had not been made", but subject to a proviso that the "first layer or stratum of earth" should be kept separate.

88. The report of the first instance decision records that beneath the common lands were several beds of coal and ironstone, and nearer the surface "there is also in some places the stone common in the district". The defendant ascertained that there was some stone fit for building near the surface of the allotments to which he was entitled for life, and agreed to sell it to stone merchants who started to remove it. The lord of the manor claimed that he was entitled to the stone.

89. Parke B's judgment at first instance records that prior to the Act the lord was entitled to the soil of the waste, including every stratum of stone. He concluded that, although the wording of the Act was "open to much doubt", the stratum of stone in dispute was included in the reservation. The saving clause had to be construed with reference to the lord's original title to the whole soil. He went on to say:

> "The term 'minerals,' here used, though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines; and Dr.

[34] (1848) 2 Exch. Rep. (Welsby, Hurlstone and Gordon) 800, a decision of the Exchequer Chamber, affirming the decision of the Court of Exchequer reported at (1845) 153 ER 724, 14 M. & W. 859.
[35] (1851) 6 Exch. Rep. (Welsby, Hurlstone and Gordon) 644.

> Johnson says, that 'all metals are minerals, but all minerals are not metals;' and mines, according to Jacob's Law Dictionary, are 'quarries or places where anything is digged;' and in the Year Book, 17th Edw. 3, c. 7, 'mineræ de pierre' and 'de charbon' are spoken of. Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals, and so we think they must be held to be in the clause in question, bearing in mind that the object of the act was to give the surface for cultivation to the commoners, and to leave in the lord what it did not take away for that purpose; and this construction is greatly favoured by the last clause, which provides that the surface soil, 'the first layer or stratum of earth, is to be kept separate, without mixing with the lower strata;' a provision which clearly indicates that the removal of the surface soil to a great extent may take place, and be subsequently restored, so that the getting strata of stone by quarrying must have been contemplated.
>
> It must, however, be admitted, that the provision authorising the working of mines and minerals, and leading and carrying away the lead ore, lead, coals, iron-stone, and fossils, leads to the supposition that the legislature intended to reserve metallic minerals only, and creates much doubt about the true construction of the word in this act. But the word 'fossils,' in a strict sense, may apply to stones dug or quarried; at any rate, we do not think that this provision so clearly indicates the intention of the legislature to limit the proper meaning of the word, as to call upon us to do so."

90. It is clear that "fossils" as used here had a broader meaning than we would now apply to it (Dr Johnson defined "mineral" as "Fossile body; matter dug out of mines").

91. *Micklethwaite v Winter* related to a poorly drafted 1760 enclosure act, where a minerals exception, including of stone, was implied from the obligation of the lord to pay compensation for digging "coals or other minerals". Pollock CB said:

> "It is contended that the effect is to reserve to the lord, instead of his right to the minerals, the incorporeal right to dig and take them, but leaving the ownership in the allottees. That appears to me a very inconvenient kind of right; and the more natural and reasonable construction is that, the lord being in possession of the minerals, the Act intended his right to continue, and that if, in the exercise of it, injury was done to the surface, he should make compensation. *The Earl of Rosse v. Wainman* distinctly decided that the word 'minerals' includes stones."

92. Platt B referred to the fact that before the Act was passed the right of the commoners was limited to the surface. The fact that the right to compensation was limited to compensation for digging, rather than for the coal or minerals, necessarily implied that the lord retained the right to, and to dig for, minerals. Martin B noted that the stones in question were not lying on the surface but were dug out of a quarry, and said

that *Wainman* was direct authority that "whatever stone is got from quarries, and separated from other stone, is minerals in the ordinary sense of the word", and belongs to the lord.

93. Mr Moeran also relied on the wording "**any**… minerals **whatsoever**" in the 1816 Act as excluding any limitation or qualification, relying on *Duck v Bates* (1884) 13 QBD 843 at pp 851-852, and *The Earl of Jersey v Neath Union Rural Sanitary Authority* (1889) 22 QBD 555, per Bowen LJ at p 563 (the latter case in fact deals with a private conveyance).

Case law relied on by the Defendant

94. Mr Wonnacott relied in particular on *Waring v Foden* [1932] 1 Ch 276 and the following statement of Lawrence LJ at p 294:

> "The two main principles … are, first, that the word 'minerals' when found in a reservation out of a grant of land means substances exceptional in use, in value and in character (such as, for instance, the china clay in *Great Western By. Co. v. Carpalla United China Clay* Co.[36]), and does not mean the ordinary soil of the district which if reserved would practically swallow up the grant (such as, for instance, the sandstone in the *Budhill* case[37]); and, secondly, that in deciding whether or not in a particular case exceptional substances are 'minerals' the true test is what that word means in the vernacular of the mining world, the commercial world and landowners at the time of the grant, and whether the particular substance was so regarded as a mineral: see per Lord Loreburn L.C. in the *Budhill* case."

95. Whilst this extract refers to "ordinary soil" of the district I agree with Mr Wonnacott that it cannot be limited to topsoil or subsoil. This is clear from the reference to sandstone that appears a couple of lines later in the passage cited, but also from the facts of the case (which related to sand and gravel), the judgment of Lord Hanworth MR, which refers to the "ordinary rock of the district" at p 291, and the judgment of Romer LJ which refers to "common surface rock" at p 302.

96. Mr Wonnacott pointed out that the existence of the two separate principles set out by Lawrence LJ is not spelt out by Slade J in *Earl of Lonsdale v Attorney General*. As expressed by Lawrence LJ, the first question is whether the substance in question is exceptional, and is not the ordinary soil of the district. The second question is which exceptional substances are and are not within the reservation. The "vernacular" test is relevant to the second question, and does not decide exceptionality. The distinction is discussed to some extent by Lawrence Collins LJ in *Coleman v Ibstock Brick* [2008] EWCA Civ 73, where the appellants conceded that the tests of exceptionality and not being "the ordinary soil" were not identical or coterminous (see [33] to [36] and [65]). Lawrence Collins LJ did however also caution against construing Lawrence LJ's judgment as if it was a statute ([55] and [64]).

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[36] [1910] AC 83.
[37] [1910] AC 116.

97. Mr Wonnacott submitted that there is a presumption that a reservation is limited to substances which are "exceptional" in use, value and character and not part of the ordinary rock, because otherwise a mineral reservation would swallow up the grant. Only the clearest words would reserve the right to destroy the surface: *McLean Estates Ltd v Earl of Aylesford* [2009] EWHC 697 at [22] and [23].

98. Mr Wonnacott also submitted that, against the background of lead and slate mines in the district, the words "all other metals stone and minerals" in the A type reservation should be interpreted *eiusdem generis* with the words "coal and ironstone", and meant materials like those specified that are commonly worked for profit. No one had ever worked the common mudstone for commercial profit. He referred to the following statement by Lord Halsbury LC in *Lord Provost and Magistrates of Glasgow v Farie* (1888) 13 App. Cas. 657 ("*Farie*") at p 669:

> "I think no one can doubt that if a man had purchased a site for his house with a reservation of mines and minerals neither he nor anybody else would imagine that the vendor had reserved the stratum of clay upon which his house was built under the reservation of mines and minerals."

99. Mr Wonnacott also relied on the following statement by Lord Watson at p 675:

> "The only principle which I can extract from these authorities is this; that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Inclosure Act, regard must be had, not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or act embodies. 'Mines' and 'minerals' are not definite terms: they are susceptible of limitation or expansion, according to the intention with which they are used."

100. Mr Wonnacott also relied on *The Earl of Jersey v Neath Union Rural Sanitary Authority* (referred to at [93] above) for a "purpose of profit" test. In that case the question arose as to whether *Hext v Gill* had been overruled by the House of Lords in *Farie*. In concluding that it had not, Lord Esher MR referred at pp 559-60 to a statement by Mellish LJ in *Hext v Gill* that:

> "…a reservation of 'minerals' includes every substance which can be got from under the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning."

Lord Esher went on to say:

> "In my opinion the rule so laid down is an excellent rule of construction, founded on a long series of cases, and it would require a decision of the House of Lords to produce…an authority which I should be bound to obey."

The scope of the minerals reservations: application to the facts (categories A, B and D)

101. This part of the judgment considers the scope of the mineral reservations in relation to categories A, B and D. Categories A and D are considered first, followed by a brief consideration of category B. I have not separately considered the scope of the minerals provisions in the enclosure agreements relevant to category C, for the reasons explained in the following section of this judgment.

Categories A and D

102. I have concluded that mudstone is not within the scope of either the category A reservation set out at [41] above or the category D reservation set out at [49] above.

103. I accept that mudstone can be described as a mineral, and I take into account that the category A reservation also expressly refers to stone. However, it does not follow that the terms used should be given their widest literal meanings. The context is critical. Normal principles of construction apply, and the factual matrix, including the nature of the minerals involved, the district in question, the commercial background and the parties' relative positions are all highly relevant: see Slade J's summary set out at [83] above, Lord Watson's comment in *Farie* set out at [99] above, and *Coleman v Ibstock Brick* at [47] to [49].

104. Category A comprises private conveyances of land previously owned by the Wynnstay Estate. This land was not common land at the date of sale, and in many cases it may never have been. Mr Moeran's point about the relevant context as including the fact that the land was waste, subject only to rights of common ([84] above), cannot apply to category A. It may be relevant to category D, but as discussed further below the relevant context there also includes the fact that tenants to whom land was allotted held their properties as freeholders, not copyholders.

105. The property sold at auction in 1919, all of which was offered for sale subject to the same exceptions and reservations, was not limited to open pasture. It included a considerable number of farms (including farmhouses and other farm buildings), some cottages and other larger houses, a shooting lodge and woodland. The allotments under the 1816 Act were also not limited to upland open areas. They included, for example, sites in and around the town of Llanidloes and the township of Caersws.

106. Mudstone is without doubt the common rock of the district. It is everywhere. Its existence is and was obvious in the form of outcrops, and because the soils are thin. In order to enclose fields, at least in upland areas, it is likely that at least some of the fence posts would have to be driven into the bedrock, bearing in mind the extent of outcropping. At a minimum, mudstone in the subsoil would be disturbed.[38] Cottages

[38] The evidence given to the Royal Commission indicated the wire and post fencing was in use from about the 1870s. Before that some form of hedging may have been used. That would be consistent with the provision of the 1816 Act referred to in footnote 25 above, relating to young fencing being established. Mr Duncan suggested in oral evidence that stone walls were used before post and wire fencing became more common after the First World War, but that is not consistent with his report which suggests that in the area in question stone was not generally used, at least by graziers. If stone walls were used then they would no doubt have been constructed from immediately available loose stone – that is, they would have required disturbance of mudstone in the subsoil.

and farm buildings would have been constructed from mudstone (no doubt the better variety in terms of sandstone content, if available), and miners would have used it for mine infrastructure: see [66] above. Mudstone would also have been used for roads, tracks and other farm infrastructure. In all cases practicalities would dictate that stone was taken from the immediate locality.[39] At least some loose mudstone is also likely to have been disturbed when ploughing newly enclosed fields.

107. Mudstone clearly does not satisfy any test of exceptionality. Quite apart from being ubiquitous in the area, it has one of the lowest values for any rock. It has limited uses. Its character does make it suitable for forest roads and tracks, but that cannot make it "exceptional" in any meaningful sense. Some use can be found for most materials.

108. I have no doubt that mudstone would not have been viewed as a material that was worthwhile quarrying and selling commercially, whether in 1816 or 1919. It of course had a "value" in its uses in infrastructure and construction, but that was as a means to an end, whether in allowing slate or lead to be extracted and removed, or for agricultural or forestry purposes. The fact that the quarries are all properly described as borrow pits supports this: they were created for a specific local purpose (see [78] to [80] above).

109. When considering the test of what the words used meant in the vernacular of "the mining world, the commercial world and landowners at the time of the grant", the expert evidence in this case, whilst entitled to respect, must be treated with some caution. The experts were expert mineral surveyors, not experts in linguistics or semantics,[40] or indeed local history. The test is one of the vernacular meaning at the time of the relevant grant, not today.

110. There was no direct evidence of the vernacular meaning of the words used at the time of the relevant grants. However, I have concluded that, particularly in the context of this locality, none of the mineral world, commercial world or landowners would have had in mind mudstone. They would clearly have had in mind lead and slate, together with other metalliferous minerals that might be found in the area, such as zinc (which had also been mined in Montgomeryshire). The known presence of those minerals in the area both provided a good reason to include a minerals reservation, and provides context to assist in understanding the sorts of material that it would have been intended to cover. Sandstone, where found in thick enough bands, might also qualify. However, the experts agreed that it would not generally be practical to work the thin bands of sandstone seen at the sites they had inspected on a selective basis. Mudstone (preferably with a reasonable sandstone content) would have to be used for construction purposes, but that is not what the mineral world, commercial world or landowners would consider that the exception and reservation would be aimed at: it was not the sort of material that a minerals owner would be aiming to extract.

111. The powers of working are important in this context. There are three particular points that can clearly be derived from the wording of the 1816 Act. First, the right is expressed as a right to "…make merchantable, and take and carry away". Mudstone

[39] This is consistent with the fact that the 1816 Act made provision for building stone to be available in each parish: see [50] above.
[40] HHJ Purle QC, sitting as a High Court judge, made the same point in *McLean Estates Ltd v Earl of Aylesford* at [14].

would neither have been regarded as merchantable, nor worth carrying away. Secondly, there is an express right to "erect and use" roads and other infrastructure. In my view it would clearly have been in the contemplation of the parties that rock in the vicinity could be used for these purposes, as it always had been and as was practically necessary. It had a value in that sense, but that was not what the reservation was getting at. The value in question was an aspect of the powers of working. Thirdly, the express power to "delve, search for, get up…" must be taken to extend to the destruction and removal of mudstone that would inevitably surround the veins or seams of minerals that were being sought.

112. The provisions of the category A reservation set out at [41] above also make explicit reference to "carrying away". The provisions are less explicit about the creation of infrastructure, but in the factual context, and taking into account what the parties must be taken to have been aware of, the words "all necessary or proper powers…" are clearly broad enough. The powers of "searching for mining working getting…" also obviously contemplate the destruction and removal of mudstone in order to get at the minerals being mined or quarried.

113. The "purpose of profit" test approved by Lord Esher MR in *Farie* (see [100] above) is consistent with this. Whilst I agree with Mr Moeran that "for the purpose of profit" does not necessarily mean for the purpose of *sale* at a profit, what it was intended to convey was that the material has some value that makes commercialisation possible. In 1816 and 1919, taking account of its ubiquity and the remoteness of the district, mudstone would not have been in that category. It would never have been worth anyone's while to dig it up except for their own use in the immediate vicinity, or to allow them to extract the more valuable material they were seeking. This is consistent with the absence of historic evidence of mining or quarrying for mudstone, except in the form of small borrow pits.

114. In relation to category D, *Wainman* can be distinguished, for the following reasons:

i) Most importantly, whilst the stone in question was referred to as "the stone common in the district", there is no indication that it was ubiquitous, or that it was uniformly close to the surface. The report of the first instance decision records at p 727 that "nearer the surface there is also *in some places* the stone common in the district" (emphasis supplied). The stone in dispute was suitable for building and was obviously of commercial value. It happened to be accessible under allotments held by the defendant. That is obviously different from mudstone which is close to the surface throughout the whole area.

ii) The structure of the drafting of the reservation is different. In the 1815 Act considered in *Wainman*, manorial incidents are dealt with in the same provision as the minerals reservation, and all on terms that the relevant rights and interests would be held:

> "in as full, ample, and beneficial manner, to all intents and purposes, as he could or might have held and enjoyed the same, in case this act had not been made."

In contrast, in the 1816 Act this text appears in the savings provision for manorial rights (see [52] above), but not in the immediately preceding

provision which sets out the minerals reservation. It has been suggested[41] that this wording became commonplace in order to ensure that the lord retained extensive mineral rights. Whilst certainly not determinative, the absence of the wording from the minerals reservation and the contrast with the manorial rights drafting is of some note.

iii) In *Wainman* the court relied at least to some extent on the specific requirement to keep the first layer of earth separate as supporting a construction that the object of the Act was to give (only) the surface for cultivation. That wording is not present in the 1816 Act.

iv) *Wainman* must in any event be read in the light of subsequent case law, summarised by Slade J in *Earl of Lonsdale v Attorney General*.

115. In the context of this case, *Micklethwaite v Winter* does not add anything material to *Wainman*. Again, it is obvious that the materials extracted, which comprised "large quantities of stone, grindstones and flag stones", had commercial value: there is a reference to £50 in the report (see p 704).

116. I agree with Mr Moeran that the words "**any**…minerals **whatsoever**" in the 1816 Act indicate that a broad construction is required. However, it does not mean that the list should be regarded as all encompassing. In context, for example, it would have helped to dispel any doubt that stone could in principle be within the reservation.

117. Also relevant to category D are two further points about what the awards made under the 1816 Act conveyed, which provide some additional support for the Defendant's case that this was not simply a conveyance of the surface for the purposes of cultivation.

118. First, the Act recited that the lord was entitled to the "soil" of the waste land, and the awards to the lord were expressed to be "in lieu and satisfaction of his right and interest" in that soil. That wording in the awards is consistent with the "in full bar of and satisfaction…" wording in s 14 of the Inclosure Consolidation Act, set out at [53] above. Under s 35 of that Act the terms of the awards were binding and conclusive (see [54] above). Those terms would therefore have bound the Claimants' predecessors in title. Given that it is accepted that "soil" included the substrata as well as the surface, this provides some indication that it was not intended that the lord would retain everything under the surface.

119. By the time that the 1816 Act was passed and the awards were made it was already clear from *Townley v Gibson* 100 ER 377; (1788) 2 TR 701 that "soil" included mines, so that "a grant of the soil will pass every thing under it" (per Kenyon CJ at 379)[42]. That case emphasised the need for an express minerals reservation, by making it clear that without it the starting point was to transfer the whole soil. *Townley v Gibson* also made it clear that, where a freehold estate was awarded, the whole soil passed even if the tenants had only copyhold titles to their existing property.

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[41] Blundell Lecture by James Maxwell of Farrer & Co, *Dealing with uncertainty: minerals and land registration*, June 2018 paragraph 20.

[42] Contrast *St Catherine's College Cambridge v Rosse* [1916] 1 Ch 73, where the recitals to the relevant Act referred separately to "soil" and "mines and minerals", and it was held that, in context, the term was used in a more restrictive sense.

120. Put another way, if the intention had been just to convey the surface then that might have been expected to be done in express terms. Instead, what was awarded was the land previously owned by the lord, subject to a proviso which excepted mines and minerals.

121. Secondly, land awarded under the 1816 Act was to be held with the same tenure as the property in respect of which it was allotted: see [51] above. In this case that was a freehold, not copyhold, tenure. That is relevant because of the broad entitlement to minerals under copyhold tenements, referred to by Mellish LJ in *Hext v Gill* (see [84] above). Instead, the 1578 feoffments contained a relatively narrow exception which Professor Ibbetson translated as "mines of gold silver copper lead coal and other metals whatsoever of and in the premises" (see [182] below). Whilst, in view of the breadth of the drafting of the minerals provision in the 1816 Act, I do not agree with Mr Wonnacott's submission it should be construed in a way that limits it only to those items reserved under the 1578 feoffments, the terms of the feoffments, and in particular the fact that the tenure was freehold rather than copyhold, do provide relevant context.[43]

122. In relation both to category A and category D there are important issues of practicality, as follows:

i) As put in opening, the Claimants' claim is to the ownership of everything under the topsoil. But that makes no practical sense, particularly in the area in question and given the shallowness of the topsoil. It would be impossible to erect or extend any form of permanent farm or other building, or even put in fencing, without trespassing on the Claimants' property. Tree roots would often extend into the subsoil. The construction of any road or track would at least involve some disturbance to the subsoil, as would digging trenches for pipes, drains or cesspits. All of these activities must have been activities that would have been contemplated by the parties to the awards under the 1816 Act and the category A conveyances.

ii) Even if soil and organic matter within subsoil are excluded from the claim, pieces of broken mudstone within the subsoil are still mudstone, in the same way as the bedrock. Disturbing them, as would inevitably happen with any of the activities referred to in the previous paragraph, would amount to a trespass. Extracting or using them, for example for building purposes, would amount to a trespass and conversion.

iii) Again, taking account of the hilly terrain, the thinness of the soils and the occurrence of outcrops, some disturbance of the bedrock was also highly likely to be required as part of the activities that would have been contemplated by the parties. In some areas foundations of buildings would rest on the bedrock, but this would not always be the case, particularly if the bedrock is very close to the surface. In any event it is hard to imagine that no element of levelling would be required, particularly on any form of slope. Any construction of a

[43] It is highly unlikely that the draftsman of the Act was aware of the terms of the feoffments. It is also somewhat unlikely that the parties to the awards would have the terms of the reservation in the feoffments at their fingertips. It is however relatively clear from the evidence that it was generally believed at the time that the land was held in freehold tenure. In particular, the key allotment provisions in the 1816 Act refer to the commoners as "freeholders".

cellar would involve cutting into the bedrock. And as already discussed, the construction of roads and tracks around hillsides would also often involve cutting into the bedrock.[44]

iv) I do not accept that the parties to the enclosure awards or category A conveyances could possibly have in mind that they could be required to compensate the lord of the relevant Manor (or vendor in category A cases) for the sorts of disturbance to the mudstone that I have described in the previous three paragraphs. That would in reality deprive the acquirer of a significant element of practical enjoyment of the property acquired.

v) I also do not accept that the existence of a specific provision in the 1816 Act for waste to be set aside for building stone means that the parties contemplated that allottees were not also entitled to use mudstone found on the land awarded to them. This provision was for the benefit of the whole parish, not just the allottees, but it also benefitted allottees because they were not forced to destroy the surface of their own land to extract mudstone.

vi) During the course of submissions, Mr Moeran accepted that a term might need to be implied that the grants extended both to subsoil and to whatever layer of stone was necessary for the uses of the surface land that would have been in reasonable contemplation at the time of the grant. Those uses would have been agricultural in nature. Mr Moeran also accepted that some element of disturbance to bedrock may have been contemplated in road and track construction (including by digging into the hillside), to whatever extent would have been required for the sorts of roads and tracks constructed at the time. He further accepted that some element of rock outcrops would be included in the grants, together with at least some element of loose stone in the subsoil.[45] He also made clear that, to the extent that road or track construction amounted to a trespass, no claim was being made in respect of it.

vii) Whilst these were realistic concessions to make in the light of the practicalities, they create another difficulty, namely that it is then wholly unclear where the line – in this case a literal boundary line – should be drawn, if it is not immediately below the topsoil. The court is being asked to make a declaration of the Claimants' rights, including in relation to extraction of material from quarries and borrow pits, and in relation to the construction of the wind turbine and telecommunications mast. But to do that it must determine where the boundary falls. There was no evidence before the court as to, for example, the relative width of hillside roads as they now exist as compared to the type existing in 1816 or 1919, or as to the depth of the foundations of the mast or turbine compared to building foundations (or indeed cellars, if they existed) in 1816 or 1919. There is also no obvious way to divide

[44] Although this was not argued before me and I do not rely on it, it is arguable that even resting foundations on bedrock would amount to trespass: compare *Duke of Hamilton v Graham* (1871) 9 M. (H.L.) 98 at p 105, where the Lord Chancellor compares using a tunnel cut through excepted minerals with passing over the *solum* included in the grant, the latter being a trespass by the minerals owner, and again at p 107 where he refers to drawing minerals over part of the granted property. (There is a shorter report of this case at (1870-75) L.R. 2 Sc. 166, where the point is touched on at p 170.)

[45] Mr Moeran also accepted that existing buildings, including their foundations, would be covered in category A grants, which expressly extended to "premises".

up rock outcrops. Furthermore, bearing in mind that the quarries and borrow pits have typically been constructed in exactly the same way as the roads, by digging into the hillside, it would be inherently unclear what element would be regarded as a trespass and what might have been contemplated as permissible. It would certainly not be possible to establish boundaries based on the evidence before the court, and in reality I expect that it would in practice be an impossible task even if all available evidence were provided.

viii) Another problem with the concession is that land boundaries are generally fixed. A boundary cannot simply move downwards because a building or road is constructed in a location where it previously did not exist and was not contemplated, and requires a certain element of disturbance to the bedrock, or indeed to loose stone. In the context of minerals, the proposition that boundaries will not move as they are worked is supported by *Duke of Hamilton v Graham* (1871) 9 M. (H.L.) 98; (1870-75) L.R. 2 Sc. 166. That case decided that the void created by worked out coal remained the property of the minerals owner, so he could continue to use it to convey minerals from adjacent land.[46]

123. These practical difficulties provide a further indication that what was intended at the date of grant was a more limited reservation that did not include the local mudstone. I do not accept the Claimants' explanation that purchasers of cottages or farm buildings at the 1919 auction were simply ill-advised. I also do not accept that it should be assumed that allottees under the 1816 Act were prepared to give up exclusive rights of sheepwalk for rights to the surface that, in reality, would not enable them to do much else with the land. The question is the objective meaning of the words used in the context of the factual background.

124. I also do not accept the suggestion that the obligation to compensate provides an answer to the proposition that it cannot have been intended that the lord of the Manor (or vendor) would be entitled to come and dig up all the mudstone under a building, because that obligation would mean that it was not worth his while doing so.

125. Digging up all the mudstone would risk swallowing up the grant of the surface that the Claimants say was made: the surface owner would in principle simply retain part of a void. But it would also allow a rights holder to claim ransom money to prevent him creating the unwanted inconvenience to the freeholder that would inevitably result, and which would be unlikely to be fully reflected in compensation. The fact that the property might be materially affected if minerals that were within the grant were found in the land does not prevent this being a relevant consideration. If such minerals were found then it would be understood that the rights holder would be entitled to exercise his rights (subject to paying compensation), even if that meant damage to or potentially even destruction of part of the landowner's property: see *Hext v Gill* at pp 714-717. But (on the approach I am taking) it would be highly unlikely to swallow up the grant entirely, because the landowner would still own the surrounding material as well as the space created by the removal of his property.

[46] This was a Scottish case, but the Lord Chancellor made it clear that there is no distinction between the laws of England and Scotland on the issue. An exception to the general rule that boundaries do not change is that boundaries by water can move (albeit only gradually and imperceptibly) by natural processes: *Southern Centre of Theosphy Inc v State of South Australia* [1982] AC 706 (PC).

126. In this case, of course, the Claimants are not seeking access to the Defendant's land to dig up mudstone, with good reason given its limited value and the remoteness of the sites. Instead they wish to charge the Defendant for its use of the material on its land. For all the reasons given, they are not entitled to do so under the terms of the category A and D grants.

Category B

127. The analysis of the scope of the Claimants' entitlement to minerals in the 408 acres forming part of title B12 is in my view relatively straightforward. Crown grants are construed "most strictly against the grantee and most beneficially for the Crown", and nothing passes "except that which is expressed, or which is [a] matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant", *Viscountess Rhondda's claim* [1922] 2 AC 339, 353, per Lord Birkenhead LC.

128. Particularly when contrasted with the addition of the word "substrata" in the conveyance of the northern parcel (see [44] above), it is not appropriate to give "minerals" a broad meaning. In my view, and applying the principles summarised by Slade J in *Earl of Lonsdale v Attorney General* and discussed above, the rights granted by the Crown in respect of the 408 acres clearly do not cover the local mudstone.

Category C: the effect of the enclosure agreements and subsequent conveyances

129. The enclosure agreements relied on in respect of category C titles were not executed as deeds. It is also clear from the text set out at [46] above that they were not intended to effect any form of conveyance or creation of an estate or interest in land.[47] The last paragraph of the extract makes it clear that existing property rights were intended to be preserved, but even without this the position is clear as a matter of law. The operative part of the example agreement set out above granted a permission, which cannot have been more than a contractual licence, to Mr Morgan to put fences up and also to cultivate the land rather than simply using it for grazing. It did not grant any more rights than that. It is therefore wholly unsurprising that the agreement purported to retain, among other things, all "substrata", as well as powers to work.

130. Although the parties to the agreement purported to bind their successors, the terms of the agreement could not, without more, "run" with the land. This was the case even if the land was sold "subject to" it: see the Court of Appeal's decision *Ashburn Anstalt v Arnold* [1989] Ch 1 at pp 25 to 26, dispelling what Millett J described in *London Borough of Camden v Shortlife Housing* (1993) 25 HLR 330 as the "heretical view" that a contractual licence created an interest in land capable of binding third parties. Mr Morgan (or his equivalent for other land) would have been able to assign the benefit of the agreement, although there was no evidence that he or anyone else did so, but he would not have been able to assign any obligations under it.

[47] The agreements were also entered into with the baronet personally, rather than with the trustees of the relevant settlement. There is no indication that he would have had power either to convey land or bind his successors under the terms of the settlement.

131. What in fact then happened was that, over time, the holders of rights under these agreements, or their successors in title to the farm to which the relevant sheepwalk or other right attached, started to treat themselves as, and in many cases no doubt came to believe that they were, the owners of the relevant land. This is important because it explains how the Defendant came to be registered as the holder of category C titles. It did not achieve this by deriving any form of paper title from the Claimants' predecessors. The root of the Defendant's own title was adverse possession by its predecessors in title against the Claimants' predecessors.

132. Mr Moeran submitted that *Ashburn* was irrelevant, because the beneficiaries of the enclosure agreements and their successors in title never obtained an entitlement to more than the surface. The agreements expressly reserved the rights in the substrata. Later conveyances by them were subject to the proviso *nemo dat quod non habet*.

133. The difficulty with this argument is that the agreements did not pass the surface title. There has at no stage been a severance of the legal estate as between the surface land and the substrata that the Claimants say they own. Prior to enclosure agreements the Claimants' predecessors had an undifferentiated title to the whole of the land. It was waste, which was owned in its entirety by the lord of the relevant Manor, subject only to rights of common or (in this case) rights of sheepwalk. That did not change when the agreements were entered into.

134. What then happened was that the Defendant's predecessors established their own titles by adverse possession. A title acquired by adverse possession is a fresh title. The dispossessed owner's title is not transferred. Rather, it is extinguished.[48] But irrespective of this there was at no stage any severance of the legal estate between the surface and what was below, at least in any manner that assists the Claimants.

135. The fact that many of the subsequent conveyances of category C titles contain mineral exceptions makes no difference. The Claimants and their predecessors in title were not party to those documents and cannot rely on them to create any rights in their favour. I therefore do not accept Mr Moeran's suggestion in opening submissions that these later conveyances effected a severance, if it did not occur earlier. As far as the Claimants are concerned there is therefore simply no effective minerals exception or reservation in Category C titles.

136. As explained in *Ashburn* at p 25, citing Dillon J in *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044, 1051, land is often expressed to be sold "subject to" encumbrances to satisfy the vendor's duty to disclose all possible encumbrances known to him, and to protect him against any possible claim by the purchaser, rather than there being any suggestion that the purchaser is assuming a new liability in favour of a third party. The wording obviously imposes notice but that is insufficient to impose any obligation or equity: *Ashburn* at p 26. So the exceptions might assist the Claimants if they had an existing right to the substrata which had not been extinguished by adverse possession, but they would not have created any new rights in their favour.

137. The conclusion that there has been no severance is also supported by the Supreme Court decision in *Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380. Lord

[48] See *Megarry & Wade* at 7-004.

Hope confirmed at [27] that the owner of the surface is the owner of the strata beneath it, including minerals, "unless there has been an alienation of it by a conveyance, at common law or by statute to someone else". (The reference to alienation here should of course be read as encompassing a situation where an owner of the whole conveys the surface and retains strata beneath it.)

138. Adverse possession in relation to land where there has been no severance of title between the surface and substrata is adverse possession against the whole of the dispossessed owner's title, not just some part of it.[49] The Defendant (or strictly the National Assembly for Wales) is the registered title holder, so a title based on adverse possession has clearly been established to the satisfaction of the Land Registry. The Claimants' predecessors must therefore have been deprived of their title.

139. This again finds some support in *Bocardo*. In that case the paper title owner, Bocardo SA, was claiming damages for trespass in respect of petroleum extraction activities at a significant depth below the surface of its land. The question arose as to whether it needed to establish possession, as well as title, to the strata below its estate in order to maintain its claim. Lord Hope agreed at [31] with a comment by Aikens LJ in the Court of Appeal that it was difficult to say that Bocardo had actual possession of the strata because it had done nothing to reduce them into actual possession. However, applying a dictum of Slade J in *Powell v McFarlane* (1977) 38 P&CR 452 at p 470, Bocardo as the paper title owner to the strata had the prima facie right to possession, so as to be deemed to be in factual possession.

140. In this case the Defendant's predecessors in title established themselves as paper title owners through adverse possession. In principle, that extended to the substrata. Acts of possession at the surface, sufficient to establish title, carried the right to possession of the substrata, even if not actually exercised.

141. While the right of sheepwalk (or other right of common) existed, any use of the land consistently with that right would not have led to time running against the Claimants' predecessors. However, those rights would have been extinguished at the latest by 1970 for non-registration under the Commons Registration Act 1965 (*Central Electricity Generating Board v Clwd* [1976] 1 WL R 151). As already indicated, the licences granted by the enclosure agreements were wider, permitting planting and tillage, which might in principle have covered forestry. However, as already explained there is no evidence that the benefit of those agreements was assigned by the original tenant, so if the contractual licence had not already fallen away on the relevant baronet's death, it would have done at the latest when the land was sold. The reality is that, at least by 1970 and in most cases well before that, it was clear that it was the Defendant's predecessors who were claiming to be, and acting as, sole owners of an undifferentiated title.

Adverse possession: categories A, B and D

142. In view of the conclusions reached in the preceding sections it is not strictly necessary to express any views on the question whether the Defendant has established title to the mudstone through adverse possession in categories A, B or D. However, in case the

[49] *Jourdan & Radley-Gardner on Adverse Possession*, 2nd ed, at 11-03, referring to *Seddon v Smith* (1877) 36 LT 168, where adverse possession of the surface of land extended to adverse possession of coal underneath it.

matter goes further, and because the issue requires factual findings, I will deal with this relatively briefly.

143. The Defendant's position is that, even if mudstone was included in the reservations, the use that it and its predecessors have made of it over many years amounts to adverse possession of the mudstone. The Claimants' response is, in summary, that the localised use that the Defendant has made does not amount to adverse possession either vertically (below any area disturbed) or horizontally (across a wider area). Given the size of the areas in question, digging in one small area cannot amount to adverse possession of the rest. The Claimants also say that it is relevant that the Defendant did not appreciate that forest road construction could be an incursion into the Claimants' property.

The principles

144. It is clear that, where there has been an effective severance of mines and minerals, adverse possession of the surface will not cause time to run against the mines and minerals owner.[50] In order for that to occur the squatter needs to take possession of the mines and minerals.

145. There is very little authority that assists in determining what acts can amount to adverse possession of substrata. The concept clearly exists, however: see *Rich d. Lord Cullen v Johnson* (1740) 2 Str. 1142; 93 ER 1088 (adverse possession of a mine) and *Glyn v Howell* [1910] 1 Ch 666 (a dispute between owners of undivided shares in a mine, where adverse possession was demonstrated in respect of the part of the mine worked, but not other parts which were held not to be in actual possession). Mere working of a mine in a way that encroaches on to a neighbour's property does not, however, confer title by adverse possession: *Ashton v Stock* (1877) 6 Ch D 719; *Thompson v Hickman* [1901] 1 Ch 550.

146. Both parties agreed that the normal tests for adverse possession apply. Thus, the Defendant must establish (1) factual possession, in the sense of a sufficient degree of physical custody and control, and (2) an intention to possess, meaning an intention to exercise that custody and control on its own behalf and for its own benefit: *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at [40], per Lord Browne-Wilkinson. Under s 15 Limitation Act 1980, adverse possession for a continuous period of 12 years will bar a paper title owner.[51]

147. In order to establish factual possession, the alleged possessor must be shown to have been dealing with the land as an occupying owner might be expected to deal with it, and that no one else has done so. What acts are required to establish a sufficient degree of exclusive control will depend on the circumstances, in particular the nature of the land in question and the manner in which land of that nature is commonly used or enjoyed: *Pye v Graham* at [41], citing Slade J's judgment in *Powell v McFarlane* at pp 470-471. For a recent example see *Thorpe v Frank* [2019] EWCA Civ 150, concerning paving an open area at the front of a bungalow.

[50] *Jourdan & Radley-Gardner on Adverse Possession* at 11-04.
[51] Subject to s 32, as to which see below.

148. Further, acts on one part of an area owned by a single paper title owner may be treated as evidencing possession of the whole area provided that there is such a common character of locality as would raise a reasonable inference that if a person were possessed of one part of it as owner then he would so possess the whole of it: *Roberts v Swangrove Estates Ltd* [2007] 2 P&CR 17. The question is one of fact and degree.

149. Intention to possess (*animus possidendi*) means "an intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow": Slade J in *Powell v McFarlane* at pp 471-472, approved by Lord Browne-Wilkinson in *Pye v Graham* at [43]. As Slade J explained at p 472 of *Powell v McFarlane*, it is necessary for there to be "clear and affirmative evidence" that the trespasser "not only had the requisite intention to possess, but made such intention clear to the world". In other words, there must be both a subjective intention and an objective manifestation of it.

Application to the facts

150. As discussed further below I have concluded that, when digging into mudstone to construct a road or track, to construct ramps to allow harvesting or to extract material from a quarry or borrow pit, the Defendant[52] acted in relation to the mudstone it disturbed as an occupying owner of it might normally be expected to do. However, there is also a question as to the area over which the reasonable inference referred to in *Roberts v Swangrove Estates* extends, whether horizontally (the geographical area) or vertically. I shall address the horizontal aspect first.

Determining the relevant geographical area

151. One issue that arises is how the area of the relevant title is to be determined. Mr Moeran submitted that I should consider the question by reference to the Defendant's individual registered titles, because details of those would be available to the "objective informed observer" referred to in *Powell v McFarlane* at p 478. However, this does not take account of the fact that before around 2005 the Defendant's title was unregistered, and it claims that adverse possession was established well before that. More importantly, it does not reflect the fact that adverse possession would be against the *Claimants'* paper title, which is unregistered. I therefore preferred Mr Wonnacott's submission that it is the area of the Claimants' title that should be the focus, rather than the Defendant's title to the surface.

152. However, that in turn raises the question of how to identify the Claimants' title. For category B it is pretty clear: it derives from the Crown grant. For categories A and D, the question arises as to whether it is a single title to all the minerals, derived from lordship of the relevant Manor, or whether it needs to be broken down by reference to the individual enclosure awards and conveyances.

153. Given that, for adverse possession to be in issue, the Claimants must have succeeded in showing that mudstone was excepted from the conveyances and awards such that what was conveyed was essentially limited to the surface, with their predecessors

[52] In this section references to the Defendant's actions should be read as including those of its statutory predecessors.

retaining ownership of everything beneath that, I think it must follow that title cannot be defined simply by reference to the individual plots awarded and conveyed. Instead, I conclude that, based on the available evidence, there is a single title derived from ownership as lord of the relevant Manor.

154. It is clear that this is the correct approach with category D titles, all of which relate to former waste of the Manor of Arwystli. In reaching the same conclusion in relation to category A titles I have taken account of the following:

i) Some areas claimed under category A might have been acquired by the Claimants' predecessors in title from allottees under the 1816 Act (or their successors in title). It appears that this may have been the case, for example, in relation to part of title D36 that should have been treated as an A category claim. Where such an acquisition occurred then the surface and substrata title will have merged. It might then be argued that, when sold subsequently, the area of the title retained should be determined by reference to the earlier award. However, I do not consider that this is correct. The Claimants' position is that their predecessors in title retained ownership of the mudstone throughout: they never disposed of it under the enclosure award, and so they did not acquire it when they bought the surface back.

ii) Some areas claimed under category A might have been allotted to the lord of the Manor under the 1816 Act. In that case the surface and substrata titles will not have been split, and the title of the Claimants' predecessors, as lord of the Manor, would have been unaffected until the category A conveyance was entered into.

iii) Category A might also include land that had always been demesne land of the relevant Manor. In that case it would again be clear that there is a single title derived from lordship of the Manor.

iv) There would be more scope for argument in respect of any property that had been conveyed under the 1578 feoffments and was subsequently acquired by the Claimants' predecessors in title from third parties (whether by purchase or escheat[53]), because the reservation under the 1578 feoffments was more limited, and arguably of an incorporeal rather than corporeal nature (see [182] below). However, I was not shown any evidence that any parts of the property in dispute fell into this category.

v) A further category would comprise land which never formed part of either Manor (whether as demesne, waste or land held by tenants). Again, however, there was no evidence of property in this category.

155. The next point is to determine how much of the area covered by the Claimants' title can be treated as possessed by evidence of acts on part of it, applying the principles discussed in *Roberts v Swangrove Estates*.

156. A number of the areas claimed are geographically separate. Furthermore, the evidence did not allow me easily to determine the relationship between those areas and the

[53] Reversion to the lord on death of a tenant without heirs.

Defendant's forest boundaries, but it was clear that at least to some extent the claim relates to separate forests or forested areas.

157. An act of possession in one area will not evidence possession of a separate area if there is insufficient "common character of locality". Identifiably separate forests would not meet the "common character of locality" test. I also think that the same must apply to forested areas separated by land used for other purposes, and that this must be the case even if the Claimants' title runs across that land and into both forested areas[54]. However, separation by a forest road or track or (for example) by a stream or rock outcrop would not be sufficient to destroy the "common character".

Equivocal acts?

158. Mr Moeran submitted that any interference with mudstone in connection with forest roads or tracks was insufficient. The only acts of possession had occurred at the quarries and borrow pits, which comprised a very small part of just some of the areas claimed. He submitted that it was relevant that members of the Defendant's staff appreciated that mineral rights owners had rights in respect of the quarrying activity, but did not appreciate this in relation to work on roads and tracks, which continued even after quarrying activity ceased.

159. It was not disputed that *animus possidendi* is not negated by the possessor's mistaken belief that he is the true owner. Mr Moeran's point was a more subtle one, related to the need for clear evidence to demonstrate both a subjective intention to possess and an objective manifestation of it. Equivocal actions that may or may not be consistent with a use that the true owner might wish to make of the land, or which otherwise do not clearly demonstrate an intent to exclude the true owner, are insufficient. Where use of land is equivocal, "compelling evidence" is required (*Powell v McFarlane* at p 476).

160. Mr Moeran submitted that work on roads and tracks were, if trespasses at all, equivocal acts. The Defendant's staff did not consider that any rights were being interfered with. They were, effectively, accidental trespasses that manifested no intention to exclude the true owner. The position could be contrasted with, for example, the erection of a fence which intrudes into a neighbour's property. In that case the intention to possess would generally be clear, and it would not matter whether or not the squatter believed that the fence marked the paper title boundary.

161. Mr Moeran also submitted that actions in relation to roads and tracks were not sufficiently unambiguous acts of exclusive physical control to amount to factual possession. For example, digging and refilling the surface below a road might be compared with dumping rubbish on a neighbour's land, or repairing a wall from the neighbour's side of the boundary. Digging into the bedrock to create a hillside road did not itself amount to possessing the void created by it, or at the most resulted in possession of that void and no more.

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[54] See the examples referred to in *Roberts v Swangrove Estates* at [60], quoting a passage from *Lord Advocate v Lord Blantyre* (1878-79) L.R. 4 App Cas. 770, including an example of trees in a belt of woodland. There is a similar reference to an unfenced wood, or a continuous belt of trees, in the judgment of Parke B in *Jones v Williams* (1837) 2 M&W 326; 150 ER 781. That case related to a claim to a whole river bed on a boundary between the parties.

162. More generally, and relevant to quarries as well as roads and tracks, Mr Moeran submitted that where a void was created by digging then either the Defendant's surface title moved down to the new surface, or in any event the void could not have the same common character as the mudstone around it that had not been dug out.

163. I have already addressed the point about the location of the surface title. It is not the case that the boundary simply moves down to the new surface (see [122(viii)] above). It follows that, if the Claimants are right about the extent of their title, the Defendant would have been trespassing in the void.

164. Turning to Mr Moeran's other points, I do not accept that there is a meaningful difference in this context between forest roads and tracks on the one hand, and quarries and borrow pits on the other. I have found as a fact that in most cases it was necessary to cut into the bedrock to some degree to construct roads and tracks (see [77] above). Quarrying is usually into the hillside, in the same way as for hillside roads and tracks ([80] above). Whatever may have been the Defendant's belief about paper title ownership at the time, the objective manifestation is similar. And although there was a concession that road building may not amount to an interference with the Claimants' rights, I have already explained the difficulties with that approach, in terms of establishing where the boundary might lie (see [122] above). The objective observer would discern no meaningful difference. Clearly quarrying might involve a greater incursion, but the difference is quantitative rather than qualitative. There would be no real dividing line.

165. The areas in dispute are used for forestry purposes. That is the way in which the land is used and enjoyed. In using the land for forestry, the Defendant has undertaken related activities, in particular constructing, improving and maintaining forest roads and tracks, and (in some areas and prior to this dispute) extracting material from borrow pits for the purpose. There was nothing that would indicate to the hypothetical informed observer that, within any particular forested area, any distinction was being drawn between different areas of the Claimants' title.[55]

166. The position is very different from the example given by Lindsay J in *Roberts v Swangrove Estates* at [54] of possession of a small kitchen garden in the corner of a 40 acre field, where it may well be apparent that the possession is restricted to that corner. In this case it would not have been so apparent. As Lindsay J pointed out at [64], there will be many situations where a squatter may only conduct limited operations on the land in question, and unless a practical view is taken then in many cases acquisition of the whole by actual possession would be impossible. Forestry activities are in their nature sporadic, and the extent to which it is necessary to dig into the subsoil or bedrock will depend on the circumstances at the time, including the need to ensure suitable access for harvesting. Similarly, forest roads and tracks, and voids created by constructing or widening them, will be used as the circumstances require.

167. I also do not accept the argument that there was no continuing possession by acts of breaking the surface and removing mudstone. Not only is it unnecessary for activities

[55] The only possible qualification to this relates to an overbund (bank of soil) constructed in Aerospace quarry, but that was between two C category titles, and was constructed in connection with a belief that the mineral rights status differed between the two.

on the type of land in question to be continuous, but by breaking and removing part of the surface the Defendant would have occupied space owned (on the Claimants' case) by the Claimants. Whilst I see the argument that any void would not have a common character with mudstone that had not been dug out, I think the argument goes too far. Logically, it would suggest that adverse possession of a mine or quarry could never extend beyond the area already dug out. That seems to me to be contrary to authority, in particular the decision in *Rich d. Lord Cullen v Johnson* and the recognition in *Ashton v Stock* that, depending on the facts, possession might be acquired of a whole mine or a seam of coal, and not merely the quantity of coal actually worked. The same point is recognised in *Halsbury's Laws of England, Limitation Periods*, vol. 68 at 1082.

168. I accept that quarries do not exist in every area, and that the Defendant has not provided definitive evidence that there are forest roads or tracks that have been cut into the bedrock in every area. However, at the very least there will have been disturbance to mudstone in subsoil, and (consistent with the finding at [77] above) I consider it more likely than not that by now at least some disturbance to the bedrock will have occurred in every forested area the subject of a claim. In every such area at least some forest roads or tracks will need to have been constructed or improved to allow mechanised planting. Trees must in many places have themselves encroached on the subsoil. An objective informed observer would appreciate that additional activity would typically be required for harvesting (if not for thinning).

169. By planting, the Defendant's statutory predecessor was manifesting an intention to take whatever steps it needed to take to harvest in due course, and the informed observer would be aware that that would be highly likely to require further disturbance to the subsoil, and in many cases to the bedrock. Importantly, this intention would be manifest as regards the whole forested area. No such observer would consider that the actions taken by the Defendant and its statutory predecessors were equivocal. Furthermore, in all areas some harvesting activity is likely to have occurred already (see the final sentence in [72] above, read with the last sentence of [71]). If roads or tracks had not previously been cut into the bedrock, then the additional activity required for harvesting is likely to have required it, at least to some extent.

Conclusions as to possession, and vertical extent

170. I consider that the Defendant has established factual possession, with the necessary intention to possess, of at least a sufficient depth of mudstone over the area claimed to allow any activity that is consistent with forestry operations. This includes the construction and improvement or repair of forest roads and tracks, turning circles for machinery, ramps for harvesting and related quarrying to produce material for those purposes. These are the uses that an occupying owner of the forest might expect to make of the mudstone. Like the construction of paving in *Thorpe v Frank*, the trespasses were not simply temporary: the actions taken by the Defendant and its predecessors have changed the subsoil and bedrock in an enduring way. The Defendant has also been dealing with the land in this way, and as an occupying owner would, for well over the 12 years required to establish title by adverse possession. No one else has been dealing with it. The activity undertaken was intended to exclude others. It was not comparable with working a mine in a way that encroaches on a part of a neighbour's property. The Defendant was manifesting an intention to possess the

whole of the relevant forested area, including mudstone that might be disturbed in the course of its forestry activities.

171. The position in relation to other constructions, in particular wind turbines and telecommunications masts, is less straightforward, in part because there was no evidence as to the extent of the incursion into the mudstone as compared to other activities undertaken by the Defendant. However, the difficulties identified at [122] above are also relevant here. I do not see that it is realistically possible to draw a dividing line in the mudstone between what might be regarded as possessed by forestry operations, and material below that which is still relatively close to the surface and may be disturbed by other construction work, of whatever kind, undertaken by the surface owner. Overall, I think the better view is that the inference discussed in *Roberts v Swangrove Estates Ltd* applies such that adverse possession to the mudstone is established to whatever depth might be required for activities undertaken by the Defendant as surface owner of the relevant forested area. All that material seems to me to have the necessary "common character of locality".

172. It does not follow from this that the Defendant has also established adverse possession to other minerals that may be located near to the surface (and indeed it did not claim to have done so). The concept of "common character" must, it seems to me, be capable of applying to sub-surface strata as well as to areas of the surface. Materials such as ironstone nor slate would not have the necessary common character with the mudstone.

Section 32 Limitation Act

173. Mr Moeran also maintained that this was a case where time did not run because of the effect of s 32(1)(b) and (2) Limitation Act 1980. Section 32(1)(b) prevents time running if any fact relevant to the Claimants' right of action has been "deliberately concealed", and s 32(2) provides that a deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment. The breach of duty relied on was the duty of the Defendant (as a public authority) not to act in a manner incompatible with the Claimants' property rights pursuant to s 6 HRA.

174. This point was not developed in oral submissions, and was not relied on by Mr Moeran in seeking to cross-examine the Defendant's witnesses on the subject of knowledge of the Claimants' rights (see [17] to [19] above). However, it was not withdrawn, and I will therefore address it briefly.

175. The first point to make is that the Claimants only relied on s 32 for periods after s 6 HRA came into force on 2 October 2000. That would appear to be a full answer in all cases where acts amounting to possession, as described above, had already been going for more than 12 years by that date. The Defendant's position, which I did not understand to be challenged, was that in all cases the acts it relied on to establish adverse possession had been going on from at least 1970, and in most cases years earlier.[56] Once a title is barred by adverse possession it cannot be unbarred. The

[56] The significance of 1970 is that that is when rights of sheepwalk were extinguished for non-registration under the Commons Registration Act 1970. See [141] above.

Claimants can only re-establish title by going into possession themselves, which they have not done.

176. Putting this point to one side, I accept that the Defendant must have been aware of the existence of minerals exceptions on many of the titles, and in some cases would have been aware that these belonged to the Wynnstay Estate. They were not, however, notified of the unilateral notices placed on the Defendant's registered title in 2013 (referred to at [189] below).

177. I am satisfied that no steps were taken to conceal or disguise any of the Defendant's activities on the land in dispute. Whilst access to areas where quarrying or construction work is occurring is restricted for obvious public safety reasons, signs are erected warning of the works, which are in any event often noisy. Large machinery and low loaders will also be visible travelling to and from the sites.

178. Insofar as the acts of possession related to roads, tracks, planting and harvesting, the evidence also showed that the Defendant's staff did not believe that there was any breach of any other person's rights. As far as quarrying activity is concerned, the evidence demonstrated that activity ceased at the disputed sites as and when the Defendant received advice that it should do so following a review of minerals ownership (prompted by a query from a prospective wind farm developer), and has not recommenced.

179. In the circumstances I conclude that there has been no deliberate commission of a breach of duty.

Incorporeal rights and prescription

180. The Claimants' claim was pleaded in the alternative, either that they were entitled to ownership of the claimed material (a corporeal right), or alternatively had a sole right to extract it (an incorporeal right, a form of profit à prendre). The focus of the submissions at the trial was almost exclusively on the former, being the Claimants' primary submission.

181. In view of the conclusions I have reached that mudstone is not within the scope of the reservations, the question whether the rights that are retained are corporeal or only incorporeal is of less significance than it might otherwise be. However, it does make a difference to the question of adverse possession. If there was only an incorporeal right then adverse possession is not relevant, and instead the defence would be one of prescription.[57] It also affects the declaratory relief that the Claimants are seeking.

182. In the case of category D, the Defendant's position is that what the Claimants have is limited to an incorporeal right, because the effect of the 1816 Act was to make the awards subject to the same reservation as contained in the 1578 feoffments, where the minerals reservation forms part of a list which reads as follows:

> "…Except and in every way reserved to the aforesaid Earl his heirs and assigns in all regalities liberties franchises privileges

[57] Or the doctrine of lost modern grant.

> jurisdictions and their [mizes][58] mines of gold silver copper lead coal and other metals whatsoever of and in the premises or any proceeding from there or by reason of the premises or any parcel…"

183. Mr Wonnacott submits that "regalities…mizes" are all incorporeal rights, so the minerals reservation should be read in the same way.

184. Given my conclusion that the extent of the reservations in the enclosure awards is not limited by reference to the 1578 feoffments (see [121] above), I do not need to reach a conclusion about the nature of the reservation in those documents. Putting them to one side, I would construe the terms of the minerals reservation in the 1816 Act as having the effect that the Claimants' predecessors retained a corporeal estate in the mines and minerals. That is most consistent with the words "nothing… shall prejudice, lessen or defeat any right, title or interest…in or to" the minerals (see [49] above). I have therefore concluded that, in relation to category D, what the Claimants retained was a corporeal right to the minerals that are captured by the drafting.

185. In relation to categories A and B it was accepted by the Defendant that, if the scope of the rights were limited to metals and other minerals of value (such as ironstone, lead and slate) as it claims to be the case, then what the Claimants have is a corporeal right to that material.

186. I agree that the Claimants have corporeal rights to the materials covered by categories A and B. In the case of category B this is clear from the terms, which "grant and convey" mines and minerals in the 408 acres, and the entire interest in the 201 acres. The drafting of category A, with its use of language of exception as well as reservation, is also in my view sufficiently clear to demonstrate that what was intended to be, and was, retained was a corporeal right, with a separate power of working.

187. For these reasons I have not considered the alternative defence of prescription, on which I received no oral submissions.

Land Registry aspects

188. The Defendant, or more accurately the National Assembly for Wales, is the first registered owner of each of the titles in dispute. The Claimants' title to minerals in the areas covered by the titles is in each case unregistered.[59] Out of 40 titles in dispute minerals are "excepted" from the registered title in 28 cases, either in respect of the whole or part of the land. This means that the Defendant's registered title does not extend to them, but it does not establish the Claimants' title to them.

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[58] Prof Ibbetson did not offer a translation of this word, but it was not disputed that it was a Welsh tax payable by tenants if the lord of the manor died (*Elwyn Evans, Arwystli and Cyfieliiog in the Sixteenth Century*, (1950) 11 Montgomery Collections, 23, 32). As Mr Wonnacott said, this was presumably with a view to discouraging any attempt to hasten that event.

[59] It would be possible for corporeal rights to minerals to be registered as a separate estate on a voluntary basis, see s 3 Land Registration Act 2002 ("LRA 2002") and the definition of land in s132, which includes mines and minerals. But compulsory registration does not apply: s 4(9).

189. For all titles in categories A, C and D (which covers all relevant areas in respect of which mineral rights are not excepted), the Claimants have registered unilateral notices on the Defendant's title. This was done in 2013, shortly before "manorial rights" ceased to override first registration or registered dispositions.[60]

190. The Defendant's position is that rectification of the register would be needed if the Claimants established a corporeal title to a sub-surface stratum in a case where the minerals are not currently excepted from registration. Its position is that any such right is not a "manorial right", and furthermore that the Defendant is in physical possession, and the restrictive conditions for rectification against an owner in possession are not satisfied[61].

191. No claim to rectification has been pleaded, but the Claimants' position is that it is not needed because they have an overriding interest in the form of a manorial right, protected by the unilateral notices. They also say that, in any event, the Defendant has not established that it is physically in possession.

192. Given the conclusions I have reached on other aspects, and the absence of pleading on the point, it is not necessary to decide whether the Claimants would be entitled to rectification of the register, and in my view it would not be appropriate to express a view on the legal issues raised.

Human Rights Act

193. Given the conclusions I have reached, it is also not necessary to give separate consideration to the Claimants' human rights claim. I understood that claim to have been raised primarily in the context of s 32 Limitation Act 1980, which I have dealt with briefly at [173] to [179] above. I should however record that the Claimants accepted that the relevant limitation periods are ECHR compliant.

Conclusions

194. In conclusion:

i) Subject to the mapping issues referred to at [16] above, the Claimants have retained a corporeal title to minerals in those parts of the titles in dispute that fall into category A, B or D.

ii) In none of those categories does the Claimants' title extend to ownership of mudstone, including interbedded sandstone and shales of the kind found on the Defendant's land. Specifically in relation to sandstone, the Claimants' title does not extend to interbedded sandstone of the kind disturbed or extracted from the Defendant's titles to date. No finding is made as to whether it could, in principle, extend to sandstone if it was found in quantities making it practicable to extract it as a separate material.

iii) If the conclusion at ii) above is incorrect, then the Defendant has established adverse possession to the mudstone (including interbedded sandstone and shales, as above) to whatever depth might be required for activities undertaken

[60] Section 117, and para 11 of Schedules 1 and 3, LRA 2002
[61] Para 3(2) Schedule 4 LRA 2002, read with s 131.

by the Defendant as surface owner of the relevant forested area. There was also no concealment or deliberate commission of a breach of duty for limitation purposes.

iv) In respect of category C, as against the Claimants the Defendant has an undifferentiated title to the surface and everything beneath it. The title of the Claimants' predecessors has been extinguished by adverse possession.

v) The Defendant is not liable in damages for trespass or conversion in respect of any of the activities pleaded in the Amended Particulars of Claim.

vi) The Claimants have also not established any breach of Convention rights, and the Defendant is not liable in damages or otherwise under the Human Rights Act.

APPENDIX

A titles

Subject to the points below, the Claimants' paper title to the minerals etc reserved under the terms of the reservation set out at [41] above is established.

A1: This title includes the Horeb borrow pit.

A2: In relation to title A2, the Defendant put the Claimants to proof of their paper title because there was no proof that the property was actually sold at the 1919 auction. The Claimants say that the original conveyance has been lost, but produced evidence showing that the property was one of the lots in the auction and that a conveyance in 1941 from a Mr Arthur B Owen excepted and reserved the "mines and minerals" under the property and related rights "to the parties entitled thereto". The auction particulars for this property (described as a "fine sheep farm") also show Mr Arthur B Owen as being in occupation at the time of the sale, so the Claimants suggest that the property was sold to the sitting tenant. I accept that the Claimants have established that the property was owned by their predecessors in title and was either sold at the auction or subsequently, and that it is more likely than not that the estate would have imposed terms that excepted minerals in materially the same terms as set out at [41] above. This conclusion derives some support from the original conveyance of plot A3, which took place in 1929 (rather than following or soon after the 1919 auction), which also contained a reservation along those lines.

Title A2 includes the Dolydd quarry.

A3: This title includes the wind turbine.

A5: The sale of this property excluded the area then used for the Nant Iago lead mine, which the Claimants retained.

A8: Part of title A8 is accepted as having been conveyed in 1921 on terms similar to those set out above. This part is tinted blue on the Land Registry plan. The remaining part falls into category C rather than category A as pleaded, because the Claimants' claim relies on the terms of an 1857 enclosure agreement.

A11: There is a 1922 conveyance from the Claimants' predecessors in title of the northern part of this plot. The original conveyance from the Claimants' predecessors of the southern part has been lost but, based on the terms of a recitation in a later conveyance in 1947, the existence and terms of the exception and reservation in favour of the Claimants was not disputed.

B title

The Claimants' paper title in respect of property conveyed under the 1864 Crown grant is established, subject to mapping issues.

C titles

Subject to the general points in the next paragraph and to the specific points made below in respect of individual titles, the Claimants' paper title is established. However, this is barred by adverse possession.

The mapping of the precise areas of the titles covered by the enclosure agreements is not agreed. In a number of cases the Claimant's claim also does not extend to the entire title.

C13: This is a complex title where the Claimants' claim (which may not extend to the whole title) derives in part from an enclosure agreement, in part from the 1864 Crown grant and in part from an 1883 conveyance. The first two parts are generally correctly categorised as type C (see [43] and [44] above in respect of the Crown grant), although there is a category B element for one area. The third part (derived from the 1883 conveyance) is strictly type A, and the Defendant accepts that this part appears to include the Nanty quarry. The wording of the 1883 conveyance excepts and reserves "all the mines minerals quarries and substrata", with powers of working. I do not consider that the different wording as compared to the wording set out at [41] above makes a difference to the result in this case. Mudstone is not covered for the reasons given in this judgment.

C14 and C15: The Aerospace quarry is on these titles.

C16: The Claimants' claim is in respect of part only of this title, and is based partly on an enclosure agreement and in part on a Deed of Arrangement (a compromise) entered into in 1854 which acknowledged that "all mines minerals stones and other substances lying within or under" the relevant land were the property of Sir Watkin Williams-Wynn as lord of the Manor of Cyfeiliog, and reserved powers of working. The latter is now agreed to be type A rather than type C. The title includes the telecommunications mast, which appears to be on the part the subject of the 1854 compromise. I do not consider that the slightly different wording of the Deed of Arrangement as compared to the wording set out at [41] above makes a difference to the result in this case: in my view mudstone was not intended to be within it.

C17: Again, the Claimants' claim is in respect of part only of this title. One part, the southern parcel, is subject to an A type exception and reservation, pursuant to a conveyance made in 1924 which contained an exception and reservation in similar terms to that contained in the sales that followed the 1919 auction. Mr Moeran relied on the express power included in this conveyance, unlike other type A conveyances, which allowed the Defendant's predecessor to extract stone for building and roads on site (and not for sale or use elsewhere) as showing that it was understood at the time that an express right was needed. I disagree. It is equally consistent with the purchaser or his adviser being cautious, and wanting to spell out explicitly that the normal use of mudstone contemplated at the time, that is use in the immediate vicinity, was not prevented.

The Claimants also rely on two enclosure agreements in respect of certain parts of the northern parcel. The Defendant's position is that this is not possible because the northern parcel itself had rights of sheepwalk over an adjacent part of the Claimants' predecessors' waste called Parc Common, and this was reflected in a registration in 1970 of a right to graze 40 sheep pursuant to the Commons Registration Act 1965. The land must, the Defendant says, have therefore been granted in 1578 and the terms on which it is held are determined as between the parties' predecessors. The lord's waste could not have right over the lord's waste.

I am not persuaded that registration of a right of common is itself determinative between the parties of the status of the land benefitting from that right. To the extent that they cover the same geographical areas there is an apparent conflict in evidence between the right registered in 1970, which indicates that the land benefitting from the right was not itself waste owned by the Claimants' predecessors at the time when the right was created, and the enclosure

agreements. However, there is no such conflict if the right was created after the land ceased to be waste. Registration is also only determinative of the matters registered, that is the right to graze sheep: s 10 Commons Registration Act 1965. I am prepared to accept that the Claimants have a claim based on the enclosure agreements, but that fails for the reasons discussed in this decision.

C18: The Claimants' claim is to part of this title and was pleaded as a C type claim, although the Claimants now say (in response to the Defendant's submissions) that in the alternative it falls into category A. However, it is not pleaded in the alternative. I am prepared to agree with the Defendant that this is a type A case, on the basis that the title appears to derive from a sale by the Claimants' predecessors in 1917 which (according to a 1928 abstract of title) reserved "all mines and minerals in or under" the property, together with power to work and provision for compensation to the "Purchaser or other the owner for the time being of the surface". However, the reservation is certainly no wider than the reservation set out at [41] above, and the conclusion is the same. See also D36 below in relation to the reference to ownership of the "surface".

If this is wrong and the title did not derive from the 1917 conveyance (the Claimants suggest that there is doubt on the point) then this is a category C claim.

C20 and C21: These were pleaded as C type claims, by reference to a 1904 enclosure agreement, but as Mr Wonnacott pointed out and Mr Moeran accepted during the trial, the areas in question were in fact awarded under the 1816 Act. That was probably simply overlooked when the 1904 enclosure agreement was entered into. Mr Wonnacott indicated that the Defendant's would consent to an application to amend the pleading. I agree that they are properly type D claims.

C24: There is no enclosure agreement in respect of this title. The Claimants say that one can be inferred from the existence of a 1918 minerals lease by Sir Herbert Lloyd Watkin Williams-Wynn in relation to the western part of the title, minerals exceptions in conveyances made in 1923 and 1926 and a tithe map from 1861 showing most of it to be open sheepwalks.

I do not accept that this evidence demonstrates that there was an enclosure agreement, and certainly not in respect of the whole title. Land could well have been appropriated or enclosed without agreement. This is illustrated by provisions in the 1816 Act that made specific provision for earlier encroachments on the waste, providing that areas that had been encroached for at least 20 years would be allocated to the person in possession or receiving rent and that compensation would be paid to others who had built on or otherwise appropriated waste and were being dispossessed. It is further illustrated by the terms of the standard enclosure agreement set out at [46] above, which expressly permitted the tenant to "maintain such Fences as are now existing".

The tithe map is consistent with a large part of the area being unenclosed waste in 1861, but it goes no further than that and also does not provide evidence of the Claimants' rights to the remainder.

The terms of the 1923 conveyance which forms the root of the Defendant's title except and reserve rights of the lord of the manor, including "mines and minerals" under the land, but there is a 1936 statutory declaration that the seller in 1923 had been in uninterrupted

possession since 1910. There is a similar statutory declaration in respect of the seller in 1936. There is no acknowledgement of any enclosure agreement.

C25: This one is worth noting because the enclosure agreement relied on by the Claimants was made with Earl Vane, the 5th Marquess of Londonderry, in 1857. In 1930 the 7th Marquess granted a 999 year lease to lay a water main (in a 6 inch pipe) under the land. The land must then have been sold the following year, because the abstract of title prepared in 1956 for a conveyance to the Ministry of Agriculture states that there was a conveyance by the Marquess in 1931 both subject to the lease and to an exception and reservation of mines and minerals. In the requisitions on title, the seller stated that the mines and minerals were vested in the executors of the Marquess. This is a clear illustration of how the Claimants' predecessors' title was extinguished by adverse possession in category C cases.

C29: The category C claim to this title is limited to part covered by an 1859 enclosure agreement. Very small parcels also derive from the Crown grant. It was not made clear which part of the Crown grant is the relevant one, but based on the maps I infer that they form part of the 408 acres referred to at [43] above. The Defendant disputes whether the 1859 enclosure agreement provides sufficient evidence that all the land covered by it was owned by the Manor of Arwystli, by reference to a licence for lead granted in 1870 which was limited to a smaller area east of the River Diliw, and the fact that the location of the boundary with the Crown Manor of Croyddin had been disputed (that being the background to the 1864 Crown grant). However, the lead licence is missing and the best evidence available is the enclosure agreement. I accept that evidence.

C30: An enclosure agreement exists for part of this title. In respect of other parts the Claimants say that there was either an enclosure agreement which has been lost or the conveyance in 1972 to the Secretary of State for Wales was simply of sheepwalk, with the "usual" rights of the lord retained.

For the reasons given above in relation to C24 I do not accept that the existence of an enclosure agreement can be inferred.

In any event the term "sheepwalk" is used in the conveyance in a descriptive sense only. It is clear that the land is being conveyed. The conveyance of most of the land is subject to an exception and reservation contained in a 1915 conveyance, but that was not a conveyance by the Claimants' predecessors.

C31 and C32: There are no enclosure agreements, and the Claimants rely on similar arguments to those raised in respect of C30. As above, I do not accept that agreements can be inferred.

C33: Again there is no enclosure agreement, and I do not agree that one can be inferred by reference to the evidence provided, which included an 1861 tithe map (showing part enclosed and part as sheepwalk) and the minerals lease referred to in C24 above.

C34: There is no enclosure agreement for this title, and it is not appropriate to infer one: see above. It has also not been otherwise demonstrated that this title was part of the Manor of Arwystli at all. Although some later conveyances refer to that Manor, the first of them, in 1919, is equivocal, stating that the transfer was "subject to" any mineral or other rights in relation to premises that were "formerly waste of the Manor of Arwystley or of any other

manor". The doubt on this point is not sufficiently dispelled by a letter written in 1938 which states that the property "appears to be all in the Manor of Arwystley".

C35: Again there is no enclosure agreement, and I do not agree that one can be inferred.

D titles

Subject to the specific points made below in respect of individual titles and to mapping issues, the Claimants' paper title is established.

D36: The Claimants' claim (which does not cover the entire title) derives from two enclosure awards, and as to part from an 1877 conveyance. The latter element is type A rather than type D, and is claimed as such in the amended pleadings. The 1877 conveyance excepted "all mines and minerals in under and upon" the land, and provided powers of working and for compensation to be paid to "the owner and occupier of the surface". I am satisfied that the terms of the reservation are certainly no wider than the reservation set out at [41] above, and that the conclusion is the same. The reference to ownership of the surface, which was relied on by Mr Moeran, can be explained as a convenient reference to the owner for the time being of the land excluding the mines and minerals (or indeed as a reference to the surface owner only, in the event of some further severance of title). The reference to "in under and upon" also explicitly indicates that the mines and minerals could cover material on the surface.

The area claimed includes Sunken Quarry, but the Defendant does not consider that the mapping is adequate to establish this.

D37: The area includes Dolgau Quarry. Again, the Defendant says it is not established that the quarry is on the land area awarded under the 1816 Act or forms part of the original farm. The Claimants' claim does not extend to the entire title, but they say that the quarry is clearly within one of the plots awarded.

D38: This includes the Allt y Genlli quarry. The claim in respect of this title falls mainly within category C (as reflected in the amended pleadings) and partly within category D. The latter includes plot 44, originally allotted to the lord of the Manor but sold before allotment, such that the allotment went direct to the buyer, Rev William Adams, and is therefore subject to the reservations in the 1816 Act. The parties have not agreed the exact location of the quarry in relation to the enclosure awards: the Claimants maintain it fell within plot 43, which was both awarded and allotted to Rev William Adams. Another plot, plot 47, was awarded to a Mr Collins and the Claimants maintain that it was acquired by the estate some time after that, because the Claimants say that that area is covered by a 1904 enclosure agreement.

To the extent the claim is made under the 1904 enclosure agreement (that is, category C) the Claimants cannot claim in the alternative under category D. Acquisition by the estate would have resulted in a merger of the mineral rights reserved under the 1816 Act and the title acquired.

D39: The claim is based on two enclosure awards, and extends only to part of the title. In relation to one of the awards, M27, the Claimants' predecessors claimed in 1969 that the northern part was theirs, which if correct would have resulted in a merger of the mineral rights reserved under the 1816 Act. However, there was a competing claim by a Mr Jerman, and in 1983 a Commons Commissioner decided the claim in his favour. The southern part of

M27 was vested in the seventh Marquess of Londonderry by 1927.[62] There is no evidence of this part having been claimed by the Claimants' predecessors since the award was made. The reasonable conclusion is that there was no merger in respect of award M27.

[62] He conveyed the land in 1927, excepting and reserving minerals to himself, but this would not have deprived the Claimants' predecessors of any rights they already held.