

# Examination of title – minerals

In this issue Professor Stewart Brymer explains why mineral rights play an important, but often overlooked part of the conveyancing transaction.

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## Introduction

The late Professor John Sinclair rightly described the art of examination of title as the “stuff of conveyancing”. At its core, it is an exercise carried out so that a client may be advised as to the validity and marketability of the title to a particular property.

To be done properly, it requires the synthesis of a broad knowledge of the law and related practical issues focused on a particular factual matrix. Put bluntly, it is part of what conveyancers are trained to do and, done properly, the process is akin to a voyage of discovery.

A particular topic that sometimes does not get the attention it deserves in examination of title is that of mineral rights. The purpose of this short article is not to deliver a treatise on the law of minerals. There are well-respected texts on that subject. See, for example, *Minerals and the law of Scotland* by Rennie and Simpson.

Mineral rights are a distinctive component of Scotland's system of land ownership. In this context, mineral rights might be summarised as a type of property right covering the authority to quarry, mine or otherwise extract sub-strata materials.

Mineral rights can be owned separately from the surface of the land and are, as such an exception to the common law principle that ownership of land means ownership *a caelo*,

*usque ad centrum*. In general, mineral rights go with the land unless they have been sold or reserved by a previous owner, who may, of course, subsequently have sold them. This, therefore, requires some detective work during the examination of title phase.

The rights to gold and silver, the right to petroleum (oil and gas) and the right to coal are held in the national interest.

## Mineral reservations

So what is the effect of a mineral reservation clause on the marketability of a particular title? To answer this question requires experience of both law and the practicalities of property ownership. Comprehensive mineral reservation clauses are common in old mining areas in parts of Central Scotland but may be found to exist in unexpected areas. Care is required.

There are various types of mineral reservation. The most common example is a reservation of minerals with a right to work by underground operations but with no right to work from the surface. Generally such reservations contain an obligation to pay compensation for damage to the surface and any buildings thereon.

However, it is not unusual to find mineral reservation clauses that provide that no compensation will be payable for surface damage. This could have severe consequences for the land owner.

Since different parties can claim ownership of a piece of land and to the minerals that lie underneath, it may be difficult to find out who owns mineral rights. As a result, developers such as house builders may be faced with a claim from third parties claiming rights, and compensation, related to proposed house building activity. To avoid problems, this should be considered at the outset when a development is being planned.

It is already good practice for a developer to make use of the Keeper's Development Plan Approval service - [www.ros.gov.uk/service/dpa](http://www.ros.gov.uk/service/dpa) Development Plan Approval (DPA) gives developers the confidence that any title extent issues can be identified and resolved prior to the sale of individual houses in a development. DPA does not deal with subterranean mineral rights, however. Nevertheless, it is suggested that it would be prudent for a developer to make investigations as to the title to minerals, etc. at the same time as instructing a DPA. This is because foundations and services will require to be installed which may involve going through or removing a layer of minerals. If those minerals are owned by a third party and a Disturbance Agreement is not entered into, this could lead to a liability for damages or, a demand that work be stopped on site. Accordingly, house builders and, potentially, their solicitors are in a potentially difficult position.

### Searches

A search of the Coal Authority's Gazetteer for Scotland - [www.groundstability.com](http://www.groundstability.com) - and the British Geological Survey - [www.bgs.ac.uk/GeoReports](http://www.bgs.ac.uk/GeoReports) - will provide some guidance but that, of itself may not be sufficient. More information can be gleaned from the Coal Holdings Register ("CHR"). The CHR was compiled under the term of the Coal (Registration of Ownership) Act 1937. This Register and the associated 26,500 claim files dealt with the transfer of ownership of coal, and the rights associated therewith, prior to the nationalisation of the Coal Industry which took place on 1 January 1947. Reference to the CHR, of itself, does not have much value.

It is best read in conjunction with matters such as Application Plans, Mining Leases, Exclusion Notices, etc. which are held within the claim files. It costs around £80 plus VAT per hour for a qualified surveyor to review the CHR. This should provide a link between owners of minerals when they were severed from the surface and those with current ownership. Unfortunately, not many conveyancers appear to be aware of the existence of the CHR let alone its content. That, on occasion, could have unfortunate consequences if a claim arises as a result of either ground instability or a subsequent development of substrata mineral rights.

### Title insurance

Title insurance is available in the form of a minerals rights protection policy. This is a simple way to mitigate risk. One policy can be placed which covers the developer during the construction phase and the individual plot buyers after construction - if it is a residential development.

Whilst insurance will not prevent an owner of mineral rights asserting its rights, it can negate to a large extent the attendant cost implications of such an event. As with all title insurance policies, it is essential that no approach is made to minerals owners to obtain their consent to the works.

### Conclusion

My message to conveyancers is to remember to think what might be under of the surface of the subjects being acquired and to advise accordingly.

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