

ARC Aggregates Ltd v Branston Properties Ltd [2020] EWHC 1976 (Ch)

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Facts

A transfer of part of a development site in 1988 provided that there was:

“EXCEPT and RESERVING to the TransferorAll mines minerals and mineral substances lying beneath the surface of the Red Land [the land transferred] at a depth below the lowest level of past excavation carried out by the Transferor and its predecessors in title but without the right to work or get the said minerals or mineral substances.”

A transfer in 1989 of the remainder of the development site contained similar provisions (by the same parties).

The transferor (ARC) argued that development work carried out on the land by the transferee's successor in title (BP) had encroached upon the mines and minerals of which it remained the freehold owner. It sought an injunction preventing BP from encroaching on the mines and minerals, excavating them or working or carrying them off.

Issue

Had ARC excepted to itself in the transfers ownership of the mines and minerals (in which case any encroachment by BP would constitute a trespass) or had ARC merely reserved an incorporeal right in the mines and minerals by way of a profit à prendre (in which case ownership of the mines and minerals would have passed to BP and no encroachment would have occurred).

Decision

Ownership of the mines and minerals had been excepted altogether from the transfers. The exclusion in the transfers of the right to work the mines and minerals indicated that the parties did not intend to reserve for ARC a profit à prendre. A profit is a right to take something from someone else's land and the transfers expressly prohibited ARC from doing the very thing that a profit would have permitted it to do.

Points to note/consider

1.

Over the last few years, historic exceptions and reservations of mines and minerals have become much more significant, with the owners of those mines and minerals seeking to extract ransom payments from surface land owners looking to develop their land.

This case shows that when buying land to develop where it appears that the mines and minerals have been

excepted or reserved in the past, it is important to analyse the provisions from the relevant conveyance or transfer carefully (assuming they are readily available), rather than relying on any generic Land Registry description as to the nature of the interest in question. Did a third party truly except ownership of the mines and minerals when selling the land or did it simply reserve to itself a profit to work those mines and minerals in the future? Because of its ransom value, the former is more likely to give the third party leverage in negotiating a share in any future profit arising from the development.

2.

This case is also a reminder of the difference between an exception and a reservation. Although the two terms are in practice usually 'lumped together' and used interchangeably, they are different concepts and a court will distinguish between them by applying relevant contractual principles of interpretation (rather than just relying on labels used by the parties).

3.

If a third party did truly except ownership of mines and minerals, it is then necessary to consider the extent of that exception before concluding that a development by the surface owner will encroach on that third party's mines and minerals. Another case this quarter illustrates this point. In *Wynne-Finch and others v Natural Resources Body for Wales* [2020] EWHC 1924 (Ch), the claimants argued that they had retained ownership of everything below the surface, including all mudstone, of land used for forestry and owned by the National Assembly for Wales as a result of exceptions made on sales in 1919 and enclosure awards under a private Act of Parliament passed in 1816.

The judge decided that the exception of ownership of mines and minerals was directed at a more limited category of material (e.g. lead, slate, zinc and other metalliferous minerals) found in the area. Mudstone would not have been viewed as worth quarrying and selling commercially in 1816 or 1919 and a claim to own everything below the surface made no sense given the shallowness of the topsoil. Erecting or extending any farm or building, putting in fencing, constructing any road or track or digging trenches for pipes, drains or cesspits would all involve trespassing on or disturbing the subsoil. In any event, the judge felt that even if she were wrong on this point, the surface owner had extinguished the claimants' title to the mudstone by adverse possession by quarrying for it in small areas for over 12 years (there was existing authority that actions in part of an area by a single paper title owner can be evidence of factual possession of the whole area).

Contact



David Harris

Professional Development Lawyer

david.harris@brownejacobson.com

+44 (0)115 934 2019

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