A question of what lies beneath

Anti-fracking campaigns have raised the thorny issue of the British government facilitating what has become a hotly-debated issue, write ***Romola Parish*** and ***James Nierinck***

The ability to challenge fracking under one's home through the law of trespass has been a core thread to national anti-fracking campaigns. Last October, Greenpeace launched a nationwide 'legal block' against fracking in an attempt to stall onshore development. However, the government has been quick to recognise the threat posed by this age-old law. Following consultation this summer, the government has taken a major step towards facilitating fracking in the UK by recently announcing its intention to proceed with primary legislation addressing this issue. Whilst the messages on the placards may read 'frack-off', the message from the government is clear: 'frack-on'.

Under the Law of Property Act 1925, a freeholder is considered to own the sky above and the substratum below the area of land to which he has title (unless it, or the minerals within it, have been vested in a third party by law, conveyance or under common law).

As a product of our 1918 wartime economy, the ownership of 'petroleum' (that is, oil and gas) in Great Britain vests in the Crown. Operators may obtain a licence to exploit oil and gas from the Crown, but this does not confer the below-ground access rights needed to extract the hydrocarbons. This access must be sought from the landowner.

In respect of conventional petroleum sources, land was traditionally bought or leased from the owner by the relevant minerals company. Those minerals would then be exploited and, if the land was leased, returned to its former owner.

However, fracking, with its broad geographical footprint, has raised some technical wrinkles in this traditional approach. As readers will no doubt be aware, the process of fracking involves drilling vertically downwards, then injecting liquid under pressure to flush natural gas out of shale formations. The primary issue is that under the common law, the consent of all landowners must be obtained before lateral wells are fracked to prevent an actionable trespass arising. Where such wells extend below densely populated areas, the process of seeking consent from all landowners is clearly unworkable.

The existing routes to obtain access are by agreement with the landowner or a notoriously long-drawn out procedure of transferring the requisite rights by the courts under the Mines (Working Facilities and Support) Act 1966. Both are uncertain and potentially costly in time and money. In the leading case for trespass in relation to oil exploitation, *Star Energy v Bocardo*, the Supreme Court concluded that the landowner was not in any way affected by activities carried on over a mile beneath the surface and that the correct measure of damages was a nominal sum and not a share of the revenues.

The trespass issue prompted amendments to secondary planning legislation that came into force on 13 January 2014 which provided that for planning applications for fracking activity, landowners only affected by subsurface activity are no longer required to be notified of the proposed activity.

Primary legislation

The Department for Energy and Climate Change (DECC) recently published the government's response to its consultation on underground access for the extraction of gas, oil or geothermal energy.

In its consultation, DECC proposed to introduce primary legislation to provide underground access below 300m for shale gas and deep geothermal operations. Operators would still need to obtain the requisite planning and environmental consents.

Despite 99% of the 40,647 respondents opposing this proposal, the government is set to proceed. The response comments that the consultation was not intended to address the wider objections to fossil fuel exploitation, including fracking operations. By including geothermal operations alongside fracking (but apparently silent on conventional hydrocarbon activities which would benefit from the same regime) it has eased the path for renewables as well as shale gas exploitation. In either case, it provides a certain and viable framework for operators.

> **"The 'community': does it cover only those in the vicinity of surface activities or does it refer to the whole of the area estimated to be affected by lateral wells?"**

As part of the same consultation, proposals were made for voluntary notification of access by operators, accompanied by a community payment of £20,000 for every lateral well over 200 metres long. This community payment is intended to replace sums paid to individual landowners and is in addition to the existing voluntary proposals offered by operators in June 2013 of £100,000 per site at exploration stage and 1% of revenues at production stage.

A community payment is considered by the government to be more administratively efficient and, arguably, fairer and more certain than requiring the court to determine individual payments challenged by landowners (particularly in light of Star Energy). Naturally, opponents consider this to be, in effect, a bribe.

Local businesses are to be included in further consultation for the distribution of such payments and the payment is not intended to be *in lieu* of compensation for damage. There remain several issues to bottom out, including the question of who constitutes the 'community': does it cover only those in the vicinity of surface activities or does it refer to the whole of the area estimated to be affected by lateral wells?

The government has declared that it will now press ahead with primary legislation to implement the proposals, the effect of which is to effectively truncate ancient subsurface property rights neatly at 300m in exchange for a nominal community payment. It is worth noting that Google's drone-mounted cameras have given rise to a threat of trespass or an invasion of privacy and consequential consideration of a minimum altitude below which operating a drone might be permitted. The "Englishman's castle" is not, apparently, inviolable: notwithstanding widespread opposition, the development of the UK's onshore shale gas industry remains on track.

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