Wynne-Finch v Natural Resources Body for Wales

Court
Court of Appeal (Civil Division)

2021 WL 04731166

Neutral Citation Number: [2021] EWCA Civ 1473

Case No: A3/2020/1616

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY, TRUSTS AND PROBATE LIST (ChD)

MRS JUSTICE FALK

[2020] EWHC 1924 (Ch)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 12 October 2021

Before :

LORD JUSTICE HENDERSON

LORD JUSTICE ARNOLD

and

LORD JUSTICE BIRSS

- -

Between :

(1) DAVID HENEAGE WYNNE-FINCH

(2) RICHARD WILLIAM KENDRICK PRICE

(3) RUPERT THOMAS MEAD

Claimants/Appellants

- and -

NATURAL RESOURCES BODY FOR WALES

Defendant/

Respondent

- -

Fenner Moeran QC and Oliver Radley-Gardner QC (instructed by Forsters LLP) for the Appellants

Mark Wonnacott QC and Harriet Holmes (instructed by Hugh James) for the Respondent

Hearing dates : 30 June and 1 July 2021

- -

Approved Judgment

Lord Justice Henderson :

Introduction

1. This case is mainly about the ownership and exploitation of Welsh mudstone, which is the prevailing bedrock in large areas of mid-Wales.

2. The claimants (and appellants in this court) ("the Trustees") are the trustees of the Williams-Wynn 1987 Settlement, and in that capacity are the legal owners of substantial parts of a rural estate in Powys (formerly Montgomeryshire) which has been held in trust over many generations for members of the Williams-Wynn family. The estate as a whole is generally known as the Wynnstay Estate. That 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.

3. The defendant (and respondent to the appeal), the Natural Resources Body for Wales ("the NRBW"), is a public body corporate which was formed in 2012 to take over the devolved Welsh functions of the Environment Agency and the Forestry Commission. Relevantly for present purposes, the NRBW occupies and manages land contained in some 40 freehold or long-leasehold titles, as statutory successor to the Forestry Commission, on behalf of the National Assembly for Wales, which is the registered owner of each of the titles. Nearly all of the land with which this case is concerned falls within the Manors of Arwystli (also known as Arustley) and Cyfeiliog ("the Manors").

4. I will follow the approach of both parties and the judge below (Falk J) in treating the NRBW as if it, rather than the National Assembly for Wales, were both the registered owner and the occupier of the relevant land. Nobody has suggested that there is any relevant distinction between the two bodies: see paragraph [3] of the reserved judgment which Falk J handed down on 27 July 2020 ("the Judgment") following a seven-day trial on issues of liability before her in June 2020. The neutral citation of the Judgment is [2020] EWHC 1924 (Ch). In the rest of this judgment, I will refer to the NRBW as "the Respondent".

5. As the judge explained in the introductory section of the Judgment at [4], the Trustees' case is that the land in question was formerly nearly all rough open pasture and formed part of 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."

By the date of the trial, there was no longer any dispute about the means by which the 1987 Settlement became entitled to the rights asserted by the Trustees. The rights are now held by the Trustees under a trust of land, having previously been subject to a strict settlement governed by the Settled Land Act 1925.

6. As the judge went on to explain at [6], the Trustees "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 Respondent to the Trustees' agent in September 2016, enquiring whether it could acquire stone by licence. This resulted in the Trustees becoming aware that the Respondent had previously extracted what they say "is a considerable volume of stone from the property". The Trustees were prepared to agree terms for future use of stone, but only if they were compensated for stone that had been taken in the past. This was refused by the Respondent, which then argued that the Trustees had no rights to the stone, or (if they ever did) that those rights had long since been barred by adverse possession. These contentions were developed in the statements of case following issue of the claim form on

27 February 2018 in the Business and Property Courts of England and Wales (Property, Trusts and Probate List).

7. At the trial, the parties were represented by Mr Fenner Moeran QC leading Mr Paul Stafford for the Trustees and Mr Mark Wonnacott QC leading Ms Harriet Holmes for the Respondent. For the reasons given in her careful, comprehensive and scholarly judgment, which runs to 194 paragraphs with an appendix containing comments on individual titles, the judge dismissed the claim in its entirety.

8. The judge summarised her conclusions in the Judgment at [194], as follows:

"(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 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."

9. Following a hearing on consequential matters on 4 September 2020, the judge's order of that date dismissed the claim. The Trustees were ordered to pay the Respondent's costs on the standard basis, with a payment on account of £750,000 to be paid in two instalments in September 2020 and January 2021. Permission to appeal was refused.

10. The Trustees now appeal to this court, with permission granted by Floyd LJ on 4 December 2020.

11. Before coming to the grounds of appeal, I will first set out some more of the relevant background, including some of the key findings of fact made by the judge. The grounds of appeal are almost entirely concerned with questions of law, and unless I state otherwise it can be taken that the judge's findings to which I refer are unchallenged.

Background

(1) Geology and terrain

12. The judge found the facts that she considered relevant to the scope of the minerals reservations at [56] to [82] of the Judgment. She began by describing the land in dispute, under the sub-heading "The terrain":

"56. The land in dispute is… 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.

…

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 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…"

13. The judge then referred to some of the evidence given by the expert chartered mineral surveyors on each side, Mr Alastair Duncan for the Trustees and Mr Michael Sherratt for the Respondent. Mr Duncan described the landscape as "dotted" with outcrops. Otherwise there is generally a thin layer of topsoil and other organic material, normally less than 20 centimetres in depth, and beneath that subsoil, with occasional deposits of peat or boulder clay. As the judge explained in [58]:

"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."

The total thickness of the topsoil and subsoil (including regolith) above the solid bedrock varies, but in a number of places Mr Sherratt had recorded depths of around 1 metre: see [60].

(2) Mudstone and its uses

14. Under this heading, the judge made a number of important findings at [61] to [66], from which I quote the following extracts:

"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). 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.

…

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."

(3) Forest infrastructure: roads and tracks

15. The judge dealt with this topic at [67] to [77]. As one would expect, there is a mixture of forest roads and tracks. With one possible exception, the Land Registry plans all show at least one road or track, and often multiple tracks, on the registered title. These are all used for forestry processes, and may need widening and strengthening for operations such as harvesting. In addition, areas may be required for turning vehicles or stacking cut timber, and ramps are also typically constructed to facilitate harvesting. At [74], the judge referred to the evidence of Mr Antony Wallis, who had held the post of Country Land Agent for Wales at the Forestry Commission before becoming head of corporate assets for the Respondent, to the effect 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". The judge commented:

"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."

16. Again as one might expect, the roads tend to run broadly along contour lines, with a maximum gradient of 10%. Accordingly, 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": see [75].

(4) Quarries and borrow pits

17. There are six quarries on the disputed titles that have been used in recent years, together with a further one described as a borrow pit. That term "refers to generally small-scale quarrying activity for a specific purpose, commonly developed to help build infrastructure": see [79]. Mr Duncan's evidence was that all the quarries, with one possible exception, were "very small-scale", and there was no indication that any of them had been used for any purpose other than maintaining the forest estate. This was confirmed by the evidence of Mr Wallis (ibid) 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."

(5) Wind turbines and telecommunications masts

18. There is one wind turbine and one telecommunications mast on the land in dispute: see [81]. In both cases, digging for the foundations will have extended into the bedrock "at least to some extent". Mudstone available at the site, including any that was extracted, is "likely to have been used to backfill and level areas, and for access tracks" (ibid).

(6) The four categories of claim

19. Against the physical and economic background which I have described, the 40 titles in dispute were divided into four categories in the Amended Particulars of Claim. The judge summarised these categories at [39], as follows:

Category A: conveyances by the Trustees' 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).

20. For present purposes, category B may be disregarded, because there is no longer any issue in relation to it.

The grounds of appeal

21. There are six grounds of appeal. The first ground relates to the category A conveyances, and challenges the judge's conclusion as a matter of construction that the reservations of "all other… stone and minerals" or equivalent words in them did not include mudstone. Ground 2 similarly challenges the judge's conclusion as a matter of construction that the reservations of minerals in category D awards under the 1816 Act did not include mudstone. Ground 3 relates to only two of the category C titles, and alleges that the judge was wrong to hold that the Respondent's predecessors in title had established their own title to the relevant land by adverse possession.

22. The remaining three grounds of appeal arise only if and to the extent that the Judgment in relation to the mudstone in categories A, C and/or D is overturned. They challenge in various ways the judge's alternative (and obiter) conclusions that the Respondent and its predecessors had obtained title to the disputed land by adverse possession even if they did not have a good paper title.

The Category A reservations

23. The category A titles derive from reservations in private conveyances made by the Trustees' predecessors in title following an auction in 1919. The judge made the following findings about the background to the sales:

"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.

…

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."

24. All of the reservations were in materially the same form, which reflected the conditions of sale provided with the auction particulars. At [41], the judge quoted a typical example taken from a 1926 abstract of title in respect of property A1. The abstract stated the form of conveyance as follows:

"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 quarries of coal and ironstone and all other metals stone and minerals within 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 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…"

25. The areas of land specified in the First Schedule to the conveyance were evidently extensive. The 1926 abstract includes particulars of two working farms let on yearly tenancies, extending to over 1,700 acres. It is also worth noting that there were further reservations of the sites of various cottages, buildings or works used in connection with mining activities on one of the farms, together with:

"(c) such rights of occupation and user of and access to and from the said cottages buildings and works… as the Vendor or his successors in title might require for the purpose of working the said mines without making any compensation to the Purchaser or his assigns in respect of the user of any part of the surface of the hereditaments thereby conveyed or the buildings thereon…"

The Vendor, I should add, was the then tenant for life under a strict settlement, exercising the power of sale in the Settled Land Act 1882 to overreach the legal interests in remainder.

26. The critical words in reservation (a) were "All mines beds and quarries of coal and ironstone and all other metals stone and minerals within and under the hereditaments and premises… conveyed", but the reservation must of course be construed as a whole in its context. In particular, it is immediately apparent from the second paragraph of reservation (a) that it included "all necessary or proper powers rights and easements" for searching for and exploiting the reserved mines and minerals, and "the right to let down the surface whether built upon or not" for those purposes, subject always to the payment of proper compensation for all damage done to the surface or the buildings upon it and for the occupation of the surface in exercise of the reserved rights and powers. Furthermore, the express provision for the amount of such compensation to be settled in case of dispute by arbitration provides an indication that the reservation was of an essentially commercial character, with a fair price to be paid for the damage and disturbance occasioned to the purchaser and his successors in title by exercise of the reserved rights of exploitation.

Does the reservation include mudstone?

27. Mr Moeran QC mounted before us, as he doubtless did before the judge, a powerful case that the language of the reservation is clear and unambiguous, and it is therefore the duty of the court to give effect to it. The basic steps in the argument could hardly be simpler. Mudstone is undeniably a form of stone. The reservation extends to "all other… stone… within and under" the property conveyed. Accordingly, mudstone must be included in the reservation.

28. Mr Moeran reminded us of the words of Lord Clarke of Stone-cum-Ebony JSC in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900, at [23] where he said:

"Where the parties have used unambiguous language, the court must apply it."

It is, however, also important to have regard to what Lord Clarke said at [21]:

"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

29. More recently, the Supreme Court has given very well known guidance on the principles of contractual interpretation in Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC

1173, at [8] to [15] per Lord Hodge JSC. At [11], Lord Hodge expressly endorsed the principles which Lord Clarke had stated in the Rainy Sky case at [21]. At [13], Lord Hodge said:

"Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."

30. As one might expect, there is a great deal of learning in the books about the construction of reservations of "mines and minerals". This learning was the subject of an extensive and valuable review by Slade J in Earl of Lonsdale v Attorney-General [1982] 1 WLR 887, where the issue was whether the then Earl of Lonsdale was entitled to ownership of any oil or natural gas in or under certain tracts of land which form part of the seabed adjacent to the Cumbrian coast. The Earl claimed to be so entitled in reliance on a conveyance of 1880 whereby the Crown granted to his predecessors in title its interest in all of certain specified mineral substances, and also "all other mines and minerals (if any) down to the bottom of the coal measures in and under the same tracts of land". The judge's overall conclusion is helpfully summarised in the headnote, at 888C-E:

"Held, that, the phrase "mines and minerals" was not a definite term, but one capable of bearing a wider variety of meaning; that, therefore, the court had to consider, inter alia, what the phrase meant in the vernacular of the mining world, landowners and commercial men at the time of the grant but, in applying that test, the court had to have regard to all the terms of the instrument and the circumstances in which the phrase was used…; that the evidence of the vernacular usage in either 1880 or 1935 did not establish clearly whether minerals included oil or natural gas…; and that, in construing the document in the light of the circumstances, it was reasonably plain that "mines and minerals (if any)" was not intended to include anything but solid substances capable of being dug out of a mine; and that, the phrase being ambiguous, the document was to be construed in the manner most favourable to the Crown; and that, therefore, the grant did not include oil or natural gas…"

31. The present case does not, of course, involve a grant by the Crown, so the last part of Slade J's reasoning is not relevant for present purposes. Nor are we concerned, directly, with a reservation of "mines and minerals" simpliciter. Nevertheless, it is notable that the reference to "stone" in the reservation which we have to construe is, so to speak, book-ended by the words "mines" and "minerals" ("All mines… and all other metals stone and minerals"). The judge in our case found Slade J's review of the authorities on the meaning of "mines and minerals" very helpful, and she prefaced her discussion of the relevant case law by setting out, at [83], the eight principles which he had distilled from the authorities at 924-925. In my view she was right to do so, because the reservation in the present case is clearly akin to a reservation of mines and minerals, and more generally the parties to the 1919 conveyances and their advisers must have been well aware that this was an area of law where there is a wealth of guidance in the authorities, even if it does not always point in the same direction.

32. The whole of Slade J's judgment repays careful reading, but at this stage I would single out two of the eight sub-paragraphs in which he summarised his conclusions from the authorities:

"(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 LJ in Hext v Gill, L. R. 7 Ch. App. 699, 719 and approved by the House of Lords in the Budhill case [1910] AC 116. The common link between the three categories of persons referred to by James LJ 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.

…

"(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 LJ. 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] AC 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."

33. As Slade J recorded at 919, the question which the Court of Appeal had to consider in Waring v Foden [1932] 1 Ch. 276 was whether a reservation of "all mines, minerals and mineral substances" in a conveyance of 1925 included sand or gravel. The court held unanimously that those substances were not included.

34. In his judgment in that case, Lawrence LJ referred to two cases in the House of Lords (North British Railway Co v Budhill Coal and Sandstone Co [1910] AC 116 and Caledonian Railway Co v Glenboig Union Fireclay Co [1911] AC 290) before saying at 294:

"The two main principles to be gathered from these pronouncements 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 Ry. Co v Carpalla United China Clay Co [1910] AC 83), 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); 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."

35. It is also worth noting what Lawrence LJ went on to say about the local geology, at 295-296:

"The common soil of the district in which Booth's Farm is situate consists of sand and gravel lying immediately underneath a thin layer of cultivated top-soil averaging about twelve inches in thickness… There are many gravel and sand pits scattered over a wide area in the immediate neighbourhood of Booth's Farm, and one of the gravel pits is on the farm itself. In these circumstances it cannot possibly be said that in the district in question sand and gravel are substances which are rare and exceptional in character. Further, the sand and gravel are not substances which are exceptional in use or value; they are used mainly if not wholly for building and road-making purposes, and their commercial value depends entirely on local requirements and facilities for transport.

It would be impossible to build a house, make a road or lay down a drain on Booth's Farm without cutting into the underlying sand and gravel. The trees and shrubs growing on this farm have their roots embedded in the sand and gravel. It is difficult to imagine that the real nature of the transaction between the parties was as is now alleged by the appellant, and that all he was selling and the defendant was buying was the layer of top-soil (which in some places was practically non-existent) with an implied easement to construct and maintain any buildings, road and drains he might desire upon and within the underlying sand and gravel retained by and belonging to his vendor."

36. To similar effect, Lord Hanworth MR said at 292:

"It seems to me that it would be a negation of the substance of the transaction to hold that all sand and gravel, which is very generally a part of the soil and subsoil of this farm and worked and gotten from the surface, was excepted from the grant and remained the property of the plaintiff. It would not be a reservation of what is exceptional, but of what is general and of general importance to the utility and efficiency of the land conveyed. The exception ought… if it was intended to have the effect now claimed, to have been expressed in far clearer terms,"

37. In the light of these principles derived from cases of high authority, it would in my view be surprising if the word "stone" were to stand out in the present case, as if stranded on an island of literal interpretation, surrounded as it is by words of such notoriously indeterminate meaning as "mines" and "minerals". Yet this was the burden of Mr Moeran's submissions to us. He said that "stone" is neither ambiguous nor understood by the legal profession to be a term of art. Rather, it simply bears its unambiguous meaning. I am unable to accept that submission, not least because, as Mr Moeran himself acknowledges, the word "minerals" tends to include stone, as a matter of natural language: see, for example Midland Railway Company v Checkley (1867) L. R. 4 Eq. 19 at 25, per Lord Romilly MR. But if that is right, why should the word "stone", like the word "minerals", not be apt to exclude, in a suitable context, the prevailing stone of the district, as this court so clearly recognised in Waring v Foden? In my view, Mr Moeran had no answer to this question.

38. The point is elegantly made by counsel for the Respondent, in paragraph 13 of their skeleton argument:

"Nor does it matter whether the word is "mineral" or "stone". Legal language today is full of synonyms or near synonyms, because lawyers before the Protectorate had to speak English, read Law-French and draft in Latin. "Mineral", is from the Latin for mines; "stone" is Germanic Old English. Conveyancers couple such words together as a matter of use and habit, in case and lest there is any difference in their force and effect, and not because they want and intend there to be. As Hoffmann J pointed out in Tea Trade Properties v CIN Properties Ltd [1990] 1 EGLR 155, 158:

"… draftsmen traditionally employ linguistic overkill and try to obliterate the conceptual target by using a number of words or phrases expressing more or less the same idea.""

39. The judge concluded that mudstone is not within the scope of the category A reservations, and in my opinion she was clearly right to do so. Her reasoning is contained in the section of the Judgment running from [102] to [126], although parts of it apply only to the category D reservations which she considered at the same time. The main relevant strands in her reasoning were in summary as follows.

40. First, she explained at [106] to [108] why "[m]udstone is without doubt the common rock of the district" and "clearly does not satisfy any test of exceptionality". As she said at [107]:

"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."

The judge then said she had "no doubt that mudstone would not have been viewed as a material that was worthwhile quarrying and selling commercially, whether in 1816 or 1919": see [108].

41. Secondly, she considered the vernacular meaning of the words used at the time of the relevant grants, which again I take to be a finding about the position in both 1816 and 1919. She said at [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."

42. In my judgment, these were evaluative findings of fact which the judge was clearly entitled to reach on the evidence before her. Nor are they challenged in the grounds of appeal.

43. Thirdly, the judge regarded the powers of working contained in the reservation as an important part of the context. As she said at [112]:

"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."

44. Fourthly, the judge referred to the "purpose of profit" test, which Lord Esher MR had described as "an excellent rule of construction, founded on a long series of cases" in The Earl of Jersey v The Guardians of the Poor of the Neath Poor Law Union (1889) 22 QBD 555 at 560. The judge held, at [113], that the test imported "that the material has some value that makes commercialisation possible". She then said:

"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."

45. Finally, the judge discussed in [122] what she described as "important issues of practicality". I will not set these out at any length, but they include a number of cogent further reasons for concluding that the Trustees' claim to ownership of everything under the topsoil makes no practical sense, given (a) the terrain and the shallowness of the topsoil; (b) the fact that such consequences could not objectively have been contemplated by the parties to the 1919 conveyances; and (c) the acute difficulty, if the Trustees' case were correct, of how to draw a "literal boundary line" if it is not immediately below the topsoil. The last of these points was made in response to what the judge described as some "realistic concessions" which Mr Moeran had been driven to make during the course of his submissions, and which (perhaps for that reason) he did not repeat before us. The judge also rejected, at [123], any suggestion that the purchasers of cottages or farm buildings at the 1919 auction "were simply ill-advised". As she rightly said, at [123], "[t]he question is the objective meaning of the words used in the context of the factual background."

Conclusion

46. For all these reasons, I would dismiss the first ground of appeal.

The category D reservations

47. The category D reservations are contained in awards made under the 1816 Act, which was one of the more than 4,000 private Inclosure Acts made in the eighteenth and early nineteenth centuries in England and Wales. As counsel for the Respondent explain in their written submissions, in a passage which I do not understand to be controversial:

"In essence, inclosure involved abandoning farming the manor as a community in accordance with its ancient customs and replacing that with private free enterprise, carving the manorial land up in severalty in the process, so that every landowner would be free to farm his land as he saw fit… To achieve that the common fields and manorial waste were divided up into individual plots, which were then allotted out between the lord, the freeholders and any copyholders of the manor, in proportion to the value of the rights they had previously enjoyed over those fields and in that waste."

48. The category D awards with which we are concerned relate solely to former commons and waste of the Manor of Arwystli (or Arustley as it is spelt in the 1816 Act). As the judge recorded, at [47]:

"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. 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."

49. The recitals also refer to the Inclosure Consolidation Act 1801, which set out all the standard clauses "usually inserted" in and "usually required on the passing of" local Inclosure Acts, so that subsequent Acts could incorporate them by reference, as the 1816 Act duly did. The default rule was that an allotment of land made under an Inclosure Act was made in fee simple, and included all the mines and minerals under the land. The provisions of the 1801 Act did not alter that default position. However, it was common for private Inclosure Acts, which were generally promoted by wealthy landowners, to reserve mineral rights by way of a bespoke provision. As one would expect, these bespoke provisions vary widely in their scope and drafting. The widest form of exception was one where the lord would continue to enjoy his mines and minerals "in as full and ample a manner as if the Act had not been passed", or words to that effect.

50. The minerals reservation in the 1816 Act was set out in full by the judge in [49]. It 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 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 or 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."

51. It can be seen, therefore, that the reservation expressly extended to "any Mines, Ores, Coals, Metals or Minerals whatsoever" in or under the former waste of the Manor. The Trustees are the present successors in title to the lordship of the Manor, and as such are entitled to the benefit of the reservation.

52. The 1816 Act provided, in the usual way, for the allotments under it to be made by professionally qualified Commissioners, in specified proportions. The allotments made to the lord under the 1816 Act were to be either one-fourteenth or one-twentieth of the value of the land being inclosed, depending on its location. In the former case, where the land had previously been occupied in common, the Act provided for the allotted land to be fenced. The judge inferred "that this was generally the more suitable land for cultivation, as opposed to grazing". Where only a twentieth share was allotted, the land had previously been used for grazing alone. Provision was also made "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": see the Judgment at [27] and [50].

53. Awards made by the Commissioners were "binding and conclusive" in courts of law, by virtue of section 35 of the 1801 Act. The allotments made to the lord under the 1816 Act were expressed to be made "in lieu and satisfaction of his right and interest in the soil of the said commons and waste lands". The commons and wastes which were being inclosed included land in several villages, and in the middle of a market town. That land, as I understand it, did not form part of the Manor of Arwystli, but it was allotted with the same reservation of minerals as the rest of the land subject to the 1816 Act. It therefore forms part of the wider context within which the scope of the reservation must be determined.

54. In construing the scope of the category D reservations, the starting point, submits Mr Moeran for the Trustees, is that Inclosure Acts are different from most documents because they are generally in a common form. Accordingly, when a question of construction has been decided by the court, its decision should normally be followed if the same issue arises under a different Act. In support of this submission, Mr Moeran referred us to the judgment of Lord Esher MR in Consett Waterworks Co v Ritson (1889) 22 QBD 318, also reported as a Note to Consett Industrial and Provident Society v Consett Iron Co [1922] 2 Ch. 135 at 187. Lord Esher said, at 188:

"Now, these Inclosure Acts are not like a contract which may be casually made between individuals, they are unlike any other contract which has been made by anybody else. Inclosure Acts are of a common form which has existed for years.

Whenever you have such a common form as that where there have been decisions as to the mode of construing those Acts, it is not true, in my view, to say that the mode of construing them which has been adopted by a Court is not to be noticed by subsequent Courts.

When you have two casual agreements, one of which may never be repeated, the decision about the construction of it cannot give any help in construing another one which is different: but when you have documents which are ordinary documents – though not exactly alike – then the mode of construing them or any rule of construction, and although it is sometimes somewhat objected to, it is a word which I myself very much like, any canon of construction applied to that species of document which is a common one, it seems to me the Courts would be doing wrong if after a canon of construction has been laid down with regard to such documents it should not be followed."

55. While I see the general force of the point which Lord Esher MR was there making, I respectfully doubt whether it provides much assistance in the present case, where the provision which we have to construe forms part of a bespoke reservation in the 1816 Act. In the present context, I am more assisted by the guidance given by Lindley LJ at 194:

"The cardinal principle is to put the true construction on the Act with which you have to deal. That of course is a very general proposition, and these Inclosure Acts have been examined and discussed so often that there may be said to be now some subordinate rules to assist one in arriving at a true construction; but after all, one must not lose sight of the fact that their true construction is what we must get at in each particular case."

56. Mr Moeran went on to submit that the leading case on the meaning of the word "minerals" in Inclosure Acts is Earl of Rosse v Wainman (1845) 14 Meeson and Welsby 859, 153 E. R. 724, when it was heard at first instance by the Court of Exchequer (Parke B). The case was then in effect reheard on appeal by the Exchequer Chamber (sitting as a court of seven presided over by Lord Denman CJ) on a writ of error, when the first instance decision was upheld in short form: see Wainman v The Earl of Rosse (1848) 2 Exchequer Reports (Welsby, Hurlstone and Gordon) 800, 154 E. R. 714. The judgment of the court was pronounced by Wilde CJ, who is reported to have said:

"This Court has fully considered the case of Wainman v The Earl of Rosse, which is certainly one attended with considerable difficulty; but the result of the consideration of the Court is, that the judgment below must be affirmed."

57. The reservation which the court had to construe in that case was of:

"… all mines and minerals of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample, and beneficial a manner, to all intents and purposes, as [the lord] could or might have held and enjoyed the same, in case this act had not been made,"

As Mr Moeran points out, that description of the reserved substances is similar to that in the present case ("any Mines, Ores, Coals, Metals or Minerals whatsoever, in or under the said Waste Lands"), although the 1816 Act does not go on to say expressly that the reserved rights are to be enjoyed in as full, ample and beneficial a manner as if the Act had not been made.

58. The specific issue in the Wainman case was whether the reservation included a seam of valuable building stone which the lord had agreed to sell to a stone merchant. It is not entirely clear from the report of the case, or from the court roll which the Respondent's counsel have been able to examine (as described in their supplemental skeleton argument dated 11 May 2021), whether this stone was the same as "the stone common in the district" referred to in the case stated for the opinion of the court. I am inclined to agree with the submission of counsel for the Respondent that the valuable building stone in question was not the common stone of the district, but whether or not that is so, the important point is that the stone was evidently of high quality. As the roll shows, the claim was for conversion of "one thousand cart loads of fossils, one thousand cart loads of stone and one thousand cart loads of flagstones and one thousand cart loads of other minerals of great value", namely the then very considerable sum of £100. More specifically, the case stated also records that the building stone which had been removed before action brought had a value of over £40.

59. The Court of Exchequer held that the stone was included in the reservation. Giving the judgment of the court, Parke B said at 729:

"What these rights are depends upon the construction of the act, which is not very clearly expressed, and is open to much doubt; but the result of our consideration of the whole of its provisions is, that, in our opinion, the right to the stratum of stone was reserved to the lord, and consequently the plaintiff is entitled to recover."

60. Parke B went on to say, at 730:

"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… 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."

61. In my view, the assistance which the Trustees are able to gain from this authority is very limited. In the first place, it is a decision on the particular wording of a different Inclosure Act, which is not in this respect based on any standard form. Secondly, the stone in question was evidently a valuable building stone which could never be said of the mudstone in the present case. Thirdly, the court found considerable support for its conclusion, in what it clearly regarded as a finely balanced case, in the wording of the last clause with its express requirement to keep the first layer of earth separate. That provision was again not present in the 1816 Act. In view of these distinguishing features, I cannot agree with Mr Moeran that Wainman is an authority directly in point on the construction of the reservation in the 1816 Act, and still less that (as a decision of the Exchequer Chamber) it binds us to reach the same conclusion in relation to the mudstone in issue in the present proceedings.

62. Mr Moeran also referred us to the decision of the Court of Exchequer in Micklethwaite v Winter (1851) 6 Exchequer Reports (Welsby, Hurlstone and Gordon) 644, 155 E. R. 701. The case concerned a poorly drafted Inclosure Act of 1760, relating to the inclosure of Ardsley Common in the West Riding of Yorkshire. The provisions of the 1760 Act did not include any express reservation of minerals, but the court was able to imply such a reservation from a provision requiring the lord to pay compensation for digging "coals or minerals". The Act also provided that certain "stone quarries" which were the property of the lord should be included in the allotments made to him. Both the existence and the scope of the reservation were in issue when the matter came before the court on a claim brought by the successors in title of the lord some ninety years later, after the defendant had opened a quarry and taken and converted to his use "divers large quantities of stone, grindstones, and flagstones of the value of £50".

63. The leading judgment was delivered by Pollock C. B., who held that there was an implied reservation to the lord in the 1760 Act of his right to the coal and minerals, and that the reservation included the stone in issue. Pollock C. B. said that the Wainman case "distinctly decided that the word "minerals" includes stone." Concurring judgments were delivered by Barons Alderson, Platt and Martin, the last of whom said:

"The next question is, whether stones are minerals within the exception. The Earl of Rosse v Wainman is a direct authority that whatever stone is got from quarries, and separated from other stone, is minerals in the ordinary sense of the word. Such stone is not included in the exception, but belongs to the lord."

64. In my view this case adds nothing of any significance to Wainman. Like the earlier case, it concerned strata of stone with real commercial value, which could be quarried and sold at a profit.

There is no suggestion that any of the stone was the prevailing stone of the district, and even if it was its character was wholly different from that of the commercially valueless mudstone in the present case.

65. Against this background, the judge in our case held that the category D reservations did not include mudstone, for reasons very similar to those which led her to conclude that mudstone was excluded from the reservations in the 1919 conveyances. Indeed, as I have already said, she treated the category A and D reservations together in the same section of the Judgment. As before, I consider that the judge came to what is clearly the right conclusion on this issue. In what follows, I will not repeat points which I have already made in relation to the category A reservations, but will concentrate on those parts of the judge's reasoning which are specific to the category D reservations and the 1816 Act.

66. At [111], the judge observed that:

"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 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."

I respectfully agree.

67. At [114], the judge gave her reasons for distinguishing Wainman. The first and third of those reasons are reflected in points which I have already made in my discussion of that case. I am inclined to agree with Mr Moeran that the second reason, which turns on differences in structure of the drafting of the reservation in the 1815 Act considered in Wainman and in the 1816 Act, does not take matters much further, because the overall effect of the provisions is substantially similar. Mr Moeran also criticised the judge's fourth reason, which was that Wainman must in any event be read in the light of subsequent case law, summarised by Slade J in the Lonsdale case. I am unable to accept that criticism. In each Act the reservation did not refer expressly to "stone", and the main focus of the reservation was on mines and minerals. I can see no reason why different principles should apply to the interpretation of those words in a bespoke reservation in a private Inclosure Act and in private conveyances of the kind considered by Slade J in his review of the authorities in Lonsdale.

68. At [115], the judge referred to Micklethwaite v Winter, saying it "does not add anything material to Wainman." As will already be apparent, I agree. I also agree with what the judge said in the next paragraph, [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."

69. At [117] to [121], the judge made two further points which in her view provided some additional support for the Respondent's case "that this was not simply a conveyance of the surface for the purposes of cultivation."

70. The first point was that the 1816 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. Since it is common ground that "soil" included the substrata as well as the surface, including mines (see Townley v Gibson (1788) 2 TR 701), it is clear that there was need for an express reservation of minerals if they were not to be included in the awards. Accordingly, if the intention had been only to convey the surface of the land, one would expect that to have been done in express terms. Instead, the subject of the awards was land previously owned by the lord, subject to a proviso which excepted mines and minerals.

71. The second point was that the land awarded under the 1816 Act was to be held with the same tenure as that to which the land was previously subject. In this case, that was a freehold, not copyhold, tenure. Whereas copyhold tenure carried a broad entitlement to minerals, that was not true of freehold tenure.

72. Mr Moeran criticised the judge's reasoning on both the above points. As to the first, he pointed out that the position was essentially the same in Wainman, which also concerned an Inclosure Act made after Townley v Gibson and where similar language was used in the Act. As to the second, the fact that the land allotted under the 1816 Act was held on freehold rather than copyhold tenure was irrelevant, if on its true construction the land awarded did not include the sub-soil. I agree that there is force in these objections, and I do not think the judge's two points really advance the Respondent's case. But they are only subsidiary points, and they do not in my judgment detract from the judge's basic conclusion that, properly construed, the reservations of mines and minerals in the 1816 Act did not include mudstone. The critical point, to my mind, is that the reservation of mines and minerals in the 1816 Act is not apt to include mudstone, both because of its ubiquity and because of its lack of commercial value. This conclusion is then supported by all the relevant issues of practicality which the judge discussed in [122].

Conclusion

73. Accordingly I would dismiss the second ground of appeal.

The disputed category C titles

74. At trial, the category C claims were the most numerous, but the third ground of appeal relates to only two of them: claims 17 and 25 (the grounds of appeal say 24, but this was an error as the Trustees' skeleton argument made clear). The issues raised in relation to those two titles are specific to their particular circumstances, and of no general importance. I will therefore deal with them briefly.

75. The background to the category C claims is that they relate to those parts of the manorial waste of the Manors which were left untouched by the 1816 Act. The lord therefore continued to own the undifferentiated fee simple in that land, both the surface and everything beneath it. The land was, however, subject to rights of common vested in the freehold landowners of the Manors. The relevant common right was one of sheepwalk, which in the Welsh mountains normally meant an exclusive right to graze sheep on the particular part of the waste nearest to the landowner's holding rather than a right for each landowner to put a particular number of sheep on the whole of the waste: see the Judgment at [26].

76. From the 1850s onwards, a series of private enclosure agreements were entered into between the lord of the relevant Manor and individual landowners, allowing them to inclose and (if they wished) cultivate those parts of the waste where they had an exclusive right of sheepwalk. The judge found, at [47], that the text of the agreements generally followed a standard printed format, with individual details added in handwriting. The agreements were not executed as deeds, nor were they intended to effect any form of conveyance or creation of an estate or interest in land: see [129]. The operative part of the agreement therefore did no more that grant "a permission, which cannot have been more that a contractual licence… to put fences up and also to cultivate the land rather than simply using it for grazing": ibid. The agreements also contained an express saving and reservation to the lord and his successors in title of:

"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 [in effect to work and exploit the same, subject to payment of reasonable compensation for all damages and losses thereby occasioned]"

77. Since the agreements took effect as contractual licences (a finding against which there is no appeal), they did not sever or affect the lord's title in any way.

78. In her discussion of the category C titles, at [129] to [141], the judge explained what happened next:

"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.

…

133… 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."

79. As the judge then correctly observed at [134], "[a] title acquired by adverse possession is a fresh title. The dispossessed owner's title is not transferred. Rather, it is extinguished." See generally Megarry and Wade, The Law of Real Property, 9th Edition, at paragraph 7-004.

80. To complete the picture, reference may be made to the Judgment at [141], where the judge explained how any surviving rights of sheepwalk would have been extinguished at the latest by 1970 for non-registration under the Commons Registration Act 1965: see Central Electricity Generating Board v Clwyd County Council [1976] 1 WLR 151. The reality, at least by 1970 and in most cases well before that, was that the Respondent's predecessors (in practice probably the Forestry Commission) "were claiming to be, and acting as, sole owners of an undifferentiated title."

81. Against this background, I can now turn to the two C titles in dispute.

Claim C17

82. This title contains two separate parcels of land. The appeal concerns only the southern parcel known as Bwlch Hyddgen (Buckskin Pass). The Trustees now say that this should have been treated as a category A title, because there is a conveyance dated 1 January 1924 by their predecessors in title which contains an express reservation of the category A type. That is indeed so, but the conveyance also gave the purchaser the express right:

"to get from and out of the said hereditaments hereby conveyed for use thereon but not for sale or use elsewhere stone gravel and sand for building and for the making and repair of roads walls and fences."

83. In the Appendix to the Judgment, the judge said:

"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."

84. Mr Moeran criticises the judge's conclusion on this point, but in my view the contention that this title should be treated differently from the other category C titles is only true in the sense that it should properly be regarded as a category A title. The inclusion of a type A reservation, in a private conveyance made in 1924, shows this to be the case. I can see no reason why the reservation in the 1924 conveyance should be construed any differently from the reservation in the 1919 category A conveyances, and I did not understand Mr Moeran to suggest that it should. Since I have held that the appeal in relation to the category A reservations fails, it must therefore follow that the type A reservation in the 1924 conveyance was similarly ineffective to reserve any rights to mudstone. Nor is that conclusion altered in any relevant way by the terms of the specific further power to extract "stone gravel and sand" for use on the site. This was clearly a specific provision to accommodate the needs of the purchaser and it cannot be inferred from it that the main type A reservation must therefore have included mudstone. Furthermore, if any particular points were to be made about the geology of this particular parcel of land, the Trustees should have pleaded a specific case supported by relevant expert evidence, which they failed to do.

Claim C25

85. This parcel of land was acquired by the Ministry of Agriculture from a Mr Hugh Hughes on 25 September 1956. In answer to a requisition on title, Mr Hughes stated that the mines and minerals were vested in the Executors of the Marquess of Londonderry. This answer was no doubt based on the fact that Mr Hughes had acquired the property from members of the Evans family, who had themselves acquired it from the Londonderry Settled Estate on 16 March 1931 by a conveyance which expressly excepted and reserved to the vendor "All mines and minerals in or under the property".

86. Had the Trustees been successors in title to the Marquess of Londonderry, this would have been an "A" type claim, and the question would have been whether the exception of "all mines and minerals" included mudstone. But the Trustees are not successors to the Marquess of Londonderry. They are strangers to the 1931 conveyance, and do not take the benefit of any exception or reservation in it. Instead, the Respondent is a successor in title of Mr Hughes and the Ministry of Agriculture, and the relevant question is whether the Respondent or its predecessors in title have acquired an independent title to the land by adverse possession against the Trustees' title. On the basis of the judge's findings of fact, the answer to that question is Yes.

87. I found it difficult to understand from the Trustees' written and oral submissions to us precisely what their objection is to the judge's conclusion, but I take it to be that, because title to the substrata was severed by the 1931 conveyance, it was thereafter impossible as a matter of law for adverse possession to be obtained to the severed strata. If I have correctly understood the argument, I would reject it. As I have already explained, a title to land which is obtained by adverse possession is a

fresh title which extinguishes the previous title upon expiry of the relevant period for recovering possession. Provided the requirements for adverse possession are satisfied, the fresh title prevails and it is no longer relevant to enquire into the history of the dispossessed paper owner's title. It is well established that where a paper title is extinguished by adverse possession of the surface, the adverse possession extends to minerals beneath the surface (unless, of course, they have been reserved by an earlier conveyance which is independently binding on the adverse possessor): see the Judgment at [138] and Seddon v Smith (1877) 36 LT 168.

88. Further and in any event, I see no reason why the reservation in the 1931 conveyance should be construed so as to include mudstone, having regard to the principles which I have discussed in the context of the category A reservations. Accordingly, I can find no support for the supposed horizontal severance of the title in 1931 which the argument takes as its starting point.

Conclusion

89. For the above reasons, I would dismiss the third ground of appeal.

Adverse possession issues

90. The remaining grounds of appeal arise only if and to the extent that the judge's conclusions in relation to the mudstone in the category A, C and/or D claims are overturned. If the other members of the court agree with me that the first three grounds of appeal should be dismissed, this condition will not be satisfied and anything which we said in relation to the remaining grounds of appeal would be obiter. Indeed, our views would in a sense be doubly obiter, because the judge herself did not need to deal with the adverse possession issues save in relation to category C. She therefore dealt with the matter "relatively briefly" in case it went further, and because it required factual findings, which she then proceeded to make: see the Judgment at [42].

91. The issues of law which would arise, if we needed to decide them, are both complex and difficult. We heard some interesting arguments on them. But in my view it would not be appropriate or helpful for us to rule on them when our judgment would have no binding force, and when the judge herself did not need to decide them.

Overall conclusion

92. I would dismiss the appeal.

Arnold LJ:

93. I agree.

Birss LJ:

94. I also agree.