

Compulsory Acquisition of Working Rights? Using the Mines (Working Facilities and Support) Act 1966

In the minerals industry and amongst professional advisors the acquisition of rights to search for and work minerals compulsorily under The Mines (Working Facilities and Support) Act 1966 is occasionally discussed as a means of adding leverage to negotiations with mineral owners. However, the practicalities of an application are seldom considered, and few within the industry or their professional advisors have direct experience of an application.

What can mineral operators achieve by using the Act and how?

The process starts with an application to the Secretary of State who must be satisfied there is a prima facie case and if so will refer the matter to the Court.

The rights sought can be to search for minerals, work them, and ancillary rights including wayleaves, drainage and to occupy surface for plant.

The applicant needs to show both in the initial application to the Secretary of State and to the Court that the grant of rights is "expedient in the national interest". This is a complex concept, but the applicant must show something more than its private interest and the working of the minerals must be for some greater economic good.

In our experience it is vital to place the application in an economic and geological context and considerable work will have to be undertaken and reports prepared prior to submission.

The applicant must also show that it is not

reasonably practicable to obtain the rights by agreement with the persons who can grant them because:

- They are numerous or have conflicting interests;
- They can not be found or ascertained;
- They do not have the necessary powers of disposition through title defects, lack of legal capacity or otherwise; or
- They unreasonably refuse to grant the rights or demand terms which, having regard to the circumstances, are unreasonable.

It is this latter reason that gives rise to most serious consideration of the use of the Act. However, the mere fact that negotiations prove difficult or prolonged will not be sufficient as an applicant will need to show it has made every reasonable attempt to accommodate legitimate requirements.

Once the Secretary of State has referred the matter to the Court and the Court is satisfied with the grounds for making an order, it may make it on such terms, conditions and for such period as it thinks fit.

The Court will have regard to the time reasonably necessary for all minerals to be worked, and where compensation or consideration has not been agreed, provide that it should be paid.

The issue of "compensation" has been one of the attractions of an application or the threat of one. In the 1987 case, BP Petroleum Developments Limited v Ryder, it was suggested that the basis of compensation should be that of compulsory acquisition, therefore the value of the right to the acquirer was to be disregarded, potentially to the

considerable detriment of the person from whom the right is acquired.

However, last year in Bocardo SA v Star Energy, a case not directly relating to the Act, but trespass where pipelines for oil extraction were laid without authority, the High Court regarded the outcome of the Ryder case as incorrect and the proper measure should be what would be paid for the rights on a fair and reasonable basis between a willing grantor and a willing grantee, which would take account of the benefit of the rights to the acquirer. Bocardo SA v Star Energy is subject to appeal; the case has been heard, but judgement is awaited.

The result of the appeal may diminish the financial benefit of an order under the Act to the applicant but the attraction of an application, or a legitimate threat of an application, will remain in appropriate circumstances particularly for those involved in the energy industry, the extraction of scarce minerals or those used in added value industrial processes.

The complex two stage application requires a considerable amount of interdisciplinary preparation and co-ordination and, on the legal side, knowledge of the minerals industry combined with practical litigation skills.

If you would like further advice in connection with the use of the Act or of other specialist procedures available to or affecting the minerals industry please contact Richard Lashmore.
Email: richard.lashmore@knightsllp.co.uk



Knights solicitors llp
The Brampton
Newcastle-under-Lyme
Staffordshire ST5 0QW

T 01782 619225
F 01782 620410

Eagle Tower
Montpellier Drive
Cheltenham GL50 1TA

T 01242 524654
F 01242 524590

E mail@knightsllp.co.uk
W knightsllp.co.uk

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Backdale: a winning case?

Secretary of State for Communities and Local Government and Peak District National Park Authority v Bleaklow Industries and MMC Midlands Limited.

Background

The Peak District National Park Authority issued an enforcement notice alleging the winning and working of limestone other than in accordance with the mineral planning permission for Backdale, granted in 1952. The enforcement notice was varied by the Inspector on appeal so that it required cessation of the winning and working of limestone, other than the working of such limestone as is won in the course of working fluorspar and barytes.

In March 2009 the Court of Appeal concluded, contrary to the finding of the High Court judge, that the Planning Inspector had been right to uphold the enforcement notice, as varied by him.

The Planning Permission

The 1952 permission was contained in a decision letter by the Minister of Housing and Local Government and the description of the development was a lengthy one, but was simplified in the context of the matters before the Court as being, first for “the winning and working of fluorspar” and, second “for the working of [limestone] which is won in the course of working [fluorspar]....”.

It was the different use of the words “winning” “working” and “winning and working” which were at the crux of the matter but the case is also interesting for the general approach which was taken to interpretation of planning permissions.

The Approach to Interpretation

The general rule is that in the absence of ambiguity regard may be had only to the planning permission itself, including the conditions on it and the express reasons for them. In this case, a report of an officer of the Ministry of Housing and Local Government which preceded the decision letter expressed its recommendation in different terms from those in which the permission was eventually granted. Naturally both sides sought to rely on this to their benefit!

However, the Court of Appeal declined to use the report as a means of construing the planning permission. Whilst the Court clearly considered the permission unambiguous there was an obvious reluctance to admit extrinsic evidence. Referring to the more recent cases on the point, the Court stated “a planning permission runs with the land and should be capable of being relied on by later landowners and others who may well not have access to officers' reports and other extrinsic material”.

Despite arguments from the owner and operator that the permission was not necessarily being precise in its use of the terms “winning” and “working” the Court of Appeal decided that the wording should be

regarded as “deliberate and meaningful” with the result that the following operations were permitted:

- winning and working of fluorspar
- working of limestone won in the course of working fluorspar

Working of limestone won in the course of winning fluorspar was not permitted, and nor was winning limestone.

The use of the geological context to apply the meanings of winning and working in the context of fluorspar mining by both the Inspector and the High Court judge was, though, impliedly accepted by the Court of Appeal.

Meaning of “Winning” and “Working”

The Court of Appeal endorsed its own decision in the case of English Clays Lovering Pochin Limited v Plymouth Corporation, a case after the 1952 permission, but which itself followed earlier authorities.

“Winning”, as used in the 1952 permission, said the Court of Appeal, refers to the process of achieving access to the desired mineral, so that it can then be worked and “working” refers to the process of removing the desired mineral from its position in the land.

The Practical Effect

Fluorspar is found mainly in veins which run through the limestone outcrop and at Backdale there is a limestone overburden to be removed before there can be access to the fluorspar.

The effect of the Court of Appeal's interpretation of the 1952 permission was that there was not permission “to work” the limestone overburden as its removal was “winning” the fluorspar. As a result it could not be exported and sold from the site.

There was permission to work the limestone where it was immediately adjacent to the fluorspar veins and the fluorspar extraction inevitably required removal of that limestone.

What is also interesting is the approach to the limestone overburden which, of course, had a commercial value to the operator and to the owner. This, the Court of Appeal decided, was properly considered “waste” in the context of the 1952 permission and fell to be dealt with in accordance with the conditions on the planning permission.

For further information please contact Andrea Bruce.
Email: andrea.bruce@knightsllp.co.uk

THE MINING WASTE DIRECTIVE - AN INTRODUCTION

Q What is the title for the Directive?

A Directive of the European Parliament and of the Council on the management of waste from extractive industries; Directive 2006/21/EC.

Q What does it apply to?

A Extractive waste, ie waste resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries.

Q What does treatment include?

A Crushing, screening and washing but not manufacturing operations.

Q How is it to be implemented in England and Wales?

A Regulations are currently before Parliament and expected to be debated before the summer recess. They are due to come into force on 7 July 2009.

Q Who will enforce the Regulations in England and Wales?

A The Environment Agency.

Q Will the Regulations replace any existing regulatory requirements?

A No. They will sit alongside the Quarry Regulations and the planning regime.

Q What are the basic requirements?

A Waste Management Plans will be required for all extractive waste.

Q Are there any additional requirements?

A Where extractive waste is placed in a “waste facility” there are additional controls, including in the case of facilities considered to be highest risk, such as a permit.

Note: Waste facilities could include soil and storage bunds.

For further information please contact Andrea Bruce. Email: andrea.bruce@knightsllp.co.uk