

Deregulation at Depth

The Infrastructure Act 2015, Hydraulic Fracturing and Rights to Subsurface Land

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Legal Framework

- Complex mixture of national and local provisions for *exploratory* sites:
 - Petroleum Exploration and Development Licence (PEDL) permits activity and is issued by the Oil and Gas Authority (govt. company of Dept. for BEIS)
 - Issued in licensing rounds.
 - Covers a fixed geographical area.
 - Environmental Risk Assessment component.
 - Variety of other national permissions and authorities dependent on the nature of the extraction site and the proposed operation.
 - Coal Authority, COMAH, COSHH, British Geological Survey.
 - Health and Safety Executive.

Legal Framework

- Local Mineral Planning Authority will give planning permission to individual extraction projects:
 - Based on national and local planning frameworks and guidance.
 - Considers *inter alia* noise, visual impacts, archaeological and heritage features, traffic, and risks of contamination.
 - Appeals on such decisions are (and have been) considered by the Sec. of State for Communities and Local Government.

Location, location, location

- Private landowner permission for activity is required as an addition to established local planning and national licence frameworks.
- Private arrangements to which we are not privy.
- Implications for both landowners *and* neighbouring landowners of the practice are apparent.

Private Land Rights

- Principle of *cuius est solum, eius est usque ad coelum et ad inferos*
- *Star Energy Weald Basin Limited and another v Bocardo SA* [2010] UKSC 35
 - Rights cannot exist to the centre of the earth, BUT
 - 240m 'far from absurd'

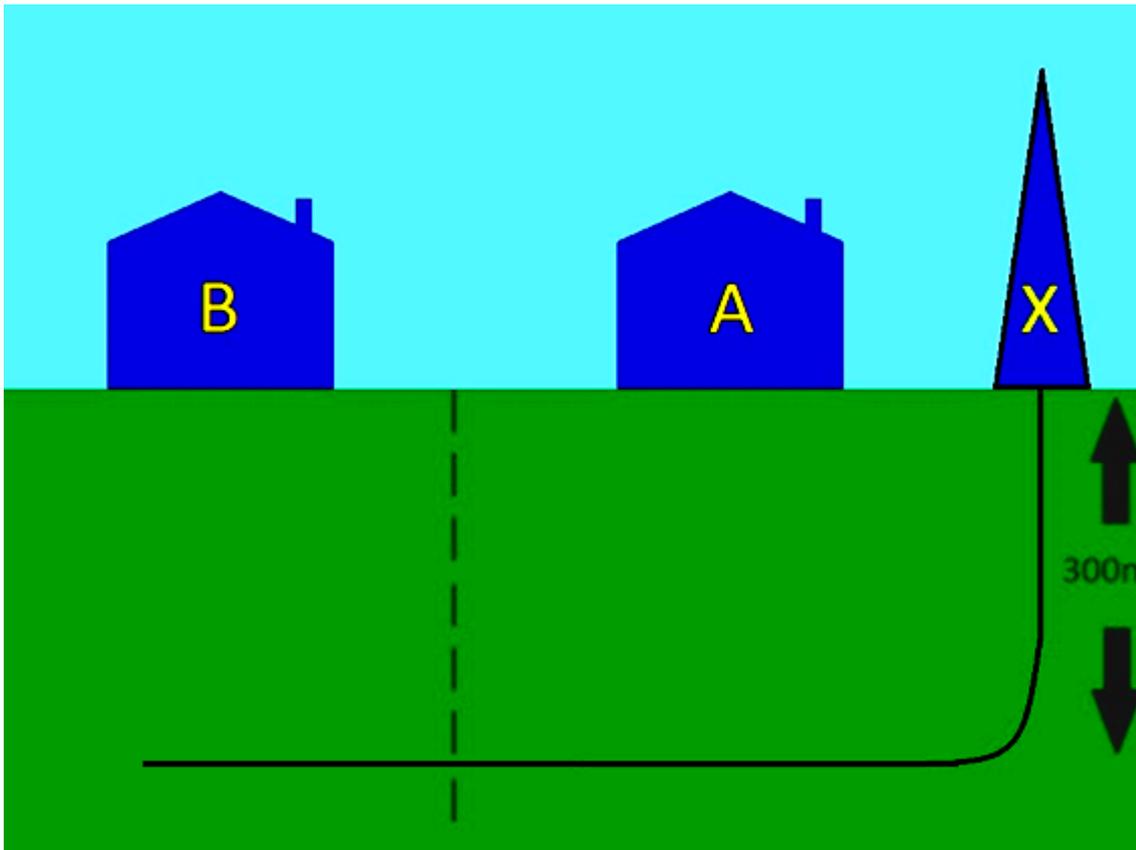
Impact of the Infrastructure Act

- Section 43(1)
 - A person has the right to use deep-level land in any way for the purposes of exploiting petroleum or deep geothermal energy.
- Section 43(4)
 - Deep-level land is any land at a depth of at least 300 metres below surface level.

Impact of the Infrastructure Act

- Section 44 (1)
 - a) allows drilling, boring, fracturing or otherwise altering deep-level land;
 - b) installing infrastructure in deep-level land;
 - c) keeping, using or removing any infrastructure installed in deep-level land;
 - d) passing any substance through, or putting any substance into, deep-level land or infrastructure installed in deep-level land;
 - e) keeping, using or removing any substance put into deep-level land or into infrastructure installed in deep-level land.
- Section 44 (3)
 - The right of use includes the right to leave deep-level land in a different condition from the condition it was in before an exercise of the right of use (including by leaving any infrastructure or substance in the land).

Impact of the Infrastructure Act



In brief:

- A is exempt from liability for the licensed activities of X in the event of harm to B
- X is free to operate without B's consent below 300m.
- B cannot stop X drilling beneath their land below 300m.
- Land below 300m can be left as X sees fit once operations cease.

A no go area

- Trespass
 - Excluded below 300m
 - Land can be left in a different condition under statutory authority
 - Essentially there is no *unjustifiable interference*

A pain in the....

- Nuisance
 - Statutory authority to operate in the prescribed manner is present
 - Use must therefore be unreasonable and not aligned to the purpose of the Act
 - *Barr v Biffa Waste Services* [2012] EWCA Civ 312 and *Allen v Gulf Oil Refining Ltd* [1981] AC 1001
 - Intentions of Parliament should be assessed
 - *Some* rights are clearly revoked
 - Nuisance must go beyond that envisaged by Parliament in permitting the activity

Allen v Gulf Oil Refining Ltd [1981] AC 1001

"the establishment of an oil refinery, etc. **was bound to involve some alteration of the environment** and so the standard of amenity and comfort which neighbouring occupiers might expect... **Parliament must be taken to have authorised it...**[I]n my opinion the statutory authority extends beyond merely authorising change in the environment and an alteration of standard. It **confers immunity against proceedings for any nuisance** which can be shown to be the inevitable result of erecting a refinery upon the site...To the extent and only to the extent that the actual nuisance (if any) caused by the actual refinery and its operation **exceeds that for which immunity is conferred, the plaintiff has a remedy.**"

per Lord Wilberforce

A glimmer of hope?

- Negligence
 - Licensed process where some risk is accepted
 - Harm must be proven to exist above 300m and attributable to one firm/well
 - Action must be unreasonable in the context of the activity permitted *and* the harm foreseeable
 - But... *Woodland v Essex County Council* [2013] UKSC 66
 - 'an antecedent relationship between the defendant and the claimant'
 - An assumption of responsibility would be likely

(A) Well within your rights

- Overall, rights are removed and/or severely inhibited.
 - Stopping drilling before it begins under private land (below 300m) is impossible.
 - Challenging when harm is done, greatly inhibited.
- The consequence, a *free legal space*.

Conclusions

- Current regulatory regime is complex and composed of both new bespoke provisions and established mechanisms for the broader oil and gas industry.
- The Infrastructure Act provisions remove or considerably inhibit pre-existing common law rights over subsurface land.
- The result is an operational space devoid almost entirely of regulation on which firms can base the minimal legitimacy of activity.

Further considerations

- Variance between local authority standards.
- Produced water re-injection increases the relevance of the subsurface rights and demands a fresh look at regulation of wells post-extraction.
- Human Rights implications of the arbitrary removal of subsurface rights were not considered in the passage of the Act through Parliament.

Further research

- Interviewing firms to assess their perception of the current framework and their responsibilities under it.
- Assessing the human rights implications of hydraulic fracturing as a whole well life extraction method.
- Outlining regulatory responses to the idiosyncrasies of this form of extraction within what is an established and regulated wider industry.