Written Evidence from Christopher Jessel (MAR 04)

Manorial Rights

Executive Summary

- The expression "manorial rights" in the Land Registration Act 2002 ("LRA 2002") refers to the rights of a lord of a manor to minerals in, sporting over, or markets affecting copyhold land enfranchised under Act of Parliament, or to require the owner of such land to do, or contribute to the cost of, works.

- The lord does not have a unilateral right to go on to the land to exercise the rights without the landowner's consent save in exceptional cases but can prevent the landowner taking minerals or game on the land or holding a market.

- Other mineral or sporting rights belonging to a manor can derive from an Inclosure Act or an agreed enfranchisement but they are not "manorial rights" within the LRA 2002.

- Legislation could give landowners a right to buy out the mineral and sporting manorial rights. That would be consistent with the policy of Parliament in the Copyhold Acts 1841 to 1894. Rights of market and obligations to do or pay for works which have not been exercised for 20 years could be abolished.

Introduction

1 I am a solicitor, and until retirement in 2008 I was a partner in Farrer & Co of Lincoln's Inn Fields practicing property law. I acted for lords of manors and for people who disputed rights claimed by lords. I am still a consultant to the firm and I have provided advice to assist their clients in both categories but this evidence is personal and individual and has no involvement with that firm.

2 I am the author of *The Law of the Manor* first published 1998, second edition 2012. The book includes a discussion of the nature of manorial rights and an account of minerals, sporting and markets and fairs and takes into account the LRA 2002.

3 I appreciate that the Committee will already have received advice on the legal nature of manorial rights. My evidence may duplicate that but some aspects of the law are obscure or unsettled.

Meaning and proof of Manorial Rights

4 Although the meaning of "manorial rights" is not defined in case law, the comparable "seigniorial rights" was the subject of the leading case *Townley v Gibson* in 1788 followed by several nineteenth century decisions on Inclosure Acts. These cases held that it meant established rights of the lord over land owned by someone else.

5 The LRA 2002 does not define "a manorial right". Paragraph 11 of Schedules 1 and 3 re-enacts with amendments a provision formerly in the Land Registration Act 1925 ("LRA 1925") section 70(1)(j) which referred to manorial rights as binding land "until

extinguished". The LRA 1925 in turn derived "manorial rights" from the Land Registry Act 1862 section 27(2), which did not define it either.

6 Manorial rights principally affected copyhold land. Most copyhold land belonged to its owner as fully as a freehold but it was conveyed in a different way and was subject to the rights of the lord of the manor. Enfranchisement converted it to freehold. That could be done by agreement at common law but was more easily done under the Copyhold Acts 1841 to 1894 on the initiative of either lord or tenant. The Law of Property Act 1922 ("LPA 1922") converted all remaining copyholds to freeholds on 1 January 1926.

7 Manorial rights originally included payments such as entry fines, quit rents, reliefs and heriots and also rights to timber. Following enfranchisement those rights were extinguished on payment of compensation by the landowner to the lord calculated according to rules laid down by Parliament. The LPA 1922 allowed a period of time for compensation to be agreed and the rights continued until payment but no payments were due after 1950. The words "until extinguished" in the LRA 1925 refer to that process.

8 Other rights of the lord to minerals, sporting and markets and to contributions to the cost of works were not extinguished but were preserved by the Copyhold Act 1894 section 23 and the LPA 1922 schedule 12 paragraphs (5) and (6). "A manorial right" in the LRA 2002 appears to mean the preserved rights. I understand that is the view of the Law Commission and of the Land Registry.

9 While that is the better view, it is arguable, in the absence of a definition, that "manorial right" includes minerals and sporting rights under Inclosure Acts and agreed enfranchisements of the types discussed below, and other miscellaneous rights such as rentcharges reserved on enfranchisement and small payments known as rents of assize. In my view a court would be unlikely to interpret the expression in that way.

10 The lord may own roadside verges and common land. There may be rights to hold manor courts and appoint manorial officers and to ceremonial renders such as a pair of gloves. The lord may also have escheat where, on the insolvency of a landowner, a liquidator or trustee in bankruptcy has disclaimed burdensome freehold land: while title normally passes to the Crown, in rare instances it might pass to the lord. While those could be described as "manorial rights" they are not relevant to another landowner's registered title and are not covered by the words in LRA 2002.

11 Manorial mineral and sporting rights and liability to do or pay for works derive from legal custom which in theory existed before the coronation of Richard I on 3 September 1189. Some customs are general and recognised by the courts as being found throughout the country: others are special to particular manors and their terms must be individually proved.

12 A market does not exist by custom. It is a right known as a franchise and in theory was created by charter from the Crown or by Act of Parliament. If it pre-dates 1189 it is authorised by the Statute *Quo Warranto* 1290. If later the claimant should in theory produce a charter or an Act: if that is not possible, but the market is shown to be long-standing, the courts will often presume one.

13 Manorial rights can be sold or given away from the manor: although they become owned by someone who is not the lord they are still manorial rights.

14 Registration of a notice under the LRA 2002 does not itself establish that the lord has any rights but simply protects any rights which may exist.

Manorial mineral rights

15 By general custom the lord of the manor could not open new mines in copyhold land without the consent of the copyholder. That was established by cases including *Player v Roberts* (1631), *Bishop of Winchester v Knight* (1717), *Grey v Duke of Northumberland* (1806) and *Bourne v Taylor* (1808). Originally a similar rule also applied to felling timber trees but the timber rights of the lord were extinguished on enfranchisement.

16 Correspondingly by general custom the copyholder could not open mines in the copyhold land without the consent of the lord. That derived from the doctrine of waste under which landholders who did not own the fee simple could not make physical alterations to their land.

17 In *Eardley v Granville* in 1876 Sir George Jessel Master of the Rolls said "The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout, except as regards for this purpose timber-trees and minerals. As regards the trees and minerals, the property remains in the lord, but, in the absence of custom, he cannot get either the one or the other, so that the minerals must remain unworked, and the trees must remain uncut. The possession is in the copyholder; the property is in the lord."

18 As there was a mutual veto both parties had to cooperate if the minerals were to be worked. Common practice was for both to grant a mineral lease or licence and the royalties to be divided. That remains the situation after enfranchisement.

19 In some manors there was a special custom that the copyholder could work minerals on the land without any need for the lord's consent. That was upheld by the House of Lords in *Lord Salisbury v Gladstone* in 1861.

20 In a few manors there was a special custom that the lord had a unilateral right to take minerals by underground working only. The House of Lords decided in *Wolstanton Ltd v Newcastle-under-Lyme Corporation* in 1940 that the lord or a licensee of the minerals must not withdraw support from the surface or cause subsidence. Therefore although unilateral working may in theory be permissible, the law imposes such tight restrictions that it may not be practicable.

Manorial sporting rights

21 I would expect that the ordinary rule for minerals and timber also applied to sporting so that the lord had no right to go on to the copyhold but could prevent the copyholder killing wild animals but I have not found any direct legal authority on the point. There is some support in *Davies Case* in 1688 and *Tilbury v Silva* in 1890. The issue does not seem to have been litigated, possibly because the value at stake was not worth the cost.

22 This view is supported by the Game Act 1831. Trespass is a civil wrong but the Act made it a criminal offence to trespass in pursuit of game. Section 35 contains an exemption for the lord of the manor or the lord's gamekeeper. That would make sense if the lord owned the game rights but had no right to go on to copyhold land. The copyholder could sue the lord in trespass but the lord would not have committed an offence.

23 Even though the lord may not have a right of access, the sporting rights can still be useful. Although the lord could not shoot over the land, neither could the copyholder, thus preserving the game. It is common contemporary practice on the sale of cottages

from sporting estates for the seller to reserve sporting rights without any right to go on to the sold land to exercise them. This prevents the cottage owner from putting out a bowl of corn and, when birds (raised at the expense of the estate) come down to feed, taking and eating them.

24 Some lords seem to have claimed the right to go on to copyhold land to hunt and hawk. As manorial sporting rights must in theory have existed in 1189 it is likely following *Moore v Earl of Plymouth* in 1820 that the right would be limited to exercise in a manner possible in 1189 which would exclude the use of firearms.

25 In *Gunnerside Estates Limited v Milner* in 2010 the Adjudicator to the Land Registry decided that a notice of manorial sporting rights on the register of title did not infringe the landowner's human rights. The decision seems to have assumed that the owner of the rights could come on to the land to shoot game but the point was not relevant to the adjudication and does not seem to have been discussed.

26 Some lords had franchises of free warren which allowed them to take game on copyhold land but after *Morris v Dimes* in 1834 it was difficult to establish title. Free warren was abolished by the Wild Creatures and Forest Laws Act 1971.

27 If a lord has no ancient right to go on to former copyhold land to shoot but has in fact done so for at least 30 years and the landowner has not resisted access then the lord may have acquired a profit à prendre under the Prescription Act 1832. That would not be a manorial right but a statutory right conferred by Parliament.

Similar mineral and sporting rights

28 Other rights which derive from manors are not manorial rights within the LRA 2002 although they may be confused with them. They normally involve separate ownership of the mineral strata from the surface. They were created by inclosure awards and by agreement on enfranchisement and often do include express rights to go on the land. Although they do not need to be noted against a registered title it is likely that some have been.

29 Several thousand Inclosure Acts were passed in the 18th and 19th centuries to convert manorial waste, which was owned by the lord but subject to rights of common, to enclosed fields. The Acts authorised Awards which extinguished the grazing and other rights over the common land and compensated the commoners by allotting parts of it to them as freehold. Lords frequently wished to retain mineral and sporting rights over the allotted land. Early Inclosure Acts reserved "seigniorial rights" but *Townley v Gibson* decided that a lord who owned the waste before inclosure could not also claim to have had seigniorial rights over it because people can not have rights over their own land.

30 Subsequent Inclosure Acts and Awards therefore often included express rights for the lord to enter the land to open shafts and do other things necessary for working minerals, or to take game. Although such rights may still belong to the lord of the manor, in my view since they are statutory rights conferred by Parliament they are not "manorial rights" in the sense used in the LRA 2002.

31 If the land was enfranchised either at common law or under an Act the parties could agree that in return for the copyholder having to pay a reduced sum as compensation the lord would have enlarged mineral or sporting rights. Even if before enfranchisement the lord had manorial rights, the effect of such a bargain was to extinguish them and create by agreement new rights on new terms. Although they reflect a manorial origin, in my view

they are not manorial rights within the LRA 2002.

Markets and Fairs

32 Most functioning market rights now belong to local authorities or commercial companies although a few may still belong to lords of manors. (*Spook Erection Ltd v Secretary of State for the Environment* in 1988 concerned manorial market rights owned by a company.)

33 In the absence of a franchise of market anyone can organise an informal "concourse of buyers and sellers". The franchise creates a monopoly restriction which enables the franchisee to prevent anyone else from holding a market within the franchise area, such as $6\ ^{2}/_{3}$ miles from a town centre.

34 A franchise does not by itself give the market owner any right to hold it on someone else's land. It is not clear why the LPA 1922 includes markets in the list of preserved rights but possibly it was considered that otherwise the former copyholder would take free of the restriction and be able to hold a rival market on the enfranchised land.

35 A franchise of market is not lost by non-use. In the Middle Ages many lords obtained franchises in the hope of establishing a commercial venture, but the endeavour failed. A lord of such a manor may now seek to revive the ancient market rights in modern conditions.

Obligations of construction and repair

36 LPA 1922 Schedule 12 Paragraph (6) preserves certain obligations existing on 1 January 1926 for construction, maintenance, cleansing and repair of dykes, ditches, canals, sea or river walls, piles, bridges, levels, ways and other works for the benefit of land within a manor or for abating nuisances within it. Where they exist, these will usually be known to the landowner.

Recent exercise

37 I have advised on manorial mineral rights. One client as lord of a manor obtained an income from extraction of sand and gravel in former copyhold land. Another client as landowner had to make payments to a lord for a gravel pit on her land. I also know of (but did not advise on) a lord who received payments for a building stone quarry on a former copyhold.

Arguments for and against abolition and implications of abolition

38 Manorial mineral rights are not positive (to do an act) but restrictive (to restrain mineral working by the landowner) since the lord has no right to go on to the land. Even in the rare instances where the lord has a power to work underground, that must not cause subsidence. Therefore the rights do not interfere with the landowner's normal occupation of the land.

39 Manorial mineral rights can be valuable. While the LPA 1922 abolished the lord's right to timber (usually worth half the value of the timber on the copyhold land: see LPA 1922 Schedule 13 paragraph 12) it preserved mineral rights.

40 In my view in the absence of special custom the lord can not enter on land to exercise manorial sporting rights although the law is not clear. Where the lord owns a sporting

estate the ability to prevent an adjoining landowner from killing birds raised on the estate adds to its value but again should not interfere with the landowner's normal occupation.

41 Parliament could give the landowner an option to extinguish manorial mineral and sporting rights. This could be based on procedures used under the Copyhold Acts and the LPA 1922. The compensation for minerals might be typically half the value of unworked deposits, reflecting the prospect of planning consent and the costs of working. The compensation for sporting rights would reflect the diminution in value of any adjoining land of the lord.

42 Where a market was originally granted to a lord the law could be amended to make the rights free standing and to cease any connection with the manor. Market rights which have not been exercised for say 20 years could be extinguished.

43 Obligations to do works which have been enforced say within the last 20 years and which still serve a useful purpose should be protected. Otherwise they should be abolished.

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