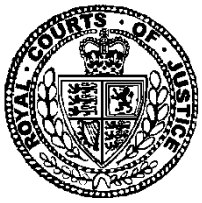

Neutral Citation Number: [2020] EWHC 1976 (Ch)

Case No: PT-2019-000974

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

7 Rolls Building
Fetter Lane
London EC4 1NL

Date:22 July 2020

Before :

MR JUSTICE ZACAROLI

- -

Between :

ARC AGGREGATES LIMITED	**Claimant**
- and -	
BRANSTON PROPERTIES LIMITED	**Defendant**

- -
- -

Edwin Johnson QC (instructed by **Knights Professional Services Limited**) for the **Claimant**
Mark Wonnacott QC and Harriet Holmes (instructed by **Gowling WLG (UK) LLP**) for the **Defendant**

Hearing date: 3 July 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -

MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. The short question raised by these applications for summary judgment is whether the claimant, ARC Aggregates Ltd ("ARC") retains a corporeal right to mines, minerals and mineral substances (the "mines and minerals") lying beneath the surface of property owned by the defendant, Branston Properties Ltd ("Branston"), or whether it retains merely an incorporeal right to the mines and minerals.

2. The property in question, which is situated between the A38 and the River Trent at Branston, Burton-on-Trent, Staffordshire, was sold by ARC pursuant to two transfers, one dated 21 December 1988 (the "1988 Transfer") and one dated 26 June 1989 (the "1989 Transfer" and, together, the "Transfers"). The transferees were the same in both cases. Branston is the successor in title to the transferees.

3. ARC carries on business as a building materials company. Branston's business is commercial property development.

4. These proceedings, commenced by a claim form dated 26 November 2019, arise as a result of development work being undertaken on the property by Branston. ARC claims that Branston has encroached upon the mines and minerals and excavated or carried off minerals in the course of its development work. It seeks a declaration that it is the freehold owner of the mines and minerals, an injunction to restrain Branston from encroaching on them or excavating, working or carrying off the minerals (or damages in lieu), damages for trespass and conversion, and an account.

5. Branston denies that ARC is the freehold owner of the mines and minerals. By its counterclaim, Branston seeks a declaration that on the true construction of the Transfers, the property conveyed included the corporeal fee simple in the soil of the property and everything beneath the soil, and that there was reserved to ARC merely an incorporeal easement, right or privilege in respect of the mines and minerals

6. Branston contends that if ARC has only an incorporeal right, then any encroachment upon the mines and minerals in the course of creating the foundations for building development would not constitute a trespass. It is common ground that if ARC owns the mines and minerals in fee simple, any encroachment by Branston would constitute a trespass.

The Applications

7. On 11 February 2020, Branston applied for summary judgment on its counterclaim. It contends that this raises a point of law as to the construction of the Transfers which is capable of being resolved on a summary basis.

8. ARC's primary position is that the determination of the construction of the Transfers involves disputed issues of fact as to the relevant factual matrix within which they are to be construed, such that a trial is required. In case that is not accepted, on 16 February 2020 it issued its own application for summary judgment on its claim for declaratory relief.

9. By the same application notice, ARC seeks an order that it be given access to the property. That application has been listed for a separate hearing.

The terms of the Transfers

10. The 1988 Transfer defined the transferred land as the "Red Land". By clause 2(a):

> "The Red Land is transferred:- EXCEPT and RESERVING to the Transferor for the benefit of … [the Blue Land] …
>
> (i) All such quasi-easements or rights or privileges whether of way water light air drainage or otherwise howsoever as are now or usually enjoyed by the Blue Land over through or from the Red Land and in particular but without prejudice to the generality of the foregoing the right to carry on upon the Blue Land and any other adjoining or neighbouring lands vested in the Transferor for any estate or interest the businesses of and related to quarrying storage processing manufacture handling making merchantable sale or disposal of sand gravel stone or aggregates or any mineral products concrete and coated materials and ancillary operations including but not limited to temporary landfill and transportation operations … notwithstanding that the same may interfere with the use of or cause damage to the Red Land or to the owner or occupier thereof or constitute a nuisance or inconvenience to the owner or occupier thereof
>
> (ii) All mines minerals and mineral substances lying beneath the surface of the Red Land at a depth below the lowest level or past excavation carried out by the Transferor and its predecessors in title but without the right to work or get the said minerals or mineral substances."

11. By clause 3(c), the transferee covenanted so as to bind the Red Land "for the benefit of the Blue Land and the property of the Transferor comprising the Sand and Gravel Pit at Barton-under-Needwood", without the consent of the Transferor, not to:

> "…use or permit or suffer to be used the Red Land for all or any of the purposes following, namely the extraction production or sale of minerals, aggregates or broken or crushed stone, the production or sale of ready-mixed concrete, the production or sale of coated stone, the tipping of waste or other

> materials, the production or sale of concrete blocks or any pipemaking."

12. Clause 2(a) of the 1989 Transfer was in similar terms to clause 2(a) of the 1988 Transfer, but with certain differences. It provided as follows:

> "The Property is transferred:-
>
> (a) EXCEPT AND RESERVING to the Transferor in fee simple
>
> (i) for the benefit of the neighbouring land of the Transferor known as Barton Sand and Gravel Pit Repton Sand and Gravel Pit and Egginton Sand and Gravel Pit (each and every part of which is hereinafter called "the Retained Property") the right to carry on upon the Retained Property and any other adjoining or neighbouring lands vested in the Transferor for any estate or interest within a ten mile radius of the Property the businesses of and related to quarrying storage processing manufacture handling making merchantable sale or disposal of sand gravel stone or aggregates or any mineral products concrete and coated materials and ancillary operations including but not limited to temporary landfill and transportation operations and to comply with any conditions or requirements incidental to any planning or other consent authorising the use of the Retained Property or such other land as aforesaid for such purposes or any of them in any manner which is acceptable to the local planning or other competent authority notwithstanding that the same may interfere with the use of or cause damage to the Property or to the owner or occupier thereof or constitute a nuisance annoyance or inconvenience to the owner or occupier thereof
>
> (ii) All mines and minerals and mineral substances (including but not limited to sand, gravel backfill materials and pulverised fuel ash) of whatsoever nature lying beneath the surface of the Property at a depth below the lowest level of past excavation carried out by the Transferor and its predecessors in title but without the right to work or get the same."

13. The land transferred by the 1989 Transfer in fact comprised the Blue Land referenced in the 1988 Transfer.

14. Clause 3(c) of the 1989 Transfer contained a covenant similar to that in clause 3(c) of the 1988 Transfer, not to do the following:

> "(i) use or permit or suffer to be used the Property as or for all or any of the purposes following namely the production or sale of minerals, aggregate or broken or crushed stone, the production or sale of ready mixed concrete, the production or sale of coated stone, the production or sale of concrete block or

> pipemaking, the production or sale of pulverised fuel ash or the tipping of waste or other materials
>
> (ii) permit or suffer to be permitted the removal of backfilling materials or pulverised fuel ash from the Property for the production sale or otherwise disposal of backfilling materials or pulverised ash fuel in any way that may compete with the business of the vendor."

Agreed matters as to the factual matrix

15. It is common ground that at the time of each Transfer the relevant property was agricultural land that had formerly been gravel pits which had by then been subjected to at least some restoration and backfilling. It was not agreed, however, whether the restoration and backfilling had been completed at the time of the Transfers.

16. ACR contends that there was no planning permission in respect of the land for any use other than agricultural and that the property was sold at agricultural values (the implication being that the price for each Transfer was much lower than if they had been sold with the benefit of planning permission for development or, more broadly, for the purpose of development). Branston does not agree, but accepts for the purposes of its application for summary judgment that I must assume both of these additional facts formed part of the matrix against which the Transfers must be construed.

Legal principles

17. The approach to construction of contracts is well known. The court must find the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties at the time of each Transfer: *ICS Ltd v West Bromwich BS* [1998] 1 WLR 896.

18. The Transfers fall to be construed in the following legal context.

19. By s.1(1) of the Law of Property Act 1925 ("LPA 1925") the only estates in land capable of subsisting or being conveyed or created at law are an estate in fee simple absolute in possession and a term of years absolute. By s.1(2) of LPA 1925, the only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are an easement, right or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute (together with certain other interests of no relevance for present purposes).

20. A fee simple in the surface of land includes the strata beneath it, including mines and minerals found there, unless there has been alienation of the minerals by a conveyance, or at common law or by statute, to someone else: *Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380.

21. There are two ways in which someone other than the owner of the surface of the land may assert an interest in the mines and minerals beneath.

22. The first is to divide up the land into separate physical strata, with boundaries at different vertical levels. Each of the separate strata is a corporeal estate within s.1(1) LPA 1925, capable of being owned in fee simple by different persons.

23. The second is by the grant of an incorporeal right within s.1(2)(a) LPA 1925. This may be accomplished by the owner of the surface granting a right to a third party, or by the owner of the surface reserving a right to itself upon conveying the land to a third party. Such a right is a profit à prendre, described as "a right to take something off another person's land": Megarry and Wade, the Law of Real Property, 9th ed., at para 26-055.

24. A profit à prendre may be either appurtenant (for the benefit of another piece of land) or in gross. A fee simple estate, however, can only exist in gross. It is impossible for it to exist for the benefit of another corporeal estate.

25. Accordingly, upon a transfer of land, if the transferor wishes to retain an interest in mines and minerals beneath the surface it may do so in one of two ways. First, it can except the mines and minerals from the transfer altogether, so that they are not conveyed at all. In that case, the transferor retains an estate in fee simple in the mines and minerals. Second, it can reserve an incorporeal right in the mines and minerals by way of profit à prendre, a new right created at the time of the conveyance: Emmet and Farrand on Title at para 17.039.

26. There is accordingly an important difference between an "exception" and a "reservation" when those words are used in a transfer of land. According to Emmet and Farrand (above), "Exceptions are properly placed directly after the parcels, while reservations should be placed in the habendum although in practice they tend also to be placed after the parcels, the whole being introduced by some such words as 'Except and reserving….'". Emmet and Farrand go on to refer to a number of cases where, although the drafter used the word "reserving", on its true construction the transfer contained an "exception" and vice versa. These cases illustrate the general proposition that in deciding whether a transfer contains an exception or a reservation it is necessary to construe the words of the contract as a whole.

27. The distinction between an exception and reservation was described as "very clear in our English law" by Lord Hathaway LC in *Duke of Hamilton v Graham* (1871) 9 M, (HL) 98. Although the case concerned Scottish law, at p.102 Lord Hathaway LC referred to the position under English law, noting the difference between an exception from a demise and the mere reservation of a right. As to the latter, he said: "If, on the other hand … you reserve certain rights and interests parting with the property, whether you use the word "except" or not (there is no magic in the words), the thing done is this – you have parted with the property, the right reserved cannot therefore be an exception out of what you granted, because you have not excepted any part of the property but the whole is disposed of…"

28. Mr Mark Wonnacott QC, who appeared with Ms Harriet Holmes for Branston, highlighted this passage as demonstrating the lack of importance of the choice of words. However, I consider that Lord Hathaway's comment that there is no "magic" in the words used was no more than a reference to the general principle to which I have already referred (and which was common ground between the parties): the meaning of words used in a contract has to be gleaned from the contract as a whole.

29. Mr Wonnacott placed particular reliance (as I will explain below) on the fact that, in the common case of mines and minerals beneath the surface of former copyhold land, the lord of the manor's pre-existing right to the mines and minerals was preserved, upon enfranchisement pursuant to s.128 of the Law of Property Act 1922 ("LPA 1922"), as an incorporeal right under s.1(2)(a) LPA 1925: see HM Land Registry Practice Guidance 65, at para 1. The same Practice Guidance, at para 3.2, described the most common situation prior to enfranchisement being that the "property" in the mines and minerals was with the lord of the manor but the lord could not work them without the consent of the copyholder.

30. In *Attorney-General v Tomline* (1877) 5 Ch D 750, the lord of the manor had encroached on the land of the copyholder to dig for and carry away coprolites (fossilised animal faeces). Fry J, at p.762, derived the following two propositions from *Hext v Gill* (1871-72) LR 7 Ch 669: (1) the lord of the manor is, in the absence of custom, entitled to all the minerals beneath the surface of copyhold land, although (also in the absence of custom) "the lord cannot get it without the license of the tenant"; and (2) minerals includes every substance which can be got from beneath the surface of the earth for the purpose of profit.

Summary judgment on Branston's counterclaim: the 1988 Transfer

31. Mr Wonnacott helpfully distilled his submissions on the construction of the 1988 Transfer into nine points.

32. **First**, he submitted that the 1988 Transfer expressly annexed the benefit of the mines and minerals to the Blue Land. Since a fee simple can only exist in gross, it follows that the mines and minerals cannot have been retained as a corporeal stratum. He suggested that this was bespoke drafting, to which full effect should be given, contrasting it with the "boilerplate" phrase "except and reserving".

33. I will deal first with the fact that the drafter has used the combined boilerplate phrase, "except and reserving". As Emett and Farrand point out (above), although exceptions should properly be placed directly after the parcels (the legal and physical description of the property being conveyed) with reservations being placed in the habendum (describing the estate being sold) a combined phrase, such as "except and reserving" is typically used in conveyances after the parcels, in order to introduce the whole.

34. Mr Wonnacott submitted that I should make no assumption that the drafter intended the word "except" to govern any part of clause 2(a), as it had been used merely as part of a boilerplate phrase. Mr Edwin Johnson QC, who appeared for ARC, submitted that as the draftsman had used both words, except and reserving, the only task was to identify which parts of clause 2(a) were reservations and which were exceptions.

35. The answer lies somewhere in between. The fact that the drafter has used the word "except" cannot be ignored merely because it is boilerplate language. Nor, however, should the court make any assumption that the use of the word means that the body of clause 2(a) contains at least one item which constitutes in law an exception. The correct approach is to have regard to the contents of clause 2(a), in the context of the agreement as a whole, to determine which part or parts, if any, constitute exceptions or reservations.

36. Turning to the point that the drafter has used the language "for the benefit of [the Blue Land]" as applying to both sub-clauses (i) and (ii), I accept that this could be read as indicating that everything within (i) and (ii) can only be a reservation. It can equally be read, however, as merely limiting the reservations which follow to reservations appurtenant, as opposed to reservations in gross. On this reading, the words "for the benefit of…" qualify only "reserving". In other words there are two concepts identified: (1) an exception and (2) a reservation for the benefit of the Blue Land. That is supported by the fact that, as the reasonable recipient of the document would know, an exception is legally incapable of being for the benefit of any other land, which might suggest it was not the intention to qualify it by the words "for the benefit of…"

37. Two additional points were made in Mr Wonnacott's skeleton argument. First, that "except" is a preposition which simply qualifies "reserving" with the latter word describing how they are excluded and, second, it would be odd if "except" (which appears first) were intended to refer to the matters contained in the second sub-clause. I do not find either point persuasive. The fact that "except and reserving" is commonly used in conveyances before a habendum containing both exceptions and reservations militates strongly against reading "except" as a mere preposition to the word "reserving". It also militates against reading anything into the order in which matters are set in the remainder of the clause.

38. **Second**, Mr Wonnacott submitted that part of the covenant in clause 3(c) is otiose if the mines and minerals were excepted from the Transfer. This submission relates only to that part of the prohibition in clause 3(c) that relates to the "extraction" of "minerals". The clause goes much wider than this, and it is not suggested that any other aspect of it would be rendered otiose.

39. I do not accept this submission. In the first place, the incorporeal right for which Branston contends would itself preclude it extracting any minerals. Mr Wonnacott equated ARC's right with that of the lord of the manor in *Tomline* but in that case Fry J approved, at p.762, the following passage from the judgment of Mellish LJ in *Hext v Gill* (above), at 713: "There is nothing to be got out of the soil and sold for a profit which the copyhold tenant, in the

absence of some special custom, is entitled to get without the permission of the lord; the property of it is in the lord, although it is true that, in the absence of special custom, the lord cannot get it without the license of the tenant" (see, to the same effect, Megarry and Wade (above) at para 2-013: "in the absence of any such custom, the … minerals could not be dealt with except by agreement between lord and tenant"). Accordingly, the covenant would be equally otiose on Branston's case.

40. In any event, as Mr Johnson submitted, the covenant against extraction covers all minerals, whereas the exception or reservation in clause 2(a)(ii) is limited to those situated below the lowest level of past excavation. Any minerals above that level, for example within the space that was backfilled, do not fall within clause 2(a)(ii).

41. Mr Wonnacott suggested that the parties to the Transfer cannot have intended that "minerals" would include material used to backfill the quarries. According to Fry J's definition of minerals in *Tomline* (above), however, they include anything beneath the soil which can be taken away for profit. In the 1989 Transfer, the same parties specifically prohibited, among the equivalent covenant, the removal of backfilled materials and pulverised fuel ash. The terms of the 1989 Transfer are irrelevant as an aid to construction of the 1988 Transfer, but they are relevant to the limited extent of demonstrating an understanding between the same parties, from the same timeframe, that backfilled materials had a commercial value worthy of protection by a covenant against competition. Accordingly, it is perfectly feasible that the parties to the 1988 Transfer intended that the minerals within the non-competition covenant would include the materials found within the layer of backfill.

42. **Third**, Mr Wonnacott submitted that if ARC had wished to prevent a purchaser developing the land then an obvious way to do so would have been by way of restrictive covenant against development. This was, at least in part, an answer to Mr Johnson's argument that the commercial rationale for excepting mines and minerals from the transfer was to create a form of ransom strip, enabling the transferor to share in any future enhancement in the value of the land by being able to demand a further payment if the future landholder wished to use the land in a way which necessitated encroaching on the mines and minerals.

43. It is rarely a useful approach to construction to consider how else the drafter might have achieved the same end. As Mr Johnson pointed out, if the mines and minerals were excepted from the transfer then there was clearly no need for a restrictive covenant. Moreover, a covenant would have been a less effective protection if ARC subsequently sold the land benefitting from the covenant, unless it was accompanied by restrictions on onward sale by the transferee unless the purchaser entered into a similar covenant with ARC. In addition, as Mr Wonnacott pointed out in defending his own interpretation of the Transfer against the charge that it was itself of no commercial use, an incorporeal right over mines and minerals equivalent to the lord of the manor's right over former copyhold land afforded better protection than a covenant, given the jurisdiction to modify covenants.

44. **Fourth**, Mr Wonnacott relied on the absence of a covenant against putting foundations down into the minerals. I understood this to be a variation on his third point, and I reject it for the same reasons: if ARC's construction of the 1988 Transfer is correct, then there was no need for such a covenant; such a covenant would have been less robust; and it does not assist in construing the terms used by the drafter to consider what alternative means could have been used to achieve a similar end.

45. Mr Wonnacott's **fifth** and **sixth** points took issue with the relevance of the assumed fact that the property was sold for agricultural values. He drew an analogy with the sale of a house, where the seller retained a small piece of land which would prevent the kitchen being extended. He said that in those circumstances, the buyer would not pay the value of the house, but would pay less on account of the fact that the seller was retaining something of intrinsic value to the house. He also contended that on ARC's construction of the 1988 Transfer it would have prevented the purchaser from erecting even an agricultural building, so that the land could only ever be used for growing crops (or, I assume, grazing animals).

46. For reasons I address below, I do not find it necessary to make any assumption about the price paid under either the 1988 or 1989 Transfer. Had it been necessary to do so, I would not accept that there is a necessary analogy between selling a house (with a ransom strip excluded) and selling a field (without the mines and minerals beneath). Whether the buyer of a piece of land for agricultural purposes and at an agricultural price would expect to have acquired the ability to use that land for wider purposes is something which – if it were relevant to construction – would need to be explored at trial. I would also not accept without more that it would have been impossible to erect a building of a type consistent with agricultural purposes, without encroaching on the mines and minerals. That is a further matter which it would be necessary to explore at trial.

47. **Seventh**, Mr Wonnacott contended that, since ARC is a minerals company, the obvious commercial purpose of the retention of any right in respect of the mines and minerals beneath the surface was to prevent competition with ARC's business. That, he submits, points towards construing clause 2(a) as creating a stalemate that mirrors that which exists between the lord of a manor and the occupier of former copyhold land.

48. It is clear, from the list of matters prohibited by the covenant in clause 3(c) and from the fact that the covenant is described as being for the benefit of not only the Blue Land but also the Transferor's property comprising the "Sand and Gravel Pit" at Barton-under-Needwood, that it is designed to prevent activities that would compete with ARC's business. The parties have therefore already provided comprehensive protection against competition by clause 3(c).

49. While it is true, as Mr Wonnacott pointed out, that the reservation of a profit à prendre over the mines and minerals would be a more permanent and effective protection against the extraction of the minerals for their use in competition with ARC, so would the exception of the mines and minerals from the transfer altogether. This point does not, therefore, assist in determining whether clause 2(a)(ii) contains an exception or reservation.

50. Moreover, it cannot be said that prevention of competition is the obvious or only purpose to clause 2(a)(ii). An equally plausible purpose is as a ransom strip: as Mr Johnson submitted, by excepting the mines and minerals from that which was transferred, ARC could ensure that if the purchaser or any subsequent onward purchaser sought to exploit the land for development purposes, it could share in the consequent increase in value of the land.

51. **Eighth**, Mr Wonnacott pointed to the fact that an incorporeal right over mines and minerals is a common occurrence, since it exists in the case of all mines and minerals on former copyhold land, and has done so for centuries. He submitted that the parties to the 1988 Transfer should be taken to have reserved a right that was in such "standard form". Indeed, he said, it would have been a "very odd thing to do" to purport to create a right to physical land without a power of working.

52. I reject the submission which lies at the heart of this point, that the parties to the 1988 Transfer must be taken to have had in mind, let alone to have intended to replicate, the right of the lord of a manor to mines and minerals beneath the surface of former copyhold land. There is no evidence to that effect, and it is Branston's case that there is no need for any factual matrix evidence in order to construe the Transfers.

53. As Mr Johnson submitted, the task in this case is to interpret a private contract. It would not be relevant, in construing this particular contract, to see what rights were created by other contracts. It is equally irrelevant to see what rights were created by statute on 1 January 1926 upon the enfranchisement of all former copyhold land, the more so because the relationship between the lord of a manor and the minerals beneath the surface of former copyhold land is not the product of any commercial bargain between private parties.

54. I take Mr Wonnacott's point that it would be a "very odd thing" to purport to create a right to physical land without a power of working, as a submission that, testing the rival interpretations against business common sense, I should find that Branston's construction is more in keeping with business common sense than ARC's construction. I do not accept this. As I have already noted, there is an obvious business purpose in excepting mines and minerals altogether from the transfer, without a power of working, in order to enable the vendor to share in any future upside arising on development of the transferred land.

55. Indeed, in the absence of any evidence that the parties intended to replicate the relationship between the lord of a manor and former copyhold land, I consider that the exclusion in clause 2(a)(ii) of the right to work the mines and minerals points strongly towards the conclusion that the parties did *not* intend to create an incorporeal right in the form of a profit à prendre. That is because (as I have noted above) a profit à prendre is described as a right to take something off another's land. Clause 2(a)(ii) thus expressly prevents the Transferor doing the very thing which a profit à prendre is designed to permit.

56. Mr Wonnacott's **ninth** point was that to construe the 1988 Transfer as excepting the mines and minerals would create a "massive problem" for conveyancing up and down the country. He said I should take judicial notice of the fact that "except and reserving" is a common boiler plate clause in every conveyance of land, so that if the phrase has the general effect of leaving every subsurface strata in the vendor's ownership in fee simple, it would be a conveyancing hazard for the development of land.

57. I am not persuaded by this *in terrorem* submission. As I have noted, the task in this case is to construe the words used in the context of the Transfers as a whole, without any *a priori* assumption that either of the words "except" or "reserving" was intended to govern any of the matters identified in the sub-clauses that followed. The same would be true in relation to <u>any</u> private contract for the transfer of land.

58. Mr Johnson sought to rely upon the entry in the Land Registry for the land transferred under the 1988 Transfer. This stated: "There are excluded from this registration the mines and minerals excepted by a Transfer of the Land." I reject the suggestion that this is relevant to the construction of the 1988 Transfer, as it simply reflects the opinion of someone within the Land Registry whose task it was to interpret the Transfer. I nevertheless think that the fact that the Transfer was interpreted in this way by the Land Registry and that those particulars have remained on the Register since 1989 further diminishes the force of the *in terrorem* point. Mr Wonnacott accepted in his skeleton argument that both forms of separation of mines and minerals from the surface (separate physical strata and the grant of incorporeal rights) are common. As Mr Johnson pointed out, the possibility of mines and minerals being excluded would be the subject of a routine enquiry.

59. As I have noted, ARC's primary position was that there were disputed issues of fact concerning the factual matrix within which both Transfers fall to be construed, so that it was not appropriate to determine their construction on a summary basis.

60. The ground was – to a large extent – taken from under this position (at least so far as Branston's application for summary judgment is concerned) by Branston's acceptance that I should assume that ARC sold the land for agricultural purposes at agricultural values.

61. If a party contends that construction of a contract depends upon matters of fact that need to be established at a trial, it is its responsibility to place before the court whatever evidence it thinks necessary to support its case. Sufficient evidence must be adduced to enable the court to see that if the facts are established at trial they may have a bearing on the outcome. It is not enough to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: see *ICI Chemicals & Polymers Ltd v TTE Training Limited* [2007] EWCA Civ 725, per Moore-Bick LJ at [13]-[14].

62. Mr Johnson said that ARC would also wish to adduce evidence at trial that it was routine commercial practice for the Hanson group (of which ARC forms part) to except minerals from transfers, in order to answer the argument that to do so would be an odd thing to do. The submission that it would have been an odd thing to do was based on Branston's contention that it is entirely normal for mines and minerals to be separated from the surface by way of an incorporeal profit à prendre, given the common occurrence of former copyhold land. I have addressed, and rejected, that submission above, in particular in dealing with Mr Wonnacott's eighth point. In any event, Hanson's usual practice in 1988/1989 would have been irrelevant without, at the very least, some evidence that it was known to both parties to the Transfers. No evidence has been adduced to that effect.

63. ARC would also wish to adduce evidence at trial as to where the upper horizontal boundary of the minerals lay at the time of each Transfer, because this would be relevant in answering the submission that the restrictive covenant in clause 3(c) of each of the Transfers was otiose. I have addressed, and rejected the contention that clause 3(c) of the 1988 Transfer was otiose on Branston's construction, without reference to the question where the precise boundary lay. The fact that it is not known precisely where the boundary lay at the time is accordingly irrelevant.

64. Mr Johnson finally submitted that since there will be a trial in any event, I ought not to grant summary judgment. If this were an application to order a trial of a preliminary issue, there may be force in Mr Johnson's point. If, however, the issue is one of construction that does not turn upon any disputed issue of fact, then both parties are in agreement that it can be determined without the need for a trial at all. Both parties have already incurred the time and expense in fully arguing the point. If it is capable of determination then it would be a waste of both the parties' time and money, and the court's time, to decline to determine it.

65. Accordingly, I conclude that Branston's claim is capable of being determined on an application for summary judgment.

66. Mr Johnson's submissions on the question of construction were made in reverse order, that is he focused first on the 1989 Transfer and then pointed out why the differences in language between it and the 1988 Transfer should not make any difference to the outcome. That is not a permissible approach, however. In the absence of any suggestion to the contrary, I infer that the 1989 Transfer was negotiated subsequently to, and separately from, from the

1988 Transfer and it is therefore inadmissible on the question of construction of the earlier one.

67. The central submission made by Mr Johnson on the construction of the 1988 Transfer (putting aside his argument that, since the drafter had used both "except" and "reserve" in the opening line of clause 2(a), the only task is to identify which of the matters that follow were exceptions and which were reservations, which I have already rejected) was that while the content of sub-clause (i) is clearly only consistent with it containing matters properly the subject of a reservation, the language of sub-clause (ii) is more consistent with it containing matters excepted from the transfer altogether.

68. Largely for the reasons which I have developed in dealing with Mr Wonnacott's nine points, I accept Mr Johnson's central submission. The language of sub-clause (i) indicates that it contains the subject matter of a reservation, but the language of sub-clause (ii) indicates that it contains the subject matter of an exception.

69. The matters referred to in sub-clause (i), namely "quasi-easements or rights or privileges" in relation to various matters, did not exist at the time of the Transfer but were created by the Transferee, and they were to be enjoyed by the retained land. These were clearly reservations.

70. Sub-paragraph (ii), in contrast, describes a distinct, physical part of the property, namely the mines, minerals and mineral substances lying below a certain point beneath the surface, and in existence prior to the Transfer. There is no reference to rights, and no reference to the retained land. The exclusion of physical property, as opposed to a right such as to go on to the land and work the mines or take away the minerals is redolent of an exception and not a reservation.

71. Most significantly, (as I have indicated when dealing with Mr Wonnacott's eighth point) the fact that the drafter has specifically excluded the right to work or get the minerals and mineral substances (that being the essential element in a profit à prendre) strongly reinforces the conclusion that sub-clause (ii) was not intended to create such a right, but was intended to except the mines and minerals from the transfer altogether.

72. Accordingly, in my judgment, certainly on the basis of the assumption made at paragraph 16 above, the mines and minerals were excepted from the 1988 Transfer.

Summary judgment on Branston's counterclaim: the 1989 Transfer

73. The respects in which the 1989 Transfer differs from the 1988 Transfer reinforce the conclusion that it too contained an exception of the mines and minerals.

74. First, the words "for the benefit…" of the neighbouring land in clause 2(a) of the 1989 Transfer are removed from the preamble and contained only in sub-clause (i). This removes the argument available to Branston in respect of the 1988 Transfer that the presence of those words in conjunction with "except" mean that the apparent exception should be read as a reservation.

75. Second, the word "extract" is missing from the restrictive covenant in clause 3(c) of the 1989 Transfer. This removes the possibility of arguing that clause 3(c) is rendered otiose on ARC's construction. Mr Wonnacott maintained that the prohibition against "production" of minerals might itself be rendered otiose, because that could only refer to extracting them from beneath the surface. I do not find this point persuasive. The phrase "production or sale" is used in the remainder of clause 3(c), including in relation to backfilling materials removed from the site. This indicates a broader meaning of "production" than extraction. Moreover, since the relevant phrase in clause 3(c)(i) is "production or sale of minerals, aggregates, or broken or crushed stone" and, even if in relation to minerals production meant extraction, the word clearly applies to the remainder of the materials mentioned. In any event, the clause is no more otiose on ARC's case than it would be on Branston's case, for the same reasons I have set out in rejecting the same argument in relation to the 1988 Transfer.

76. Mr Wonnacott argued that there was some significance in the fact that the 1989 Transfer involved the sale of the "Blue Land" under the 1988 Transfer. He suggested that this provided a reason why the words "for the benefit of…" were moved from the opening part of clause 2(a) (in the 1988 Transfer) to the body of sub-clause (i) (in the 1989 Transfer). I understood this argument to be advanced primarily in response to Mr Johnson's argument based on reading backwards from the 1989 Transfer (see paragraph 66 above). Since I have rejected both (i) that argument of Mr Johnson, and (ii) the argument that the presence of the relevant words in the opening part of clause 2(a) leads to the conclusion that the mines and minerals were subject only to a reservation under the 1988 Transfer, this argument does not lead anywhere.

77. Accordingly, I reach the same conclusion in relation to the 1989 Transfer (certainly, again, on the assumption made in paragraph 16 above): the mines and minerals were the subject of an exception, not a reservation.

Conclusions on the application for summary judgment on Branston's counterclaim

78. For the above reasons, I dismiss Branston's application for summary judgment.

ARC's application for summary judgment

79. It does not necessarily follow from the dismissal of Branston's counterclaim that I should grant summary judgment on ARC's claim for declaratory relief. That is because of Branston's concession for the purposes of *its* summary judgment application that I should assume in ARC's favour that the land was sold for agricultural purposes at agricultural values.

80. While I have noted that concession, however, I have not in fact taken it into account in reaching my conclusions on the meaning of the 1988 and 1989 Transfers. In other words, even though the fact (if it was established at trial) that the land was sold for such purposes and values might provide a supporting reason for interpreting the Transfers as excepting the mines and minerals, I have reached my conclusion irrespective of that assumed fact.

81. Branston does not suggest that there are any facts it would wish to rely on at trial in support of its arguments as to the construction of the Transfers. It does not suggest, for example, that (if it was the case) the fact that the land was *not* sold for agricultural purposes or for agricultural values would have a bearing on the meaning of either of the Transfers.

82. Once the possible impact of the concession is put aside, it logically follows that the rejection of Branston's case on the true construction of the Transfers leads to the acceptance of ARC's case on construction.

Disposal

83. For the reasons set out above, I dismiss Branston's application for summary judgment and grant summary judgment in favour of ARC on its claim for a declaration that it is the freehold owner of the mines and minerals.