

What property owners need to know about fracking

25 July 2014 | By Neil Sagoo

The government has said that its Infrastructure Bill will include provisions permitting energy operators to drill for oil, gas and geothermal energy (i.e. naturally-occurring heat) underneath land belonging to others without being liable for trespass.



Presently, any oil or gas lying beneath your land does not belong to you. It belongs to the Crown. In turn, the Crown (i.e. the Department of Energy and Climate Change) licences exploration and exploitation rights to energy companies under the Petroleum Act 1998. However, drilling by others underneath your land is a trespass, remediable by damages and injunction.

Subject to obtaining any necessary planning, environmental and other statutory permissions, oil and gas operators can buy or lease land to construct and operate their drilling rigs and other plant and equipment.

Conventional oil and gas extraction involves vertical or near-vertical drilling from the surface. However in the case of gas or oil trapped in shale rock, wells are usually run vertically down to the shale layer and then extended horizontally. The horizontal drilling can extend for up to two miles. Inevitably, this is likely to trespass under land belonging to many other landowners.

An energy operator can avoid trespass either by negotiating with landowners for their consent or by obtaining, and paying compensation for, a statutory wayleave under the Mines (Working Facilities and Support) Act 1966.

The amount of compensation likely to be awarded by a court is low. In *Bocado v Star Energy* (2010) the former owner of Harrods Mohammed Al Fayed discovered this to his cost when Star Energy drilled diagonally under his land.

The Supreme Court ruled that compulsory purchase principles apply. Damages should therefore be based on the diminution in value of the landowner's land, not on what might have been negotiated between the parties. Since trespass at such a depth did little to diminish the value of the land, the damages awarded were a mere £1,000.

Applications for planning permission for oil and gas extraction should be made to the minerals planning authority rather than the local planning authority. But in many ways, the planning process is broadly similar to that for other planning permissions, including public consultation and an assessment of economic, social and environmental factors.

However, things are changing. The government's proposal seeks to give energy operators automatic rights of access — without payment of compensation — to land at least 300m below the surface for the extraction of oil, gas or geothermal energy.

This is similar to the rules under the Coal Industry Act 1994 which already give licensed coal miners rights of underground access without paying compensation.

The government's approach is that the 1966 Act procedure is too costly and takes too long, especially where large numbers of surface landowners are involved, that drilling at 300m below the surface would be of no detriment to landowners and that such drilling would be in the national interest.

In return, energy operators would have to pay £20,000 to the local community for each horizontal well. Payments would be made to a community body agreed between the operator and local people.

Neil Sagoo is a partner at Maples Teesdale