Fracking has hardly been out of the headlines, with the mining method proving highly controversial. A recent survey from YouGov revealed that most people in the UK would prefer to live near a wind farm rather than a fracking site. However, with the British Geological Survey estimating there could be 13,000 trillion cubic feet of shale gas in the north of England alone, the economic imperative to extract this gas will not abate.

Linked to fracking, there is confusion over property issues, not just who owns and controls gas and land but what land is for the purpose of control.

People may perceive that they own everything above and below their land, reaching from the earth's core to the edge of space and reckoning us all genetic neighbours on our oblate spheroid. This slightly absurdist concept is further confused by the assumption that because someone owns land, they own and necessarily control everything within it.

Ownership of shale
Shale gas, like any other petroleum reserves, is owned by the Crown, which then grants exploitation licences. Crown ownership is independent of the ownership of the surface or the material in which the gas is found. The energy company with a licence also needs planning permission for their undertaking and will need to acquire land, secure access to it, build on it (subject to there being no restrictive covenants) and then deal with the subterranean issues.

Trespass
The costs of requiring the surface land equivalent to the gas field from which they are licensed to extract would be enormous, and the practicalities near insurmountable. Gas can be extracted by horizontal drilling through others' adjacent land. To do that, a right in land law is needed – planning consent neither creates nor trumps private law rights.

Running a pipe across someone else's field is clearly trespass. What if it is hidden underground? In Ster Energy Wesl BD Ltd v Bocardo SA [2010], the Supreme Court had to decide whether horizontal drilling apparatus placed between 200m and 850m below Bocardo’s land was trespassory.

The court had to consider how far ownership extends (and with it, the incidental rights of control). It saw that the law was at the cusp of absurdity and recognised that previous case law had limited the extent of ownership into the skies by considering the need to protect only the air column necessary for the ordinary use and enjoyment of the land and structures. The court observed that there must be some point where the concept of underground land being owned or possessed by the surface owner was “so absurd as to be not worth arguing about”. That point had not been reached in Bocardo and the energy company was treated as being a trespasser, although suffered a lesser measure of damages than was sought. An injunction was rejected as a remedy, understandably in the context of a 16-year-old drilling operation.

An energy company can seek consent or get the courts to grant ancillary rights to enable it to exercise the gas extraction licence meaningfully. The court can give rights over other land and make them subject to various controls. However, the company must demonstrate that (among other things) the private consent was unreasonably refused.

Consent will be costly either way and technical trespass an unsurprising commercial alternative.

Change in the law
The current position may alter. The UK government is looking to change how fracking and trespass interact as part of the Infrastructure Bill. It will consider taking the matter outside the scope of trespass, making the owner's or court's permission irrelevant, but providing some compensation.

Achieving planning permission in any form can be a complex process. Gaining it to explore for shale gas raises further complications – but, with changes in the law looking to make the process easier for energy companies, it seems landowners might lose their capacity to challenge and resist. This will place more of the burden of control on the planning authorities, because private law leverage will have been lost and the planning system left as the last lever of any opposition.

In a strategically important industry, that is perhaps for the best.

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Further info
Related competencies include Access and rights over land, Management of the natural environment and landscape, Planning, Legal/regulatory compliance, Minerals management