

Case Comment:
***Bocado SA v Star Energy UK Onshore Ltd
and another***

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Abstract

The intention of this paper is to analyse the decision and possible consequences of the Supreme Court's ruling in Bocado SA v Star Energy UK Onshore Ltd and another.¹ While this is an English case, the case is of relevance particularly to oil and gas companies and by extension it is hopefully of interest to the readers of the Aberdeen Student Law Review, as Aberdeen is the energy capital of Europe. Furthermore, while it is an English case in which principles of English law were applied, the broad statutory framework which provided the basis for the decision is equally applicable in Scotland.

1. The Supreme Court's Decision

A. Factual Background

Star held a licence to search, bore for and extract petroleum from the Palmers Wood oil field in Surrey. The apex of the oil field is under property owned by Bocado. To reach the oil, the original licence holder drilled diagonal wells from neighbouring land owned by them and only entered the sub-strata of Bocado's land at a depth of 800ft. The drilling and existence of the wells did not affect Bocado's use or enjoyment of their land. The statutory framework provides the opportunity for a licence holder to acquire ancillary rights required to access the petroleum if an agreement with the landowner cannot be reached. However, neither Star nor the original licence holder had sought to negotiate with Bocado over such access rights or make use of the statutory framework to acquire such rights.

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¹*Bocado SA v Star Energy UK Onshore Ltd and another* [2010] UKSC 35; the parties are designated 'Bocado' and 'Star' hereinafter.

B. Litigation History

Against this factual background, at first instance Peter J accepted that trespass had occurred and assessed Bocardo's damages as 9% of the gross revenue generated by the oil field from 22 July 2000 until 31 December 2007, which equated to £621,180 plus interest, and 9% of all future revenue.² In reaching these figures the court adopted the 'user damages' approach to valuation.

Star appealed to the Court of Appeal which held that trespass had occurred but that the proper measure of damages in this context was that of general principles of compulsory purchase valuation.³ Consequently, the measure of damages was the value to the owner, which in this case was assessed as a nominal £1,000.

C. Statutory Framework

The Supreme Court decided this case within the statutory framework of the Petroleum (Production) Act 1934 (hereinafter 'the 1934 Act') and the Mines (Working Facilities and Support) Act 1966 (hereinafter 'the 1966 Act'). Lord Clarke of Stone-cum-Ebony provided the fullest description of the statutory framework.⁴

Section 3 of the 1934 Act is headed 'Provisions as to compulsory acquisition of rights to enter on land' and provides that:

Part 1 of the Mines (Working Facilities and Support) Act 1923,⁵ as amended by subsequent enactment, shall apply for the purposes of enabling a person holding a licence under this Act to acquire such ancillary rights as may be required for the exercise of the rights granted by the licence.⁶

The 1966 Act provides a general definition of ancillary rights; 'in relation to minerals, any facility, right or privilege'.⁷ Section 2(1) of the 1966 Act then goes on to provide a non-exhaustive list of rights which are included in the general definition. This case was concerned particularly with section 2(1)(b) of the 1966 Act;

² *Bocardo SA v Star Energy UK Onshore Ltd* [2008] EWHC 1756 (Ch).

³ *Bocardo SA v Star Energy UK Onshore Ltd* [2009] EWCA Civ 579.

⁴ See *Bocardo SA* (n 1) at paras. 129-135; such description adopted by the lead judgement of Lord Hope of Craighead at para. 37.

⁵ Lord Clarke of Stone-cum-Ebony explained that the precursor to the 1966 Act, namely the Mines (Working Facilities and Support) Act 1923, was consolidated by the 1966 Act.

⁶ Petroleum (Production) Act 1934 s3(1).

⁷ Mines (Working Facilities and Support) Act 1966 s2(1).

a right of air-way, shaft-way or surface or underground wayleave, other right for the purpose of access to or conveyance of minerals or the ventilation or drainage of the mines.⁸

Lord Clarke of Stone-cum-Ebony continued:

If the licensee wished to drill a deviated well beneath another person's land, he needed to negotiate or apply under the 1966 Act for an ancillary right, here an underground wayleave.⁹

D. Questions to the Court

Within the statutory framework described above the Supreme Court was asked the following questions:

1. Did the deviational drilling through Bocardo's land constitute trespass?
2. If it did constitute trespass, what was the appropriate measure of damages?

E. Court's Decision

The Supreme Court unanimously upheld both the High Court and Court of Appeal's decisions that the deviational drilling constituted trespass. This affirmed the Latin maxim *cuius est solum, cuius est usque ad coelum et ad inferos*.¹⁰ This part of the decision is taken as accepted and the focus of this article's analysis is on the second part of the decision, in relation to which the Supreme Court held, by a majority of 4-1, that the principles of compulsory purchase were applicable in assessing the damages.¹¹ In reaching a final decision on the actual measure of damages in this case, the Supreme Court held that the general principles of compulsory purchase, and in particular the *Point Gourde* principle,¹² applied to the valuation. As a result any increase in value attributable to the existence of the scheme in question should be disregarded. The scheme in this case was the exploitation of the petroleum from the Palmer Wood oil field under a licence granted by the Secretary of State. This final decision was reached by a 3-2 majority.

⁸ *ibid* s2(1)(b).

⁹ *Bocardo SA* (n 1) at para. 133.

¹⁰ Whoever owns [the] soil, [it] is theirs all the way to Heaven and to Hell.

¹¹ Lord Clark of Stone-cum-Ebony provided the only dissenting opinion which will be discussed in further detail below.

¹² Derived from *Point Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.

2. Analysis of the Majority's Approach

Despite the fact that the event giving rise to a claim of damages was trespass, the measure of damages was not decided within the common law of trespass. This was due to the agreement between the parties that, if damages were to be assessed, it should be done on the basis of the price that would have been negotiated between reasonable persons in the position of the parties within the statutory framework set out above.¹³

There are two broad arguments against the majority's approach:

1. The specific statutory framework of this case (i.e. 1934/1966 Acts) is not one to which the principles of compulsory purchase apply; and
2. If the applicability of compulsory purchase principles is accepted, the valuation attached to the compulsorily purchased rights should not disregard the market/ransom value.

A. Do the principles of compulsory purchase apply?

The first of these arguments is essentially one of statutory interpretation. Lord Clarke of Stone-cum-Ebony argued that on a literal interpretation, neither the 1934 Act nor the 1966 Act state that the principles regarding compulsory purchase should apply to the valuation of the right acquired by the licence holder. On the contrary, section 8(2) of the 1966 Act provides:

*The compensation or consideration in respect of any right, including a right to enforce restrictions, shall be assessed by the court on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted.*¹⁴

The wording of the 1966 Act does not suggest that the potential value to the purchaser should be disregarded. On the contrary, the statutory framework explicitly states that the valuation of the right acquired should be assessed on the basis of what would be fair and reasonable between a willing grantor and a willing grantee. This is in contrast to a variety of compulsory purchase legislation which specifically states how compensation is to be assessed.¹⁵ In rebutting Lord Clarke's analysis that the general principles of compulsory purchase valuation do not apply, Lord Brown argued that due to section 3(2)(b) of the 1934 Act, and the express reference to compensation being 'on account of

¹³*Bocardo SA* (n 1) at para. 37.

¹⁴ Emphasis added.

¹⁵ For example, s.63 of the Land Clauses Consolidation Act 1845, the Gas Act 1986 or the Channel Tunnel Act 1987.

the acquisition of the right being compulsory',¹⁶ the situation is indisputably one that the general principles of compulsory purchase valuation apply irrespective of the actual words used in the 1966 Act.¹⁷ In doing so, Lord Brown creates the inference that when rights over land are purchased compulsorily, all of the general principles of compulsory purchase valuation are automatically applicable. Such a view is supported by Lord Collins of Mapesbury when he states that:

Even without the express reference in section 3(2)(b) to the acquisition of the right being compulsory, there can be no doubt that this would have been a case of compulsory acquisition and that any general principles of compulsory acquisition law are applicable.¹⁸

However, in my respectful submission even if one accepts that one should disregard the express wording of the 1966 Act, the inference of automatic applicability of all of the general principles of compulsory purchase valuation is incorrect. Indeed, there is precedent for Lord Clarke's approach. In *Mercury Communications Ltd v London and India Dock Investments Ltd*,¹⁹ the court held that due to similar provisions in the Telecommunications Code, the *Pointe Gourde* principle used in valuing the rights acquired compulsorily was not applicable. Rather, the valuation of the rights to be acquired was determined in the light of the actual words used in the code, namely:

with respect to the payment of consideration in respect of the giving of the agreement, or the exercise of the rights to which the order relates, as it appears to the court would have been fair and reasonable if the agreement had been given willingly and subject to the other provisions of the order.²⁰

The ability to compulsorily purchase rights over land, without automatically importing all of the compulsory purchase valuation principles has also been accepted by the Upper Tribunal (Lands Chamber).²¹ It is submitted that this approach is preferable as it would allow the valuation process expressly envisaged by the 1966 Act to be applied whilst recognising the fact that the rights have been acquired compulsorily as stated by the 1934 Act.

One could argue that the valuation of the right acquired between a willing grantor and grantee would produce the same results as that under the

¹⁶ Petroleum (Production) Act 1934 s3(2)(b).

¹⁷ *Bocado SA* (n 1) at para. 71.

¹⁸ *ibid* at para. 101.

¹⁹ *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, hereinafter the 'LIDI case'.

²⁰ Telecommunication Act 1984 (as amended), Schedule 2 The Telecommunications Code, Paragraph 7(1)(a)

²¹ *Potter v Hillingdon LBC* [2010] UKUT 212 (LC).

general principles of compulsory purchase. However, it is submitted that the results would in fact be in stark contrast. On the one hand, in this case where the general principles of compulsory purchase were applied to the valuation, the Supreme Court valued the necessary rights acquired to make effective use of the licence holder's licence to extract petroleum at a sum of £1,000. On the other hand, if one looks at the twelve mile territorial seabed which is managed on behalf of the Crown by the Crown Estate, a very different picture emerges. It is submitted that as the general principles of compulsory purchase do not apply to Crown land,²² the Crown Estate is in the position of negotiating a valuation of the necessary rights in the way envisaged by the 1966 Act (i.e. between a willing grantee and a willing grantor). The practical consequence of this is that it generates a far greater income for the grantee of the necessary rights. For example, the headline income from similar wayleave rights to the seabed for laying pipelines required to make effective use of a licence holder's licence is £46.6 million per year (as of 2009/2010).²³ On an individual project basis, as in the Bocardo case, the Crown Estate provides a standard heads of terms. This gives an indication of the valuation of the rights that Bocardo could have expected if the valuation was conducted as specified in the 1966 Act. These heads of terms specify a base rate of £32,700 per annum, with an additional rental rate ranging from £10,500 to £259,000 per annum.²⁴

B. Should the key value be disregarded?

Even if one accepts the majority's approach to the all-inclusive nature of the general principles of compulsory purchase, does this negate any key value that the land to be acquired may have when measuring the value of damages to the 'selling' party? Despite giving the lead speech, Lord Hope of Craighead was in the minority when it came to the valuation of damages. Lord Hope accepted that the compulsory purchase principles apply, including the 'value to owner' and 'no scheme rule' principles.²⁵ Lord Hope continued:

Accordingly, an increase in value which is consequent on the scheme for which the land is being acquired must be disregarded. The basis on which

²² Stair Memorial Encyclopaedia, *Compulsory Acquisition and Compensation* (Reissue 4) at para. 44; the general rule that a statute is presumed not to apply to the Crown except by express statement or necessary implication. Neither the 1934 Act nor the 1966 Act fall within this exception,

²³ The Crown Estate, 'Annual Report 2010', available at <http://www.thecrownestate.co.uk/our_portfolio/marine.htm> (accessed 12 June 2011).

²⁴ The Crown Estate, 'Terms for Rents and other lease terms for Oil and Gas Pipelines within United Kingdom Territorial Waters', available at <http://www.thecrownestate.co.uk/37_pipeline_heads_of_term.pdf> (accessed 12 June 2011).

²⁵ *Bocardo SA* (n 1) at para. 38.

compensation is awarded is the value of the land to the owner, not its value when taken by the promoter of the scheme. *But if the land has a special value because it is the key to the development of other land, that will represent part of its value to the owner which may be taken into account in the assessment of compensation in just the same way as it would if the owner was negotiating to realise its value in the open market: Waters v Welsh Development Agency [2004] 1 WLR 1304, paras 64-65 per Lord Nicholls of Birkenhead.*²⁶

Lord Hope then went on to argue that the special, or key, value of Bocado's land was the geographical position above the apex of the oil field. While acknowledging that there could only be one licence holder to the oil field at a time, Lord Hope argued that anyone who obtained a licence would have had the same need to acquire a wayleave from Bocado in order not to commit trespass. This is essentially the ransom strip argument to valuation. Therefore,

it was not Star's scheme that gave the relevant strata beneath Bocado's land its peculiar and unusual value. It was the geographical position that its land occupies above the apex of the reservoir, coupled with the fact that it was only by drilling through Bocado's land that any licence-holder could obtain access to the part of the reservoir that gives it its key value.²⁷

In support of this view, Lord Hope relied on the decision of the Lands Tribunal in *Chapman, Lowry & Puttick Ltd v Chichester District Council*.²⁸ This case involved a strip of wasteland to the rear of a plot of land which the Council had gained planning permission for fourteen houses to be built. The strip of land was required for access to the development. VG Wellings Esq, QC noted that any owner or developer of the plot of land would have the same need for the wasteland as the Council. He concluded that:

It is not the scheme underlying the acquisition which gives value to the reference land [the strip of waste ground] in excess of its existing use value; it is its geographical position, coupled with the fact that there is no other suitable access for residential development on the rear land [the plot purchased by the Council]. If rule 3 [of section 5 of the Land Compensation Act 1961]²⁹ were to apply the claimants would receive in compensation less than their true loss and would be wrong.³⁰

²⁶ *ibid* at para. 39; emphasis added.

²⁷ *ibid* at para. 42.

²⁸ (1984) 47 P & CR 674.

²⁹ Rule 3 states '[T]he special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any authority possessing compulsory purchase powers', Land Compensation Act 1961 s5.

³⁰ *Chapman, Lowry & Puttick Ltd v Chichester District Council* (1984) 47 P & CR 674 at p. 680.

Interestingly, Lord Walker of Gestingthorpe JSC relies on the same Lands Tribunal case to reach opposite conclusion. Lord Walker notes that

the key's value depended entirely on the scheme, unlike a ransom strip for which there might have been a variety of possibilities of profitable realisation, some not involving compulsory purchase.³¹

In my respectful submission, this is incorrect. There is no difference here between a ransom strip, as in the *Chapman* case, and the factual situation in *Bocado*. The inference that there needs to be a variety of possibilities of profitable realisation, some not involving compulsory purchase is not supported by the *Chapman* case. In his decision *VG Wellings Esq*, QC states:

the question whether the needs of the authority for the reference land [the strip of waste ground] as access to the rear land are peculiar to itself cannot be determined unless the needs of other possible owners of the rear land are considered. It is therefore right to take into account the needs of some hypothetical owner or developer of the rear land. It is, in my opinion, reasonable to assume that such hypothetical owner or developer could expect to receive precisely the same planning permission for precisely the same residential development as that which the acquiring authority obtained....I accordingly hold that the acquiring authority's needs for the reference land as access to the rear land are not peculiar to itself. On that basis rule 3 does not apply and I so hold. It appears to me that the reference land is the key which unlocks the development value of the rear land in whosoever's hands the rear land happens to be. By reason of that fact the reference land had acquired naturally a value in excess of its existing use value.³²

As stated above, and identified by Lord Hope, while there can only be one licence holder at a time, any licence holder to the Palmers Wood oil field would have precisely the same need as Star to drill through *Bocado's* land if they wanted to reach the apex of the oil field. As a result, Star's requirement for the underground wayleave was not peculiar to itself. The very fact that the licence has been transferred between companies illustrates that the hypothetical licence holder envisaged by *VG Wellings Esq*, QC does exist. Consequently, the value that *Bocado* could have expected to receive would be in excess of its existing use value. It is therefore submitted that the valuation would be in excess of the nominal £1,000 it was awarded, as illustrated above with regards to the Crown Estate valuation of the necessary rights required to make offshore licences effective within the twelve mile territorial seabed.

³¹ *Bocado SA* (n 1) at para. 55.

³² *Chapman* (n 30) at pp.679-680

Even if one does not accept the above analysis regarding a ransom value, Lord Clarke also put forward another argument for the key value of Bocado's land not being disregarded. Such an argument is closely linked with the above but focuses on the *Pointe Gourde* principle. Under that principle, the value of the right that is to be compulsorily purchased is to be considered with regards to the value to the owner and not to the potential purchaser. As a result, the additional value that one could expect either in the form of a ransom value or value added as a result of the proposed scheme is to be disregarded. However, Lord Clarke argued that the key value pre-existed Star's scheme. Therefore, it formed part of the value to the owner and should not be disregarded under the *Pointe Gourde* principle. Lord Brown argued against such an approach stating that the statutory framework essentially deleted any pre-existing value.³³ He stated:

The correct analysis seems to me to be this: that by these provisions Parliament was at one and the same time extinguishing whatever pre-existing key value Bocado's land might be thought to have had in the open market and creating a new world in which only the Crown and its licensees had any interest in accessing the oilfield and in which they had been empowered to do so (to turn the key if one want to persist in the metaphor) compulsorily and thus on terms subject to the *Pointe Gourde* approach to compensation.³⁴

In my respectful submission, it does not logically follow that a pre-existent increase in value beyond a land's use value is dependant on an unlimited possible users. The pre-existent increase in the value of the land is dependant only on their being more than one possible user, real or hypothetical, as discussed in *Chapman*. By Lord Brown's very definition of the 'new world' there is more than one possible user in this case. Therefore, the change brought about by the 1934 Act did not alter the status quo with regards to the pre-existent value of Bocado's land. As a result, it is submitted that it should therefore not have been disregarded under the *Pointe Gourde* principle. In addition, Lord Brown, as discussed above, does not appear to acknowledge the ability, which has been judicially approved, for land to be compulsorily purchased without *Pointe Gourde* automatically applying.

3. Potential Consequences of the Majority's Approach

Despite the decision ultimately being only a token award of damages, it is submitted that the decision is not a victory for oil and gas companies. The unanimous decision of the Supreme Court was that the deviational drilling

³³ *Bocado SA* (n 1) at para. 90

³⁴ *ibid.*

employed by the original licence-holder was trespass, irrespective of well depth or affect on the surface. This has two broad consequences; firstly the immediate impact on current schemes that have adopted a similar approach and secondly the potential inadequacy of the current legislative provisions in light of this decision.

A. Current Projects/Schemes

Even if one views the decision of the Supreme Court as a victory for oil and gas companies,³⁵ there are still immediate concerns for such companies. Firstly, is the potential negative corporate image that could be generated as being labelled as a trespasser and infringing on other's rights. Secondly, in this particular case there was only one landowner who was affected by the trespass and therefore the award of damages in itself was inconsequential. However, it is conceivable that there are current schemes whose wells go through land owned by multiple owners. Indeed Star's expert witness, a Dr SC Wright stated that he was unaware of any current scheme having made use of the statutory framework to gain the necessary ancillary rights required to avoid committing trespass.

B. Potential Inadequacy of Current Statutory Framework

The potential inadequacy of the current statutory framework in light of the Supreme Court's decision has been highlighted by a letter from the United Kingdom Onshore Operators Group (UKOOG).³⁶ This emphasises the potential cost of the Supreme Court's decision both in time delays and the viability of projects when applied to the current legislative provisions. UKOOG has summarised the procedure into six steps:

1. Determine the expected well path, allowing for margins of error should the well deviate from its planned path
2. Identify the landownership under which the well is expected to pass
3. Enter into negotiations with the landowner with a view to obtaining the necessary grant of rights to drill under their land
4. If the landowners are too numerous, refuse the grant or demands unreasonable terms, apply to the Minister (the Department of Energy and Climate Change ('DECC') for ancillary rights

³⁵ For example, Tetley-Jones 'Closing Pandora's Box' 2010 Property Law Journal 6.

³⁶ Letter from the Chairman of UKOOG to all of the onshore licence operators (obtained via personal communication).

5. The Minister will review the case, including consultation with the landowners and, unless he considers that a prima facie case is not made out, refer the matter to the Court
6. The Court will set a date and hear the case and, if it is satisfied that the requirements of the legislation are complied with in the case of the applicant licence holder, grant the compulsory purchase rights.

UKOOG estimate that where a landowner refuses to grant the required rights or attempts to impose terms that the applicant licence holder considers unreasonable, the process would take eighteen to twenty-four months. Such a delay and uncertainty may make future projects unviable. This may become of particular importance if there is an increase in onshore oil and gas activity. Such an increase may occur as a result of the development of shale gas and other unconventional hydrocarbon resources.³⁷

4. Conclusion

While the Supreme Court's decision would have initially alleviated the fears of oil and gas companies, it is not as strong a judgement in favour of the oil and gas companies as it may first appear. Underpinning the judgement is the fact that the Court held that the deviational drilling utilised resulted in the licence holder committing trespass. Furthermore, the only reason that one could consider the decision a triumph for oil and gas companies is the fact that a nominal award of damages was made. However, it is this final valuation that split the Court 3-2 and as discussed the majority's approach may be open to criticism. As a result, it is foreseeable that the valuation of damages will be revisited which could result in this case being distinguished on its facts. If this were to happen it would open up the possibility of higher awards of damages being made to landowners whose land has been trespassed upon.

³⁷ DECC, 'The Unconventional Hydrocarbon Resources of Britain's Onshore Basins - Shale Gas', available at:
<https://www.og.decc.gov.uk/UKpromote/onshore_paper/UK_onshore_shalegas.pdf>
(accessed 12 June 2011).