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PRESS SUMMARY

Star Energy Weald Basin Limited and another (Respondents) v Bocardo SA (Appellant) [2010] UKSC 35

On appeal from [2009] EWCA Civ 579

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Brown, Lord Collins, Lord Clarke

BACKGROUND TO THE APPEAL

The appellant, Bocardo, is the freehold owner of the Oxsted Estate, Surrey. The apex of an oil field (the Palmers Wood oil field) lies at a depth of some 2,800 ft below ground within the Oxsted Estate.

Pursuant to section 2 of the Petroleum (Production) Act 1934 Star held a licence issued by the Secretary of State for Energy on behalf of the Crown giving them the exclusive right to search and bore for and get the petroleum lying underground (the property in which section 1 of the 1934 Act had vested in the Crown) in a part of Surrey including the Palmers Wood oil field.

To win the petroleum, Star needed to drill and install three wells. These three wells were drilled diagonally from a site outside Bocardo's Oxsted Estate. They each entered the estate at various depths below ground level (between about 800 ft and 1,300 ft), ran through the estate for between about 250 m and 700 m and then exited the estate at a depth below ground level that was even greater than the depth at which they entered the estate. Their drilling and installation occasioned no harm whatsoever to the estate. There was no interference with Bocardo's use or enjoyment of its land.

The Mines (Working Facilities and Support) Act 1966 applied to enable Star to acquire such ancillary rights as they required in order to win the petroleum. Star's predecessors did not seek to negotiate any contractual licence or way-leave from Bocardo to drill and install the wells. Nor did they apply for any statutory right to do this under the 1966 Act or the Pipelines Act 1962. Star in turn did not seek to do this when they acquired the licence from their predecessors.

So far as material, section 8(2) of the 1966 Act provides that "[t]he compensation or consideration in respect of any right...shall be assessed...on the basis of what would be fair and reasonable between a willing grantor and a willing grantee...". And section 3(2)(b) of the 1934 Act gave the grantor a minimum uplift in compensation of 10% "on account of the acquisition of the right being compulsory".

The issues that this case raises fall into two parts:

- The trespass issue: was the drilling of the wells under Bocardo's land an actionable trespass? The High Court held that it was and its decision was affirmed by the Court of Appeal.
- The damages issue: if there was an actionable trespass, what is the correct measure of damages? The measure that was adopted by the High Court was rejected by the Court of Appeal, which made a very substantial reduction in the award of damages.

Bocado appealed to the Supreme Court on the damages issue, and the respondents cross-appealed on the trespass issue.

JUDGMENT

The Supreme Court unanimously dismisses the respondents' cross-appeal on the trespass issue, with Lord Hope giving the judgment of the Court on this issue. By a majority (Lord Walker, Lord Brown and Lord Collins), the Supreme Court dismisses Bocado's appeal on the damages issue, with Lord Brown giving the judgment of the majority on this issue.

REASONS FOR THE JUDGMENT

The trespass issue

- The question whether the drilling of the wells under Bocado's land, and the continued presence of the well casing and tubing within them, was an actionable trespass raises the following issues:
 - (1) Whether Bocado's title to the land extends down to the strata below the surface through which the three wells and their casing and tubing pass.
 - (2) Whether possession or a right to possession is a pre-condition for bringing a claim for trespass and, if so, whether Bocado has or is entitled to possession of the subsurface strata through which these facilities pass.
 - (3) Whether the respondents have a right under the 1934 Act to drill and use the three wells and their casing and tubing to extract petroleum from beneath Bocado's land which gives them a defence to a claim in trespass.
- As to (1), the Court holds that the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of them by conveyance, at common law or by statute, to someone else. There must obviously be some stopping point, as one reaches the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about. But the wells that are at issue in this case are far from being so deep as to reach the point of absurdity. Indeed the fact that the strata can be worked upon at those depths points to the opposite conclusion [para 27].
- As to (2), as the paper title carries with it title to the strata below the surface, Bocado must be deemed to be in possession of the subsurface strata too. There is no one else who is claiming to be in possession of those strata through Bocado as the paper owner [para 31].
- As to (3), the right to search and bore for and get the petroleum was obtained by the respondents under licence from the Crown. There is no common law defence against a claim of trespass in relation to a landowner who was not a party to that arrangement [para 32]. The relevant statutory provisions (and the context in which they were enacted) also do not give the respondents a defence to Bocado's trespass claim [paras 33-35].

The damages issue

- The answer to the damages issue depends upon the answers to two fundamental questions:
 - (1) Do the principles ordinarily governing the approach to valuation in the field of compulsory land purchase apply equally to the construction of the application of section 8(2) of the 1966 Act with regard to the compulsory acquisition of ancillary rights over (or, as here, under) land?
 - (2) Even assuming that compulsory purchase principles apply to the assessment of compensation under section 8(2), can Bocado nevertheless assert and benefit from the key value of the ancillary right which Star needed to acquire here?

- As to the first question, that the present context is one of compulsory acquisition of rights over land seems to Lord Brown indisputable. Lord Brown notes that this could not be more clearly demonstrated than by the express requirement under section 3(2)(b) of the 1934 Act for a 10% or greater uplift in compensation “on account of the acquisition of the right being compulsory” [para 71]. If the Court is to construe section 8(2) consistently with other legislative provisions governing compulsory acquisition, it falls to be approached on the basis that what is fair and reasonable depends not on what the grantee is gaining but rather on what the grantor is losing [para 74].
- As to the second question, Lord Brown referred to the decision of the House of Lords in *Waters v Welsh Development Agency* [2004] 1 WLR 1304, in which it was reaffirmed that if any premium value of a strip of land was due to the very scheme of which the acquisition forms an integral part, that value fell to be disregarded (the “no-scheme rule”). However, it was also recognised in *Waters* that a strip of land may have special value if it is key to the development of other land. In that event this feature of the land represents part of its value as much for purposes of compensation as on an actual sale in the open market [paras 80-81].

The scheme in the present case is the exploitation of the petroleum licence in the specified area. There cannot be any doubt that, whatever particular value existed in the ancillary right here required to facilitate that exploitation (any “premium” or “key” or ransom” value), it existed exclusively because of the scheme. But for the scheme, there was no potential use of value whatever in the right being granted [para 82]. It is impossible to characterise the key value in the ancillary right being granted here as “pre-existent” to the scheme [para 83].

It must be recognised that by the 1934 Act, Parliament in terms (a) vested the property in all petroleum in the Crown, (b) gave the Crown the exclusive right of searching and boring for and getting such petroleum (a right that could be licensed to others, as here to Star) and (c) enabled any licensee compulsorily to acquire any necessary ancillary right (as here to access the petroleum through Bocardo’s land). The correct analysis is that by these provisions Parliament was at one and the same time extinguishing whatever pre-existing key value Bocardo’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 compulsorily and on terms subject to the “no-scheme rule” approach to compensation [para 90].

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html