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The Supreme Court of the United Kingdom (fka the House of Lords) decides an oil and gas case

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Cases Considered:

Star Energy Weald Basin Limited v Bocardo SA, [2010] UKSC 35

It is not every day, or even every year, that the highest court in the United Kingdom passes judgement in an oil and gas case. But the Supreme Court of the United Kingdom did so at the end of July and while much of the Court's reasoning turns on the details of the UK's petroleum legislation, and in particular on the terms of the Crown vesting legislation in that jurisdiction, the Court also had something to say about the common law ownership rights of the surface owner. These comments merit carefully scrutiny in the context of the ongoing debate in Alberta and elsewhere about ownership rights in relation to pore space, an important issue in the context of carbon capture and storage (CCS).

Facts

The Petroleum (Production) Act (PPA) of 1934 (UK) vested in the Crown the property in petroleum "existing in its natural condition in strata in Great Britain" and gave the Crown the exclusive right to search and bore for and get such petroleum. The same Act authorized the Crown to grant licences to others to engage in that activity. Star Energy held such an exclusive licence to an area that included lands underlying Bocardo's farm. But Star Energy did not drill from a surface location on Boacardo's property Instead it drilled a number of wells directionally from a surface location on an adjacent property, but the wells (two producing wells and an injection well) all had bottom hole locations under Bocardo's land. At no point did Star Energy acquire any sort of right from Bocardo although the PPA provided that it did not confer upon the Crown or any licensee any other rights to "enter on or interfere with land." Indeed, other legislation incorporated by reference in the PPA authorized a Crown petroleum licensee to acquire other "ancillary rights" from owners of property other than the petroleum that would permit working operations subject to the payment of compensation for a way-leave of equivalent. It was broadly accepted that Star Energy's operations did not "interfere 'one iota' with Bocardo's enjoyment of the land" (per Lord Walker at para. 54).

The decisions below

The questions at issue in this litigation were two-fold: (1) was this a trespass, and (2) if so, what would be the correct measure of damages? The trial judge held that this was a continuing trespass (with a limitations defence precluding recovery beyond six years) and that significant damages should be awarded (£621,180). The Court of Appeal also held that this was a trespass but reduced the damages to a mere £1,000.

The decision on liability

The Supreme Court held unanimously that this was a trespass. The court split on the assessment of damages.

I will focus here on the question of liability because it is the discussion of Bocardo's property rights that is of interest in the context of pore space ownership and carbon capture and storage projects. Indeed, the leading judgement on liability, that of Lord Hope, specifically refers to CCS (at para. 19).

Star Energy made a number of arguments in support of the claim that this was not a trespass. In particular, it argued that the Latin brocard *usque ad coelum et ad inferos* (the owner of the land also owns to the heavens and to the depths – the centre of the earth) was not part of English law. But Star Energy also adopted an argument from John G. Sprankling, "Owning the Center of the Earth" (2008) 55 UCLA L Rev 979 to the effect that any ownership claims by a surface owner to the strata beneath the surface should be subject to the same limitations as the courts had imposed on the surface owner's claims to airspace rights: see, for example, *Bernstein of Leigh (Baron) v. Skyview and General Ltd*., [1978] QB 479.

Lord Hope, writing the leading judgement on the liability\ownership point, rejected both arguments. He held that the brocard or tag (at para. 26) "still has value in English law as encapsulating, in simple language, a proposition of law which has commanded general acceptance" and that (at para. 27) "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 a conveyance, at common law or by statute to someone else." Lord Hope also rejected Sprankling's analysis, noting that there were significant differences between airspace and the subsurface and while it may be true (at para. 26) "that the airspace as a public highway to which only the public had a just claim. The same cannot be said of the strata below the surface." Lord Hope was prepared to recognize (at para. 27) that at some point property claims by the surface owner would become absurd. But this would happen when "physical features such as pressure and temperature render the concept of the strata belonging to anybody" to be something that was "not worth arguing about." But that was not this case (at para. 27): "the wells that are at issue in this case, extending from about 800 feet to 2,800 feet below the surface, 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."

But ownership does not itself perhaps provide all of the necessary conditions for an action in trespass; that entitlement goes to the person in lawful possession or perhaps, in the absence of actual possession, the person with the right or the better right to possession. Was Bocardo in lawful possession of substrata at least 800 feet below the surface? Yes, answered Lord Hope; Bocardo's paper title "carries with it title to the strata below the surface, the appellant 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 the appellant as the paper owner." Thus Star Energy had committed a trespass and it mattered not that the wells did not in any way interfere with Bocardo's use of the land. The only issue was the measure of damages to which Bocardo was entitled.

The decision on damages

As indicated above, it was the damages issue that occasioned the most disagreement for members of the court. By contrast the property\liability issue was easy. I will not provide a full account of the reasoning on damages but only this summary. Lord Hope held that substantial damages should be awarded, calculated by reference to the incremental amount of oil that was obtained by the trespassory directional drilling into the apex of the reservoir. Lord Brown (Lords Walker and Collins concurring) held the award of the Court of Appeal should stand; damages should reflect the value of the right to the owner of the land and not the person acquiring the interest; the way-leave interest had little value but for Star Energy's "scheme." Lord Clarke would have preferred an assessment of damages that gave some recognition to the fact that Bocardo's land had some special value (independent of Star Energy's "scheme") because of its strategic location over the apex of the reservoir. In sum, the majority of the Supreme Court upheld the Court of Appeal's assessment of damages at £1,000.

The implications of this decision for the debate over pore space ownership

It would seem to be clear from this decision that, absent some other legislation in the UK that vests pore space ownership in the Crown, pore space ownership will vest in the surface owner unless the surface owner has granted those rights to another party.

The question for present purposes is whether that conclusion extends to the situation in Alberta? The days in which the senior court in the Commonwealth can make law for a Canadian province have long since passed, but the judgements of the UK Supreme Court will still be treated as persuasive authority in the context of basic issues of the common law of property, tort and contract. Given that, I think that this decision offers some support to the claims of the surface owner to pore space but the decision will not be directly applicable to the situation in Alberta. This is because the Crown's claim to the mines and minerals title in 80% of Alberta (the balance of the mineral interests are held privately) does not depend upon Crown vesting legislation as in the UK. Instead it depends either upon: (1) Crown ownership of an unsevered estate (i.e. a combined surface and minerals title), or (2) the reservation of the mines and minerals estate upon sale or grant of the surface estate. In such a case the Crown mineral title certainly includes an implied right to work and an implied right to licence others to work subject only to the terms of the *Surface Rights Act*, RSA 2000, c. S-24. This conclusion follows from *Borys v. CPR* [1953] AC 217 (PC) and Lord Hope acknowledges the force of this proposition at para 32 of his judgement (although without mentioning *Borys*). I acknowledge that this does not conclusively deal with the Crown\mineral owner's separate claim to pore space ownership. In the severed estate situation (where the Crown owns the mineral title), the Crown's claim to pore space must depend upon it being able to show that such rights were necessarily reserved as part of the mines and minerals or accrue to the Crown as owner of the minerals in some other way e.g. *Mines and Minerals Act*, RSA 2000, c. M-17, s.57 (*MMA*)) The private owner of a severed mineral estate will be in much the same position as the Crown and in an argument between such an owner and the surface owner much may well turn on the terms of the particular conveyance\reservation that effected the severance.

In sum, this leaves us in a situation of considerable uncertainty and thus, as noted in a comment on my last CCS blog, "Mutatis Mutandis: The ERCB speaks (in Latin) on the subject of carbon capture and storage," I tend to favour provincial declaratory legislation to resolve the issue. I referred to some examples in that comment and made a passing reference to Alberta's approach to sand and gravel. The relevant legislation is Part 7 of the *Law of Property Act*, RSA 2000, c. L-

7. If the provincial legislature is uncomfortable with taking this step without paying compensation, the damages part of the *Star Energy* decision offers some arguments for suggesting that any compensation that should be paid for a taking of pore space rights for disposal purposes (rather than say, gas storage) might be minimal.

The directional drilling issue

Alberta has dealt with the issue of trespass by directional drilling in what is now s.59 of the *MMA*, which gives the holder of mineral rights the right to drill directionally through another tract "without permission from or compensation to any other person for the right to work". Thus, in a fact pattern like *Star Energy*, while compensation would have to be paid to the relevant surface owner for the surface rights, there is no need to make a way-leave payment (such as that discussed in *Star Energy)* to the adjacent owner (whether a surface owner or a mineral owner) for those way-leave rights.

(This case was drawn to my attention by Barry Barton; see Barry's comment on my most recent CCS ABlawg post, "Mutatis Mutandis: The ERCB speaks (in Latin) on the subject of carbon capture and storage.")