SHERIFF APPEAL COURT

[2018] SAC (CIV) 14
FFR-B317-16

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

SSE TELECOMMUNICATIONS LIMITED

Pursuer and Appellant

against

WILLIAM MILLAR

Defender and Respondent

Pursuer & Appellant: Wilson QC, D M Thomson QC;
CMS Cameron McKenna Nabarro Olswang LLP
Defender & Respondent: R D Sutherland; Blackadders LLP

16 May 2018

Introduction

[1] This is the judgment of the court to which we have each contributed.

[2] This appeal is concerned with the proper interpretation and application of the telecommunications code, which is to be found within Schedule 2 of the Telecommunications Act 1984. In this opinion they are respectively referred to as "the code"

and "the 1984 Act". Unless the context requires otherwise, references to sections are to sections of the 1984 Act; and references to paragraphs are to paragraphs of the code.

[3] As more fully explained in paragraphs [18] and [19] below, the pursuer has appealed and the defender cross-appealed against the decision of the sheriff dated 12 June 2017. For that reason, we refer to the parties as the pursuer and the defender respectively.

The Parties

[4] The pursuer operates an electronic communications network in terms of the 1984 Act. By virtue of paragraph 1, they are the operator of that network, the code applying to the pursuer by virtue of a direction under section 106 of the Communications Act 2003 ("the 2003 Act"). The defender is the heritable proprietor and occupier of certain lands located near to Tealing, Angus ("the property").

Background

[5] In 1959 an Electricity Wayleave Agreement was entered into between the North of Scotland Hydro-Electric Board and the then heritable proprietors of the property. The electric lines over the property formed part of the overhead transmission line between Kintore and Tealing.

[6] In or around 1998 Scottish Hydro Electric plc installed a fibre optic cable over the property. This was installed in the earth wire within the existing overhead transmission line. The fibre optic cable was initially used by the pursuer's parent to control its electricity network.

[7] In or around 1998 a telecommunication wayleave agreement was entered into between Scottish Hydro Electric plc and the then heritable proprietors of the property. The

pursuer is the successor to Scottish Hydro Electric plc in terms of that telecommunications wayleave agreement.

[8] The fibre optic cable that is in place over the defender's land has 24 individual fibre optic strands. The pursuer uses them in pairs with one fibre optic strand to transmit data and one to receive data. When the pursuer 'lights' the fibre cable, it is providing a transmission medium for its customer to transmit and receive their data. The pursuer has no access to the customer's data. Fibre which is not being used to transmit information is 'not lit' and therefore not in use. When the pursuer enters into a contract with a customer to lease a pair of fibres for their sole use, the customer puts their own electronic equipment at each end and will 'light' the fibre. Such fibres are termed 'dark fibre' as the pursuer owns, but has no visibility of, them.

[9] The defender's title to the property was registered on 25 August 2015, with a date of entry of 31 May 2015. In December 2015 the pursuer's agents wrote to the defender indicating their wish to enter into a new agreement with the defender, as the property owner. The pursuer proposed terms to the defender.

The 2016 Dispute

[10] On 24 May 2016, agents acting on behalf of the defender sent a formal notice to the pursuer's agents, intimating that the defender required the pursuer to remove all electronic communications apparatus from the property, under paragraph 21(2).

[11] In response to the foregoing notice, on 31 May 2016, the pursuer served upon the defender a formal counter notice in terms of paragraph 21(3). There followed negotiations between the parties in an attempt to agree a fresh wayleave. The negotiations between the parties were unsuccessful.

[12] On 29 July 2016 the pursuer gave notice to the defender in terms of paragraph 5(1). The required agreement was not forthcoming in the requisite period of 28 days. The pursuer was thereafter entitled to apply to the court for an order conferring the proposed right or providing for it to bind any person on the interested land and (in either case) dispensing with the need for the agreement of the person to whom the notice was given, i.e. the defender (see paragraph 5(2)).

The Proceedings

[13] The pursuer commenced proceedings in Forfar Sheriff Court in October 2016. The pursuer's summary application seeks three orders from the court. First, to grant to the pursuer the right to install, keep and store the electronic communications apparatus for the statutory purposes on, under or over the property, together with a right to execute works in, on, over or across said lands for or in connection with installation, maintenance, adjustment repair, alteration or replacement of the electronic communications apparatus and, where necessary, the right to enter on the said lands to inspect the electronic communications apparatus kept installed, all in terms of paragraphs 2 and 5. Second, to dispense with the need for the defender's agreement in writing (in terms of paragraph 5(2)). Third, to grant the rights sought subject to the terms and conditions specified in the draft agreement which had been attached to the notice served by the pursuer on the defender dated 29 July 2016, or on such other terms and conditions as may seem to the court to be fair and reasonable in all the circumstances of the application (in terms of paragraphs 5 and 7).

[14] After some discussion as to the appropriate procedure, a debate proceeded before the sheriff on 12 May 2017, both parties having previously lodged notes of argument. The sheriff heard debate on two main issues.

[15] First, whether under the code the pursuer is entitled to allow third parties to use the dark fibres within the fibre optic cable ("the first issue"). The sheriff found in favour of the defender in respect of the first issue. He concluded that the proper interpretation of the code meant that the pursuer was not entitled to allow third parties to use the dark fibre in the fibre optic cable.

[16] Second, whether the "no-scheme rule", or "*Pointe Gourde* rule" (see *Pointe Gourde Quarrying & Transport Co Ltd* v *Sub-intendent of Crown Lands* [1947] AC 565), applies to the assessment of consideration and compensation under the code ("the second issue"). On the second issue, the sheriff preferred the pursuer's approach. He concluded that the general approach set out by the Supreme Court in *Bocardo SA* v *Star Energy UK Onshore Ltd* & *Another* [2011] 1 AC 380 should apply to the code.

[17] In addition a number of unrelated pleading points were raised by parties in their notes of argument and these were dealt with by the sheriff in his decision. We refer to these as "the pleading points". On the pleading points, the sheriff declined to exclude from probation certain passages in the defender's answers 7 and 9.

The Appeal and the Cross-Appeal

[18] The pursuer appeals against the sheriff's decision. The pursuer contends that the sheriff erred in holding that the pursuer may not allow third parties to use the dark fibres within its fibre optic cable. Moreover, the pursuer contends that the sheriff erred in failing to exclude from probation certain averments made by the defender in answers 7 and 9.

[19] The defender contends that the sheriff did not err in the foregoing respects. The defender does, however, contend that the sheriff erred in holding that the proper approach to construction of paragraph 7 meant that there was no reason why the provisions of the

code should be treated as falling outside the normal application of the *Pointe Gourde* rule. The pursuer maintains the sheriff did not err in this respect.

The First Issue

[20] In finding for the defender on the first issue, the sheriff relied heavily upon the terms of paragraph 2(1) of the code. As the sheriff correctly notes, a considerable number of statutory definitions require to be considered to understand the extent of the pursuer's rights under the code.

[21] Paragraph 2(1) is in the following terms:-

> "The agreement in writing of the occupier for the time being of any land shall be required for conferring on the operator a right for the statutory purposes—
>
> (a) to execute any works on that land for or in connection with the installation, maintenance, adjustment, repair or alteration of electronic communications apparatus; or
> (b) to keep electronic communications apparatus installed on, under or over that land; or
> (c) to enter that land to inspect any apparatus kept installed (whether on, under or over that land or elsewhere) for the purposes of the operator's network."

[22] The term "statutory purposes" is defined in paragraph 1(1) as follows:

> "'the statutory purposes' means the purposes of the provision of the operator's network."

[23] The term "operator's network" is also defined in paragraph 1(1). Insofar as applicable to the pursuer in this case, it is as follows:

> "'the operator's network' means—
>
> (a) … so much of any electronic communications network or conduit system provided by that operator as is not excluded from the application of the code under section 106(5) of the Communications Act 2003."

[24] The definition of an "electronic communications network" is to be found (via paragraph 1) within section 32(1) of the 2003 Act, which provides:

> "In this Act 'electronic communications network' means—
>
> (a) a transmission system for the conveyance, by the use of electrical, magnetic or

> electro-magnetic energy, of signals of any description; and
> (b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—
> (i) apparatus comprised in the system;
> (ii) apparatus used for the switching or routing of the signals;
> (iii) software and stored data; and
> (iv) (except for the purposes of sections 125 to 127) other resources, including network elements which are not active."

[25] The definition of "apparatus" is to be found within section 405 of the 2003 Act, which provides:

> "'apparatus' includes any equipment, machinery or device and any wire or cable and the casing or coating for any wire or cable."

[26] From a consideration of the foregoing, it is apparent that the fibre optic cable (and the dark fibre within it) is apparatus comprised within the pursuer's electronic communications network. It would only fall outwith that definition if one regarded the dark fibre as distinct and separate from the lit and unlit fibre. In essence, contrary to the view reached by the sheriff, such an interpretation requires the disaggregation of an *unum quid*, namely, the fibres within the cable. The defender's argument is predicated upon exactly that proposition. He contends that as the dark fibre is not used by the person providing the system (i.e. the pursuer) it is not apparatus and is therefore not part of the pursuer's electronic communications network. We regard such a construction as misconceived.

[27] The defender's argument is predicated entirely upon the appearance of the words "for the statutory purposes" in paragraph 2(1). As noted above, the definition of that term is in turn reliant upon the definition of *"the operator's network"* (see paragraph [23] above). *Inter alia*, that term means so much of **any** electronic communications network **provided** by that operator (emphasis added). On any view, the dark fibre is provided by the pursuer, albeit it is not used by them. The fibre optic cable remains within the ownership of the

pursuer. Even if the dark fibre is part of a third party's electronic communications network, it belongs to the pursuer and has been provided by them to that third party.

[28] The purpose of paragraph 2(1) of the code (read along with paragraph 5 thereof) is to provide a means whereby operators, such as the pursuer, can acquire certain rights (namely those set out in sub-paragraphs 2(1)(a) to (c)) from the occupier for the time being of any land in question. Whilst paragraph 2(1) expressly provides that the agreement in writing of the occupier is required, that consent can be dispensed with by way of paragraph 5. In this case the apparatus has already been installed, however, the pursuer may still have need of certain of the rights afforded by sub-paragraph 2(1)(a) as well as those set out in sub-paragraphs 2(1)(b) and (c).

[29] The defender's argument would simply not work if we were interpreting the code against a backdrop of the installation of a new fibre optic cable. At such a stage, no issue of third party usage could arise. This demonstrates that the defender's argument relates not to the rights the pursuer seeks to acquire, but to the use which the pursuer seeks to make of those rights.

[30] If one follows through the logic of the defender's argument, in cases such as the present one, there would need to be either tri-partite or parallel agreements for third party usage of dark fibre. The providers of the electronic communications network would require to negotiate with the proposed user of the dark fibre; and that proposed user would also have to negotiate with the land owner, in relation to the proposed user's utilisation of apparatus which is already there and which the provider of the electronic communications network has already acquired rights to install and maintain from the land owner.

[31] When one considers the code as a whole, and paragraph 5(3)(b) in particular, it is clear that the wider consumer benefit of an electronic communications network is a matter

of some significance. To interpret the code in the manner contended for by the defender would inevitably lead to added complexity, cost and delay in the negotiation of the rights necessary to access a pre-existing electronic communications network and, consequently, would not, on any view, be consistent with the wider consumer interest.

[32] For the foregoing reasons, the interpretation argued for by the defender is misconceived. We prefer the interpretation argued for by the pursuer. Properly construed, the code does not prevent the pursuer from permitting third parties to use the dark fibres within its fibre optic cable. To the extent that the sheriff found otherwise he erred.

Paragraph 29 of the code

[33] Neither before the sheriff, nor in their notes of argument before this court, did either party address the terms of paragraph 29 of the code. By virtue of sub-paragraph (1)(b), this applies where, either expressly or impliedly, the code imposes a limitation on the use to which electronic communications apparatus installed may be put or on the purposes for which it may be used. It is accepted that there is no express provision of the code which prevents third party usage; what the defender argues for, as the proper interpretation of the code, is an implied limitation.

[34] The remaining pre-requisites of sub-paragraph 29 are satisfied in this case. The code applies to the pursuer by virtue of a direction under section 106 of the 2003 Act; and the pursuer is a party to a relevant agreement. In terms of sub-paragraph (4), a "relevant agreement" is one in relation to electronic communications apparatus which relates to the sharing by different parties to the agreement of the use of that apparatus. The third party agreements averred in this case are, on any view, ones which relate to the sharing by the pursuer and their customers of the sharing of the fibre optic cable.

[35] To be "relevant agreements", the agreements must also satisfy the requirements of sub-paragraph (5). To do so, either (a) every party to the agreement must be a person in whose case this code applies by virtue of a direction under section 106 of the 2003 Act; or (b) one or more of the parties to the agreement is a person in whose case this code so applies and every other party to the agreement is a "qualifying person".

[36] Whether or not a person is a qualifying person for the purposes of sub-paragraph (5) is determined by sub-paragraph (6). Whilst the position of the applicability of the code to the pursuer is addressed in the pleadings, the identity of the pursuer's customers and their respective positions *quoad* the code are not. The matter cannot be resolved at this stage, however, it is notable that the defender's own argument as to the proper interpretation of the code proceeds on the basis that the third party provides an electronic communications network. If that were to be established, paragraph 29 would apply.

[37] It follows from the foregoing that, even were the defender's interpretation of the code correct, if the agreements with customers referred to in the summary application were "relevant agreements" in terms of paragraph 29, by virtue of sub-paragraph (2), the limitation argued for by the defender would not preclude the pursuer from permitting the customers to use their apparatus in pursuance of those agreements.

Disposal on the First Issue

[38] Accordingly, we will vary the interlocutor of the sheriff dated 12 June 2017 by deleting the words "sustains in part the defender's preliminary plea number 4 to the relevancy and specification so far as this is directed to Issue 1 referred to below and excludes from probation the last sentence of article 2 of condescendence;".

The Second Issue – does the *Pointe Gourde* rule apply?

[39] The *Pointe Gourde* rule, sometimes referred to as a principle, is that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. It is important to appreciate that the rule is essentially one of statutory construction: see Lord Walker of Gestingthorpe in *Transport for London* v *Spirerose Ltd* 2009 1 WLR 1797, at paragraph 12; Lord Brown of Eaton-under-Heywood in *Bocardo* at paragraph 73; and *Bennion on Statutory Interpretation* at page 442.

[40] The nub of the second issue is the basis upon which the defender is entitled to be paid in respect of any right granted to the pursuer. Parties were agreed that the manner in which payment falls to be assessed turns upon how the material provisions of the code fall to be construed. Those are paragraphs 5(4) and 7.

[41] Paragraph 5(4) is the provision which confers on the court the power to attach conditions to an order and is in the following terms:

> "An order under this paragraph made in respect of a proposed right may, in conferring that right or providing for it to bind any person or any interest in land and in dispensing with the need for any person's agreement, direct that the right shall have effect with such modifications, be exercisable on such terms and be subject to such conditions as may be specified in the order."

[42] Paragraph 7 deals with the financial terms to be included in any such order and, insofar as material, is in the following terms:

> "(1) The terms and conditions specified by virtue of sub-paragraph (4) of paragraph 5 above in an order under that paragraph dispensing with the need for a person's agreement, shall include—
> (a) such terms 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; and
> (b) such terms as appear to the court appropriate for ensuring that that person and persons from time to time bound by virtue of paragraph 2(4) above by the rights to which the order relates are adequately compensated (whether by the payment of such consideration or otherwise) for any loss or damage sustained by them in consequence of the exercise of those rights."

[43] Paragraph 7 thus, reading short, provides for payment of such sum as would have been fair and reasonable if the agreement had been given willingly, but parties are at odds over the approach to construction of that deceptively simple phrase. The pursuer contends that the scheme provided for in the code is one for the compulsory acquisition of rights so as to bring the *Pointe Gourde* rule into play and that "fair and reasonable" must be construed having regard to that rule. The defender contends that the reference to fair and reasonable consideration takes the scheme outwith the ambit of the rule and that consideration should be assessed by analogy with the sum payable under a wayleave agreement, where the land is the key to unlocking the value of the operator's right. The difference between the parties is whether consideration should be assessed by reference to the value of the land to the owner, or the value to the operator of obtaining the right.

[44] Before the sheriff, the defender's submission was predicated on *Mercury Communications Ltd* v *London & India Dock Investments Ltd* [1994] 1 EGLR 229, an English county court case in which it was held that compulsory purchase principles were not applicable to the assessment of consideration under paragraph 7. *Mercury* was mentioned, but not judicially considered, in the subsequent Court of Appeal case of *Cabletel Surrey and Hampshire Ltd* v *Brookwood Cemetery Ltd* [2002] EWCA Civ 720, since the parties in that case were content to accept the approach taken in *Mercury* as correct. The defender's submission was that the sheriff should follow that line of authority, in preference to the approach taken in *Bocardo,* which concerned a different legislative framework and factual background. That submission having been rejected by the sheriff, the defender's initial submission before this court, as contained in his note of argument, was likewise that *Bocardo* did not apply and that the approach in *Mercury* ought to be followed. However, at the hearing, counsel for the defender subtly modified his submission, by expressly stating that he did not rely upon

Mercury, but rather that he sought to distinguish the scheme in *Bocardo* from that in the present case. Counsel argued that, properly applying *Bocardo* to the code, the sheriff ought to have concluded that the *Pointe Gourde* rule had no application. The defender's land did have a value which was not solely attributable to the scheme, since any operator – not merely one with code rights – could ask for permission to run a cable over, or install equipment on, land, and the defender could demand payment in return for such permission. The pursuer's position was as it had been before the sheriff, namely, that *Bocardo* was applicable and should be followed. In construing paragraph 7, one must have regard not simply to the language used, but to the principles of statutory construction in considering provisions providing for compulsory acquisition in exchange for payment. Accordingly, in the event, both parties sought support for their respective positions from the case of *Bocardo*, to which we now turn.

[45] To understand, and properly apply, *Bocardo* it is necessary to say something of the facts. The defendant, who held an exclusive petroleum production licence to search, bore for and get oil, had bored pipelines through the claimant's land without obtaining their agreement or any right from the court to do so in terms of the applicable legislation, the Mines (Working Facilities and Support) Act 1966 ("the 1966 Act"). Property in the oil was vested in the Crown by virtue of section 1 of the Petroleum (Production) Act 1934 and the claimant had no right to it. The offending pipelines were drilled from a site outside the claimant's land and caused no damage thereto, nor did they interfere with the claimant's enjoyment of their land. (The defender is therefore wrong to state, as he did in his note of arguments, that it was a "classic compulsory purchase situation".). It was common ground that damages for the trespass which was held to have been committed fell to be assessed by reference to the compensation or consideration which would have been payable to the

claimant had the defendant sought the relevant right from the court. In that event, the court would have assessed the amount payable to the claimants under section 8(2) of the 1966 Act, which required compensation or consideration to be assessed on the basis of what would be fair and reasonable between a willing grantor and a willing grantee. We observe that that wording is not dissimilar to that used in paragraph 7.

[46] The issues before the Supreme Court, as summarised by Lord Brown of Eaton-under-Heywood at paragraph 63, were, first, whether the principles ordinarily governing the approach to valuation in the field of compulsory land purchase applied equally to the construction and application of section 8(2); and, second, assuming that compulsory purchase principles did apply, did they operate to deny the claimant what would otherwise be regarded as the powerful bargaining position of a landowner able to control access to a valuable oil field partially sited beneath their land? On the first of these issues, the majority of the Supreme Court held that the scheme laid down by the 1934 and 1966 Acts was a power of compulsory acquisition of rights over land. Consequently, in construing section 8(2), the court had to have regard not just to the language used, but to the approach taken to construction of powers of compulsory acquisition. The general principles of compulsory acquisition law, including the *Pointe Gourde* rule, were applicable to the assessment of consideration. That rule is, as Lord Brown pointed out at paragraph 68, "no more than the name given to one aspect of the long established 'value to owner' principle". As explained by Lord Collins of Maplesbury at paragraphs 101 to 102, it involves asking not what the person who takes the land gains by taking it, but what the person from whom it is taken will lose by having it taken from him. The words "fair and reasonable" therefore had to be construed with these principles in mind. On the second issue identified by Lord Brown, the

Supreme Court also found against the claimant, on the basis that the land held no pre-existing premium or "key" value attributable to some feature other than the scheme.

[47] The following can be distilled from *Bocardo* as it applies to this case. First, a two-stage approach falls to be taken to the construction of statutory provisions such as paragraph 7: the court must decide whether the provision gives rise to a statutory scheme for the purpose of the compulsory acquisition of rights; and, if it does, the principles applicable to such acquisition, including the *Pointe Gourde* rule, must then be applied to the language of paragraph 7. This, of course, follows from the observation, made above at paragraph [39], that the *Pointe Gourde* rule is one of statutory construction. Second, and consequently, where the principle does apply, the language used should generally be construed as not entitling the owner of land to be compensated for any value which is attributable solely to the underlying scheme. However, and third, that leaves open the question whether in fact the land did have a pre-existing value, independent of the scheme, which would therefore properly be taken into account in assessing compensation. That last question, it seems to us, is at least partly a question of fact since it involves consideration of the precise nature of the scheme, and what was the value of the land before the scheme came along.

[48] As regards the first matter, we are in no doubt that the code does provide for the compulsory acquisition of rights. It is nothing to the point that the legislative framework within which the code operates involves a competitive market place for the provision of services by private telecommunications operators, or that a non-code operator may seek to reach an agreement with the landowner. As the pursuer points out, it is always open to a person who does not have compulsory powers of acquisition to attempt to acquire land, or rights in it by agreement. That does not detract from the right of a code operator, such as the

pursuer, to apply to the court for a right in or over land, to execute works on that land, to keep apparatus on it or to enter the land for the statutory purpose, in other words to obtain such a right without the consent of the land owner – that is, to obtain it compulsorily. The nature of the right sought by the pursuer is not such that the defender may grant it to only one person. The pursuer is not in competition with other potential operators to acquire the right. Further, the defender's argument that the wording of paragraph 7 points toward the scheme under the code not being one for compulsory acquisition inverts the proper approach which is first to ask whether compulsory acquisition is involved before then going on to consider how the code ought to be construed.

[49] If follows that in construing paragraph 7, and in particular the words "fair and reasonable", the principles of compulsory purchase acquisition, including *Pointe Gourde*, must be applied, and the consideration payable must be assessed by reference to value to the defender, as owner, rather than to the pursuer. As was the case in *Bocardo*, what is "fair and reasonable" must then be assessed against the background that should agreement not be reached there is a right of compulsory acquisition.

[50] The sheriff considered that *Bocardo* was not binding on him, but that it provided highly persuasive guidance on the approach to be taken to assessment of sums due to be paid to an occupier of land under a statutory scheme similar in nature. It may be more accurate to say that *Bocardo* **is** binding as to the approach to be taken to the construction of a statute which provides for compulsory acquisition of rights in land but that distinction is of no great moment in the present appeal given that the sheriff did in fact follow the approach in *Bocardo* and, for the reasons we have given, he was correct to say that "the hypothetical negotiation takes place in a 'no scheme' world" (paraphrasing the *dicta* of Lord Walker of Gestingthorpe in *Bocardo*).

[51] In giving effect to his decision, the sheriff excluded from probation the following passage in Answer 7:

> "Payment should reflect value of wayleave agreement to person acquiring it, not a payment based on compensation for loss to grantee; in determining a fair and reasonable payment the starting point should be based on an open market value rent having regard to the other terms of the agreement, negotiated between a willing granter and a willing grantee, and it should be reviewed every three years. Recommended rates between operators and SLF/CLA/NFU are based on compensation for loss on value of agricultural land and are not the correct basis for determining payments for wayleave agreements under the Code. Recommendations are stated not to be binding, are not determinative, and members of SLF/CLA/NFU are entitled to negotiate their own payments. That rate recommendation was specifically agreed not to be an open market valuation. Such a valuation basis is not a recognised basis of assessing open market value in terms of International Valuations Standards or the relevant RICS Practice Statement."

[52] We take no issue with the exclusion of the first part of that passage, down to "loss to grantee", which follows from the application of the principles of construction of statutory provisions for compulsory acquisition. However, as we have pointed out, we also recognise that having determined the correct approach to the assessment of consideration, the actual assessment is a question of fact which can only be determined after hearing evidence, in particular as to the value of the defender's land but for the scheme. Further, the consideration cannot be determined in a vacuum but must also depend to some extent on the other terms of the order pronounced by the court. We consider it going too far, too fast to exclude the remainder of the passage from probation. Those averments may properly be the subject of evidence and are not inconsistent with the value to occupier approach.

[53] As the case will be going back to the sheriff for proof, we should record that counsel for the defender conceded that it was no part of his submission that the defender was entitled to share in the profits made by the pursuer and that consideration should be assessed by reference to those, the sheriff having inaccurately recorded his submission at paragraph 21 of his note.

Disposal on the Second Issue

[54] Accordingly, we will vary the sheriff's interlocutor of 12 June 2017 by deleting the words "'Statement' at page 12 in line 8" and replacing them with the words "'grantee' at page 11 in line 34".

The pleading points

[55] There are three pleading points. We can deal with each briefly.

[56] The first is whether the sheriff was correct not to exclude from probation a passage in answer 7, in lines 14 to 20 on page 11 of the appeal print, to the effect that the pursuer is in breach of the code and their licence because there is no written agreement in accordance with paragraph 2 of the code. It is, of course, the absence of agreement which has given rise to the proceedings, and the remedies sought in accordance with the code. The averments have no bearing on the issues in the action, and we agree with the pursuer that they are irrelevant. The sheriff states at paragraph 39 of his note that it "appears to be no more than an averment designed to give context to the defender's position" but even allowing that this is a summary application we do not consider that the passage complained of serves any useful purpose, and, being irrelevant, it should not be admitted to probation.

[57] The second is whether the sheriff was correct not to exclude from probation averments in answer 7 to the effect that the rate recommendations were likely to be anti-competitive in terms of the Competition Act 1988 and/or Article 1 of the Treaty on the Functioning of the European Union. We agree with the pursuer's position as stated in the related ground of appeal that the averments disclose no facts which could be said to support a breach of either provision. The sheriff states that the averment is made in response to the position taken by the pursuer, but the pursuer does not raise the issue of whether or not the

rates are anti-competitive. The averments in question are both fundamentally lacking in specification and irrelevant and ought not to be admitted to probation.

[58] The third is whether the sheriff was correct not to exclude from probation a sentence in answer 9 which reads: "It is believed and averred that the pursuer's customers have open to them alternative access to an electronic communications network from other operators." Again, the sheriff declined to exclude this averment from probation because it was made in response to the position taken by the pursuer. However, even leaving aside the pleading point that there is no basis in averment for use of the phrase "believed and averred", the averment that the pursuer's customers (which itself is lacking in specification) have alternative access from other operators is irrelevant to the matters in issue and ought not to be admitted to probation.

[59] Accordingly, we will further vary the sheriff's interlocutor of 12 June 2017 by excluding from probation the following averments:

(a) in answer 7, from "Furthermore", in line 6 to "licence" in line 14;

(b) the last sentence of answer 7;

(c) in answer 9, from "It is believed and averred" in line 6, to "operators" in line 8.

Expenses

[60] As invited by both parties, we will reserve the question of expenses.