Associated Building Credits Ltd. v. British Columbia (Minister of Transportation and Highways) 2007 BCCA, 93 L.C.R. 129

- Disturbance Damages for Delay

The claimant ABC appealed from the decision of the ECB rejecting liability for disturbance damages for delay, and its alternative award of $310,000 had liability been established.

Facts

ABC was an investment holding company that purchased a nine acre parcel in 1986 for $2.25 million. The property was close to Victoria General Hospital and ABC assessed it as having potential for development it as a commercial medical village. Approvals from government for the proposed development were in place by 1989. Shortly after listing the property for sale in the fall of 1989 for $5.25 million, ABC's listing agent was told by MoTH's property agents of plans for an interchange. The "likely scenario" for developing the interchange would have ruined ABC's proposed road access. ABC's agent was unable to obtain clarification from MoTH on its plans for the interchange. The agent advised ABC that it should drastically reduce its asking price in view of his lack of success in marketing the property given the uncertainty regarding MoTH's plans for the interchange. The owners decided not to reduce the price; instead opting to "sit tight".

The Town of View Royal completed an OCP review in July 1990 which changed the future land use designation for the property to allow for commercial development, coupled with medium density residential development, which would have made for a more profitable development that the medical village. The agent offered the opinion that the property would now be worth $6.3 million; ABC had it listed for $6.8 million to test the market. There were some inquiries from interested parties but the listing expired without any offers being received. There were some further approaches by potential purchasers in the early 1990's but the property was not listed for sale again. ABC also attempted to acquire some adjacent lands was also unsuccessful in persuading adjacent landowners to sell.

MoTH's plans for the interchange, and thus for the property took time to crystallize. From 1991 to 1993 MoTH's plans were on hold while the CRD undertook a regional transportation study. Eventually MoTH expropriated 2.5 acres of the lands in March 1996. The taking apparently destroyed the existing access from the main (Helmcken) Road. ABC was left with just over 6 acres of land, with access from the rear, which remained vacant as of the hearing and appeal.

Claims for the market value of the lands taken and injurious affection to the remainder were settled and only the disturbance damages claims proceeded to hearing. Apart from the parts of the claim for expenses thrown away the ECB rejected ABC's claim, concluding that any losses were not caused by the expropriation.

Issues on appeal

(1) Whether the ECB correctly applied the test for liability for pre-expropriation losses in *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.* [1995] 2 A.C. 111, adopted by the Supreme Court of Canada in *Dell Holdings* (*Toronto Area Transit Operating Authority v. Dell Holdings Ltd.* [1997] 1 S.C.R. 32)
(2) Whether ABC's damages exceeded the $310,000 found by the ECB in its alternative finding.

Discussion

Liability - The Court of Appeal set out the three pronged test from *Shun Fung* for losses arising from the threat of expropriation:

(1) the losses must be casually related to the expropriation;
(2) the loss must not be too remote; and
(3) the must not be one that a reasonable person in the position of the claimant would have avoided.

Expanding on these 3 conditions, the CA observed that in *Shun Fung* the Privy Council had rejected the Crown's argument that only losses sustained after the expropriation should be compensable. Such a limitation would be highly artificial as it would not take into account the true consequences of the expropriation. Similarly, courts and tribunals should not attempt to draw an artificial line "based on the degree of certainty that the expropriation scheme will come to fruition and that losses arising before that arbitrary point in time should be considered too remote." The CA quoted Lord Nicholls with approval:

> Their Lordships have in mind that, at the outset of a shadow period, there may be no certainty that resumption will take place. As time passes, and the scheme proceeds, the likelihood of resumption increases, until the Governor makes a resumption order. At that stage, but not before, there is a legal commitment. Their Lordships can see no sound reason for attempting to draw a spurious line somewhere along this penumbra of ever darkening shadow.

Not all losses that might be said to arise from the threat of an expropriation will be compensable. Restricting recovery to only those losses that were reasonably foreseeable by the authority was seen as striking a fair balance between the interests of the claimant and authority. The flip side of this coin is that losses must also have been incurred reasonably by the owner to be compensable.

With those principles laid out as background the CA stated that the Board's task was to decide whether ABC sustained a loss that was casually connected to the threat of expropriation, and if there was such a loss, whether it was too remote. On the causation issue the question was whether ABC would have suffered a loss "but for" the impact of the shadow of the expropriation on the value of the property. If such a causal link could be found the CA felt there was no issue of remoteness. There was no concern basis for concern that liability might extend to unforeseen or disproportionate consequences. The Court thought that it was reasonably foreseeable that the market value of the land would be affected by knowledge of the interchange proposal.

The Board was faulted for improperly placing the focus on the commencement of the expropriation process, as opposed to the prospect of the expropriation. The CA noted that the two listing agents gave evidence that as a result of MoTH's disclosure of the interchange proposal the property was either unmarketable or marketable only with a substantial price reduction. If the Board had accepted this evidence, the CA reasoned that its next task would have been to determine whether ABC acted reasonably. That issue would have required answers to such questions as to whether a reasonable person in ABC's position would have quickly sold at the best price available, whether the reasonable owner would stuck with the medical village development, or gone with some other type of development, or continued to hold the property? The Court asserted that the Board failed to ask these questions. However, the ECB's treatment of the evidence does not entirely support the appeal court's assertion.

The CA took the Board to task for drawing a spurious line that it would only recognize ABC's losses after the onset of the expropriation process and paying lip service to the edict from the *Shun Fung* case to avoid drawing arbitrary lines when considering the shadow effects of the scheme. The Court stressed that part of the ECB's reasons where it found merit in MoTH's argument that the expropriation process could not have been said to have commenced as of 1989 as its plans for the interchange were still too vague and that it was not until 1994 that the expropriation process was actually underway.

However, for all the Court's criticism of the ECB for having misread the judgment of Lord Nicholls in *Shun Fung*, there is, with respect, a good argument for saying the CA misread the ECB's reasons that it failed to consider the full extent of the shadow period or ABC's conduct and options during this period. Despite its statement that MoTH's position on the onset of the expropriation process had merit, the ECB appears not to have arbitrarily limited its consideration to a period later than the 1989 start date of the shadow period advanced by ABC. At para. 43 of its reasons the Board said the following:

> After reviewing the chronology of events and evidence presented, the board accepts this formulation of Lord Nicholls [ie. no spurious line drawing along the penumbra of an ever darkening shadow] as being the appropriate approach to employ in the circumstances of the present case. Rather than draw a somewhat "spurious line" between October 31, 1989 and the date of expropriation, the board will consider the actions of the claimant from October 31, 1989 and will assess the reasonableness of the claimant's actions in accordance with this formulation.

While it may be true that the Board never made an express finding as to when the process of expropriation commenced, it nevertheless considered the full shadow period, and the reasonableness of ABC's actions during it.

With respect to ABC's efforts to market the property, the Board remarked on the total listing period being less than one year of a total alleged loss period of 6 years. An offer was received at the claimant's asking price but with the risk of a vendor take back interest free second mortgage. There was no indication of a counter offer or any negotiations.

When the OCP future land use designation was favourably amended ABC increased its asking price but only for 3 months and at a listing price $500,000 higher than recommended by the agent, intended, in the words of one of claimant's principals, to test the market. There was further evidence of unsolicited buyer interest which was not pursued by ABC. Finally, ABC made efforts to increase its land holdings. With this evidence one might have thought that any Board finding that the claimant was not motivated to sell would have been entitled to a fair degree of deference by the appeal court..

With respect to ABC's development efforts, the Board noted that ABC never applied for a development permit (the property being appropriately zoned for the medical village proposal). McDonalds had indicated interest in developing the property and recommended a pro-active approach to the claimants in dealing with MoTH, as a means of eliciting a more concrete proposal for the interchange. Instead the claimant opted to leave the matter on hold. Of additional interest to the Board was the move of one of the claimant's principals to Australia as part of a changing investment focus by the claimant. The Board found that the claimant failed to make any meaningful attempts to develop the property.

Mr. Justice Smith found that the ECB failed to consider whether the threat of expropriation adversely affected the sale or development of the property. He contended that the Board did not ask why ABC continued to hold the property in the face of "looming expropriation", and thus never came to grips with whether ABC acted reasonably in holding onto the property. Yet it seems that the Board did answer this question by its conclusion that the claimant was not motivated to sell or develop the property, noting that ABC failed to make "reasonable efforts to do so".

It would seem that the best, if not the only, way that a tribunal could fairly assess whether there have been losses caused by the threat of an expropriation is to consider the matter from the perspective of the owner's conduct. For ABC that required, first, a determination of whether its sale efforts were scuppered by the prospect of the project, or the owner's half-hearted efforts in marketing the property and, secondly, a determination of whether it made meaningful development efforts. If the answers to those questions were, as the Board found, that the claimant did not make meaningful sale or development efforts, then a loss could only be hypothetical, and not casually related to the prospect of the expropriation. Furthermore, the loss would have been one that a reasonable person in the claimant's position would have avoided.

The Board's reasons can be criticized perhaps for not setting out its findings in a manner that more precisely dovetailed with the analysis in *Shun Fung*. But even though it did not pose questions in the manner suggested by Smith J.A. the Board's overall reasoning process seems to have been faithful to the *Shun Fung* test. In reality the Board was making findings of fact or mixed law and fact to which the appeal court arguably ought to have accorded sgreater deference.

Separate reasons were provided by Justices Huddart and Hall. Huddart J.A. made one particularly interesting observation in stating that ABC's decision to hold the land pending expropriation also benefited the expropriating authority. She continued her reasoning as follows:

> Had the claimant sold at the reduced value, the authority would have been required to compensate for that business loss with the understanding we have of the provisions of the *Expropriation Act* after the decisions [in *Shun Fung* and *Dell Holdings*].

It must be recalled that ABC's claim was brought for financial losses linked to a partial taking under s. 40 of the *Expropriation Act*. Had ABC sold the property before the expropriation then under what theory of liability would MoTH have responsible to compensate it for the loss in sale value? Providing owners knowledge of the potential for an interchange that might impact their property could not satisfy the actionability requirement in the Loiselle test for injurious affection without a taking.

Compensation – The CA split on how to deal with the ECB's alternative assessment of compensation. Smith J.A. rightly observed that ABC had overreached in its claim by a large margin in asserting financial losses in excess of $28 million. He did not accept ABC's claim that it was denied the use of its land throughout the shadow period. Instead he reasoned that some type of development could have been feasible and thus ABC was not able to use its land as profitably as it might otherwise have. He concluded that its claim should be considered as a loss of a chance to earn a better rate of return and that it was necessary to return the matter to the Board for a fresh assessment of damages.

Huddart J.A. (Hall J.A. concurring) held that the Board did not err in its approach to valuing ABC's business losses; upholding its decision to accept MoTH's method of valuation based on a rate of return equal to commercial bank prime lending rate plus one quarter of one percent. Interestingly, Justice Huddart noted that as a decision on a question of fact, the Board's decision only need be reasonable. In other words, deference was to be extended on appellate review.

Checkman Holdings (Calgary) Ltd. v. Spur Valley Improvement District 2008 BCCA 83, 94 L.C.R. 65

- Abandonment of Expropriation – right to compensation – statutory interpretation

The Court of Appeal upheld the dismissal of Checkman's claim for compensation in relation to a *Water Act* expropriation that was abandoned by the improvement district after it prevailed in obtaining a declaration from the Supreme Court that it was entitled to an easement over Checkman's lands without compensation.

Checkman sought damages for the delay in its development plans occasioned by the abandoned expropriation proceeding. It claimed that being hindered in its development amount to a taking. The claimant's right to compensation did not have to be established

by an express entitlement in statute; rather it argued that there must be a clear legislative intention to deny compensation in an expropriation statute.

The appeal court upheld the reasoning of the court below that there had been no taken. The earlier court ruling that the improvement district was entitled to an easement could not be construed as a taking. There is no presumption of compensation in a case of injurious affection where no land is taken. The appeal court noted that in *Shun Fung Ironworks* the Privy Council stated that where an expropriation process does not come to fruition a landowner has to bear any loss caused by delay in utilizing the property or from a lost sale.

The Water Regulation provided that only select provisions of the *Expropriation Act* applied to expropriations conducted under the *Water Act*. Noticeably absent was the inclusion of s. 19 in respect of abandoned expropriations. The appeal court agreed with the chambers judge that it was a fair inference that if the Legislature had intended damages should flow from an abandoned expropriation it would have been simple enough to incorporate s. 19 by reference. The Legislature's silence indicated an intention not to provide compensation in these circumstances. Thus any presumption in favour of compensation had been effectively rebutted by the provisions of the *Water Regulation*.

Yin Wan Enterprises Ltd. v. City of Richmond 2008 BCSC 146

- Valuation method – Subdivision approach
- Injurious Affection to remainder

The trial judge rejected the claimant's appraiser's use of the subdivision approach, citing one of the several ECB decisions [*Double Alpha Holdings v. Pacific Coast Energy* 65 L.C.R.] which had criticized its use. There was sufficient market evidence to support a direct comparison analysis. Further the development approach used was based on layout that was characterized as completely hypothetical and speculative.

On the injurious affection issue the appraiser's concessions in cross examination were numerous and significant. Chief amongst them was that the properties had improved visibility and exposure after the taking, an increase in vehicular and pedestrian traffic and that their after taking corner orientation was preferable to their prior interior lot orientation. All of this lead the Court to conclude that the claimant had failed to meet the onus of establishing a loss in value as a result of the expropriation.

Thompson v. Alberta (Minister of Environment) 2007 ABCA, 94 L.C.R. 22

- Screening out effects of the scheme – s. 33 B.C. Act equivalent

The owner had acquired the lands knowing that the province wanted to acquire them as part of the Transportation and Utility Corridor established under the Calgary Restricted Development Area Regulation. The authority subsequently acquired the lands. The owner argued that the entire TUC should be ignored which would have required the lands

to be valued as in an unaffected region of Calgary and ready for development. The trial judge accepted the province's argument that the Alberta equivalent of s. 33(d) did not require that the entirety of the impact of the TUC be screened out. The established TUC, in place as of the expropriation date, was to be considered (which had a downward impact on market value).

The appeal court agreed with the trial judge's analysis. Prior to expropriation the land was a "neighbour" to the TUC. It was noteworthy to the court that the claimant was aware of the TUC's presence when he purchased the lands. The court was of the view that the owner would have received a windfall if the effect of the entire TUC had bee screened out. On the other hand, the court suggested that other owners (or past owners) might suffer unfair losses from having conducted themselves and undertaken development in light of the TUC over the 25 years it had been in place. In the result the statute required that only the latest expropriation step was to be disregarded in determining value.

Gimbel v. Alberta (Minister of Public Works, Supply and Services) 2008 ABCA 262

- Interest entitlement

The owners lands were expropriated in 1995. The Alberta board issued a compensation decision in 1997, from which the owners successfully appealed. The second hearing before the board took place in 2004 with a decision being rendered in 2006, awarding the owners $2.8 million, apparently some $1.55 million higher than the advance payment. The owners bought other lands in substitution for the expropriated lands which they had intended to develop. The substitute lands were purchased with a mortgage for $2 million.

The owners sought to recover as interest their cost of borrowing. The Board had ruled that they had failed to lead evidence in relation to their overall financial operations as to whether they were net borrowers or net investors, and whether the proceeds of the expropriation could have been used to pay down existing loans. The Board awarded the owners interest at an investor's rate a 90 day T-bill.

The Alberta Court of Appeal overturned the Board's decision. The appeal court held that there is no obligation for a claimant to demonstrate that it is a net borrower or a net investor. The question was rather had the claimant established that it was entitled to interest based on the cost of borrowing.

Regrettably, the court did not make a finding that the claimants were so entitled, although its disapproval of the Board's decision contains a strong hint that the claimants are likely entitled to recover the interest costs on the mortgage. The issue was remitted to the Board for reconsideration, along with the issue of whether a 90 day T-bill rate would be appropriate if the Board was required to view the matter from the perspective of the reasonably prudent investor.

Ammouri v. Caledon (Town) [2008] O.M.B.D. No. 458, 95 L.C.R. 59

- Injurious Affection – Evidence

The claimant called two appraisers in support of its claim. The second appraiser retained had the opportunity to review the appraisal of the first before he started his assignment. The second appraiser admitted in evidence that although he could not recall what was involved in his preliminary investigation. From that auspicious beginning he made the further admission that "I decided there was injurious affection, but I didn't know how I was going to prove it." The Vice Chair's rather understated comment was that this was not the statement of a dispassionate expert witness. The second appraiser's conclusions were irretrievably tainted and as a result the board assigned no weight to his evidence.

The claimant's first appraiser fared only slightly better. In respect of this June 2004 taking he testified that he relied on an incomplete working study of injurious affection that he had developed over his career. It involved 11 properties in the City of London impacted by a street widening. Most of the transactions occurred before 1995, and showed an average value reduction of 38 percent. From this he reasoned that the subject suffered a 25% reduction, in relation to a strip taking 8.5 metres in depth, representing 7% of the pre-taking area.

The Vice Chair found that the first appraiser could not provide satisfactory answers as to the basis for selecting the 11 properties in his working study. The board was unimpressed by the lack of a systemic or objective process, in the end referring to the study as not amounting to anything more than a professional hobby.

The evidence of the authority's appraiser that there was no injurious affection was accepted given that there was no impact on the shape of the parcel, and that it did not negatively effect its future development or use.

Jasper v. Ottawa (City) [2008] O.M.B.D. No. 604, 95 L.C.R. 36

- Screening out effects of the scheme

The property was expropriated for a bridge spanning the Rideau River. The parties agreed on the highest and best use but there was a need for a rezoning. The City's appraiser applied a 15% adjustment for zoning, while the claimant did not.

The property had been the subject of a previous rezoning application, made after a feasibility study had been completed for the bridge which showed its alignment through the claimant's property. The board considered the minutes of an advisory planning committee where the mayor opposed the rezoning on the basis of it being situated in the middle of the proposed bridge alignment. Clearly the bridge was the dominant factor for the board in the denial of the rezoning. In the absence of opposition related to the bridge the rezoning likely would have gone through. Accordingly, the 15% adjustment for the rezoning was not appropriate as it took into the effect of the scheme.

Antrim Truck Centre Ltd. v. Ottawa [2008] O.M.B.D. No. 271, 94 L.C.R. 240

- Pleadings – Injurious Affection – Foreknowledge and Reasonableness

In an injurious affection claim arising out of a road realignment the authority alleged in its reply that the claimant was disentitled to any injurious affection damages on the basis that the claimant had made a business decision to purchase the property knowing that the subject interchange would be built, and that as a consequence any losses from changes in traffic patterns should fall on the claimant, rather than the public. The authority also pled that in the construction and realignment of the highway it had acted reasonably in its dealings with the claimant.

The claimant applied to have these portions of the reply struck out on the basis that they were irrelevant to its entitlement to compensation. The board reviewed the leading cases which set out the guiding principles on injurious affection; none of which proved to be of much assistance to resolve the pleadings issue. The board referred to the ECB's decision in Warlow et al v. MoTH (1997) 60 L.C.R. 218 as having dealt with the combined questions of "reasonableness" and "foreknowledge" and concluding that the claimants were not entitled to compensation, having bought with knowledge of the proposed works. The board declined to strike the offending paragraphs of the authority's reply, given the support in the jurisprudence considering both foreknowledge and reasonableness.

While the board noted there were cases that addressed the issue of foreknowledge on a claimant's entitlement to injurious affection compensation, what is notable is relatively few decisions on the point. If the matter proceeds to hearing it will be interesting to see the Board's contribution to the cases on the issue.

Canadian Alliance of Pipeline Landowners' Assn. v. Enbridge Pipelines Inc. 2008 ONCA, 94 L.C.R. 129

- Constructive Expropriation

The association of landowners appealed the dismissal of their class action claim on summary judgment. The claim alleged that the enactment of the control zone restrictions in s. 112 of the National Energy Board Act effected a taking of their lands, even though the respondent pipeline companies had not exercised any of the responsibilities or rights assigned to them under s. 112 or the Pipeline Crossing Regulations. Section 75 of the Act set out a regime for determining compensation where arbitration was ordered by the Minister. The Minister had rejected the owners arbitration request on the basis that any damages sought were not a direct result of an activity of a pipeline company.

The court upheld the chambers judge's ruling that s. 75 did not create a statutory right of action. Rather s. 75 provides a complete code respecting the determination of compensation claims. Having provided for arbitration, there was no room for implication of a further statutory right of action.

Secondly, the court viewed the Act's control zone restrictions as being akin to zoning regulations; they were regulatory and not confiscatory. As mere regulations they could not effect a taking of land giving rise to compensation.