AIRD BERLIS

Divisional Court Confirms Expropriation Claimants Not Immune to Interest and Costs Consequences

May 16, 2019

By Ajay Gajaria, Rebecca Hines and David P. Neligan

The Ontario Divisional Court's recent decision in *Shergar Development Inc. v. City of Windsor*[1] ("***Shergar***") shows expropriation claimants and expropriating authorities alike that an unreasonable claimant will not be insulated from adverse interest and costs consequences in appropriate circumstances. The decision also signals that "Rule 49 settlement offers" (i.e. settlement offers made pursuant to Rule 49 of the *Rules of Civil Procedure*) may begin to play a more prominent role in expropriation proceedings in the future.

Facts

The facts underlying the *Shergar* decision are complex and span more than two decades. In 1995, Shergar Developments Inc. ("**Shergar**") acquired two parcels of land in Windsor along the Detroit River from the Canadian Pacific Railway Company ("**CPR**"): a 5.7 hectare property (the "**Subject Lands**") and another narrow 2.4 hectare strip of land. CPR took back a mortgage on the two properties. Approximately three years later, on April 29, 1998, the City of Windsor (the "**City**") expropriated the Subject Lands.

Eighteen years passed between the City issuing its Notice of Expropriation to the date of the initial compensation hearing before the former Ontario Municipal Board (the "**Board**," now the Local Planning Appeal Tribunal (the "**Tribunal**")). During this time, Shergar took a number of steps that significantly delayed the ultimate determination of compensation, including: refusing the City's request for access to the property to conduct environmental assessments; failing or refusing to cooperate with the City in its efforts to determine and pay compensation, both to Shergar and CPR; and pursuing several other related legal proceedings before finally issuing its claim for compensation on July 5, 2013.

The City made two settlement offers for the Subject Lands. First, in 1998, it made a joint offer to Shergar and CPR of $500,000 in accordance with section 25 of the *Expropriations Act* (the "**Act**"). Second, in 2015, the City made a Rule 49 settlement offer with a total value of approximately $1.2 million dollars to Shergar alone.

The Prior Ontario Municipal Board Proceedings

At the initial compensation hearing, the Board accepted the evidence from the City's retained appraiser that the value of the Subject Lands was $710,000 on the valuation date. The Board rejected the evidence from the two appraisers retained by Shergar, who valued the Subject Lands at approximately $5 million and $4 million, respectively. The Board held that the experts retained by Shergar had not fulfilled their duty to provide the Board with opinion evidence that was "fair, objective and non-partisan."

At the initial compensation hearing, the Board also made findings regarding the quantum of the compensation award upon which interest was to be paid, the rate of interest and period over which interest was payable to the claimant, and the disposition of costs. The City, being successful on the valuation argument, took issue with these related findings and sought a review of the Board's decision on these issues pursuant to section 43 of the former *Ontario Municipal Board Act*. The section 43 review was granted and a rehearing was ordered.

At the rehearing, the Board confirmed that interest was only payable on Shergar's portion of the compensation for market value (i.e. the fair market value of the Subject Lands less CPR's entitlement as mortgagee) at approximately $270,000, not on the entire fair market value at $710,000. The Board held

that valuation on the full amount, in the circumstances of this case, would have resulted in a windfall interest award to Shergar.

In terms of the amount of interest payable, the Board determined that Shergar should not be rewarded for its conduct in delaying the determination of compensation by receiving an increased amount of interest. The Board also reaffirmed that the key consideration when exercising discretion to adjust an interest award under subsection 33(2) of the Act is whether the conduct of the claimant caused delay in the determination of compensation. The Board held that Shergar had caused an egregious delay and, as a result, only awarded Shergar an interest rate of 3% up to the date of Shergar's compensation claim rather than the statutory rate of 6%, and then the statutory rate thereafter.

Perhaps most significantly, the Board awarded costs against Shergar on the basis of its objectionable conduct in causing excessive and unreasonable delay in the determination of the compensation claim, including Shergar's failure to accept the City's Rule 49 offer, which the Board determined had complied with the requirements of Rule 49 insofar as it was certain, understandable, and open until the commencement of the hearing. Under subsection 32(2) of the Act, the Board can exercise its discretion to make any order respecting costs where the amount awarded by the Board is "less than 85% of the amount offered by the statutory authority." The Board determined that subsection 32(2) should not be narrowly construed as to only apply to offers made pursuant to section 25 of the Act and that this section also applies to Rule 49 offers that are made subsequent to the statutory offer. In coming to this determination, the Board referred to Rule 141 of the former *Ontario Municipal Board Rules of Practice and Procedure*, now Rule 28.22 of the *Local Planning Appeal Tribunal Rules of Practice and Procedure*, which provides that if an offer to settle is made and it is not dealt with in the Act, the *Rules of Civil Procedure* apply. Since the City's Rule 49 offer was more than 85% of the Board's award (the applicable threshold under subsections 32(1) and (2) of the Act), the Board exercised its discretion to award significant costs against Shergar.

The Appeal and Divisional Court Decision

Shergar appealed the rehearing decision of the Board to the Divisional Court on the grounds that the Board erred in its consideration of sections 32 and 33 of the Act and the role of Rule 49 offers in the context of expropriations. The Court denied Shergar's appeal in its entirety.

With respect to interest, the Court upheld the determination that the interest payable should be calculated on Shergar's proportionate interest in the Subject Lands being approximately $270,000 rather than the full market value of $710,000. The Court reasoned that both Shergar and CPR were "owners" under the Act and since the interest entitlement of the mortgagee is ascribed under sections 17 and 20 of the Act, Shergar is only entitled to interest on the remainder.

Shergar argued that there can only be one settlement offer, being the offer made pursuant to section 25, and that there is a distinction between cases where land is taken and cases where no land is taken. The Court rejected this argument, taking both a textual and conceptual approach. The Court's reasoning that the Board has the discretion to consider Rule 49 offers rests on the principle that the purpose of giving direction regarding costs "is clearly directed to encouraging an expeditious settlement of claims on an equitable basis"[2] and picked up the rehearing decision's statement that "the Act should not be interpreted so as to permit the funding of unreasonable claims with no costs risk."[3] In essence, the Court held that there is a balance between the principles of full compensation and the just and equitable determination of compensation in a cost-effective manner, and that negotiations should be encouraged to promote early settlement.[4]

Notably, neither the Board in its rehearing decision nor the Divisional Court applied Rule 49 as it is typically applied in the context of civil litigation (i.e. with the threshold for determining cost consequences being a determination of whether the offer in question was less, as or more favourable that the judicial award in question). Rather, the Divisional Court upheld the Board's decision to import the 85% threshold amount from the Act for determining whether subsection 32(1) or (2) should apply with respect to the determination of costs. In this regard, the Court cited and relied on the Board's broad discretion to dispose of costs under subsection 32(1) and (2) when dealing with an offer to settle in the expropriation context. While subsection 32(2) undoubtedly confers broad discretion with respect to the disposition of costs, presumably the Court's reference to discretion with respect to subsection 32(1) was in terms of the Board's discretion to determine what constitutes "reasonable" legal, appraisal and other costs actually

incurred by the owner for the purposes of determining the compensation payable given the circumstances of each individual case.

Something the Court did not address was how Rule 49 offers should be treated in cases where there is an absence of poor conduct on the part of a claimant or where the delta between the settlement offer and the award at a hearing is smaller. Subsequent decisions may clarify the treatment of Rule 49 offers in the expropriation context where an authority serves a subsequent offer in the form of a Rule 49 offer without the findings of unreasonableness on the part of the claimant in proceeding with a claim. Future decisions also may clarify whether the approach taken with respect to Rule 49 offers in terms of the applicable threshold will be the typical approach that is employed in civil litigation matters or a hybrid or differentiated approach unique to expropriation matters, as was adopted in this case.

Conclusions

Expropriating Authorities

The Court decision demonstrates that claimants who are found to have behaved unreasonably in the determination of land compensation claims are not necessarily shielded from adverse interest and cost consequences. In terms of interest entitlements, the Tribunal may use its discretion to adjust the rate of interest payable as well as the time upon which interest will be payable in light of the conduct of a claimant. Authorities should be aware of this in order to encourage claimants to proceed with the resolution of claims efficiently and reasonably, and also so that, if necessary, the authority can advocate for such interest adjustments or costs awards in appropriate circumstances.

This decision should also encourage authorities to use settlement offers as a means by which to secure a reasonable outcome in the context of compensation claims and to militate against the use of unreasonable delays by claimants as a litigation tactic. Of course, for an authority to avail itself of the procedure set out in Rule 49 with respect to offers made subsequent to section 25 offers, the authority must ensure that the offer complies with the requirements of Rule 49, meaning that the offer should be certain, understandable and open until the commencement of the hearing.

Claimants

Claimants should take care to act reasonably in their dealings with authorities and ensure that any decisions they make that may result in a delay to the determination of a compensation complaint are done so for legitimate and defensible reasons. This decision is a strong signal to claimants that they are not insulated from interest and costs consequences simply by virtue of being a claimant. As such, even though claimants are not the ones who choose to initiate expropriation proceedings, it is still incumbent upon them to act reasonably throughout the process in order to avoid any adverse interest or costs consequences.

Retained Expert Witnesses

The Board's determination in *Shergar* is also a reminder to retained expert witnesses that their duty remains to provide fair, objective and non-partisan evidence in accordance with their executed acknowledgement of expert's duty form. An adverse finding in this area may influence the Tribunal's exercise of discretion on costs consequences and has a reputational risk for the individual witnesses and their firms. The role of settlement offers and the potential for adverse costs consequences against claimants arising from subsequent settlement offers by expropriating authorities may also inform payment structures and retainer practices for expert witnesses now that the full indemnification of a claimant, including their costs, may not be guaranteed.

[1] 2019 ONSC 2623; 9 L.C.R. (2d) Part 4, May 2019.
[2] Ibid. at para 99.
[3] Ibid. at para 101.
[4] Ibid. at para 102.

Authors

Ajay Gajaria
Associate
T 416.865.3065
agajaria@airdberlis.com

Rebecca Hines
Associate
T 416.865.7757
rhines@airdberlis.com

David P. Neligan
Associate
T 416.865.7751
dneligan@airdberlis.com

Brookfield Place, 181 Bay Street, Suite 1800, Toronto, Canada M5J 2T9
T: 416.863.1500 | Fax: 416.863.1515

AIRD BERLIS