COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Springman and Springman Limited v. Surrey (City),* 2023 BCCA 130

Date: 20230324
Dockets: CA47816; CA47817

Docket: CA47816

Between:

Springman and Springman Limited and 498198 B.C. Ltd.

Appellants (Plaintiffs)

And

City of Surrey

Respondent (Defendant)

- and -

Docket: CA47817

Between:

Larry Visco

Appellant (Plaintiff)

And

City of Surrey

Respondent (Defendant)

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated September 14, 2021 (*Springman v. Surrey (City)*, 2021 BCSC 1804, New Westminster Dockets S227335 and S227336).

Counsel for the Appellants:	A.L. Faulkner-Killam C.E. Hanman
Counsel for the Respondent:	E.A. Cooke R.W. Parsons
Place and Date of Hearing:	Vancouver, British Columbia November 1–2, 2022
Place and Date of Judgment:	Vancouver, British Columbia March 24, 2023

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux

Summary:

The appellants appeal the adequacy of compensation awarded to them following the partial expropriation of a property they used to operate a car dealership. Held: Appeal allowed in part. The judge erred in calculating compensation for the reduction in value of the remaining land by relying on a percentage approach that she had rejected as not based on market evidence. Compensation for injurious affection must be grounded in the impact of the taking on the market value of the remaining property. The judge also misapprehended the evidence in concluding that the appellants' decision to sell the land and business was not a result of the expropriation. Consequently, they are entitled to claim certain out-of-pocket expenses and costs as business interruption losses. Finally, the judge did not err in rejecting the appellants' claim for loss of opportunity to continue to operate the business and sell the land at a later date, as such claims are not compensable under the Expropriation Act.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

[1] This appeal arises out of the partial expropriation of a property used to operate a car dealership. The central question is whether the judge adequately compensated the appellants for the reduction in value of the remaining land, business interruption losses, and loss of opportunity to continue in business.

Background

[2] The appellant Springman and Springman Limited ("Springmans") operated a car dealership on the Langley Bypass in Surrey, British Columbia. Dan and Reuben Springman owned the business and 25% of the property through their holding company, 498198 B.C. Ltd. ("498"). The other 75% of the property was owned by the appellant Larry Visco, an armchair investor who left it to the Springman brothers to run the business. 498 and Mr. Visco leased the land to Springmans on a 20-year renewable term.

[3] Springmans was a successful dealership for Saturn from 1997 to 2009 when the recession hit and General Motors stopped production of the Saturn brand. Springmans sold off its Saturn inventory at a loss and in 2010 rebranded as a Saab dealership. Unfortunately, Saab went into bankruptcy in December 2011, causing

the Springmans to sell off its new Saab vehicle inventory at a loss in 2012. The company intended to continue as a used car dealership with flooring financing and as a parts and repair business: at paras. 9–12.

[4] Meanwhile, in July 2011, the City of Surrey contacted the Springman brothers to let them know that it intended to expropriate some of the property to accommodate construction of an overpass, with the project to start in early 2012 and to continue until the end of 2014. The Springman brothers and their staff worried about the negative impact of the overpass project on their business. Some employees left and Springmans purchased less inventory, anticipating that parking and display space would be limited: at para. 16.

[5] In March 2012, the City acted on three expropriation notices:

a) A fee simple interest of 259.7 m^2 (the "Fee Simple Area");

b) A permanent right of way interest of 242.4 m^2 (the "Permanent RW Area"); and

c) A temporary right of way interest of 622.3 m^2 (the "Temporary RW Area").

The City compensated the two owners, 498 and Mr. Visco, as required under s. 20 of the *Expropriation Act*, R.S.B.C. 1996, c. 125 (the "*Act*") paying:

a) $146,738 for the Fee Simple Area;

b) $89,032 for the Permanent RW Area; and

c) $33,877 for the Temporary RW Area.

As lessee, Springmans received $1 for each taking.

[6] The City began accessing the property in March 2012 which affected the vehicle display areas and reduced visibility of Springmans' inventory. Active construction occurred from mid-July 2012 until October 31, 2013, although the notices indicated the City had the right to be in possession of the Temporary RW

Area until December 31, 2014. Pile driving started in mid-July and ended in late November 2012. Excavation, concrete pouring and related activities started in August 2012 and finished at the end of November 2012. Girders and the overpass deck were subsequently installed. The judge described the impact of the construction on the business this way:

> [27] There is no question that the construction created a great deal of noise, dust and distraction. Obviously, such effects are inimical to running a successful car dealership. For example, construction vehicles made it difficult to access the Property at times. The dust made it challenging to keep the inventory and interior of the building clean. The noise deterred some potential customers. The construction meant there was less drive-by traffic on Highway 10. The adverse effects on Springmans and its staff included diminished pay for commission employees and low morale. While some staff were assured of a minimum base pay, the general anxiety persisted.
>
> [Emphasis added.]

[7] By July 2012, the City had agreed to make regular payments to Springmans to make up for lost earnings due to the impact of the expropriation on the business. The payments were known as the “float” or the “float payments”.

[8] The float payments began in August 2012 and carried on through April 2013, for a total of $762,818. The payments were made on a without prejudice basis under s. 30(2)(b) of the *Act* to cover business losses to which the company might be entitled under ss. 34, 39 or 40 of the *Act*. The City also compensated the plaintiffs for out-of-pocket expenses directly attributable to the expropriations.

[9] In April 2013, the City advised Springmans that it would not make any further float payments. The judge described the effect of that announcement as devastating for the Springman brothers who did not see how they could continue to operate, given that construction of the overpass project was not anticipated to be completed until March 2014. They tried to convince the City to reinstate the float payments, without success. At that point the brothers were of the view that they had no option but to sell their business. They contacted the owner of a nearby car dealership, Gary Trotman, who had previously expressed interest in buying or leasing the property. Based on an appraisal prepared by Andrew Wilson, 498 and Mr. Visco agreed to sell

the property to the Trotman Group for $6,025,000. Springmans also sold its assets for $550,000 plus the value of parts and inventory. It was a condition of the sale that the City had to be finished construction and off site by October 31, 2013, rather than March 2014. The City agreed to accelerate its work schedule to enable the sale to proceed.

[10] The appellants sought compensation from the City for loss in value of the property due to the partial expropriation and what they describe as the forced nature of the sale of their land and business. When the City refused to pay any further compensation, the appellants commenced the underlying action. The trial judge agreed with the appellants that the takings and construction had diminished the value of the remaining lands, and awarded damages of $154,114 plus interest under the *Act*. She also agreed that the City had undercompensated Springmans for $65,182 plus interest in business losses, but declined to award damages for loss of the opportunity to continue to run the business and sell the land at a later date. She concluded the sale had not been necessary and that the business could have continued to operate if the appellants had pursued other options.

On Appeal

[11] The appellants contend the judge undercompensated them for the expropriations, and failed to recognize the financial peril the company was in due to the expropriations. They identify the following errors in relation to three heads of damages:

1. Injurious affection: the appellants contend the $154,114 awarded by the judge is based on an assessment method inconsistent with the *Act* and should have been $382,144;

2. Business losses: although the appellants accept that the additional $65,182 for business losses adequately compensated them for lost profits during construction, they contend the judge failed to compensate the business for three out-of-pocket expenses including legal and accounting fees and borrowing to maintain the business; and

3. Loss of opportunity: the appellants say the judge failed to recognize that the expropriation forced them to sell the property and business assets six years before they intended to, thereby depriving them of about $3 million in increased land value and business profits.

I turn now to the first ground of appeal.

1. Injurious Affection

[12] As owners of the property, 498 and Mr. Visco received compensation for the Fee Simple Area, the Permanent RW Area and the Temporary RW Area as detailed above. They take no issue with those amounts on appeal. The dispute centers on their entitlement under s. 40(1)(b)(i) of the *Act* to compensation for the reduction in value of the remaining land—commonly referred to as "injurious affection".

[13] At trial, the parties tendered expert appraisal reports valuing the property at the date of expropriation. The City's expert, Larry Dybvig, identified a slightly higher bare land value of $52.50 per ft^2 compared to the appellants' expert, David Kirk, who valued the land at $49.50 per ft^2. The judge accepted Mr. Dybvig's value. She accepted Mr. Kirk's opinion that the expropriation had reduced the value of the remaining land because it resulted in a reduction in the parking/vehicle display area and reduced visibility to westbound traffic on Highway 10: at para. 59. However, she did not accept Mr. Kirk's opinion that the remaining property suffered a 10% loss in value as a result of the construction—an opinion based on his view that the highest and best use of the property had changed from an "A grade to a B grade auto dealer use" (at para. 57)—saying:

> [58] Mr. Kirk does not provide any evidence of a classification system for auto dealerships or the criteria on which it is based. In his rebuttal report, Mr. Dybvig states that he is unaware of any such classification system. Without evidence of an accepted classification system for auto dealerships, there is no basis to conclude that there was a change in highest and best use: both before and after expropriation, the highest and best use of the Property was as a full service auto dealership. The evidence that new car dealerships are typically full service facilities, with parts and service departments, body and paint shops, whereas used car dealerships tend not to have these services, supports treating Springmans as a full service auto dealership both before and after the expropriation.

[Emphasis added.]

[14] The judge did not accept the magnitude of the impacts identified by Mr. Kirk, finding only a slight reduction in visibility and the loss of approximately 7 out of 40 parking/display stalls: at para. 64. Further, the judge accepted the City's submission that loss of value in the remaining land must be based on market evidence, and that Mr. Kirk's reliance on his judgment and another expropriation case to arrive at a figure of 10% did not meet that requirement: at paras. 65–67. The judge concluded that an appropriate reduction in the value post-expropriation was 5%, and awarded damages of $154,114 for injurious affection.

[15] In my respectful view, the judge fell into error in assessing the compensation due to the landowners in this way. Having rejected the assumptions Mr. Kirk used to value injurious affection, she did not explain how it was nonetheless appropriate to use one-half of his estimate to value the loss. In effect, the judge determined compensation based on a method she had found to be unsound. Further, and more importantly, the judge failed to adhere to the requirement under the *Act* that compensation be tied to the impact on the market value of the remaining property, despite noting that this was the proper approach. Although s. 40(3) of the *Act* provides latitude to a judge to choose the method of assessing compensation, that determination must be based on "the reduction in the market value of the remaining land".

[16] In fairness to the judge, she was faced with an unsatisfactory record—neither side's expert provided a detailed opinion on the market value of the property immediately pre- and post-taking. Further, the appellants' summary of their claims in closing submissions was described by the judge as difficult to follow, failing to distinguish between the claims of Mr. Visco and 498 and those of Springmans. Despite the deficiencies in the record, however, in my view the judge had the evidence necessary to calculate the loss in market value in accordance with s. 40(3) of the *Act* which reads:

> If part of the land is expropriated, the amount of compensation payable in respect of the matters referred to in subsection (1) (a) and (b) (i) may be established by determining the market value of the area of all of the land before the date of expropriation and subtracting from it the market value of the land remaining after the expropriation occurs, but in no case, subject to section 44, must compensation be less than the amount determined by multiplying the ratio of the area of the land taken to the area of all of the land before it was taken, times the value of the land before it was taken with the appropriate reduction if the interest expropriated is an easement, right of way or similar interest less than the fee simple interest.

This section provides for compensation for loss of value in the remaining land to be determined by subtracting the market value of the remaining land after the expropriation from the market value of all of the land before expropriation; it also sets out a minimum compensation formula.

[17] Although Mr. Kirk's primary opinion was based on his "10% analysis", he also calculated the loss of market value in accordance with s. 40(3) of the *Act*. First, he used the Dybvig appraisal of $6.2 million as the value of all of the land before the expropriation. Second, he used the sale price paid by the Trotman Group ($6,025,000) as a marker of the value of the remaining land post-expropriation, albeit 20 months later—a sale the judge accepted had occurred at fair market value based on the appraisal prepared by Mr. Wilson: at para. 82. I note parenthetically that the City acknowledges that the Trotman sale is a significant piece of evidence in assessing the value of the remaining land, but takes issue with a single market data point being used to calculate that value. In my view the City's concern is not justified because the single data point is the arm's length sale of the very property in issue.

[18] Because all of the experts agreed comparable dealership property increased in value by 4.73% annually between March 2012 and the sale on October 31, 2013, that percentage increase should be used to adjust the figures to determine what the value of the remaining lands should have been at the time of the sale 20 months later if the construction had not affected their value.

[19] The value of the remaining lands immediately post-expropriation in March 2012 was $6.2 million less $235,770 (the sum paid for the Fee Simple Area and the

Permanent RW Area) = $5,964,230. Accepting the premise that this value of $5,964,230 increased by an annual percentage of 4.73% over 20 months yields a value of $6,435,404. The Trotman Group purchased the property 20 months after March 2012 for the adjusted sale price of $6,053,260. The difference between those two figures provides a measure of the decrease in the value of the remaining land due to the expropriations: $6,435,404 – $6,053,260 = $382,144, roughly double the amount awarded by the judge. The judge erred in overlooking this evidence.

[20] Although disputing the use of the single Trotman sale, at the hearing of the appeal the City candidly acknowledged the soundness of this calculation of injurious affection damages if the Trotman sale is used to determine fair market value of the lands remaining. However, the City questioned how the appellants on appeal could seek more than the $300,000 sought at trial. That criticism was warranted. Indeed, the appellants initially identified a claim in their factums of $478,000. At the hearing of the appeal, they explained that the increase was due to two adjustments to their claim: first, using the higher pre-expropriation value identified by Mr. Dybvig, and second, no longer deducting the compensation for the Permanent RW, since the judge had identified only loss of parking and visibility as impacts on the remaining land, and did not attribute any loss in value to the existence of the Permanent RW. By the end of the hearing, however, the appellants had accepted that the Permanent RW compensation should be deducted in doing the calculation under s. 40(3), leaving their increased claim of $382,144, with the difference between what was sought at trial and on appeal explained by the Dybvig appraisal value only. I accept that the award sought on appeal is therefore generally consistent with what the appellants sought at trial.

[21] In summary on this ground of appeal, Mr. Visco and 498 are jointly entitled to compensation for injurious affection of $382,144 plus interest under the *Act*.

2. Business Disturbance Damages

[22] At trial, Springmans claimed business losses due to the overpass project including some expenses for 2011 and amounts from January 2012 to October

2013. They claimed these losses were compensable as disturbance damages under s. 39 of the *Act*:

> 39 If land that is subject to a lease having a term greater than one year is expropriated, the lessee, whether or not he or she is an occupant of the land, is entitled to reasonable disturbance damages in an amount to be determined by the court by having regard to
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> (a) the length of the term of the lease,
>
> (b) the length of the unexpired term of the lease,
>
> (c) any rights to renew or the reasonable prospect of renewal,
>
> (d) the nature of the business, if any, carried out on the land under the lease, and
>
> (e) the extent of the lessee's investment in the land that the lessee cannot reasonably recover.
>
> [Emphasis added.]

[23] As noted above, the City paid Springmans $762,818 in float payments to offset their business losses. The judge found the actual losses amounted to $828,000, leaving an additional $65,182 plus interest under the *Act* payable to Springmans.

[24] On appeal, the appellants contend the judge failed to recognize three additional out-of-pocket expenses as business losses. First, they say $250,000 borrowed by 498 from Mr. Visco and put into Springmans to sustain it during the overpass construction was such an expense. Like the judge, I would not accede to this submission. Springmans has been compensated for its losses in operating the business. To compensate 498 for money put into the company would result in a double counting. The losses were based on the difference between average profits in the year preceding the expropriation and monthly earnings during construction. Springmans' borrowings were subsumed in that analysis. They had borrowed money in the past, as they did in 2012. The losses to be compensated did not depend on individual expenses and borrowings, but rather on the overall reduction in the company's performance and earnings.

[25] Second, the appellants seek to recover $66,115 in out-of-pocket expenses for accounting, severance, and early termination fees. Third, they seek to recover

$83,000 in losses on parts and vehicle inventories as a result of the forced sale. I will address these claims together because their success turns on whether the judge erred in determining that the sale was not forced by the overpass project, but was rather a choice made by the Springman brothers not to carry on in business.

[26] The City acknowledges that if the sale of the business resulted from the construction, those sums would be payable as business losses, albeit at a discounted rate because they are expenses and losses that would have been incurred eventually in any event if the Springmans had carried on with their plan to sell the business and retire in mid-2019.

[27] I turn, then, to whether the judge erred in her determination that the sale was not the result of the overpass project. In addressing this question, the judge said:

> [83] The plaintiffs have not persuaded me that the sale to Mr. Trotman was effectively involuntary. Specifically, their evidence does not show that they lacked access to financial resources that would have enabled them to continue to operate, or that they had no viable option to lease, or that they could not have negotiated a better bargain, at the time they finalized the sale to Mr. Trotman.
>
> [84] I sympathize with the anxiety, uncertainty and disruption the Springman brothers had to endure over the course of the Overpass Project. I accept that they were frustrated and exhausted. However, that does not make the sale a forced sale. Even if I were to find that the plaintiffs sold the Property at less than fair market value (which I do not), it was because they did not have the appetite or energy to maximize their economic interests, not because of the expropriation. As there is no evidence of what else was going on in their lives over that period, a causal connection is speculative.
>
> [Emphasis added.]

[28] I am mindful that this Court is not to interfere with findings of fact absent error in principle or a palpable and overriding error of fact. However, in my respectful view, the judge's findings on this issue reflect a material misapprehension of the evidence.

[29] First, the judge found there was "no evidence" as to what else was going on in the Springman brothers' lives and nothing to show that they lacked financial resources to carry on the business in 2013. But there was such evidence in the record. Reuben Springman testified that the dealership's operations were financed

with a demand loan secured against the assets of 498 and Dan and Reuben Springman personally. Dan Springman said that the bank was asking "a lot of questions" after the float payments were cut off in April 2013. He also testified that the property was encumbered by a demand loan, and that he and his brother were going to lose their homes which guaranteed the demand loan if it was called in by the bank. That evidence was supported by the company's December 2012 financial statements which read:

> 8. BANK OPERATING LOANS
>
> The bank operating loans bear interest at Envision Financial's prime rate plus 2%, are due on demand, and are secured by a general security agreement as well as two vehicles included in inventory with a carrying value of $25,268. Further security for this amount is provided by the unlimited guarantees of a related company and the shareholders. The loan is subject to certain financial covenants. At December 31, 2012, the Company did not comply with these financial covenants and is at risk that the lender could demand repayment of the operating loans.
>
> [Emphasis added.]

[30] Second, Ms. Danroth, a former employee of the dealership and its controller at the time, testified that the dealership was unable to meet expenses after the float payments ended, instead defraying or avoiding expenses from May to October 2013.

[31] Third, the judge found it significant that 498 had available to it another $250,000 under its mortgage loan facility with Mr. Visco, but she did not address whether that sum would have sufficed to cover the average monthly shortfall between May 2013 and March 31, 2014, the earliest date the appellants understood the City would be withdrawing from the property. Based on the judge's finding that Springmans' business losses amounted to $828,000 over the 22 months of the project (January 1, 2012 to October 31, 2013), their average monthly loss was $37,636. It must be remembered that when the Springman brothers were assessing their options after the float payments ended in April 2013, they did not know when the City would actually be off-site, and did not have the additional $65,000 in "float payments" ordered at trial. An additional $250,000 would not have funded losses from May 2013 through March 2014 ($414,000), and certainly not through December 2014, the period of occupation to which the city was entitled under the

expropriations. Dan and Reuben Springman understood that Springmans could not meet its expenses, and that they would be facing financial ruin if the demand loan was called in.

[32] Fourth, there was evidence that a better sale or lease arrangement was not available to the appellants. Mr. Springman gave evidence that the Dilawri group in 2012 and the Avison Young potential purchasers in December 2012 had no interest in the property unless the laydown area was vacated by the City. The trial judge made an evidentiary ruling in her reasons for judgment that Mr. Springman's recounting of the Dilawri group's decision in July 2012 to withdraw their offer to buy the property and dealership because of the construction taking place in the laydown area was inadmissible hearsay. However, although the judge was correct that this evidence could not be used as proof of the Dilawri group's reasons for withdrawing, it was admissible to explain what the Springman brothers understood about their options for selling the property and business. In any event, it was undisputed that the Trotman Group would not buy or lease while the City was in occupation, a fact recognized by the City when it agreed to accelerate the work so that it could be offsite by October 31, 2013 to allow the purchase to proceed.

[33] In my respectful view, the judge did not grapple sufficiently with the evidence supporting the appellants' contention that, in light of what they knew at the time, the decision to sell the business and the property resulted from the impact of the construction and was not a free choice.

[34] I conclude that the appellants' decision to sell the property resulted from the construction and was a necessary and reasonable step taken to avoid further losses, both corporate and personal. I would accordingly allow the claims in the amount of $66,150 for out-of-pocket expenses and $83,000 in losses on parts and vehicle inventory discounted to reflect that they are accelerated expenses. If the parties are unable to agree on the acceleration discount, that question should be remitted to the trial court.

3. Loss of Opportunity Damages

[35] Finally, the appellants submit they should have been awarded damages for the loss of opportunity to continue operating the business and to hold the land for sale until their planned retirement date of mid-2019, claiming a further six years of profits and increased land value. They calculate those losses at approximately $3 million, excluding any claim by Mr. Visco.

[36] I would not accede to this argument. The appellants' reasoning would have them fully compensated for the property and business in 2013, and then also allow them to claim for the growth in the real estate market and lost profits to 2019. The appellants did not identify a single case where future lost real estate market opportunity was found to be compensable under the *Act* separately from the future value crystallized in the market value at the date of expropriation. To the contrary, cases that touch on the issue support the proposition that such compensation is not available: see e.g., *L'Abri B.C. Ltd. v. Abbotsford School District No. 34*, 1994 CarswellBC 2737 at paras. 81–84, 52 L.C.R. 161 (B.C. E.C.B.); *747926 Ontario Ltd. v. Upper Grand District School*, [2001] 56 O.R. (3d) 108 at paras. 21, 24–25, 2001 CanLII 24126 (C.A.); *Rebel Holdings Ltd. et al. v. Division Scolaire Franco-Manitobaine*, 2008 MBCA 65 at para. 201. That is not surprising, because the market value of the land in 2013 would have contemplated the risk/reward of the real estate market rising or dropping over time. Having received the fair market value of the land in 2013, it was for the appellants to reinvest their equity, as Mr. Visco did, and to receive the benefit of any growth in the real estate market or potential business profits in that manner.

[37] As the City contends, there is a common sense policy reason for tying market value compensation to the date of expropriation, as required by s. 32 of the *Act*: neither party should be responsible for future changes in the real estate market. When a compensation claim is heard after a drop in the real estate market, an expropriating authority cannot claim reimbursement for payments made prior to the downturn. Similarly, it is trite that expropriated owners cannot claim against authorities for future gains in the market.

Disposition

[38] I would allow the appeal to the extent of increasing the damage award to 498 and Larry Visco for injurious affection from $154,114 to $382,144. I would award Springmans damages of $66,115 and $83,000, subject to an acceleration discount. As the appellants have been substantially successful, they are entitled to their costs of the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Abrioux"