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DETENTION DAMAGES IN EMINENT DOMAIN PROCEEDINGS

BY JACOB SCHIFFMAN* and PATRICK J. TOOLE, JR.**

A new interest in eminent domain exists because of the ever-increasing amounts of land taken for public use. Court calendars are reflecting the expanded prevalence of condemnation cases. In recent years our courts and boards of view have had occasion to consider numerous problems in this field. The importance of eminent domain today is apparent as we consider the extent to which private property may be taken for public use. The Commonwealth's Department of Highways appropriates land for its program of highway construction and improvement. The turn-pike system exists because of the authorized use of condemnation proceedings. The Department of Forests and Waters, in fulfillment of its flood control responsibility and land acquisition requirements, utilizes the power of eminent domain. Counties are resorting to this procedure in governmental functions. City redevelopment and urban renewal projects, as well as public utilities, employ eminent domain as an integral part of their programs.

The United States¹ and Pennsylvania² constitutions both expressly provide that private property cannot be taken for public use without just compensation. Difficulties arise in determining what is just compensation in eminent domain proceedings. Three basic types of damages may be available to the property owner when his land is taken for public use. (1) Upon appropriation he acquires an immediate right to the fair market value of the land.³ This claim, however, does not become a debt until the amount has been definitely ascertained,⁴ either by agreement between the parties or by judicial determination. When the amount of the claim is finally determined it relates back to the time of taking.⁵ (2) He may be entitled to recover *detention damages* from the date of the taking of the property to the date of

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1. "Nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

2. "Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. art. I, § 10.

3. *Kenter v. United States*, 156 F.2d 5 (3d Cir. 1946). Where there is a partial taking of the land, the damages equal the difference between the fair market value immediately before and immediately after the taking. *Philadelphia Ball Club, Ltd. v. City of Philadelphia*, 192 Pa. 632 (1899).

4. *Whitcomb v. Philadelphia*, 264 Pa. 277, 107 Atl. 765 (1919).

5. *Ibid.*

the award as compensation for delay in payment.⁶ (3) He may receive interest from the date of the award to the date of payment.⁷

This Article will discuss detention damages—the manner of computing them, the period of time for which they can be recovered, and how the condemnor and condemnee can protect their respective interests. Detention damages generally may be defined as the amount due the landowner for the condemnor's failure to compensate him at the time of the appropriation and for the delay in payment until the specific amount due is determined.⁸ The objective in allowing detention damages is to make the owner of the property whole⁹—to put him in the same economic condition he would be in if condemnation had not occurred. Since the purpose is to compensate the owner for injuries he has received through delay in payment by the condemnor, he may not be entitled to detention damages where the delay has been caused by his failure to co-operate or by unreasonable demands.¹⁰

In many respects detention damages resemble interest. This is especially so since the sum is awarded as damages for the detention of money and is generally computed by applying the normal commercial rate of interest during the period of detention to the market value of the land.¹¹ Unless evidence is introduced that the commercial rate of interest is less, the legal rate of six per cent is presumed.¹² In discussing the distinctions between interest and detention damages the judge in an early Pennsylvania case¹³ observed that

6. *Wolf v. Commonwealth*, 403 Pa. 499, 170 A.2d 557 (1961).

7. PA. STAT. ANN. tit. 26, § 43 (1958). The statute provides:

The amount of damages allowed in a report of viewfers for the taking, injury or destruction of property by the exercise of the right of eminent domain shall, as finally confirmed, bear interest at the rate of six per centum per annum from the date of the filing of the report.

In *Wolf v. Commonwealth*, *supra* note 6, at 506-07, 170 A.2d at 561 the court recognized that under prior decisions the Commonwealth had been immune from paying interest after the award. In *Wolf*, however, it was thought that the constitutional mandate of "just compensation" required that the person whose property had been taken be paid interest from the date of the award until payment. The statute would appear to make this observation *dictum*.

8. See *Waugh v. Commonwealth*, 394 Pa. 166 n.1, 146 A.2d 297 n.1 (1958).

9. *Moffat Appeal*, 400 Pa. 123, 161 A.2d 353 (1960). The case was remanded for a finding as to whether the owner had acted unreasonably or in bad faith in the negotiations. The court distinguished detention compensation in condemnation cases from interest as of right in actions of contract or tort. If the plaintiff was at fault in contributing to the delay his award should be reduced accordingly.

10. *Ibid.*

11. *Waugh v. Commonwealth*, 394 Pa. 166, 146 A.2d 297 (1958).

12. *Ibid. Accord*, *Lehigh Valley Trust Co. v. Turnpike Comm'n*, 401 Pa. 135, 165 A.2d 383 (1960). Although the parties had stipulated that the *prime* commercial rate of interest was 4%, the lower court acted properly in adjusting the rate to 6% since the condemnor had failed to introduce evidence of the *normal* commercial rate of interest. The court drew a distinction between prime commercial rate of interest which is charged to borrowers with exceptionally good credit and normal commercial rate which is charged to average or normal borrowers.

13. *Richards v. Citizens Natural Gas Co.*, 130 Pa. 37, 18 Atl. 600 (1889).

interest is recoverable as of right while detention damages are not authorized unless the circumstances of the case require them for full compensation. Interest is recoverable for the failure to pay a *liquidated* sum on the date it becomes due while in the case of detention damages the debt is *not liquidated* on the date of appropriation, when it is technically due.

It has been stated that the period of time for which detention damages can be recovered extends from the date of the taking to the date of the award. However, there may be some question as to when the taking actually occurs for purposes of computing detention damages. It may be held to occur upon the adoption of a condemnation resolution or ordinance by the body authorized to appropriate private property for public use,¹⁴ upon filing the plans as authorized by law,¹⁵ upon filing the bond to secure payment of the compensation,¹⁶ or not until actual entry on the land.¹⁷ In order to determine when the taking occurs in each situation it is necessary to examine both the statute which authorizes the taking and the case law which interprets it.

In preparing his case for hearing or trial the landowner who has had his land appropriated for public use is faced with the decision of how to present most effectively his claim for damages. It would seem advisable for the condemnee to refrain from introducing any evidence of the normal commercial rate of interest. Since the maximum rate of six per cent is presumed unless there is evidence to the contrary, this presumption operates to the benefit of the condemnee.

A more difficult problem arises with the question of whether or not the condemnee should testify as to the fair market value of the real estate. Although

14. Lakewood Memorial Gardens, Inc., 381 Pa. 46, 112 A.2d 135 (1955). In *Henry v. Allegheny County*, 403 Pa. 272, 169 A.2d 874 (1961) it was held that plaintiff property-owners' action for damages in eminent domain proceedings was not barred by the statute of limitations because the taking occurred in 1958 when the commissioners adopted a resolution providing for relocation of an existing road, rather than in 1925 and 1927 when the original construction of the road was authorized and completed.

15. In *Lakewood Memorial Gardens, Inc.*, *supra* note 14, at 53, 112 A.2d at 139, the court discusses *The State Highway Law, PA. STAT. ANN. tit. 36, § 670-208 (1961)*, which provides that taking occurs when the plans are approved by the Secretary and Governor and filed as a public record.

16. The court in *Lakewood Memorial Gardens, Inc.*, 381 Pa. 46, 57, 112 A.2d 135, 141 (1955), distinguished condemnation proceedings by private corporations with the power of eminent domain from condemnation by a public body for a public purpose. Although the taking by a public body occurs with the adoption of a resolution, it is necessary for the private corporation to file its bond in court before the property would be deemed "taken." The reason given for this difference was that the resolutions of a public body are of public record while the resolutions adopted by a private corporation are not of public record and do not give notice of the proposed action.

17. Where the Pennsylvania Turnpike Commission entered upon land which had not been specifically included in the condemnation resolution which had been adopted, the supreme court stated that the owner would be entitled to recover damages from the date of entry on the property rather than from the adoption of the resolution. *Rosenblatt v. Pennsylvania Turnpike Comm'n*, 398 Pa. 111, 132, 157 A.2d 182, 192 (1959).

ownership of the land qualifies him to testify,¹⁸ it may be to his disadvantage to do so when expert witnesses are available. A determination must be made of the anticipated impact of the owner's testimony. The factors which must be balanced are the desirable effects of permitting the owner to testify to any unique characteristics of the land which may enhance its value and the possible unfavorable effects his self-interest will give his testimony. As has already been observed, detention damages may be denied where the owner has failed to co-operate or has been unreasonable in his demands. If the valuation which he placed on the land is completely out of proportion with estimates by expert witnesses, it is possible that this could be used as evidence that he has been unreasonable in his demands and may operate to reduce or defeat his recovery of detention damages. In *Wolf v. Commonwealth*¹⁹ it was claimed that Wolf should be denied detention damages because the valuations of his real estate experts were approximately 400,000 dollars greater than the valuations of the Commonwealth's experts. The Commonwealth contended that the discrepancy in the valuations was evidence that Wolf's demands were unreasonable and excessive. The court observed that Wolf had not given any testimony as to his valuation of the land and concluded that there was no evidence of unreasonable demand on his part since he was not bound by the valuations of his experts. This case leaves open the question of whether the owner could be denied detention damages where the sole evidence of unreasonable demand on his part is *his* testimony as to the fair market value of the land. In *Springer v. Allegheny County*²⁰ the court held that it was not error for the trial judge to charge the jury that it could consider the discrepancy in valuations in deciding whether to allow detention damages. The court admitted that an owner "could not be found to have been exorbitant or unreasonable in his demands because of the valuations . . . by the expert witnesses he produced at trial."²¹ In this case, however, the owner had testified as to the fair market value of the land.

The *Springer* and *Wolf* cases indicate the risks to the owner's recovery of detention damages when he testifies as to value. They also indicate that where an owner does not testify he will not be denied detention damages because of the exorbitant or unreasonable fair-market-value testimony presented by his real estate experts. If the experts' excessive estimation at trial is not fatal to the owner's claim for detention damages, it is possible that their unreasonable demands on his behalf during negotiations will not be imputed to him either. Although the cited decisions do not deal specifically

18. *Westinghouse Air Brake Co. v. Pittsburgh*, 316 Pa. 372, 176 Atl. 13 (1934).

19. 403 Pa. 499, 170 A.2d 557 (1961).

20. 401 Pa. 557, 567-68, 165 A.2d 383, 388 (1960).

21. *Id.* at 569, 165 A.2d at 389.

with this point, there appears to be merit to this conclusion. There would appear to be considerable merit in the owner's decision to leave the negotiations and testimony as to fair market value in the hands of real estate appraisers. Another way to avoid the possibility of being denied detention damages because of unreasonable demands might be to have all prior negotiations conducted by the attorneys for the owner. The lack of personal involvement appears to be an enhancing factor in the owner's quest for detention damages.

When a public body possessed with the power of eminent domain appropriates private property for public use, there are many ways in which it can minimize the damages for which it will eventually be liable. One way to limit the recovery is to introduce evidence that the normal commercial rate of interest is less than the legal rate of six per cent.²² This evidence rebuts the presumption that the legal rate of interest is the normal, prevailing rate to be applied in computing detention damages.

Early partial payments might be employed to reduce or minimize liability for detention damages and interest. It has been suggested that the Commonwealth can protect itself from having to pay interest from the date of an award until final payment by paying "into court a substantial amount of the value of the property at the time of its taking as reflected by the opinions and valuations placed on such property by real estate experts."²³ Conceivably, it would be possible for condemning agencies to make an intelligently calculated anticipatory payment to the owner of the condemned property at the time of the taking. Payment of the fair market value ultimately is inevitable. The appraisal need not await trial since the factors to be appraised are always available for the condemnor's experts. It might also be pointed out that the reduction of the final award would reduce any interest payable on the award.

The condemnor in eminent domain proceedings may reduce, or even completely eliminate his liability for detention damages by showing that the delay in ascertaining the specific amount of the award was due in whole or in part to the bad faith, lack of co-operation, or unreasonable demands of the condemnee.²⁴ In *Moffat Appeal*²⁵ it was held that a property owner should not be denied detention damages because of his failure to convene a commission to assess his damages. However the court remanded for a finding as to whether

22. In *Waugh v. Commonwealth*, 394 Pa. 166, 146 A.2d 297 (1958) the court applied the legal rate of interest because no evidence was introduced as to the normal commercial rate of interest during the period of detention.

23. *Wolf v. Commonwealth*, 403 Pa. at 507 n.7, 170 A.2d at 562 n.7.

24. *Moffat Appeal*, 400 Pa. 123, 161 A.2d 353 (1960).

25. *Ibid.* In *Philadelphia Ball Club, Ltd. v. City of Philadelphia*, 192 Pa. 632, 650 (1899), the court refused a claim for detention damages because the delay in payment was due to plaintiff's "grossly excessive and unreasonable demands."

he had acted unreasonably or in bad faith in the negotiations for assessment of damages. The court stated that although his failure to convene a commission would not deprive the landowner of his right to detention damages, he could be precluded from recovery by his lack of co-operation. Since the owner of private property which has been condemned is prima facie entitled to detention damages, the burden of proof is on the condemnor to show why the circumstances may justify a reduction or complete denial of such damages.²⁶

Where the property owner remains in possession after the appropriation and continues to receive rents, issues, and profits, the recovery of detention damages may be limited accordingly. In *Patterson v. Buffalo, Rochester & Pittsburgh Ry.*²⁷ the court held that in determining detention damages the jury should consider any uses, such as rents, issues, and profits, which the property owner retains after appropriation. Such uses could reduce the award of detention damages without preventing them altogether. Although the property owner is using the land, he may be subject to restrictions in that he cannot make improvements, plan for future developments, or enter into leases.

Since in deciding whether the owner of condemned property is entitled to detention damages his co-operation in arriving at the amount of an award is so important, both parties should keep accurate records of negotiating conferences and correspondence. All factors which have probative force as to exorbitancy, unreasonableness, reluctance, or willingness to negotiate should be carefully documented. Such detailed records may be very material in determining whether or not the delay in payment was justified.

Detention damages can have a marked effect upon the final award. The condemnee may receive six per cent interest on the market value of his land computed over a significant period of time, unless the condemnor is able to introduce into evidence circumstances which justify a denial of detention damages. Attorneys involved in eminent domain proceedings should acquaint themselves fully with the manner of computing detention damages, the period of time over which they can be recovered, and the various circumstances which may operate to authorize or deny the award.

26. *Wolf v. Commonwealth*, 403 Pa. 499, 170 A.2d 557 (1961).

27. 268 Pa. 555, 112 Atl. 101 (1920).

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