

Date: 19980601

Docket: C.A. 141910

NOVA SCOTIA COURT OF APPEAL

Cite as: Silver v. Co-operators General Insurance Company, 1998 NSCA 101

Chipman, Hallett and Pugsley, JJ.A.

BETWEEN:

ROBERT and DEANNA SILVER)	Blair H. Mitchell
)	for the Appellants
)	
Appellants)	
)	Alain Begin
- and -)	for the Respondent
)	
)	Brian W. Stilwell
CO-OPERATORS GENERAL INSURANCE)	for the Intervenor
COMPANY)	
)	
Respondent)	Appeal Heard:
)	May 26, 1998
- and -)	
)	
BUSINESS DEVELOPMENT BANK OF)	Judgment Delivered:
CANADA)	
June 1 st , 1998)	
)	
)	
Intervenor)	
)	
)	
)	
)	
)	
)	

THE COURT: Leave to appeal refused per reasons for judgment of Hallett, J.A.; Chipman and Pugsley, JJ.A. concurring.

HALLETT, J.A.:

The appellants commenced action against the respondent, Co-operators General Insurance Company, under a policy of Owners Business Insurance (All Risks) which insured the business operations of Silver Spoon Desserts Enterprises Limited. Silver Spoon owned a real property on Granville Street in the City of Halifax where it operated a restaurant. The appellant Deanna Silver is the sole shareholder of Silver Spoon.

Both the Bank of Montreal and the Federal Business Development Bank (FBDB), now the Business Development Corporation (BDC)) held security interests on the real property and the personal property of "Silver Spoon". In January 1992 the Bank of Montreal postponed its charge over property and assets in favour of the FBDB. The Postponement Agreement was duly filed at the Registry of Deeds at Halifax.

FBDB foreclosed on the real property on May 5, 1994. The action was not defended. FBDB purchased the property at a Sheriff's Sale on June 16, 1994. The Bank of Montreal was not involved in the foreclosure and sale. About the same time FBDB acquired the Bank of Montreal's security interests in the chattels and equipment used in the restaurant operation.

FBDB advised the appellants, Robert and Deanna Silver, on July 7, 1994, of the proposed resale of the property on July 18, 1994.

The appellants were aware to whom the real property and assets were sold, and in fact continued to operate the Silver Spoon Restaurant under a lease arrangement with the new owner. This arrangement continued until July 1995, at which time the appellants were locked out of the premises by the landlord for arrears of rent of between \$21,000.00 and \$26,000.00.

The original statement of claim was drafted by the appellant, Robert Silver, who is not a lawyer. The pleading merely recites the existence of the policy and the fact that there was a foreclosure and a subsequent sale of the property to a third party. The statement of claim asserts that the sale was improper and, by implication, made a claim on the policy. In this decision I will refer to the statement of claim, as amended by Justice Goodfellow's order following a hearing before him to amend the statement of claim and to add the banks as parties.

The amended statement of claim issued by the appellants contains the following particulars of the contract of insurance with Co-operators:

- (a) The limits of the April 6, 1994 (001579117) policy were building, restaurant, (Leasehold Improvements), \$799,400 (A-1) replacement cost AB-11, contents \$350,000.00 (B-1) loss of income \$300,000.00 (AB-1), equipment (AB-11).
- (b) The business insured was the "Silver Spoon" operating at 1813 Granville Street, Halifax, Nova Scotia.

The appellants assert that on July 18, 1994, the contents of the Silver Spoon were wrongfully converted by the respondents, the Federal Business Development Bank and the Bank of Montreal. And as a result of the improper sale to the new owner the appellants physically lost their chattels and contents.

The amended statement of claim sets out a whole series of wrongdoings by FBDB and the Bank of Montreal in realizing on their security.

The amended statement of claim asserts that the appellants are holders of a note issued for advances to Silver Spoon in the amount of \$275,000.00 with interest at 11.95%.

The amended statement of claim asserts that the appellants filed a proof of loss under their policy with the respondent Co-operators on February 13, 1996, claiming \$650,000.00 plus interest under the policy for the wrongful conversion by the banks of the assets of Silver Spoon. The appellants claim a total loss of \$1,035,000.00.

The amended statement of claim states that on March 19th, 1996, the respondent Co-operators rejected the proof of loss stating:

The risk does not include loss of wrongful conversion of the business on July 18th, 1994. The policy only covers all risk of direct physical loss to the property insured.

Co-operators and Marjorie Freisen applied to the Court to strike the statement of claim pursuant to **Rule** 14.25 on the grounds of issue estoppel. The appellants applied to the Court for an order amending the original statement of claim and adding the two respondent banks as parties.

Justice Goodfellow heard the applications on December 9th, 1996, and rendered his decision on January 13th, 1997. He concluded that the appellants were estopped from pursuing any further claims in relation to the real property as these matters had already been adjudicated upon in a foreclosure action. He stated that the foreclosure action did not finalize nor address a possible claim in relation to the Debenture securing the chattels and equipment used in Silver Spoon's business upon which, as Justice Goodfellow stated, the Bank of Montreal apparently held first charge as security for a loan. He concluded that any further action by the appellants would be limited as to whether or not there had been a wrongful conversion of chattels as the matter of real property had been finally disposed of by the courts. In allowing the appellants to amend the originating notice and statement of claim. Justice Goodfellow stated:

...The determination of liability on the part of either or both FBDB or the Bank of Montreal would appear to be a prerequisite to the claim against Co-operators General Insurance Company, and it makes sense to have that issue joined in one action, even though for practical purposes, they might be tried separately. The amendments in relation to FBDB and the Bank of Montreal are limited to any alleged claims as relates to the security, acquisition and disposal of the chattels.

Justice Goodfellow concluded: (i) that all allegations and claims as it relates to the real property of Silver Spoon be struck; (ii) that the claim against Marjorie Freisen be struck. He dismissed the respondent's application for security for costs. He allowed the appellants to amend the statement of claim to add the FBDB and the Bank of Montreal as co-defendants.

On September 22nd, 1997, Justice Goodfellow signed an order giving effect to his decision. Those parts of his order that are relevant to this appeal are as follows:

IT IS FURTHER ORDERED that the plaintiffs be and hereby are granted leave to amend the originating notice and statement of claim herein to add the Business Development Corporation, formerly Federal Business Development Bank and the Bank of Montreal, a chartered bank, as a co-defendants in this proceeding and to claim relief against them insofar as such claims relate to the enforcement and security and disposition of the chattels, not including the real property, of the Silver Spoon Restaurant in Halifax, Nova Scotia, including those allegations claimed in the amended originating notice (action) and statement of claim set out in the form attached hereto as Schedule "A".

Attached to the Order was the amended statement of claim as approved by Justice Goodfellow. Paragraph 14 of the amended statement of claim seeks the following remedies:

- (1) an order declaring:
 - (a) that any purported realization of a security interest in the chattels comprising the undertaking of the Silver Spoon restaurant by the defendant banks or either of them,

including the appointment of a receiver and manager by the Bank of Montreal was unlawful;

(b) that any conveyance of the chattels and other assets comprising the undertaking of the Silver Spoon restaurant by the defendant banks or either of them was unlawful;

- (2) special damages, particulars of which will be provided;
- (3) general damages;
- (4) exemplary damages
- (5) interest at the rate of 12% per annum on such damages from the date received.
- (6) their costs and such further and other relief as this Honourable Court may see fit and just to grant.

On October 2nd, 1997, Justice Goodfellow's decision was appealed; the notice of appeal states that Justice Goodfellow erred in:

1. Deciding that the Plaintiffs are estopped from claiming against the intended defendant, Business Development Corporation, formerly known as the Federal Business Development Bank, for improprieties in the Federal Business Development Bank's foreclosure and sale of the interest of the Silver Spoon Desserts Enterprises Limited in real property known as 1813 Granville Street, Halifax, Nova Scotia; and
2. Deciding that the Plaintiffs are estopped from claiming against the defendant Cooperators General Insurance Company for insured losses by conversion through the foreclosure and sale of the interest of Silver Spoon Desserts Enterprises Limited in real property known as 1813 Granville Street, Halifax, Nova Scotia;
3. In any event, deciding that the Plaintiffs are estopped

from claiming against the Defendant, Co-operators, and against the intended Defendants, Business Development Corporation and the Bank of Montreal, for damages for the loss of or damage to the undertaking or business of the restaurant arising from improprieties in the sale of the chattels associated with the restaurant operation;

Grounds 1 and 2 have been abandoned.

There is nothing in the Order issued by Justice Goodfellow that estops the appellants from claiming against the respondent Banks for damages for loss of the undertaking or business of the restaurant arising from alleged improprieties in the sale of the chattels associated with the restaurant. Nor does the amended statement of claim, as approved by Justice Goodfellow, prevent the appellants from making such a claim for damages.

On appeal, the appellants seek an order from this Court that they be at liberty to issue an originating notice and statement of claim “for consequential losses on the loss of or deprivation of use of chattels involving the appellants’ restaurant operation including damages to their business or undertaking by reason of the respondent’s wrongful interference with the plaintiff’s chattels.”

In **The Law of Damages**, 1st edition, S. Waddams, at para. 203 states:

Where the defendant’s wrong causes a profit-making chattel to be withheld from the owner’s use for a period of time, the latter is entitled to be compensated for lost profits.

In Waddams **Law of Damages**, looseleaf edition, formerly 2nd edition, Release No. 6, December 1997, p. 5-43, paragraph 5.940 the author states:

Damage to a business interest is sometimes estimated as a capital sum. In principle, as has been argued in relation to damage to property, a diminution in capital value of an income producing asset is simply an alternative measure of the potential loss of income. Thus, care is needed to avoid a double compensation. Full compensation for the diminution in capital value of the plaintiff's business interest is equivalent to full compensation for the estimated loss of profit. The plaintiff therefore cannot have both. Choice of method is a matter of convenience.

The damages for consequential loss on the deprivation of use of Silver Spoon's chattels would be measured by the loss of profits suffered as a result of a wrongful interference with those chattels. Therefore, the words of Justice Goodfellow's order and those of Paragraph 14 of the amended statement of claim attached to that order, allow the appellants to claim such a loss if the realization by the respondents on the security of Silver Spoon's chattels was unlawful. Accordingly, this appeal was unnecessary. Therefore, leave to appeal is refused. I would order the appellants to pay to the respondent Co-operators, its costs in the amount of \$1,000.00 inclusive of disbursements and to the intervenor FBDB costs in the amount of \$1,000.00 inclusive of disbursements; the costs ought to be payable forthwith.

Hallett, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.

