NOVA SCOTIA COURT OF APPEAL
Citation: Sobeys Group Inc. v. Norsyd Investments Inc.., 2003 NSCA 87

Date: 20030910
Docket: CA 196428
Registry: Halifax

Between:

Sobeys Group Inc.

Appellant

v.

Goodman Rosen Inc., a body corporate, in its capacity as Court-appointed Receiver for Norsyd Investments Inc., Shoppers Realty Inc., a body corporate, Shoppers Drug Mart Inc., a body corporate, and M.C. LeBlanc Drugs Limited, a body corporate

Respondents

Judges: Glube, C.J.N.S.; Saunders and Oland, JJ.A.

Appeal Heard: June 2, 2003, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Oland, J.A.; Glube, C.J.N.S. and Saunders, J.A. concurring.

Counsel: Robert G. Grant, Q.C. and Daniela Bassan, for the appellant
Michael J. Messenger, for the respondent Goodman Rosen Inc.
Peter M.S. Bryson, Q.C. and Kevin Gibson, for the respondents Shoppers Realty Inc., Shoppers Drug Mart Inc. & M.C. LeBlanc Drugs Limited

Reasons for judgment:

[1] In late 2002, the appellant Sobeys Group Inc. ("Sobeys") opened a pharmacy within the premises it leased in a mall. Justice Gerald R.P. Moir of the Supreme Court of Nova Scotia sitting in Chambers granted a permanent injunction against Sobeys' operation of a pharmacy in those premises. This is an appeal by Sobeys of his order dated April 1, 2003.

[2] Sobeys has operated a food store in the North Sydney Mall since it entered into a 25 year lease in 1976 when that mall was first being developed. That lease as amended (the "Sobeys lease") expires December 31, 2005, subject to renewal options. Its article 4.03 reads:

> **4.03**. Save as provided herein, the Lessee shall use the Leased Premises only for the purposes of the business of the retail sale of a complete line of food products, as well as general retail merchandising, as carried on by the rest of the majority of its stores. (Emphasis added)

The Sobeys lease also contains a covenant by the landlord not to permit any part of the mall to be used for the purpose of carrying on the business of the sale of food in any form, except as expressly permitted, and makes that non-competition provision a fundamental term, breach of which justifies termination by the tenant.

[3] Less than a year after the Sobeys lease was signed, a predecessor of Shoppers Realty Inc. entered into a 20 year lease for premises in the same mall to be used as a pharmacy. A predecessor of Shoppers Drug Mart Inc. signed as guarantor. The lease as amended with Shoppers Realty Inc. will expire in 2010. M.C. LeBlanc Drugs Limited operates the pharmacy under a license from Shoppers Drug Mart Inc.

[4] Sobeys began constructing a pharmacy within its leased premises in October 2002. Despite demands to cease by the respondent Goodman Rosen Inc., the court-appointed receiver of the present landlord of the mall, it continued construction. Sobeys opened its pharmacy for business in November 2002.

[5] In his decision dated March 18, 2003 granting the receiver's application for a permanent injunction, the Chambers judge identified two issues pertaining to the meaning of article 4.03 of the Sobeys lease as critical to the application, namely,

> 1. Is operating a pharmacy in a supermarket within "general retail merchandising"?
> 2. If so, is it permitted by "as carried on by the rest of the majority of its stores"?

> After reviewing the Sobeys lease and the evidence before him by way of affidavit and cross-examination, and after hearing the submissions of counsel, the Chambers judge concluded that the Sobeys lease allowed the retail sale of goods but not the retail sale of services. He found that the professional services offered by a pharmacy were outside the meaning of "general retail merchandising" in article 4.03. He also determined that even if the operation of a pharmacy was within its meaning, pharmacies are not yet found in the majority of the Sobeys stores and consequently would be precluded on that basis. His decision is reported at (2003), 213 N.S.R. (2d) 273 (SC).

[6] Sobeys appeals, claiming that the Chambers judge erred by failing to conclude that the operation of a pharmacy is included within the phrase "general retail merchandising" as that phrase is customarily used. It also submits that the Chambers judge erred by misinterpreting the Sobeys lease in concluding that a pharmacy is not included within that phrase as used in their leasing document; by concluding that the appellant did not have pharmacies "in the rest of the majority of" its stores; and by applying incorrect principles in granting a permanent injunction restraining the appellant from operating a pharmacy in its store for the remaining term of the Sobeys lease.

[7] I begin by observing that the appellant's submissions on all its grounds of appeal are founded, to varying degrees, on its argument that the Chambers judge erred in principle by misconstruing the intention of article 4.03. In granting the permanent injunction, he considered that provision to be a restrictive or negative covenant. The appellant takes the position that it is not, either in form or in substance. It maintains that article 4.03 set a minimum standard for its store in the mall and that its purpose is, in the appellant's words, "to compel Sobeys to operate

a top-of-the-line supermarket" which would require "the sale of cutting-edge merchandise (e.g. prescription drugs) found at Sobeys' other supermarkets".

[8] For convenience, I set out again article 4.03 of the Sobeys lease:

> **4.03**. Save as provided herein, the Lessee shall use the Leased Premises only for the purposes of the business of the retail sale of a complete line of food products, as well as general retail merchandising, as carried on by the rest of the majority of its stores.

[9] I am not persuaded this article should be read as a positive obligation rather than a negative covenant. The Sobeys lease was signed over 25 years ago. No evidence was provided to suggest that its parties intended article 4.03 to be read as the appellant urges. No authority was put forward in support of that interpretation. In my view, the plain and ordinary meaning of the opening words of article 4.03, which state that Sobeys "shall use the Leased Premises only" for certain purposes, characterizes that provision as restrictive in nature. The coupling of the mandatory "shall" with the limiting "only" answers the argument, largely based on its concluding words, that article 4.03 obliges the appellant to meet a particular standard, failing which it may be liable to the landlord of the mall. The Chambers judge did not err in considering article 4.03 as a negative covenant.

[10] I will now address each of the grounds of appeal. In its first ground, the appellant submits that the Chambers judge erred in law in concluding that a pharmacy is outside of "general retail merchandising" as used in article 4.03 of its lease for the following reasons:

1. He misconstrued the contractual intent of that article;

2. He failed to construe the intent of that provision in a manner consistent with the remaining provisions of the lease;

3. He misapplied the principle that a lease free of ambiguity is construed according to the plain and ordinary meaning of its terms;

4. He misinterpreted **Eli Lilly & Co. v. Novopharm Ltd.,** [1998] 2 S.C.R. 129; and

5. In attempting to draw distinctions among various types of evidence, he discounted certain uncontroverted evidence and attributed significance to matters outside the Sobeys lease.

[11] I have already considered and rejected the first of these reasons. As to the second, after referring to the evidence of John Torella, a consultant in the Canadian and American retail industry and to the Statistics Canada publication "Standard Industrial Classification 1980," the Chambers judge addressed the recital in the Sobeys lease which refers to the "merchandising unity" of the mall and article 3.11 requiring payment of percentage rent on "all sales of merchandise and services." At ¶ 22 of his decision, the Chambers judge stated:

> . . . it seems to me that general retail merchandising usually means the business of selling merchandise in great variety, as in a department store or a general store. The business contemplated by the lease was the retail selling of a complete line of food products together with merchandise one might expect in a department store or a general store.

and continued in the following paragraph:

> Merchandise (the noun) is distinct from services and merchandising is distinct from selling services. I believe this distinction is preserved in Mr. Torella's opinion of the meaning of "general retail merchandising". It is also apparent in the Statistics Canada publication. For example, 6411 concerning Department Stores refers only to kinds of goods when identifying the sorts of merchandise included in a department store: "wearing apparel, furniture, appliances and home furnishings ... paint, hardware, toiletries, cosmetics, photographic equipment, jewellery, dogs, sporting goods ...". Clearly, the phrase in question includes the retail sale of a very wide range of goods but does not include the sale of services except as incident to sale of goods. This clarity is not disturbed by the phrase in the recitals, "merchandising unity of the Shopping Centre", even though some services might have been offered there. The phrase makes complete sense if merchandising is the primary business at the Shopping Centre. Nor does article 3.11 detract from this clarity. That was the article providing for percentage rent based on "all sales of merchandise and services". Indeed, the need to deal separately with sales of merchandise and sales of services tends to show that the later is not included in merchandising. Article 3.11 only makes it clear that

> percentage rent would be payable if the landlord allowed Sobeys to sell services at the leased premises. Pharmaceuticals are among the kinds of goods one finds at a department store. If operating a pharmacy is retail sale of goods then the lease clearly allows for it, and if operating a pharmacy is sale of services then the lease clearly disallows it.

[12] I do not agree that the Chambers judge failed to construe the intent of article 4.03 in a manner consistent with the identified recital and percentage lease provision of the Sobeys lease. The appellant argues that his interpretation does not accord with what it says was the intent of that article. But its submission that its purpose was to require the appellant to operate a "top-of-the-line supermarket" has not been accepted. Moreover, the phrase "merchandising unity" has not been interpreted to mean, as the appellant suggests, the provision of all services including operation of a pharmacy. Rather, it refers to "something in the nature of a one-stop shopping entity . . . where a customer might expect to find one outlet catering to each of his requirements: see **Spike v. Rocca Group Ltd.** (1979), 107 D.L.R. (3d) 62 (P.E.I.S.C.) at p. 66. This view that merchandising unity is not directed to the nature of the individual businesses, but the nature of their co-existence within the mall, is also supported by the non-competition clause contained in the Sobeys lease.

[13] I will deal with the third and fourth reasons on which the appellant bases its ground of appeal claiming error in the interpretation of article 4.03 in the Sobeys lease together. In **Eli Lilly**, **supra**, Iacobucci J. stated:

> 54 ... The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
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> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in Lampson v. City of Quebec (1920), 54 D.L.R. 344 (P.C.), at p. 350:
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> > . . . the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself .... [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention

> was wholly different from that which the language of our deed expresses. . . ."

[14] The appellant says that the Chambers judge misapplied the principle that a contract free of ambiguity is construed according to the plain and ordinary meaning of its terms. It argues that the definitions of "general", "retail", and "merchandising" in the **Canadian Oxford Paperback Dictionary** (2000) could encompass the retail sale of prescription drugs. However, this submission does not assist the appellant to any meaningful degree. As the respondents have pointed out, while the Chambers judge did not refer to dictionary meanings in his decision, the definitions of "merchandise" contained in the **Merriam-Webster's Collegiate Dictionary**, 10th Edition, **The American Heritage Dictionary of the English Language**, 1969, **The New Shorter Oxford English Dictionary**, 1993 and **The Canadian Law Dictionary**, 1980 all place emphasis on goods, commodities and wares without any mention of services and that of "merchandising" encompasses buying and selling and promotion for sale. The dictionary meanings presented by the appellant and by the respondents could support the Chambers judge's determination that merchandise is distinct from services and merchandising distinct from selling services.

[15] The appellant then argues that the Chambers judge misinterpreted **Eli Lilly**, **supra**, by failing to appreciate the surrounding circumstances in this case which support the inclusion of a pharmacy within the meaning of the phrase "general retail merchandising". It points to the evidence of John Torella and the evidence that department stores at the time of the Sobeys lease included pharmacies. It also refers to the Statistics Canada Industrial Classification 1984 Retail Trade Industries, the 2001 Annual Report for Shoppers Drug Mart Corporation, and the definition of a pharmacy in the **Pharmacy Act**, S.N.S. 2001, c. 36. In his decision, the Chambers judge made express reference to most of this extrinsic evidence. While the appellant stresses that Mr. Torella's evidence on the meaning of "general retail merchandising", as used in the retail industry in 1979, was uncontroverted, Sharen Cain, Vice President, Retail Planning for Shoppers Drug Mart Inc. gave evidence that she would not characterize the sale of prescription drugs as "general retail merchandise", and added that the sale of general retail merchandise does not require supervision of a professional employee licenced under the **Pharmacy Act**.

[16] I cannot identify any failure by the Chambers judge to consider the surrounding circumstances in his interpretation of the Sobeys lease or any error in his analysis of the evidence before him.

[17] In its final submission under this ground alleging error of law in contractual interpretation, the appellant says that the Chambers judge discounted certain uncontroverted evidence, namely the Torella opinion, and gave unwarranted significance to matters wholly outside the Sobeys lease such as the common-law duties of pharmacists. As indicated above, the Torella opinion was not uncontroverted. Assuming, without deciding, that the Chambers judge ought not to have considered the common-law duties and standard of care of pharmacists to which he referred in ¶ 29 of his decision, this factor does not appear to have been determinative. He referred as well to the legislation governing pharmacists before stating that dispensing and compounding prescription drugs are regulated services, not regulated goods, and that the prominence of professional services at a pharmacy takes it out of "general retail merchandising" in article 4.03, the uses clause.

[18] Having considered each of the reasons given in support of the appellant's argument on this ground of appeal, I am not persuaded that the Chambers judge erred in law in interpreting article 4.03 of the Sobeys lease.

[19] Nor am I persuaded that the Chambers judge erred in his application of the principles of contractual interpretation in reaching the conclusion that "general retail merchandising" does not include the provision of services. Whether operating a pharmacy entails primarily the sale of goods or of services is mainly a question of fact. Factual findings are reviewable on appeal only where the trial judge made a "palpable and overriding error": **Housen v. Nikolaisen**, 2002 S.C.C. 33. There was evidence before the Chambers judge in support of his determination that the operation of a pharmacy amounted to the sale of professional services. Accordingly, his finding in that regard should not be disturbed on appeal.

[20] Nor can I agree that the Chambers judge erred in law in concluding that pharmacies were not found "in the rest of the majority" of Sobeys' stores, as that phrase is meant in article 4.03. After noting that the phrase does not make sense and the only reasonable interpretation is that the parties were referring to the majority of the rest of those stores, he determined that this phrase was intended to include all the food stores across Canada owned by the appellant and operating

under the Sobeys name. This determination was not challenged on appeal. Rather, the appellant submits that the Chambers judge erred in principle by failing to construe that phrase in accordance with the contractual intention and purpose of article 4.03. I have already rejected its argument that its intention was to set a standard for the expansion of the appellant's business in the mall in keeping with changes at its other supermarket locations. Moreover, the evidence was that at present only 42% of the Sobeys stores contain pharmacies. The suggestion that the Chambers judge erred by not taking into account the stores for which pharmacies are planned by the end of 2003 is not sustainable, particularly where the appellant acknowledged that delays in construction or renovation work are always possible. There was no error in the Chambers judge's conclusion that the pre-condition to the addition of a new use under article 4.03 has not been met.

[21] Finally, I see no merit in the appellant's submission that the Chambers judge erred in law by treating article 4.03 as a negative covenant and thereby applied incorrect principles in granting a permanent injunction, or by failing to refuse the injunction on equitable grounds. The interpretation of the provision as a positive obligation as urged by the appellant has been rejected.

[22] In conclusion, I see no reason either in law or in equity to interfere with the comprehensive decision of the Chambers judge. The appeal is dismissed. The order of the Chambers judge provided that the appellant was to pay the respondents their costs on the application and that, failing agreement, the court would determine costs. In dismissing this appeal, I would order costs to the respondents as a group, of 40% of costs as agreed by the parties and confirmed by order, or as determined by the Chambers judge.

Oland, J.A.

Concurred in:

Glube, C.J.N.S.

Saunders, J.A.