Date: 19971219 Docket: C.A. 140188

NOVA SCOTIA COURT OF APPEAL

Cite as: Ells v. Nova Scotia Farm Loan Board, 1997 NSCA 189

Pugsley, Hallett and Flinn, JJ.A.

BETWEEN:

DENNIS ELLS, RUFUS ELLS and ELLS FARMS LIMITED, a body corporate Appellants - and - THE NOVA SCOTIA FARM LOAN BOARD, DAVID ARENBURG and ROBERT ADAMS Respondents	R. Peter Muttart, Q.C. for the Appellants Alexander M. Cameron for the Respondent Appeal Heard: December 3, 1997 Judgment Delivered: December 19, 1997

THE COURT: Appeal dismissed with costs per reasons for judgment of Flinn, J.A.; Hallett and Pugsley, JJ.A., concurring.

FLINN, J.A.:

This appeal arises out of a dispute between the appellants (Ells) and the respondent, the Nova Scotia Farm Loan Board (Board) with respect to the occupancy, by Ells, of farm lands (the farm property) owned by the Board.

Justice Moir of the Supreme Court of Nova Scotia, in Chambers, vacated an *ex parte* interim injunction which Ells had obtained, and which had effectively prevented the Board from completing a transaction with respect to the farm property. Justice Moir also ordered that possession of the farm property be delivered up to the Board.

Ells appeals Justice Moir's decision and order.

The farm property had been owned by members of the Ells family for many years. In 1994 the Board acquired full title to the farm property following the bankruptcy of Ells Brothers Limited. Ells became a tenant of the Board, with respect to the farm property, in August 1994. The lease agreement expired on February 28, 1996. There were negotiations between the parties, in the early part of 1996, with respect to a possible

acquisition of the farm property by Ells. There were problems with these negotiations because Ells was in arrears of rent. The Board was anxious to obtain possession of the farm property and tender it for sale.

In July 1996 the Board commenced proceedings, in the Supreme Court of Nova Scotia, in Halifax, under the ***Overholding Tenants Act***, R.S.N.S. 1989, c. 329, to obtain an order for possession of the farm property. The Board agreed to withdraw its application in exchange for an undertaking, signed by Ells, in which Ells promised to pay up the rental arrears, to vacate part of the farm property (the residence and 12 acres) by September 30, 1996; and to vacate the balance of the farm property by November 15, 1996.

The letter of undertaking provides as follows:

> 1. Ells Farms Ltd. acknowledges that it owes the board 1995 rent or lease fees of $11,500.
>
> 2. Ells Farms Ltd. acknowledges that the 1996 rent or lease fees of $15,000 are now due.
>
> 3. Ells Farms Ltd. and I, by separate arrangements, will secure payment of these sums of the board from the expected potato cheques from Bolands Ltd.

> 4. Ells Farms Ltd. and I will vacate the house, which I now occupy, and surrounding 12 acres under lease arrangements with the Board by September 30, 1996 to allow the Board to proceed to tender sale as of that date. Reasonable co-operation will be extended for viewing, etc.
>
> 5. Ells Farms Ltd. and I will vacate the balance of the farm (and/or buildings) under Lease arrangements with the Board at the end of the 1996 crop year and in any event not later than November 15, 1996 to allow the Board to proceed to tender sale as of that date.
>
> 6. I undertake my best efforts in co-operation with the Board and its solicitors and agents to make speedy payment of the $11,500 and $15,000 sums.

The Board's position is that permitting Ells to remain in possession of the farm until November 15, 1996 was designed only to give Ells an opportunity to remove his crops before any purchaser of the land could have taken possession.

Ells' position is that the letter of undertaking evidenced a contract between Ells and the Board whereby the residence and 12 acres would be sold separate and apart from the rest of the farm; and that the rest of the farm would not be offered for sale until November 15, 1996.

The Board advertised for tenders on the farm property, including

the residence, in September of 1996. On October 8, 1996 the tenders were opened and the Board determined to accept a bid of $259,075 for all of the farm property. Ells had bid substantially less than the successful bid; however, his bid was for only a portion of the farm property.

Also, on October 8, 1996, Ells commenced an action against the Board. In that action Ells claimed,

> a) an order permanently restraining the defendants from interfering with the property of the plaintiff (or occupied by the plaintiff as husbandman) over which he has had control and the anticipated right to participate in tendering for purchase;
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> b) damages for anticipatory breach of contract;
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> c) exemplary damages;
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> d) punitive damages;
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> e) damages in tort for fraudulent breach of fiduciary duty, collusion to breach contract and intentional causing of hardship and emotional and economic distress to the plaintiff, including loss of income, loss of business, loss of future business, loss of reputation in the community, trespass and nuisance;
>
> f) costs.

On the same day Ells applied to Justice Hall, in the Supreme Court at Kentville, and was granted, *ex parte*, an interim injunction by which the Board was:

> . . . restrained from concluding any tender respecting the property at Sheffield Mills, Kings County, NS farmed by or resided in by Rufus Ells or Ells Farms Limited or otherwise interfering in any manner with the same until further order of the Court.

The order also provided for a further hearing in November 1996 "for determination as to whether [the] restraint shall be continued".

Because of scheduling delays and other delays, the matter was not heard until the hearing of other proceedings which the Board had commenced.

On February 6, 1997 the Board made application to the Supreme Court of Nova Scotia in Halifax for:

(1) an order vacating the interim injunction granted by Justice Hall on October 8th, 1996; and

(2) an order evicting Ells from the farm property pursuant to the provisions of the ***Overholding Tenants Act***.

Both matters were dealt with at a hearing before Justice Moir of the Supreme Court of Nova Scotia in April and May, 1997. Justice Moir

ordered that the *ex parte* interim injunction, which had been granted by Justice Hall on October 8th, 1996, be vacated. He decided that proceedings against the Board were subject to the provisions of the **Proceedings Against the Crown Act**, R.S., c. 360, and the provisions of that **Act** prevent an injunction being issued against the Crown. He also ordered that possession of the farm property be delivered up to the Board.

I will now deal with the two main issues which are raised in this appeal:

1. whether Justice Moir erred in vacating the *ex parte* interim injunction which had been granted by Justice Hall on October 8th, 1996; and
2. whether Justice Moir erred in ordering that possession of the farm property be delivered up to the Board.

The *Ex Parte* Interim Injunction

Section 16(2) of the **Proceedings Against the Crown Act** provides that the court shall not, as against the Crown, grant an injunction:

> **16** (2) Where, in proceedings against the Crown, any

> relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but may, in lieu thereof, make an order declaratory of the rights of the parties.

Counsel for Ells refers to s. 3(2)(d) of the **Proceedings Against the Crown Act** which provides as follows:

> 3 (2) Except as otherwise provided in this Act, nothing in this Act
>
> .....
>
> (d) subjects the Crown to proceedings under this Act in respect of a cause of action that is enforceable against a corporation or other agency owned or controlled by the Crown.

Counsel for Ells submits that since the Board is a corporation owned or controlled by the Crown; and since Ells' cause of action is enforceable against the Board, there is nothing which subjects the Crown to proceedings under the **Proceedings Against the Crown Act**. The **Act**, he submits, has no application to this case.

Section 3(2)(d) of the **Proceedings Against the Crown Act** is,

simply, a recognition that corporations or other agencies, owned or controlled by the Crown, generally speaking, do not have the rights, privileges and immunities of the Crown. However, if it is determined that a particular corporation or other agency, owned or controlled by the Crown, is entitled to the rights, privileges and immunities of the Crown, then such a corporation or other agency would not be one within the meaning of **s. 3(2)(d)** of the **Act**. Such a determination is only made after an examination of:

1. the statutory provisions, or other provisions, from which the corporation or other agency; derives its existence; and
2. the degree of control which is exercised or retained by the Crown with respect to that corporation or agency.

In **Braeside Farms Ltd. et al. v. Nova Scotia Farm Loan Board et al.** (1973), 5 N.S.R. (2d) 687 (S.C.T.D.), Justice Dubinsky decided that the Board was an administrative arm of Her Majesty the Queen in Right of the Province of Nova Scotia, and, as such, is entitled to the privileges, immunities

and prerogatives of the Crown. He decided, therefore, that proceedings against the Board must comply with the provisions of the **Proceedings Against the Crown Act**. In coming to his conclusion, Justice Dubinsky considered the provisions of the **Agriculture and Rural Credit Act**, R.S., c. 7 from which the Board derives its existence. He also considered the degree of control exercised or retained by the Crown with respect to the Board. Justice Dubinsky said at p. 700:

> ...having examined the legislation pertinent to this application in light of the several cases cited above, I am firmly convinced that the Nova Scotia Farm Loan Board is an administrative arm of Her Majesty the Queen in the Right of the Province of Nova Scotia. Therefore, before commencing this action, the plaintiffs must need have complied with Section 17 [now s. 18] of the *Proceedings Against the Crown Act*. ...

Justice Dubinsky's decision was affirmed, by this Court, without detailed reasons (see (1973), 5 N.S.R. (2d) 685).

Since it has been determined, by this Court, that the Board is entitled to the privileges, immunities and prerogatives of the Crown (because it is an administrative arm of Her Majesty the Queen in the Right of the Province of Nova Scotia), the Board is not a corporation within the meaning

of **s. 3(2)(d)** of the **Proceedings Against the Crown Act**. The Board has the same privileges, immunities and prerogatives which the Crown has under the **Proceedings Against the Crown Act**.

In my opinion, therefore, Justice Moir was correct to have vacated the *ex parte* interim injunction which was issued by Justice Hall on October 8th, 1996, against the respondents. No injunction can issue against the Board by virtue of the provisions of s. 16(2) of the **Proceedings Against the Crown Act**; which prevents an injunction being issued against the Crown. I note here that, presumably, it was not brought to Justice Hall's attention, on the *ex parte* application, that the injunction was being sought against a body corporate entitled to the privileges, immunities and prerogatives of the Crown.

With respect to the individual respondents, who were also subject to the *ex parte* interim injunction, they were not acting in any capacity other than as employees of the Board. They had no personal interest in the subject-matter.

Order for Possession

Counsel for Ells argues that Justice Moir erred in ordering that possession of the farm property be delivered up to the Board. Ells' counsel submits that Ells had a contract with the Board which provided that a portion of the farm property (the residence and 12 acres) would be sold separate and apart from the rest of the farm. The Board breached that agreement, he submits, and until such time as that breach is rectified, Ells can remain in possession of the farm property.

I reject that submission.

Firstly, with respect to Justice Moir's order, made under the **Overholding Tenants Act,** Ells has not complied with the appeal provisions of the **Act.** No bond has been filed, as required by S. 11 (1), the time constraints imposed by S. 14 and S. 15 were not complied with, and S.18 requires that the appeal be heard **de novo.**

Secondly, and quite apart from the failure of Ells to comply with the appeal provisions of the **Act**, in my opinion Justice Moir was correct in his

finding that the Board was entitled to be put into immediate possession of the farm lands. Even if the submission of Ells' counsel is correct - that there was a contract between Ells and the Board, whereby the Board agreed to sell the properties separately - that agreement did not create any legal or equitable interest in the farm property, or any right of possession after November, 1996.

Whether Ells has a cause of action, in damages, against the Board, and its employees, is not before us. However, it appears that Ells may not have given two months prior notice, of its intended action, as that is required under s. 18 of the **Proceedings Against the Crown Act**.

Finally, in my opinion, Justice Moir made no error in law in rejecting the contention of Ells' counsel, that this matter should have been heard in Kings County rather than in Halifax County by virtue of the provisions of the **Land Actions Venue Act**, R. S. c. 247.

I would, therefore, dismiss this appeal. Further, I would order that Ells pay to the Board its costs of this appeal, which I would fix at $1000.00 plus disbursements.

Flinn, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.

C.A. No. 140188

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DENNIS ELLS, RUFUS ELLS and ELLS FARMS LIMITED, a body corporate	)	
	)	
Appellants	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	
THE NOVA SCOTIA FARM LOAN BOARD, DAVID ARENBURG and ROBERT ADAMS	)	FLINN, J.A.
	)	
	)	
Respondents	)	
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