NOVA SCOTIA COURT OF APPEAL

Citation: *Sobeys Group Inc. v. Goodman Rosen Inc.*, 2003 NSCA 47

Date: 20030403
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

Respondent

Judges:	Justice Gerald B. Freeman
Application Heard:	April 3, 2003, in Halifax, Nova Scotia (In Chambers)
Written Decision:	April 25, 2003 (Orally rendered April 3, 2003)
Counsel:	Robert Grant, Q.C., for the appellant Peter Bryson, Q.C., for the respondent, Shoppers Michael Messenger, for the respondent, Goodman Rosen

Decision: (Orally)

[1] The appellant Sobey's Group Inc. (Sobey's) has appealed from an order of the Supreme Court of Nova Scotia granting its landlord's receiver a permanent injunction restraining it from operating a pharmacy in the North Sydney Mall for the remainder of its lease. The 25-year lease for 22,000 square feet, later expanded, was entered into between Sobey's and the now defunct mall developer, the Rocca Group Limited, April 26, 1979. It expires December 31, 2005, subject to renewal options.

[2] The appeal has been set for hearing on June 2, 2003, and the appellant has applied for a stay of the order until that date. The stay is opposed by the intervenors in the injunction application, Shoppers Realty Inc. and associated companies. The appellant Goodman Rosen Inc., the landlord's receiver, takes no position on the stay application but does not disagree with Shoppers.

[3] Sobey's began constructing a pharmacy in its food store premises in October of 2002, after acquiring the assets of the Owl Drug Store in North Sydney and hiring the owner for its proposed operation. Shoppers and the landlord's receiver demanded that Sobey's discontinue construction. Construction continued. An injunction application brought by all respondents was heard November 1, 2002. The Shoppers interlocutory injunction application was dismissed. The landlord's permanent injunction application was adjourned to February 17, 2003 and the decision granting the injunction was dated March 18, 2003. The pharmacy opened for business November 18, 2002. Sobey's wishes to continue its operation until the hearing of the appeal, although it has been negotiating for an alternative location in the same Mall.

[4] The order declares that Sobeys is not entitled to use the leased premises for the purpose of operating a drug store, and then provides:

> . . . [T]hat the respondent be and hereby is restrained from operating a drug store, dispensary, or pharmacy, or conducting retail sale of items requiring the supervision of a registered pharmacist on the leased premises until the expiry of the Respondent's existing lease for the leased premises dated April 26, 1979, as amended.

[5] The injunction is based on Article 4.03 of the lease between Sobey's and its landlord:

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

[6] This article was construed in depth by the trial judge in the context of the remainder of the Sobey's lease and the leases of the intervenors and other businesses in the mall. Expert evidence was received as to the meaning of "general retail merchandising". The operations of Sobey's and its subsidiaries were considered to interpret the phrase "as carried on by the rest of the majority of its stores. The conclusion was that article 4.03 was a negative covenant capable of supporting the injunction.

[7] That conclusion was vigorously attacked in application for the stay. The appellant asserts the interpretation of a lease is a question of law subject to the standard of correctness.

[8] Stays pending appeal are not automatic in Nova Scotia and the appellant must meet the criteria set out by Justice Hallett in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 (NSCA). It must:

> 1. Satisfy the Court that:
>
> (a) There is an arguable issue raised on appeal;
>
> (b) That if a stay is not granted and an appeal is successful, the appellant will have suffered irreparable harm that is difficult to or cannot be compensated for in damages. This involves a consideration of whether the Appellant would be able to collect if successful on appeal, and
>
> (c) That the appellant would suffer greater harm if the stay was not granted than the Respondent would suffer if it was granted ("the balance of convenience"); or
>
> 2. Failing to meet the primary test, satisfy the Court that there are exceptional circumstances making it just and fit that the stay be granted.

[9] Justice Hallett described this as “a proper test” because:

> . . . [I]t puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.

[10] This Court considered the meaning of “arguable issue” in **Coughlan et al. v. Westminer Canada Limited et al.** (1993), 125 N.S.R. (2d) 171 (C.A.) at p. 174:

> An “arguable issue” would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed.

[11] The appellant raises the following grounds of appeal:

> 1. That the Learned Trial Judge erred in law in misinterpreting the Sobey’s Lease to conclude that a pharmacy is not included within the phrase “General retail merchandising” as used in the Sobey’s Lease.
>
> 2. That the Learned Trial Judge erred in fact by failing to conclude that the operation of a pharmacy is included within the phrase “general retail merchandising” as the phrase is customarily used.
>
> 3. That the Learned Trial Judge erred in law in concluding that pharmacies are not included “in the rest of the majority of” the Appellant’s stores.

[12] Given the vagueness of the language of Article 4.03 and the difficulties it poses in construing it, I am satisfied these grounds are sufficient to raise an arguable issue within the meaning of **Coughlan v. Westminer**.

[13] The second Fulton criterion requires the appellant to show it will suffer “irreparable harm that is difficult to or cannot be compensated for in damages. This involves a consideration of whether the Appellant would be able to collect if successful on appeal.”

[14] Sobey’s main ground in asserting irreparable harm was that it could turn neither to the landlord nor the intervenors for compensation in damages if the stay was not granted and the appeal succeeded. Shoppers undercut that argument by offering an undertaking to be responsible for damages in such an event.

[15] If it had not been possible to find an early hearing date the issue of irreparable harm might have caused the applicant serious difficulties, but the time frame is part of the overall context. Without a stay Sobey's proposed moving its pharmacy to another location pending the appeal and then, if it was successful, moving back. Drugstores are not portable undertakings. Renovations for the present one cost $250,000 and another $100,000 is estimated for the alternative. Such a move would be inconvenient at best for its customers, whose files must be kept available for them and kept confidential. The manager and staff are a consideration. If the appeal is dismissed one move will be necessary; if Sobey's succeeds on appeal the store will stay put. Given the brief period before the appeal is heard, it seems highly impractical to require so much, possibly unnecessary dislocation, which I would consider to represent irreparable harm. Sobey's will, of course, be responsible in damages to Shoppers if it loses the appeal, but it presumably would be responsible in any event for the period between the opening of the pharmacy and the present time. Another two months is not a major consideration.

[16] The issues involve competition in the marketplace and the right to do business; a permanent injunction is a serious remedy. If Sobey's loses the appeal, the inconvenience to the intervenors of waiting another two months for their remedy is not so great as Sobey's would suffer if it had to shut down and relocate the pharmacy, then win the appeal.

[17] I will therefore order that the injunction be stayed until the appeal can be heard. Costs will be costs in the appeal.

Freeman, J.A.