Cite as: Bank of Nova Scotia v. LaHave Developments Ltd., 1990 NSSC 136

CANADA
PROVINCE OF NOVA SCOTIA

S.H. No. 75202

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

THE BANK OF NOVA SCOTIA

Plaintiff

- and -

LAHAVE DEVELOPMENTS LIMITED
and THE ROYAL BANK OF CANADA

Defendants

D E C I S I O N

HEARD BEFORE: The Honourable Mr. Justice K. Peter Richard

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: November 20, 1990

DECISION DATE: November 23, 1990 (ORAL)

COUNSEL: Robert W. Wright, Q.C. for the Plaintiff

S. Bruce Outhouse, Q.C. for the Defendant LaHave Developments Limited

Robert Grant and Ms. A. Smith (articled clerk) for the Defendant The Royal Bank of Canada

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Richard, J. (Orally):

The applicant Scotiabank entered into a leasing agreement with the defendant LaHave in 1975. This was a 20 year lease with renewal options pertaining to some 3008 square feet of commercial space in LaHave's "Bridgewater Mall". By supplementary agreement of 1976, Scotiabank enlarged its holdings by 400 square feet under the same terms and conditions set out in the 1975 lease. In 1988-89, LaHave acquired several contiguous parcels of land and developed plans to greatly expand the Bridgewater Mall. The company also developed adjacent malls, called Riverside and Eastside Court. These are across the street from the Bridgewater Mall. Upon completion, the expanded Bridgewater Mall, exclusive of the Riverside and Eastside projects, contained some 98 commercial business establishments - a three-fold increase from the previous 30 businesses. Gary Hurst, the principal officer of LaHave, approached Scotiabank in 1988 to discuss the expansion plans.

These discussions resulted in Scotia Bank leasing a further 692 square feet of space and also completely renovating its existing premises in the mall. According to R. G. Durham, vice-president of Scotiabank, these renovations required a capital investment of about $450,00.00.

In the letter of confirmation sent to LaHave from F. F. Chase, senior property manager for Scotiabank, the new arrangement was confirmed and this letter of understanding was acknowledged and agreed to by Gary Hurst, on behalf of LaHave. This letter contained the following comment:

> "The existing lease conditions incorporating the current area of 3,408 s.f. will remain unchanged."

One of the lease clauses which Scotiabank argues remained unchanged was Clause 17(e), the exclusivity clause. This clause purports to give Scotiabank "exclusive banking rights in Bridgewater Mall...".

In early September 1990, LaHave concluded negotiations with The Royal Bank to lease a portion of the expanded mall for the purpose of operating a personal banking centre. This centre, scheduled for opening on December 1, 1990, is located in the newly expanded portion of the mall structure but on lands which were included in the legal description of the lands covered by the 1975 Scotiabank lease. Scotiabank protested to Hurst that the Royal Bank lease violated the exclusivity clause but these protestations did nothing to resolve the dispute. On November 8, 1990, Scotiabank gave notice to the Royal Bank of the exclusivity clause

but this did not deter the Royal Bank in its plan to open the banking centre. It appears that the centre is almost complete at this time, and according to the affidavit of Michael Byford, the Royal Bank has expended about $125,000.00 to date on this project.

Scotiabank has started this action to enforce the rights which it alleges it had under the original lease of 1975, and in particular, clause 17(e), the exclusivity clause. This application is for an interlocutory injunction to restrain the defendants, or either of them, from proceeding with the establishment of the Royal Bank personal banking centre or any other bank facility at the Bridgewater Mall, pending the trial of the principal action. It is not for me to decide this case on its merits. That is for another court at the trial of the action. I am asked only to provide interlocutory relief to protect the legal rights of Scotiabank until the trial. I have no difficulty in finding that an application of Scotiabank is neither frivolous or vexatious. The plaintiff's action contains matters of substance and real questions for determination at trial. Therefore, it appears that Scotiabank has a prima facie case. On the basis of either a prima facie case or on the principles as set out in American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All E.R. 504, this application of Scotiabank is properly before me. My ruling here today will not effectively put an end to this action, so there is no need to consider the relative strength of the prima facie case as was done by Davison, J. in J. W. Bird and Company Ltd. v. Levesque (1988), 82 N.S.R. (2d) 435. Therefore, I find that Scotiabank has answered the threshold

question and has established its right to seek the intervention of the court at this stage in the proceedings.

However, the matter does not end there. After successfully getting past the threshold question, the plaintiff is then faced with proving that it will suffer irreparable damage or injury that cannot be adequately compensated for by an award of damages. In the Alberta case of Bank of Montreal v. Calbax Properties et al (1977), 4 A.R. 483, the learned trial judge, after finding that the plaintiff had failed to prove irreparable injury said at p. 492:

> "This is not to say that it may not do so at trial. The defendants appear on the evidence before me, to own rather substantial assets and I am unable to conclude that they, or either of them, could not be successfully called upon to pay such damages as may be awarded to the plaintiff, or that damages would not adequately compensate the plaintiff."

In the present case, I am not satisfied that Scotiabank, if successful in its principal action, could not be adequately compensated in damages nor do I feel that damages would be impossible to calculate. It was for the second reason that Chief Justice Glube granted the injunction in the Gateway Realty Limited v. Arton Holdings Limited and LaHave Developments Limited (October 25, 1989 - unreported), where at p. 3 she said:

> "I find that the Defendant could be satisfied in damages and the Plaintiff could not, in a way in which it would be reasonable to calculate. It is not a case of it being easy or hard to calculate, because even if it is hard to calculate, that does not matter..."

In this case, if Scotiabank is successful at trial, in my view, it can be adequately compensated in damages. The relative difficulty in assessing these damages is not really a question for my consideration in this interlocutory application. I dare say that the plaintiff ought have no more difficulty in establishing the sound basis for an award of damages than would the defendants in the event that they successfully defended this action. In this respect, some semblance of a level playing field as between the parties is maintained by dismissing this application.

In the result, therefore, the application for an interlocutory injunction is dismissed and the matter of costs will await determination at trial.

J.

Halifax, Nova Scotia
November 23, 1990