

 [Islington Village Inc. v. Citibank Canada](#)

Ontario Judgments

Ontario Court of Justice - General Division

Toronto Motions Court

Farley J.

Heard: September 22, 1992

Judgment: September 23, 1992

Action No. RE 1698/92

[1992] O.J. No. 1970 | [27 R.P.R. \(2d\) 100](#) | [35 A.C.W.S. \(3d\) 846](#)

Between Islington Village Inc., Applicant, and Citibank Canada, Respondent

(12 paras.)

Case Summary

Injunctions — Interlocutory injunctions — Enforcement of term of the lease — Irreparable harm — Whether any harm could not be compensated for in damages.

The landlord applied for an interlocutory mandatory injunction to force its tenant, a bank, to continue to operate its business in the leased premises.

HELD: No injunction was granted.

There was a valid and subsisting lease which had been breached by the bank. The application was rather sparse on evidence. There was no more than speculation as to the loss in value to the landlord's property that would be caused by the bank. Difficulty in assessing damages should not be seen as synonymous with irreparable harm. There did not appear to be any problem with the bank being able to satisfy any monetary judgment. The court was not persuaded that damages would be an inadequate remedy. On the material presented, it would not be just, convenient or equitable to issue an injunction.

James C. Morton, for the Applicant. Arnie Herschorn, for the Respondent.

FARLEY J.

1 Islington Village Inc. ("Landlord") is the owner of a small suburban Toronto shopping plaza involving both retail and office space. CitiBank Canada ("Bank") entered a ten year lease in 1986. The Bank decided to close this branch (and another) earlier this summer and surprisingly wrote its branch customers and the federal bank regulator to that effect a week before informing the Landlord by letter dated August 31, 1992. Bank indicated it would close this branch on

October 2, 1992 but continue to pay rent for the balance of the term, subject to adjustment if a new tenant were found before expiry of the term. Bank advised Landlord that it was pursuing the possibility of assigning the lease to another financial institution. Bank's decision to close the branch was based upon continuous significant losses at that location; the business it had derived was a small fraction of what it had originally contemplated. The branch was not a busy one; it was estimated that it was visited approximately 1600 times a month. The branch has an easily visible location at a ground level corner of the plaza.

2 There is no doubt that Bank is in breach of the lease with its announcement and proposed close down scheduled for October 2nd. There was no suggestion that Landlord was in any way to be faulted as to the lease. I have no hesitation in giving a declaration that the subject lease is valid and subsisting, but would be breached by Bank's course of action.

3 However, the thornier problem is Landlord's application for a final permanent injunction on a mandatory basis to require Bank to specifically perform the terms of paragraph 9.03 of the lease. The operative provision of that paragraph is:

Tenant further covenants that at all times throughout the Term, Tenant shall continuously, actively and diligently conduct its business in the whole of the Premises in an up-to-date, first class and reputable manner.

Landlord alleges that it will suffer irreparable harm if the injunction is not granted in that damages would not be a sufficient or adequate remedy. It was claimed that it would be impossible to quantify such damages.

4 While Bank's counsel suggested that I must take into account the balance of convenience test, I see no reason to do so since this is not an interlocutory injunction. In any event what Bank was relying in this regard was the difficulty it would have in reversing its announcement and winddown mechanisms (e.g. staff layoffs). In my view balance of convenience should normally be assessed on circumstances existing after rinsing out as much of the misconduct and ancillary actions thereto. Bank should not be heard to complain of its foot injury caused by its own gun aimed at that appendage. Since there is an established breach, it seems to me that the aspects to be analyzed are whether Landlord has proved that it will suffer irreparable harm that cannot be compensated for by damages after quantification thereof, and secondly whether the Court should issue an injunction requiring that an active business be operated for up to the next four years with the attendant question of supervision of such by the Court.

5 I note specifically that there was no clause in the lease which specified that paragraph 9.03 could be enforced by injunction (as was the arrangement in *Dover Shopping Center, Inc. v. Cushman's Sons, Inc.* (1960), 164 A.2d. 785 at p. 790). Rather Article 15: Default, Remedies, Termination extensively canvasses these subjects without making any reference to any injunctive process. While I do not find this determinative of the situation, it should be weighed in the balance between these two sophisticated parties as to what might have been their mutual intentions on entering the lease. Landlord's standard form lease was extensively negotiated and changed.

6 The application was rather sparse on "hard" facts. This is surprising given that the permanent injunction was proposed by the Landlord as the final determination of this situation. Bank's lease was not a percentage rent one; there was no evidence as to the terms of the leases with the other tenants of the plaza. The plaza is fully leased as to retail space; it was indicated in submissions that there were a couple of offices vacant. The length of term of these other leases was not revealed; we therefore do not know whether these expire before that of the Bank's lease. There was apparently a rejuvenation of the plaza with the leasing to Jumbo Video which was said to have attracted traffic and thereafter a number of retail vacancies were filled. However there was no hard evidence submitted concerning value and depreciation thereof that would be caused by the Bank's pullout. Eric Lisus a principal of Landlord said in his affidavit:

17. If the Bank ceases operation of the Key Location, the Plaza and Islington will suffer irreparable and incalculable harm.
18. The leasing market is very poor at present and should the Key Location be vacated it will immediately and significantly harm the rest of the Plaza's image, reputation and value. In light of the likely difficulty in finding any tenant for the Key Location, let alone a quality tenant, the cessation of operations by the Bank is of tremendous concern.

7 Let us then take a look at what Mr. Lisus had to say in cross-examination as to that element:

- Q. All right. it emerges from your Affidavit, I take it, that your principal concern once the bank leaves, if that's the way it turns out, is not that there's going to be a shortfall in rent but that there will be a shortfall in people attracted to the other stores in the plaza. Is that accurate?
- R. No. It's much more than that.
- S. All right.
- T. This type of building and the way it was designed is such it's most desirable to have a prestige tenant on the main corner, and this building was designed with a financial institution in mind on that corner. It's really the only sort of occupancy which adds to the value and appearance and perception of the plaza.

We would not want to put, for example, a doughnut shop in there or a fish and chip shop. We would like to keep it as -- We would like to have a prestige tenant in there, since it's the principal corner of the property.

And, in fact, after Citibank took the premises -- We had offered the premises to every financial institution we could think of. Not Citibank, funnily enough. We didn't know Citibank was going to be in the retail banking business at that stage. And subsequent to the Citibank taking it, Toronto-Dominion Bank wanted it. But having leased it to Citibank, of course we couldn't do that. We couldn't give it to them.

Incidentally, CIBC is right across the street on the other corner, which is a busy branch. So it's not just a question of paying the rent. It's a question of the long-term effect on the plaza and the value of the plaza.

But all this amounts to is a speculation as to a loss in value that will be caused by Bank's pullout. There was no expert or even non-expert view that such would likely happen based on the physical pullout. Note what was not said (and could not be) was that the plaza would be less valuable on a capitalization of earnings basis since Landlord would continue to enjoy rent from Bank. Neither was there any evidence of percentage rents being paid by other tenants which could be affected by lack of traffic arising out of Bank's pullout. It would be equally valid to speculate that another tenant would generate more traffic for the plaza given the Bank's dismal experience. Nor is there any evidence that this pullout would affect other renewals since there was no indication of when other leases would come up for renewal. Things are quite up in the air at present; Landlord understandably at this time has not made any effort to lease the subject premises; Bank is actively pursuing another financial institution. The premises may be rented out quickly or not at all or sometime in between. I find myself in agreement with Geatros J. (Weyburn Square Developments Limited v. Liggett Drug Limited, [\[1988\] 6 W.W.R. 401](#) Sask. Q.B. at p. 406) where he indicates that the statement of Steele J. in S.B.I. Mgmt. Ltd. v. Carol Wabush Co-op Soc. Ltd. ([1985](#), [51 Nfld. & P.E.I.R. 257](#), 150 A.P.R. 257 and 261 (Nfld. T.D.):

Admittedly vexed questions may arise on any assessment of damages. However, difficulty in assessing damages is not necessarily synonymous with irreparable harm or immeasurable damages. These questions are problems for another day.

As well, contrary to many other injunctive situations, there would not appear to be any present problem with Bank being able to satisfy any money judgment it might suffer if Landlord pursued a damages claim. See the article entitled "The Interlocutory Injunction and Irreparable Harm" by Paul Perell in the Canadian Bar Review, (September, 1989), Vol. 68, wherein it was postulated that a subconscious reason for giving injunctions was the concern that when a matter eventually got to trial the defendant would be unable to pay the damages because of financial difficulties.

8 I also note that paragraph 16.03 of the lease is a "Sole Agreement" clause which indicates that the lease contains all the warranties, representations, covenants, promises, agreements, conditions and understandings between Landlord and Bank and no others are to prevail. There was no indication in the lease of any acknowledgement of "key" tenant or "traffic attracting" tenancies.

9 Steinberg J. in La Compagnie de Construction Belcourt Ltee. v. Golden Griddle Pancake House Limited, [\[1988\] R.J.Q. 716](#) (QSC) at p. 726 observed that Benoit J. in Proprietes Cite Concordia Ltee v. Banque royal du Canada, [1980] C.S. 188 (QSC) refused a mandatory interlocutory injunction noting, inter alia, that no proof had been made with respect to the impact on other tenants. In the same vein one should note that the Court of Appeal in Dover, supra, stated at p. 790:

[Plaintiff] argues that damages for the breach of a percentage lease arrangement are not readily measurable. Plaintiff also adduced proofs to show the very nature of the shopping centre as a cooperative enterprises with each store's success dependent on the continued operation of the other stores, requires that defendant's bakery business be maintained in accordance with the lease for the benefit of all involved.

The obligation on a lessor to provide such proof in such a situation must be taken into account when citing *Dover* at p. 791 (as Landlord's counsel did) as well as the fact that the quote was immediately after referring to the uniqueness of percentage leases:

But the gravamen of the complaint here is not only the possible loss of additional income by way of a percentage of defendant's increased gross sales, but the difficulty in measuring the harm that would come from the withdrawal of one of the members of a semi-cooperative enterprise like a shopping centre. Plaintiff's damages cannot therefore be ascertained, and remedy by way of damages at law would be impracticable and unsatisfactory.

Landlord's counsel referred me to A.L. Smith L.J.'s statement at p. 322 of *Shelfer v. City of London Electric Lighting Company*, [1895] 1 Ch. 287 (CA). However, this was a case in nuisance which involved vibrations caused by the defendant making the plaintiff ill and continuing to cause cracks in his home. However, what Landlord complains of here is the possible loss of value in the plaza it would suffer as a result of Bank's pullout. Such, by its very nature, is a money question. Based on the limited material of the Landlord can one reasonably say that A.L. Smith L.J.'s good working rule (the four elements thereof) would not come into play.

10 Then there is the question that the Court ought not to enforce a positive covenant which has been breached where supervision is a problem: see *Montgomery J.* at p. 7 of *Scanti Investments Ltd. v. National Bank of Canada*, unreported decision released July 28, 1982. In *Scanti*, the covenant was significantly more definitive of how and when the Bank's operations would be conducted as compared with the subject covenant. Simply put, how is one to define what would comprise the Bank's "diligently conduct[ing] its business". See also *Bramalea Ltd. v. Canada Safeway Ltd.* (1985), 37 R.P.R. 191 (Ont. H.C.J.) at p. 200; *S.B.I.*, supra, at pp. 259-261; *Lundigran Group Limited v. Lawton's Drug Stores Limited* (1985), 55 Nfld. & PEIR and 162 A.P.R. 22 (Nfld. Dist. Ct.) at pp. 23-4. I note that we do not have the benefit of the terms of the lease in *Centre City Capital Limited v. Great Atlantic & Pacific Company of Canada, Ltd.*, an endorsement of *Montgomery J.* released August 22, 1988, except the reference to the requirement to stay open 24 hours a day except Sunday. However, in that case where he granted the injunction, the breach was in failing to stay open for 24 hours a day and the injunction was merely to stay open 24 hours a day, a rather mechanical situation.

11 I also think it instructive to review what *Geatros J.* had to say about mandatory injunctions at pp. 404-5 of *Weyburn*, supra.

Courts are traditionally more reluctant to grant a mandatory injunction. The principles to be considered were laid down by Lord Upjohn in *Morris v. Redland Bricks Ltd.*, [1970] A.C. 652 at 665-66, [1969] 2 W.L.R. 1437, [1969] 2 All E.R. 576 (H.L.):

The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be "as of course." Every case must depend essentially upon its own particular circumstances. Any general principles for its application can only be laid down in the most general terms:

1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future ... It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.
2. Damages will not be a sufficient or adequate remedy if such damage does happen. This is only the application of a general principle of equity ...
3. Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act the question of the cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account:
 - (a) where the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and unreasonable acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the plaintiff ...
 - (b) but where the defendant has acted reasonably, though in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. First, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only upon a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the plaintiff is in no way prejudiced for he has his action at law and all his consequential remedies in equity.

The fourth consideration is stated in the following terms by Maugham L.J. in *Fishenden v. Higgs & Hill Ltd.* (1935), 153 L.T. 128 at 142 (C.A.), referred to by Lord Upjohn:

I should like to observe, in the first place, that I think a mandatory injunction, except in very exceptional circumstances, ought to be granted in such terms that the person against whom it is granted ought to know exactly what he has to do.

12 In conclusion I am not persuaded that damages would be an inadequate remedy if damage as speculated should happen. Finally, while I have sympathy for Landlord, I do not find that on the material presented it would be just, convenient and equitable to grant a mandatory injunction in the circumstances.

FARLEY J.