NOVA SCOTIA COURT OF APPEAL

Citation: *Skylink Express Inc. v. Innotech Aviation*, 2018 NSCA 32

Date: 20180413
Docket: CA 466475
Registry: Halifax

Between:

Skylink Express Inc.

Appellant

v.

Innotech Aviation, a division of IMP Group Limited

Respondent

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: March 19, 2018, in Halifax, Nova Scotia

Subject: Landlord and Tenant—Collateral Contract

Summary: Since 1999, the appellant has leased hangar space and office facilities from the respondent for its air cargo operation pursuant to a lease agreement which was amended from time-to-time. Most recently, the lease was extended for a five-year term commencing on July 15, 2014.

As a result of a downturn in its business, the appellant removed the five aircraft it was keeping at the respondent's facility and stopped paying rent.

The respondent sought a declaration that the appellant was in breach of the lease agreement. In its defence, the appellant alleged that the parties had entered into a collateral contract by an exchange of emails which did not require it to pay for space it was not using.

The application judge found that there was no collateral contract, and concluded the appellant was in breach of the lease agreement.

Issues: Did the application judge err in concluding that no collateral contract was formed which would relieve the appellant from paying rent for space it wasn't using?

Result: The application judge did not err in finding that there was no collateral contract. The email exchange which the appellant alleged gave rise to the collateral contract lacked certainty of terms and an intention to establish the existence of a collateral contract.

The appeal is dismissed with costs to the respondent in the amount of $5,000.00.

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Respondent

Judges:	Fichaud, Farrar and Van den Eynden, JJ.A.
Appeal Heard:	March 19, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Farrar, J.A.; Fichaud and Van den Eynden, JJ.A. concurring
Counsel:	Patrick O'Neil, for the appellant John Shanks and Jeff Waugh, for the respondent

Reasons for judgment:

[1] Skylink Express Inc. is a regional air cargo operator servicing large courier companies. Innotech Aviation, a division of IMP Group Limited, is the owner of hangar space, office and storage facilities and parking ramps at the Halifax Stanfield International Airport which it leases to airlines.

[2] IMP and Skylink have had a longstanding business relationship. The parties first entered into a lease agreement on July 15, 1998. The Lease permitted Skylink to store aircraft at IMP's facility and to use associated office and storage facilities for a monthly rental fee. The amount of the rental fee for the premises was set out in the Terms and Services Agreement appended to the Lease as a Schedule.

[3] The initial lease term was for one year and expired on July 14, 1999. The lease was amended over the years as follows:

- July 15, 1999 – The term of the lease was extended by three years expiring on July 14, 2002;
- December 1, 2001 – Skylink rented additional space in the facility;
- July 15, 2002 – The lease was extended until July 14, 2003;
- July 1, 2004 – The lease term was extended for a further one year term;
- December 1, 2004 – Skylink rented additional office space and storage space;
- July 2005, July 2006, July 2007, July 2008 – each of these addenda to the lease extended it for a one year term;
- October 1, 2009 – the lease term was extended to July 14, 2010 and the office space on the first floor was deleted;
- August 1, 2010 – the lease was extended to July 14, 2011. After July 14, 2011 the lease continued on a month-to-month basis.

[4] This brings us up to the period of time at issue in this appeal. In or around October 2013, IMP and Skylink began negotiations for another lease extension. Joel Bédard, Innotech's Vice President and General Manager, was negotiating the

extension on behalf of IMP. Graham Morgan, the Director of Maintenance at Skylink, was negotiating on its behalf.

[5] IMP presented three options to Skylink: a one year, three year or five year term. The rental costs for the longer term options were reduced, with the five year term having the lowest cost to Skylink. Ultimately, Skylink chose a five year lease term which allowed them to lease the space at the lowest available rental increase.

[6] As part of the negotiations for the lease extension, IMP agreed to credit Skylink $27,121.23 for hangar space that Skylink had not used since October 2013.

[7] By April 27, 2015, the lease extension had not been signed by Skylink. On that day, Mr. Morgan emailed Mr. Bédard advising that he had only "one question left". It was as follows:

> If we were to change the type or number of aircraft we have, or need more office space would we be able to do an Ad Hoc Addendum to the lease when the event happened?

[8] Mr. Bédard replied in the affirmative that same day:

> Yes, we would just do an addendum reflecting that change to ensure we don't have the same problem. But it would be important to let us know ASAP so we can reflect the changes. If it is only temporary I would rather leave everything as is and agree to a temporary rate via E-mail when it comes to extra aircrafts we can just agree on a daily rate.

[9] Skylink executed the final addendum to the lease on April 27, 2015 which was retroactive to July 15, 2014.

[10] Three days later IMP provided Skylink with the credit of $27,121.53.

[11] In the 2014 Addendum Skylink rented from IMP:

> A. use of office and storage area being those portions of the Heliport shown marked in red on Schedule "2" annexed hereto;
>
> B. the use of sufficient hangar space at the Heliport for accommodation of one (1) Beechcraft 1900 and four (4) Caravan aircraft of the aircraft described in Schedule "3" annexed hereto

[12] Schedule 3 to the 2014 Addendum described the aircraft to be stored at the facility as follows:

- Beechcraft 1900 (Aircraft Registration - C-GSKN)
- Caravan - C208 Bravo (Aircraft Registration - C-FFGA)
- Caravan - C208 Bravo (Aircraft Registration - C-GEGA)
- Caravan - C208 Bravo (Aircraft Registration - C-GLGA)
- Caravan - Cargomaster (Aircraft Registration - C-GSKS)

[13] The rent payable under the Lease was also amended by the 2014 Addendum. Schedule 1 set out the rents payable by Skylink to IMP, exclusive of H.S.T.:

(i) Office - $845.13 Monthly

(ii) Maintenance Office - $1,147.65 Monthly

(iii) Ramp Parking (as required, as available) - $105.00 Daily per Aircraft

(iv) Hangarage (one Beechcraft 1900 Aircraft) - $4,403.70 Monthly

(v) Hangarage (four Caravan Aircraft) - $11,462.44 Monthly

(vi) Storage Space - $448.87 Monthly

(vii) Parking (8 spaces) - $504.00 Monthly.

[14] Skylink paid rent to IMP in accordance with the 2014 Addendum until October 2015.

[15] Beginning in November 2015, Skylink stopped paying rent to IMP for hangarage of aircraft (items (iv) and (v) above) after it removed all five of its aircraft.

[16] The rent payments stopped following emails from Skylink to IMP advising of its decision to reduce the number of aircraft stored at the hangar from five to none. On September 15, 2015, Skylink advised IMP that it would be removing the Cessna C208 Caravan aircrafts. IMP was further advised on October 15, 2015 that Skylink would be removing the Beechcraft B1900 aircraft as a result of it losing its B1900 flight contract as of October 31, 2015:

> As per our discussion, this email is to reiterate all our C208 hangar spots 30-day termination notice (provided in September) with a 31OCT2015 end date and to now add that, due to our B1900 flight contract ending on 31OCT2015, we must

> serve 30-day termination notice (final date 14NOV2015) for our YHZ B1900 hangar spot, as well.

[Emphasis added]

[17] In response, IMP advised Skylink that there was no clause in the original Lease nor the 2014 Addendum which would allow it to terminate.

[18] The reduction of aircraft followed the loss of a contract by Skylink for transporting documents between several banks in Atlantic Canada. In an email from Mr. Morgan to Mr. Bédard dated November 12, 2015, he confirmed that Skylink had not contemplated such a dramatic change in its hangarage requirements:

> …[Management] confirmed we are not attempting to terminate the lease but merely require an Addendum to the lease to show the present situation and change in requirements. This has been done repeatedly in the past as aircraft and office requirements change. You confirmed this would happen, if there was a change in aircraft or office space, prior to the signing of the present lease. We never anticipated such a dramatic change at the time but we could be in the reverse situation and need the aircraft space back if UPS open [sic] a YHZ Gateway. Such is the industry in these times.

[Emphasis added]

[19] On August 19, 2016, as a result of Skylink's failure to pay rent, IMP made an application in court for a declaration that Skylink was in breach of the Lease.

[20] In a decision dated June 29, 2017 (reported as 2017 NSSC 176), Justice D. Timothy Gabriel found that Skylink was in breach of the Lease when it stopped paying the full rental amounts required by the 2014 Addendum.

[21] Skylink appeals that decision.

[22] For the reasons that follow I would dismiss the appeal with costs to IMP in the amount of $5,000 inclusive of disbursements.

Issues

[23] Skylink has framed the issues on this appeal as follows:

1. Did the Learned Trial Judge err in concluding that no enforceable collateral agreement between Skylink and Innotech was created by the email exchange between Messrs. Bédard and Morgan of April, 2015, which collateral contract required Innotech to negotiate a new addendum in the event that Skylink experienced a fluctuation in the "type or number of aircraft" it had stored at the hangar?
2. Did the Learned Trial Judge err in characterizing Innotech's offer of a $27,121.53 refund to Skylink as merely an "inducement" to enter into a contract, rather than a, or part of a, collateral contract to the April 2015 hangar addendum?

[24] I agree with IMP that the issues identified by Skylink are indivisible and are more appropriately characterized as one issue as follows:

> Did the application judge err in concluding that no collateral contract was formed on the basis of the April 27, 2015 email exchange between Mr. Bédard and Mr. Morgan?

Standard of Review

[25] Skylink has not raised any challenge to the legal principles applied by the application judge. Instead, it challenges the application judge's interpretation of the facts leading up to the execution of the 2014 Addendum and the application of the law to those facts. This is a question of mixed law and fact and will be reviewed on the palpable and overriding error standard (*McPhee v. Gwynne-Timothy*, 2005 NSCA 80, ¶6). An error is palpable where it is "clear or obvious". An error is overriding if it is "so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue" (*McPhee*, ¶32).

Analysis

Issue **Did the application judge err in concluding that no collateral contract was formed on the basis of the April 27, 2015 email exchange between Mr. Bédard and Mr. Morgan?**

[26] Skylink relies on the email exchange of April 27, 2015, to establish, what it says is a collateral contract. I will repeat that email exchange:

> Mr. Morgan:
>
> We only have one question left. If we were to change the type or number of aircraft we have or need more office space would we be able to do an Ad Hoc Addendum to the lease when that event happened?
>
> Mr. Bédard:
>
> Yes we would just do an addendum reflecting that change to ensure we don't have the same problem. But it would be important to let us know ASAP so we can reflect the changes. If its only temporary I would rather leave everything as is and agree to a temporary rate via E-Mail when it comes to extra aircrafts we can just agree on a daily rate.

[27] Skylink argues this created a collateral contract which would allow it to unilaterally reduce the number of planes that it was storing in the hangar and to require IMP to enter into a further addendum to that effect.

[28] In its factum, Skylink refers to the application judge quoting (at ¶53) the following excerpt from G.H.L.Friedman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell 2011) at pp. 513-13:

> A party alleging a collateral contract must not only prove the terms of such a contract, he must also show the existence of *animus contrahendi* on part of all the parties. Any laxity on these points would enable a party to escape from the full performance of the main contract, proved by the writing assented to by the parties, and would lessen the authority of the written contract by permitting variation simply by suggesting the existence of a verbal collateral agreement relating to the same subject matter. Thus, to establish a collateral contract requires the same kind of evidence as to certainty of terms and intention to enter into a binding, contractual agreement, as is needed where any contract is alleged to exist between the parties.
>
> What this means is that the statement purporting to be the contractual promise in such a collateral contract must amount to more than a broad, general inducement to enter into the main contract, or even a representation in the sense in which that word has been discussed earlier. The statement must constitute a definite, contractual undertaking, a binding promise meant to be taken seriously by the party to whom it is made, and intended to have such effect by the party who made the statement. An understanding or expectation is not sufficient to create a contractual obligation.
>
> [Emphasis added]

[29] Skylink takes no issue with this statement of the law but it argues the application judge erred in failing to properly apply that law to the facts before him.

[30] With respect, I disagree. The application judge went to great lengths to explain why, on the evidence before him, he did not find a collateral contract. His reasoning may be summarized as follows:

> (a) The history of the business relationship between the parties had only ever involved increases to the amount of space rented by Skylink. Skylink had never decreased the space rented at the Heliport.
>
> (b) Skylink's interpretation would allow unfettered discretion to unilaterally modify its contractual obligations when it perceived that its business needs changed.
>
> (c) The need to reduce aircraft stored at the Heliport to zero was not on the mind of either Skylink or IMP in April, 2015. Skylink did not anticipate that it would lose the contract with the banks.
>
> (d) Skylink's interpretation would allow it to pass its business losses to IMP. Clear evidence is required to establish an intent contrary to normal business practices such as this. Skylink did not provide any such evidence.
>
> (e) The alleged collateral contract was contrary to the clear intentions of the parties as demonstrated by the negotiations leading up to the 2014 Addendum. Skylink bargained for a five year term. IMP received more certainty as a result of the longer term and Skylink received the lowest available rental increase. Skylink's interpretation denies IMP of the principal benefit of the bargain: the security of rental payments over a 5 year term. At the same time, Skylink would be permitted to retain (i) the value of the credit note; (ii) the lowest possible rental increase when aircraft are stored at the Heliport; and (iii) the ability to pay no rent for hangar space when no aircraft were stored there.
>
> (f) Skylink first attempted to terminate the Lease upon thirty days' notice. Skylink only attempted to rely on the alleged collateral contract after they were advised they did not have a right to terminate the Lease.

[31] Each of the application judge's findings were supported by evidence and have gone largely unchallenged except for two. In its written submissions, Skylink challenges the factual basis for the finding that the need to reduce aircraft stored at the facility was not in the mind of either Skylink or IMP in April 2015. It says this in its factum:

> 33. At paragraph 48 of his decision, the Learned Trial Judge found that the potential need of Skylink to reduce its hangarage space requirements, and thus

> seek an "Ad Hoc Addendum", as Mr. Morgan framed it, "could not have even been in the mind of (Skylink), much less that of (Innotech)".
>
> 34. With respect, that conclusion is perplexing in the circumstances. The refund issue specifically arose because Skylink found itself paying for space with Innotech that, due to business changes, Skylink found it did not need. As a result, Skylink racked up hangarage lease payments in excess of $23,000.00, plus hst, which Innotech eventually paid back under the collateral contract that finally induced Skylink to sign the July 2014 addendum. It would be more than passing strange if both parties did not have on their minds the very contingency His Lordship concluded that they could not have been even considering. As M. Bédard noted at the time, he did not want a repeat of "the same problem".

[Emphasis added]

[32] With respect, it is not the application judge's finding that is perplexing, but rather Skylink's argument which can be summarized as follows: IMP agreed to pay Skylink $27,121.23 plus HST to return to it monies it paid for space it did not use; agreed to enter into a longer 5-year term at a lower rent; and further, agreed that Skylink could unilaterally terminate the lease with no consequences to it. It relies on the $27,121.23 paid to it as evidence the parties never intended Skylink would have to pay for space it did not use.

[33] With respect, that argument is without merit.

[34] The application judge's factual finding that a reduction in aircraft to zero was not contemplated by either party is supported by the evidence. Mr. Morgan confirmed on cross-examination that he had not contemplated the number of aircraft being reduced to zero. This was further supported by Mr. Morgan's email of November 12, 2015 stating that Skylink had not anticipated such a "dramatic change". It was also established on cross-examination of Mr. Morgan that Skylink lost the bank contract in 2015 after the 2014 Addendum was entered into. Skylink had not anticipated the loss of this contract when the 2014 Addendum was signed.

[35] Further, the application judge accepted the evidence of Mr. Bédard that the credit note was provided by IMP to Skylink as an inducement to enter into the 5-year lease extension. It was not available to Skylink and would not have been provided had they entered into a 1 or 3 year lease.

[36] Finally, if the refund of money was owed Skylink because it did not use the hangar for the period from October 2013, it would have been entitled to that money as of right. The evidence of Mr. Bédard, which was accepted by the application

judge, made it clear the monies were not going to be paid until the 5-year lease extension was signed.

[37] The payment of the $27,000.00 credit does not support the argument of Skylink but rather runs contrary to it.

[38] The second factual finding challenged by Skylink was the application judge's determination that there had never been a decrease in the space rented by Skylink. As support for its position it refers to the October 1, 2009, addendum to the Lease which provided as follows:

> AND WHEREAS the Occupant wishes to amend the Premises of the Lease by deleting office space on the 1st floor of the Heliport.

[39] It argued, clearly, there had been a reduction in leased space and the application judge's finding to the contrary constituted a palpable and overriding error which influenced his determination on the existence of the collateral contract.

[40] Again, with respect, I disagree. Read in context, I take the application judge to be saying there had never been a reduction in the hangarage space rented by Skylink. At the time of the hearing before him, Skylink continued to rent office space and the reduction of the office space was never in issue.

[41] Further, even if it could be said the application judge was in error, the error was not one which would have affected the result.

[42] The evidence and the conduct of the parties was such that whenever a change to the Lease was sought the parties negotiated the terms and entered into a written agreement.

[43] The April 27, 2015 email exchange was not and could not be a collateral contract. There was no certainty of terms nor was there any intention to enter into such an agreement. Referring back to the excerpt from *Friedman*, *supra*, Skylink has not produced the kind of evidence as to certainty of terms and intention to enter into a binding contract to establish the existence of a collateral contract.

[44] I agree with the thorough analysis and conclusions of the application judge. They are amply supported on this record.

Conclusion

[45] I would dismiss the appeal with costs to IMP in the amount of $5,000, inclusive of disbursements.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Van den Eynden, J.A.