[TRANSLATION]

Alexis Nihon Co. Ltd (*Suppliant*) *v.* **The Queen** (*Respondent*)

Present: Dumoulin J.—Montreal, February 16, 1970, Ottawa, February 26, 1970

Crown—Petition of right—Lease—Treasury Board approval—Absence of requisite signatures by Department officials—Public Works Act, R.S.C. 1952, c. 288, s. 18—No rent payable.

An offer to lease suppliant's warehouse, which had received Treasury Board approval, was made by an official of the Public Works Department to suppliant's president in Montreal. Suppliant's president after striking out two clauses signed the offer on behalf of suppliant, forwarded the document to the Department at Ottawa, and handed the keys to the Department's official on the same day. For undisclosed reasons the offer was not signed by the Minister or Deputy Minister of Public Works or countersigned by the Departmental secretary as required by s. 18 of the *Public Works Act*. Suppliant sued for rent. The Crown contended there was no lease but offered the value of two months' occupation.

Held, dismissing the claim for rent but confirming the Crown's offer, the Treasury Board's approval of the proposed lease was not a direction to proceed but only a consent in the public interest to incur the proposed expense.

The provisions of s. 18 of the *Public Works Act* apply to every instrument involving the Department's liability, including an offer to lease, as in this case. *Lord & Co.* v. *The Queen* [1960] Ex.C.R. 185 referred to.

PETITION of right.

André Quesnel for the suppliant.

Raymond Roger for the respondent.

DUMOULIN J.: The facts giving rise to this litigation are substantially summarized in the respondent's brief from which I shall presently quote the essential passages which relate to the testimony of the company's president and probable sole shareholder.

Alexis Nihon personally or, if one prefers, through this company, carries on a large-scale business involving the purchase, sale and rental of buildings in the Greater Montreal area.

Approached by J. M. Malouin, one of the officers of the Department of Public Works of Canada, in early summer 1966, the petitioner, after normal negotiations concerning the leasing of a warehouse as a carbarn for mail trucks, signed a lease form which the respondent's representative sent to him; this is exhibit R-1 (in the original and S-2 in copy).

Accepted by Alexis Nihon on (or about) October 6, 1966, the proposed lease, for a five-year term, gave the Department of Public Works occupancy

of an area of 16,026 square feet in the building at 6018 Côte de Liesse in City of St-Laurent. The stipulated annual rent was $24,039, as the petitioner was notified by letter on September 9, 1966, exhibit S-1, from Mr. J. M. Malouin District Manager of the Property Branch of the department concerned (whose redundant and slightly quaint title in English is: "A/District Manager, Property & Building Management Branch"), stipulations reiterated in document R-1, S-2.

In the said communication of September 9, 1966 (exhibit S-1), paragraph one reads as follows:

> Confirming your telephone conversation with our Mr. Charlebois, under date of September 6, 1966, please consider this as our official notification to the effect that our department has been authorized by Minute No. 659632 of a Meeting of the Honorable the Treasury Board, held on September 1st, 1966, to enter into a lease with your company, for a net area of 16,026 square feet, in a one storey brick and concrete block building steel frame warehouse, at 6018 Côte de Liesse Road, Saint Laurent, Quebec, for a term of five (5) years from date of occupancy, at an annual rent of $24,039.00.

We shall soon see that learned counsel for the petitioner will make a great deal out of this authorization granted by the Treasury Board.

After signing the draft lease, from which he had deleted two clauses (exhibit R-1), Nihon sent it, as was appropriate, to the Department of Public Works at Ottawa, and handed over the keys to the warehouse to Mr. Malouin that very day, namely October 6, 1966; hence, had certain complications not arisen, this lease would have run until September 30, 1971.

One of these complications, of a physical nature, was the fact that the respondent used the warehouse only from October 6, 1966 to December 9 of the same year, according to the petitioner, and from the first mentioned date to November 29, according to article 16 of the statement of defence.

Moreover, the initial complication, from which the foregoing stems, is a statutory one, nothing other than the failure to sign the draft lease as required under s. 18 of the *Public Works Act* (R.S.C. 1952, c. 228), prescribing that such instruments must be signed by the Minister or by the Deputy Minister and countersigned by the Secretary of the Department. No reason for this refusal was divulged.

The ensuing dispute led the Nihon Company, after repeating its offer of peaceful occupancy of the premises to the respondent, and expressly subject to any future recourse, to claim payment of the sum of $14,092.19 as rent owing from October 31, 1966 to April 30, 1967, plus interest on over-due payments.

On the other hand, the respondent contends that no lease exists between her and the opposing party; that she never signed any such commitment, and that those of her employees who took the liberty of putting vehicles in the petitioner's warehouse did so mistakenly and without authority.

Justified or not, this claim does not remove the tangible fact that the warehouse was occupied for two months, which is why the Crown should have offered, in its statement of defence, the compensation which it belatedly proposed in article 4 hereunder, of a subsequent document entitled "Notice of Admission and Tender", dated April 10, 1967:

> 4. Respondent hereby offers suppliant, without prejudice to the position she has taken in her statement of Defence, the value of her occupation of the premises in question, to wit from October 6, 1966 to November 29, 1966, said value being based on the monthly rent stipulated in exhibit R-1 and amounting to $3,683.39 and detailed as follows:
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> October 6th to October 31st $1,680.14
> November 1st to November 30th $2,003.25

Alexis Nihon's testimony as reported in the "Note of the Respondent" and the brief comments interspersed therein, are in sufficient agreement with my own notes and my opinion to justify their being included textually. Learned counsel for the department writes that:

> He (Alexis Nihon) negotiated for several months on this matter (draft lease) with employees of the Post Office Department in Montreal. By his own admission an experienced man where leasing is concerned, he states that he never agreed to recognize the letter of September 9, 1966, as being binding on both parties. Because of his experience, he insisted on obtaining a written lease. This lease was prepared by the officers of the department. Mr. Malouin, an officer of the Post Office Department, turned over the draft lease in Mr. Nihon's office where, before signing it, Mr. Nihon made major changes in the provisions submitted (exhibit R-1) by the officers of the department at Montreal. Mr. Nihon then insisted, he said, that a copy be signed by the Minister and sent to him. He personally deemed such signature essential in order to bind both parties. However, when Mr. Nihon affixed his signature after striking out several clauses (it should be noted that this "several" means only two clauses crossed out), he voluntarily handed over the keys to the building to Mr. Malouin, thus permitting possession on sufferance.

Because the minister had not signed the lease, as requested by Nihon, also, because of the unilateral changes to the draft lease, to wit, the two deleted clauses, the respondent deduced that since the parties had not reached agreement or a concurrence of wills, such irregularities would have vitiated any negotiation, even in private law. But since this was a transaction in public law, in observance of the prescribed forms would determine its complete invalidity. Such is the respondent's argument; that of the petitioning company is clearly set forth on page 2 of its "Notes and Authorizations", expressed as follows:

> At the beginning of the hearing, the Court . . . drew the attention of the parties to s. 18 of the *Public Works Act* (R.S.C. 1952, c. 228) which states that no contract can be binding on Her Majesty in right of Canada unless it bears the signature of the Minister or of the Deputy Minister, and is countersigned by the Secretary or another duly authorized person.
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> The point offered in support of the petitioner's claims is that the authorization stipulated in s. 18 was given at the Treasury Board meeting held on September 1, 1966, an extract from the Minutes of which was filed by the respondent (R-2). The essential conditions of the lease to be entered into are closely mentioned in that extract.

The allegation of fact is correct but the deduction of consequences which allegedly flow from it is certainly less so. The Treasury Board's action denotes mere monetary approval of an expenditure in the public interest and nothing more. In other words, the authorization simply constitutes optional permission to proceed and not a compulsory order to act. Any comparison is lame, but at the risk of appearing lame, I might compare the Treasury Board's monetary *fiat* to the obligation to acquire a driver's licence in order to have the right to drive; this, of course, does not compel anyone to hold a licence if for some reason or another he decides not to use driving privileges.

I return to the exact wording of s. 18 of the *Public Works Act*, the importance of which is incontestable; it states that:

> No deed, contract, document or writing in respect of any matter under the control or direction of the Minister shall be binding on Her Majesty or be deemed to be the act of the Minister, unless the same is signed by him or by the Deputy Minister, and countersigned by the Secretary of the Department, or the person authorized to act for him.

It cannot be denied that this statutory provision governs the validity of any written instrument purporting to involve the department's responsibility. This formal order was not carried into effect in this instance, and yet the terms of a lease are obviously an instrument in writing.

Furthermore, and in all humility, I refer the parties to the report on *Lord & Cie Ltée v. The Queen*[1] where a distinction is pointed out between that case, which is similar to this one, and those of *Her Majesty the Queen and Henderson*[2] and *Dominion Building Corporation Limited and the King*[3].

For all these reasons, the Court allows the respondent's offers to pay the petitioner compensation of $3,683.39, with interest at the legal rate from October 24, 1967, the day of filing of the statement of defence in which this offer was omitted, to April 16, 1969, the date of its rejection; as for the remainder, the petition of right is dismissed but without costs in view of the respondent's tardiness in regularizing her position.

[1] [1960] Ex. C.R. 185 at 189-190.
[2] (1898) 28 S.C.R. 425, 432.
[3] [1933] A.C. 533 at 539, 546, 547.