
Montreal 1966 Feb. 11

Ottawa Mar. 10

BETWEEN:

ABC REALTY CORPORATION .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Claims as incentive payments to builders and purchasers of houses—Authority of Appropriation Act No. 5 of 1963—Eligibility for the "winter house building incentive programme"—In October and November, 1963, conditions in force contained the words "multiple dwelling unit structures" but not the word "detached"—Order in Council P.C. 1964-232, February 13, 1964, and P.C. 1964-884 of June 18, 1964—Petition of Right rejected.

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The suppliant, a builder of houses, claims by its Petition of Right the sum of $24,000, i.e., $500 for each of the 48 suites erected by it in Montreal, P.Q. in the fall of 1963 and winter of 1964 as incentive payments to builders and purchasers of houses between December 1, 1963, and March 31, 1964, under the authority of *Appropriation Act No. 5* of the 1963 Session of Parliament of Canada.

The respondent refused to pay it on the basis that the suppliant's structure did not qualify for such payments.

The respondent's programme was restricted to residential structures that contain not more than four dwelling units.

Whereas, the structure built by the suppliant consists of twelve 4-storey units joined together by common walls which makes it a residential structure containing 48 units.

It was declared by the respondent's representative that there was no necessity for the respondent to encourage the building during winter months of structures containing more than four dwelling units as they were being built in sufficient quantities during the winter season.

Conditions of eligibility for "winter house building incentive" is described as follows:

> Eligibility is limited to single detached dwellings and multiple dwelling unit structures containing not more than four self-contained units which shall be built solely for year round residential use.

Orders in Council P.C. 1964-232 of February 13, 1964, and P.C. 1964-884 of June 18, 1964, which by inference clearly show that a multiple dwelling unit could not be joined to other such dwelling units by a common or party wall or a residential structure could not be joined side by side to one or more other such buildings by a common wall and qualify under the programme.

A proper consideration of the *Appropriation Act No. 5* of 1963 which authorizes the Government to make payments to a maximum established by the Act clearly states that such payments shall be made "in accordance with terms and conditions approved by the Governor in Council".

Held, That these terms and conditions were established by order-in-council dated February 13, 1964, and it appears clearly from its contents that the suppliant's buildings, which is admitted by its president, did not qualify under the regulations contained therein.

2. That in the Court's view, even if the suppliant had conformed to the conditions in force in the fall of 1963 inscribed on the reverse side of the application forms and even if the latter did not prohibit the units from being linked by a common wall, the suppliant would still not be entitled to any of the incentive payments because the suppliant did not comply as it had to with the terms and conditions set down in the order-in-council passed later, on February 13, 1964.

3. That no officer of the Crown was authorized to involve the Government in spending public funds without the authority of Parliament or upon conditions other than those established by it.

4. That the invitation made by the Department of Labour to take advantage of the programme was therefore subject to:

> 1. the appropriation of funds by the Government;

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2. the construction of the buildings as required by the conditions set down by the Governor in Council.

5. That the fact that the programme started prior to the adoption of these conditions, or that there was printed on the application forms conditions different from those adopted later by the Governor in Council cannot give the builders any right to the incentive payments as such if it turned out that their buildings did not meet with the requirements set down by the Governor in Council.

6. That the suppliant should have inquired specifically as to whether common walls were permitted and it would have been told at the time that common walls would not be allowed.

7. That the programme was subject to parliamentary approval of the money to be appropriated and also the buildings would have to comply with the regulations to be passed by order-in-council in order to be eligible for the bonuses.

8. That the suppliant having not complied with the regulations passed by the order-in-council therefore it is not entitled to the amount claimed as damages for the loss of the subsidies.

9. That the suppliant's petition of right be rejected.

PETITION OF RIGHT.

John G. Ahern, Q.C. for suppliant.

Paul M. Ollivier, Q.C. for respondent.

NOËL J.:—The suppliant, a builder of houses, claims by its petition the sum of $24,000, i.e., $500 for each of the 48 suites erected by it in Montreal, P.Q., in the fall of 1963 and winter of 1964 as incentive payments to builders and purchasers of houses between December 1st, 1963 and March 31st, 1964, under the authority of *Appropriation Act No. 5* of the 1963 session of Parliament which the respondent refuses to pay it on the basis that its structure does not qualify for such payments. The suppliant alleges that if it does not qualify for the incentive payments, it is because it was induced to erect the above mentioned structure at a cost of $300,000 by the erroneous approval of an application for same by the officer in charge of the administration of the programme, Mr. F. M. Hereford, who wrongly advised the suppliant that its project was eligible, when it was not as the structure built by the suppliant consists of twelve 4-storey units joined together by common walls which makes it a residential structure containing 48 units, whereas the programme was restricted to residential structures that contain not more than four dwelling units. There-

was indeed according to Mr. Hereford no necessity to encourage the building during the winter months of structures containing more than four dwelling units as they were being built in sufficient quantities during the winter season.

The suppliant alleges that the respondent is responsible for the damages suffered by it as a result of the erroneous advice given by Her representative Hereford.

The residential structure containing 48 units was erected in the following circumstances. As a result of the advertising of the winter build $500 cash bonus programme initiated to provide employment during the winter, Mr. S. Mitchell, president of the suppliant, wrote the Special Services Branch, Department of Labour on October 2, 1963, asking for the necessary forms and papers required to apply for the incentive payments. On October 4, 1963, Mr. F. M. Hereford, of the Department of Labour, Director of Special Services Branch, wrote Mr. Mitchell, enclosing ten copies of the pamphlet describing the winter house building incentive programme along with 60 copies of the application form.

Upon receipt of the documents, the suppliant, who had prior thereto secured the necessary land, caused plans to be prepared to erect thereon 48 individual dwellings consisting of 12 units of four flats each. On October 29, 1963, Mr. Mitchell visited the office of Mr. F. M. Hereford, in Ottawa, and submitted a set of blue prints which the latter looked at and application forms which he told him to leave with him. The same Mr. Hereford acknowledged receipt in writing of the application for certification of each of the 12 units and informed the suppliant that the first inspection of each structure and the building site would be carried out on or about November 30, 1963, and that it would be advised of the result of this inspection. On November 30, inspection certificates were issued for each unit as appears from Ex. S-2 stating that "the conditions of eligibility evident at the date of inspection have been fulfilled" and that "the applicant may assume the structure, has met the qualifications concerning the stage of construction permitted prior to November 30, 1963". One of the conditions of eligibility for the "winter house building incentive" in order to ensure that the major part of the work would be conducted during the winter months was that "construction shall not have

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proceeded beyond the first floor-joist stage (including sub-floor) or its equivalent prior to November 30, 1963", and the above certificates were for the purpose of ensuring only that the stage requirement prior to November 30, 1963, had not been exceeded. Around December 12, 1963, Mr. Mitchell, president of the suppliant, heard a rumour that his company did not qualify for the incentive payments and upon communicating by telephone with Mr. Hereford in Ottawa was told that there was some question as to the suppliant's eligibility for these amounts. On the same day, Mr. Hereford wrote to Mr. Mitchell (Ex. S-3) to this effect and referred to the conditions of eligibility under the programme as set out on the reverse side of the application form as follows:

> You will note that eligibility is limited to single detached dwellings and multiple dwelling unit structures containing not more than four self-contained units My information is that the housing being constructed by you consists of four storey quadruplex units adjoined to other quadruplex units by a common wall, and that the applications submitted by you cover one structure containing 48 individual units. If this is the case, I regret that I must inform you that the dwelling units will not qualify for the incentive payment.

On January 10, 1964, Mr. Mitchell, returning to Montreal after an absence of several weeks, found Mr. Hereford's letter of December 12, 1963, and wrote a letter (Ex. S-6) to the Honourable Minister of Labour, Allan J. MacEachen. In this letter, after mentioning his meeting with Mr. Hereford in Ottawa on October 29, 1963, when he left the applications for certification, he states that his "purpose for visiting the Department was not only to ensure that the application forms were properly filled out but more important to submit our plans for the dwelling units so that there should not be any possible mis-understanding on our part" and adding "the conditions of eligibility were discussed, the blue prints and plot plans were looked at by Mr. Hereford, and I was assured and satisfied when I left his office that there was no doubt whatsoever that we would be entitled to the incentive payment of $500 per dwelling unit". I might point out here that the plans contained the french words "murs mitoyens" which in English is "common walls". Mr. Mitchell then stated that the suppliant's estimated cost of each of the four storey units is

approximately $22,500, thereby involving a total investment of $270,000 and that:

Our entire planning and entering into this project was based on the Winter House Building Incentive Program, without which we stand to sustain a serious loss if the purchasers are ineligible to receive the incentive payments, a loss which would jeopardize the financial status of our company.

He then added that:

While we acknowledge that legally and or technically we do not comply with conditions of eligibility by virtue of the 12 units having common walls, it is our sincere opinion and belief that the fault was not ours.

We had sufficient space on our lots for 12 multiple dwellings each of 4 self-contained units and the extra cost entailed would have been of no consequence in terms of our overall investment.

On January 22, 1964, the Minister of Labour wrote Mr. Mitchell stating that he was sorry to learn that the 48 dwelling unit structure which the suppliant had under construction would not qualify under the winter house building incentive programme adding:

This program, as was very clearly indicated in all our publicity and informational material, is restricted to residential structures that contain not more than four dwelling units. Under the regulations, the housing which you are constructing does not qualify as it consists of twelve 4-storey units joined together by common walls, which makes it a residential structure containing 48 units.

I understand from Mr. Hereford that during his discussion with you he gained the impression that the residential structures you proposed to build would be separate buildings containing not more than four dwelling units. According to Mr. Hereford there was no suggestion by you that these units would be joined by common walls. Mr. Hereford says that he was shown a floor plan of one of the units and a plan showing a four unit structure, but that he did not see any plot plans or any evidence that these units were joined by common walls.

Mr Hereford further informs me that he gave you no assurance that the housing you are constructing would qualify under the program but advised you that your applications would be processed and that the building sites would be inspected by the Central Mortgage and Housing Corporation.

The application forms sent to the suppliant on October 4, 1963, comprised on the reverse side the conditions of eligibility for winter house building incentive and described as follows the type of structure that would qualify under the programme:

In English:

Eligibility is limited to single detached dwellings and multiple dwelling unit structures containing not more than four self-contained units which shall be built solely for year round residential use.

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In French:

L'admissibilité se limite aux maisons simples à logement unique et aux immeubles d'au plus 4 logements indépendants, construits uniquement aux fins d'habitation à l'année longue.

It was not until February 13, 1964, that an order in council was passed setting out the regulations concerning the programme and it was not also until then, according to the suppliant, that subparagraph (2) of paragraph 2 of the said regulations pointed out that the units could not be linked together by common walls, by providing that where "each dwelling unit in the building (i) has all the characteristics of a single detached dwelling unit except for being joined to other such dwelling units by a common or party wall and (ii) is built for occupancy by the purchaser thereof, the Minister may deem the building to be a residential structure".

The position taken by the suppliant herein as I understand it is that:

(1) prior to the above regulations in the fall of 1963, when the Government of Canada gave much publicity to its winter house building programme and invited builders to provide employment by building under the said programme, the conditions on the reverse side of the applications, which in October and November of 1963 were the conditions in force, contained the words "multiple dwelling unit structures" but did not contain the word "detached" and, therefore, did not prevent units from being joined by common walls. The suppliant therefore urges that it cannot be bound by conditions imposed (after its applications had been made and received) by orders in council P.C. 1964-232 of February 13, 1964 and P.C. 1964-884 of June 18, 1964 which by inference clearly show that a multiple dwelling unit could not be joined to other such dwelling units by a common or party wall or a residential structure could not be joined side by side to one or more other such buildings by a common wall and qualify under the programme;

(2) the suppliant was induced to erect the structure at a cost of $300,000 by the approval of its applications by the officer in charge of the administering of the programme, Mr. F. M. Hereford after examination of the plan (Ex. S-1) of the structure by the latter, which, as already mentioned, clearly stated in French that the walls

would be common, and his assurance that there was no doubt whatsoever that the buildings to be erected by the suppliant would be entitled to the incentive payments of $500 per dwelling unit and that, therefore, the respondent is responsible for the damages suffered by reason of the erroneous advice given by Her representative Hereford;

(3) that (this argument was raised during argument only) if Mr. Hereford did not, as alleged, give Mr. Mitchell such an assurance he was at fault in not telling him that his proposal did not meet with the requirements of eligibility, that no appropriation had yet been authorized for the programme and that regulations setting down the conditions of eligibility had not yet been passed.

Suppliant's first argument that it cannot be bound by conditions imposed (after its applications had been made and received) by the orders in council of February 13, 1964 and June 18, 1964, but is governed by the conditions contained on the reverse side of the application forms in force in the fall of 1963, which did not prevent the multiple units from being linked by common walls cannot be legally sustained even if the suppliant's interpretation of the conditions inscribed on the reverse side of the application forms is the correct one. A proper consideration of the *Appropriation Act No. 5* of 1963, which authorizes the Government to make payments to a maximum established by the Act clearly states that such payments shall be made "in accordance with terms and conditions approved by the Governor in Council . . .".

These terms and conditions were established by order in council dated February 13, 1964 and it appears clearly from its contents that the suppliant's buildings (and Mr. Mitchell admits that this is so) do not qualify under the regulations contained therein.

I am also of the view that even if the suppliant's contention that it had conformed to the conditions in force in the fall of 1963 inscribed on the reverse side of the application forms and even if the latter did not prohibit the units from being linked by a common wall, it would still not be entitled to any of the incentive payments for the following reasons.

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The Department of Labour advertised the bonus plan in the fall of 1963 prior to the passing of the *Appropriation Act* and invited builders to take advantage of the programme. No officer of the Crown, however, was authorized to involve the Government in spending public funds without the authority of Parliament or upon conditions other than those established by it. The invitation made by the Department of Labour to take advantage of the programme was, therefore, subject to (1) the appropriation of funds by the Government and (2) the construction of the buildings as required by the conditions set down by the Governor in Council. The fact that the programme started prior to the adoption of these conditions, or that there was printed on the application forms conditions different from those adopted later by the Governor in Council cannot give the builders any right to the incentive payments as such if it turned out that their buildings did not meet with the requirements set down by the Governor in Council.

The above is supported by considerable authority as expressed in a number of decisions of the Supreme Court.

In *Morris Robert Palmer and Hull Pipe and Machinery v. The Queen*[1] where the petitioners claimed damages for an alleged breach of a covenant of peaceful enjoyment after they had been expropriated by the Crown but had remained in occupation and paid rent to the Crown, it was held that as there was no lease between the parties (no valid consent having ever been given to bind the Crown by way of the authorization of the Governor in Council, which is an essential requisite for a valid lease entered into by a Department of the Crown) the petition had to be dismissed.

In *St. Ann's Island Shooting and Fishing Club Limited v. The King*[2], it was held that because section 51 of the *Indian Act*, R.S.C. 1906, c. 81, provides that all Indian lands which are reserves surrendered to His Majesty shall be managed, leased and sold as the Governor General in Council directs, subject to the conditions of surrender and the provisions of Part I of the Act, the authorization of the Governor General in Council was an essential requisite for a valid lease entered into by a Department of the Crown.

[1] [1959] S.C.R. 401. [2] [1950] S.C.R. 211.

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The Jacques Cartier Bank v. Her Majesty the Queen[1], *Ludger Charpentier v. Her Majesty the Queen*[2], and *The B.V.D. Company Limited* and *Her Majesty the Queen*[3] are further authorities in this regard.

It therefore follows that as suppliant here has not complied with the conditions set down by the Governor in Council which are an essential requisite for its right to claim the incentive payments, it has no right to same and, therefore, its first submission cannot be entertained.

I should also point out that although the conditions of eligibility which were inscribed on the reverse side of the application form might have been more clearly spelled out in order to eliminate entirely the linking of the units by common walls by adding the word "detached" to the words "multiple dwelling unit", the words "multiple dwelling unit structures containing not more than four self-contained units" would alone, I believe, indicate that the construction containing the four units must be a detached building. The suppliant could have, and should have, in the fall of 1963, inquired specifically as to whether common walls were permitted and it would have been told at the time, if the evidence of Mr. Hereford is referred to, that common walls would not be allowed.

I now turn to suppliant's second submission that it is entitled to the amount claimed as damages sustained by it resulting from the fact that an officer of the respondent, Mr. Hereford, had assured its president, Mr. Mitchell, that the building it intended to erect qualified under the programme.

Evidence on this point was given by both Mr. Hereford and Mr. Mitchell. The former, at pp. 34 and 35 of the transcript, questioned by the Court, stated:

> Q. But you definitely knew on the 29th October, that these units had to be individual units?
>
> A. Yes.
>
> Q And could not be part of any wall structure? You knew that?
>
> A. Oh yes.
>
> Q. But you didn't point that out to him?
>
> A. I feel that I did. You see there were twelve applications for twelve separate buildings, four units, and he was anxious to have me indicate that I approved—which I was not in a position to do. All I could say to him, and all I did say to him, is that these were

[1] (1895) 25 S.C.R. 84. [2] [1955] S.C.R. 177 at 180.
[3] [1955] S.C.R. 787.

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individual buildings containing no more than four units. "The application would appear to be in order, it will be processed; inspection will be carried out and you will be notified in due course."

Q. Did you not point out to him that they had to be individual units?

A. I—yes. When I say "individual" separate buildings.

Q. Cannot they still be individual units and have a common wall?

A. Under the conditions of the programme as it existed at that time, the answer would be "no".

Mr. Mitchell at p. 5 of the transcript confirms Mr. Hereford's evidence that he did not assure the former that the applications would be confirmed in answer to the following questions:

Q. Did you discuss with him (Hereford) the eligibility of these constructions to receive the winter subsidy for constructions?

A. I did.

Q. And what did he tell you?

A. He said "leave the applications over here and as soon as I get approval I will mail it to you".

Counsel for the suppliant upon re-examination, by means of a reference to paragraph 2 of page 2 of a letter written by the president of the suppliant on January 10, 1964, to the Minister of Labour, attempted to reinforce the testimony of Mitchell on the question as to whether Hereford had given him an assurance that his construction qualified under the plan when at p. 18 of the transcript he asked him the following questions:

Q. Which version is right—the one you gave in the box previously, or the one you gave in the letter? In the box, previously, you said Mr. Hereford would submit your application to the higher-ups, and would let you know?

A. I didn't say "higher-ups". This is exactly the version of it, it goes back since 1964, that is exactly what happened in his office when the plans were presented to Mr. Hereford.

Q. He said, "Leave your applications there and I will send your approval"?

A. The impression was left with me, in fact in my remarks to him I said, it is the most wonderful thing the Government can do to stop unemployment, and he agreed with me on this particular matter. He said, "This will give people work and save a lot of money."

Counsel's efforts in this regard, however, were not successful as from a review of the above evidence, it appears that although the president of the suppliant parted with Mr. Hereford with the impression that his building project would be approved, he received no assurance from Mr. Hereford (who as a matter of fact had no authority to

give such assurance) that such would be the case. He was merely told that his company's applications seemed to be in order, that they will be processed, inspection will be carried out (which as already mentioned dealt with the stage requirement certificate to be obtained through Central Mortgage whose sole responsibility was in regard to ensuring that the construction had not gone beyond the stage of construction permitted prior to November 30, 1963) and that he would be notified in due course. This is far from the assurance pleaded in the petition of right and mentioned in Mr. Mitchell's letter to the Minister of January 10, 1964, and therefore the suppliant's claim based thereon must also fail.

I now come to suppliant's third plea raised by counsel in that if Mr. Hereford did not, as alleged, assure Mr. Mitchell that his proposed constructions met with the requirements he did not tell him that his proposal did not meet with these requirements when he should have, thus committing a fault of omission. According to counsel for the suppliant, Mr. Hereford, as Director of Services, had a duty to inform Mr. Mitchell in the fall of 1963 that no appropriation of funds had then been authorized for the programme, and that regulations had not yet been adopted by the Governor in Council and that having not done so, he is responsible for the loss of the subsidies sustained by the suppliant in the amount of $24,000.

There is, I believe, a simple answer to suppliant's last argument in that it does appear to me that Mr. Hereford's omission in not informing Mr. Mitchell that the programme was subject to Parliamentary approval of the money to be appropriated for the programme or that the buildings would have to comply with the regulations to be passed by order in council (if he was subjected to such a duty) had nothing to do with the fact that the suppliant's buildings were not eligible for the bonuses, but were due to the fact that Mr. Mitchell was imprudent, in view of the conditions of eligibility on the reverse side of the application, which indicated that multiple dwelling unit structures should not contain more than four self-contained units, in not pointing out to Mr. Hereford that the plans he was showing him indicated that the walls would be common. It is indeed not sufficient in the present circumstances to have, as Mr. Mitchell did, merely deposited blue prints

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indicating in the French language that the buildings would be joined by common walls, which Mr. Hereford states he did not notice nor realize as he cannot read nor understand the language. He is therefore responsible for his own misfortune and that of his company. I might inject here that had the situation been different and had Mr. Hereford assured Mr. Mitchell that his proposed buildings would qualify under the plan after the latter had informed him of the intention of his company to use common walls between the units, I might (under the authority of *Hedly Byne & Co. Ltd. v. Heller Partners Ltd.*[1], which can also, I believe, be sustained under the Civil Code [cf. 44 Revue trimestrielle de Droit civil, p. 46 *et seq.*]) have come to a different conclusion.

It therefore follows that the suppliant's petition of right is rejected with costs.

[1] [1963] 2 All E.R. 575.