1921
June 2.

IN THE MATTER OF THE PETITION OF RIGHT OF CHARLES J. SAXE AND JOHN S. ARCHIBALD..... SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Contract — Construction — Public Buildings — Plans — Competition of Architects—Order in Council authorizing same—Board of Assessors—Power of same to alter conditions.

The Dominion Government, having need of additional departmental buildings at Ottawa, by order in council proposed a competition for architects involving the submission of preliminary designs for certain of such buildings, "the prizes being the selection of say five of the most successful competitors who would be invited to complete working plans of such of the buildings as the Minister of Public Works may prescribe, for which they would be paid each $3,000. Of these latter, the architect submitting the best working plans would be employed to carry out this work at a commission to be arranged." The order in council also provided for the appointment of three assessors to judge the preliminary designs and select the five prize-winners to prepare the working plans as above mentioned, and to ask the most successful of such competitors to prepare the working plans. The award of the assessors in both cases was to be subject to the approval of the Minister under the order in council. Advertisements were then published inviting architects to enter such competition and, assessors having been appointed, conditions were published by them for the guidance of architects in preparing their competitive designs. By these conditions the number of competitors was increased to 6 instead of 5, as provided by the order in council, and each of the five unsuccessful competitors who submitted plans was to receive an honorarium of $3,000. Plans were submitted by the suppliants, which were among the 6 sets selected. There was no approval of these plans by the Minister, and there was no competition as to final plans. The buildings were not proceeded with by the Government, owing to the breaking out of war and other reasons. Suppliants claim 1% on an estimated cost of $10,000,000 for buildings constructed on their plans.

Held, that the Crown was justified under the circumstances in not proceeding with the erection of the buildings; and that even if a contractual relationship existed the delay in proceeding did not constitute a breach thereof.

2. That the approval of the Minister of the plans was a condition precedent to the right of the suppliants to recover even the honorarium of $3,000; and that all the circumstances negatived the existence of a contract between the suppliants and the Crown to pay the percentage claimed.
3. That no action would lie against the Crown on account of the failure of the Minister to approve of the suppliants' plans, the matter being one of executive discretion.
4. As between a reasonable construction of the intention of the parties to a contract and an absurd one, the Court should be zealous to find reasons to adopt the former.
5. That the portion of the conditions prepared by the assessors which purported to change the conditions embodied in the order in council were ultra vires and void.

PETITION OF RIGHT seeking to recover $100,200.00 damages by reason of an alleged breach of contract between suppliants and the Crown.

23rd, 24th and 25th days of May, 1921.

The case was heard before the Honourable Mr. Justice Audette at Ottawa.

Eugene Lafleur, K.C., Rinfret, K.C., and *Barclay* for suppliants.

F. H. Chrysler, K.C., and *P. Chrysler,* for the Crown.

The facts are stated in the reasons for judgment.

AUDETTE J., now (June 2nd, 1921) delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of $100,200.00 as damages resulting from an alleged breach of contract between themselves and the Crown, under the circumstances hereinafter set forth.

The Crown having realized the desirability and urgent need of additional departmental buildings, in the City of Ottawa, decided, as mentioned in the order in council of the 27th February, 1912 (exhibit No. 1) to expropriate on Wellington Street for such purposes.

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After having obtained the report and plans of landscape architects with respect to laying out the grounds and indicating the position and size of the various buildings, it was decided to call, under the provisions of the order in council of the 14th April, 1913 (exhibit No. 2), a *preliminary* competition open to "architects of Great Britain and of her colonies for preliminary designs of the proposed buildings, the prizes being the selection of say five of the most successful competitors who would be invited to complete working plans of such of the buildings as the *Minister may prescribe,* for which they would be paid each $3,000. Of these latter, the architect submitting the *best working plan* would be employed to carry out the work at a commission to be arranged."

The order in council further proceeds to provide, for three assessors to judge the *preliminary designs* and select the five prize winners, who will be asked to prepare working plans from which the most meritorious would be chosen.

The award of the assessors, in both cases, is subject to the *approval of the Minister* of Public Works, as provided by the latter order-in-council and the conditions hereinafter mentioned.

Advertisements, under the signature of the Secretary of the Department of Public Works, were then issued and published inviting architects to submit sketch designs in a *preliminary competition* for the erection of departmental and courts buildings. Copies of these advertisements are filed as exhibits 3, 4, and 5, whereby, by the latter, the time for the reception of the designs in the first competition in question is extended to *April 2nd, 1914.*

The assessors then published the "General conditions for the guidance of architects in preparing competition designs," and a copy thereof is filed as exhibit No. 6 to which reference will be made in respect of several of its provisions.

It is well to lay down as a guiding principle that the assessors had in no case the right to formulate conditions beyond the scope of, or varying, the order-in-council of the 14th April, 1913, appointing them and defining their powers.

It may be well to state here that whilst the order in council provides for the selection of *five* of the most successful competitors, the conditions (item 6, exhibit No. 6) provide for *six*.

Counsel at bar for the Crown admitted that the figure six had been mentioned in the conditions and that he did not intend taking any objection to it. However that may be that admission cannot have reference to any change in the order in council, which must be held to be the foundation and only source from which the assessors derived their power and authority. This is to be said with more force, at this juncture, with respect to section 6 of the Conditions, which is in direct conflict with the order in council in respect to the payment to be made to the architects.

Indeed, the order in council provides that the *five* most successful competitors would prepare their *preliminary designs* and would be entitled to be paid $3,000 each only after completing the working plans prepared after the second competition. Then after this second competition, the best out of the five would be employed to carry out the work at a commission to be arranged. This is clearly stated and yet under clause 6 of the conditions a very material departure

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from the provisions of the order in council is readily found. This clause 6 proceeds by saying that the government has appointed the assessors "to draw up conditions, etc., . . . , and to select from the preliminary sketches, *six* designs, the authors of which are to be invited to submit final designs and each of the five unsuccessful architects submitting a design in accordance with these conditions shall receive an honorarium of $3,000."

This part of the Conditions is obviously different from the order in council which specifically provides that all the successful competitors should receive a payment of $3,000 for their preliminary designs after supplying the working plans, and furthermore that the best of them of the five, would receive his commission over and above the $3,000, thereby creating a liability of $3,000 which did not exist under the order in council.

That part which purports to change the terms of the order in council is obviously *ultra vires*, null and void, because the terms of the order in council must prevail. The provisions of the conditions varying and changing the remuneration of the successful competitor is void and inoperative, being beyond the power of both the Minister and the assessors. *The British American Fish Corporation, Ltd.*, v. *the King* (1); *The King* v. *Vancouver Lumber Company* (2); and *Belanger* v. *the King* (3).

The extended time within which the sketches might be received expired on the 2nd April, 1914. The 59 preliminary designs were submitted within the allotted time.

(1) 18 Ex. C.R. 230; 59 S.C.R. 651. (2) 17 Ex. C.R. 329; 41 D.L.R. 617; 50 D.L.R. 6.
(3) 54 S.C.R. 265.

As testified to, on the 16th April, 1914, the Minister of Public Works announced in the House of Commons that the assessors had given their decision in the first competition, while notice thereof was never given to the six successful competitors. See also exhibit No. 11 in that respect.

On the 18th April, 1914, Mr. Archibald, one of the suppliants, saw all of the 59 designs exhibited in the "East Block" at Ottawa. He at the same time saw the designs of his own firm therein exhibited, notwithstanding that clause 11 of the Conditions provided that the designs of the first competition would "be seen only by the assessors and the Honourable the Minister of Public Works and his Deputy."

While mentioning this inhibition, it might be said I am unable to realize that these successful competitors could be hurt or damaged by this publicity, because what they were to do in the final competition was to submit working plans—more matured plans—from which contractors could work, and that could be done only from the first designs respectively filed by the successful competitors.

There is no satisfactory evidence that this public exhibition would work out a disadvantage to the competitors and there is further no evidence of any protest to that step having been taken. I only mention this point casually, because I cannot see that much turns upon it, to indicate that it should not have been done, since the assessors had undertaken not to do it.

Proceeding chronologically we next find that on the 4th July, 1914, the Deputy Minister of Public Works, informs the assessor, Mr. Colcutt, in answer to inquiry, that he "understands the reason instructions were

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given to hold the matter of the new Departmental buildings competition *for the present*, is that further progress may be made by the Federal Plan Commission . . . covering Ottawa and Hull." Then, on the 20th July, 1914, Mr. Russell, one of the assessors, wrote to the Deputy, and among other things said that some of the "selected designs came from the Old Country, and that might have some bearing on the time for receiving the drawings for the final competition." In reply to that letter, the Deputy wrote, on the 6th August, 1914, stating that the designs of the six successful competitors were never returned for further development by the authors, as instructions were received to hold the matter for the present. Up to that time nothing had been done or said from which it could appear that the Crown did not intend to proceed within reasonable time with the erection of the buildings in question.

The war had then been declared.

Up to date nothing has been done in respect of the second competition, the enormous expenditure occasioned by the war having, from an indefinite time, stayed the execution of these buildings, involving the spending of several millions of dollars.

For want of proceeding with the second competition within reasonable time, the suppliants allege a breach of contract on behalf of the Crown, and claim, under the Architect's Tariff for the Province of Quebec, where they reside, for preparing and furnishing preliminary plans 1% on the estimated cost of the buildings at $10,000,000, the sum of $100,200.

If the suppliants are entitled to so recover, the other five competitors, who are in the same position, would also be entitled to recover upon the same basis. That is to say (see Exhibit 11) if the six competitors have

similar right of action, and that the cost of the building would equally be $10,000,000 and no more, that the total amount the Crown would be called upon to pay, under the advertisement calling for preliminary sketches, is the sum of $601,200 and would not at that have working plans to start the erection of the buildings in question. Can that be said to be the meaning, the spirit of the contract which resulted from such advertisement? Did that contention ever enter the head of the several contracting parties—if I may call them thus—at the time these six competitors accepted the Crown's invitation to compete?

A very large proposition indeed and a very extraordinary contention under the circumstances, which would operate harshly and unfairly.

When there is an offer of reward for the supply of a specific piece of information, the offerer clearly does not mean to pay many times over for the same thing. Anson on Contract, 3rd Ed. 67. And again at p. 65 et seq, Anson says: "The offer, by way of advertisement, of a reward for the rendering of certain services, addressed to the public at large, becomes a contract to pay the reward so soon as an individual renders the services, but not before.

"To hold that any contractual obligation exists before the services are rendered, would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or, as it has been expressed, that a man may have a contract with the whole world."

"While it is true there is a technical legal distinction between an exception and a reservation, it is also true that whether a particular clause in a deed will be considered an exception or a reservation depends, not

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so much upon the words used, as upon the nature of the right or thing excepted. In each case the equities of all parties must be considered in arriving at the intent of the deed." *Delano* v. *Luedinghans* (1).

If in the light of the evidence an absurd result would be arrived at by adopting a certain construction, the court must be zealous to reach another conclusion by a reasonable and sensible construction of the intentions of the parties to the instrument. *Yates* v. *the Queen* (2).

Under such circumstances, the Court is entitled and indeed bound, to look at the whole matter from this point of view that, if there is a reasonable and sensible construction of this alleged contract, and also an absurd one, the Court should lean to the reasonable and sensible construction apart from anything else.

I am glad to say that the solution of the controversy can be readily arrived at from a legal standpoint.

Under the order in council 14th April, 1913 (ex. No. 2)—(and its provisions must prevail against the Conditions prepared by the assessors who derived their power and authority thereunder)—all the five successful competitors are entitled to recover, as a prize, is $3,000, for their successful preliminary designs, after they have been completed, under the second competition, by working plans.

As a condition precedent to any one of the five (or six—liability be admitted to that extent) successful competitors for the preliminary designs, to become entitled to these $3,000, the award of the assessors "is subject to the approval of the Minister of Public Works," and under the case of *Vautelet* v. *the King* (3),

(1) 127 Pac. Rep. 198. (2) [1885] 14 Q.B.D. 648
(3) Audette's Ex.C. Practice 115.

it would be a bar to the action. And there is no evidence upon the record that the Minister has ever approved of the award or was ever even asked to do so by the suppliants. Only one of the five architects, however, could in the result be selected, and the suppliants cannot succeed because the assessors are not bound to accept their plans. *Walbank* v. *Protestant Hospital for the Insane* (1).

As a further condition precedent to any enforceable obligation arising in favour of the architect who submits the best preliminary plans (a matter which still remains undetermined) there must take place a final competition, which has never taken place, and the final plans must also have received the approval of the Minister of Public Works. No one of these two events have as yet happened.

There is still a third condition precedent in the way of the suppliants before they can recover and that is there are now six successful competitors; but if in the final competition the suppliants were ranked last, or 6th, they would be out of court entirely, because the order in council only provided for the first *five* competitors and not six, and the order in council must prevail over the conditions, and yet the rank of the suppliants among the candidates has never been determined and there is nothing to show where the suppliants stand. The assessors have no power to vary the order in council.

The conditions under which a right of action might arise do not seem to have so far been fulfilled.

All of these conditions are precedent to the existence to any legal obligation. The Court will not make any agreement for the parties but will ascertain what the agreement was.

(1) M.L.R. 7 Q.B. 166.

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The question now remaining to be decided is whether or not under the circumstances, there were reasonable grounds for not proceeding more expeditiously with the matter of the second competition and the erection of the buildings.

The Court has a right to take judicial notice of the great war which has created such an upheaval the world over, coupled with the Deputy Minister's evidence attributing that "all considerable works in Canada at present have been prevented on account of the war."

The rights of the parties upon the terms of the order in council and the Conditions are not ambiguous. By these terms it is stipulated that such compensation as is sought here is not to be paid until, *inter alia*, the second competition has taken place and that one of the five is given first rank. It establishes a moment, a time before the arrival of which he cannot ask for compensation and there is no evidence on the record establishing or indicating that the respondent, through any volition of its responsible Minister or officers, has failed to carry out the contract, if any.

The order in council and the Conditions in question supersede the ordinary rule that the architect has earned his commission when he has prepared the preliminary sketches called for by the said advertisements. Moreover, by clause 12 of the Conditions the final designs become the property of the Government without any further compensation than the $3,000 above referred to.

Coming to the question of impossibility of performance we must first distinguish the question of *possibility* of performance of a thing promised as a condition precedent to the duty of the promisor. When such performance is legally or physically impossible at the

time the promise is made, no duty arises, not even a liability to a duty. In such case the acceptance is an inoperative fact and we should say that no contract is formed. But when the impossibility arises subsequently to the acceptance, the existing liability (or conditional duty) is discharged. Anson, on contract, 427, 428. Pollock on Contract, 8th Ed. 437, 439, and 442.

It may be said, *en passant*, that there can be no order for specific performance against the Crown. *Clark* v. *the Queen* (1). And further, as decided in the case of *Lake Champlain* v. *the King* (2) no action will lie to compel the Crown to approve plans which had, by Parliament been made subject to such approval before works would be started, the matter being discretionary.

Counsel at bar, on behalf of the Crown, contended in effect that the suppliants had a right, after a reasonable delay of inaction, to free themselves of the obligation resulting from the Conditions of the competition, and that the Crown had the right in respect thereto, when the suppliants had done so, to consider the contract, if any enforceable, at an end. The contract would cease and be at an end without any breach and the parties would therefore be discharged from any further performance in respect thereto. He cited *Thomas* v. *the Queen* (3); *The Darley Main Colliery Company* v. *Mitchell* (4); *Windsor & Annapolis Ry. Co.* v. *the Queen* (5); *Krell* v. *Henry* (6); *Chandler* v. *Webster* (7); *Churchward* v. *the Queen* (8); *Kelly* v. *Sherlock* (9); *Metropolitan Water Board* v. *Dick et al* (10).

(1) 1 Ex. C.R. 182.
(2) 16 Ex.C.R. 125, 54 S.C.R. 461.
(3) L.R. 10 Q.B. 31.
(4) [1886] 11 A.C. 133.
(5) [1886] 11 A.C. 607.
(6) [1903] 2 K.B. 740, 756, 760, 761.
(7) [1904] 1 K.B. 493, 497, 499, 500.
(8) L.R. 1 Q.B. 173, 201 et seq.
(9) L.R. 1 Q.B. 695.
(10) [1918] A.C. 119; [1917] 2 K.B. D. 1, 3, 22.

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All of this contention would seem to be borne by the obvious jurisprudence applicable under the circumstances of this case. The law comes to the rescue of the facts.

Furthermore, the Crown sets up the defence that under the Public Works Act and the facts of the case, the Minister has not *inter alia*, so far the power to proceed with the erection of the buildings. No such authority had ever been given him and that therefore the time for the payment of a commission, as claimed, has never arisen.

While the principles of the English law of contracts which had become so clearly settled during the last century as the result of enlightened judicial decision and scholarly research on the part of text-writers, bringing, may I say, those principles more and more in harmony with the civil law—have been necessarily strained by the extraordinary economic and industrial conditions growing out of the great war of 1914-1918, yet it is a matter of gratification to those who have an abiding faith in the stability of the law as a means of safe-guarding the State to recognize that there has been no real unsettlement of or departure from fundamental legal principles in matters of contract.

It has been argued on behalf of the suppliants that an implied contract on behalf of the Crown must be read, in the documents in question whereby the Crown had to erect these buildings within reasonable time and has failed to do so. Is there not, on the contrary, an implied contract introducing within these documents, some tacit condition in cases when the impossibility of performance arises? The respective ability to perform is a tacit condition which must be read into the contract; because the law implies exceptions and conditions that are not necessarily expressed.

A contract like the present for *personal services* which can only be performed during the lifetime of the party is obviously subject to the implied condition that he shall be alive to perform and his heirs and assigns would not be responsible in damages for the non-performance resulting therefrom. Ergo, logically reasoning in respect of the position of the Crown, under the present contract, circumstances unforeseen to both parties, have arisen that makes it unexpectedly burdensome and even impossible to perform on account of the war and from the delay in performance, justifiable under the circumstances, a breach of contract does not arise. The suppliants have a right, after reasonable delay, to be discharged from their obligation of performance, and that the contract be declared at an end and to be taken as having ceased to be operative as between the parties thereto with respect to further steps thereunder, if they see fit. And neither the suppliants nor the Crown can force the execution of their respective obligations under the present conditions and circumstances. The contract ceases to exist as between them.

I find that the Crown was and is absolutely justified in not proceeding to the erection of the buildings in question, a construction which would involve an expenditure of several millions of dollars when our Canadian Exchequer is now overburdened with the debts occasioned by the late iniquitous war. These circumstances operate as an impossibility of performance and I so find under the numerous authorities cited herein and that the suppliants are only entitled to recover the sum of $3,000 offered them by the Crown's statement in defence.

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The conditions of trade and finance have been so much altered by the war and its result that it must be found that the Crown did not act unreasonably in delaying the erection of the buildings in question—it is an urgent national necessity to delay such work. *North Metropolitan Electric Power Supply Co.* v. *Stoke Newington Corporation* (1); *Crown of Leon* v. *Lord Commission of the Admiralty* (2); See *Metropolitan Water Board* v. *Dick* (3); *Bank Line, Ltd.*, v. *Arthur Capel & Co.* (4); *Smith* v. *Beck et al* (5); *Blackburn Bobbins Co., Ltd.*, v. *Allan & Sons* (6) and cases above cited.

Under articles 1071 and 1072 C.C.P.Q. a debtor is excused of liability when the inexecution of an obligation proceeds from a cause which cannot be imputed to him or which is the result of a fortuitous event or by irresistible force without any fault on his part, unless he has obliged himself thereunto by the special terms of the contract. The non-fulfilment of the conditions and order in council has not been caused by the act of the Crown.

The plea of prescription has been waived by the Crown, as will appear by the order in council of the 2nd April, 1919, filed herein as exhibit C; however, it also appears from exhibit 14, that the Petition of Right was lodged with the Secretary of State, as provided by sec. 4 of the Petition of Right Act, during the month of May, 1916. It was time and again held by this Court that the lodging of the petition of right, pursuant to the requirement of the Petition of Right Act interrupted prescription from that date.

(1) [1921] 1 Chy. 455.
(2) [1921] 1 K.B. 595.
(3) [1918] A.C. 119.
(4) [1919] A.C. 435.
(5) [1916] 2 Chy. 86.
(6) [1918] 2 K.B. 467.

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The suppliants are not entitled to any portion of the relief sought by their petition of right; but through the benevolence of the Crown expressing its willingness to pay them $3,000, there will be judgment accordingly. The Crown obviously succeeds on the issue whereby the Petition of Right claims $100,200 and the suppliants recover these $3,000, which are almost equal to a solatium under the circumstances.

The offer to pay $3,000, which is the amount the successful competitors in the first competition are all entitled to receive after they have supplied working plans under the second competition—is made by the statement in defence and it should carry costs to the suppliants up to that stage of the case.

Therefore, there will be judgment adjudging that the suppliants are entitled to recover the said sum of $3,000, with costs up to the stage of filing defence. All other claims set up by the suppliants are dismissed without costs to either parties.

Judgment accordingly.