

CANADA / JUDGMENT

Lumberland Inc. v. Nineteen Hundred Tower Ltd.

[1977] 1 SCR 581

COURT

Supreme Court of Canada

DECIDED

7 October 1975

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Lumberland Inc. v. Nineteen Hundred Tower Ltd.

Collection

Supreme Court Judgments

Date

1975-10-07

Report

[1977] 1 SCR 581

Judges

Judson, Wilfred; Spence, Wishart Flett; Pigeon, Louis-Philippe; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Quebec

Subjects

Priorities and hypothecs

Decision Content

Supreme Court of Canada

Lumberland Inc. v. Nineteen Hundred Tower Ltd., [1977] 1 S.C.R. 581

Date: 1975-10-07

Lumberland Inc. (Plaintiff) Appellant,

and

Nineteen Hundred Tower Limited (Intervenor in continuance of suit) Respondent.

1974: October 10; 1975: October 7.

Present: Judson, Spence, Pigeon, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Privilege—Privilege of supplier of materials—Incorporation of materials—Lumber used to make a form work—Meaning of “enter into a construction”—Civil Code, arts. 2013, 2013a, 2013e.

Appellant sold to Brummer Construction Co. Ltd. the lumber required for the construction of a building which became the property of respondent. Part of the lumber, worth \$10,000, was incorporated into the structure of the building while the rest, worth \$36,000, was used to make the form work necessary for the pouring of concrete, but it was not incorporated into the building. Despite the ambiguous wording of the joint statement filed before the hearing in the Court of Appeal, it emerges that the only point at issue “is whether the furnishing of materials, intended not for incorporation into the structure but for use in carrying out work, such as the building of forms for pouring concrete, is subject to being a privilege”. The Superior Court and the Court of Appeal replied in the negative and ordered that the privilege of the supplier of materials, by which appellant’s claim was secured and respondent’s building hypothecated, was for the amount of \$10,000 and not for \$46,000, as claimed by plaintiff. Hence the appeal to this Court.

Held: The appeal should be allowed.

Although the joint statement refers to the definition of form work adopted by the trial judge, which mentions that the materials used are capable of being re-used, the evidence enables one to conclude that a part of the lumber supplied for the form work was in fact consumed. Nor may it be compared to a tool, since there is no question of supplying form work, but rather of supplying lumber for making forms.

The deciding reason for the lower Courts holding that appellant was not entitled to a privilege securing its entire claim was that part of the lumber had not been incorporated into the building. This passage from the first paragraph of art. 2013e of the Civil Code, to the effect that a “supplier of materials has a privilege on the immovable in the construction of which the materials ... have been used”, has been interpreted as meaning that the materials must enter into the construction, that is, enter into the building and be effectively incorporated into it if a privilege is to arise. This erroneous interpretation stems from the fact that “construction” was used in its secondary sense of “building being constructed”, a sense which it has in the fourth and sixth paragraphs of the same article. However, the primary meaning of the word is “act of constructing” and it is clear on the basis of both proper French usage and of the English version that the first paragraph of art. 2013e, which is the governing provision, uses it in this sense. It follows that if the expression “enter into a construction (building)”, when used in reference to materials, can suggest a form of incorporation, the same cannot be said of the expression “enter into the construction of a

building”, which is broader. The latter implies that the materials must be consumed in the process of construction, either by incorporation or as a result of their use when they have been altered to such an extent that they can only be used for limited purposes. By conferring additional value on the immovable into the construction of which they enter, the materials correctively lose their value as such, totally or substantially.

This interpretation is, moreover, in accordance with the principle intended by the legislator and stated in art. 2013 of the Civil Code, that those persons whose labour or materials have conferred additional value on an immovable benefit from a privilege on that immovable. Finally, although this Court has spoken in previous decisions of the incorporation of materials, it has never had to decide on the question which has been submitted in this case, nor to give a different interpretation to art. 2013e than the one proposed.

Gadbois v. Stimson-Reeb Builders Supply Co., [1929] S.C.R. 587, distinguished; Terreau et al. v. Hôtel Loretteville, [1965] C.S. 313; Clarkson Co. Ltd. et al. v. Ace Lumber Ltd. et al., [1963] S.C.R. 110; Munn & Shea Ltd. v. Hogue Liée, [1928] S.C.R. 398; Nineteen Hundred Tower Limited v. Cassiani, [1967] Que. Q.B. 787; Sofinac Inc. v. Amico Inc., [1969] Que. Q.B. 941; Assistance Loan and Finance Corp. v. Bourassa, [1972] C.A. 631; Craft Finance Corp. v. Belle-Isle Lumber et al., [1966] S.C.R. 661, referred to.

APPEAL from a decision of the Court of Appeal of Quebec[1] affirming a judgment of the Superior Court. Appeal allowed and judgment of the Superior Court amended with costs.

Sid Cutler, for the appellant.

Michael A. Gagnon, for the respondent.

The judgment of the Court was delivered by

BEETZ J.—This is an action on a privilege. Plaintiff-appellant Lumberland Inc. sold to Brummer Construction Co. Ltd. the lumber required for the construction of a fifteen-story building. The building subsequently became the property of Nineteen Hundred Tower Ltd., intervenor in continuance of suit and respondent in this Court. Part of the lumber, worth \$10,000, was incorporated into the structure of the building; the rest, worth \$36,000, was used to make the form work necessary for the pouring of concrete, but it was not incorporated into the building.

We must decide whether the privilege of the supplier of materials, by which Lumberland’s claim is secured and the building of Nineteen Hundred Tower hypothecated, is for the amount of \$10,000, as held by the Superior Court and the Quebec Court of Appeal, and as Nineteen Hundred Tower now acknowledges, or of \$46,000, as Lumberland contends.

The particulars of the problem are simple. However, they have been complicated by an awkwardly worded joint statement of counsel, which was filed before the hearing in the Court of Appeal:

CONSENT

The Appellant consents that in view of the fact that Respondents have not appeared, the Intervenant, Nineteen Hundred Tower Limited, be permitted to contest the present appeal in lieu of Respondents.

THAT the joint record be comprised of the following only:

- (a) Plaintiffs Declaration
- (b) Intervenant's Intervention
- (c) Contestation of Intervention
- (d) Answer to contestation
- (e) Judgment of the Honourable Mr. Justice André Montpetit dated May 14, 1968.

That the only issue to be decided by this Honourable Court be the question as to whether "Form work" as described in the Judgment is susceptible to being a privilege or not.

That in the event that this Honourable Court reaches the conclusion that "Form work" is subject to being a privilege then in such event the immovable property described in Plaintiffs declaration be declared hypothecated for the amount of \$46,000 instead of only \$10,000, the whole with interest and costs in both Courts from date of service of Plaintiffs action.

Montreal, June 2, 1969

(S.).....

Attorneys for Appellant

(S.).....

Attorneys for Nineteen Hundred Tower Limited

The description of the "form work" referred to in this joint statement is that submitted in a brief by Nineteen Hundred Tower to the trial judge and adopted by him:

"Form-work consists of materials used to create forms into which concrete is then poured. After the concrete has solidified, the form-work is removed and does not remain incorporated with the structure of the building. They are construction tools so to speak rather than building materials.

Ownership of the materials used for form-work remains with the builder after they have been used in the construction of a particular building and may, of course, be re-used for the same or any other purpose in the construction of other buildings"...

This is a fair description of what is called "form-work" in the building trade. It is a description which is justified by the evidence before me.

The wording of the joint statement is clearly erroneous, and should the Court of Appeal, and so this Court, not look beyond it, they would be in danger of settling a different question than the one which arose in the trial Court, and an issue other than that which in fact divides the parties. The interpretation that Nineteen Hundred Tower proposes to apply could even deprive the case of its substance.

In the first place—and this error is the least serious—the joint statement literally asks whether materials are, or can become a privilege. The supplying of material only can give rise to a privilege in favour of the supplier: but, of course, the material itself is not, and cannot become, a privilege.

Next—and this is a more serious error—the joint statement of the parties and the description to which it refers as laid out in the decision of the trial judge emphasize the supplying of form work (coffrage)—and incidentally this expression seems to be used in more than one sense—not the supplying of the lumber that was used in making the forms. From the outset of the hearing in this Court, counsel were closely questioned as to the meaning of this statement, and they had to agree, as is indeed clearly evident from the record, that Lumberland never supplied form work to the builder and first owner of the Nineteen Hundred Tower building; it only supplied lumber, part of which was used to make the forms. In fact, as may be seen in the judgment of the Superior Court, the following admission was produced at the start of the hearing:

The parties admit that the Plaintiff delivered to the site of construction materials for incorporation into the building at a price of \$10,000 and the said materials were incorporated into the building and that Plaintiff delivered to the site lumber for form work at a price of \$36,000.

In the Court of Appeal, Crête J.A., summarized the problem as follows:

[TRANSLATION] The only issue in the appeal, therefore, is whether the furnishing of materials, intended not for incorporation into the structure but for use in carrying out work, such as the building of forms for pouring concrete, is subject to being a privilege. (at pp. 482-483.)

In these circumstances, the judgment of the Court of Appeal did not, in my opinion, really deal with “‘Form work’ as described in the Judgment”, nor can this Court arrive at its decision on such a basis.

Lastly, in the briefs submitted to the Court, counsel do not agree on the way in which the trial judge’s description should be interpreted. This description states that the materials remain the property of the contractor and are capable of being re-used after the concrete has solidified and the forms have been removed. Counsel for Lumberland contends that lumber recovered in this manner is scrap lumber and has practically no value. In short, in his opinion this lumber should be treated as a consumable asset.

Counsel for Nineteen Hundred Tower replies that such a submission conflicts with the trial judge's description, which was incorporated into the joint statement and which is binding on the parties. Carried to its logical conclusion, the argument of counsel for Nineteen Hundred Tower implies that the lumber used in fabricating form work should be considered as a lasting, that is a non-consumable asset.

The trial judge's description, which deals mainly with form work although this is not the subject on which the Court has to decide, maintains that the lumber used in making the forms may be used more than once. However, the description does not say that it may be used indefinitely, for a long time, or even a number of times. Nor does it say that the lumber remains unaltered by the use made of it. It gives no indication of the change in the value of the lumber after its first or second use. Should this lumber be considered as capable of enduring indefinite use while remaining identifiable, as in the case of steel struts used to hold up forms for the pouring of concrete, the issue would be different from the one before us.

The oral evidence, presented before the trial judge was not reproduced in the case printed for the use of this Court; however, it may be found in the original record filed with the registry office. The testimony of witnesses Bronstein and Brummer disclosed that the lumber used for form work consisted mainly of plywood and of 4" x 4" and 2" x 2" structural lumber. In order to make the form work necessary for constructing this fifteen-story building, a supply of enough lumber to build three stories would appear to have been sufficient; once the concrete had been poured, the forms had to remain in place at least eighteen days in warm weather and twenty-one in winter, after which they could be removed and by all indications, used again, to build the upper stories. While there was no direct evidence of this, it can be inferred that the lumber supplied for making the forms could have been used at least two or three times for this purpose, depending on the speed at which the work was carried out. It is difficult to believe that the repeated operations of setting up and dismantling the form work would not entail unavoidable losses as well as an appreciable decrease in the size and quality of the remaining pieces of lumber; this would soon tend to restrict the use to which they could be put and reduce their value. This evidence further discloses that lumber valued at \$2,000 to \$3,000, used in form work for the two underground levels and the ground floor shorings, remained underground because excavations would have been necessary for its recovery. The evidence is not entirely clear on this point, but it does enable one to conclude that a substantial part of the lumber supplied by Lumberland and used in making the form work was in fact consumed. In the case at bar, the problem of assessing the extent of the privilege, if indeed there is a privilege, does not arise; the parties have agreed that, should the Court conclude that the lumber supplied for making the form work gave rise to a privilege on the building, the immovable in question would be declared subject to a privilege securing a claim of \$46,000, instead of \$10,000. At least this part of the joint statement contains no ambiguity; it should be implemented if the conditions required by law for the creation of a privilege are fulfilled.

Furthermore, in arriving at their conclusions, neither the Superior Court nor the Court of Appeal refer to the fact that the lumber supplied by Lumberland was of a non-consumable nature. It is true that the Superior Court compares the form work to a kind of tool. However, apart from the fact that a tool remains the property of its owner and is not a material, once again there is no question of supplying form work in this case, but rather of supplying lumber for making forms at the site.

The deciding reason in the opinion of the Superior Court and of the Court of Appeal why Lumberland is not entitled to a privilege securing its entire claim is that part of the lumber was not incorporated into the Nineteen Hundred Tower building. The merit of this reason must now be considered.

The privilege in favour of the supplier of materials is provided for in art. 2013 C.C.:

Art. 2013. The workman, supplier of materials, builder and architect have a privilege and a right of preference over all the other creditors on the immovable, but only upon the additional value given to such immovable by the work done or by the materials.

In art. 2013a C.C. an attempt is made to define the supplier of materials, but in a non-limitative manner, in order to make it clear that materials include manufactured objects which enter into any construction, since this might otherwise have been uncertain:

Art. 2013a. The word “workman” includes the artisan, the labourer and generally every one who makes his living by manual labor.

The words “supplier of materials” include the supplier not only of raw materials but also of every manufactured object which enters into any construction.

The word “builder” includes both contractor and sub-contractor.

The words “end of the work” mean the date at which the construction is ready for the use for which it is intended.

Finally, the extent of the privilege of the supplier of materials is determined in the first paragraph of art. 2013e C.C. However, reference must also be made to the sixth paragraph. The two paragraphs read as follows:

Art. 2013e. The supplier of materials has a privilege on the immovable in the construction of which the materials supplied to the proprietor or builder have been used, or for the construction of which they have been specially prepared.

...

The supplier of materials is also entitled, in case of the insolvency of the proprietor or builder, or in case of failure to make payment at the periods agreed upon, to revendicate the materials he has supplied, but which have not yet been incorporated into the building.

...

Relying on another judgment of the Superior Court, *Terreau et al v. Hôtel Loretteville*[2], and on G.-M. Giroux, author of *Le Privilège ouvrier*, Montpetit J. of the Superior Court concluded that the first paragraph of art. 2013e C.C. was not applicable unless the materials supplied became immovable by nature as a result of their incorporation into the property that was built.

His decision was upheld by the Court of Appeal, which considered that its opinion was supported by the wording of the sixth paragraph of art. 2013e C.C. cited above. This paragraph entitles the supplier, under certain circumstances, to “revendicate the materials he has supplied, but which have not yet been incorporated into the building”. After noting that the expression used in the English version of this paragraph is similar to the French one (“qui ne sont pas encore incorporés à la construction”), Crête J.A., whose opinion was adopted by both his colleagues, concluded as follows:

[TRANSLATION] In my opinion, this passage sheds further light and enables us to see even more clearly how art. 2013e should be interpreted: in order that there be privilege, the materials supplied must enter into the construction of the immovable. (at p. 484).

The Court of Appeal also argues that privileges are a matter of strict law and must not be extended beyond those cases for which provision is made by the law.

The opinions of Geo.-M. Giroux, contained in his text *Le Privilège ouvrier*, have been largely responsible for creating a corpus of doctrine and of case law to the effect that materials must “enter into the construction”, that is, enter into the building and be effectively incorporated into it if a privilege of the supplier is to arise. This is illustrated by the following extract from the above-mentioned text:

[TRANSLATION] 67—Materials entering into a building. In order to be a supplier within art. 2013, it is not sufficient to sell construction materials; it is also necessary to supply the materials that are actually incorporated into an immovable: “the supplier... has a privilege on the immovable in the construction of which the materials supplied have been used ...” (art. 2013e). The supplier of art. 2013 must procure materials, the assembly of which constitutes a building, materials entering into a construction, materials forming a building; hence his privilege can only secure the selling price of the materials that entered into a construction, that were incorporated into an immovable. (Geo.-M. Giroux, *op. cit.* at p. 76).

The word “construction” has the primary meaning of “act of constructing” and, per extensum, a secondary meaning of “the building being constructed”. It is clear that this word is used in its secondary sense of “the building being constructed”, in for example the fourth paragraph of art. 2013a and in the French version of the sixth paragraph of art. 2013e cited above. While it is quite possible that this is also the meaning in the second paragraph of art. 2013a, in this case the comma after the words “matériaux bruts” (raw materials) in the French shows that the relative clause, “qui entrent dans une construction” (which enters into any construction), refers only to the “objets façonnés” (manufactured objects) and not both to the latter and to the “matériaux bruts”; the grammatical structure of the English version confirms this interpretation. On the other hand, in my opinion it is equally clear that this same word “construction” is intended to

have its primary meaning, “act of construction”, in the first paragraph of art. 2013e, which is the governing provision in the case at bar. In proper French usage this meaning, which is confirmed by the English version, must be chosen over the other.

While the expression “enter into a construction (building)”, when used in reference to materials, can suggest a form of incorporation, the same cannot be said of the expression “enter into the construction of a building”. The first paragraph of art. 2013e requires that the materials enter into the “act of constructing” an immovable, that is, that they be used in the making of an immovable, in order for the supplier to be granted a privilege, but it does not require that the materials enter into the building being constructed.

In the second volume of Paul Robert’s *Dictionnaire alphabétique et analogique de la langue française*, it is stated that the infinitive “entrer” (to enter) can mean “être employé dans la composition, ou dans la fabrication de quelque chose” (to be used in the composition or the making of something), and one of the examples given is the following: “Matériau qui entre dans la construction d’un édifice” (material entering into the construction of a building). The *Dictionnaire de l’académie française* also states that the infinitive “entrer” can mean “être employé dans la composition ou à la confection d’une chose” (to be used in the composition or for the manufacture of something), and gives the following examples as illustrations: “Entrer dans la composition, dans la construction, dans la formation de quelque chose. Le fer et le bois entrent dans la construction de la plupart des édifices” (To enter into the composition, construction or structure of something. Iron and wood enter into the construction of most buildings).

In my opinion, it would be limiting the scope of the first paragraph of art. 2013e to require, because of it, that materials enter into the immovable and become a constituent part of it. The expression “enter into the construction of an immovable” is broader; it should not be given a meaning that it does not have, nor should it be unduly restricted by insistence on the idea of incorporation, even though it also covers the case where materials are effectively incorporated into the building. The expression implies that materials must be consumed in the process of construction. This is the case when materials are incorporated into the construction, but it is also the case when, as a result of their use in construction, they have been altered to such an extent that they can only be used for limited purposes. By conferring additional value on the immovable into the construction of which they enter, the materials correctively lose their value as such, totally or substantially.

In my opinion, the English version of the first paragraph of art. 2013e expresses the same idea:

The supplier of materials has a privilege on the immovable in the construction of which the materials supplied to the proprietor or builder have been used, or for the construction of which they have been specially prepared.

The expression “used in the construction of an immovable” clearly does not mean that the materials are required to be incorporated into the immovable or that all cases in which an object is used for the construction of an immovable are equally covered. In *Clarkson Co. Ltd. et al. v. Ace Lumber Ltd. et al.*[3], this Court had occasion to interpret a similar expression contained in s. 5 of the Mechanics’ Lien Act, R.S.O. 1960, c. 233:

...any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting of any ... building... has a lien ... upon the estate or interest of the owner in the building ... (The emphasis is mine).

In this case the material involved was simply leased to the contractor for the purposes of construction, and therefore in the end the decision had to be against the existence of a lien. Nevertheless, I think it would be useful to reproduce a passage from the reasons of Ritchie J., speaking for this Court, in order to illustrate the meaning that can be ascribed to the expression “used in the construction of an immovable”:

All the judges of the Court of Appeal agreed with Roach J.A., that as the equipment here in question was neither furnished for the purpose of being incorporated nor incorporated into the finished structure of the buildings and as it was not consumed in the construction process, it could not be said to have been “material” furnished “to be used in the constructing or erecting of the building” within the meaning of the said s. 5. I agree with the reasoning and conclusion of Mr. Justice Roach in this regard. (at p. 112) (The emphasis is mine.)

Clearly, in this case the idea behind the expression was “used in the constructing of a building”, not “used in the construction of a building”. However, I see no reason to adopt a narrower meaning for the latter expression as used in the first paragraph of art. 2013e. The provisions contained in this paragraph and in arts. 2013a to 2013f, though incorporated into the Civil Code, really belong to the area of statutory law existing on this subject in most jurisdictions of North America. With regard to the sixth paragraph of art. 2013e, in which the Court of Appeal finds an argument in support of its conclusions, and where the word “construction” is clearly used in its secondary meaning of “building being constructed”, its purpose is not to decide upon the existence or extent of the privilege of the supplier of materials, but only to regulate the right of revendication conferred upon the supplier under certain conditions. While it was logical to forbid the revendication of materials that had become immovable by nature, there is no reason to impose a contrario on the privilege the limits inherent in the right of revendication.

When the *Augé Act* (Qué. 1894, c. 46) was enacted, no one could have foreseen the use of concrete, or of certain materials, such as wood, that are normally quite durable but undergo substantial deterioration when used in form work. However, the “law is ever commanding”, as provided in s. 49 of the *Interpretation Act* (R.S.Q. 1964, c. 1). The law commands the more easily when, as is the case here, the letter of the law allows it to adapt to changes resulting from later inventions and improved techniques, and when this adaptation corresponds with the spirit of the measures whose application is involved. In this case, the principle intended by the legislator, and stated in art. 2013 C.C., is that those persons whose labour or materials have conferred additional

value on an immovable benefit from a surety and a right of preference in that immovable. While it is true that privileges are a matter of strict law, I do not think that the interpretation that I adopt goes beyond the provisions of art. 2013e. Undoubtedly, the cost of the form work would be included in the contractor's privilege. It is equally certain that if the form work had been entrusted to a sub-contractor, he would be entitled to a privilege. Why then should the Court by interpretation create an anomaly at the expense of the supplier of materials alone?

There remains the question of whether this Court, as has been stated or implied, has handed down an earlier interpretation other than the one I am proposing. I do not believe it has.

According to Geo.-M. Giroux, in *Gadbois v. Stimson-Reeb Builders Supply Co.*[4], this Court ruled that [TRANSLATION] "in order to establish his privilege and guaranteed claim, it was not enough for a supplier to prove that materials had been supplied to a builder on a construction site; he had to prove that the materials supplied by him had been incorporated into the building" (Geo.-M. Giroux, *op. cit.* at p. 77). I fail to see how this judgment decided that incorporation of materials was mentioned in passing, as other expressions, but that was not the point at issue. The question raised in that case was as to which immovable was the basis of the supplier's privilege of respondent, or more precisely, whether respondent could claim single privilege on all the houses constructed on nine different lots. The Court replied in the negative for the reason that, on the facts, contrary to the situation existing in *Munn & Shea Ltd. v. Hogue Ltée*[5], the owners did not consider the adjacent lots as a single unit for the purposes of construction.

It would also seem advisable to clarify the scope of the decision of the Quebec Court of Appeal in *Nineteen Hundred Tower Limited v. Cassiani*[6], of which it was implied, without the necessary qualifications that it met with the approval of this Court: *Sofnec Inc. v. Amico Inc.*[7], at p. 945 and *Assistance Loan and Finance Corp. v. Bourassa*[8], at pp. 633 and 636. A reader of the summary in the case report might think that in *Cassiani* the Court of Appeal held that the privilege of the supplier of materials arises when delivery of the materials begins and they begin to be incorporated into the building: which would amount to acknowledging that the materials must be incorporated into the building in order for a privilege to arise. It seems to me that the ratio decidendi in *Cassiani* is to be found at p. 792 of the report:

[TRANSLATION] Considering the provision of the law and the acknowledged fact that, on March 4, 1963, the date of the loan contract with a dation en paiement clause, appellant (the lender) knew that the above-mentioned building was then under construction, it was his responsibility to protect himself, in particular against the possibility of privileges of suppliers of materials.

This was basically an application of the reasoning adopted by the Court of Appeal in *Belle-Isle Lumber v. Craft Finance Corp.*[9]. In that case it was held that the concluding by the owner of a loan contract containing a dation en paiement clause did not affect the rights of the supplier of materials with whom the owner had made a previous contract, if the delivery of the materials began before such a loan contract was entered into and registered. The latter decision was upheld by this Court, which declared itself in agreement with the reasons and conclusions of the Court of Appeal and formally adopted them: *Craft Finance Corp. v. Belle-Isle Lumber et al.*[10].

However, in *Cassiani*, when *Salvas J.A.*, whose opinion was concurred in by the two other judges of the Court of Appeal, stated that:

[TRANSLATION] The privilege of the *mis en cause* arose as soon as they started to perform their obligation to supply materials, and as soon as these materials started to be incorporated into the building; hence no formality was required by law, (at p. 792),

he went further than was necessary in order to decide the case before him. Simply stated, it seems to me that, in reference to the circumstances surrounding *Belle-Isle Lumber*, the fact that the building was under construction when the loan contract was concluded was only a further reason for deciding that the privileges of suppliers of materials were not affected by the subsequent entering into and registration of the loan contract containing a *dation en paiement* clause. Moreover, the statement that this Court upheld the judgment of the Appeal Court in *Cassiani* should be qualified. At page VI of the Supreme Court Reports, 1967, there is only the following: “Nineteenhundred Tower Ltd. et al. v. *Cassiani*, *Harris Steel Corpn.*; *Franklin Electrical Supply et al. (Que.)*, [1967] Q.B. 787, appeals dismissed with costs, December 1, 1967”. However, the oral judgment of the Court as entered in the record reads as follows:

We are all of the opinion that the Court of Appeal has reached the proper conclusion. The appeal in each of the cases is therefore dismissed with costs.

In this decision, the reasons given by the Court of Appeal were not adopted as they were in *Belle-Isle Lumber*.

I would allow the appeal, quash the decision of the Court of Appeal and modify the judgment of the Superior Court by stating that the immovable described therein is affected and hypothecated in favour of appellant by a privilege of supplier of materials in the amount of \$46,000, and not \$10,000, the whole with costs against respondent for contested intervention of \$46,000 in the Superior Court, and in both the Court of Appeal and this Court, for an appeal of \$36,000.

Appeal allowed with costs.

Solicitors for the appellant: *Gliserman, Ackman, Cutler & Boidman*, Montreal.

Solicitors for the respondent: *Ogilvy, Cope, Porteous, Hansard, Marler, Montgomery & Renault*, Montreal.

[1] [1973] C.A. 482.

[2] [1965] C.S. 313.

[3] [1963] S.C.R. 110.

[4] [1929] S.C.R. 587.

[5] [1928] S.C.R. 398.

[6] [1967] Que. Q.B. 787.

[7] [1969] Que. Q.B. 941.

[8] [1972] C.A. 631.

[9] [1966] Que. Q.B. 135.

[10] [1966] S.C.R. 661.

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