Legal hypothecs for construction and the enforcement of contractual rights: The Superior Court condemns the use of the land registry as a means for intimidation

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On September 21, 2012, Justice Babin of the Superior Court of Québec rendered a decision which denotes the effect of bad faith of the registrant on damages awards in the context of the unjustified publication of a legal hypothec for construction.[1]

While the decision serves as a useful reminder that a legal hypothec for construction may only secure the *surplus* value added to the immovable from the work undertaken, it also makes very clear that the holder of a hypothec may not use the land registry as a tool to intimidate, harm or prevent a party from enforcing its contractual rights. Moreover, the case provides further evidence that Quebec courts are very hesitant in awarding sizeable compensation to plaintiffs for their troubles and inconveniences relating to their creditor's oppressive acts.

THE FACTS
In November 2009, Carol Bergeron and his spouse Sophie Gagné (the "plaintiffs"), were looking to purchase a vacant lot of land in order to build their family residence. After several discussions with a representative of Gestion L.M.S. ("Gestion" or alternatively, the "defendant"), the plaintiffs decided to purchase land from the defendant for $75,000. However, given that the land was located on mountainous and rocky terrain of approximately 40 feet in height, it was also agreed that Gestion would dynamite and excavate specific areas so as to allow for the construction of a home. With these elements in place, Gestion and the plain tiffs entered into a contract of sale on February 22, 2010 (the "Agreement").

Over the Spring of 2010, the plaintiffs decided to construct a larger home than was originally planned. As such, the parties modified the Agreement – Gestion was to dynamite and excavate an additional parcel of land on the plaintiffs' property, and the plaintiffs were to provide an additional consideration of $20,000. As the plaintiffs had sold their previous home and agreed to vacate the premises by July 1, 2010, a provision that all work was to be completed by June 1, 2010 was added to the
Agreement so that construction of the new home could commence as quickly as possible.

Gestion only delivered the land in a suitable condition for construction on October 12, 2010, over four months later than the deadline stipulated in the Agreement.

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On October 29, 2010, after having put Gestion in default on two separate occasions with no results, the plaintiffs initiated an action before the Superior Court for damages in the amount of just over $48,000. A few days later, Gestion published a legal hypothec for construction on the plaintiffs' land in the amount of $217,417.

The plaintiffs petitioned the Superior Court for an order striking the hypothec from the land registry, as well as for damages flowing from the troubles, inconveniences and expenses incurred from Gestion's failure to deliver the land in a suitable condition.

THE DECISION

Justice Babin declared Gestion's legal hypothec to be illegal, abusive and contrary to good faith on several grounds.

First, the Court held that the monetary amount of the purported legal hypothec was unreasonable given that the excavation work under the parties' contract was evaluated at $20,000. Indeed, art. 2728 of the *Civil Code of Québec* stipulates that a construction hypothec may only validly secure the increase in value added to the immovable by the work carried out. An expert's evaluation established that the land in question was worth $71,000 in May 2011, $4,000 less than what the plaintiffs' paid for it in
February 2010. As such, the excavation work most certainly did not increase the land's value by the $217,417 indicated by the defendant.

Second, the Court held that the hypothec was published with the specific intention to intimidate and embarrass the plaintiffs, as well as to negatively impact their ability to obtain credit. Indeed, the published hypothec had considerable financial ramifications on the plaintiffs, as the financial institution which had agreed to provide their initial mortgage refused to advance the $217,417 as a result of the significant charge on the property. As such, one of the plaintiff's fathers had to finance the construction work being carried out so that the general contractor would allow work to go forward. This situation persisted for nearly two years, as the plaintiffs were unable to convince a financial institution to lend them the funds necessary to complete construction under such conditions.

Third, certain facts led Justice Babin to determine that Gestion was in bad faith. Gestion curiously published its legal hypothec for construction only a few days after the plaintiffs had put it in default and claimed over $48,000 in damages. Moreover, one of Gestion's representatives approached the plaintiffs and asked them to sign a document prepared by Gestion's notary stipulat ing a mutual release under the Agreement. The document also included a mention that the plaintiffs agreed to forfeit any right to judicial recourse stemming from Gestion's failure to deliver the land in a condition suitable for construction by the deadline established.

For these reasons, the Court ordered the cancellation of the defendant's legal hypothec from the land registry and awarded damages in the amount of $24,594.94 to the plaintiffs. Of this amount, $3,000 was awarded to compensate the plaintiffs for the troubles and inconveniences experienced on account of the defendant's actions.

COMMENTARY

While the Superior Court's holding makes clear that the land registry is not to be used as a tool for intimidation or coercion, it nevertheless failed to seize the opportunity to award significant damages which would serve as a suffi cient deterrent against such aggressive and hostile acts.

In the present case, the plaintiffs requested $50,000 under this head of damage but were only awarded $3,000. This number seems quite low when one considers that the defendant's charge on the property caused the plaintiffs to be denied access to financing to complete their project for over two years. Although the Court made repeated ref erence to the defendant's bad faith and abusive

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behaviour, such acts still did not justify significant damages, and this, despite the very real harm inflicted upon the plaintiffs.

It is interesting to note that the holding is in line with Quebec jurisprudence, as courts have typically awarded between $1,500 and $7,500 for troubles and inconveniences endured in similar circumstances.

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[1] *Bergeron* v. *9099-5374 Québec inc. (Gestion LMS)*, 2012 QCCS 4739.

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