The Superior Court of Québec rules on the insurable interest of someone who acted as a nominee in the context of the acquisition of a property

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On September 8, 2017, in the case of *El-Ferekh c. Intact, compagnie d'assurance,* [1] the Superior Court of Québec ruled on the insurable interest of someone who acted as a nominee in the context of the deeds pertaining to the acquisition of an immovable property covered by an insurance policy. The insurer had denied coverage on several grounds, namely, the absence of insurable interest, the misleading representations at the time of the underwriting of the policy and an increase of risk.

The facts

The plaintiff, Robbie El-Ferekh (**"Robbie"**), instituted proceedings against Intact compagnie d'assurance (**"Intact"**), claiming $296,941.38 for damages caused to a property which Intact insured. At the time the mortgage was purchased, Steven El-Ferekh (**"Steven"**) had asked Robbie to act as a nominee in the context of the sale for tax and financing reasons. The deeds of mortgage and sale were both made in Robbie's name even if, in fact, Steven was assuming the payment of the mortgage and all expenses related to the property. When purchasing the insurance policy on the property, Steven posed as his brother as he answered the questions of the insurance broker. Since Steven declared that he would live in the property, a homeowner policy was issued by Intact.

Prior to the closing of the sale of the property and purchasing the insurance policy, and contrary to his representations to the insurance broker, Steven rented the property to a third party. The tenant occupied the property for more than three years. Several months after the tenant left, a fire, the cause of which remains undetermined, entirely destroyed the property. Robbie filed a claim with Intact. Intact denied coverage on the grounds that the policy was null *ab initio* for lack of insurable

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interest and because of the false and misleading representations of the El-Ferekh brothers.

The judgment

The Court first confirmed that an insured had to demonstrate that he suffered financial harm as a result of the loss of the property to justifying an insurable interest. Accordingly, a nominee has no insurable interest since he cannot suffer direct and immediate harm as a result of the loss of such property.

Robbie first alleged that an implicit partnership existed between himself and his brother and that their patrimonies were merged. This argument was rejected by the Court since a private arrangement cannot be effective against third parties.

Secondly, Robbie alleged that he had an insurable interest as a mortgage debtor. However, the evidence demonstrated that Steven assumed all expenses on the property and that, accordingly, Robbie was not exposed to any financial loss as a result of the fire. The Court thus ruled that the policy was void *ab initio* because of the lack of insurable interest.

Although this conclusion was enough to dismiss the action, the Superior Court nevertheless ruled on the other grounds for denial raised by Intact.

The Court confirmed that Intact was justified in invoking the nullity of the policy taking into account the bad faith of the insured and the false statements made respecting the occupation of the property. On the one hand, it was proved that Robbie never lived in the property and that a homeowner policy has issued. On the other hand, although Intact Créneaux, a division of Intact, could have accepted to cover the property as leased property, it is a separate entity from Intact. Therefore, the Court concluded that the insured acted in bad faith when he purchased the insurance, which also justified the *ab initio* nullity of the policy.

As for the risk increase, the evidence demonstrated many aggravating circumstances during the coverage period, namely: criminal activities on the property (the culture of cannabis), police interventions, a change of the electrical system, failure to supply the property with electricity and a situation where the property was left vacant. The Court determined that Intact was well-founded in denying coverage for that reason.

Conclusion

In brief, the Superior Court concluded:

> that the simple fact that someone is a mortgage debtor does not constitute evidence of insurable interest in the property;
> that a nominee has no insurable interest since he cannot suffer any direct and immediate harm resulting from the loss of such property.

In other words, in the absence of an exposure to financial loss, a nominee cannot demonstrate an insurable interest in a property.

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1. 2017 QCCS 4077 (Judge Guylène Beaugé).

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