Sales without legal warranty at the buyers' risk: Clarity is key

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On July 15, 2022, Justice François Lebel of the Court of Québec rendered a decision[1] confirming that, in the case of the sale of immovable property, a clear and unambiguous exclusion clause, whereby the warranty is waived at the buyer's risk, results in a break in the chain of title preventing the buyer from taking any legal action under such warranty against the seller and previous sellers.

Justice Lebel thus declared the originating application against the defendants Marshall and Bergeron inadmissible and dismissed the call in warranty.

This decision is consistent with the recent decision of the Court of Appeal of Quebec in *Blais*,[2] rendered in May 2022, which clarified the state of the law on the consequence of waiving a legal warranty where successive sales are involved.

The facts

In March 2009, the defendant Bergeron sold an income property (hereinafter the "Property") to the defendants, the Marshalls, with a legal warranty of quality. In May 2012, the Marshalls in turn sold the Property to the defendants Hamel and Drouin, still with a legal warranty of quality.

In December 2016, the defendants Hamel and Drouin resold the Property to the plaintiff, but this time [translation] "without legal warranty of quality, at the buyer's risk, but with warranty of ownership".

In the fall of 2020, the plaintiff had work done to repair the drain tile system. It was at that point that it discovered the presence of petroleum hydrocarbons in the soil under the Property's foundation, rendering the soil unsuitable for residential use. According to an expert report, the alleged contamination stemmed from a heating oil tank once located in a shed behind the Property. The tank was apparently removed before the sale in December 2016.

The plaintiff was seeking a reduction in the sale price and to have the defendants Hamel and Drouin, as well as the two previous sellers, the defendants Marshall and Bergeron, held solidarily

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liable. The plaintiff referred to the warranty of quality provided for in articles 1726 and following of *the Civil Code of Québec* (C.C.Q.) and the warranty against public law restrictions provided for in article 1725 C.C.Q. The plaintiff also claimed to be the victim of fraud on the part of the defendants Hamel and Drouin.

After being called in warranty by the defendants Hamel and Drouin, the Marshalls moved to dismiss the substantive claim and the action in warranty. They claimed that the sale of the Property between the defendants Drouin and Hamel and the plaintiff was made at the buyer's risk and that such a clause in a subsequent deed of sale irrevocably breaks the chain of title, thereby preventing the plaintiff from taking any legal action against the seller and previous sellers.

The law and the importance of a clear clause

According to article 1442 C.C.Q., which codifies the principles arising from the decision in *Kravitz,*[3] buyers may seek to have the sellers previous to their own seller held liable. However, for such an action to be deemed valid, it must be established that:

> The defect existed at the time that the previous sellers owned the immovable; and
> The right to the legal warranty was transferred to the plaintiff through subsequent sales.

Indeed, the buyer of an immovable may take legal action directly against a previous seller in accordance with article 1442 C.C.Q. However, this article presupposes that the right to the legal warranty was passed on from one owner to the next, right down to the current buyer seeking to file a claim for latent defects. In other words, the legal warranty must have been transferred to each owner through the chain of title.

In *Blais*, the Court of Appeal confirmed that an unambiguous warranty exclusion clause results in a break in the chain of title. Such a clause prevents the buyer of an immovable from taking legal action directly against the former owners who sold the immovable with a legal warranty. Given the decision in *Blais*, it is now clear that such a clause waiving the legal warranty closes the door to any direct recourse against a seller's predecessors, even if such predecessors sold the immovable with a legal warranty.[4]

In these circumstances, a buyer who acquires an immovable at their own risk will be deprived of their right to take legal action directly against the previous sellers, insofar as the warranty exclusion clause in the deed of sale is clear and unambiguous.

In this case, Justice Lebel considered that the wording of the warranty exclusion clause in the deed of sale, which was binding on the plaintiff, was clear and unambiguous, and that a sale at the buyer's "risk" excludes both the warranty of quality and the warranty of ownership, which covers the public law restrictions of article 1725 C.C.Q.

Justice Lebel indicated that there was a break in the chain of title resulting from the sale at the buyer's risk and that the plaintiff could not claim that it was still entitled to take legal action directly against any sellers other than the defendants Hamel and Drouin. He therefore ruled in favour of the defendants Marshall and Bergeron and declared the originating application against them inadmissible.

Key takeaways

> A warranty exclusion clause in a deed of sale will only be deemed valid if it is clear and unambiguous.
> The mention that a sale is made "at the buyer's risk" completely eliminates the warranty of quality provided for in article 1726 C.C.Q. and the warranty of ownership provided for in article 1725 C.C.Q.
> A deed of sale containing a valid warranty exclusion clause AND a mention that the sale is made "at the buyer's risk" precludes any recourse by the buyer against the seller, but also against previous sellers.

With the current state of the Quebec real estate market, the decision in *Hamel*, which ties in with the

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Court of Appeal's teachings in *Blais*, certainly clarifies how case law established in recent years should be applied, in particular as concerns the effect of a warranty exclusion clause on successive sales.

The members of our Litigation and Dispute Resolution group are available to advise you and answer your questions.

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1. *9348-4376 Québec inc.* c. *Hamel*, 2022 QCCQ 5217
2. *Blais* c. *Laforce*, 2022 QCCA 858.
3. *General Motors Products of Canada Ltd* v. *Kravitz*, [1979] 1 S.C.R. 790
4. Supra note 1, paras. 6 and 8.

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