

## HIDDEN DEFECT, REDUCTION IN THE PURCHASE PRICE AND LIABILITY INSURANCE COVERAGE

### LOUIS CHARETTE

ON JUNE 2, 2010, THE QUEBEC COURT OF APPEAL CONFIRMED THE SUPERIOR COURT'S DECISION (PER JUSTICE GILLES HÉBERT), WHICH DISMISSED THE INSURED'S ACTION IN WARRANTY AGAINST HIS LIABILITY INSURER UNDER HIS HOME OWNER'S POLICY. THE INSURED ALLEGED THAT THE PURCHASERS' CLAIM FOR REDUCING THE PURCHASE PRICE DUE TO A HIDDEN DEFECT WAS COVERED UNDER THE LIABILITY INSURANCE POLICY.<sup>1</sup>

### THE FACTS

In April 2005, Plaintiffs, Bérubé and Marcil, purchased Johnston's residence. A few days after having taken possession of the property, they decided to expand the kitchen, which required them to demolish a veranda. When doing so, they discovered two pipes emerging from the ground.

Upon closer examination, they noticed that an old heating oil tank was buried in the ground, that it was perforated and that the soil was contaminated.

Plaintiffs notified Johnston who then informed his insurer, Chubb Insurance Company of Canada ("Chubb"). They instituted proceedings against Johnston before the Superior Court, claiming the costs of the clean-up, rehabilitation of the soil and the removal of the buried tank. They further claimed damages for trouble and inconvenience and extrajudicial costs.

Johnston instituted an action in warranty against Chubb requesting that the latter be ordered to take up his defence and, if required, indemnify Plaintiffs.

### THE INSURANCE POLICY

Johnston held an insurance policy issued by Chubb. This policy included various items of coverage, including civil liability. The insured's personal liability coverage was described as follows:

#### *"Personal Liability Coverage*

*We cover damages a covered person is legally obligated to pay for personal injury or property damage which take place anytime during the policy period and are caused by an occurrence, unless stated otherwise or an exclusion applies. Exclusions to this coverage are described in Exclusions."*

The terms "property damage" and "occurrence" are defined as follows:

*"Property damage means physical injury to or destruction of tangible property, including the loss of its use. Tangible property includes the cost of recreating or replacing stocks, bonds, deeds, mortgages, bank deposits, and similar instruments, but does not include the value represented by such instruments.*

<sup>1</sup> Johnston v. Chubb Insurance Company of Canada, 2010 QCCA 1066.

*Occurrence means a loss or accident to which this insurance applies and which begins within the policy period. Continuous or repeated exposure to substantially the same general conditions unless excluded is considered to be one occurrence.*" (emphasis added)

Johnston maintained that the discovery of the buried tank and the contamination of the soil constituted a loss which caused damages, giving rise to the plaintiffs' claim for a reduction of the purchase price.

## THE JUDGMENT IN FIRST INSTANCE

In first instance<sup>2</sup>, the judge noted that Plaintiffs established the existence of a hidden defect, namely, an old buried oil tank and the contamination of the soil. He therefore ordered Johnston to pay the costs for the restoration of the land. However, as Johnston was unaware of the buried tank and the contamination of the soil, the judge did not award damages for trouble and inconvenience. As for the claim for extrajudicial costs, the trial judge concluded that Plaintiffs' evidence failed to meet the requirements established in the *Viel v. Entreprises immobilières du terroir Itée*<sup>3</sup> case.

As for Johnston's action in warranty against Chubb, the judge, noting the absence of an "occurrence", ruled that Chubb was under no obligation to defend nor indemnify Johnston:

[Translation]

"[59] The Court notes that, in this case, there is no 'occurrence', loss, accident or event. The same situation existed before Johnston purchased the property in 1986 and after the applicants purchased it in 2005."

Moreover, the trial judge concluded that the plaintiffs' claim was clearly a request for a reduction of the purchase price of the property, which did not constitute "property damage" within the meaning of the policy.

## JUDGMENT OF THE COURT OF APPEAL

Referring to the wording of the liability insurance policy, the Court of Appeal affirmed the judgment in first instance in the following terms:

"[7] The trial judge was right to conclude that this coverage could not be triggered here since there had been no damage caused by an occurrence to the property. This conclusion is the only one to be drawn from a correct interpretation of the policy, as it was decided in numerous cases.

"[8] In reality, the amount that the appellant was condemned to pay to the purchaser was nothing but the restitution of a part of the paid purchase price to reflect the true value of the property at the time of the sale considering its real state." (emphasis of the Court)

The Court of Appeal confirmed that the trial judge committed no error in law and that he was well founded in applying the previous case law to this case and concluding that Johnston was not insured in respect of the claim for reducing the purchase price.

<sup>2</sup> 2008 QCCS 4589.

<sup>3</sup> [2002] R.J.Q. 1262 (C.A.).

## CONCLUSION

A hidden defect is not in and of itself considered an occurrence and a claim for a reduction of the purchase price due to a hidden defect is not a claim for compensatory damages. This is a judgment on the merits, which confirms the jurisprudence of the Superior Court and that of the Court of Appeal, which denied leave to appeal the judgments in first instance with regard to "Wellington" motions related to hidden defects.

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