NOTES

Creditor's recourse for deterioration of immovable security

by Allan Lutfy *

A creditor may be faced with the real or apparent deterioration of that immoveable property over which he has been given an hypothecary right in return for the money he has loaned or advanced to his debtor. Although the present jurisprudence allows the creditor to sue the debtor when faced with these circumstances either under the general provisions of article 1092 c.c.,[1] or under articles 2054 - 2055 c.c.,[2] which deal specifically with hypothecs and privileges, it is submitted that a correct interpretation of the law necessarily limits the plaintiff creditor to the latter recourse.[3]

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[1] Article 1092 c.c. "The debtor cannot claim the benefit of the term when he has become a bankrupt or insolvent, or has by his own act diminished the security given to his creditor by the contract."

[2] Article 2054 c.r. "Neither the debtor nor other holder can, with a view of defrauding the creditor, deteriorate the immoveable charged with privileged or hypothecary claim, by destroying or injuring, carrying away or selling the whole or any part of the buildings, fences or timber thereon."

"Le débiteur ni le tiers-détenteur ne peuvent cependant dans la vue de frauder le créancier détériorer l'immeuble grevé de privilège ou d'hypothèque, en détruisant ou endommageant, enlevant ou vendant la totalité ou partie des bâtisses, des clôtures et des bois qui s'y trouvent."

Article 2055 c.c. "In the event of such deterioration the creditor who has a privilege or hypothec upon the immoveable may sue him, even though the claim be not yet payable, and recover from him personally the damages occasioned by such deteriorations, to the extent of such claim and with the same right of privilege or hypothec; but the amount so recovered goes in reduction of the claim."

"Dans le cas de telles détériorations, le créancier qui a le privilège ou hypothéque sur l'immeuble peut poursuivre ce détenteur lors même que la créance ne serait pas encore exigible, et recouvrir de lui personnellement les dommages résultant de ces détériorations, jusqu'à concurrence de sa créance et au même titre de privilège ou d'hypothèque; mais le montant qu'il en perçoit est imputé sur et en déduction de sa créance."

[3] Cases applying 1092 c.c.: *Piché* v. *Jean-Paul Guenette* [1960] R.P. 155; *Demers* v. *Strachan* [1915] 48 S.C. 71; *Robert* v. *Robert* [1951] S.C. 41.

Cases applying 2054-2055 c.c.: *Davis* v. *Smith* (1912) 8 D.L.R. 486; *Stevens* v. *Kerklow* (1923) 61 S.C. 435; *Lasalle Builders Supply Ltd.* v. *Lasalle Quarry Ltd.* [1947] S.C. 72.

Despite a conflict amongst French authors[4] as to the scope of their equivalent of article 1092 c.c. and despite similar uncertainty in Quebec jurisprudence,[5] it can be assumed for the purpose of this discussion that the article is limited to contracts and does not extend to privileges whose legal effects are derived from the Civil Code and not from the express will of the parties. Secondly, no one has argued that a tiers-détenteur or other holder of the immoveable can be sued under 1092 c.c. In short, it would seem that of the creditors with a privileged or hypothecary right who are confronted with the deterioration of the immoveable, only those who sue the debtor of a hypothecary claim enjoy the option of one of the two recourses.[6] It is the author's contention that, even in these limited applications, such an advantage is unjustified.

Why would the plaintiff-creditor prefer to sue under 1092 c.c.? A quick reading of the relevant articles of the Civil Code provides the obvious answer. In the first place, it is only article 2054 c.c. which allows the defense of lack of fraudulent intention on the part of the debtor. In the case of *Demers* v. *Strachan*,[7] although the court recognized that the deterioration of the immoveable was only temporary and that a new and better building was to replace the old structure, it was held that since the hypothecary creditor saw fit to sue under 1092 c.c., the debtor could not avail himself of this defence. A second advantage lies in the fact that a successful action under 1092 c.c. will immediately make exigible the *whole* of the debt regardless of the terms of the contract. On the other hand, article 2055 c.c. provides that only the portion of the debt equivalent to the damages suffered will be immediately owing to the creditors.

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[4] Those authors who would allow privilege resulting from contracts to come within the scope of 1092 c.c. include: Paniol et Ripert, *Des Obligations*, t. vii at p. 352 f.f.; Baudry-Lacantinerie et Barde, *Des Obligations*, t. 2, n. 1016. For Quebec doctrine see Faribault, *Traité de Droit Civil*, t. VIII, bis pp. 112-3.

Other authors give a restrictive interpretation to 1092 c.c. and include only those claims resulting directly from the expressed intention of the parties: Laurent, *Droit Civil Français*, *t.* 17, n. 202; Moudon, t. 2, p. 627. For Quebec doctrine see Mignault, *Droit Civil Canadien*, t. 5, p. 460.

[5] *Wark* v. *Perron* [1893] 3 S.C. 56; *Jacques* v. *Belhumeur*, 50 S.C. 319; *Piché* v. *Guenette* [1960] R.P. 155.

[6] It has been held that these two recourses are incompatible, of a different nature and cannot be included in one and the same action. See *Lasalle Builders Supply Ltd.* v. *Lasalle Quarry Ltd.*, [1947] S.C. 72 at p. 75, and *St. Hilaire* v. *Dame Lavoie* [1935] 73 S.C. 90 at p. 94.

[7] (1915) 48 S.C. 71.

Mignault has gone so far as to argue that the debtor must always be sued under article 1092.[8] He bases this contention on the ground that the codifiers, when referring to a personal action in article 2055 c.c., could only have intended a tiers-détenteur or other holder since such an action is already available against the hypothecary debtor.

It is submitted that this interpretation of the article is erroneous. Firstly, some meaning must be attached to the opening words of article 2054 : "Neither the debtor nor the other holder . . .". Despite the poor draftsmanship of article 2055 c.c., it is suggested that the preliminary words of article 2054 c.c. are sufficiently explicit to warrant the conclusion that the codifiers intended to favor both the debtor and the tiers-détenteur with the advantages of articles 2054 c.c. and 2055 c.c.

Secondly, the words ". . . even though the claim be not yet payable . . ." of article 2055 c.c. obviously imply that a debt may still be owing by the defendant. This would not be the case if the creditor was suing a tiers-détenteur; the words could only have reference to an action against the debtor.[9]

It is submitted, therefore, that the words "ce détenteur" of 2055 c.c. refer to both the debtor and other holder.[10] The advantage of articles 2054 and 2055 c.c. were intended for both situations. As such, these provisions of the Civil Code serve as exceptions to the general rule of 1092 c.c. and should be applied by the courts in all cases based on hypothecary or privileged claims. The words of the text justify this proposition and the economy of the law would be greatly served if the hypothecary creditor who is faced with what appears to be a diminution of his security were limited to an action under articles 2054 and 2055 c.c., without regard to whether the holder of the immoveable is the debtor or tiers-détenteur.

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[8] *Droit Civil Canadien*, vol. IX at pp. 137 ff.

[9] Mignault limits the application of 2054 c.c. and 2055 c.c. to tiers-détenteur. However, tiers-détenteurs are other holders of the immoveable that have NOT assumed the debt of the original holder. Mignault's interpretation, therefore, leaves these words of article 2055 c.c. without any meaning and effect.

[10] This proposition is maintained in *Stevens* v. *Kerklow* (1923) 61 S.C. 435 at 437, and *Best Realties Corporation* v. *Quintal* [1948] B.R. 139 at 146.