LEVINE AND ANOTHER V. FRANK W. HORNER LTD.

Sale — Immoveable occupied for commercial purposes — Bulge in exterior wall — Indication of the possibility of a structural defect — Solidity of the building not affected — Examination by experts — Subsequent alterations — Action for costs of repairs to wall — Apparent defect—1522, 1523 C.C.

Graham Nesbitt*

"La loi n'est pas faite pour les négligents" Tellier J. stated succinctly in a leading case on vendor's warranty.[1] Thus while the vendor must warrant the buyer against latent or hidden defects in the thing sold, he is not bound for defects the buyer "might have known of himself."[2] The courts have often held that the inexperienced buyer of an old building should call in an expert, such as an architect or an engineer, to examine the premises before the purchase. If the buyer neglects to do so, he is legally presumed to know of defects which an expert could have noticed on an examination.[3]

The recent decision in *Levine and another v. Frank W. Horner Ltd.*[4] introduces a whole new concept into the problem of warranty against latent defects. As St. Jacques J. stated in the Court of Appeal, "Nous sommes en face d'un problème juridique qui ne me paraît pas avoir de précédent dans nos annales judiciaires."[5] In this case two experts examined a building before purchase and reported no defects; structural defects were later found when alterations were begun; yet the courts nevertheless maintained that these defects were *not* latent within the meaning of the Code. The facts of the case, which are not in dispute, are as follows.

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*Of the Junior Board of Editors, McGill Law Journal; second year law student.

[1] *Arpin v. Francoeur* (1930) 48 K.B. 231 at p. 233.

[2] Art. 1522 C.C.: "The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them."

Art. 1523 C.C.: "The seller is not bound for defects which are apparent and which the buyer *might have* known of himself." *Italics* are mine.

Note that the courts have held that the buyer of a *new* building need not hire an expert: he is entitled to rely on the builder's skill. *Tellier v. Proulx* [1954] S.C. 180; *Rothstein v. International Construction Inc.* [1956] S.C. 109.

[3] *Arpin v. Francoeur, supra,* note 1, at p. 231. *Dallaire v. Villeneuve and Clermont Automobiles Inc.* [1956] Q.B. 6; *E. and M. Holdings Inc. v. Besmor Investment Corporation* [1961] Q.B. 376.

[4] *Levine and another* (Plaintiffs-Appellants) *v. Frank W. Horner Limited* (Defendant-Respondent) [1961] Q.B. 108.

[5] [1961] Q.B. 108 at p. 113.

Respondent Frank W. Horner Ltd. sold the building in question to appellants for $140,000 by deed dated January 4, 1952. Appellants intended to make extensive alterations, and accordingly before the purchase had the building examined by the witness Bernstein, an architect, and the witness Berenstein, an engineer. These two experts did not see anything, in their opinion, worth reporting to appellants.

The building was originally constructed about 1916, and over the years the northerly half and an additional storey were added and several other structural changes were made. When appellants' contractors began the alterations by removing the interior wall dividing the old and new parts of the building, they found that the concrete beam supporting the fourth floor had tilted, thus pushing out the brickwork. In addition, they discovered that the work on a partly bricked-over window was defective.

On the advice of the architect Bernstein and the engineer Berenstein the front of the building was rebuilt at a total cost of $8,867.28. Appellants then instituted an action for damages for $12,000, claiming that latent defects had made the additional work necessary. Bernstein, Berenstein, and Frank, the contractor, testified that the concrete beam had not been correctly anchored and that the brickwork over the windows was of varying thickness and not properly bonded to the pre-existing structure. There was no suggestion of bad faith on the part of either party to the action.

In the court of first instance Ralston J. held that the defects were not latent within art. 1522 C.C.[6] He put particular emphasis on the fact that appellants' experts had noticed a "bulge" in the exterior brickwork near the concrete beam. Both the experts testified that they did not think the bulge was significant enough to mention to the buyer. But respondent's architect, Chadwick, testified that he would have made a further examination if he had seen such a bulge. He felt that the location of the bulge on a face-wall where there was little brickwork was important. It is worth noting that Chadwick did *not* see the building in its original state. As he had only examined the building while the alterations were being made, his testimony was based mainly on what he had heard in court.

The Superior Court judgment was upheld in a 3-2 decision in the Court of Queen's Bench. Montgomery and Choquette JJ. dissented on the ground that it would be placing too heavy a burden on the buyer to require him to do more than have a normal examination made by competent professionals.[7]

On appeal to the Supreme Court the appeal was dismissed with costs, with Abbott J. speaking for the Court.[8] It is unfortunate that with a point of law as difficult and contentious as in this case the Supreme Court did little more

[6][1961] Q.B. 108 at p. 110.

[7]Both dissenting judges held that as the seller was in good faith, the buyer should be granted the repair expenses but not the damages.

[8]Supreme Court judgement pronounced January 23, 1962; as yet unreported.

than simply agree with the courts below. As no new grounds were advanced by the Supreme Court, the reasoning behind the *Levine* case is therefore to be found in the judgment of the Court of Appeal.

May any general principles be extracted from *Levine v. Horner*? Several come to mind, all rather disturbing. No longer may a buyer feel secure that his expert has freed him from responsibility for apparent defects: the expert's examination may be rejected by the courts. Even where the competence of an expert is unquestioned (as in *Levine*) the courts may distinguish between normal and meticulous examinations. The expert is also in a very tenuous position. He cannot be satisfied that he has fulfilled his obligation by a customary inspection of a building. If he does not take extraordinary care, he presumably may find himself embroiled in an action in damages taken by the buyer of a building.

As noted above, there seems to be no exact precedent for the *Levine* case. But it is submitted that this decision runs contrary to the spirit of the Civil Code, the jurisprudence, and both French and Quebec authors.

In his notes in the *Levine* case, St. Jacques J. in the Court of Appeal put forward two main arguments: (1) the defect was not so hidden that an expert could not have discovered it; and (2) the defect did not affect the solidity of the building until the alterations had started. These arguments require detailed analysis.

The learned judge states his first argument as follows:[9]

> Etait-ce réellement un vice tellement caché qui n'aurait pas pu être découvert par un homme de l'art, usant de son expérience et d'un jugement sain?

The key words are "n'aurait pas pu être découvert par *un homme de l'art*." But by art. 1523 C.C. the seller is not responsible for defects "dont *l'acheteur* a pu lui-même connaître l'existence".[10] There is a great difference between these two statements: if it is the buyer who could have seen the defect, then his duty will be fulfilled if he hires an expert to do a customary examination. But if it is the expert who could have seen the defect, then the burden on the buyer is heavier. The expert will be required to carry out a far more stringent examination than is normal, as otherwise anything he "could have" discovered will be considered an apparent defect. It is submitted that the criterion of St. Jacques J. is too hard on the buyer and runs contrary to the Civil Code and to most of the leading authorities. Thus Baudry-Lacantinerie writes about a defect:[11]

> . . . il doit . . . être considéré comme *apparent* toutes les fois qu'au moyen de l'examen attentif qu'un homme sérieux apporte aux marchés qu'il traite, l'acheteur a pu les remarquer.

[9][1961] Q.B. 108 at p. 113-114.

[10]*Italics* are mine.

[11]G. Baudry-Lacantinerie, *Traité théorique et pratique de droit civil*, 3rd ed. (1908), vol. 19, p. 425, no. 418.

The author makes it clear, however, that "l'examen attentif" has definite limits:[12]

> Le vice serait caché, s'il ne pouvait être aperçu qu'au moyen de travail qu'il n'est pas dans l'usage de faire.

Yet in the *Levine* case, defendant's architect Chadwick testified that in order to discover the defect it would have been necessary to remove either a part of the exterior brickwork or of the interior panelling, and that he himself would have gone to these lengths.[13] Would not such an examination come within "travail qu'il n'est pas dans l'usage de faire"?

Further support for this view comes from Planiol et Ripert:[14]

> . . . l'acquéreur d'un immeuble perd le droit d'invoquer la garantie s'il n'a pas aperçu un vice qu'un architecte aurait immédiatement découvert. . .

In the *Levine* case, the architect certainly could not have *immediately* seen the defect. The bulge itself was not the defect: if it had been, the appellants would have had a poor argument. If a defect is enclosed by panelling on one side and brickwork on another it obviously cannot immediately be seen even by a competent professional.

Planiol et Ripert continue:[15]

> L'acheteur . . . n'est pas tenu de soumettre la chose à un examen demandant des recherches scientifiques particulières.

Would not removing panelling or brickwork be considered "recherches scientifiques particulières"?

Faribault agrees with the other authorities:[16]

> . . . un vice n'est plus apparent lorsque son existence ne peut être constatée qu'après des recherches minutieuses et d'un caractère spécial.

Appellants' experts saw the bulge and did not think it signified a structural defect. It was not their duty to make:"recherches minutieuses".

St. Jacques J. states in his notes that he was sarisfied with architect Chadwick's testimony: "on apercevait dans le mur extérieur ce qu'on appelle *a bulge*, une saillie indicatrice de la possibilité d'un défaut purement structural."[17] In the learned judge's words, then, the bulge only showed the *possibility* of a structural defect: it was not in itself a clear indication of a defect. In fact it was such an unclear indication of a defect that the plaintiff's two experts did not even think it worth reporting to their client. It is submitted that even if

[12]*Ibid.*, p. 427, no. 419.

[13][1961] Q.B. 108 at p. 111.

[14]Planiol M. and Ripert G., *Traité pratique de droit civil français*, 2nd ed. (1956), vol. 10, p. 145, no. 130.

[15]*Ibid.*, p. 146, no. 130.

[16]Faribault L., *Traité de droit civil du Québec*, vol. XI, p. 278, no. 308.

[17][1961] Q.B. 108 at p. 114.

the bulge indicated the possibility of a defect, that such a possible defect cannot be equated with an apparent defect under 1523 C.C. Something that is only possible is not apparent. Nowhere does the Civil Code suggest that the buyer is responsible for "possible" defects.

At one point in his testimony architect Chadwick suggested that it is not uncommon to find a bulge:[18]

> Q. . . . Generally speaking, in a building, a commercial building, a good commerical building that has been up for twenty years or so, is it not a fact that you occasionally find a bulge?
>
> A. Yes.

The existence of a bulge therefore does not necessarily imply a structural defect, as bulges sometimes appear even in *good* commercial buildings. A good commercial building obviously cannot have structural defects and still be considered "good".

Chadwick himself even says that the bulge might have led an expert to conclude that only minor repairs would be necessary:[19]

> It [the concrete beam] would be displacing the brickwork. If it tilted inward or fell inward, I would be inclined to think you would see some displacement appear, although you might think just a repointing job was necessary . . .

It was thus quite possible to think that the bulge simply indicated that the brickwork needed to be reset with mortar.

Because the defect in question could only have been seen after a very detailed and special examination, it is therefore submitted that the defect was not apparent.

It was also stressed in the Court of Appeal that the respondents had occupied the premises for many years without the solidity being threatened:[20]

> Cette saillie, apparaissant au mur de façade, n'affectait en aucune façon la solidité du bâtiment, tel qu'il était exploité par les vendeurs et tel qu'il aurait pu l'être par les acheteurs, s'ils l'avaient conservé dans l'état où il était lors de la vente, sans le transformer.

By these remarks it seems that the buyer is to be penalized simply because he does not leave the building in the same state as it was when he bought it. If the buyer makes alterations and structural defects are found, why should he be held responsible? There is no parallel here between, for example, using a recently bought small car as a tractor and then suing on the grounds of latent defects. That use of a car is highly unorthodox, and one could reply that the resulting damage was caused not by structural defects but by misuse. But it is certainly not unusual to buy a building with the intention of making alterations, as in the *Levine* case. If structural defects complicate the alterations, it is submitted that the seller should not escape responsibility by replying that the buyer should have left the building as it was, "sans le transformer". Art.

[18][1961] Q.B. 108 at p. 117.

[19][1961] Q.B. 108 at p. 117.

[20][1961] Q.B. 108, St. Jacques J., p. 114; similarly St. Jacques J., p. 112, and Badeaux J., p. 115.

1522 C.C. states that the seller must warrant the buyer "against such latent defects in the thing sold . . . as render it unfit for the use for which it was intended". Appellants intended to use the building for their own business purposes, and hence planned to make alterations. It is submitted that the use for which the building was intended was not violated by simply making alterations: the building was still to be used as a building. Both respondent and appellants intended to occupy the premises as a commercial building. Alterations are therefore irrelevant in this context.

This argument might be set out in another way. The original building was solid. Major alterations were undertaken. The building, because of structural defects, was no longer solid. Therefore these alterations must have brought out defects which were hitherto hidden, otherwise the building would have remained as solid as before. Therefore those defects were latent.

It is respectfully submitted that there is an incompatibility in the *Levine* case between (i) the major alterations, and (ii) the existence of an apparent defect. If the building was perfectly sound until those alterations were made, then it is submitted that it was impossible for the defect to be apparent.[21]

But there is another element of latent defects which does not seem to have been mentioned by the learned judges. Several leading authorities maintain that even if the defect *was* noticed before the sale, but the consequences of the defect could not have been visualized, an action would still lie under legal warranty for latent defects. Planiol et Ripert say this situation would apply "si, par exemple, ces conséquences ne pouvaient apparaître qu'au moyen d'expertises spéciales . . ."[22] These words might have been written to apply directly to the *Levine* case.

Faribault supports this theory:[23]

> Il peut arriver qu'un défaut puisse être constaté par l'acheteur lors de la vente, mais que ces conséquences ne puissent alors être prévues, en ce sens qu'à ce moment l'acheteur ne puisse raisonnablement le considérer comme pouvant nuire à *l'usage qu'il entend faire de la chose.* Ce vice ne doit pas alors être considéré comme apparent.

W. S. Johnson in an article in *La Revue du Barreau* clearly expresses the same idea:[24]

> The *possible result* of the known or observable defect is in a degree *caché* in the sense that, except in a most flagrant case, it is not wholly *predictable.*

Even if it is maintained that the bulge in *Levine* was the sign of a defect, the consequences could not have been visualized. The consequences were "not

[21]But notice that Choquette J. (dissenting) states that even without the alterations, the repairs would have been necessary: "Ces travaux étaient nécessaires, même sans les altérations. L'architecte de la défenderesse ne dénie pas cette nécessité." [1961] Q.B. 108 at p. 116.

[22]Planiol et Ripert, *op. cit.*, p. 147, no. 130.

[23]Faribault, *op. cit.*, p. 278, no. 308. *Italics* are mine.

[24]Johnson, W. S., "The Redhibitory Action and Buildings — Implications of Acceptance of Work", 12 Rev. du B. (1952) 322, at p. 332.

wholly *predictable*", and in this sense as well the defect was therefore hidden.

It might be wise to end this discussion with a final reference to the Civil Code. Art. 1523 says that the seller is not responsible for "defects which are apparent *and* which the buyer might have known of himself."[25] The word "and" is crucial — but the courts have interpreted it to mean "or". The grounds of the *Levine* case could be crudely paraphrased as follows: although the defect was not apparent in the sense of being obvious, it might nevertheless have been known by the buyer. In this way the courts have artificially split the article. By the *Levine* decision the seller can now avoid responsibility for a defect under art. 1523 C.C. in *two* distinct ways: (1) if the defect was apparent; or (2) if the buyer could have known of the defect. This dichotomy, it is submitted, has no basis in the Civil Code.

Perhaps the moral of the *Levine* case is that the buyer should insist on clauses in the contract specifically giving warranty for any irregularities he has noticed and which may possibly harbour a structural defect. While this might be a solution, it nevertheless cuts down the efficacy of legal warranty and magnifies the importance of conventional warranty. The Civil Code states that legal warranty "is implied by law in the contract of sale, without stipulation" (art. 1507 C.C.). Thus the buyer should not be forced to protect himself by stipulating warranty in every case where it is unclear if a structural defect does in fact exist. In the *Levine* case the buyer was prudent enough to engage two competent professionals; these experts examined the building with normal thoroughness and found no defects. Buyer and experts acted as reasonable men would in similar circumstances. It is respectfully submitted that the buyer's duty was thereby discharged. If even an expert's examination fails to reveal any defects, then the principle of *caveat emptor* should be satisfied.

[25] *Italics* are mine.