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Is Accepting the Leased Premises "As Is Where Is" Equivalent to Waiving Legal Warranties?

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Accepting the leased premises "as is where is" under a commercial lease may be confusing even though this wording is quite often used. Does this wording imply that the lessor has no work to perform on the leased premises or does it imply that the lessee waives all legal warranties pertaining thereto?

Many argue that this wording means that the lessee accepts the leased premises without the lessor having to perform any work. However, a study of the Courts' interpretation shows us that the meaning of this wording is not unanimous and can thus implicate certain risks.

1. Origin of the "As Is Where Is" Notion

To better understand the interpretation today of the notion "as is where is", it is necessary to consider its origin. As such, we must look to the *Civil Code of Lower Canada* (hereinafter, "C.C.L.C."), which provided in its book on leasing that the delivery of the leased premises was made with a warranty against latent defects.

> ***Section 1606 C.C.L.C.:*** *The lessor must warrant the lessee against latent defects in the thing leased which prevent or diminish its use, whether or not they are known to the lessor.*
> *The lessor who knew or was presumed to know of the defects is also liable for the damage suffered by the lessee.*

This warranty against latent defects was similar to that found in matters of sale.[1] Indeed, the lessor only warranted the leased premises against defects impairing their normal use and that were serious, latent, and unknown to the lessee at the time of delivery.[2] The "as is where is" clauses were akin to those found in matters of sale, which are today inappropriate considering the statutory changes made to the notions in leasing.

2. Current Warranties Under the *Civil Code of Quebec*

The warranty against latent defects was replaced during the reform of the *Civil Code of Quebec* (hereinafter, "C.C.Q.") by a warranty of good use.

> ***Section 1854 C.C.Q.:*** *The lessor is bound to deliver the leased property to the lessee in a good state of repair in all respects and to provide him with peaceable enjoyment of the property throughout the term of the lease.*
> *He is also bound to warrant the lessee that the property may be used for the purpose for which it was leased and to maintain the property for that purpose throughout the term of the lease.*

Consequently, the legislator broadened the warranties borne by the lessor from the delivery of the premises and for the duration of the lease. The lessor must henceforth warrant that the leased premises are free of any usage

defects, i.e. they can be used for the purpose for which they were leased.[3]

This warranty by the lessor is an obligation of result, which means that the lessor may only be exempted by raising a third party's fault or a superior force, which entails circumstances absolutely out of the lessor's control.[4] Furthermore, the lessor's liability shall be incurred regardless of whether the usage defects are visible or latent.[5]

A good example of the application of this interpretation of section 1854 C.C.Q. is evident in the decision by the Court of Appeal in *Corporation Quad inc.* v. *Groupe immobilier Borex*. In this industrial leasing case, the lessee took a recourse action against the lessor for reimbursement of costs incurred for the repair of the roof through which water was leaking inside the leased space. The Court refused to address the question whether such defect was latent or not, the facts showing that the lessee was deprived of the good use of the premises as stated in the lease. Therefore, the lessor had the obligation to execute the necessary repair work in order to maintain the good use of the leased space whether or not the defect causing the leak was apparent or hidden.[6]

3. Waiving the Good Use Warranty

The case law, including the above *Corporation Quad*, states that section 1854 C.C.Q. is not a rule of public order; a lessee can waive the good use warranty.[7]

To be valid in law, a waiver must be non-equivocal. It may nonetheless be valid if made in an express or implicit manner.[8]

In light of these principles, we must question whether an "as is where is" acceptance clause of the leased premises is sufficient to put aside the good use warranty provided by section 1854 C.C.Q. Such clauses are common in leases, but to extend beyond than an acceptance "as is where is", it must be possible from reading the lease to determine whether the lessee waives the good use warranty upon delivery and for the term of the lease or if the lessee solely accepts the leased premises at delivery without the lessor performing any additional work.

4. Interpretation of "As Is Where Is" Clauses

In general, leasing "as is where is" is understood as an exemption clause from legal warranties. However, the case law interpretation has often limited this exemption to protect the lessee based on different motives. Some Courts concluded that they were style clauses having to be interpreted restrictively; others stated that they should be interpreted in favour of the party whose rights had been limited, i.e. the lessee. Others also concluded that, under such clauses, the lessee waived the warranty for visible defects, but not that for latent ones.[9]

Therefore, to ensure that an interpretation by the Courts would be in accordance with the parties' intention, it is in the parties' interest to specify what is understood when the expression "to lease 'as is where is'" is used in their lease.

For example, a clause providing that the leased premises are taken "'as is where is' without any legal or conventional warranties from the Lessor" was recently interpreted by the Superior Court as valid and exempting.[10] In this case, the leased space was not in compliance with fire safety standards applicable to the purpose for which the lessee intended to use it. For that reason, the lessee petitioned the Court to resiliate the lease, which the Court refused because of the lessee's waiver of the good use warranty. The lessee was thus forced to pay its monthly rent until the end of the lease pursuant to an injunction issued by the lessor.[11]

5. Limits to a Waiver

Nonetheless, the lessor cannot be contractually exempted from all liability. Section 1474 C.C.Q. provides that no person may limit his or her liability caused by an intentional or gross fault, which shows gross recklessness, gross carelessness or gross negligence.[12] In addition, it provides that a person may not in any way exclude his or her liability for a bodily or moral injury caused to another.

Author Pierre-Gabriel Jobin describes another limit to an exemption clause according to which "an exemption clause is inoperative when it would have the effect of depriving the lessee of any enjoyment and leaving it without recourse".[13] In contract law, an exemption clause should not deprive a contract of its essential effect.[14]

This principle has the effect of avoiding a situation where the lessee would be deprived of the good use of the leased property which is the very essence of the leasing contract as well as of any recourse to remedy same. It is indeed what the Court of Appeal concluded in an equipment rental case where the lessee lost the use of a rented tractor which had burned due to an electrical defect. Notwithstanding the lessee's waiver of section 1854 C.C.Q. and the fact that it had consented to the lessor's full exemption, the Court concluded that the waiver had no effect in the circumstances. The lessor's obligation to ensure the good use of the leased property remained and the lessee could resort to the exception for nonperformance by ceasing to pay its rent.[15]

6. Advice for the Lessor

For the lessor seeking to be exempted from expenses pertaining the good use warranty, it may be suitable to have the lease expressly stipulate that the lessee waives its rights under section 1854 C.C.Q. or to legal warranties, including that of good use.

If the lessee refuses such waiver, the lessor may provide for an additional rent clause that would equal the costs of any repair work necessary for the maintenance of good use, amortized over the term of the lease. This way the lessee would ultimately bear the repair costs.[16]

It is also advisable to set forth in the lease that, prior to accepting the premises "as is where is", the lessee carefully examines the premises and recognizes that the lessor has no obligation to perform any work on the leased space. Any such work would then be the responsibility of the lessee.

7. Advice for the Lessee

For the lessee who wants to ensure that the leased premises may be used for the purpose for which they are leased upon delivery and for the entire term of the lease, the lease could provide that the lessee accepts the premises "as is where is", while reserving the warranties under section 1854 C.C.Q. in order for the lessor to bear the legal obligations.

Nevertheless, if the lessor requires that the lessee waives the good use warranty and the provisions of section 1854 C.C.Q., the lessee may then specify that such waiver is subject to defects that a careful and diligent inspection of the premises would not have showed or non-conformities to applicable laws on the date of possession, including environmental laws, or provide for any exception to the waiver according to the circumstances.

Additionally, the lessee who accepts to waive damages that may be caused by the loss of the good use of the premises may still reserve its rights to force the lessor to perform the necessary repair work to regain the good use of the leased premises and preserve its recourses in rent reduction or lease resiliation.

8. Conclusion

In conclusion, it is to the parties' advantage to make sure that the terms of the lease reflect their intentions as precisely as possible leaving little room for interpretation. Clauses using the "as is where is" wording risk being interpreted restrictively and not having their full exempting effect with regards to the lessor. Parties should clearly stipulate whether the lessee waives the good use warranty pursuant to section 1854 C.C.Q. and, if so, subject to which conditions and to which recourses.

In order to fully understand the subtleties of exemption clauses in a lease, we strongly recommend that both lessors and lessees seek the advice of legal counsel who will assess the effects of the language chosen by the parties on the obligations incumbent upon them under the lease.

1. C.C.Q., s. 1726.
2. Pierre-Gabriel JOBIN, *Le louage*, 2nd ed., 1996, Cowansville, Éditions Yvon Blais, p. 347-348.
3. *Leblond* v. *Dionne*, 2006 QCCA 341, par. 25.
4. Jacques DESLAURIERS, *Vente louage, contrat d'entreprise ou de service*, 2nd ed., 2013, Montreal, Wilson & Lafleur, p. 387, no. 1152.
5. *Ibid.*, p. 382, no. 1136.
6. *Corporation Quad inc.* v. *Groupe immobilier Borex*, 2007 QCCA 1868, par. 17-22.
7. *Ibid.*, par. 23; see also *Société de gestion Complan (1980) inc.* v. *Bell Distribution inc.*, 2011 QCCA 320, par. 25; J. DESLAURIERS, supra note 4, p. 389, no. 1157.
8. *Union canadienne (L'), compagnie d'assurances* v. *Quintal*, 2010 QCCA 921, par. 47; *Placements André Turgeon inc.* v. *Ville de Longueuil et al.*, 2003 CanLII 47937 (QC CA), par. 26.
9. P.-G. JOBIN, *supra* note 2, p. 450; see also J. DESLAURIERS, *supra* note 4, p. 383, no. 1139.
10. *Gestion immobilier Carrefour inc.* v. *Association des professionnels de la construction et de l'habitation du Québec (APCHQ) Région de Montréal - Métropolitain inc.*, 2019 QCCS 1914, par. 209.
11. *Ibid.*, par. 216.
12. *Leblond* v. *Dionne*, *supra* note 3, par. 31-35.
13. P.-G. JOBIN, *supra* note 2, p. 445 (our translation); see also *Société de gestion Complan (1980) inc.* v. *Bell Distribution inc.*, *supra* note 7, par. 25; J. DESLAURIERS, *supra* note 4, p. 382, no. 1138.
14. Jean-Louis BAUDOUIN, Pierre-Gabriel JOBIN and Nathalie VÉZINA, *Les Obligations*, 7th ed., 2013, Cowansville, Éditions Yvon Blais, p. 1077, no 871.
15. *CNH Canada Ltd.* v. *Promutuel Lac St-Pierre - Les Forges, société mutuelle d'assurances générales*, 2015 QCCA 204, par. 54-64.
16. See for example *Corporation Quad inc.* v. *Groupe immobilier Borex*, *supra* note 6, par. 31-34.

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