

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** Société en commandite Place Mullins *v.* Services immobiliers Diane Bisson inc., 2015 SCC 36, [2015] 2 S.C.R. 699 | **Date:** 20150625  **Docket:** 35461 |

Between:

Société en commandite Place Mullins and 139612 Canada inc.

Appellants

and

Services immobiliers Diane Bisson inc.

Respondent

**Official English Translation**

**Coram:** McLachlin C.J. and Abella, Rothstein, Cromwell, Wagner, Gascon and Côté JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**  (paras. 1 to 28) | Wagner J. (McLachlin C.J. and Abella, Rothstein, Cromwell, Gascon and Côté JJ. concurring) |

Appeal heard and judgment rendered: March 18, 2015

Reasons delivered: June 25, 2015

Société en commandite Place Mullins *v.* Services immobiliers Diane Bisson inc., 2015 SCC 36, [2015] 2 S.C.R. 699

Société en commandite Place Mullins and

139612 Canada inc. Appellants

v.

Services immobiliers Diane Bisson inc. Respondent

**Indexed as:** Société en commandite Place Mullins ***v.*** Services immobiliers Diane Bisson inc.

**2015 SCC 36**

File No.: 35461.

Hearing and judgment: March 18, 2015.

Reasons delivered: June 25, 2015.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Wagner, Gascon and Côté JJ.

on appeal from the court of appeal for quebec

*Contracts — Brokerage contract — Commission — Brokerage contract stipulating that broker entitled to payment of commission where agreement to sell immovable concluded or where seller voluntarily prevents free performance of contract — Soil of promisor‑sellers’ immovable contaminated — Promisor‑buyer repudiating initial promise and submitting new offer — Promisor‑sellers turning offer down — Whether broker entitled to payment of its commission.*

The promisor‑sellers signed an exclusive brokerage contract — drawn up using a standard form of the Association des courtiers et agents immobiliers du Québec — under which they gave a brokerage enterprise a mandate to sell their immovable. The contract stipulated that the promisor‑sellers’ obligation to pay the brokerage enterprise’s commission would be triggered, *inter alia*, where an “agreement to sell the immovable” was concluded during the term of the contract, or if “the seller voluntarily prevents the free performance of this contract”. The promisor‑sellers initially accepted a promise to purchase obtained by the brokerage enterprise. This promise to purchase gave the promisor‑buyer a right to withdraw the promise if he was not completely satisfied with the results of his due diligence on the immovable. After it was discovered that the immovable might be affected by environmental contamination, the promisor‑buyer reiterated to the promisor‑sellers that he intended to buy the immovable, but on condition that they decontaminate it at their own expense. The promisor‑sellers refused, and the sale of the immovable never went through. The brokerage enterprise claimed from the promisor‑sellers the commission amount set out in the brokerage contract, but the Superior Court dismissed the action. The Court of Appeal set aside that judgment in a split decision and allowed the appeal.

*Held*: The appeal should be allowed.

In principle, where a contract contains a resolutory condition, the obligations for which the contract provides nevertheless arise and are exigible, as if they were pure and simple, as soon as it is signed. Thus, even though a promise to purchase can be resolved, it is binding on the parties as soon as it is concluded. But so long as a promise to purchase is not unconditionally binding on the promisor‑buyer and the promisor‑seller and it is not yet possible for one of them to bring an action to compel transfer of title, there is no “agreement to sell the immovable” within the meaning of the brokerage contract. In this case, because the environmental assessment had shown that the soil was contaminated and because the promisor‑buyer had clearly expressed his intention not to conclude a sale until such time as the property had been decontaminated at the promisor‑sellers’ expense, the promisor‑buyer had repudiated the initial promise and submitted a new offer to purchase. The initial promise to purchase never became unconditional, and the promisor‑buyer’s new offer was never accepted. This means that no agreement to sell the immovable was concluded, and the brokerage enterprise was not entitled to be paid its commission.

Nor was the obligation to pay the commission triggered by the promisor‑sellers’ voluntarily preventing the free performance of the brokerage contract. Under the promise to purchase, the promisor‑sellers did not have an obligation either to decontaminate their property or to renegotiate the terms of the initial promise to purchase. Given that they had not known about the contamination when the brokerage contract was entered into, it cannot be concluded that they wrongfully prevented the completion of the sale. Although the brokerage contract contained a declaration by the promisor‑sellers that the immovable was in accordance with environmental protection laws and regulations, the declarations set out in the brokerage contract cannot on their own, absent proof of bad faith, serve as a basis for arguing that the promisor‑sellers voluntarily prevented the free performance of the contract. Furthermore, those declarations are not warranties and the legal warranties could not apply, because no sale had been concluded. Under art. 1396 of the *Civil Code of Québec*, an accepted promise to purchase is not equivalent to a sale and does not produce any of the effects of a sale. In sum, the promisor‑sellers committed no fault in relation to their obligations under either the promise to purchase or the brokerage contract.

**Cases Cited**

**Referred to:** *H.W. Liebig & Co. v. Leading Investments Ltd.*, [1986] 1 S.C.R. 70; *Royal Lepage des Moulins Inc. v. Baril*, 2004 CanLII 29347; *Mutuelle des fonctionnaires du Québec v. Immeubles G.C. Gagnon inc.*, 1997 CanLII 10674; *9118‑7781 Québec inc. (Groupe Sutton Millénia) v. Lerer*, 2012 QCCA 430, [2012] R.J.Q. 331; *Remax Alliance v. Placements Jabena inc.*, 2007 QCCQ 12756; *Racicot v. Mercier*, [1968] B.R. 975.

**Statutes and Regulations Cited**

*Civil Code of Québec*, arts. 1396, 1503, 1723, 1725.

**Authors Cited**

Jobin, Pierre‑Gabriel, avec la collaboration de Michelle Cumyn. *La vente*, 3e éd. Cowansville, Qué.: Yvon Blais, 2007.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*, 2e éd. Montréal: Thémis, 2012.

Richard, Henri. *Le courtage immobilier au Québec: Droits et obligations des agences, courtiers et clients*, 3e éd. Cowansville, Qué.: Yvon Blais, 2010.

APPEAL from a judgment of the Quebec Court of Appeal (Pelletier and Fournier JJ.A. and Gagnon J. (*ad hoc*)), 2013 QCCA 868, [2013] AZ‑50964779, [2013] J.Q. no 4684 (QL), 2013 CarswellQue 4404 (WL Can.), setting aside a decision of Paquette J., 2011 QCCS 1930, [2011] AZ‑50745003, [2011] J.Q. no 4261 (QL), 2011 CarswellQue 4091 (WL Can.). Appeal allowed.

Vlatka (Carol) Kljajo and Gabriel Di Genova, for the appellants.

Pierre-G. Champagne, for the respondent.

English version of the judgment of the Court delivered by

Wagner J. —

1. Introduction
2. A real estate broker’s compensation is uncertain in many respects. As La Forest J. put it in *H.W. Liebig & Co. v. Leading Investments Ltd.*, [1986] 1 S.C.R. 70, a brokerage contract is like a hunting licence in the sense that, “as in hunting, the broker may spend much time and effort but fail to achieve his goal” (p. 80). The case at bar provides a perfect illustration of this.
3. In this case, Services immobiliers Diane Bisson inc. (“respondent”), a brokerage enterprise, is claiming from Société en commandite Place Mullins and 139612 Canada inc. (“appellants”) the commission amount set out in a brokerage contract even though the immovable in question was not sold during the term of that contract. The respondent initially argued, first, that an agreement to sell the immovable had been concluded by the appellants and the promisor‑buyer, David Douek, and, in the alternative, that the appellants, through their inaction, had prevented the free performance of the brokerage contract.
4. The appellants admitted that if either of those situations were proven, they would be required to pay the commission, but they asserted that neither of them had in fact occurred. There were essentially two issues:

(1) Was an “agreement to sell the IMMOVABLE” within the meaning of clause 6.1(3o) of the brokerage contract validly concluded?

(2) Did the appellants voluntarily prevent the free performance of the brokerage contract within the meaning of clause 6.1(4o)?

1. In the Superior Court and the Court of Appeal, the argument focused on the first of these two questions. In this Court, the respondent conceded that Mr. Douek had availed himself of the resolutory condition, which meant that no agreement to sell the immovable had actually been concluded. The alternative argument advanced in the Superior Court and the Court of Appeal has therefore become the principal argument in the appeal to this Court.
2. Despite the respondent’s concession that no agreement to sell the immovable had been concluded, I will nonetheless consider both this argument based on clause 6.1(3o) and the one concerning free performance of the contract based on clause 6.1(4o). In my opinion, partly for the reasons given by Paquette J. of the Superior Court (2011 QCCS 1930) and by Fournier J.A. of the Court of Appeal (2013 QCCA 868), the respondent’s arguments must fail and the appeal must be allowed.
3. Background Facts
4. On September 8, 2007, the appellants signed an exclusive brokerage contract with the respondent under which they gave the respondent a mandate to sell their immovable. The asking sale price, as amended on September 19, 2007, was $3,420,000. The contract was drawn up using a standard form of the Association des courtiers et agents immobiliers du Québec, clause 6.1 of which set out the situations that would trigger the appellants’ obligation to pay the commission. The relevant portions read as follow:

[translation]

6.1 The SELLER shall pay to the BROKER compensation of:

Five percent (5% + GST + QST) of the sale price, in the cases provided in 1o, 2o and 3o below, or of the [sale] price [asked] in the case provided in 4o below . . . :

. . .

3o where an agreement to sell the IMMOVABLE is concluded during the term of this contract, whether through the BROKER or not; or

4o where the SELLER voluntarily prevents the free performance of this contract.

(A.R., vol. II, at p. 154)

1. On November 30, 2007, the respondent obtained Mr. Douek’s signature on a promise to purchase in the amount of $3,260,000. The promise to purchase stipulated that the appellants would give Mr. Douek certain documents to enable him to do his due diligence, and that Mr. Douek would supply an environmental study as part of that process:

[translation]

**4.0 OBLIGATIONS-DECLARATIONS AND OTHER CONDITIONS**

4.1 OWNERSHIP DOCUMENTS: The SELLER shall provide: (a) a valid title of ownership free of any charges and other real rights other than those declared herein and the usual servitudes of public utility; (b) any titles it may have in its possession; . . . and (k) all other documents relevant to due diligence on the immovable.

. . .

4.14 OTHER CONDITIONS: Following acceptance of this Promise to Purchase, the BUYER shall have fifteen (15) working days after receiving all the documents listed in article 4.1 of this Promise to Purchase (which the SELLER undertakes to supply to him within 48 hours after the Promise to Purchase is accepted) to inspect the immovable and verify the expenses and the current rents to his complete satisfaction and at his sole discretion. If the BUYER is not satisfied and written notice to this effect is sent by registered mail to the SELLER at the above‑mentioned address or to Services Immobiliers Diane Bisson inc., chartered real estate broker, before the expiration of that time, this Promise to Purchase shall be null and void and the deposit shall be returned immediately and in full to the BUYER. If no notice is given within that time, the BUYER shall be considered to be satisfied. . . .

4.14.1 ENVIRONMENTAL STUDIES: The buyer shall supply his environmental study. [Emphasis added.]

(A.R., vol. II, at pp. 158 and 160)

1. The appellants accepted the promise to purchase on the same date. On January 11, 2008, Mr. Douek obtained a Phase I environmental site assessment report that identified potential environmental risks related to activities engaged in on the property in the past. After the potential contamination was discovered, Mr. Douek was granted an extension of the time he had been given to finalize his due diligence. The existence and extent of the contamination were confirmed in a Phase II report ordered by the appellants from Inspec-Sol inc. and then in a second report ordered from Laforge Environnement inc. On July 14, 2008, the appellants received an estimate of over $75,000 for decontamination of the soil.
2. On July 22, 2008, the appellants received a formal notice from Mr. Douek, who reiterated that he intended to buy the immovable, but on condition that the appellants decontaminate the soil at their own expense. Mr. Douek refused to assume any responsibility whatsoever for the cost of decontamination, which he knew from experience could exceed the estimate of $75,314. The appellants refused and tried unsuccessfully to work out a compromise, but the sale of the immovable to Mr. Douek ultimately did not go through.
3. On August 5, 2008, the respondent brought its action, claiming $183,986.25 from the appellants. This amount represented the commission of 5 percent of the accepted sale price and taxes, plus interest and the additional indemnity. The Superior Court dismissed the action, but the Court of Appeal set aside that judgment in a split decision and allowed the appeal.
4. Analysis
   1. Was an “agreement to sell the immovable” Within the Meaning of Clause 6.1(3o) of the Brokerage Agreement Validly Concluded?
5. Although, as the Court of Appeal rightly noted, the Superior Court was wrong to base its analysis on clause 6.1(1o), I am of the opinion that the same reasoning applies and the result is the same if the issue is considered in the context of clause 6.1(3o).
6. Clause 6.1(3o), provides that the broker is entitled to the commission once an [translation] “agreement to sell the IMMOVABLE” is concluded (emphasis added). A sale is therefore not necessary. The wording of the clause is broad enough to encompass a promise to purchase accepted by the promisor-seller, but in my opinion, the obligations that flow from such a promise must also become certain, that is, unconditional.
7. In this case, clause 4.14 of the promise to purchase gave Mr. Douek a right to withdraw the promise if he was not completely satisfied with the results of his due diligence. To withdraw the promise if he was dissatisfied with those results, Mr. Douek had to give written notice to that effect to the promisor‑seller within the specified time. The promise to purchase therefore remained conditional until it was withdrawn or until the expiration of the time in question.
8. In principle, where a contract contains a resolutory condition, the obligations for which the contract provides nevertheless arise and are exigible, as if they were pure and simple, as soon as it is signed (D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at No. 2498). Thus, even though the promise to purchase could be resolved, it was binding on the parties as soon as it was concluded. Although this may at first glance seem sufficient for the purposes of clause 6.1(3o), I am of the opinion that so long as a promise to purchase is not unconditionally binding on the promisor‑buyer and the promisor‑seller and it is not yet possible for one of them to bring an action to compel transfer of title, there is no “agreement to sell the IMMOVABLE” within the meaning of clause 6.1(3o): see reasons of Paquette J., at para. 23, and Court of Appeal’s reasons, at para. 32. A different interpretation of this clause would result in the broker being entitled to be paid its commission as soon as the promise is accepted despite the condition. However, that payment would then be susceptible to the effects of the occurrence of the event to which the resolutory condition in the promise to purchase applies. It seems to me that a conclusion that there is a right to be paid the commission that is immediate but at risk would be inconsistent with the intention of the parties to such a contract. Since clause 6.1(3o) provides for the payment of compensation when an “agreement to sell the IMMOVABLE is concluded”, the agreement to which it refers is logically an unconditional agreement, one that is subject to no conditions — whether suspensive or resolutory — whatsoever.
9. In the instant case, because the environmental assessment showed that the soil was contaminated with hydrocarbons, there is no doubt that it was open to Mr. Douek to avail himself of the resolutory condition that had been stipulated in his favour. But what did he actually do? Although the formal notice sent to the appellants on July 22 reiterated that Mr. Douek intended to buy the property, it added two conditions to the initial promise to purchase. First, the appellants had to decontaminate the site at their own expense and, second, they had to provide Mr. Douek with a certificate of environmental conformity issued by the Ministère de l’Environnement:

[translation] The seller is therefore bound by the said accepted promise to purchase between the parties until such time as it provides the buyer with properties that are conforming, that is, decontaminated, together with a supporting report, thereby enabling the buyer to complete his due diligence. [Emphasis added.]

(A.R., vol. II, at p. 175)

1. Thus, Mr. Douek very clearly expressed his intention not to conclude a sale “until such time” as the property was decontaminated. This was also clear from Mr. Douek’s testimony at trial. He therefore unilaterally added two preconditions to the promise to purchase.
2. By sending that letter, Mr. Douek gave notice to the appellants that he was dissatisfied with the condition of the immovable as revealed by his due diligence. The conclusion of the majority of the Court of Appeal that Mr. Douek had expressly waived the exercise of his right of withdrawal is inconsistent with this observation (paras. 47 and 50). There is no doubt that Mr. Douek still wanted to buy the immovable, but that is not the question. As the formal notice shows, there was no way he was going to buy the immovable in the condition it was in and at the price set in the promise to purchase. He expressed his dissatisfaction unequivocally, and the resolutory condition was triggered when he communicated that dissatisfaction in writing. Through the notice, Mr. Douek repudiated the promise and submitted a new offer to purchase. The initial promise to purchase never became unconditional and Mr. Douek’s new offer was never accepted. This means that no agreement to sell the immovable was concluded within the meaning of clause 6.1(3o) of the brokerage contract.
   1. Did the Appellants Voluntarily Prevent the Free Performance of the Brokerage Contract Within the Meaning of Clause 6.1(4o)?
3. The respondent’s main argument in this Court is that the appellants could not refuse to decontaminate the immovable without violating art. 1503 of the *Civil Code of Québec* (“*C.C.Q.*”), and that because they did in fact refuse to do so, they are liable to pay the commission under clause 6.1(4o) of the brokerage agreement.
4. Article 1503 *C.C.Q.* provides that “[a] conditional obligation becomes absolute when the debtor whose obligation is subject to the condition prevents it from being fulfilled.” The effect of clause 6.1(4o) is that the seller has an obligation to pay the commission if he or she *voluntarily* prevents the free performance of the brokerage contract. That clause mirrors art. 1503 *C.C.Q.* To be able to rely on clause 6.1(4o), the respondent had to prove fault on the part of the seller, the appellants in the case at bar: *Royal Lepage des Moulins Inc. v.* *Baril*, 2004 CanLII 29347 (Que. C.A.), at paras. 17‑18; *Mutuelle des fonctionnaires du Québec v*. *Immeubles G.C. Gagnon inc.*, 1997 CanLII 10674 (Que. C.A.), at p. 7. Thibault J.A. of the Quebec Court of Appeal was asked to interpret a stipulation similar to clause 6.1(4o) in a recent case, and in doing so she identified the evidence needed to trigger the application of the stipulation in question:

[translation] In conclusion, in an action instituted by a broker to claim his or her remuneration or compensation under article 7.2 of the brokerage contract, the broker must establish the existence of a valid brokerage contract, the performance of the broker’s own obligations under that contract and . . . the fact that fulfilment [of the preconditions for the right to compensation] was prevented through the fault of the seller. [Emphasis added.]

(*9118‑7781 Québec inc. (Groupe Sutton Millénia) v. Lerer*, 2012 QCCA 430, [2012] R.J.Q. 331, at para. 36)

1. In my opinion, such a fault may result either from a failure by the promisor‑seller to do something it had an obligation to do, or from its doing something it had an obligation not to do. For example, a promisor‑seller who knowingly prevents or impedes the promisor‑buyer or its mandatary from doing its due diligence on the immovable will be considered to be at fault under art. 1503 *C.C.Q.* and clause 6.1(4o). To determine whether there was a fault in the instant case, therefore, it will be necessary to establish what obligations the appellants had under the promise to purchase, on the one hand, and under the brokerage contract, on the other.
2. Under the promise to purchase concluded in this case, the appellants did not have an obligation either to decontaminate their property or to renegotiate the terms of the initial promise to purchase. They did not do anything that would have precluded the conclusion of an agreement with Mr. Douek. On the contrary, they co‑operated with him and did everything they could to ensure that the sale went through. The Superior Court and the Court of Appeal both found that the appellants had acted in good faith. Given that the appellants did not know about the contamination when the brokerage contract was entered into, it cannot be concluded that they wrongfully prevented the completion of the sale (*Remax Alliance v. Placements Jabena inc.*, 2007 QCCQ 12756; H. Richard, *Le courtage immobilier au Québec* (3rd ed. 2010), at p. 199).
3. Moreover, the brokerage contract has two important parts: part 7, entitled [translation] “Declarations by the Seller”, and part 8, entitled “Obligations of the Seller”.
4. Part 7 of the contract contains a series of declarations made by the seller in the broker’s favour, including the following:

[translation]

7.1 The SELLER declares that the information contained in this contract is accurate and that he will provide to the BROKER any additional information regarding the IMMOVABLE as soon as he becomes aware of it.

7.2 The SELLER also declares that, unless stipulated otherwise, including in 11.1, in the Declarations by the Seller form or in any annex forming part of this contract:

. . .

8o the IMMOVABLE shall be sold free of any real right and other charges other than the usual and apparent servitudes of public utility, and that the SELLER shall hold any prospective buyer harmless from any violation to restrictions of public law affecting the IMMOVABLE that are exceptions to ordinary law;

. . .

13o the IMMOVABLE is in accordance with environmental protection laws and regulations. [Emphasis added.]

(A.R., vol. II, at p. 154)

1. The respondent relies on the declaration in clause 7.2(13o) of the brokerage contract to argue that the appellants had an obligation to provide an immovable that was in accordance with environmental protection laws and regulations, which they did not do. Even though it was accepted that the immovable was not “in accordance” with environmental standards, the declarations set out in the brokerage contract cannot on their own, absent proof of bad faith, serve as a basis for arguing that the seller *voluntarily* prevented the free performance of the contract. This situation cannot be said to constitute a wrongful act, since it is common ground that the appellants were not aware of the contamination of the property.
2. Contrary to the respondent’s argument, these declarations by the seller are not warranties. This is clear from the fact that part 8 of the brokerage contract contains a clause that has almost exactly the same wording as the declaration in clause 7.2(8o) reproduced above:

[translation]

8.4 The SELLER shall provide to the prospective buyer a valid title of ownership. The IMMOVABLE shall be sold free of any real right and other charges other than the usual and apparent servitudes of public utility, and the SELLER shall hold any prospective buyer harmless from any violation to restrictions of public law affecting the IMMOVABLE that are exceptions to ordinary law, except as otherwise stipulated, namely in 11.1 or any annex forming part of this contract. [Emphasis added.]

(A.R., vol. II, at p. 154)

If it were concluded that the clauses of both part 7 and part 8 constitute warranties, clauses 8.4 and 7.2(8o) would be redundant. Moreover, I note that there is no clause in part 8 that is equivalent or similar to clause 7.2(13o).

1. As for clause 8.4, it refers to warranties that are identical to the legal warranties provided for in arts. 1723 and 1725 *C.C.Q.*, which suggests that they are inapplicable as long as a sale has not been concluded. The appellants’ argument that the legal warranties could not apply because no sale had been concluded is correct in law. Article 1396 *C.C.Q.* provides that a promise to contract is not equivalent to the proposed contract. An accepted promise to purchase is therefore not equivalent to a sale and does not produce any of the effects of a sale: P.-G. Jobin, with the collaboration of M. Cumyn, *La vente* (3rd ed. 2007), at p. 54. In any event, contamination cannot be considered a real right, nor has the respondent identified any statutory provision that supports its contention that contamination violates a restriction of public law. In short, the refusal to decontaminate the immovable did not amount to a fault that violated clause 8.4. Nor did it represent an act by which the seller voluntarily prevented the free performance of the brokerage contract. To this extent, *Racicot v. Mercier*, [1968] B.R. 975 (C.A.), on which the respondent bases its argument, is therefore of no assistance to it.
2. In sum, the appellants committed no fault in relation to their obligations under either the promise to purchase or the brokerage contract. They therefore did not voluntarily prevent the free performance of that contract within the meaning of clause 6.1(4o).
3. Disposition
4. For these reasons, I would allow the appeal with costs throughout, except for the costs awarded against the appellants on the motion to extend time in this Court.

*Appeal allowed with costs.*

Solicitors for the appellants: Mitchell Gattuso, Montréal.

Solicitors for the respondent: de Grandpré Joli‑Cœur, Montréal.