Unofficial English Translation of the Judgment of the Court

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| Dr. Elias Abdulnour inc. c. Millowitz | | | | | 2022 QCCA 918 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-09-029438-215 | | | | |
| (500-17-091437-155) | | | | | |
|  | | | | | |
| DATE: | June 27, 2022 | | | | |
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| CORAM: | | THE HONOURABLE | | JEAN BOUCHARD, J.A.  GENEVIÈVE MARCOTTE, J.A.  PETER KALICHMAN, J.A. | |
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| dr. elias abdulnour inc. | | | | | |
| nora amer  patrice champigny  louise gélinas  alfred corriveau  marie-claude sauvé  christian dagenais  azita ghaemi-yekta  anna maria giove  tony sciarrabba  benoit guilbault  marie-claude bruneau  jacob lazarovic  CHING-I liang  chi-nan kang  georgia lombardos  michel maltais  EIMAN masri abDulhadi  athina maria mougoyannis  WALMILIAN cristina paulino  éric pépin  michel reichman | | | | | |
| lara reichman  lee reichman  gestIon riojo inc.  jean-stéphane rousseau  9089-1359 quÉbec inc.  specific CONSULTING CORP., as successor of SPeCIFIC | | | | | |
| holding corp. | | | | | |
| david thomson  ton-that quoc-tuan  NGOC-han nguyen  nicolas zara  shawn zimmerman  marcy benami | | | | | |
| APPELLANTS – Plaintiffs | | | | | |
| v. | | | | | |
|  | | | | | |
| stuart m. millowitz, practising his profession of notary | | | | | |
| millowitz hodes bergeron s.e.n.c.r.l. | | | | | |
| la garantie des immeubles résidentiels inc. | | | | | |
| RESPONDENTS – Defendants | | | | | |
| and | | | | | |
| 7989288 CANADA INC. | | | | | |
| IMPLEADED PARTY – Defendant | | | | | |
| and | | | | | |
| **ROBERT ARCHAMBAULT** | | | | | |
| IMPLEADED PARTY – Intervenor | | | | | |
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|  | | | | | |
| JUDGMENT | | | | | |
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1. The appellants appeal from a judgment rendered on February 22, 2021, by the Superior Court, District of Montreal (the Honourable David E. Platts, J.S.C.), dismissing their claim for damages with legal costs.
2. The appellants signed preliminary contracts and paid down payments totalling $3,346,855 for the purchase of 25 units in a deluxe condominium tower project being developed by the impleaded party 7989288 Canada Inc. (the “Developer”).
3. These down payments were initially deposited into the trust account of the respondents, notary Stuart M. Millowitz and the firm Millowitz Hodes Bergeron S.E.N.C.R.L. (collectively the “Notary”). They were then disbursed to the Developer to finance the project, except for an amount of $450,000 which was given to the other respondent, La Garantie des immeubles résidentiels inc. (“GIR”) as security by the Developer.
4. The project never saw the light of day after the National Bank of Canada (the “Bank”) refused to finance it. The down payments were never reimbursed to the appellants, except for the portion insured with GIR, an amount of $30,000 per unit, pursuant to the accreditation.
5. The appellants therefore sued the Notary and GIR for the difference between the down payments disbursed and the compensation received. Their claim totalling approximately $2,500,000 was dismissed because they failed to prove a causal connection between the faults alleged against the Notary and GIR and the loss of the down payments. Despite finding that the Notary and GIR had made several errors, the judge held that the appellants’ loss was instead a direct and immediate consequence of the Bank’s refusal to finance the project.

**BACKGROUND**

1. It should be briefly recalled that the Developer first acquired the property where the tower was going to be built for $5 million in 2011, with a balance of $4 million to be paid on the purchase price. It then obtained a hypothecary loan of $4.2 million in the summer of 2012 from 9103-3175 Québec inc. (“Point Zéro”) to repay that balance. The Notary’s services were then retained and he drafted, at no charge, a standard preliminary contract in exchange for the Developer’s promise to entrust to the Notary the preparation and signing of the future deeds of sale for the units.
2. According to the Notary’s standard preliminary contract, the Notary was authorized to disburse the down payments received to the Developer after receiving: (i) confirmation that the demolition work had begun and (ii) authorization of the residential guarantee, as appears from the wording of clause 3.5:[[1]](#footnote-1)

[translation]

3.5 The Purchaser irrevocably authorizes Millowitz Hodes Bergeron to disburse the deposits referred to in paragraphs 3.1, 3.2, 3.3, and 3.4 above to the Vendor as soon as written confirmation has been received from the project architect (the “Architect”) that the demolition has begun, subject to Millowitz Hodes Bergeron having received written instructions from the provider of the guarantee plan for new residential buildings (to be chosen by the Vendor) to remit these deposits, in full or in part, to the Vendor.

[Emphasis added]

1. This clause was reproduced in full in only 9 out of the 25 contracts signed with the appellants. The 16 other contracts signed contained only one condition precedent to the disbursement of the down payments, that is, confirmation that the demolition had begun. All of the preliminary contracts, however, stipulated that the Developer had until October 31, 2013, to cancel the project.
2. On August 8, 2013, when the loan granted by Point Zéro was due, Point Zéro had not received any repayment. The Developer and Point Zéro then agreed to amend the hypothecary deed to, among other things, extend the deadline to repay the loan in full to November 8, 2013, and increase the interest rate from 15% to 24% and the amount of the hypothec by $2 million. It was a temporary mezzanine loan while waiting to sign a financing agreement for tens of millions of dollars with the Bank and with a new less expensive mezzanine lender. On August 29, 2013, Point Zéro’s amended hypothecary deed was published in the land register.
3. The same day, the architects confirmed that the demolition work had begun.
4. The next day, August 30, 2013, the Notary started to disburse the down payments, as provided for in most of the preliminary contracts that retained only the first condition precedent for disbursement. Although the Notary realized that the second condition related to the accreditation of GIR’s guarantee plan did not appear in several contracts, he did not inquire into the reasons for this change. He presumed that it had been freely negotiated between the Developer and the appellants in question.
5. On October 4, 2013, the Bank submitted a first financing offer which contained several conditions, including a first-ranking hypothec on the property, the replacement of Point Zéro by another mezzanine lender, and a minimum number of presales.
6. The table below illustrates the amounts paid between August 30 and November 8, 2013, in relation to the relevant dates of the project’s progress:

|  |  |
| --- | --- |
| **Date** | **Amounts disbursed** |
| August 29, 2013  (Condition 1: Start of demolition work) |  |
| August 30, 2013 | $1,017,627.32 |
| September 11, 2013 | $184,241.70 |
| September 12, 2013 | $195,641.45 |
| September 20, 2013 | $88,513.51 |
| October 2, 2013 | $43,678.00 |
| October 4, 2013 | $20,000.00 |
| October 23, 2013 | $42,500.00 |
| October 31, 2013  (Deadline for the developer to cancel the project) |  |
| November 8, 2013  (Deadline to repay Point Zéro) | $30,462.63 |

1. On December 9, 2013, in a letter addressed to the Notary, GIR undertook to issue the accreditation for the project’s guarantee plan in exchange for payment of $450,000 it authorized the Notary to withdraw from the down payments held in trust. GIR further undertook to authorize the Notary to disburse all the down payments upon receipt of this amount.
2. On December 11, 2013, GIR authorized payment of the down payments to the Developer, thereby confirming that it would not control the down payments after the project’s accreditation.
3. On December 12, 2013, GIR accredited the project.
4. According to the testimony of a GIR representative, Jean-Pascal Labrosse, GIR agreed to reduce the requirements for disbursing the down payments following negotiations with the Developer in exchange for security of $450,000 from the Developer, to be paid to GIR from the appellants’ down payments held in trust with the Notary. Mr. Labrosse explained that it is not unusual for down payments to be used to finance the project when provided for in the financing agreement. He added [translator] “that contractors commonly use down payments on occasion as security”.[[2]](#footnote-2) He further noted that a more expensive temporary loan while awaiting financing from the Bank is also not unusual.
5. Given the accreditation obtained from GIR, the Notary disbursed the down payments because the conditions had now been met for every contract. These disbursements appear in the table below:

|  |  |
| --- | --- |
| **Date** | **Amounts disbursed** |
| December 11, 2013  (Condition 2: GIR authorization) | $774,158.25 |
| December 18, 2013 | $273,318.57 |
| January 28, 2014 | $123,587.57 |
| January 31, 2014 | $29,025.44 |
| February 24, 2014 | $47,622.45 |
| March 13, 2014 | $228,915.70 |
| June 14, 20214 | $5,000.00 |
| July 4, 2014 | $30,462.63 |

1. In the meantime, on January 14, 2014, Société en commandite Ipso Facto submitted a financing offer to replace Point Zéro as mezzanine lender, and the Developer and the Bank continued their steps. On March 26, 2014, the Bank submitted a second financing offer. In May 2014, a loan agreement was signed with the Bank, who registered a hypothec on the property. According to the Bank’s representative, the process was on course and the Bank presumed that the Developer would fulfill the conditions to obtain a loan.[[3]](#footnote-3) A third financing offer was even eventually submitted to the Developer.[[4]](#footnote-4)
2. On September 16, 2014, the Developer had still not repaid Point Zéro, who published a prior notice of taking in payment.
3. The Bank decided not to proceed with the financing due to an insufficient number of presales, a number calculated according to the Bank’s internal rules that had not been disclosed to the Developer. The Bank’s hypothec was cancelled on   
   January 19, 2015.
4. The property was surrendered to Point Zéro on February 25, 2015.
5. As stated above, the appellants lost all the money invested, except for an amount of $30,000 per unit returned by GIR under the guarantee.

**JUDGMENT UNDER APPEAL**

1. After describing the background, the trial judge explained that the appellants’ allegations hinged on two notions:

* The Notary breached his duty to advise when the preliminary contract was signed and before disbursing the down payments by failing to alert the appellants of the risks associated with the project;
* The Notary and GIR authorized the down payments to be disbursed before the Bank financing was secured.

1. The judge first identified certain breaches by the Notary at different steps in the project that he considered of no real consequence:

* The Notary asked no questions to understand why the second condition in clause 3.5 had disappeared from certain contracts, even though this second condition would only have delayed some disbursements;
* The Notary disbursed certain down payments before the expiry of the clause allowing the Developer to cancel the preliminary contracts, while acknowledging that, in any event, the Developer never tried to cancel the contract;
* The Notary did not give the appellants a receipt upon receiving the down payments, but did so later;
* The Notary failed to mention the hypothecs charging the property in the preliminary contracts, even though the hypothecs were not themselves likely to be a cause of concern for the appellants at the time.

1. The judge then found that the Notary had committed the following additional faults:

* He failed to verify the index of immovables before making the disbursements and did not subsequently ask the Developer questions to ensure that there was no real and imminent danger concerning the project financing;
* He paid GIR $450,000 from the down payments without really knowing why GIR required this amount;
* He did not explain to GIR why it had to consent to the down payments being disbursed.

1. The judge found that GIR had also committed a fault by agreeing to authorize the disbursement of the down payments, at the Notary’s request, without asking questions.
2. Despite this, the judge held that the Notary’s and GIR’s actions were not the direct and immediate cause of the appellants’ injury because, even had the appropriate verifications been conducted, the Notary and GRI would not have perceived a real and imminent danger regarding the project financing. The judge relied primarily on the testimony of notary Mtre Collins, who testified as an expert and explained that there were no adverse entries in the index of immovables at the time of the disbursements. As a result, even had they asked the Developer or the Bank questions, the Notary and GIR would simply have concluded that the financing process was on course.
3. The judge further held that the Notary did not have to communicate with the appellants before disbursing the down payments and that, even had he done so, the disbursements would have been authorized.
4. In short, in the judge’s view, the only logical, direct, and immediate cause of the appellants’ injury was the Bank’s withdrawal from the project, based on internal rules that the respondents and the Developer could not have known, even had the Developer been asked more questions.

**GROUNDS OF APPEAL**

1. Relying primarily on the index of immovables and the titles published in the Land Register on August 30, 2013, as well as on the testimony of the Bank’s representative, the appellants submit that there was an objective risk to the financing at the time the down payments were disbursed. They argue that the judge failed to consider this element, which led him to wrongly conclude that the Notary did not have to communicate with the appellants before disbursing the down payments. The appellants further state that they would not have authorized this disbursement had they been consulted, contrary to the judge’s finding, and that the judge could not speculate about their possible reaction, if any.
2. They also argue in their brief that, in any event, the Notary could not disburse the down payments because of section 31 of the *Règlement sur la comptabilité en fidéicommis des notaires*, in force at the time.[[5]](#footnote-5) This provision added as an implied condition of the preliminary contract that the amounts in trust were to be used to pay the hypothecary creditors before any other use. At the hearing, the appellants did not refer to this regulation but nonetheless insisted on the existence of a similar implied condition in the preliminary contract.
3. They further argue that the judge erred by concluding that GIR would not have required additional conditions before authorizing the disbursement of the down payments had it made the proper inquiries of the Bank and the Developer. They claim that it committed a causal fault that injured the appellants by agreeing that the Developer’s security of $450,000 be paid out of the down payments held in trust.
4. In short, the judge committed a palpable and overriding error when he found that the sole and ultimate cause of the injury was the withdrawal of the Bank’s offer.

**ANALYSIS**

1. The issues raised are questions of fact or questions of mixed fact and law (with respect to causality) that call for a high standard of review on appeal. This requires a palpable and overriding error,[[6]](#footnote-6) particularly when the assessment of all the evidence is at issue.[[7]](#footnote-7) Deference is required, especially when it is a question of assessing the credibility and reliability of witnesses, because it is not for an appellate court to retry the case.[[8]](#footnote-8) This deference applies to both ordinary and expert witnesses.[[9]](#footnote-9) To succeed, the appellants must be able to put their finger on the precise palpable and overriding error at trial.[[10]](#footnote-10)
2. In this case, they have failed to establish a palpable and overriding error in the analysis of the trial judge, who found that there was no real and imminent danger at the time the Notary ought to have conducted the appropriate verifications in August 2013 or thereafter. In this regard, the judge concluded:

[translation]

[155] A problem exists, therefore, because the plaintiffs’ evidence on causality assumes that they had a strict right to receive all of the information contained in the land registry and the related documents. According to the evidence adduced by Mtre Millowitz’s notarial expert, which the Court accepts on this point, it is possible to believe that the notary concluded, after consulting the land registry and the official acts and a discussion with the developer, that there were no adverse entries or real or imminent danger based on the financing. As a result, Mtre Millowitz was under no obligation to communicate with each plaintiff or to communicate the information appearing in the land registry prior to disbursing the deposits, as provided in and permitted by the preliminary contract.

…

[162] In addition, the plaintiffs did not inquire further into the issue of the actions of the bank that was to finance the project. Yet, the bank’s intentions concerning the financing appear to be at the heart of the plaintiffs’ concerns, the reason they argue that it was the obligation of the notary and/or GIR to confirm that the financing offered was satisfactory and that that the project did not represent a financial risk at the time.

[163] In the fall of 2013 and the months that followed, the National Bank appears to have been bound by a series of financial offers, and it signed and eventually published a hypothec dated May 5, 2014. It requested cancellation of that hypothec only on January 15, 2015. The bank representative that testified confirmed that the bank knew the history of the Point Zéro financing in August 2012 and 2013 and simply intended to bring on a more affordable mezzanine lender.

[164] Therefore, during the fateful period where the plaintiffs claim to have been extremely worried about the financing, the National Bank was present and appears to have been entirely ready to finance the project. Had the plaintiffs sought additional information on the principal lender’s intentions for the project, the Court must find that this information would have reassured the promissory buyers, rather than doing the opposite.

[165] The representative explained the main reason the project did not go ahead, that is, the logical, direct, and immediate cause of the plaintiffs’ damages. The project was aborted due to the withdrawal of the National Bank, citing internal rules not stipulated in the financing offers, with respect to the pre-sale of the units that it claimed were not eligible for inclusion in the capital required for financing. Pre-sales had to reach 75% of the units, i.e. 38 units out of 54, for a total of $37,159,870. However, although it was not indicated in the financing offers, the internal rules of the bank excluded any sales conditional upon the sale of another immovable, sales without deposits, sales with no confirmation of the lender’s identity, and sales to persons possibly related to the project, such as the builder or the owner of Point Zéro, the [translation] “problematic lender”, who believed in the project enough to have invested in it.

[166] This information on the “quality” of the pre-sales was available in the preliminary contracts, and the Court has received no indication as to why the bank took so long to declare that it did not satisfy its internal rules.

[Emphasis added; references omitted]

1. The judge’s conclusion was based primarily on the testimony of expert notary Collins, who stated:

[translation]

Q. Now, we know that one of the issues in this case is the Point Zéro hypothec, but more particularly the amendment to the hypothec’s term on August 29, 2013.

A. Uh-huh.

Q. The term was November 8, 2013, and the interest for that period was now 24%.

…

Q. O.K. And from this perspective, we’ll presume for a moment that you not only looked at the index of immovables but also read the content of this term amendment, what would you have done given this information?

A. The first thing I would have done would have been to speak with the developer, to understand what the situation was. I would have analyzed it. But I always return to what’s the purpose? I get the index of immovables, I look at the entries, there’s a new entry. Is it an adverse entry? In this case, it was a renewal, a renewal with less favourable conditions than the original loan. So I say, okay, the situation...

THE COURT:

Q. But in your opinion, was it adverse or not?

A. In my opinion, it was not an adverse entry.

Q. O.K.

A. Even if the conditions were not as good, any loan can be renewed, often we don’t even know the loan renewal conditions. The capital owing remains the same capital owing, several years, well one year later, technically you can expect the value of the land to have increased. A slew of analyses might have been done. But as a notary, we don’t do the financial analysis as such. We look at the facts before us, I have another entry, indeed, I have a new loan. So, there was a renewal. I probably would have spoken with the developer, I think, in the following case, he said: Yes, yes, I have a “bridge”, it’s pending. I presume, I’m presuming all this, this isn’t fact. I’m presuming he said: I have a “bridge”, I’m waiting for financing from the National Bank, they’ve agreed to finance me, and I’ll get it at some point”. Will I search for more information, am I satisfied with this, do I consider this sufficient security? I would say that my situation hasn’t changed, there’s still a $4 million loan to pay, that existed in 2012, I think, or 2013, I’m no longer sure of the dates, I think that the loan existed 2012.

Mtre PASCALE CARON:

Q. What would you have done regarding the promissory buyers after you noticed the content of that deed amending the terms?

A. I don’t think I would have done anything regarding the promissory buyers.

[Emphasis added]

1. Contrary to what the appellants argue, the judge considered the entries in the index of immovables and the titles published in the Land Register on August 30, 2013, which he reproduced in Schedule A of his reasons. He was aware of the issue with Point Zéro and the new conditions of the temporary loan concluded at a rate of 24%, but he noted that this issue was no cause for concern because the Bank was getting ready to replace Point Zéro with a less expensive mezzanine lender. As Martin Gosselin, the Bank’s representative, explained:[[11]](#footnote-11)

[translation]

Q. And in this case, just so I understand, you did not refuse the project as it was based on the information you had about Point Zéro?

A. No, no because the mezzanine lender who was supposed to come would replace Point Zéro, so we were comfortable with the situation, my credit committee was comfortable with it.

1. The appellants further argue that due diligence would have [translation] “easily” revealed the risk that the Bank might withdraw its offer. The judge found that in 2013, however, there was nothing to suggest that this was the case. The Bank withdrew from the project only in 2015, based on internal rules or guidelines that were not satisfied and that it was not obligated to reveal to the Developer, as the Bank representative explained:[[12]](#footnote-12)

[translation]

A. Well, these people are related to the project, so we want valid sales to people who are not involved in the project.

Q. My question is based more on the fact that nothing presupposes that someone related to the project is invalid *per se* unless it’s usual or a way of doing business, but if the Point Zéro owner wanted to purchase two in the project and also gave $4 million to the project, I don’t see why this would automatically invalidate any sale. So, I’m looking for your reason behind this.

A. Perfect.

Q. Do you have one or not?

A. Well, in fact, our internal rule is that when people are related to the project, the sale... we assess the file based on sales to people who are not involved in the project, including the borrower.

…

Q. Perfect. And the internal guidelines, are they actually disclosed to the borrower? Does the borrower know your reasoning or concerns regarding the risk analysis?

A. Well, it stays in-house.

Q. It stays in-house?

A. We have risk measures, and we don’t have to justify our own risk analysis to the borrower when we refuse a project ...

1. It is difficult in such circumstances to argue that the Notary or GIR should have known that the Bank was going to withdraw its offer based on internal guidelines not communicated to the Developer that were not satisfied.
2. Last, the loan agreement entered into with the Bank in May 2014, the date on which most of the disbursements had already been made, followed by the publication of a hypothec by the Bank, show that the process to obtain financing was on course. Nothing suggested that it would fail.
3. A notary’s duty to advise is guided by the notary’s mandate and by the circumstances, including the [translation] “transaction’s level of risk”.[[13]](#footnote-13) Naturally, there is an obligation of result when the mandate is clear, for example, when the contract stipulates specific conditions for disbursing amounts.[[14]](#footnote-14)
4. When performing their obligation as mandatory and depositary, notaries also have a duty to advise, the scope of which varies according to the circumstances. As author Gabriel-Arnaud Berthold explains:[[15]](#footnote-15)

[translation]

**247.** *Obligation to advise and parties’ instructions –* These [translation] “instructions received and implemented by the notary [hold] a determinative place in the interested parties’ relationships” and, sometimes, in those they have with third parties, however it is important that they be clear and effective. Thus, while it is true that it is generally up to the parties to determine the content and scope of the terms and conditions of the prestation, notaries are still bound to advise them to ensure its validity and favour its effectiveness. The same is even truer where the parties want to amend the terms and conditions, or the circumstances require their amendment, after the contract has been signed; if notaries are themselves unable to amend, they should then try to guide them. That said, the notary’s role in any given matter is the same: to inform the parties on the effects and limits of the instructions they are proposing and, if necessary, recommend other more suitable instructions.

[Emphasis added; references omitted]

1. These remarks echo those of authors Jean-Louis Baudouin, Patrice Deslauriers, and Benoît Moore in their work *La responsabilité civile*.[[16]](#footnote-16)
2. In this sense, the Notary must inform the parties of the consequences of their acts, paricularly if the Notary is aware of any foreseeable risk, so that the parties may revise the conditions for, or their consent to, disbursements, for example. That said, when assessing breaches of the duty to advise, one must place oneself at the time of the relevant facts.
3. In this case, expert notary Collins states the following in his report:[[17]](#footnote-17)

[translation]

… there are two conflicting positions [here]:

a. the position of the developer who, with a clear contract, requires that the down payments held in trust be disbursed and used to advance its development project; and

b. the position of the promissory buyer who, despite an agreement with the developer, would like maximum protection for its deposit while wanting the project to be completed.

Faced with such a situation, a notary must not be the judge but must follow the clear instructions given in the preliminary contract, which is the notary’s implied contract for services. In this context, to not follow the terms and conditions of that agreement would leave the depositary notary open to an action for damages by the developer because the notary would have breached the implied contract for services. Alternatively, it is also necessary to consider that obtaining written authorization from all the promissory buyers also jeopardizes the real estate project’s completion for all the other promissory buyers and leaves any notary who requires such authorization when neither required nor justified open to an action for damages.

[Emphasis added]

1. The judge related the testimony of this same expert on the Notary’s obligation to communicate with the appellants:

[translation]

[49] Mtre Collins, Notary Millowitz’s expert witness, denies that Mtre Millowitz had any obligation to take the initiative of communicating with the promissory buyers. Namely, he denies that the notary must communicate with them prior to disbursing the deposits. He stated that imposing the obligation to obtain the parties’ consent at the time of disbursement makes no sense because there is a signed, enforceable contract. Furthermore, such an obligation would go against the notary’s obligations towards the vendor/developer, who is entitled to receive the deposits as soon as certain conditions are fulfilled. According to Mtre Collins, a notary who creates other conditions on his own would be subject to being sued by the developer.

[50] The Court accepts several elements of this reasoning, but queries specific aspects of this case that raise issues for which this reasoning cannot supply satisfactory answers.

[Emphasis added]

1. The judge continued his analysis of the testimony of expert notary Collins:

[translation]

[94] Indeed, according to his own expert, Mtre Collins, the fault accepted by the Court is that he did not validate the index of immovables for each disbursement to ensure that no adverse entry had been registered and that he did not obtain the acts mentioned therein to read them. Merely looking at the name on the index is not at all sufficient. Mtre Collins considers this to be a standard of practice for a notary who is preparing to disburse deposits. It would also probably have been necessary to ask the developer questions to validate that there was no real or imminent danger based on the financing, given the content of the acts in question.

[95] Unless there is information that seriously imperils the very existence of the project, Mtre Collins does not consider that he has the obligation to share the details of the project’s financing with promissory buyers. He noted that the entries in the index of immovables do not constitute adverse entries. In addition, he confirmed that he would not prevent a developer from collecting the deposits because of a lack of [translation] “settled” financing, as these deposits constitute the developer’s cash flow. The preliminary contracts specifically provide that the deposits may be disbursed for the purpose of construction, as part of the financing structure.

[96] He therefore denies that a notary has a duty to inform the promissory buyers when he is deciding whether a disbursement can or should be made pursuant to the preliminary contracts. He further denies that such a duty would involve seeking their permission before disbursing deposits.

[Emphasis added]

1. In light of this evidence, the judge found that the Notary did not have an obligation to communicate with the appellants before disbursing their down payments or to obtain their permission to do so:

[translation]

[97] The Court is of the view that the notary’s duty of transparency and to inform do not require all of the information to be shared with the promissory buyers. While there is a fault in that the detailed contents of the index of immovables was not validated, the Court agrees that Mtre Millowitz had no obligation to share the specific contents of the index with each promissory buyer, unless there is a genuine adverse entry that neither the notary nor the developer can resolve, or if the developer cannot provide a reasonable explanation about future financing.

[98] Furthermore, the evidence in general does not support that a notary must communicate with the promissory buyers before disbursing their deposits or, even less, seek their permission to do so. All of the ethical rules and the case law on the role of a depositary cited by the plaintiffs to argue that the obligation of means becomes an obligation of result do not apply to a notary who is merely following the agreement entered into between the parties, as part of the preliminary contract, with respect to the time of disbursement. The Court confirms that neither the contents of that contract nor what appears to be the standard of practice governing the conduct of a notary who executes such an act involves the promissory buyers again in the decision to disburse.

[Emphasis added]

1. Later, he reiterates:

[translation]

[155] A problem exists, therefore, because the plaintiffs’ evidence on causality assumes that they had a strict right to receive all of the information contained in the land registry and the related documents. According to the evidence adduced by Mtre Millowitz’s notarial expert, which the Court accepts on this point, it is possible to believe that the notary, after consulting the land registry and the official acts and a discussion with the developer, would have concluded that there were no adverse entries or real or imminent danger based on the financing. As a result, Mtre Millowitz was under no obligation to communicate with each plaintiff or to communicate the information appearing in the land registry prior to disbursing the deposits, as provided in and permitted by the preliminary contract.

[Emphasis added]

1. The appellants propose that the Court set aside the trial judge’s opinion, which is based on expert notary Collins, and substitute it with its own assessment of the facts by accepting the position of their own expert notary Tessier this time. Tessier’s position is that in addition to ensuring compliance with the conditions stipulated in the preliminary contract, the Notary had a duty to ensure that [translation] “the transaction [was] safe and [had] been duly approved by the promissory buyer”.
2. To propose another position to the Court is insufficient. The appellants must identify in what way accepting Mtre Collins’s proposal is a palpable and overriding error. They have failed to do so.
3. With respect to the trial judge’s assessment of the appellants’ testimony, the appellants allege that the judge speculated about their reactions. However, they in turn suggest that the Court speculate otherwise and find that they would not have authorized the Notary to disburse the down payments had they been informed of the situation in the fall of 2013. This position is inconsistent, however, with the facts as related above and the essence of the testimony summarized in the judgment under appeal for which they have failed to identify any error.
4. The appellants wrongly submit that the Notary’s duty to advise included ensuring that the Bank’s financing was completed and Point Zéro’s hypothec cancelled. The preliminary contract did not stipulate these conditions for disbursing the down payments. The protection claimed by the appellants is akin to that required of an officiating notary asked to execute deeds of sale and ensure clear title is transferred and charges encumbering the property are eliminated. To require such protection amounts to distorting the Notary’s mandate, which should be understood in light of the purpose of the down payments that, according to the testimony on the practices at the time, was to finance the building’s construction.
5. On whether the trial judge erred in finding that GIR would not have required additional conditions to disburse the down payments, the appellants have also failed to establish any palpable and overriding error in the judge’s analysis when he found:

[translation]

[174] The Court must conclude that even if Mtre Millowitz had better explained his idea behind the clause that allowed GIR to add conditions to the disbursement of the deposits, GIR would not have instituted additional safeguards that would have secured the deposits of the promissory buyers beyond the contractual basis of its guarantee. One only has to look at the change of course between the expressed wishes of GIR’s director of risk management and accreditation and her replacement’s reaction when these intentions were rejected by the developer/builder. The new director, with the support of GIR’s decision-making bodies, immediately agreed to lower his demands and allow the disbursement of deposits under the preliminary contracts.

[175] Furthermore, even if the representative of GIR had asked additional questions about the financing in the fall of 2013, she would have received the same explanations from the developer and from the builder, and the same assurance from the National Bank, which meant that the project was not declared a failure until some time in 2015. Every person who sought additional information on the project’s viability ended up convinced that it would be built, one way or another. As discussed, the ultimate reason for the failure of the project and the loss of amounts exceeding the guarantee have nothing to do with Mtre Millowitz, GIR, or their actions in the fall of 2013.

[Emphasis added]

1. They allege that GIR was at fault when it analyzed the Developer’s financing by failing to realize the risk posed by the Point Zéro loan and the fact that the Bank’s financing was not assured. This ground is similar to the one against the Notary. Because the Court is of the view that the judge’s factual finding on the absence of a noticeable, real, and imminent danger based on the financing at the relevant time contains no reviewable error, the argument fails.
2. Last, as to whether GIR caused the appellants’ an injury by agreeing to issue the guarantee in exchange for a security from the down payments deposited with the Notary, the evidence reveals that accreditation was necessary to obtain financing from the Bank.
3. As seen above, GIR’s representative stated at trial that it was not unusual, in this type of project, for a bank to consider the down payments to be a source of financing. Nor was it abnormal to see such down payments used as security by the contractor. Thus, even if we conclude that GIR should not have accepted the amounts from the appellants’ down payments, the fact remains that the refusal to proceed this way would not have resulted in the down payments already paid to the Developer in December 2013 being reimbursed. In fact, only the down payments for the nine contracts with the obligation to first obtain GIR accreditation were held in trust by the Notary at that time.
4. Moreover, such a refusal by GIR would have made it impossible to put in place the Bank’s financing and might have resulted in the loss of all the amounts invested in the project, including the $1.6 million in down payments paid by the appellants up to that point. It also would have deprived the appellants of the compensation paid by GIR because it would have refused to accredit the project.
5. That being so, to the extent that the appellants admitted at the hearing that, in any event, the Developer’s security would have been obtained elsewhere had it not been paid from the down payments, they acknowledge that the accreditation required from GIR would have been obtained no matter what happened. If that is the case, this statement amounts to acknowledging that the second condition in the preliminary contracts would then have been met and that the disbursement of the down payments to the Developer would have been authorized as a result.
6. In this context, the appellants have failed to explain on what basis these amounts, had they not been used to pay the Developer’s security but instead been paid to the Developer, would not have been lost anyway after the project failed.
7. Last, the appellants have failed to establish that the judge’s conclusion on the absence of a causal connection between the payment of the down payments as a $450,000 security to GIR and the appellants’ loss contains a palpable and overriding error.
8. For all these reasons, the Court finds that the judge did not commit a palpable and overriding error in concluding that, even if the Notary had conducted the appropriate verifications, he would not have identified a real and imminent danger requiring him to first obtain authorization from the appellants before disbursing the down payments to the Developer. The Court finds that he was also not wrong in concluding that the situation would not have led the appellants to refuse the disbursement of the down payments stipulated in the preliminary contract or GIR to require additional conditions to authorize the disbursements of the down payments and to accredit the project, because nothing in the index of immovables or elsewhere suggested that the project’s financing was in jeopardy. The financing process was on course and, according to the evidence, would likely have been granted had it not been for the Bank and lender Ipso Facto’s dissatisfaction with the presales.

**FOR THESE REASONS, THE COURT:**

1. **DISMISSES** the appeal, with legal costs.

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|  | | JEAN BOUCHARD, J.A. |
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|  | | GENEVIÈVE MARCOTTE, J.A. |
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|  | | PETER KALICHMAN, J.A. |
|  | | |
| Mtre Sylvain Lanoix | | |
| Mtre Joël Brassard | | |
| DUNTON, RAINVILLE | | |
| For the appellants | | |
|  | | |
| Mtre Pascale Caron | | |
| DONATI MAISONNEUVE | | |
| For Stuart M. Millowitz and Millowitz Hodes Bergeron S.E.N.C.R.L. | | |
|  | | |
| Mtre Jacinthe Savoie | | |
| For Garantie des immeubles résidentiels inc. | | |
|  | | |
| Date of hearing: | May 9, 2022 | |
| Date taken under advisement: | May 13, 2022 | |
|  |  | |

1. See for example exhibit P-1b: Promise to purchase of Louise Gélinas and Patrice Champigny dated November 10, 2012. [↑](#footnote-ref-1)
2. Testimony of Jean-Pascal Labrosse, September 24, 2019, at 2740 (at 275), 2747 (at 301), 2763 (at 368), and 2764 (at 371). [↑](#footnote-ref-2)
3. Testimony of Martin Gosselin, September 17, 2019, A.B. at 2205 (at 148). [↑](#footnote-ref-3)
4. *Ibid.* A.B. at 2208. [↑](#footnote-ref-4)
5. *Règlement sur la comptabilité en fidéicommis des notaires*, c. N-3, r. 5.1, s. 31. [↑](#footnote-ref-5)
6. *Salomon v. Matte‑Thompson*, 2019 SCC 14 at para. 33*; Bertrand c. Hoppenheim*, 2019 QCCA 769 at para. 5. [↑](#footnote-ref-6)
7. *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 38. [↑](#footnote-ref-7)
8. *Xiao c. Lo*, 2021 QCCA 984 at para. 3; *Édifices St-Georges inc. c. Ville de Québec*, 2021 QCCA 198 at para. 6; *Garcia Lorenzo c. Miga (Migas Home Inspections)*, 2016 QCCA 1661 at para. 8; *London Life Insurance Company c. Long*, 2016 QCCA 1434 at paras. 72–74. [↑](#footnote-ref-8)
9. *Dicaire c. Chambly (Ville de)*, 2008 QCCA 54 at para. 25; *Lafortune c. Financière agricole du Québec*, 2014 QCCA 1891 at para. 41; *London Life Insurance Company c. Long*, 2016 QCCA 1434 at para. 72. [↑](#footnote-ref-9)
10. *P.L. c. Benchetrit*, 2010 QCCA 1505 at para. 24; *J.G. c. Nadeau*, 2016 QCCA 167 at paras. 76, 77; *CWB National Leasing Inc. c. Gagné*, 2020 QCCA 1734 at paras. 14–18. [↑](#footnote-ref-10)
11. Testimony of Martin Gosselin, *supra* note 3 at 2217 (at 194). [↑](#footnote-ref-11)
12. Testimony of Martin Gosselin, *supra* note 3 at 2197 (at 114) and 2217 (at 194). [↑](#footnote-ref-12)
13. Jean-Louis Baudouin, Patrice Deslauriers & Benoît Moore, *La responsabilité civile, Volume 2 — Responsabilité professionnelle*, 9th ed. (Montreal: Yvon Blais, 2020) at para. 2-165 (La Référence) [Baudouin, Deslauriers & Moore]. [↑](#footnote-ref-13)
14. As explained by author Gabriel-Arnaud Berthold in his work *La responsabilité civile du notaire* (Montreal: Wilson & Lafleur, 2017) at 112–113, para. 246:

    [translation] 246. *Disbursement and parties’ instructions* – As the prestation of disbursement the notary is bound to render at this step is only a form of delegation, if not a transposition of one of the parties’ obligations, the notary must first and foremost follow their instructions. The notary’s prestation is infused with the particular geometry of the parties’ common intention, thus it is this common intention that, fairly often, dictates the allocation of payments, that is, their distribution, when they should be made, the conditions to which they are subject, and who will be the *accipiens.* [Emphasis added; references omitted] [↑](#footnote-ref-14)
15. *Ibid*. at para. 247. [↑](#footnote-ref-15)
16. Baudouin, Deslauriers & Moore, *supra* note 13 at paras. 2-165 and 2-167. [↑](#footnote-ref-16)
17. Expert report prepared by notary Steve Collins, dated July 13, 2017, A.B. at 436. [↑](#footnote-ref-17)