

SAMUEL LEVINE AND HYMAN }  
 LEVINE (*Plaintiffs*) .....

APPELLANTS;

1961  
 {  
 \*Nov. 13  
 —

AND

FRANK W. HORNER LIMITED }  
 (*Defendant*) .....

RESPONDENT.

1962  
 {  
 Jan. 23  
 —

ON APPEAL FROM THE COURT OF QUEEN'S BENCH,  
 APPEAL SIDE, PROVINCE OF QUEBEC

*Real property—Sale of building—Bulge on front wall—Examination by experts—Whether latent defect—Civil Code, art. 1522, 1523.*

The plaintiffs purchased from the defendant a building which had been built originally about 1916 and which had been constructed in four stages, the last important alteration having taken place some 30 years ago. Before the purchase, they had the building examined by architects and engineers who noticed a bulge on the front wall which they regarded as of no importance. After the purchase, the plaintiffs made extensive alterations and discovered that a structural defect was causing the front wall to bulge. This wall had to be partly rebuilt and the plaintiffs sued to recover the cost of the additional work caused by the structural defect. The trial judge dismissed the action and this judgment was affirmed by a majority in the Court of Queen's Bench. The plaintiffs appealed to this Court.

*Held:* The appeal should be dismissed.

PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

1962  
 LEVINE AND  
 LEVINE  
 v.  
 FRANK W.  
 HORNER  
 LTD.

Assuming that the sale was one made with full legal warranty, the sole question in issue was whether the defect was a latent defect within the meaning of art. 1522 of the *Civil Code*. The Courts below rightly held that it was not such.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec<sup>1</sup>, affirming by a majority a judgment of Ralston J. Appeal dismissed.

*H. L. Aronovitch*, for the plaintiffs, appellants.

*Albert Bissonnette*, for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—In their action appellants claim a sum of \$12,000 as damages suffered as the result of an alleged latent defect in a building in the city of Montréal purchased by them from respondent. The action was dismissed by the learned trial judge and that judgment was confirmed by the Court of Queen's Bench<sup>1</sup>, Choquette and Montgomery JJ. dissenting.

The facts, as to which the parties are in substantial agreement, are concisely set forth in the reasons of Montgomery J. as follows:

The building in question is located on the westerly side of St. Urbain Street (civic No. 950) and was sold to Appellants with legal warranty by deed dated 4th January 1952, for a price of \$140,000. Respondent had acquired it from its predecessor company, Frank W. Horner Limited (1912), for which the building had been constructed.

The building, as it was when sold to Appellants, had been constructed in four stages, designated by the witness Bernstein stages A, B, C, and D. These stages are shown on four drawings filed as Exhibit P-8. There are also photographs, one (Exhibit D-2) showing the building as it was after the first addition (stage B) and three (Exhibit D-1) showing it as it was at the time of the trial. (These drawings and photographs are not reproduced in the joint case, but I have examined them in the original record.)

The original building, as constructed in 1916 or shortly thereafter, comprised the first three floors of the southerly half of the building as it now is. In 1919 a fourth storey was added (stage B). The front wall of this new storey was supported on a beam or slab of concrete 12 inches thick by 5 feet high and extending across the whole front of the building. In 1922 or 1923 the northerly half of the building was added (stage C). This was built against the existing northerly wall, which was not demolished.

Up to this point, almost the entire front of the building as originally constructed was made up of a single window on a steel frame. The new part of the building had smaller windows with brick between. The proprietors apparently wishing to make the appearance of the building more uniform, partly bricked over this large window (stage D). This was done very shortly after the completion of the new part.

<sup>1</sup> [1961] Que. Q.B. 108.

When they bought the building Appellants intended to make extensive alterations and, particularly, to remove the wall between the old and new Parts. Before buying it, they had it examined by an architect, the witness Bernstein, and an engineer, the witness Berenstein. Starting in April, 1952, the proposed alterations were carried out by Frank & Pascal, general contractors, under the direction of the witness Frank. In the process of removing the interior wall, the contractors discovered that the concrete beam supporting the front wall of the fourth storey had tilted, so that the lower part had moved outward and was pushing out the brickwork. They also discovered the steel-framed window behind the bricks on the front of the original building. This situation was reported to the architect Bernstein and the engineer Berenstein and, on their recommendation, the front of the southerly part of the building was rebuilt. For this additional work, Appellants paid \$8,445.03 to the contractors plus a fee of \$422.25 to the architect.

1962  
LEVINE AND  
LEVINE  
v.  
FRANK W.  
HORNER  
LTD.  
Abbott J.

Appellants' witnesses testified that the concrete beam above referred to had not been properly anchored and that the brickwork over the window was of varying thickness and not properly bonded to the pre-existing structure. It was established in evidence, and both Courts below have so found, that there was a bulge in the exterior brickwork in the vicinity of the concrete beam which had been observed by appellants' architect and engineer when they examined the property, but which they regarded as of no importance. An architect called on behalf of respondent testified that had he noticed such a bulge he would have suspected that there was some structural defect and would have made further investigation which would, in his opinion, have revealed the defects of which appellants complained. There is no suggestion of bad faith on the part of either appellants or respondent.

The building had been built originally about 1916, an additional storey was added and various other structural changes made in the intervening years. After purchasing the property appellants made further extensive alterations at a cost of approximately \$80,000, of which they attributed \$8,867.28 as being the cost of additional work caused by the structural defect complained of.

Although appellants did not ask to be furnished with the plans of the building until after the purchase had been completed, they did have it examined by an architect and an engineer. The bulge in the front wall was apparent to the latter but, as I have stated, they considered it to be of no consequence. In fact, as found by the trial judge it indicated the existence of, and was caused by, the structural defect complained of by appellants.

1962  
LEVINE AND  
LEVINE  
v.  
FRANK W.  
HORN  
LTD.  
Abbott J.

Assuming as I do, but without deciding, that the sale was one made with full legal warranty, the sole question in issue here is whether the defect complained of was a latent defect within the meaning of art. 1522 of the *Civil Code*. The learned trial judge and the majority in the Court below have held that it was not and I am in respectful agreement with that finding.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Attorneys for the plaintiffs, appellants: Chait & Aronovitch, Montreal.*

*Attorneys for the defendant, respondent: Stikeman & Elliott, Montreal.*

---