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Share deal: What happens in case of seller's omission in the representations intended to be exhaustive?

The decision of the Paris Court of Appeals of June 2, 2020[1] provides valuable insights into the interplay, sometimes complex, between the various agreements entered into between a seller and a purchaser of shares, which agreements generally include a promise of sale agreement subject to conditions precedent, a set of representations and warranties (called *garantie d'actif et de passif* under French law) and the final purchase agreement that acknowledges the fulfillment of the conditions precedent and the proper completion of the sale transaction.

The Court of Appeals ruled in particular on the consequences of the seller's failure to mention the existence of a significant customer contract in the representations whereas it had warranted to the purchaser that such representations were complete and exhaustive.

In 2010, Brossard Distribution Surgelés was sold by its shareholders to Financière de Kiel, now called Labeyrie Fine Foods. This sale took place in two stages, as is generally the case: the signature of a "framework sale agreement" subject to conditions precedent dated June 11, 2010 (hereinafter the "***Framework Agreement***") followed by the signature, on August 6, 2010, of a final sale agreement that acknowledged the fulfillment of the conditions precedent and, in fact, the proper completion of the sale transaction (the "***Final Agreement***").

A few months later, the purchaser, relying on the post-closing discovery of an existing contract between

Brossard Distribution Surgelés – which became Labeyrie Traiteur Surgelés following the completion of the sale – and the Belgian company Ceges pertaining to the distribution by the latter of products competing with those marketed by the purchaser, terminated said contract. Ceges then brought the matter before the Brussels Commercial Court and, as per the terms of a judgment dated April 22, 2015, obtained compensation for the loss suffered as a result of the termination of the contract.

It should be recalled that at the time of the sale, the sellers had made a number of representations and warranties, including some with regard to the to-be-sold company. The purchaser therefore notified the sellers that it would seek, based on these representations and warranties, the reimbursement of the indemnities paid to Ceges following the judgment of the Brussels Commercial Court. The sellers did not take any action following the receipt of this notification.

Labeyrie Fine Foods and Labeyrie Traiteur Surgelés then brought the dispute before the Paris Commercial Court and invoked the inaccuracy of the representations made by the sellers under Article 6 of the Framework Agreement which provided as follows: "*Sellers represent and warrant that they have disclosed to the Purchaser all material information concerning the Frozen Foods Business and/or necessary for the evaluation of the Frozen Foods Business. In particular, the Sellers represent and warrant that the list of Customer Contracts included in Appendix B and the list of Significant Contracts other than the Customer Contracts included in Appendix C are exhaustive and complete (...)*". The plaintiffs argued that the Ceges contract had been omitted from these lists that had been certified as exhaustive by the sellers.

By a judgment dated July 5, 2017, the Paris Commercial Court dismissed the claims brought by Labeyrie Fine Foods and Labeyrie Traiteur Surgelés on the grounds, in particular, that the finding that the Ceges contract had been omitted from the representations made in the Framework Agreement was a condition precedent to the occurrence of a loss, namely the compensation ordered by the Brussels Commercial Court, did not however make it possible to conclude that said omission was the cause of the loss. Indeed, the decision of the Paris Commercial Court specified in this respect that "*this termination occurred after 6 months of on-going business relationship between Ceges and Labeyrie following the transaction, and* [after] *at least one meeting to discuss the commercial prospects for 2011, i.e. in full knowledge of the facts; and without the Plaintiffs invoking a new event that would have urgently prompted this termination, or showing that they have sought other solutions – less costly – to the problem they allege, for example by opening negotiations with Ceges, or with Brossard*".

The Paris Commercial Court also noted in its decision that the information relating to the existence of a contract with Ceges was indeed included in the electronic data room available to the purchaser, and more specifically that "*it is possible that Labeyrie neglected this information, or did not notice it, but in this case it can only blame itself for the inadequacy of its own pre-acquisition analyses*".

Labeyrie Fine Foods lodged an appeal against this judgment.

In its decision of June 2, 2020, the Court of Appeals reversed the judgment handed down by the Paris Commercial Court.

First of all, it refuted the argument developed by the sellers, according to which "*the Ceges contract did not have to appear in the list of 'Customer Contracts', as Appendix B was not a list of all customers, but only of those whose contractual relationship constituted, within the meaning of the protocol "a Customer Contract", the continuation of which was a condition precedent to the completion of the transaction*". The Court of Appeals concluded in this respect that, as a "Customer Contract", the Ceges contract should have been included in an appendix to the sellers' representations set forth in the Framework Agreement.

Similarly, it dismissed the claim brought by the defendants, according to which the sellers' warranties were limited solely to the representations set forth in the Final Agreement which did not include any representation concerning the list of transferred clients or commercial contracts and even exempted the sellers from making any representations in addition to those set out in said Final Agreement. More precisely, the Court of Appeals considered in this respect that "*the purchase agreement did not terminate the warranties under Article 6.2 of the Framework Agreement but* [that] *such warranties come in addition to those set forth in the purchase agreement*".

The Court of Appeals' June 2, 2020 decision provides valuable insights into some of the questions that legal practitioners are regularly confronted with when drafting and negotiating the documentation relating to a transaction, including in particular the synallagmatic promise of sale agreement subject to conditions precedent, the representations and warranties made by the seller and the final purchase agreement.

1**. This decision first of all makes us reflect on the legal scope of the disclosure of certain documents in a data room during a sale transaction.**

More specifically, does the fact that the seller has disclosed a document or a piece of information in a data room to which the purchaser had access and on the basis of which its legal counsels were able to conduct due diligence investigations, allow the seller to evade liability thereafter?

In its decision, the Court of Appeal clearly says "no". However, the fact that the seller has disclosed a document or piece of information in a data room will, at the very least, allow it to deny any fraudulent intent with respect to said document or piece of information.

The scope of this teaching must be qualified, however, since the Court of Appeals' answer would most certainly be different if the representations and warranties stipulated that any document and/or information disclosed in the data room release the seller from liability. In practice, of course, the insertion of such a clause, unless it has been negotiated in advance between the parties when the letter of intent was signed, is very often a vain wish on the part of the seller's counsel. Indeed, it is in the purchaser's best interest to obtain a commitment from the seller with respect to the exhaustiveness of the representations that have been made, and not simply an assurance that the documents and information available in the data room are exhaustive. This is due to the fact that, in large transactions, it is often difficult for the seller to ensure the completeness of its representations, given the volume of documents exchanged between the seller and the purchaser at the data room stage. It is also not uncommon for a document contained in the data room to be subsequently omitted in the seller's representations and warranties, which greatly facilitates the purchaser's remedy against

the seller in the event of a loss, as illustrated by the decision of the Paris Court of Appeals in the case at hand.

2. This decision is also interesting insofar as it recalls the importance of clearly defining the scope of so-called "completeness" clauses in complex contractual wholes.

This type of clause, which is found almost systematically in a final purchase agreement, is very often neglected by the parties. As a reminder, such clauses tend to limit the court's power of interpretation to the sole content of the document(s) reflecting the parties' understanding, to the exclusion of any extraneous element. It is conceivable that a completeness clause intended to "confine" the agreement of the parties to the final purchase agreement alone, to the exclusion of the synallagmatic promise of sale agreement subject to conditions precedent, might, on the basis of article 1192 of the French Civil Code[2], hinder the court's power to impose further obligations in addition to the contractual basis defined by the parties.

It should be added, however, that here are two limitations on this apparent contractual freedom: (i) compliance with public order which is binding on the judge, and (ii) the case law of the *Cour de Cassation* which in two decisions issued in 2013[3] held that "*Concurrent or successive contracts that contribute to a transaction that includes a financial lease are interdependent; the clauses of the contracts which are inconsistent with this interdependence are deemed to be unwritten* [i.e. ineffective]". Although these decisions concerned contractual wholes that included a financial lease, it is nevertheless questionable whether this position of the *Cour de Cassation* would also apply to other complex contracts, such as sales that involve the signature of several successive instruments, in particular a letter of intent, a synallagmatic promise of sale agreement subject to conditions precedent, representations and warranties, and a final purchase agreement.

3. Finally, it should be noted that the Court of Appeals, in its June 2, 2020 decision, "*before ruling on the loss alleged by Labeyrie Fine Foods, ordered the reopening of the proceedings at the hearing of Monday, October 19, 2020 at 2:00 p.m. and invited the parties to explain the loss of opportunity of which Labeyrie Fine Foods could have taken advantage if it had been able to negotiate its acquisition on other terms and conditions*". At first glance, it may seem surprising that the Court of Appeals immediately addressed the question of compensation for the loss of opportunity. This implies that, for the Court, the compensation for the loss suffered by Labeyrie Fine Foods could, in practice, prove to be much lower than the amount of the compensation ordered by the Brussels Court.

Now, this reference to the notion of loss of opportunity seems somewhat paradoxical insofar as the Court of Appeals acknowledges the applicability of the warranties made by the sellers under the Framework Agreement, in that "*such warranties come in addition to those set forth in the purchase agreement*" but does not strictly apply the terms and conditions of the Framework Agreement, Article 6. 2.4 of which provides that the sellers undertake to indemnify the purchaser, or alternatively Labeyrie Traiteur Surgelés if so requested by the purchaser, "*for all losses suffered by the purchaser as a result of any inaccuracy in the representations and warranties referred to in this* [Framework] *Agreement (…)*".

[1] Paris Court of Appeals, 5th Division, 8th Chamber, June 2, 2020, n°17/18974, SASU Labeyrie Fine Foods vs. SAS Jacquet B. Distribution.

[2] Article 1192 of the French Civil Code: “Clear and unambiguous clauses are not subject to interpretation, otherwise there is a risk of distortion”

[3] Mixed Chamber of the *Cour de Cassation*, May 17, 2013, n° 11-22.768 and 11-22.927.