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DRAWING BRIGHT LINES: LIMITING THE SCOPE OF REPRESENTATION AND THE SNARE OF UNINTENDED RESPONSIBILITY

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ON August 26, 2013, the Court of Appeal for Ontario issued its opinion in *Outaouais Synergest, Inc. v. Lang Michener L.L.P.*[1] The decision marked the end of a two-year-long[2] appeal by upholding a superior court of justice ruling that, among other things, requires lawyers to draw a "bright line" separating the attorney's responsibilities from the client's responsibilities when lawyers share duties with their clients.[3] The case, which originated from a relatively modest real estate transaction, may make lawyers tread very carefully and communicate very clearly when outlining the scope of representation with their clients, particularly if the client is buying real estate. The first section of this article provides background information on the purchased property, the second section discusses the details of the sale of the property, and the third section outlines the holdings of the Court of Appeal and the implications of the "bright line" requirement for attorneys.

I. OWNING A FARM

This case originated as a relatively ordinary real estate transaction.[4] Outaouais Synergest, Inc. (OSI) sought to purchase a parcel of commercial land, the majority of which was owned by Harold Keenan[5] and a small portion of which was owned by his brother Douglas Keenan[6] (collectively "the Keenans"). OSI hired two attorneys[7] from the firm Lang

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1. *See* Outaouais Synergest, Inc. v. Lang Michener L.L.P., 2013 ONCA 526 (Can. Ont. C.A.) [hereinafter OSI Court of Appeal Decision].
2. *Id.*
3. Outaouais Synergest, Inc. & Keenan, 2011 ONSC 637, para. 123 (Can. Ont. Sup. Ct.) [hereinafter OSI Superior Court Decision].
4. *Id.* para. 1.
5. OSI Court of Appeal Decision, *supra* note 1, para. 9.
6. *Id.*
7. The two Lang Michener attorneys are referred to by name throughout the court's opinion and their actions are independently analyzed to determine whether either attorney, independent of the other, committed negligence, however, in the interest of clarity; here, the actions taken by either attorney will be ascribed to the firm and treated as a single actor.

Michener L.L.P. (Lang Michener) as its solicitors for this transaction.[8] The parcel of real estate at issue was an undeveloped portion of a farm that OSI wished to purchase and develop for OSI's own business purposes.[9]

A. Undeveloped and Technically Unencumbered[10]

In 1999,[11] the local municipality, the City of Gloucester—which is now amalgamated with the City of Ottawa[12]—chose to construct several roads around the farm and one road that ran through the farm.[13] The city needed to purchase portions of the farm from the Keenans to facilitate the construction of the roads.[14] The City of Gloucester took the stance that because the new road construction would enhance the development potential—and thereby the value—of the remainder of the Keenans' property, the Keenans should shoulder some of the costs of the new road construction.[15]

The Keenans and the City of Gloucester negotiated an agreement where the city would cover the costs of the construction of the roads initially but would be able to recover a portion of the construction costs from subsequent owners of the Keenan property.[16] Additionally, the Keenans agreed to defer receipt of a portion of the purchase price of the lands to be sold to the City of Gloucester with the understanding that the $50,000 portion deferred[17] would also be paid by subsequent owners of the Keenans' property.[18]

The City of Gloucester devised a mechanism to enforce this deferred payment system. This mechanism functioned by creating 0.3 meter[19] "reserves" which would be owned by the City of Gloucester on the outer borders of the Keenan property.[20] The rationale behind the creation of these "reserves" was that a subsequent owner of all or part of the Keenans' property would be unable to access the public roads from the Keenans' property as long as the City of Gloucester owned the 0.3 meter border fully encompassing the property.[21] The agreement reached with Keenans provided that the City of Gloucester would only release the "reserves" as part of the public roads once subsequent owners of the

8. OSI Superior Court Decision, *supra* note 3, para. 9.
9. *Id.* para. 3.
10. After a brief analysis, the trial judge came to the conclusion that the "cost recovery agreement" discussed in this section was technically not an encumbrance on the property, but rather a defect of title. *Id.* para. 98.
11. OSI Court of Appeal Decision, *supra* note 1, para. 10.
12. *Id.*
13. *Id.*
14. OSI Superior Court Decision, *supra* note 3, paras. 14–15.
15. *Id.* para. 16.
16. OSI Court of Appeal Decision, *supra* note 1, para. 12.
17. *Id.* paras. 14, 16.
18. *Id.* para. 12.
19. OSI Superior Court Decision, *supra* note 3, para. 16.
20. *Id.*
21. OSI Court of Appeal Decision, *supra* note 1, para. 15.

Keenans' property reimbursed the city for one-third of the costs incurred by the city when building the roads,[22] plus an additional $50,000, which was the deferred portion of the purchase price to be paid to the Keenans upon the sale of the remaining portions of their property.[23]

The agreement to require reimbursement from subsequent owners of the Keenans' property along with the 0.3 meter reserve enforcement mechanism will be jointly referred to as the "cost recovery agreement." Curiously, this cost recovery agreement was neither registered against the land that the City of Gloucester purchased from the Keenans nor the remainder of the Keenans' property.[24] It was the existence of this unregistered cost recovery agreement that ultimately turned the sale of part of the Keenan farm into a litigious matter and an act of malpractice.

II. BUYING THE FARM

OSI was seeking to purchase a vacant lot to construct a new operations building on.[25] OSI found and liked the portion of the Keenan farm owned primarily by Harold Keenan and retained two attorneys from Lang Michener, as well as a real estate agency, to represent OSI in the purchase of the property.[26] OSI conducted lengthy negotiations with Harold Keenan before settling on a purchase agreement.[27] Despite the length of the negotiations, the cost recovery agreement was apparently never discussed at all.[28]

Evidence considered by the Superior Court of Justice indicated that neither OSI nor the attorneys at Lang Michener were ever explicitly told about the cost recovery agreement by the Keenans, their representatives, or anyone else.[29] The Court of Appeal noted that this silence was "in spite of the fact that [Harold Keenan's attorney] had [a copy of the cost recovery clause] on his desk, had discussed it with Harold Keenan, and had recommended to [him] that it be disclosed."[30] The evidence was also clear that, "had [OSI] known of the [cost recovery clause], OSI would not have closed."[31]

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22. *Id.* paras. 14, 16.
23. *Id.*
24. *Id.* para. 18.
25. *Id.* para. 19.
26. OSI Superior Court Decision, *supra* note 3, para. 32.
27. OSI Court of Appeal Decision, *supra* note 1, para. 12.
28. *Id.* para. 25. According the Court of Appeal, evidence considered by the Superior Court of Justice indicated that the overwhelming majority of the extensive negotiations centered on several environmental concerns that OSI had with the property at issue including: concerns about an area near several buildings where farm equipment was previously stored, the existence of a fuel tank buried under part of the property, and a concern that fill may have been applied to some parts of the property. *Id.* para. 24. Environmental issues with the property were litigated extensively in the Superior Court of Justice, but none of the environmental issues were raised on appeal by any of the parties or discussed by the appellate court to any significant degree. *Id.* paras. 24–25.
29. *Id.* para. 26.
30. *Id.*
31. *Id.* para. 27.

The closest Harold Keenan came to revealing the existence of the cost recovery agreement was inserting the following language into the purchase agreement: "the Purchaser shall be responsible to satisfy all municipal development charges for the property *including all costs recovered to the City of Ottawa to its 0.3 meter reserve.*"[32] Harold Keenan testified at trial that the purpose of this language was to notify the OSI of the charges associated with having the City of Ottawa release the reserve.[33]

A. Due Diligence and Dividing Duties

Lang Michener did conduct a standard title search a short time before the sale closed.[34] Unsurprisingly, the title search did not reveal the existence of the cost recovery clause because neither the City of Gloucester nor the Keenans registered the cost recovery clause on the title, an omission that the trial judge found surprising.[35] But the title search report did reveal the existence of the 0.3 meter border now owned by the City of Ottawa.[36]

The Court of Appeal noted that the search report made it clear that the City of Ottawa would not lift the 0.3 meter reserve bordering the property until the city collected from the purchasers of the property a predetermined amount of the City of Ottawa's costs incurred in connection with the road construction near the Keenans' farm.[37] The court referred to this language as a "pointed reference to the cost recovery mechanism" created between the Keenans and the City of Gloucester.[38]

An attorney for Lang Michener acknowledged that he saw this clause and testified that he was told by OSI's own real estate agent that the clause referred to "payment of the standard administrative fee to the municipality to lift the reserve when the site plan obligations had been fulfilled."[39] But the attorney made no inquiries to the City of Ottawa (Ottawa and Gloucester amalgamated between the creation of the cost recovery agreement and the negotiations to purchase the Keenans' property) with respect to what the referenced costs would amount to.[40]

The attorney further testified that he understood that the 0.3 meter reserves would not be released until OSI had satisfied the conditions set by the City of Ottawa.[41] While the attorney thought that this may include

32. *Id.* para. 31 (emphasis in original) (quoting language inserted by Harold Keenan into the purchase agreement for the Keenan farm).
33. *Id.* para. 33.
34. OSI Superior Court Decision, *supra* note 3, para. 33, n.5.
35. *Id.* para. 29. While the trial judge did describe the failure of anyone to register the agreement as surprising, the trial judge did not hold that the lack of registration affected the enforceability of the agreement. *Id.*
36. OSI Court of Appeal Decision, *supra* note 1, para. 30.
37. *Id.*
38. *Id.*
39. *Id.* para. 33. The Lang Michener attorney testified that he was under this impression as a result of statements made by OSI's real estate agent and that he believed that the cost required to lift the restriction was approximately $200. *Id.*
40. *Id.* para. 34.
41. *Id.* para. 40.

paying costs such as "landscaping, curbing, garbage bin enclosure, etc., as well as development charges," he did not believe that OSI would have to pay for any of the costs incurred for the City of Gloucester's construction of the roads around the Keenans' property.[42]

Finally, the attorney testified that an agreement had been reached with OSI so that OSI, and not Lang Michener, would undertake any necessary inquiries related to the development aspects of the property being purchased.[43]

III. 0.3 METERS SHORT OF SATISFIED

OSI finally became aware of the cost recovery agreement only after purchasing the Keenans' property.[44] Much to OSI's chagrin, it found that ingress and egress[45] for its newly purchased real estate was completely blocked by the City of Ottawa's 0.3 meter reserve,[46] leaving OSI with a piece of property completely useless for its desired purpose.[47] The only way for OSI to remove the 0.3 meter reserve was to pay the City of Ottawa in accordance with the cost recovery agreement.[48] Unfortunately for OSI, this amounted to a charge of $240,000,[49] an exceptionally steep price[50] to pay to be able to make use of a piece of property that OSI purchased for $850,000.[51]

A. An Act of Professional Negligence or Two

The Court of Appeal agreed with the Superior Court of Justice that a "solicitor must perform the services for which he or she has been retained in a reasonably competent and diligent manner," and that this is the test for professional negligence.[52] Both the Superior Court of Justice and the Court of Appeal identified two discrete actions—or, more precisely, inactions—that brought Lang Michener attorney's conduct beneath this bar.[53] The first negligent act was failing to properly and clearly delineate the scope of the representation and the independent responsibilities of

42. *Id.*
43. *Id.* para. 33.
44. *See id.* para. 27.
45. OSI Superior Court Decision, *supra* note 3, para. 118.
46. *Id.*
47. *See* OSI Court of Appeal Decision, *supra* note 1, para. 19.
48. *Id.* paras. 14, 16.
49. *Id.* para. 2. Notably, this figure actually represents the reduced price that OSI was able to negotiate for with the City of Ottawa. The original figure that the city requested was $433,466.60, more than 50 percent of the price that OSI paid to purchase the property from the Keenans. *Id.* para. 1.
50. Even after negotiating the price down, the City of Ottawa still expected OSI to pay the city nearly 30 percent of the purchase price OSI already paid to the Keenans just so that OSI could have access to its new acquisition.
51. *Id.* para. 1.
52. *Id.* para. 41; OSI Superior Court Decision, *supra* note 3, para. 116 (describing the standard as that of an ordinary, reasonably competent solicitor).
53. OSI Court of Appeal Decision, *supra* note 1, para. 42; OSI Superior Court Decision, *supra* note 3, paras. 116–123.

the attorney and the client to the client.[54] The second act of negligence was failing to inquire with the City of Ottawa about the nature and purpose of the 0.3 meter border around the property after the existence of the border was discovered during the conducted title search.[55]

Both courts recognized that OSI's attorneys knew that a 0.3 meter boundary can be used to deny access to a piece of property and that the fact the boundary can be used for that purpose affects whether the seller can convey good and marketable title.[56] This possibility makes the existence of such a boundary a distinct legal issue, and therefore a responsibility of the buyer's solicitor.[57]

It is undisputed that OSI had an agreement with Lang Michener that OSI would handle matters relating to "the development of the property."[58] OSI's attorneys claimed that issues relating to access, such as the existence of the 0.3 meter boundary, are matters relating to "the development of the property" and therefore fall under OSI's responsibilities in accordance with this agreement.[59]

Both courts disagreed with Lang Michener's position.[60] The Court of Appeal noted that "lawyer[s] h[ave] a duty to consult with [their] client[s] on all questions of doubt which do not fall within the express or implied discretion left to [the client]."[61] Variations from this relationship are the exception not the rule, and to have such an exception, there must be a "clear delineation" of the responsibilities that will belong to the client.[62] The court characterized this delineation as a "bright line" and opined that in the absence of such a "bright line" the attorney remains responsible.[63]

The court found that Lang Michener failed to establish a "bright line" between its and OSI's duties, and that the matter of the 0.3 meter boundary owned by the City of Ottawa remained the responsibilities of the attorneys, not the client.[64] Unable to shield themselves by claiming that the boundary was OSI's responsibility, OSI's attorneys were responsible for searching the lands surrounding the property and determining if there was access to a public road.[65] The Court of Appeal concluded that the language found in the title search[66] relating to the release of the 0.3 meter

54. OSI Court of Appeal Decision, *supra* note 1, para. 42; OSI Superior Court Decision, *supra* note 3, paras. 120–123.
55. OSI Court of Appeal Decision, *supra* note 1, para. 42; OSI Superior Court Decision, *supra* note 3, paras. 117–119.
56. OSI Court of Appeal Decision, *supra* note 1, para. 43; OSI Superior Court Decision, *supra* note 3, para. 118.
57. OSI Court of Appeal Decision, *supra* note 1, para. 43.
58. *Id.* para. 44.
59. *Id.*
60. *Id.*; OSI Superior Court Decision, *supra* note 3, para. 119.
61. OSI Court of Appeal Decision, *supra* note 1, para. 45.
62. *Id.*
63. *Id.* para. 46.
64. *Id.*
65. *Id.* para. 47.
66. The trial judge did indicate that he felt that the wording of the conditions for the release of the 0.3 meter board found in the title search was "poorly drafted", but nevertheless held that there was sufficient evidence that OSI's attorneys should

reserve was more than sufficient to inform OSI's attorneys that there was an access problem and that, given that access problems have been determined to be the lawyers responsibility, the failure to ensure that there was access to the property was an act of professional negligence.[67] The Superior Court of Justice awarded OSI $290,000[68] in damages and the Court of Appeal agreed.[69]

B. IMPLICATIONS OF THE DECISION

The Court of Appeal's holding with respect to the delegation of duties between attorney and client in this case is likely to rattle the nerves of more than a few attorneys. The court's ruling that Lang Michener, and not OSI, was responsible for dealing with the 0.3 meter border hinges on two points, first that the nature of access is a fundamental legal issue, and second that the "bright line" separating the lawyer's duties from the client's duties was not drawn.

This ruling creates a couple of concerns for practicing attorneys. First, the Court of Appeal directly identified access problems with a piece of property as a natural legal responsibility, but the court did not provide attorneys with a clear method of determining what else may be considered a natural legal responsibility. This ambiguity, coupled with the court's ruling that natural legal responsibilities are responsibilities that stick with attorneys unless clearly delineated to the client, means that lawyers will need to start drawing up very detailed agreements outlining the scopes of their representations and specifically identifying things that the lawyer will not be responsible for.[70] This has clear implications for real estate attorneys, but nothing in the court's opinion indicated that this phenomenon is limited to real estate matters only. In any situation where lawyers are collaborating with their clients to meet a common end, this issue may arise and lawyers will need to be particularly careful moving forward to avoid not performing an essential legal responsibility simply because the client was supposed to take care of it.

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have known that the border created an access problem. OSI Superior Court Decision, *supra* note 3, para. 41.

67. OSI Court of Appeal Decision, *supra* note 1, paras. 48–52.
68. OSI Superior Court Decision, *supra* note 3, paras. 149, 152.
69. OSI Court of Appeal Decision, *supra* note 1, para. 4.
70. *See* Yamri Taddese, *Court Sends Message About Lawyers Sharing Duties with Clients*, LAW TIMES (Sept. 2, 2013), http://www.lawtimesnews.com/201309023423/headline-news/court-sends-message-about-lawyers-sharing-duties-with-clients.