Outaouais Synergest Inc. v. Lang Michener LLP et al.
[Indexed as: Outaouais Synergest Inc. v. Lang Michener LLP]

Ontario Reports

Court of Appeal for Ontario,

Blair, Rouleau and Pepall JJ.A.

August 26, 2013

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Case Summary

Professions — Barristers and solicitors — Negligence — Municipality building road on farm property and entering into agreement with owner that it would recover portion of its construction costs from subsequent owner — Deferred payment mechanism implemented by creation of 0.3 metre reserve abutting farm property which was owned by municipality and which would be released upon payment by subsequent owner — Cost recovery agreement not registered on title but title search revealing existence of reserve and of restrictive covenant that referred to cost recovery — Plaintiff purchasing property for development without being aware of cost recovery agreement — Trial judge not erring in finding that plaintiff's solicitor was negligent in failing to thoroughly investigate access issues raised by existence of reserve.

Real property — Registration — Municipality building road on farm property and entering into agreement with owner that it would recover portion of its construction costs from subsequent owner — Deferred payment mechanism implemented by creation of 0.3 metre reserve abutting farm property which was owned by municipality and which would be released upon payment by subsequent owner — Registration of cost recovery agreement on title not required — Cost recovery clause not constituting "encumbrance" as it did not create right or interest in farm property in favour of municipality.

Sale of land — Fraud — Municipality building road on farm property and entering into agreement with owner that it would recover portion of its construction costs from subsequent owner — Deferred payment mechanism implemented by creation of 0.3 metre reserve abutting farm property which was owned by municipality and which would be released upon payment by subsequent owner — Cost recovery agreement not registered on title — Failure to disclose existence of cost recovery clause to subsequent purchasers not constituting fraudulent misrepresentation — Doctrine of equitable fraud not applying — Owner not acting in bad faith — Cost recovery clause reasonably discoverable by purchasers had their lawyer made necessary inquiries.

The municipality built a road on farmland owned by the defendants HK and DK and entered into an agreement with them under which it paid for the construction of the road but would recover a

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portion of its construction costs from subsequent owners of the property. HK and DK agreed to defer payment of part of the price to be paid by the municipality for purchasing the lands needed for the road project, and that amount, too, would be paid by subsequent owners. The deferred payment mechanism was implemented by creating a 0.3 metre reserve, owned by the municipality, along the boundaries of the K lands. A restrictive covenant was contained in the transfers of the lands that the Ks conveyed to the municipality for the roads and for the reserve. That restrictive covenant provided that no part of the 0.3 metre reserve was to be dedicated as a public road until such time as the municipality had collected from the owners of the adjacent lands [page743] a proportionate share of the municipality's costs incurred in connection with the road project. The cost recovery agreement was not registered against the farmland or the lands acquired by the municipality. The plaintiff subsequently purchased the farmland for development purposes. After closing, it discovered existence of the cost recovery agreement, and had to pay approximately $240,000 to the municipality in order to obtain the release of the 0.3 metre reserve. The plaintiffs sued their solicitor, and the solicitor made a cross-claim against DK and HK for contribution and indemnity. The trial judge found the solicitor liable for negligence and dismissed the cross-claim for contribution and indemnity. The solicitor appealed.

Held, the appeal should be dismissed.

The search report prepared for the solicitor revealed the existence of the 0.3 metre reserve and the restrictive covenant. A copy of the restrictive covenant was contained in the title search. An amendment to the agreement of purchase and sale provided that "[t]he Purchaser shall be responsible to satisfy all municipal development charges for the property including all costs recovered to the City of Ottawa to its .3 metre reserve". The solicitor requisitioned evidence that there were no unregistered encumbrances, and was told to satisfy himself. There was ample support for the trial judge's conclusion that the solicitor was negligent, particularly based on his failure to make any inquiries of the municipality concerning its cost recovery requirements for lifting the 0.3 metre reserve to ensure his client's access to the property, and his failure to ensure that the lines of responsibility as between the law firm and the client regarding the legal and the development aspects of the transaction were clear.

The trial judge did not err in dismissing the claim for contribution and indemnity. The cost recovery clause was not required to be registered on title as an "encumbrance" or disclosed as an unregistered "encumbrance". It was not an encumbrance as it did not create a right or interest in the farm property in favour of the municipality; it merely required subsequent owners of the property to pay cost recoveries if they chose to have access to the road constructed by the municipality. The agreement of purchase and sale was an agreement to which the doctrine of *caveat emptor* applied. There was no fraudulent misrepresentation. As the trial judge found, the cost recovery clause could be said to be a defect relating to the quality of the lands to be conveyed and a defect relating to title -- the two types of title defence to which *caveat emptor* relates. The doctrine of equitable fraud had no application, and the Ks did not act in bad faith.

Cases referred to

Accurate Fasteners Ltd. v. Gray, [2005] O.J. No. 4175, [2005] O.T.C. 856, 35 R.P.R. (4th) 9,

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142 A.C.W.S. (3d) 692 (S.C.J.); *Alevizos v. Nirula*, [2003] M.J. No. 433, 2003 MBCA 148, 234 D.L.R. (4th) 352, [2004] 10 W.W.R. 634, 180 Man. R. (2d) 186, 15 R.P.R. (4th) 167, 127 A.C.W.S. (3d) 563; *Bank of Nova Scotia v. Suthakaran*, [2011] O.J. No. 5304, 2011 ONSC 6970 (S.C.J.); *Canson Enterprises Ltd. v. Boughton & Co*., [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, 85 D.L.R. (4th) 129, 131 N.R. 321, [1992] 1 W.W.R. 245, J.E. 92-271, 6 B.C.A.C. 1, 61 B.C.L.R. (2d) 1, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 43 E.T.R. 201, 30 A.C.W.S. (3d) 199; *Dynamic Transport Ltd. v. O.K. Detailing Ltd*., [1978] 2 S.C.R. 1072, [1978] S.C.J. No. 52, 85 D.L.R. (3d) 19, 20 N.R. 500, 6 Alta. L.R. (2d) 156, 9 A.R. 308, 4 R.P.R. 208, [1978] 2 A.C.W.S. 72; *First City Capital Ltd. v. British Columbia Building Corp*., [1989] B.C.J. No. 130, 43 B.L.R. 29, 14 A.C.W.S. (3d) 12 (S.C.); *Folland v. Reardon* (2005), 74 O.R. (3d) 688, [2005] O.J. No. 216, 249 D.L.R. (4th) 167, 194 O.A.C. 201, 28 C.C.L.T. (3d) 1, 136 A.C.W.S. (3d) 638 (C.A.); *Guerin v. Canada*, [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45, 13 D.L.R. (4th) 321, 55 N.R. 161, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1; [page744] *Kalish v. Rosenbaum* (2009), 100 O.R. (3d) 169, [2009] O.J. No. 5396, 88 R.P.R. (4th) 297 (S.C.J.); *Kaufmann v. Gibson*, [2007] O.J. No. 2711, 59 R.P.R. (4th) 293, 158 A.C.W.S. (3d) 1016 (S.C.J.); *Kitchen v. Royal Air Force Assn.*, [1958] 2 All E.R. 241, [1958] 1 W.L.R. 563, 102 Sol. Jo. 363 (C.A.); *Krawchuk v. Scherbak* (2011), 106 O.R. (3d) 598, [2011] O.J. No. 2064, 2011 ONCA 352, 279 O.A.C. 109, 82 C.C.L.T. (3d) 179, 332 D.L.R. (4th) 310, 5 R.P.R. (5th) 173, 4 C.L.R. (4th) 1, 201 A.C.W.S. (3d) 848; *Lalonde v. Zuccarani Construction (Ottawa) Ltd*., [1985] O.J. No. 629, 20 C.L.R. 38, 34 A.C.W.S. (2d) 86 (H.C.J.); *Macdonald, Craig & Co. (Re)*, [1924] M.J. No. 35, 34 Man. R. 611, [1924] 2 D.L.R. 587, [1924] 2 W.W.R. 219 (K.B.); *McMaster University v. Wilchar Construction Ltd.*, [1971] 3 O.R. 801, [1971] O.J. No. 1717, 22 D.L.R. (3d) 9 (H.C.J.); *Peek v. Gurney* (1873), L.R. 6 H.L. 377, [1861-73] All E.R. Rep. 116 (H.L.); *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*., [2002] 1 S.C.R. 678, [2002] S.C.J. No. 20, 2002 SCC 19, 209 D.L.R. (4th) 318, 283 N.R. 233, [2002] 5 W.W.R. 193, J.E. 2002-448, 98 Alta. L.R. (3d) 1, 299 A.R. 201, 20 B.L.R. (3d) 1, 50 R.P.R. (3d) 212, 111 A.C.W.S. (3d) 733; *Salus v. Devkor Construction (Calgary) Ltd*., [1982] A.J. No. 607, [1982] 4 W.W.R. 162, 20 Alta. L.R. (2d) 26, 23 R.P.R. 293 (Q.B.); *Sun-Rype Products Ltd. v. Archer Daniels Midland Co*., [2008] B.C.J. No. 1298, 2008 BCCA 278, 41 E.T.R. (3d) 170, [2008] 11 W.W.R. 454, 257 B.C.A.C. 218, 81 B.C.L.R. (4th) 199, 168 A.C.W.S. (3d) 634 [Leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 416]; *Tiffin Holdings Ltd. v. Millican*, [1964] A.J. No. 103, 49 D.L.R. (2d) 216, 50 W.W.R. 673 (S.C.); *Valentini v. Reidco Wellington (1983) Ltd.* (1989), 69 O.R. (2d) 346, [1989] O.J. No. 1164, 60 D.L.R. (4th) 744, 35 O.A.C. 265, 8 R.P.R. (2d) 171, 16 A.C.W.S. (3d) 241 (Div. Ct.); *Wotherspoon v. Canadian Pacific Ltd*., [1987] 1 S.C.R. 952, [1987] S.C.J. No. 40, 39 D.L.R. (4th) 169, 76 N.R. 241, 21 O.A.C. 79, 45 R.P.R. 138, 5 A.C.W.S. (3d) 42

Statutes referred to

Land Registration Reform Act, R.S.O. 1990, c. L.4, s. 5(1), (iv)

Planning Act, R.S.O. 1990, c. P.13 [as am.]

Planning Act, 1983, S.O. 1983, c. 1, s. 50(6)

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Authorities referred to

Laskin, Bora, "Defects of Title and Quality: *Caveat Emptor* and the Vendor's Duty of Disclosure", in *Special Lectures of the Law Society of Upper Canada 1960: Contracts for the Sale of Land* (Toronto: Richard De Boo Ltd., 1960)

McCamus, John D., "*Caveat Emptor*: The Position at Common Law", in *Law Society of Upper Canada Special Lectures 2002: Real Property Law: Conquering the Complexities* (Toronto: Irwin Law Inc., 2003)

APPEAL from the order of James J., [2011] O.J. No. 1436, 2011 ONSC 637, 4 R.P.R. (5th) 102 (S.C.J.) allowing a negligence action and dismissing a claim for contribution and indemnity.

Eric R. Williams and *Kristopher L. Dixon*, for appellant.

Tara M. Sweeney, for respondent Outaouais Synergest Inc.

Rolland E. Hedges, for respondent Douglas Keenan.

Harold Keenan, in person. [page745]

The judgment of the court was delivered by
BLAIR J.A.: —

Overview

[1] The appellant law firm was retained to act as solicitors for Outaouais Synergest Inc. on the purchase of some vacant commercial land from the respondents Harold and Douglas Keenan. The price was $850,000. To its considerable surprise, following closing, Outaouais discovered that the City of Ottawa was demanding it pay an additional $433,466.60 before it could have road access to the property in order to carry on the commercial endeavour it had planned for the site.

[2] The additional payment (subsequently negotiated downwards to approximately $240,000) was required to obtain the release of a 0.3 metre reserve in favour of the municipality that bordered three sides of the purchased property. The reserve was subject to a cost recovery clause in an agreement between the Keenans and the municipality entered into several years earlier. The cost recovery clause related to the municipality's cost of completing a road project, which was intended to make the lands in the area -- including the Keenan lands -- more suitable for development.

[3] The agreement between the Keenans and the municipality, which included the cost recovery clause, was not registered on title and was not disclosed by the vendor to the purchaser.

[4] This action ensued. The trial judge found the appellant law firm liable for negligence in its representation of Outaouais during the transaction and awarded damages in the amount of approximately $290,000 (inclusive of pre-judgment interest). He dismissed the appellant's cross-claim seeking contribution and indemnity from the Keenans. The claims against Douglas Keenan were dismissed altogether. Douglas Keenan had very little involvement with the transaction except for signing the documents as owner of a small portion of the lands that were sold. Judgment was awarded against Harold Keenan in relation to an environmental clean-up claim; that portion of the judgment is not under appeal.

[5] Lang Michener appeals the finding of negligence against it and, in the alternative, appeals the dismissal of its cross-claim for contribution and indemnity against the defendant Harold Keenan.

[6] For the reasons that follow, I would dismiss the appeal with respect to both the finding of negligence against the appellant and the dismissal of the cross-claim. [page746]

Facts

[7] Here, in a nutshell, is what happened.

The underlying transaction between the Keenans and the municipality

[8] The lands in question had been part of the Keenan family farm for over 100 years. As the trial judge noted, the farm was located in what had once been a large agricultural community south of the City of Ottawa.

[9] By the 1990s, however, the farm was surrounded by urban crawl in various forms and had become a property that was ripe for development. Following the death of their father, Harold and Douglas Keenan had the farm split between them, a process that was completed when their father's estate conveyed the severed farm property to the brothers as separate portions on a reference plan. Harold owned the bulk of the lands subsequently sold to Outaouais. Douglas owned the other portion of the divided property and a very small part of the lands included in the sale.

[10] In 1999, the march of urban development led the municipality -- then the City of Gloucester, now amalgamated with the City of Ottawa -- to propose the extension and re-alignment of certain roads around the Keenan lands to support future development in the area. The road project included constructing a road running north and south through the middle of the Keenan lands.

[11] To facilitate the road project, the Keenans sold some of their lands to the municipality. Since the new road construction would enhance the development potential of the Keenans' remaining lands, the municipality took the position that the Keenans should pay a portion of the construction costs by accepting a reduced price for the lands sold to the municipality.

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[12] After lengthy negotiations, the Keenans and the municipality arrived at an agreement dated June 1, 1999 (the "1999 agreement"). The municipality would pay for the construction of the road initially but would recover a portion of its costs from subsequent owners of the Keenan lands. At the same time, the Keenans agreed to defer payment of part of the price to be paid by the municipality for purchasing the lands needed for the road project, and that amount, too, would be paid by subsequent owners of the lands owned by the Keenans.

[13] The deferred payment mechanism was implemented by creating 0.3 metre reserves along the boundaries of the Keenan lands. The 0.3 metre reserves would be owned by the municipality. The agreement included the following provision in art. 6.1, [page747] titled "Reserves and Cost Recoveries", which is central to the issues here (the "cost recovery clause"):

> The Keenans acknowledge that the Lands include allowances for reserves along their boundaries and that the City intends to maintain ownership of these reserves or portions thereof as a means of effecting cost recoveries for that part of the City's actual costs in completing the Project[1] attributable to the Keenans lands from subsequent owners of all or portions of the Keenans lands adjacent to the [lands conveyed] who may wish to have access to the road to be constructed on the [lands to be conveyed]. The Keenans acknowledge that the amount which the City intends to collect back from such subsequent owners is equal to one third of the City's actual costs in completing the Project plus Fifty Thousand ($50,000) Dollars.

[14] The $50,000 represented the deferred part of the purchase price. Articles 6.2 and 6.3 of the 1999 agreement outlined the manner in which that amount would be paid (either wholly or as a proportionate share of collect-backs received).

[15] In summary, the mechanism created by the parties to accomplish their goal was the establishment of 0.3 metre reserves owned by the municipality and abutting the lands owned by the Keenans, coupled with the cost recovery clause referred to above. The existence of the reserves meant that a purchaser requiring access to and from the municipal road and municipal services benefitting the purchased property would require the release of the reserves by the municipality through the dedication of the reserves as a public road.

[16] The agreement further provided in art. 6.5 that the lands conveyed to the municipality for the 0.3 metre reserves may contain a restrictive covenant indicating that the 0.3 metre reserves will not be dedicated as a public road until the municipality has collected from the owner of the adjacent lands a proportionate share of the costs incurred in connection with the road project attributable to the Keenan lands.

[17] A restrictive covenant was contained in the transfers of the lands that the Keenans conveyed to the municipality for the roads and the 0.3 metre reserves. The restrictive covenant in the transfers to the municipality states:

> *Restrictive Covenant*
> The [municipality] covenants with the [Keenans] that no part of the lands [the 0.3 metre reserves] shall be dedicated as a public road until such time as the [municipality] has

> collected from the owners of the lands adjacent to [page748] such part a proportionate share of [the municipality's] costs incurred in connection with [the road project].

[18] The cost recovery agreement was not registered against either the above lands acquired by the municipality or the Keenan lands.

The Keenan/Outaouais transaction

[19] Dominic Monaco and Marc Brunelle were looking for vacant land in the south end of Ottawa on which they could construct a new building for the operation of their wholesale automotive parts business, Regional Automotive Warehousing Ltd. They found, and liked, that portion of the Keenan lands owned primarily by Harold Keenan. Outaouais was incorporated to hold title to the property.

The dramatis personnae

[20] Brunelle appears to have been in charge of the purchase negotiations on behalf of Regional and Outaouais. He retained the Ottawa office of Lang Michener to act for the purchaser. The partners involved -- Pierre Richard and Charles Saikaley -- had acted for Brunelle before. Saikaley was an experienced real estate solicitor. Brunelle also retained a real estate agent, John Seccombe of Royal Lepage Realty.

[21] Harold Keenan was a farmer and businessman who, himself, had some experience as a land developer. He had been a municipal councillor for the City of Gloucester and a member of its planning committee for a number of years at an earlier time. He hired Gordon Taylor, also of Royal Lepage, as his realtor (Taylor died before trial), and retained Harold McNeely as his lawyer for the transaction (McNeely had acted for Harold Keenan on previous occasions).

[22] Douglas Keenan was the owner of the other half of the Keenan lands -- located to the west of the new municipal road -- and of a small corner of the lands to be conveyed to Outaouais. He played no part in the negotiations.

The negotiations

[23] There were extensive and lengthy negotiations -- the offer lapsed at one point, only to be renewed shortly thereafter -- before the transaction finally closed on June 27, 2003.

[24] Much of the parties' energy was directed towards dealing with environmental problems arising out of the former farming operations, particularly in the area of the outbuildings where the farm machinery had been kept and maintained, where some [page749] fill had been applied, and where an underground fuel storage tank was located. The environmental concerns, and the way in which they were or were not dealt with, were very live issues at trial. As noted above, however, the trial judge's decision on those issues is not the subject of appeal.

[25] On the issue that is the subject of this appeal -- the existence of the cost recovery clause (sometimes referred to as the collect-back clause) -- there were no direct negotiations. It may well be that the parties' focus on the environmental issues during the negotiations deflected their full attention from access problems flowing from the 0.3 metre reserve.

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[26] Neither Brunelle nor Lang Michener was ever told specifically about the existence of the June 1, 1999 agreement or the cost recovery clause. This in spite of the fact that McNeely had the agreement on his desk, had discussed it with Harold Keenan and had recommended to Keenan that it be disclosed. Harold Keenan testified to the effect that the obligation to pay cost recoveries for the road was disclosed in an amendment to the agreement of purchase and sale that I will describe shortly.

[27] Brunelle's evidence was clear that, had he known of the 1999 agreement and its financial implications, Outaouais would not have closed.

[28] Let me turn now to a brief review of the documentation that was available to the purchaser and its solicitors and the relevant exchanges between the vendor, Harold Keenan, and purchaser prior to closing.

[29] Saikaley conducted a search of title shortly before closing. The search did not reveal the existence of the 1999 agreement because it had not been registered on title. The trial judge commented, at para. 29, that the agreement should have been registered against the lands conveyed to the municipality, but that "surprisingly" no one saw fit to register it.

[30] The search report prepared for Saikaley did reveal the existence of the 0.3 metre reserve in favour of the municipality, however, as well as the existence of the restrictive covenant referred to above. Indeed, a copy of that restrictive covenant was contained in the search report (Saikaley did not read it). The restrictive covenant made it clear that the municipality would not lift the reserve abutting the property that Outaouais intended to purchase until the municipality "collected from the owners of [the Keenan lands] a proportionate share of [the municipality's] costs incurred in connection with [the road project]". This is a pointed reference to the cost recovery mechanism found in the 1999 agreement. [page750]

[31] Following a discussion between Harold Keenan and his lawyer, McNeely, a paragraph was added to clause 7 of Sch. "A" of the agreement of purchase and sale (the "amendment"). The amendment provided that

> [t]he Purchaser shall be responsible to satisfy all municipal development charges for the property *including all costs recovered to the City of Ottawa to its .3 metre reserve*.

(Emphasis added)

[32] Clause 1 of Sch. "A" also provided that the agreement of purchase and sale was conditional:

> Upon the Purchaser, at its own expense, satisfying itself with regard to . . . ingress and egress to the property for the use intended[.]

[33] Harold Keenan testified that the amendment was intended to notify the purchaser of the "charges to the one-foot (0.3 metre) reserve for the road". Saikaley agreed that he saw this clause before the agreement of purchase and sale was signed. He testified that he spoke to Outaouais' real estate agent, Seccombe, about it and was told 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 (apparently thought to be approximately $200). Saikaley said that

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in 26 years of practice he had never seen an unregistered agreement by the municipality. He was not concerned about the amendment because he assumed it related to development fees and not to collect back agreements or any unregistered agreements. In addition, he testified that Brunelle had agreed to undertake any inquiries relating to the development aspects of the property.

[34] Saikaley made no inquiries of the municipality about what "all costs recovered to the City of Ottawa to its 0.3 metre reserve" might involve.

[35] As the closing approached, Saikaley made a number of requisitions including the following:

> 2. A review of the title search seems to indicate access to the property is blocked. Access should be via Kenaston Street which was conveyed to the City . . . , but this land was not dedicated as a public road by by-law.
>
> REQUIRED: Production and registration of a by-law passed by the City of Ottawa dedicating Kenaston Street as a public road.
>
> . . . . .
>
> 10. REQUIRED: On or before closing, evidence that there are no unregistered liens, rights of way, restrictive covenants, easements, restrictions or other encumbrances of any kind affecting this property, and that possession has been consistent with registered title. [page751]

[36] The response received from McNeely to these two requisitions was as follows:

> 2. We are in the process of looking into this matter with the City of Ottawa and will advise in due course;
>
> . . . . .
>
> 10. Please satisfy yourself[.]

[37] For reasons that are unclear to me, Saikaley took the latter response to mean that McNeely was unaware of any unregistered agreements.

[38] Further to McNeely's inquiries with the municipality, he wrote to advise Saikaley:

> Our clients have an Agreement with the City of Gloucester wherein Algoma Road was to be dedicated as a public road not later than December 31, 1999 [pursuant to Article 4.1 of the 1999 agreement]. We believe the City is in breach of this Agreement but that this breach is likely the result of falling between the cracks as a result of amalgamation[.]
>
> I enclose a copy of an undertaking which I am prepared to provide you on closing and trust this will be satisfactory.

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> Please note, however, that the .3m reserve will only be "lifted" after your client has satisfied development conditions which include costs recovered by the City as a condition to removing the .3m reserve.
>
> [39] The attached undertaking stated:
> In consideration of and notwithstanding the closing of this transaction, we undertake, on behalf of the Vendor, Harold Keenan, to take the steps with the City of Ottawa to have it pass and register a by-law dedicating Algoma Road as a public road, it being understood and agreed however between the parties, that the said dedication shall not include the .3m reserves along Kenaston Street/Algoma Road and the subject property . . . *since such reserves shall only be dedicated after [Outaouais] has satisfied the conditions for development set by the City of Ottawa, including payment of development fees and costs recovered by the City of Ottawa from the Transferee for the .3m reserve* (emphasis added).

[40] Saikaley testified that he understood from the emphasized words that the reserves would not be dedicated until the purchaser satisfied the development conditions set by the municipality, including paying costs such as landscaping, curbing, garbage bin enclosure, etc., as well as development charges. He did not view these words as indicating that the purchaser would have to pay for the costs associated with construction of the road.

The Negligence Claim

[41] I begin the discussion of the negligence claim by observing that in considering the issue of Lang Michener's negligence, [page752] the trial judge applied the proper test. A solicitor must perform the services for which he or she has been retained in a reasonably competent and diligent manner: see *Folland v. Reardon* (2005), 74 O.R. (3d) 688, [2005] O.J. No. 216 (C.A.), at paras. 41-43; and *Kalish v. Rosenbaum* (2009), 100 O.R. (3d) 169, [2009] O.J. No. 5396 (S.C.J.), at para. 49. The trial judge recognized, on the basis of "honourable fair-dealing", why the appellant might well take "umbrage" at the failure of the vendor and his solicitor to disclose unambiguously the existence of the cost recovery clause during the negotiations. Ultimately, however, he concluded that Saikaley failed in his duty to represent the purchaser with the necessary degree of care by thoroughly investigating title, including the access issue raised by the 0.3 metre reserve.

[42] In my view, there is ample support in the record for the trial judge's conclusion based primarily on two factors: (i) Saikaley's failure to make any inquiries of the municipality concerning its cost recovery requirements for lifting the 0.3 metre reserve to ensure his client's access to the property; and (ii) his failure to ensure that the lines of responsibility as between the law firm and the client regarding the legal and the development aspects of the transaction were clear.

[43] Saikaley recognized that a 0.3 metre reserve is not something exclusively designed to ensure payment of future development charges, but is also a device used to deny access to a property. Questions relating to ingress and egress affect whether the vendor can convey a good and marketable title and are therefore legal issues that fall within the purview of the lawyer's responsibilities.

[44] The appellant counters this point by arguing that it was agreed between the law firm and Brunelle that Brunelle would attend to all matters relating to the development of the property and

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that the cost recovery issues were matters relating to the development of the property. Saikaley's recognition that the reserve did not only raise questions about the payment of future development charges but also related to access issues belies this distinction, however.

[45] Legal matters relating to title and to ingress and egress are not normally matters that are delegated to the client, at least not without a clear delineation of responsibilities by the lawyer, and the client's acceptance of those responsibilities; the lawyer has a duty to consult with the client "on all questions of doubt which do not fall within the express or implied discretion left to him": *Tiffin Holdings Ltd. v. Millican*, [1964] A.J. No. 103, 49 D.L.R. (2d) 216 (S.C.), at p. 219 D.L.R. I accept the trial judge's observation, at para. 123, drawing upon Molloy J.'s [page753] reasons in *Accurate Fasteners Ltd. v. Gray*, [2005] O.J. No. 4175, 35 R.P.R. (4th) 9 (S.C.J.), at para. 11, that "while the lawyer is not required to act as a 'quarterback', co-ordinating and directing the activities of the purchaser's team, the prudent solicitor must explain the clauses that require due diligence inquiries by the purchaser and ensure the client understands the consequences of waiving the conditions".

[46] Here, the trial judge concluded, on ample evidence, that this process had not occurred; that Brunelle, in taking on responsibility for development issues, did not appreciate the access implications of the 0.3 metre reserve; and that it was Saikaley's obligation to address the access issue with his client, which he did not do. Not having established the "bright line" between the roles of solicitor and client that the appellant's own expert, Craig Carter, testified should exist, Saikaley could not argue that he had transferred to his client the due diligence obligation regarding the access issue posed by the 0.3 metre reserve. I agree.

[47] Saikaley was not specifically advised of the cost recovery clause in the 1999 agreement between the Keenans and the municipality. He knew about the 0.3 metre reserve, however, and recognized that such a reserve could have implications for the access of his client to the lands they were purchasing for the purpose they had in mind. The obligation assumed by the purchaser in the agreement of purchase and sale to confirm access to the property, and the lack of clear delegation of this responsibility to the client, left the onus squarely on Saikaley to search the abutting lands not merely to determine compliance with the *Planning Act*, R.S.O. 1990, c. P.13, but also to confirm if there was legal road access to the subject property. Had Saikaley reviewed the search report with this obligation in mind, he would have discovered the restrictive covenant on the abutting 0.3 metre reserve.

[48] The restrictive covenant made it clear that the reserve would not be dedicated as a public road until the municipality had collected from the owners of the Keenan lands "a proportionate share of [the municipality's] costs incurred in connection with [the road project]". This is not the language of standard development charges associated with lifting reserves. Rather, this language clearly conveys that the municipality intended to recover a portion of its costs of the road project from the owners of the abutting lands as a precondition to dedicating the reserve as a public road. Outaouais' expert testified that a restrictive covenant registered on a 0.3 metre reserve is a "red flag" that should be investigated. [page754]

[49] The restrictive covenant is part of the context within which the amendment must be considered. Recall that the amendment required the purchaser "to satisfy all municipal development charges for the property including all costs recovered to the City of Ottawa to its .3 metre reserve", and that clause 1 of Schedule "A" placed the onus on the purchaser to satisfy

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itself as to matters of ingress and egress. Recall also that Saikaley requisitioned production of a by-law dedicating a certain street as a public road because the review of title seemed to indicate that access to the subject property was blocked. In response, he received the vendor's undertaking to have the municipality dedicate Algoma Road as a public road, with the express understanding that the dedication of the 0.3 metre reserve along the property would be dedicated only after Outaouais satisfied "the conditions for development set by the City of Ottawa, including payment of development fees and costs recovered by the City of Ottawa from [Outaouais] for the .3 m reserve". Despite being advised of this limitation respecting access, Saikaley made no inquiries of the municipality about what the costs associated with dedicating the reserve might be and was content to rely on the advice of the real estate agent that they only related to development costs.

[50] The trial judge felt that the wording of the amendment was "poorly-drafted" and that its language "standing on its own did little to give meaningful notice of the nature of the obligation awaiting anyone who intended to purchase and develop the Keenan land" (para. 41). As we shall see, the appellant relies heavily on this comment in support of its alternative claim for contribution and indemnity against Harold Keenan.

[51] However, the language of the amendment did not stand on its own in the context of the transaction. It had to be considered in light of the access implications of the 0.3 metre reserve; the provisions of the restrictive covenant that was registered on title to the abutting lands (including the 0.3 metre reserve); the purchaser's obligations with respect to ensuring matters of access; McNeely's response to Saikaley's requisition concerning unregistered liens, etc., that he should "satisfy [himself]"; and McNeely's response to Saikaley's requisition respecting access and the accompanying undertaking, both of which indicated that the purchaser would be responsible for the costs recovered by the municipality as a condition for dedicating the 0.3 metre reserve.

[52] Given all of these factors, the trial judge's conclusion that the presence of a 0.3 metre reserve on title was sufficient to put the purchaser on notice that inquiries needed to be made regarding the reserve and its implications for access was well supported [page755] on the evidence. So, too, was his finding that Saikaley and the appellant failed to comply with their duty of care to the purchaser. There is no basis for interfering with these assessments.

The Claim for Contribution and Indemnity

[53] The allegation that Harold Keenan should contribute to Outaouais' loss is more difficult to resolve and involves consideration of what the trial judge referred to as "honourable fair-dealing". In the end, however, I am satisfied that Keenan had no legal or equitable obligation to do anything further to disclose the existence of the cost recovery clause.

[54] Many of the factors that play into the negligence analysis are relevant here, too.

[55] The arguments regarding the claim over against Keenan revolved around two primary questions:

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(1) Is the cost recovery clause an "encumbrance", thus requiring the 1999 agreement to be registered on title or at least disclosed to the purchaser as an unregistered encumbrance?

(2) Was the vendor, Harold Keenan, otherwise obligated to disclose the existence of the cost recovery clause because the failure to do so constituted fraudulent misrepresentation, equitable fraud and bad faith?

[56] I will address each of these in turn.

(1) *Is the cost recovery clause an "encumbrance"?*

[57] The appellant argues that the implied covenant found in s. 5(1)(iv) of the *Land Registration Reform Act*, R.S.O. 1990, c. L.4 applied to this transaction and that the trial judge erred in his consideration of the effect of that provision. It provides that a transfer of land is deemed to include a covenant:

> 5(1)(iv) That the transferor has not done, omitted or permitted anything whereby the land is or may be encumbered, except as the records of the land registry office disclose.

[58] I do not accept the appellant's submission. For land to be "encumbered" within the meaning of this provision, it must be subject to an "encumbrance". An encumbrance is an obligation that creates a right to or interest in the land subsisting in a third person. As Estey J. explained in *Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, [1987] S.C.J. No. 40, at p. 1021 S.C.R.:

> The term "incumbrance" is a general term of law without any classical meaning. The word should be accorded its plain meaning that is consistent [page756] with the context of the statute. As is discussed by the Nova Scotia Supreme Court in *Clark v. Raynor* (1922), 65 D.L.R. 425 (C.A.), at p. 439: "The word 'encumbrance' has no technical meaning. It is not one of the 'terms of the law' and no definition of it will be found in the older books." By generally accepted definition "*it comprehends 'every right to or interest in the land which may subsist in a third person* to the diminution of the value of land, but consistent with the passing of the fee by the conveyance' . . . It is apparent, of course, that the word is to be interpreted according to the context in which it is found" (p. 439). (See also *Evans v. Evans* (1853), 22 L.J. Ch. 785 (C.A.), at p. 790.)

(Emphasis added)

[59] I accept the trial judge's view that, although the cost recovery clause may "affect" the Keenan property in the sense that it required the payment of moneys to secure road access to that property, it did not create a right or interest in the Keenan property that is held by a third person. Rather, the obligation to pay the municipality to have the reserve dedicated as a public road constitutes a title defect in relation to the Keenan property. This defect was not requisitioned prior to closing even though the purchaser bore the obligation of satisfying itself with regard to ingress and egress to the property for its intended use.

[60] The appellant relies on *Wotherspoon* for the proposition that the term "encumbrance" is a general term with no classical or technical meaning. Nonetheless, Estey J.'s reasons must be

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understood in the sense that -- however "general" or non-classical or non-technical the term may be -- it is still rooted in the existence of something that creates "a right to or interest in land" by way of a lien or charge or something of that nature that is held by a third person.

[61] Consider the following by way of analogy. A *Mareva* injunction is not an encumbrance against lands, even though it freezes assets (including lands) and prevents their sale or disposition pending the outcome of litigation: *Bank of Nova Scotia v. Suthakaran*, [2011] O.J. No. 5304, 2011 ONSC 6970 (S.C.J.), at para. 25. A *Mareva* injunction is an instrument affecting the lands but not an instrument creating a right to or an interest in the lands themselves. Rather, it is an instrument that provides a mechanism for protecting the personal rights of those who benefit from it.

[62] Similarly, the cost recovery clause did not create a right or interest in the Keenan property in favour of the municipality; it merely required subsequent owners of the Keenan property to pay cost recoveries if they chose to have access to the road constructed by the municipality. The cost recovery clause and the existence of the 0.3 metre reserve would not prevent Outaouais from re-selling the lands to another purchaser without having [page757] paid the municipality the cost recoveries referred to in the cost recovery clause. A sale by Outaouais of the lands would not trigger an obligation to pay recoveries for the road project; nor would the municipality have any right to claim an interest in the proceeds of the sale.

[63] The payment obligation is triggered only when someone seeks to have the reserve on the municipality's lands lifted in order to obtain access to the road and to the municipal services. The cost recovery clause and the 0.3 metre reserve provide for a collection mechanism that does not create any right or interest in the lands conveyed by the Keenans to Outaouais. Thus, the cost recovery clause does not encumber the lands being conveyed so as to breach the implied covenant in s. 5(1)(iv) of the *Land Registration Reform Act*.

[64] In reaching this conclusion, I have considered authorities holding that certain obligations by landowners to make payments to municipalities for various services or local improvements are "encumbrances", using the broad and flexible approach to that term called for in *Wotherspoon* and other cases: see *Valentini v. Reidco Wellington (1983) Ltd.* (1989), 69 O.R. (2d) 346, [1989] O.J. No. 1164 (Div. Ct.); *Macdonald, Craig & Co. (Re)*, [1924] M.J. No. 35, 34 Man. R. 611 (K.B.); *Salus v. Devkor Construction (Calgary) Ltd*., [1982] A.J. No. 607, 20 Alta. L.R. (2d) 26 (Q.B.); *Lalonde v. Zuccarani Construction (Ottawa) Ltd.*, [1985] O.J. No. 629, 20 C.L.R. 38 (H.C.J.). With the possible exception of *Valentini*, these are cases where the lands being conveyed were subject to an obligation in the nature of a charge or lien against the subject property -- thereby giving rise to a right to or interest in the lands themselves, as opposed to merely affecting the use to which the lands abutting the subject property could be put.

[65] I say with the possible exception of *Valentini*, because in that case, the Divisional Court found that a subdivision agreement imposing obligations on the owner of land, some of which had cost consequences, was an encumbrance; the court did not consider whether the subdivision agreement created any right to or interest in the land on the part of the municipality. However, the subdivision agreement was binding against the owner and any and all subsequent owners of the land under the then-existing *Planning Act, 1983*, S.O. 1983, c. 1, s. 50(6). This was an important consideration in the court's analysis. The subdivision agreement created

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obligations that ran with the land being purchased and that bound owners and subsequent owners to reimburse the municipality for costs it incurred. In contrast, the cost recovery clause in the present case only imposes a financial [page758] obligation if and when the owners of the purchased land seek to have the abutting reserve dedicated as a public road.

[66] While I can accept the appellant's argument that the goal of the *Land Registration Reform Act* is to drive transferors to register interests in their land so that a purchaser can search the title and determine the extent of the title being acquired, the cost recovery clause in the 1999 agreement is not caught by that purpose because it does not create a right to or an interest in the land being conveyed. Having rejected the submission that the cost recovery clause was an encumbrance, I would uphold the trial judge's conclusion that Harold Keenan did not permit his property to be encumbered so as to run afoul of s. 5(1) of the *Land Registration Reform Act*.

(2) *Was the vendor otherwise obligated to disclose the existence of the cost recovery clause?*

[67] Nor am I persuaded that Harold Keenan was obliged in law or equity to disclose the cost recovery clause on other grounds. In saying that, I note there is no basis for the appellant's suggestion that Douglas Keenan's conduct is in issue. The trial judge found he was not involved in the negotiations with respect to the sale of the property and there is no basis to interfere with that finding.

[68] As the trial judge concluded, the agreement of purchase and sale between the Keenans and Outaouais is an agreement to which the doctrine of *caveat emptor* (let the buyer beware) applies. While that doctrine is popularly reduced to the term *caveat emptor*, it is helpful to recognize for our purposes that the more complete description is *"caveat emptor, qui ignorare non debuit quod jus alienum emit*", which translates as "let the purchaser, *who ought not to be ignorant* of the amount and nature of the interest, exercise proper caution" (emphasis added). See Professor John D. McCamus, "*Caveat Emptor*: The Position at Common Law", in *Law Society of Upper Canada Special Lectures 2002: Real Property Law: Conquering the Complexities* (Toronto: Irwin Law Inc., 2003), at p. 97.

[69] There are exceptions that will shield the purchaser from the effect of *caveat emptor*, however. Here, the appellant relies upon the exceptions of fraudulent misrepresentation, equitable fraud and bad faith in the completion of the real estate transaction.

[70] I observe in passing that the appellant, as the purchaser's solicitors, stands in the same shoes as the purchaser for purposes of these submissions. The argument is that Harold Keenan is responsible to Outaouais as a result of his fraudulent or bad faith conduct in failing to disclose the cost recovery clause, and [page759] therefore he is responsible, at least partially, to contribute to Outaouais' losses.

[71] I also observe that there are several provisions in the agreement of purchase and sale which not only highlight that it is a *caveat emptor* type of agreement, but also bear on the conduct of both the purchaser and Keenan in the analysis. These provisions furnish the context within which the question whether Keenan's conduct was fraudulent or in bad faith, is to be determined, having regard to what the purchaser knew or ought to have known.

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[72] First, the agreement of purchase and sale is conditional "[u]pon the Purchaser, at its own expense, satisfying itself with regard to zoning, ingress and egress to the property for the use intended, soil tests [and various environmental concerns]". It is common ground that the cost recovery clause affects access (ingress and egress) to the lands. The purchaser was entitled to terminate the agreement of purchase and sale if those conditions were not waived or satisfied (in fact, the purchaser did so with respect to certain environmental issues at one point, only to renew the agreement after further negotiations). However, as the negligence analysis above demonstrates, the purchaser's solicitor closed the transaction without having made adequate inquiries concerning "ingress and egress to the property for the use intended". I see nothing in Keenan's conduct, or his solicitor's, that hindered the purchaser from making such inquiries.

[73] Secondly, the amendment -- already referred to above -- provided that the purchaser was to be responsible "to satisfy all municipal development charges for the property including all costs recovered to the City of Ottawa to its .3 metre reserve". By inserting this paragraph, Harold Keenan testified that it was his intention to provide notice that there would be charges against the reserve. Apart from anything else, the existence of the amendment at least underscores the obligation of the purchaser under the agreement of purchase and sale to satisfy itself regarding what the cost recoveries related to the reserve entailed.

[74] Finally, in a handwritten addition to Sch. "A", the vendor represented to the purchaser "that the Vendor has never conducted or caused to be conducted any environmental tests, studies or investigations whatsoever on the Property". Whether that representation was untrue was the subject of much attention at trial, but the trial judge found that the Keenans had not conducted or caused any environmental tests to be conducted, although others had. For present purposes, the representation extracted by the purchaser underscores the fact, in my view, that [page760] where the purchaser wished to protect itself from the rigours of the doctrine of *caveat emptor*, it did so expressly.

[75] Given this context, I turn now to the trial judge's conclusions and the appellant's arguments concerning fraudulent misrepresentation.

Fraudulent misrepresentation

[76] The trial judge found, at paras. 106-107, that the cost recovery clause could be said to be a defect relating to the quality of the lands to be conveyed and a defect relating to title -- the two types of title defect to which *caveat emptor* relates.[2] He noted that, aside from prohibiting active concealment or a failure to disclose a latent defect rendering premises dangerous, a vendor is under no duty to disparage his property and may remain silent. This is because, in Ontario, as a general proposition, a vendor is, apart from express contract, under no general duty to disclose defects relating to title or to quality: see Bora Laskin, Q.C. (as he then was), "Defects of Title and Quality: *Caveat Emptor* and the Vendor's Duty of Disclosure", in *Special Lectures of the Law Society of Upper Canada 1960: Contracts for the Sale of Land* (Toronto: Richard De Boo Ltd., 1960), at p. 401; McCamus, at p. 102.

[77] This court and the Manitoba Court of Appeal have both confirmed that silence and half-truths can amount to fraudulent misrepresentation and that, where a vendor, who has no duty to speak, decides to break that silence, the doctrine of *caveat emptor* falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised: see

Krawchuk v. Scherbak (2011), 106 O.R. (3d) 598, [2011] O.J. No. 2064, 2011 ONCA 352, at para. 77, citing *Kaufmann v. Gibson*, [2007] O.J. No. 2711, 59 R.P.R. (4th) 293 (S.C.J.); *Alevizos v. Nirula*, [2003] M.J. No. 433, 2003 MBCA 148, 180 Man. R. (2d) 186, at paras. 18-25. These cases involved situations where vendors completed voluntary vendor disclosure statements in residential real estate transactions.

[78] The appellant contends that when a vendor discloses information in an agreement of purchase and sale that he may not have been required to disclose, the doctrine of *caveat emptor* [page761] similarly falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised. In *Peek v. Gurney* (1873), L.R. 6 H.L. 377, [1861-73] All E.R. Rep. 116 (H.L.), at p. 403 H.L., Lord Cairns long ago described falsity by half-truth as "a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false".

[79] The appellant contends that if Harold Keenan intended the amendment to disclose the existence of the cost recovery associated with lifting the 0.3 metre reserve -- as he said he did -- the disclosure had to be forthright. Instead, the amendment was couched in "half-truths", deceptively leading the purchaser and Saikaley to believe the amendment referred only to municipal development charges (which the purchaser was prepared to absorb, thinking they were minor), when he knew the cost recovery agreement related to the costs of the road project and gave rise to a much more significant financial obligation on the part of the purchaser.

[80] The appellant rests this submission on the trial judge's comment, at para. 41, that the amendment "standing on its own did little to give meaningful notice of the nature of the obligation awaiting anyone who intended to purchase and develop the Keenan land". Having so concluded, the appellant contends, the trial judge erred in failing to consider the legal effect of that conclusion.

[81] In my opinion, the amendment in clause 7 of Sch. "A" is not a misstatement of the nature described in *Peek*, if it is a misstatement at all.

The context of the amendment

[82] As described above, the amendment did not stand alone, an important qualification to the trial judge's observation that it did little to give meaningful notice of the nature of the obligation contained in the cost recovery clause. Context is important. Here, the context includes the fact noted by the trial judge that the means by which the cost recovery clause "derives its force, the .3 metre reserve, appears in the records of the land registry office as depicted on Plan 4R-14871" and "the presence of the reserve is sufficient to put a purchaser on notice that inquiries need[ed] to be made" (at para. 99).

[83] The context also includes the restrictive covenant registered against the reserve lands, which was in Saikaley's search file. This covenant states: "no part of the [0.3 metre reserves] shall be dedicated as a public road until such time as the [municipality] has collected from the owners of the lands [page762] adjacent to such part a proportionate share of [the municipality's] costs incurred in connection with [the road project]". Other relevant aspects of the context are that the agreement of purchase and sale placed the onus on the purchaser to satisfy itself on matters relating to access and the purchaser's solicitors were specifically advised to satisfy

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themselves in response to the requisition concerning unregistered easements, restrictions or encumbrances affecting the property.

Interpreting the amendment in context

[84] When the amendment is read in this context, its reference to "all costs recovered to the City of Ottawa to its .3 metre reserve" is not, as explained in *Peek*, such a fragmentary statement of fact as to make the statement false, in my opinion.

[85] The amendment specifically requires the purchaser to satisfy "all costs recovered to the City of Ottawa to its .3 metre reserve". While this obligation was expressed as an inclusion in "municipal development charges for the property", the wording clearly signals an obligation for "costs recovered" to the city -- that is, an obligation referencing something that has happened in the past -- as opposed to a fee or something to defray costs incurred by the municipality in the future.

[86] It seems to me that all of the foregoing was sufficient to put the purchaser on notice to clarify exactly what those "costs recovered to the City of Ottawa to its .3 metre reserve" entailed. It may be that the language of the amendment was not as clear as it might have been. However, Saikaley had the proposed amendment in advance of the agreement of purchase and sale being signed, and could have asked for clarification, but did not.

[87] Given the foregoing context, and what was known or ought to have been known by the purchaser or its solicitors, I do not see how it could be said -- even if one accepts that the language in the amendment was ambiguous -- that it constituted "some active misstatement of fact, or at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false" (*Peek*, at p. 403 H.L.).

[88] For these reasons, I would not give effect to the argument that Harold Keenan, having decided to break silence and give notice of the cost recovery clause -- if that is what he did -- was in violation of an obligation to disclose it in a more forthright fashion. While he may have been nibbling at the edges of the "honest fair-dealing" concept referred to by the trial judge, Keenan's conduct -- having regard to all of the circumstances outlined above -- did not rise to the level where it would be [page763] "unconscientious for [him] to avail himself of the advantage obtained": *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, [2002] S.C.J. No. 20, 2002 SCC 19, at para. 39, citing *McMaster University v. Wilchar Construction Ltd*., [1971] 3 O.R. 801, [1971] O.J. No. 1717, 22 D.L.R. (3d) 9 (H.C.J.), at p. 811 O.R., p. 19 D.L.R.

Equitable fraud/bad faith

[89] The appellant points to the principle established in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, [1978] S.C.J. No. 52, at p. 1084 S.C.R., that a vendor is under a duty to act in good faith and to take all reasonable steps required of the vendor to complete the sale. It contends that the cost recovery clause in the 1999 agreement could have been disclosed to the purchaser at any time prior to the sale, and should have been disclosed in response to the purchaser's requisition concerning unregistered restrictions or other encumbrances.

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[90] According to the appellant, Harold Keenan breached the duty of good faith in failing to disclose the cost recovery clause in the 1999 agreement and his conduct "reaches the unconscionable conduct threshold for equitable fraud". It contends that, as a person experienced in real estate and development matters -- having been a councillor for the City of Gloucester and a member of its planning committee for ten years -- Keenan knew that the 1999 agreement was unregistered and effectively undetectable because of that, and he could not have failed to appreciate the practical effect of the agreement was to reduce the value of the land (as the trial judge subsequently observed in his costs reasons).

[91] It seems to me that the appellant's interrelated equitable fraud and bad faith argument is misconceived for several reasons. First, the appellant did not plead equitable fraud, which may well explain why the trial judge did not refer to this doctrine.

[92] Moreover, the appellant offers no authority for the view that the concept of equitable fraud is applicable in the present circumstances. The leading authority on equitable fraud is the English Court of Appeal's decision in *Kitchen v. Royal Air Force Assn.*, [1958] 2 All E.R. 241, [1958] 1 W.L.R. 563 (C.A.), where Lord Evershed M.R. defined equitable fraud as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other" (at p. 249 All E.R.).

[93] Although not necessarily an exclusive list, there appear to be certain recognized circumstances where the concept of equitable fraud is engaged. First, conduct amounting to equitable [page764] fraud or fraudulent concealment may prevent a party from relying on a limitation period or other statutory provision that would otherwise exonerate the party from liability: see *Guerin v. Canada*, [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45, at p. 356 S.C.R. (*per* Wilson J.), and at p. 390 S.C.R. (*per* Estey J.); *First City Capital Ltd. v. British Columbia Building Corp*., [1989] B.C.J. No. 130, 43 B.L.R. 29 (S.C.); *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2008] B.C.J. No. 1298, 2008 BCCA 278, 81 B.C.L.R. (4th) 199, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 416. Second, conduct amounting to equitable fraud is one of the preconditions to the availability of the remedy of rectification of a contract on the grounds of unilateral mistake: see *Sylvan Lake*, at paras. 38-39. Finally, equitable fraud has been used to describe conduct that gives rise to a breach of a fiduciary duty or other equitable obligation: see *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at p. 571 S.C.R.

[94] None of the recognized circumstances for considering whether a party has engaged in conduct amounting to equitable fraud exist in the present case. Harold Keenan is not seeking to rely on any limitation period or other statutory provision to escape liability. Outaouais did not seek a remedy of rectification of the agreement of purchase and sale. Finally, Keenan did not owe any fiduciary duty to Outaouais in the circumstances of this commercial transaction where both parties were represented by counsel.

[95] Nor is there any other basis on which to find equitable fraud or to find that Harold Keenan acted in bad faith. There is nothing in the agreement of purchase and sale, or, as mentioned, in the context of the transaction, that placed any onus on the vendor to carry out the purchaser's obligation to make inquiries on the purchaser's behalf. This is not a case like *Dynamic Transport*, where the vendor failed to discharge an implied obligation to apply for subdivision

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approval when obtaining such approval was the only way that business efficacy could be given to the sale agreement.

[96] While the vendors clearly knew of the cost recovery clause and its materiality, it was reasonably discoverable by the purchasers. Had the purchaser's lawyer made the necessary inquiries, which it was incumbent upon him to do, the payment requirement would have been revealed. He failed to do so, however, and in the circumstances that failure should not be visited upon the vendors. Within the boundaries of law and equity, and in the absence of any representation and warranty requiring otherwise, commercial real estate vendors such as the respondents, [page765] who are parties to a *caveat emptor* type of agreement of purchase and sale, are entitled to conduct themselves as the respondents did.

Disposition

[97] I would accordingly dismiss the appeal.

[98] The respondents Douglas Keenan and Outaouais are entitled to their costs, fixed in the amount of $25,000 each, inclusive of disbursements and GST. In the circumstances, we make no order as to costs with respect to the respondent Harold Keenan.

Appeal dismissed.

Notes

1 The project was described as "the Algoma Road Extension Kenaston Street Re-Alignment" and involved the construction of a municipal road, sanitary sewer, storm sewer and water services on the lands conveyed by the Keenans to the city.

2 Briefly, the distinction between defects in title and defects in quality is this: a defect in title relates to deficiencies that impair the quality of *ownership* of the lands; a defect in quality relates to deficiencies in the quality of *the property* to be conveyed that affect the use to which the land may be put and the physical condition of the lands or structures or improvements made to them: see McCamus, at p. 115.

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