

THE GR COURT DOCKET

June 15, 2018

Lawyers Owe Duty to Their Own Clients, Not the Opposite Side

By Stephen Thiele

The relationship between a lawyer and a client is sacrosanct. Indeed, communications between a lawyer and his or her client are protected by a privilege which the Supreme Court of Canada determined years ago was not a mere rule of evidence but a substantive rule.

In order for the justice system to work effectively, clients must be able to trust their lawyers, and must be ensured that their lawyers advocate on their behalf to the exclusion of others.

But sometimes, particularly in real estate transactions, parties on the opposite side of a deal who are disgruntled by the results of a transaction, seek to hold not only their own lawyers liable for alleged wrongs and damages, but the lawyers who represented the other party.

This was the case in [368230 Ontario Ltd. v. Feintuch¹](#).

The Facts

In January 2015, lawyers for the numbered company plaintiff brought to their attention an opportunity to place a private second mortgage on a property owned by an individual. The numbered company's lawyers told their client that the property was worth approximately \$1.75 million, that it was leased to an educational foundation for \$8,500 per month, and that an existing first mortgage was registered against the property in favour of a bank in the amount of approximately \$825,000.

As well, the numbered company's lawyers provided their client with several documents, including an appraisal report, an agreement to lease between the individual mortgagor and the educational foundation, and an acknowledgement of terms of the lease executed by the educational foundation. Based on these documents, the numbered company instructed their

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

Stephen Thiele

Partner
416.865.6651
sthiele@grllp.com

Gavin Tighe

Partner
416.865.6664
gjtighe@grllp.com

Alexander Melfi

Associate
416.865.6712
amelfi@grllp.com

¹ 2018 ONSC 3254

lawyers to proceed with the proposed second mortgage loan in the amount of \$430,000 for a one-year term at an annual interest rate of 11 percent.

At all material times, the individual borrower had his own lawyers who acted on his behalf on the transaction.

The lawyers for the lender and the lawyers for the borrower communicated directly with each other throughout the course of the transaction, and did not have any direct communication with the other's client.

Nine months later, the second mortgage went into default and the numbered company or lender took steps to have rental payments owing to the mortgagor/borrower by the educational foundation paid to it.

However, the educational foundation was not a tenant at the property. Furthermore, in arranging for a private sale of the property, the borrower advised that an appraisal valued the property at \$1.39 million – nearly \$400,000 less than the value of the property at the time the second mortgage was provided.

Numbered company sues mortgagor's lawyer

Among other grounds, the lender sued the borrower's lawyers on the general grounds that it would not have advanced the second mortgage had it known (i) the true value of the property, and (ii) that the property was not leased to the educational foundation.

More specifically, the lender alleged that the borrower's lawyers were liable for professional

negligence. The lender contended that the borrower's lawyer owed the lender a duty of care which was breached by failing to conduct adequate due diligence with respect to the mortgage transaction and failing to properly advise and protect the lender's interests. The lender complained that the borrower's lawyer failed to ensure that the documentation with respect to the second mortgage transaction was provided to them by the appraiser, failed to conduct any or, alternatively, adequate due diligence with respect to the proposed mortgage transaction and/or the mortgage documents, failed to obtain full disclosure of all material facts relating to the mortgage transaction and/or the mortgage document, and failed to properly advise and protect the lender's interests.

Finally, the lender alleged that the borrower's lawyers knew or ought to have known that it was relying upon the mortgage documents the lender had been provided with. As such, it was argued that the borrower's lawyers were obliged to use reasonable care to see that the information provided was correct.

Legal argument

The borrower's lawyers sought to strike the lender's claim against them on the grounds that the claim disclosed no reasonable cause of action. The borrower's lawyers submitted that the law was well-established that a lawyer in their position did not owe the opposing party a duty of care and thus there could be no claim against them for negligence or breach of fiduciary duty.

In addition, the borrower's lawyers argued that the lender was not in a relationship sufficiently proximate to them to give rise to a duty of



care or a fiduciary duty. They emphasized, as well, that the lender (an opposing party) was represented by its own independent lawyers. In contrast, the lender relied on a group of cases, including the Supreme Court of Canada decision in *Hercules Management Ltd. v. Ernst & Young*, to contend that it was not plain and obvious that the borrower's lawyers did not owe a duty of care to the lender and that the lender's lawyers had pleaded all of the requisite elements of a claim in negligence against the borrower's lawyers.

Decision

The Court found in favour of the borrower's lawyers and struck out the Statement of Claim as against them.

According to the Court, the facts clearly established that the borrower and the lender were represented by their own lawyers and that all correspondence and documentation exchanged between the parties happened between the lawyers, as required by the Law Society of Ontario's Rules of Professional Conduct.

In addition, the lender had alleged reliance on its own lawyers and the advice they gave in connection with the transaction. While the lender alleged that it would not have advanced the second mortgage had it known the property was worth less than \$1.75 million, it also alleged that its own lawyers had advised that the property was worth that amount and that it was the mortgagor itself who had provided the lender with the mortgage documents containing a misrepresented value and that the borrower should have known that the lender would rely on

the representation. These alleged facts could not impugn the borrower's lawyers.

In connection with the claim for negligence specifically, in order to succeed the lender had to meet the following four-part conjunctive test: (a) that a duty of care was owed by the defendants; (b) that the defendants failed to meet the standard of care; (c) that the plaintiff suffered damages; and (d) that the defendant's impugned conduct caused the plaintiff's damages, in fact and in law.

The Court held that the first part of the test was not met: no duty of care was owed. Indeed, the general rule was that a lawyer owes no duty of care to the clients of opposing counsel in litigation or commercial matters. A lawyer acting in his or her professional capacity owed a duty of care only to his or her client, not to the clients represented by opposing counsel.

Furthermore, the Court noted that opposing lawyers were precluded from directly communicating with an opposing party and that in a private mortgage transaction, like the one at issue here, both parties were required to have independent lawyers – which indeed both had.

Third, the Court found that there was insufficient proximity between the borrower's lawyers and the lender. There was no reasonable reliance by the lender on the borrower's lawyers or any reasonable foreseeability that there would be such reliance, particularly given that each party was required to be represented by its own lawyers.

Lastly, the Court found that there were no special circumstances which lifted the facts

in this case from the normal proposition that a lawyer owed a duty of care to his or her own client and not to an opposing client, particularly in circumstances where the opposing party was represented by its own lawyer.

Gardiner Roberts lawyers

The lender's lawyers were represented by Gavin Tighe and Alexander Melfi of Gardiner Roberts LLP.

Gavin is a partner and a certified specialist in civil litigation.

Alexander is a litigation associate.

(This newsletter is provided for educational purposes only and is not intended to be relied upon. Readers are encouraged to review *368230 Ontario Ltd. v. Feintuch* and to form their own views of the case. Any views or opinions expressed herein are not necessarily the views or opinions of Gardiner Roberts LLP.)