CITATION: Anbros Financial Inc. v. 2528367 Ontario Inc., 2024 ONSC 2202
COURT FILE NO.: CV-21-00666272-0000
DATE: 20240415

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ANBROS FINANCIAL INC.	)	Gathyayini Manoharan, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
2528367 ONTARIO INC., MICHAEL SAGOE and OKOLAWALE OLASIMBO	)	Jennifer Therrien, for the Defendant
Defendant	)	
	)	
	)	
	)	
	)	
	)	**HEARD:** February 8, 2024

PAPAGEORGIOU J

Overview

[1] Anbros Financial Inc. ("Anbros") is a broker who procures construction loans.

[2] 2528367 Ontario Inc. ("252") was the contractor for a construction project (the "Project"), on property in Whitby (the "Lands"). The defendants are commercially sophisticated. In their project summary, they state as follows:

> We have a combined 10 years in the real estate renovation, project management and investment business which includes strategic partnerships with industry leaders and innovators.

[3] 252 approached Anbros to assist 252 in obtaining a loan in respect of the Project.

[4] On March 16, 2021, Anbros and 252 signed a document called a Letter of Intent ("LOI"). The LOI provided that 252 would pay a brokerage fee. The defendants Michael Sagoe and Akolawole Olasimbo, the directors of 252, signed as guarantors.

[5] Thereafter, Anbros procured a commitment from Firm Capital Corporation ("FCC"). 252 did not proceed with the loan set out in the Commitment.

[6] Anbros says that procuring the Commitment fulfilled its obligations pursuant to the LOI such that the brokerage fee was payable.

[7] Anbros seeks summary judgment on its claim in the amount of $88,000, (the "Broker Fee").

[8] The parties have agreed to have this matter decided by way of summary judgment and both agree there is no genuine issue requiring a trial because the issues turn on the interpretation of the LOI. The defendants seek reverse summary judgment dismissing this claim.

[9] I agree that it is appropriate that this matter be decided by way of summary judgment as there are no material facts in dispute; the matter is essentially a dispute as to whether the LOI entitles Anbros to the Brokerage Fee because of the Commitment procured by Anbros.

[10] There are no significant factual disputes.

[11] I am satisfied that proceeding by way of summary judgment to finally decide the matters in this proceeding is appropriate. I am satisfied that I have been able to make the necessary findings of fact, that proceeding in this manner is a proportionate and just result of achieving a just result: *Hyrniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

Decision

[12] For the reasons that follow, I grant summary judgment in favor of Anbros and award it $88,000 in damages.

Issues

- Issue 1: Is the LOI a binding agreement?
- Issue 2: Did Anbros earn the brokerage fee in accordance with the terms of the LOI?

Analysis

Issue 1: Is the LOI a binding agreement?[1]

[1] The main principles of contractual interpretation are as follows: A court cannot consider evidence of the parties' subjective intentions. With respect to written contracts, a court presumes that the parties have intended what they said. A court should interpret commercial agreements in accordance with good business sense and avoid commercial absurdity. Where there is an ambiguity, the court may resort to extrinsic evidence to clear up the ambiguity. The words of a contract must be given their ordinary and grammatical meaning; The contract must be read as a whole. The court should take into account surrounding circumstances known or reasonably known to the parties or which ought reasonably be known at the

[13] A letter of intent will be deemed to be a binding contract where, when read as a whole, the language shows an intention to be bound upon signing the contract: *Wallace v. Allen et a*., 2009 ONCA 36, at paras 26-30.

[14] The LOI dated March 16, 2021, set out the following terms of proposed financing to be arranged by Anbros:

> Loan Amount:
>
> > Land Loan: The lesser of $1.1 MM and 65 % of Lender Approved Appraised Value
> >
> > Construction Amount: The lesser of $6.82 MM and 75 % of Lender Approved Cost Budget
>
> Term: 12 Months
>
> Interest Rate: 8.50 %
>
> Commitment Fees: $1.50 %
>
> Broker Fees: $1.50 %
>
> Good Faith Deposit: $5,000

[15] The LOI further stated that:

> The Lender will proceed on a best-effort-basis to provide a Term Sheet materially in accordance with the terms and conditions outlined herein. If Anbros Financial Corporation is unable to provide said commitment, the deposit, (less reasonable expenses incurred by Anbros Financial Corporation in the process of its underwriting) will be refunded. The Borrower acknowledges that the Commitment Fee and Broker Fee will be earned and payable upon the issuance of a Term Sheet substantially in accordance with this Letter of Intent.

[16] The LOI further stated that in the event that the funding of a loan was not completed for any reason other than the lender's default, the full fee would be payable to Anbros.

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time of the contract: *Sattva Corp v. Creston Moly Corp*., 2024 SCC 53 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at para. 20; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, at para. 64; *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4, at paras. 25-26; *Bellwoods Brewery Inc. v. 1896842 Ontario Limited*, 2023 ONSC 2845, at paras. 13-1.

[17] It is undisputed that the defendants signed the LOI with 252 being the borrower and the defendants Mr. Sagoe and Mr. Olasimbo being guarantors. It is undisputed that 252 paid the $5,000 deposit.

[18] The defendants make a number of arguments as to why the LOI was not a binding agreement, all of which I reject.

[19] First, they argue that there are missing essential terms such as the amount of equity required to secure the financing, whether the interest rate was fixed or variable, and how and when the Commitment and Broker Fees were to be paid. The defendants provided no case law, industry evidence, or even their own sworn evidence that these were essential terms.

[20] In fact, when Mr. Sagoe was cross examined, he said that the key terms in the LOI that they were looking for at the time were the lender, borrower, loan amount, term, interest rate, commitment fee, and broker fee, all of which were set out in the LOI. The defendants were sophisticated parties; had there been other essential terms, they could have suggested them at the time of the LOI or at least set out in their affidavit materials that they considered these other terms to have been critical.

[21] Second, they argue that there was no consideration because the LOI stated that it was not a "commitment on behalf of Anbros to provide financing," and Anbros' affiant admitted that Anbros would not be liable if it was unable to secure financing.

[22] Consideration consists of anything given which is of value to the other side. In this case, the defendants needed financing. Anbros was not a lender but a broker. As a broker, the consideration that he provided was his effort to find financing. This was of sufficient value to constitute valid consideration.

[23] Third, they say that the language contained in the LOI demonstrates the parties had no intention of being bound. The defendants reference the first paragraph of the LOI that stated that it was provided for discussion purposes and did not represent a commitment on behalf of Anbros to provide financing. The defendants are misreading the document by focusing only on that introductory line instead of reading the LOI as a whole.

[24] At the end of the LOI it states: "If you are in agreement with the foregoing terms and conditions, please acknowledge this Letter of Intent by executing the document and wiring the Good Faith Deposit to Anbros Financial Corporation within 5 days of the Letter of Intent date, failing which, this letter shall at the Lender's option become null and void and of no further effect." This wording shows a clear intention that the parties would be bound if the LOI was signed, and the deposit sent. There would be no reason to have a provision rendering the LOI of no force or effect in certain circumstances if it was not binding in the first place because the parties had no intention to be bound.

[25] The defendants signified their intention to be bound by signing and returning the LOI together with the $5,000 deposit. It is not objectively believable that the defendants paid a $5,000 deposit that Anbros accepted if the parties did not objectively intend to be bound by the LOI.

[26] The LOI when read as a whole shows an intention to be bound. Thus, I find that all necessary aspects of contract formation exist including offer, acceptance, consideration, meeting of the minds and essential terms.

[27] To the extent there is any ambiguity, the parties' conduct after the LOI shows that they had an objective intention to be bound. As will be seen, Anbros proceeded to seek out financing and delivered potential financing arrangements to the defendants which they considered and communicated with him about. It is not objectively believable that Anbros was doing this gratuitously and the defendants believed that he was doing this gratuitously.

Issue 2: Did Anbros earn the brokerage fee in accordance with the terms of the LOI?

The Letter of Interest between the defendants and FCC

[28] It is undisputed that Anbros worked towards finding a loan commitment.

[29] As a result of Anbros' efforts, on April 29, 2021, Firm Capital Corporation ("FCC") provided a letter to the defendants that set out "basic terms and conditions under which [FCC was] in a position to arrange mortgage financing as follows".

> Loan Amount: $6,200,000 first mortgage and construction loan: *This is different than the loan amount in the LOI, in part, because it does not include the land loan in the amount of $1.1 million.*
>
> Term: 18 Months: *This is different than the term in the LOI.*
>
> Interest Rate: "Floating at greater than 8.25 % Per Annum or the TD Capital Trust Posted Bank Prime Rate of 5.80 % Per Annum funded per the Advance of Funds provision herein": *This is different than the LOI which was a fixed and not a floating rate. I note that at the time of this Letter of Interest, the total interest rate would have been no more than 8.25 % because prime plus 5.80 % was still 8.25 %.*
>
> Commitment Fees: 2 %: *This is more than the commitment fee in the LOI.*
>
> Broker Fees: 2 %: *This is more than the rate in the LOI.*
>
> Good Faith Deposit: $5,000: *This is the same amount as in the LOI.*

[30] This is hereinafter referenced as the Letter of Interest.

[31] Notably, these were the same categories of terms that the defendants had indicated were important to them and which had been set out in the LOI, even if the details were different.

[32] The Letter of Interest had an additional term regarding the advance of funds that specified that the borrower would have to put $1,500,000 of their own equity into the Project based upon a preliminary budget of $8,600,000. There was no such requirement in the LOI.

[33] The Letter of Interest also provided as follows:

> This Letter should not be considered as a Commitment, but only as an indication of our interest (Letter of Intent). If you wish to proceed to the Commitment Letter stage under the terms outlined herein, please sign this letter were [sic] indicated by no later than May 21, 2021, and return one copy to the undersigned along with a Stand-By Deposit in the amount of $25,000 made payable to Firm Capital Corporation.

[34] It is clear that the terms set out in the Letter of Interest were not substantially similar to the terms of the Term Sheet required by the LOI. The loan amount was significantly different as the loan amount did not include any amount for the purchase of the land. Further, the Commitment fee and Broker fees were different. The interest rate was also different, as it was a floating rate rather than a fixed rate.

[35] However, the only issue raised by the defendants with respect to the April 29, 2021, FCC Letter of Interest at the time was that the initial LOI sent to the defendants contained a 2 % broker fee. The defendants raised the issue with Anbros who then sent a revised Letter of Interest with the Broker Fee reduced to 1.5 % dated May 20, 2021.

[36] Even though there were differences between the terms set out in the LOI and the Letter of Interest, the defendants executed the Letter of Interest and provided the $25,000 standby deposit to FCC demonstrating that the terms set out in the Letter of Interest were acceptable to the defendants.

[37] The Acknowledgement page signed by the defendants indicated that they thereby instructed FCC to "proceed to have this mortgage Loan approved for funding and on approval to issue a Commitment Letter on the same terms and conditions as set out in this Letter of [Interest]."

[38] When cross examined Mr. Sagoe admitted that they wanted to continue to move forwards based upon what was in the Letter of Interest. He also admitted that they had an ability to negotiate the terms of the Letter of Interest and that if they had any issue with a term of the Letter of Interest, they would have raised it "based on our understanding, yes."

The Commitment

[39] On June 2, 2021, Anbros forwarded the FCC Mortgage Loan Commitment to the defendants setting out financing that was approved, subject to terms and conditions set out in the Commitment as follows:

> Loan Amount: $6,200,000 first mortgage construction loan. *This is the same as in the Letter of Interest that the defendants had signified was acceptable by signing it.*
>
> Term: 18 Months: *This is the same as the Letter of Interest that the defendants had signified was acceptable by signing it.*

> Interest Rate: Floating at the greater of 8.25 % per annum, or the TD Canada Trust Posted Bank Prime Rate of Interest from time to time plus 5.80 % per annum: *This is the same as the Letter of Interest that the defendants had signified was acceptable by signing it.*
>
> Commitment Fees: $2.0 %: *This is the same as the Letter of Interest that the defendants had signified was acceptable by signing it*
>
> Broker Fees: $1.5 %: *This is the same as in the LOI and the Letter of Interest.*

[40] The Commitment also set out that the defendants would have to inject equity into the Project in the amount of $1,542,000, which was slightly more than the equity required by the Letter of Interest which stated the equity injection was to be $1,500,000.

[41] The defendants wrote to Anbros on June 8, 2021, expressing the following concerns about the Commitment:

> 1. Repayment terms state that the payments are due monthly. I know we discussed this before but we just want to re-confirm that the interest will be accrued monthly and full accrued interest payment will be made with the principal at the end of the project correct? *When cross examined, Mr. Lagoe admitted that this was just something he needed confirmed*.
>
> 2. The statement regarding the full fees being earned upon commitment: We would like to amend this to read fees are calculated as a percentage of funds advanced, at the time of advancement. *As will be seen, a revised Commitment was sent addressing this issue.*
>
> 3. Under Loan advance conditions it reads $1,542,000.00, shouldn't this read $700K. *Notably, under the Letter of Interest signed by the defendants the required equity was $1,500,000, not $700,000. Further, there was no amount set out in the LOI in respect of the equity of the borrowers required and it is unclear where the defendants were getting the $700,000 figure.*
>
> 4. Construction advance admin fee: Is this fee a normal course of business? This amount seems a bit high. *This related to the 2 % Commitment Fee which the defendants had not questioned before they signed the Letter of Interest.*
>
> 5. There are some costs related to section 7. Project costs that are quite high. To confirm if we show lower amounts in any of these costs this will reduce our equity obligation: E.g.: If Design and Engineering is $200K less than listed in the agreement does that change our equity contribution to $500K ($700K-$200K)? *This also appears to relate to the required equity contribution which the defendants wanted lowered. Again, the defendants had already signified that equity injection of $1,500,000 was acceptable to them when they signed the Letter of Interest.*

[42] Shortly thereafter, Anbros forwarded a Revised Commitment Letter reflecting a change in the way in which the brokerage fees would be earned. Specifically, the Commitment Letter now stated that $50,000 of the broker fee was to be payable on closing with the balance of the fee, being $43,000 to be payable at the second advance under the loan or pay out of the loan, whichever occurred first. This addressed the issue set out in paragraph 2 above. When cross examined, Mr. Sagoe admitted that the change in paragraph 2 of his letter was made.

[43] Although the other issues above were not addressed, as noted above, these other concerns related to matters that the defendants had already signified were acceptable to them by signing the Letter of Interest.

[44] Mr. Sagoe also admitted that the Commitment was not presented as a take it or leave it proposition. There was negotiation between the parties and that the terms he requested changes to were made. He stated that "there was negotiation between what was in the Letter of Interest and what was in the commitment—the first Commitment Letter."

[45] Even still, without seeking to negotiate any small differences between the Letter of Interest and the Commitment, (including the slightly higher equity requirement) the defendants then wrote to Anbros saying they would not be proceeding with the Commitment:

> "Regrettably, we have decided to not proceed with the offer presented by [FCC] and go in another direction, we do truly appreciate the effort put in but feel this is the best decision for our company.
>
> We have also discussed the LOI obligations with our lawyer and consulted with the FSCO and determined there is no obligation on our part to pay out any fees or commissions."

[46] It is notable that the defendants did not compare the terms of the Commitment with the terms of the Letter of Interest, but rather returned to the provisions of the LOI as a basis for rejecting the Commitment. As well, they raised no specific issues when they ultimately said they would not be proceeding with the Commitment.

[47] Further, FCC did not return the $25,000 Stand-By deposit submitted with the Letter of Interest, Anbros did not return the $5,000 deposit submitted with the LOI, and the defendants did not sue for their return.

[48] After Anbros commenced this claim, the guarantor defendant Mr. Sagoe stated in his affidavit that the defendants decided that the Commitment was not in the best interests of 252 because the terms in the Commitment were different than the terms set out in the LOI in the following respect:

> a. The amount of the loan was not the same as previously agreed.
>
> b. The interest rate was higher; *When cross examined, Mr. Sagoe agreed that based upon the prevailing interest rate, the interest rate in the Commitment would have worked out to*

8.25 % and therefore the interest rate in the Commitment was lower than in the LOI, although it could conceivably go up if the prime rate increased.

c. The term of the loan had been reduced from 18 months to 12 months; *When cross examined, Mr. Sagoe admitted that in fact the term of the loan was 18 months and so it had gone up from the 12 months period in the LOI. It was also pointed out that it could be paid out early.*

d. The commitment fee to FCC was higher; and

e. The capital to be invested by the Defendants was higher.

[49] These five items were not set out in any contemporaneous documents and Mr. Sagoe could not recall specifically raising these five issues with Anbros although he thought he raised one or two of these in a phone call, but he didn't know specifically.

[50] Notably, in his affidavit Mr. Sagoe did not say that they did not move forwards because the Commitment was not the same or substantially the same as the Letter of Interest that the defendants had signed. The only comparison he made of the Commitment was to the terms of the LOI, which the parties had already moved beyond when the defendants signified that the general terms in the LOI Letter of Interest were acceptable to them by signing the Letter of Interest.

Principles Governing Broker Arrangements

[51] The basic principles governing the relationship between the parties was set out in *Norwest Capital Corporation v E.C.R.A.* at para 14 as follows:

a) whether a commission is payable depends on the terms of their contract. Ordinary contract principles apply.

b) if the agreement calls for a commission payable on introduction of a lender willing to lend, and a loan actually results, then the commission is payable.

c) <u>commission is also payable where a lender is introduced and who is ready to make a loan on acceptable conditions</u>. [Emphasis added]

General Principles of Contractual Interpretation

[52] The main principles of contractual interpretation are as follows:

- A court must give effect to the parties' objective intentions at the time of contract formation. A court cannot take into account evidence of the parties' subjective intentions:

- With respect to written contracts, a court presumes that the parties have intended what they said.

- A court should interpret commercial agreements in accordance with good business sense and avoid commercial absurdity.

- Where there is an ambiguity, the court may resort to extrinsic evidence to clear up the ambiguity.

- Courts must read the contract as a whole, taking into account the ordinary and grammatical meaning of the words used.

  Corner Brook (City) v. Bailey, 2021 SCC 29, [2021] 2 S.C.R. 540, at para. 20; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, at para. 64; *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4, at paras. 25-26; *Bellwoods Brewery Inc. v. 1896842 Ontario Limited*, 2023 ONSC 2845, at paras. 13-1.

[53] The parties did not assert any surrounding circumstances relevant to the issues before me: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.

[54] In my view, reading the agreement as a whole, in accordance with good business sense, it was implicit that if Anbros was able to obtain terms acceptable to the defendants, even if they were not substantially the same as the terms set out in the LOI, the brokerage fee would be due. It would make no commercial sense if Anbros presented an offer with different terms that were acceptable to the defendants, but the defendants would not have to pay the commission. There is also language in the LOI that supports this. The last sentence of the LOI relating to the Broker Fee stated: "this letter shall serve as an irrevocable letter of direction to the lender's or borrower's solicitor based on this, or otherwise acceptable terms as evidenced by a signed Term Sheet." [Emphasis added]

[55] By signing the Letter of Interest, and paying the $25,000 deposit, the defendants signified that the terms set out in the Letter of Interest were otherwise acceptable to them such that the broker fee would be due and payable if a finalized term sheet in accordance with such terms was issued.

[56] Mr. Sagoe admitted that the terms set out in the Commitment were very similar to the Letter of Interest.

[57] The only difference between the Letter of Interest and Commitment raised by the defendants **in argument and by their lawyer**, was that the interest rate expressed in the Letter of Interest was different than the way the interest rate was expressed in the Commitment.

[58] In that regard, interest in the Letter of Interest was expressed in the following way:

> Floating at greater than 8.25 % Per Annum or the TD Capital Trust Posted Bank Prime Rate **of** 5.80 % Per Annum funded per the Advance of Funds provision herein.

[59] The interest in the Commitment was expressed in the following way:

> Floating at the greater of 8.25 % per annum, or the TD Canada Trust Posted Bank Prime Rate of Interest from time to time **plus** 5.80 % per annum.

[60] In my view, sophisticated parties like the defendants would recognize that this was nothing more than a typographical error in that the word "of" in the Letter of Interest should be "plus." It makes no sense otherwise as the rate in the Letter of Interest could never float at the greater amount between 8.25 % and 5.80 %, since 8.25 % would always be higher than $5.80 %. The fact that the defendants never asked for clarification at the time supports the conclusion that they understood this.

[61] In any event, the defendants provided no affidavit material indicating that they misunderstood the interest rate in the Letter of Interest and/or their position that they rejected the Commitment because they understood the interest rate in the Commitment to be different than the interest rate set out in the Letter of Interest. Even when Mr. Sagoe was cross examined, he did not say he misunderstood this. In fact, his cross-examination evidence showed that he actually appreciated that the word "of" should have been "plus."

[62] The following exchanges took place that show this:

> Q. The interest rate is floating at the greater of 8.25 per annum or the TD Canada trust posted prime rate, sorry, posted bank prime rate of 5.80 per annum. Is that correct?
>
> Ms. Therrein: Plus.
>
> Ms. Manaharan: Plus, sorry
>
> Ms. Therrein: Yes, okay
>
> Ms. Manaharan: Yes, I guess the word is missing here. Plus, yes
>
> Ms. Therrein: Right
>
> Ms. Manoharan: Sorry. Plus, yes, 5.80. Is that correct?
>
> A. Mm-hmm.

[63] Later in the cross examination a similar exchange took place.

> Q. Okay. Then in the Letter of [Interest] you have this calculated interest rate, which is again, the floating of the greater of 8.25 % per annum and the TD posted rate plus 5.8 percent. Is that correct.
>
> A. Yeah, Mm-hmm.

[64] At this point, counsel for Mr. Sagoe intervened to point out that the provision did not actually say that, but Mr. Sagoe never did. Indeed, Mr. Sagoe's counsel intervened in that way several times essentially giving evidence, to point out issues that Mr. Sagoe was not raising on his own in response to questions or in his affidavit. What is notable is that nowhere did the witness say that he did not understand the interest rate reflected in the Letter of Interest and thought that it did not mean the lesser of 8.25 % and prime plus 5.8 %. He did not say it in his affidavit, and he did not say it during his cross examination even when his counsel intervened to make the point.

[65] With respect to the required equity contribution, given that the LOI did not require any equity contribution from the defendants, the defendants would have been within their rights to reject a term sheet that had such a requirement, had they not indicated that this was acceptable to them by signing the Letter of Interest.

[66] Even though the equity had to be slightly higher at $1,542,000 in the Commitment instead of $1,500,000, in the Letter of Interest, this was not a significant difference given the size of the loan and the fact that the defendants were prepared to walk away from $30,000 in deposits by walking away from the financing offered. Again, the defendants never raised this small difference between the Letter of Interest and the Commitment at the material time, also demonstrating that this was not a material difference or why they rejected the Commitment.

[67] Further as noted Mr. Sagoe agreed that the Commitment was never presented on a take it or leave it basis, that there was a negotiation back and forth between the parties and that if they had an issue, they could have raised it. They had already successfully negotiated a change to the way in which the Broker Fee would be paid and yet they never sought to negotiate any of the terms in the Commitment on the basis that they were not substantially similar to the Letter of Interest which they could have done.

[68] Thus, the defendants signed a Letter of Interest and paid a $25,000 deposit signifying that the terms in the Letter of Interest were acceptable to them. Then, the defendants received a Commitment that was substantially the same as the Letter of Interest. Then, they rejected the Commitment without indicating any substantial differences between the Letter of Interest and the Commitment at the relevant time or seeking to negotiate it at all. Instead, they returned to the terms of the LOI saying that they did not accept the Commitment because it was not substantially the same as the LOI. This was disingenuous in all the circumstances.

[69] I agree that the defendants walked away from the Commitment, not because Andros failed to fulfil the terms of the LOI by providing loan terms that were acceptable to the defendants, but for some other undisclosed reason which made them change their minds about the Letter of Interest that they had already signified contained acceptable terms.

[70] In doing so, they breached the terms of the LOI that implicitly, if not expressly, required payment of the brokerage fee once Andros provided terms that they had signified were acceptable to them.

[71] See *Citifund Capital Corp v. Wedge Plaza Development Corp*.2005 BCSC 1501 at para 28 where the court came to the same conclusion in similar circumstances. In that case the parties

entered into an agreement in which the plaintiff broker would secure construction financing for a developer. They signed an agency agreement outlining the general terms which said that upon a commitment to a loan being given substantially in accordance with the terms of the agency agreement, the plaintiff broker would earn a commission. The plaintiff secured a lender and the defendant signed an initial engagement letter provided by the lender and paid the deposit. Although the loan was for less than what was contemplated in the agency agreement, the borrower was aware of the amount as they executed the lender's initial engagement letter. Thus, by procuring lending terms that were demonstrably acceptable to the borrower, the broker earned his fee even though the loan amount was lower than in the initial agency agreement.

[72] My conclusion might have been different had the defendants raised any significant differences between the Letter of Interest and the Commitment at the time of rejection, or had they sought to negotiate any small differences that may have existed without success.

[73] I add that the defendants had an obligation to perform the LOI in good faith. It was not good faith performance to signify that the terms in the Letter of Interest were acceptable to them, and thus their implicit agreement that the broker fee would be payable if the term sheet ultimately provided was the same or substantially the same as the Letter of Interest, and then return to the terms of LOI in order to reject the Commitment, citing the difference between them.

[74] In all the circumstances, this was a tactic to avoid paying the broker fee which Anbros had earned. I conclude that the defendants simply wanted to walk away from any financing altogether for reasons unrelated to the acceptability of the financing provided.

[75] Finally, I address one additional contractual interpretation argument made by the defendants. They argue that as a matter of contract, in any event, no amount would ever be due under the terms of the LOI unless a finalized term sheet was accepted and signed by them. They reference the following wording in the LOI:

> "The Borrower acknowledges that the Commitment Fee and Broker Fee will be earned and payable upon the issuance of a Term Sheet substantially in accordance with this Letter of Intent."

[76] They argue that "issuance" means a financing that is actually accepted and signed by the defendants. This is plainly wrong as if that is what the parties meant, they would have used the words "accepted" and "signed" instead of "[issued]." As well, there would be no reason to put the language in the LOI regarding the Term Sheet being "substantially in accordance with the [LOI], if that were the case." If the defendants had to actually accept it for payment of the Broker Fee, to be due, they would have full discretion and this wording would not be needed. In other words, the meaning the defendants want me to find makes these words meaningless. Finally, the word "signed" is used elsewhere in the agreement. If the parties meant "signed" by "issued," they would have used the word signed.

[77] The defendants' interpretation here is also inconsistent with the LOI that provides that in the event that the funding of a loan was not completed for any reason other than the lender's default, the full fee would be payable to Anbros.

[78] I find that Anbros procured financing that was substantially in accordance with terms that were acceptable to the defendants and that the funding of the Commitment was not completed for a reason related to the lender's default. Therefore, the brokerage fee is due.

[79] The total brokerage fee was $93,000. Taking into account the $5,000 already paid, the broker fee due and owing is $88,000.

[80] I encourage the parties to settle costs and interest and when the interest should run from. If they do so, they may provide me an Order. If they are unable to agree, they may make submissions no longer than 5 pages with Anbros within 5 days and the defendants within 5 days thereafter.

Papageorgiou J.

Released: April 15, 2024

CITATION: Anbros Financial Inc. v. 2528367 Ontario Inc., 2024 ONSC 2202

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ANBROS FINANCIAL INC.

Plaintiff

– and –

2528367 ONTARIO INC., MICHAEL SAGOE and OKOLAWALE OLASIMBO

Defendant

REASONS FOR JUDGMENT

Papageorgiou J.

Released: April 15, 2024