

Court of King’s Bench of Alberta

Citation: A5 Investments Inc v Pro-Pipe Service & Sales Ltd, 2024 ABKB 590

Date: 20241003
Docket: 2003 10955
Registry: Edmonton

2024 ABKB 590 (CanLII)

Between:

A5 Investments Inc.

Plaintiff

- and -

Pro-Pipe Service & Sales Ltd.

Defendant

**Reasons for Decision
of the
Honourable Justice A.K. Akgungor**

I. Introduction

[1] This matter involves a claim by the Plaintiff, A5 Investments Inc. (“A5”), for the payment of an invoice that it issued to the Defendant, Pro-Pipe Service & Sales Ltd. (“Pro-Pipe”). Pro-Pipe retained A5 to assist it in procuring financing. The determination of whether or not the invoice is properly payable by Pro-Pipe requires an interpretation of the retainer agreement between the parties.

[2] The matter came before me by way of a summary trial. No witnesses were called and the parties agreed that their affidavits would constitute the evidence at the summary trial. A5 questioned representatives of Pro-Pipe and the transcripts of that questioning are contained within A5's affidavit evidence. Pro-Pipe did not question any representatives of A5 and agreed to proceed to trial without conducting questioning.

II. Background

[3] The facts underlying this matter are largely uncontested. Where the parties part ways is in how the retainer agreement should be interpreted.

[4] A5 provides financial planning and brokering services. The principal of A5 is Popoola Akande ("Mr. Akande").

[5] Pro-Pipe is in the business of providing downhole tubulars for the oil and gas industry. Dan Porodo ("Mr. Porodo") is the sole owner and President of Pro-Pipe. Mr. Joshua Summerland ("Mr. Summerland") acted as the Chief Financial Officer of Pro-Pipe.

[6] Pro-Pipe engaged A5 for the purpose of providing financial planning services and assistance in obtaining financing. The parties entered into an engagement letter dated June 26, 2019 (the "Engagement Letter"). The relevant portion of the Engagement Letter provides as follows:

Compensation

I am compensated by my client. My compensation is 6% of the total financing you require and have agreed to obtain. *8% if total financing obtained is more than you requested for and are willing to take it.* On signing this letter of engagement or at an agreed time and date, my client will pay the lower of 50% of the compensation or \$25,000. This compensation is usually refundable if I am unable to get you the financing you require less any administrative expenses. [Italics in original]

[7] In accordance with the terms of the Engagement Letter, a \$25,000 deposit was paid to A5 by Pro-Pipe on July 2, 2019. The \$25,000 deposit was to be deducted from the 6% financing fee arising from whatever credit facilities that A5 was able to procure on Pro-Pipe's behalf.

[8] Shortly after the Engagement Letter was signed, Mr. Akande initiated discussions with his contact at the Canadian Western Bank ("CWB") with a view to brokering credit facilities for Pro-Pipe in accordance with the Engagement Letter. According to Mr. Akande, as a result of those discussions, the CWB sent a draft term sheet to Mr. Porodo on July 10, 2019 (the "Draft Term Sheet").

[9] The Draft Term Sheet contained general terms and conditions under which CWB was willing to entertain an application for credit from Pro-Pipe. Two credit facilities were referred to in the Draft Term Sheet: (1) a demand operating loan in the amount of \$2,000,000; and (2) a business visa facility in the amount of \$50,000 (the "Operating Facilities").

[10] Mr. Akande attests that Mr. Porodo signed the Draft Term Sheet on August 12, 2019 and transmitted the same to the CWB. For his part, Mr. Porodo does not recall being presented with the Draft Term Sheet nor does he recall conveying his acceptance of those terms to either Mr. Akande or the CWB. Mr. Porodo attests that the only document he was presented with as far as

CWB was a commitment letter dated September 10, 2019 that provided a \$1,250,000 operating loan and \$50,000 in credit card loans (the “Commitment Letter”).

[11] The Draft Term Sheet is appended to Mr. Akande’s affidavit as Exhibit “B”. The last page of the Draft Term Sheet contains two signatures on behalf of CWB and one signature on behalf of Pro-Pipe. On my review of the document, the signature on behalf of Pro-Pipe, which is dated August 12, 2019, appears to be the signature of Mr. Akande and not that of Mr. Porodo. Indeed, the signature on the Draft Term Sheet matches Mr. Akande’s signature on the Engagement Letter.

[12] In any event, whether or not Mr. Porodo saw or agreed to the Draft Term Sheet, there is no dispute that the Commitment Letter was signed by Pro-Pipe.

[13] Pro-Pipe confirmed both at the outset of the trial and within their submissions in their brief that it does not contest that A5 procured the Operating Facilities in accordance with the terms of the Engagement Letter. Accordingly, Pro-Pipe accepts that it is required to pay 6% of the amount of the Operating Facilities (\$78,000) less the \$25,000 deposit previously paid. In the result, Pro-Pipe agrees that it owes A5 \$53,000. GST would also be payable.

[14] The issue that remains in dispute between the parties revolves around an equipment line of credit for \$1.3 million (the “Equipment Line”). The central disagreement between the parties is whether the Equipment Line is financing that Pro-Pipe “required and agreed to obtain” such that it would trigger compensation for A5 within the terms of the Engagement Letter.

[15] The first mention of the Equipment Line in the evidence before me appears in a November 24, 2019 invoice e-mailed to Pro-Pipe by A5 on the same date. The invoice states simply that it is for a Loan Amount of “\$1,300,000 (Equipment Line)” and the commission rate is 6% which results in a commission of \$78,000 plus GST for a total amount owing of \$81,900.

[16] Mr. Summerland replied to the receipt of the invoices in an email dated November 26, 2019, which was addressed to Mr. Porodo and Mr. Akande and cc’d to an individual named Linda Dudak. With respect to the Equipment Line, Mr. Summerland states: “Pro-Pipe has not been presented with a term sheet regarding the equipment line and therefore has not had the opportunity to review and to accept, to respond to or reject its content.”

[17] Mr. Akande responded to Mr. Summerland stating that he would call him shortly. Emails exchanged between November 26 and 27, 2019 demonstrate that Mr. Akande and Mr. Summerland were not able to connect over the phone during that time and accordingly, Mr. Akande provided a response by email at 5:01 p.m. on November 27, 2019. With respect to the Equipment Line, and in specific response to Mr. Summerland’s comments about not receiving a term sheet, Mr. Akande stated as follows: “As per the numbers, you have asked many times and I have told you we are looking at a total of about \$1.3 million in Equipment line. As per the terms of the loan, security would be similar to the operating line and hence they are waiting to see the security obtained before they’ll provide an approval”.

[18] It was clarified during argument that Mr. Akande responded to Mr. Summerland’s November 26, 2019 email within the body of Mr. Summerland’s email. Mr. Akande’s comments in response are described as being “in red”. Although the emails in evidence before the Court were not in colour, Mr. Akande’s comments can be differentiated from Mr. Summerland’s comments in that Mr. Akande’s response comment appears after a hyphen in each paragraph.

[19] The next document that refers to the Equipment Line is an email dated December 9, 2019 from Mr. Akande to Mr. Summerland, cc'd to Mr. Porodo and Ms. Dudak. In that email, Mr. Akande states as follows:

Hello Dan,

We now have approval for equipment line of \$1 million. The remaining \$300,000 will be approved when we provide the payout statement for the loans.

Rates will be dependent on the type of equipment, age and amortization period. It will be provided before you proceed on each drawdown. If you are not satisfied, you can then go elsewhere and the equipment line would still be there for you.

Having said that, I have asked then to give me a range of the rates were are looking at.

Thanks.

Popoola

[20] There does not appear to be any further discussion between the parties about the Equipment Line, as least in evidence before me, until January 17, 2020. On that date, Mr. Summerland emailed Mr. Akande, Mr. Porodo and Ms. Dudak. He states: "To update, the Pro-Pipe operating line of \$1.25 million is in place and functioning in part; the credit card has just now been received and there has been no term sheet or offer received for the equipment line."

[21] Much of the January 17, 2020 email relates to concerns about getting the Operating Facilities up and going. These issues are no longer relevant to the extent that Pro-Pipe now concedes that it owes A5 compensation for procuring the Operating Facilities. The only other mention of the Equipment Line in the January 17, 2020 email from Mr. Summerland states: "Pro-Pipe has received an invoice from A5 for funding of the equipment line. This has not occurred, therefore this invoice is rejected".

[22] Mr. Akande responded to Mr. Summerland on the same day. With respect to the Equipment Line, Mr. Akande states:

We got you approval for the Equipment Line of \$1.0 million and \$300,000 take out on existing equipment leases on December 9, 2019.

You immediately informed the bank that we no longer represent you.

If you don't have an offer from the bank, it is not our fault but your fault because you did not allow us to conclude our work. By the way, I was confident that the bank would be issuing you the offer, so no brainer on this.

[23] There is no further communication between the parties after January 17, 2020 in evidence. A Statement of Claim was filed by A5 on July 6, 2020 and the matter has come to this Court for determination.

[24] In his Affidavit filed on April 26, 2023, Mr. Porodo stated as follows:

9. After obtaining the loan facility from the CWB Commitment, the Plaintiff then advised that a further \$1,300,000 would be available for an equipment line and equipment loan.

10. There were a number of issues for Pro-Pipe in proceeding with the equipment loan/line:

(a) Pro-Pipe already had existing equipment lines which CWB advised would need to be paid out with the equipment line supplied by CWB, so this would result in simply switching from one lender to another with very little benefit other than consolidating under one lender's roof, all while incurring legal fees, accounting fees, application fees and broker's fees along the way.

(b) Even if Pro-Pipe was not required to pay out their existing equipment credit facilities, the only reason that the Plaintiff was engaged was to obtain an operating line that does not require the justification of purchased equipment, but can be used as is operationally necessary. Pro-Pipe had no need to acquire additional equipment, so even if the equipment line was in addition to Pro-Pipe's existing equipment line, it would not be of any use.

(c) Furthermore, I was advised that they would likely need to obtain guarantees from the unrelated corporations once again. I was not willing to do so again.

11. As a result of the above, Pro-Pipe did not proceed with obtaining the CWB equipment line that was put forward by the Plaintiff. As a result, Pro-Pipe had gone from an initial promise of \$2,500,000 operating line which was used to entice the Plaintiff's retainer, then being provided a commitment for an operating line of \$1,250,000, but supplemented with a \$1,300,000 equipment line that Pro-Pipe did not need or want, all supported by unrelated corporations which impacted my business partners.

III. Issues

[25] The sole issue before the Court for determination is whether the Equipment Line is financing that Pro-Pipe "required and agreed to obtain" such that it would trigger compensation for A5 within the terms of the Engagement Letter.

[26] I note here that Pro-Pipe also filed a Counterclaim against A5. However, counsel confirmed at the outset of the trial that Pro-Pipe has abandoned the Counterclaim.

IV. Position of the parties

(a) A5

[27] A5 submits that, having arranged the \$1.3 million Equipment Line for Pro-Pipe, it discharged its obligations pursuant to the Engagement Letter. In return, Pro-Pipe is obliged to pay the 6% commission. A5 points to the January 17, 2020 email from Mr. Summerland as evidence that Pro-Pipe acknowledged receipt of the credit facilities. It points further to the November 26 and 27, 2019 emails as evidence that Pro-Pipe asked for the Equipment Line. It

notes that there would not have been discussion about the Equipment Line had it not been requested by Pro-Pipe. A5 then took steps to facilitate or make available that credit.

[28] A5 submits that Pro-Pipe “agreed to obtain” the Equipment Line when the November 26, 2019 email was sent regarding the term sheet for the Equipment Line. A5 says that a signed commitment letter is not required to establish that Pro-Pipe “agreed to obtain” the Equipment Line. The requirement of a commitment letter is not reflected in the express wording of the Engagement Letter. To require the signing of a commitment letter as an indication that Pro-Pipe agreed to obtain the financing would be to insert a condition precedent in the Engagement Letter that does not currently exist. In effect, it would result in a re-writing of the bargain between the parties.

[29] A5 argues that it made available an Equipment Line of \$1,300,000 to Pro-Pipe. Pro-Pipe cannot now simply state that it did not want the Equipment Line and, through its own actions, deprive A5 of payment to which it is entitled under the Engagement Letter. Whether or not, Pro-Pipe could meet the conditions for the Equipment Line financing was a separate issue. Similarly, whether or not the Equipment Line was ultimately funded is not the issue. When A5 facilitated the Equipment Line for Pro-Pipe, it had discharged its obligations under the Engagement Letter and was entitled to payment. The fact that Pro-Pipe engaged in email communications with A5 about the Equipment Line was sufficient to demonstrate that it had “agreed to obtain” the Equipment Line.

(b) Pro-Pipe

[30] Pro-Pipe submits that the Engagement Letter cannot be interpreted to mean that all that A5 had to do was find a lender who says that it will provide the financing without also including the specific terms and conditions of that financing. In that event, the lender could come back with a ridiculous interest rate, just shy of a criminal rate for example. This would not be financing that Pro-Pipe would reasonably accept, but on A5’s interpretation, Pro-Pipe would still be required to pay the 6% commission fee even though it would end up without the credit facility. Pro-Pipe says the mischief with this interpretation is obvious. A5 could continue to arrange financing without specific terms and conditions related to term or interest rate and as long as it provided a general financing option to Pro-Pipe, it could collect its commission. This could occur over and over again without any input from Pro-Pipe on the terms of the financing.

[31] Pro-Pipe asserts that “agreed to obtain” should be interpreted as a meeting of the minds on all the terms and conditions of the financing. The emails exchanged on November 26 and 27, 2019 demonstrate that matters were not yet at a stage where Pro-Pipe had “agreed to obtain” the Equipment Line. Pro-Pipe points to the statement made by Mr. Akande in his November 27, 2019 email that security would be similar to the operating line and hence the reason they are waiting to see the security obtained “before they’ll provide an approval”. Pro-Pipe argues this is evidence that the Equipment Line was not even yet approved by the lender to be offered to Pro-Pipe. To that extent, the Equipment Line still had not been facilitated by A5.

[32] Pro-Pipe points further to the email of December 9, 2019. While Mr. Akande states in that email that approval has now been obtained for the equipment line of \$1 million and the remaining \$300,000 will be approved upon provision of the payout statements, it is plain that the terms and conditions of the financing are still up in the air. As stated by Mr. Akande, “rates will be dependent on the type of equipment, age and amortization period. It will be provided before you proceed on each drawdown. If you are not satisfied, you can then go elsewhere and the

equipment line would still be there for you. Having said that, I have asked then to give me a range of the rates we are looking at”.

[33] Pro-Pipe submits that it could not have “agreed to obtain” the Equipment Line when it was not yet aware of the terms and conditions on which the Equipment Line would be based. Pro-Pipe asserts that, at minimum, a draft term sheet agreed to by Pro-Pipe would be required to evidence that it had agreed to obtain the Equipment Line. A commitment letter signed by Pro-Pipe with respect to the Equipment Line would also have satisfied the question of whether Pro-Pipe had agreed to obtain the Equipment Line. However, there is neither a draft term sheet nor a commitment letter with respect to the Equipment Line.

[34] Pro-Pipe also urged me to apply the doctrine of *contra proferentum* in finding against A5’s interpretation of the Engagement Letter. In response to a question from the Court as to whether I would first need to find the contract ambiguous in order to apply *contra proferentum* principles, Pro-Pipe took the position that the language of the contract is ambiguous. Pro-Pipe suggested that the fact that there are two counsel arguing over the interpretation of the Engagement Letter necessarily suggested that the language of the contract was ambiguous.

[35] In reply, A5 countered that parties can come to court with differing interpretations of a contract but that does not make the contract ambiguous. In A5’s view, the Engagement Letter is clear that A5’s sole obligation was to facilitate the availability of the Equipment Line. That is all the contract required A5 to do. The fact that Pro-Pipe agreed to obtain the Equipment Line is evidenced by the email discussion that it engaged in with A5 about the Equipment Line.

V. Analysis

(a) Legal principles

[36] The goal of contractual interpretation is to ascertain the objective intent of the parties at the time the contract was made *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 49 (“*Sattva*”); *Trico Developments Corporation v El Condor Developments Ltd*, 2020 ABCA 132 at para 28 (“*Trico*”).

[37] When interpreting a contract, the Court must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract: *Sattva* at para 47.

[38] Courts ought not to sanction contractual interpretations disconnected from economic reality. Commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: *Trico* at para 29.

[39] Subjective evidence of a party’s intentions does not determine the proper meaning of a contract: *Sattva* at para 59.

[40] Legal principles specific to broker arrangements were outlined in *Anbros Financial Inc. v. 2528367 Ontario Inc.*, 2024 ONSC 2202 (CanLII) at para. 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) commission is also payable where a lender is introduced and who is ready to make a loan on acceptable conditions.

(b) Interpretation of the Engagement Letter

[41] The central issue to be determined in this case is the meaning of “financing you require and have agreed to obtain” as used in the Letter of Engagement. It must also be determined whether the Equipment Line was financing that Pro-Pipe required and agreed to obtain.

[42] The Letter of Engagement was signed on or around June 26, 2019. There was no evidence presented with respect to the negotiation of the Letter of Engagement or the surrounding circumstances that existed at the time that the contract was formed.

[43] Further, the evidence surrounding the genesis of the parties’ discussions about the Equipment Line is limited. The first documentary evidence related to the Equipment Line is the invoice sent to Pro-Pipe on November 24, 2019. Presumably, however, this was not the first time that Pro-Pipe had heard anything about the Equipment Line. It would be very surprising if the parties got to the point of an invoice for the Equipment Line financing without there first having been at least some discussions surrounding the Equipment Line.

[44] Counsel for A5 indicated that the parties’ discussions about the Equipment Line were not solely in written correspondence. He stated that there were a number of telephone conversations about the Equipment Line as well. I accept that there must have been discussions between the parties about the Equipment Line prior to November 26, 2019.

[45] However, neither party testified as to the content of those telephone conversations, nor did they refer to the content of any telephone conversations in the affidavit evidence. Accordingly, I do not have the benefit of assessing how those telephone conversations might have shed light on whether the Equipment Line was financing that Pro-Pipe required and agreed to obtain.

[46] The remaining evidence with respect to the Equipment Line is contained within the emails between the parties on November 26, November 27, and December 9, 2019 as well as on January 17, 2020. It is clear that there was neither a draft term sheet nor a commitment letter provided to Pro-Pipe with respect to the Equipment Line. This is distinct from what occurred with the Operating Facilities.

[47] The evidence shows that as of November 26, 2019, Pro-Pipe communicated to A5 that that it had not received any term sheet with respect to the Equipment Line and therefore had not had the opportunity to review and to accept, to respond to or reject its content. In other words, at this point, Pro-Pipe had little, if any, information on what the terms of the Equipment Line financing would be and accordingly was not in a position to make any decisions regarding the Equipment Line.

[48] Some additional information was provided by Mr. Akande in his November 27, 2019 email. Mr. Akande informed Mr. Summerland that the Equipment Line would be for a total of \$1.3 million and that security would be similar to the operating line and hence the reason they are waiting to see the security obtained before they’ll provide an approval. It follows then that as

of November 27, 2019, CWB had not yet provided an approval for the Equipment Line financing.

[49] On December 9, 2019, Mr. Akande confirmed with Mr. Porodo that the equipment line had been approved for \$1,000,000 with \$300,000 to follow when the payout statements were provided. However, the rates were still unknown as they were dependent on the type of equipment, age and amortization period. The rate was to be provided before each drawdown. If Pro-Pipe was not satisfied, presumably with the rate, then it could go elsewhere but the Equipment Line would still be available. A range of the potential interest rates was still being sought from CWB by Mr. Akande.

[50] On January 17, 2020, Pro-Pipe communicated that still no term sheet or offer had been received for the Equipment Line. A5 responded by stating that it had obtained approval for the Equipment Line of \$1.0 million and \$300,000 take out on existing equipment leases on December 9, 2019. It is unclear to me why, if the Equipment Line was approved by CWB on December 9, 2019, no term sheet or commitment letter had been provided by January 17, 2020.

[51] Do these circumstances demonstrate that Pro-Pipe required and agreed to obtain the Equipment Line so as to trigger the compensation payable to A5 in the retainer agreement? In my view, they do not.

[52] The lynchpin in this analysis is what was meant by the parties when they used the words “agreed to obtain” in the Engagement Letter. The ordinary and grammatical meaning of “agreed to” is that there must be some form of understanding or bargain between the parties. In other words, there must have been a meeting of the minds between both Pro-Pipe and A5 that Pro-Pipe would obtain the Equipment Line. In my view, this would have required some positive action on the part of Pro-Pipe which demonstrated this agreement.

[53] However, the evidence does not demonstrate that Pro-Pipe communicated an agreement of this nature to A5. Rather, what it communicated to A5 both on November 26, 2019 and January 17, 2020 was that it had nothing to go on in assessing the terms of the Equipment Line. The Draft Term Sheet and the Commitment Letter for the Operating Facilities contained details such as repayment terms, interest rates, lender fees, security requirements, borrowing conditions, financing reporting requirements and conditions precedent, among other terms. None of these details appear to have been available to Pro-Pipe with respect to the Equipment Line.

[54] A5 submits that all it was required to do to be entitled to compensation was to obtain an indication from a lender that it would provide financing of some nature to Pro-Pipe. As I understand this argument, A5 is saying that all it was required to do to earn its commission was put an offer of financing in front of Pro-Pipe. What happened after in terms of whether the financing was funded or whether Pro-Pipe actually used the financing was none of its concern. Even if I accept this interpretation of the Letter of Engagement, I am still unable to find that an offer of financing for the Equipment Line was, in fact, put in front of Pro-Pipe. Matters had not yet progressed to that point at the time in the invoice was issued on November 24, 2019.

[55] While it appears that A5 had obtained approval for a \$1.3 million Equipment Line, the terms of this financing were still unknown and there was no independent confirmation from CWB (in in form of either a draft term sheet or a commitment letter) that it was prepared to advance the loan. If the terms of the financing remained an unknown, then it is unclear how Pro-Pipe could have agreed to obtain what it did not know.

[56] Further, the fact that a financing offer had not yet ripened seems to be tacitly acknowledged by Mr. Akande in his January 17, 2020 email where he stated that “if you don’t have an offer from the bank, it is not our fault but your fault because you did not allow us to conclude our work. By the way, I was confident that the bank would be issuing you the offer, so no brainer on this.”

[57] I have considered here whether the Draft Term Sheet could somehow be interpreted as providing the terms and conditions in relation to the Equipment Line as well as the Operating Facilities. While the Draft Term Sheet contemplates potential financing of up to \$2,050,000 and to that extent, it might be argued that the amount was intended to include the Equipment Line to some degree, I do not see how that can be case.

[58] The Draft Term Sheet clearly indicates that the credit facilities being outlined are a demand operating loan and a business visa. There is no reference to any Equipment Line. Further, the amounts of the Equipment Line (\$1.3 million) and the Operating Facilities (\$1.3 million) do not equal the \$2,050,000 contemplated in the Draft Term Sheet. Rather, the more plausible explanation is that CWB initially stated that \$2,000,000 might be available in the form of a demand operating loan but once security was obtained and other due diligence undertaken, the amount that the CWB was ultimately prepared to advance as a demand operating loan was \$1,250,000, as reflected in the Commitment Letter.

[59] In my view, the interpretation urged by A5 is not consistent with sound commercial principles and good business sense. As argued by counsel for Pro-Pipe, on A5’s interpretation of the Letter of Engagement, all it would need to do is facilitate financing of some nature (which could later be found to include terms just shy of a criminal rate of interest, for example) and it would be entitled to compensation. An agreement where one party is required to accept any financing arrangement procured on its behalf, without regard to any specific terms of the financing, appears to fly in the face of sound commercial principles.

[60] Support for this conclusion appears in the principles of broker arrangements as set out in the *Anbros* case. In considering these principles, I am mindful that it is the terms of the parties’ bargain on the financing that must ultimately govern whether a commission is payable. While similarly noting that whether a commission is payable will depend on the parties’ contract, *Anbros* also outlines two situations where a commission will be payable. First, 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. Second, a commission is also payable where a lender is introduced and who is ready to make a loan on acceptable conditions.

[61] In the second scenario, it does not matter whether a loan actually results. A commission will still be payable if a lender is put forward who is ready to make a loan on acceptable conditions. Here, it may well be that a lender was put forward who was ready to make a loan but the piece that was lacking was whether the loan was being made “on acceptable conditions”. The conditions of the loan were simply unknown or unavailable to Pro-Pipe.

[62] In *Texas Industries Ltd. v. Unicon Environmental Planning Ltd.*, 1978 CanLII 3260 (ABKB), the Court considered a term of a partnership agreement which required the plaintiff to assist in finding interim and permanent financing. It was argued on behalf of the plaintiff that it discharged this obligation by simply making attempts to find financing. This argument was rejected by the Court which concluded instead that the interim financing had to be in fact

obtained at least to the extent that a lender had committed itself to advancing a loan on terms agreeable to the plaintiff and defendant.

[63] While the facts in *Texas* are somewhat distinct from those in the present case, the finding in *Texas* appears to support the notion that a financing offer is not successfully procured unless it also contains terms and conditions, which can then be assessed by the party seeking the financing arrangement.

[64] Finally, I do not view my finding that Pro-Pipe did not agree to obtain the Equipment Line as re-writing the terms of the Engagement Letter to include a requirement for a signed commitment letter. Agreement to obtain the Equipment Line could be provided in many forms: by way of email discussions, by way of formal correspondence, by way of a signed term sheet or by way of a signed commitment letter. In the present case, my conclusion is simply that Pro-Pipe did not agree to obtain the Equipment Line as there were no clear terms or conditions of the financing on which an agreement could be formed.

[65] In the result and on the basis of the evidentiary record before me, I find that Pro-Pipe did not agree to obtain the Equipment Line and therefore there is no commission payable to A5 in relation to the Equipment Line.

[66] I note here that I have placed little weight on the information with respect to the Equipment Line as set in Mr. Porodo's April 26, 2023 Affidavit. In his Affidavit, Mr. Porodo articulates a number of reasons that it did not proceed with an Equipment Line. However, it is not clear that any of this information was conveyed to A5 at the relevant time. To that extent, I prefer to rely on the emails between the parties on November 26, November 27, and December 9, 2019 and January 17, 2020 which reflect matters as they unfolded at the relevant time.

[67] Given my finding that Pro-Pipe did not agree to obtain the Equipment Line, I do not need to consider the application of *contra proferentum*. Further, and in any event, *contra proferentum* should not be applied where there are sophisticated parties, represented by lawyers and where each had a meaningful opportunity to participate in the negotiation of the instrument: *Royal Bank of Canada v Swartout*, 2011 ABCA 362 at para 48. While I was provided with no evidence surrounding the negotiation of the Engagement Letter, the parties to the Engagement Letter are corporate entities, each appearing to be sophisticated in commercial practices, and both having access to legal counsel. Accordingly, this would not likely be an appropriate situation in which to apply *contra proferentum* in any event.

VI. Conclusion

[68] By consent of the parties, A5 is entitled to its commission for the Operating Facilities of \$78,000 less the \$25,000 deposit, for a total of \$53,000. GST is also payable.

[69] A5 is not entitled to any commission with respect to the Equipment Line as the Equipment Line was not financing that Pro-Pipe required and agreed to obtain.

[70] Interest and costs remain to be addressed. Pro-Pipe asked that I first make a finding with respect to what commissions were owing. It then requested an opportunity to address interest and costs once that determination was made. A5 did not object to this approach.

[71] As such, I invite the parties to discuss the issues of interest and costs. If they are unable to reach agreement on the issues of interest and costs, I will retain jurisdiction over those issues and would ask that the parties then advise me whether they would prefer to reconvene to make oral submissions on interests and costs or whether they would prefer to address interests and costs in written submissions. Arrangements will then be made accordingly.

[72] I thank both counsel for their able and helpful submissions in this case.

Heard on the 15th day of March, 2024.

Dated at the City of Edmonton, Alberta this 3rd day of October, 2024.

A.K. Akgungor
J.C.K.B.A.

Appearances:

Idowu Ohioze
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