Citation: Terrafund Financial Inc. v. 569244 B.C. Ltd. et al
2000 BCSC 1719
Date: 20001129
Docket: C9944672
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TERRAFUND FINANCIAL INC.

PLAINTIFF

AND:

569244 B.C. LTD.
3557537 CANADA INC. AND
WESTERN DELTA LANDS PARTNERSHIP DOING BUSINESS AS
DELTA FRASER PROPERTIES PARTNERSHIP AND THE SAID
DELTA FRASER PROPERTIES PARTNERSHIP

DEFENDANTS

REASONS FOR JUDGMENT
OF THE
HONOURABLE MADAM JUSTICE BEAMES
(IN CHAMBERS)

Counsel for the Plaintiff:	T. Delaney
Counsel for the Defendant, 3557537 Canada Inc.:	J. Shore
Counsel for the Defendant, 569244 B.C. Ltd. and Delta Fraser Properties Partnership:	D. Towill
Counsel for the Defendant, Western Delta Lands Partnership:	K. Stephens
Date and Place of Hearing:	November 15, 2000 Vancouver, B.C.

INTRODUCTION:

[1] The plaintiff applies, pursuant to Rule 18A, for judgment against the defendants for $72,164.49, plus interest and costs, representing the balance it claims is owing as a commitment fee and costs associated with a lending transaction.

ISSUES:

[2] The facts in this case, which I will deal with shortly, raise the following issues:

1) Was there a binding agreement between the plaintiff and 569244 B.C. Ltd., obligating the latter to pay a commitment fee and costs?

2) If there was a binding agreement, was that agreement revoked or repudiated by subsequent actions of the plaintiff?

3) If there was a binding agreement, which was not revoked or repudiated, is the plaintiff entitled to judgment against all, or just some, of the defendants?

BACKGROUND FACTS:

[3] The plaintiff is a commercial lender. 569244 B.C. Ltd. ("569244") is the legal owner of property referred to as the Burns Bog in Delta, British Columbia. It holds the lands as the bare trustee pursuant to a declaration of Bare Trust and Agency Agreement dated February 3, 1999, between Western Delta Lands Partnership ("Western Delta") and 3557537 Canada Inc. ("3557537") and 569244. Western Delta and 3557537 are the registered and beneficial owners of the shares of 569244. The Delta Fraser Properties Partnership ("Delta Fraser") is the partnership formed pursuant to a Partnership Agreement dated January 18, 1999 between 3557537 and Western Delta.

[4] In March of 1999, the plaintiff was contacted by a mortgage broker, Capital Pacific Mortgage Corp., concerning a request for financing on the Burns Bog property. The mortgage broker provided, in its letter of March 10, 1999 to the plaintiff, significant detail about the property and about the proposed loan. The plaintiff was advised that title to the land in question was in the name of 569244, which was to be the borrowing entity. The plaintiff was advised that 569244 was owned by 3557537 and Western Delta. Further, the plaintiff was advised that there would be no personal guarantees under the loan. The plaintiff was advised that the financing which was being sought was first mortgage financing in the amount of $2,535,000, to replace an existing first mortgage, and that there was a $25,000,000 second mortgage in favour of the Province of British Columbia.

[5] After an exchange of correspondence and a meeting involving Nick Westeinde ("Westeinde"), an authorized representative of Western Delta, the plaintiff sent a letter to 569244 setting out the terms and conditions upon which the plaintiff would be prepared to proceed with financing. That letter was returned to the plaintiff with handwritten notations and changes on the face of it. On April 12 or 13, 1999, the plaintiff wrote again to 569244, care of the mortgage broker, setting out the revised terms on which the plaintiff was prepared to proceed and secure a commitment. The letter concluded with the following:

> This letter constitutes an expression of interest only and should not be construed as a commitment. This application is open for acceptance until 5:00 p.m. on Wednesday, April 14, 1999.

569244, by its authorized signatory, agreed to and accepted the terms on April 13, 1999.

[6] On April 22, 1999, Blake, Cassels & Graydon, solicitors for Delta Fraser, wrote to the plaintiff, indicating that they understood from Westeinde that discussions were ongoing between Delta Fraser and the plaintiff regarding a commitment for financing. As solicitors for the Delta Fraser partnership, they advised as to some of the particulars of the partnership. On April 23, 1999, the solicitors wrote again to the plaintiff, providing further information, including that legal title to the lands in question was registered in the name of 569244, as a bare trustee and in trust for Delta Fraser. The law firm also confirmed that 569244 would be the borrower under the credit facility and would grant the mortgage as security for the credit facility.

[7] On April 26, 1999, the plaintiff wrote what has been referred to by the parties as the "Commitment Letter". That letter set out that the application for a loan had been approved, under terms and conditions detailed in the letter. The borrower was shown as 569244. The commitment fee was defined as being $88,725, which was to be "deemed earned, due and payable to the lender upon acceptance of this commitment letter." By the Commitment Letter, the plaintiff acknowledged receipt of $10,000 which had been paid on the acceptance of the April 12 or 13, 1999 correspondence referred to above. A further $15,000 was to be paid upon acceptance of the Commitment Letter by 569244 and the balance of the commitment fee was to be deducted from the initial advance of loan proceeds.

[8] Included in the terms of the Commitment Letter were the following:

10. Security

> (a) A first mortgage charge and general assignment of rent and/or leases on the Borrowers freehold interest in a 1,000 Acre Property located in Burns Bog, Delta, B.C. (the "1,000 Acre Property") which is legally described as Parcel 1, Reference Plan 8648, District Lot 437, New Westminster District.
>
> (b) Any other security deemed necessary by the Lenders' solicitor; not to include any personal guarantees or collateral security.
>
> All security shall be in a form approved by the Lender and its solicitor.

15. Registration in Advance

> At the option of the Lender this commitment may be cancelled and deemed null and void if the loan documents are not registered and the funds not advanced on or before May 31, 1999.

18. Costs

> The Borrower will be responsible for all costs associated with this contemplated transaction, including legal and other costs incidental to the loan, the drawing of the security documents, and advancing the funds thereunder.

19. Acceptance

> Kindly indicate your acceptance by returning one executed copy of this letter to our office by noon on Friday, April 30, 1999, along with the further $15,000 deposit, otherwise this offer, at the option of the Lender will expire.

[9] The Commitment Letter had an attached schedule, Schedule A, the terms and conditions of which were incorporated into the Commitment Letter. Schedule A contained the following terms and conditions:

> This Commitment is conditional upon the following terms and conditions, any or all of which may be waived at the sole discretion of the Lender.
>
> **A. Disbursement of Funds**:
>
> The loan funds will be disbursed upon all of the conditions herein being fulfilled, including the mortgage being registered free and clear of all financial encumbrances, except those encumbrances outlined in the preceding commitment letter. Nothing in this Commitment will obligate the Lender to advance funds.
>
> **H. Mortgage Registration:**
>
> It is understood that neither the preparation nor the registration of any documents contemplated herein shall bind the Lender to advance the funds or any un-advanced portion thereof, it being agreed that the advance of funds or any part thereof, from time to time, shall be in the sole, absolute, unfettered and unqualified discretion of the Lender.
>
> **K. Joint Obligations:**
>
> If the Borrower is comprised of more than one person, the obligations of the Borrower herein shall be the joint and several obligations of all and each of the persons comprising the Borrower and every reference to the Borrower shall be deemed to be a reference to all and each of the persons comprising the Borrower.

[10] On April 30, 1999, 569244, by its authorized signatory, signed the Commitment Letter by signing an endorsement to the letter reading as follows:

> We hereby agree to accept the mortgage loan on the terms and conditions as set out herein and agree to pay all costs incurred by Terrafund Financial Inc. whether or not the loan is made.

[11] The executed page of the Commitment Letter was sent by fax to the plaintiff by Westeinde, under cover of a fax cover page from Western Delta, and the $15,000 was forwarded by Davis & Company, with a cover letter which referred to the payment as a commitment fee payment.

[12] On May 11, 1999, counsel for the plaintiff delivered mortgage documentation to Blake, Cassels & Graydon, showing only 569244 as the borrower.

[13] On May 18, 1999, Blake, Cassels & Graydon, on behalf of Delta Fraser and 569244, wrote to counsel for the plaintiff, attaching a letter from the solicitors for the province with respect to the province's position concerning the financing, in view of the province's position as the second mortgage holder. In that letter, counsel for the province raised the issue of the borrowing structure for the first mortgage, and said the following:

> We assume that the Partnership will be the Borrower under the Terrafund transaction as is consistent with the province's loan, rather than having the bare trustee be the borrowing entity. We presume that this structure will be reflected in the documentation and that we will be provided with drafts of all documentation for our review and approval prior to execution by the Partnership.

[14] This was stated as being a condition upon which the province would accept the refinancing. By covering letter, Blake, Cassels & Graydon requested the plaintiff's counsel to telephone to discuss the issues raised in the province's correspondence.

[15] On that same date, counsel for the plaintiff responded to the letter, and a subsequent telephone discussion, with a number of comments, including the following:

> We had understood that 269244 [sic] British Columbia Ltd. was the legal and beneficial owner of the property. It appears from your letter that a partnership

> is in fact the beneficial owner. Accordingly, we ask that you provide us with a copy of the Partnership Agreement as well as a copy of the Trust Agreement or Declaration. The security previously granted to you must now be amended so as to secure both of the legal and beneficial ownership. The letter to your firm from Mr. Bozzer [counsel for the province] assumes that the Partnership is the Borrower. We also require clarification.
>
> [insertion mine]

[16] As requested, counsel for Delta Fraser and 569244 wrote to plaintiff's counsel on May 21, 1999, enclosing the Partnership Agreement, a copy of the Declaration of Partnership Registration Form, and a copy of the Declaration of Bare Trust and Agency Agreement.

[17] On May 26, 1999, counsel for the plaintiff wrote to counsel for 569244 and Delta Fraser, which letter was referred to by the parties in argument as the "Amendment Letter". Portions of that letter read:

> We refer to the Loan Commitment Letter dated April 26, 1999 from Terrafund Financial Inc. to 569244 British Columbia Ltd. (the "Letter").
>
> The terms and conditions set forth in this letter shall amend and modify the Letter as and to the extent only as set forth herein. Save as expressly modified or amended by the terms and conditions hereof, the Letter and its terms, convenants, and conditions shall remain in full force and effect.
>
> The Letter is amended as follows:
>
> ...
>
> 2. Borrower
>
> > The Borrower shall be 569244 British Columbia Ltd. ("B.C. Ltd.") and Delta Fraser Properties Partnership ("Delta") jointly and severally. The convenants of Delta to the Lender shall be binding upon Delta and its partners.
>
> 3. Security
>
> > In addition to the Security described in the Letter, Delta shall issue and grant in favour of the Lender a first equitable mortgage and charge (in the form approved by the lender's solicitors) of all of Delta's interest in and to the 1,000 Acre Property ... Each of B.C. Ltd. and Delta shall grant a General Security Agreement over their respective personal property at any time used in, on, upon, or in connection with the 1,000 Acre Property and shall grant a Deposit Agreement as to the Letter of Credit or other interest reserve.
> >
> > ...
> >
> > Kindly arrange for B.C. Ltd. and Delta to indicate their respective agreement to the amendments to the Letter as described herein by signing in the space provided below and returning to us this signed letter no later than June 4, 1999.

[18] On May 27, 1999, counsel for the plaintiff forwarded a second set of mortgage and security agreements, adding Delta Fraser and its partners as parties to some of the security. This correspondence also enclosed the plaintiff's solicitor's letter of May 26, 1999, referred to above, which was described by the plaintiff's solicitors as "constituting an amendment to the loan commitment letter".

[19] An affidavit filed on behalf of the plaintiff in support of the application before me attaches two documents from the First Supplemental List of Documents of 3557537. The first is a fax dated May 27, 1999 from Westeinde to B.J. Seaman, a principal of 3557537, including the following statement:

> The two remaining provincial objections to the Terrafund loan appear to have been overcome; this loan could therefore now complete. If the partnership does not now proceed with it, there is a very good chance that the broker's fees, (for 2% or $50,000), the Lender for the balance of his fees ($63,725) and the Lender's legal fees (est. $2,500 to date) would be claimed. This totals $116,225.

[20] The second piece of correspondence, another fax from Westeinde, dated June 1, 1999, includes the following:

> The Terrafund $2,535,000 loan commitment has been accepted by the Partnership. ...

[21] The evidence of David Posnikoff, ("Posnikoff"), for the plaintiff, is that he had a few discussions with Westeinde in and around the original intended closing date for the transaction,

May 31, 1999 about difficulties with completion of the loan transaction. None of the difficulties identified by Westeinde were related to the terms of Amendment Letter.

[22] On June 2, 1999, counsel for the plaintiff wrote to counsel for 569244 and Delta Fraser. That letter was noted to be further to the correspondence of May 18 and 27, 1999, and made reference to the Loan Commitment Letter of April 26, 1999 from the plaintiff to 569244. The letter contained the following:

> The Commitment Letter provides that funds must be advanced on or before May 31, 1999. It also provides that time shall be of the essence.
>
> The security documents have been prepared and forwarded to you for execution by the Borrowers. We have addressed the complications arising from the confusion concerning the identity of the Borrower and its unregistered interest in the land which will form security for the loan.
>
> The balance of the commitment fee as described in the Commitment Letter is now due.
>
> Our client wishes to emphasize that it has incurred significant expenses in connection with this proposed loan. Our client wishes to express its continued support for the project. The Lender cannot, however, continue to remain committed to this transaction on a "open-ended" basis.
>
> This letter shall constitute notice to the Borrower that the time limited for funding shall be extended only to and including June 11, 1999. After that date, the Commitment Letter shall have expired and the Lender's obligation to fund shall be cancelled. Time shall remain of the essence.

[23] Having heard nothing from any of the defendants between June 2nd and 14th, 1999, counsel for the plaintiff wrote all of the defendants named in this action, to advise that the Lender's obligation to fund the loan had expired, and to demand payment of the balance of the commitment fee plus legal fees, disbursement and taxes. The within action was then commenced.

ANALYSIS:

WAS THERE A BINDING AGREEMENT BETWEEN THE PLAINTIFF AND 569244 B.C. LTD., OBLIGATING THE LATTER TO PAY A COMMITMENT FEE AND COSTS?

[24] Each defendant adopts the submissions of the other defendants with respect to the defences raised to the plaintiff's claim. Consequently, unless the context requires otherwise, when I use the term "defendants", I will be referring to all of the defendants. Succinctly stated, it is the position of the defendants that there is no binding contract between the plaintiff and any of the defendants, due to a failure of consideration.

[25] It is a fundamental principle of contract law that in order to create a binding contract which the law will recognize and enforce, there must be an exchange of consideration between the parties. Consideration is simply something of value received by a promisor from a promisee. It can take the form of a right, interest or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other: *Black's Law Dictionary*, 5th Edition.

[26] As stated by Newbury J.A., in ***Canadian Imperial Bank of Commerce v. Cedar Hill Properties Ltd.***, [1997] 8 W.W.R. 26 at 39:

> If any authority is needed for the proposition that consideration is required in this context, I refer to Fridman, *The Law of Contract*, (3rd ed., 1994):
>
> > If there is no consideration there is no contract; and if there is no contract, there is nothing upon or from which to found or create liability. ...
>
> The act or promise of one party is, as it were, "bought" or "bargained for" by the act or promise of the other; each party exchanges something of value. To create an enforceable contract there must be, as Lennox J. said in *Loranger v. Haines* [(1921) 50 O.L.R. 268, 64 D.L.R. 364 (Ont.C.A.)] "reciprocal undertakings". So, if one party is neither giving anything, nor is promising to do or give anything, there is no consideration for the other party's act or promise. [at 82-3].

[27] In this case, the defendants say that the plaintiff provided no consideration to 569244 in exchange for its promise to pay fees in the Commitment Letter of April 26, 1999, and that a failure to do so resulted in there being no enforceable contract. Pursuant to the terms of the Commitment Letter, and particularly Clauses A and H of Schedule A to the Commitment Letter, cited above, the plaintiff, in the defendants' submission, did not agree to lend any money, and specifically denied any obligation to advance funds.

[28] The plaintiff relies on ***Canada v. Dragon Inn Burnaby Co.***, [1974] F.C.J. No. 202

(F.C.C.T.D.). That case involved an action for a commitment fee which arose after the defendant borrower had procured a loan from another credit source and advised the plaintiff it would not be proceeding with a loan from the Industrial Development Bank, acting as an agent of the plaintiff. In that case, Urie J., at para. 18, said:

> The defendant's third submission that the agreement was invalid because of the lack of consideration also fails because this was a case of executory consideration (i.e. it consisted of an exchange of promises). The bank promised in the future to advance money, provided certain conditions were fulfilled, and the defendant, in turn, promised to fulfill those conditions. Two of the conditions were the payment of a commitment fee and legal expenses in the event that the offer lapsed or the defendant requested the loan be cancelled. The defendant promised to make such a payment both in the application for the loan and in the acceptance of the offer which offer included these requirements. If any authority is required for the elementary proposition in the law of contracts that mutual promises provide valid consideration, it can be found in Cheshire and Fifoot, *Law of Contracts*, 6th ed. where the learned authors state at p.60:
>
>> If A orders goods on credit from B, both A and B are bound from the moment of the agreement, and, if the one subsequently refuses to execute his part of it, the other may sue at once. Yet here no benefit has been conferred upon the defendant nor any detriment suffered by the plaintiff. Mutual promises alone exist, and the plaintiff, in calling upon the defendant to fulfill his undertaking, need show no more than a willingness to implement his own. It is assumed that each promise is equally binding.

[29] The terms of the application for credit in that case are not fully set out in the Reasons for Judgment. However, there is no suggestion in the Reasons for Judgment that the advance of funds pursuant to the application for credit was solely in the discretion of the plaintiff, which, the defendants say and I agree, makes that case distinguishable from the case at bar.

[30] The plaintiff also argues that Clauses A and H in Schedule A to the Commitment Letter must be read in context. It is argued that Clause A should be interpreted to mean that the plaintiff must advance funds pursuant to the Commitment Letter once all of the conditions precedent have been met. Similarly, it is argued that Clause H must be read in the context of possible problems arising in the course of registration, which might entitle the plaintiff not to advance, but subject to that, the lender eventually would become obligated to advance the mortgage funds.

[31] I cannot accept the interpretation urged upon me by counsel for the plaintiff with respect to the plaintiff's discretion. That interpretation does not accord with the clear wording of the clauses in question, nor with the authorities provided to me in the course of submissions.

[32] It appears that this type of absolute discretion clause has been contained in mortgage documentation and loan applications for many years, and has been the subject of consideration in several courts. In ***Schwartzman v. Great West Life Assurance Company and Central Mortgage and Housing Corporation*** (1955), 17 W.W.R. 37 (B.C.S.C.), aff'd (1956), 18 W.W.R. 45 (B.C.C.A.), the plaintiff brought an action against the defendants for damages arising from what the plaintiff alleged was a wrongful refusal to advance monies under the mortgage. The clause in question in that case provided that neither the execution or the registration of the mortgage would bind the mortgagees to advance money and that the advance of money was in the sole discretion of the mortgagees. The trial judge, at p.39, said:

> Now, the discretion given to the mortgagees in this clause in the mortgage to which I have referred is unqualified. It does not depend in any way upon any failure on the part of the plaintiff to observe or perform the contract. It is absolute in its terms. In a case of a refusal on the part of the mortgagees to advance the money or any part of it, no matter what the reason, then, it seems to me, that is the end of the matter. They cannot be compelled to do so. That is the contract the parties entered into. Whether the money, or any part of it, should be advanced is in the sole discretion of the mortgagees. That being so, their failure or refusal to advance the money cannot give rise to an action for damages since, in my view, the defendants were legally justified in refusing to advance the money. The court is without power to assist the plaintiff, though one may feel he was dealt with in a high-handed and arbitrary fashion.

[33] Similarly, in ***Two Hills Rental Properties Ltd. v. First City Trust Co.***, [1982] A.J. No. 605 (Alta.Q.B.), Wachowich, J. considered a case in which there was a commitment letter, referred to as an agreement to lend money in exchange for the security of a mortgage on realty, followed by the actual security agreement required pursuant to the commitment letter. The terms of both the commitment letter and the mortgage provided that the advance of the money was in the sole discretion of the mortgagee. The plaintiff sued for damages arising from the withdrawal of the commitment and the refusal to advance funds. After considering the authorities cited to him, Wachowich J. made the following finding, at para.46:

> In my view the reference initiated in ***Frankel*** [***Frankel Structural Steel Ltd. v. Goden Holdings Ltd.***, [1969] 2 O.R. 221 (Ont.C.A.] and continued in ***Reid*** [***Reid v. Garnet B. Hallowell Ltd.*** (1978), 10 R.P.R. 308 (Ont.M.C.)] and ***Morguard*** [***Morguard Trust Co. v. 100 Main Street East Ltd.***, Ont.Div.Ct., March 16, 1978 (unreported)]

> is only applicable to the situation where there can be found a commitment to advance funds. I would submit that these references are not applicable to the case at Bar in that there is no commitment to advance funds in a certain amount. Rather, there is a provision in both the commitment agreement and the mortgage that the fulfillment by the mortgagor of his obligation (execution of the mortgage etc.) does not impose any obligation on the mortgagee to advance funds. To find that "capricious, arbitrary and selfish action" by the mortgagee could bind him to advance when there is no provision for such a binding obligation in the agreement, would be contrary to the rules of contract law. It therefore follows that the defendant was within their rights under the mortgage; that the decision of whether to advance under the mortgage was totally within the defendant's discretion. Despite the unfairness of this conclusion, this reflects the agreement made by the parties.

[34] Counsel for one of the defendants, in the course of submissions, argued that, in this case, the plaintiff is attempting to "have its cake, and eat it too". In other words, he says, this lender wanted to ensure that it had no legal obligation to advance funds, and consequently, prepared a commitment letter which made the advance of funds solely within its discretion. On the other hand, in this action to recover commitment fees, the plaintiff wishes to argue that its discretion was not unfettered, so as to argue that there was consideration given by it for the transaction.

[35] I have carefully considered the authorities submitted to me, and the submissions of all of the counsel. I have come to the conclusion that there was no consideration on the part of the plaintiff in the form of any sort of commitment to advance funds. Counsel for the plaintiff has not advanced any other argument in support of a finding of consideration. The argument that the parties to the Commitment Letter were sophisticated and represented by counsel does not cure the fundamental flaw arising from a lack of consideration, nor does the argument that at least Westeinde appeared to recognize some potential liability for commitment fees if the defendants, or some of them, did not proceed with the transaction.

[36] Although this finding disposes of the application, I will deal very briefly with the other two issues raised.

IF THERE WAS A BINDING AGREEMENT, WAS THAT AGREEMENT REVOKED OR REPUDIATED BY SUBSEQUENT ACTIONS OF THE PLAINTIFF?

[37] The defendants, as an alternate claim, argue that the plaintiff was not prepared to honour the terms and conditions of the Commitment Letter of April 26, 1999, and that the plaintiff's counsel's letter of May 26, 1999, unilaterally amending the Commitment Letter, amounted to an anticipatory breach of contract. As a result of the amendments demanded by counsel for the plaintiff, the defendants say they were entitled to treat the contract as repudiated, and that 569244's failure to return mortgage documents by the closing date amounted to an acceptance of the repudiation.

[38] The plaintiff, on the other hand, takes the position that it was entitled, under the terms of the Commitment Letter, and particularly, clauses 10 and K, cited above, to insist on adding the partnership and the partnership principals as parties to the Agreement. Alternatively, it is the plaintiff's position that the letter of May 26, 1999 amounted only to an offer to negotiate, and that it was open to the defendants to accept or not accept the terms of the Amendment Letter. On this issue, I must note that there is no evidence in the material before me that the plaintiff was in fact prepared to advance on the terms of the Commitment Letter, at any time after the Amendment Letter was prepared and forwarded to counsel for the defendants.

[39] Clause 10 gave some discretion to the plaintiff's solicitor to require additional security for the loan, but not to include personal guarantees or collateral security. I am satisfied that this clause is not broad enough to cover the addition of parties and security contemplated in the Amendment Letter. Indeed, the additional security set out in the Amendment Letter amounted, in my view, to collateral security, which was expressly excluded in Clause 10.

[40] Clause K, I find, is of no assistance to the plaintiff on the issue of adding parties to the agreement. The original party to the Commitment Letter was a corporate entity, and consequently, in law, could not be said to have been "comprised of more than one person" so as to fall within the terms of Clause K.

[41] On the issue of whether the Amendment Letter can be construed to be an offer to negotiate, the facts in this case are distinguishable from those before the Court of Appeal in ***First City Investments Ltd. v. Fraser Arms Hotel Ltd.*** (1979), 104 D.L.R. (3d) 617 (B.C.C.A.), a case upon which the plaintiff relies. In the ***First City Investments*** case, the borrower initially proposed the alteration of terms. The lender did not accept the proposed alteration but rather responded with a different proposal. In this case, the plaintiff attempted to impose a unilateral change to the terms of the Commitment Letter. The courteous language used by the plaintiff's counsel at the end of the Amendment Letter does not alter its character.

[42] In the circumstances of this case, I am satisfied that the Amendment Letter, unilaterally adding parties and security, amounted to an anticipatory breach of the terms of the Commitment Letter, on the part of the plaintiff. The defendants were entitled to accept the plaintiff's repudiation and treat the contract at an end, and they did.

IF THERE WAS A BINDING AGREEMENT, WHICH WAS NOT REVOKED OR REPUDIATED, IS THE PLAINTIFF ENTITLED TO JUDGMENT AGAINST ALL, OR JUST SOME, OF THE DEFENDANTS?

[43] Had I found consideration so as to make the Commitment Letter an enforceable contract, and had I not found the Amendment Letter to amount to a repudiation by the plaintiff, I would have held 569244 liable for the commitment fee and costs as the named party to the contract, and in its capacity as trustee. However, I would also have found 569244 to have been acting as agent for 3557537 and Western Delta, pursuant to the declaration of Bare Trust and Agency Agreement, and would have held against them as principals.

SUMMARY:

[44] In summary, I dismiss the plaintiff's claim against the defendants. In the event counsel are unable to agree with respect to costs, arrangements can be made to have the matter spoken to before me.

"A.J. Beames, J."
The Honourable Madam Justice A.J. Beames