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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	
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defendant.	)	STEPHANIE YANG
	)	for the defendant
	)	
	)	JUDGMENT DELIVERED:
	)	August 21, 2017

LANCHBERY J.

INTRODUCTION

[1] At the beginning of the trial, the style of cause was amended by consent to reflect the corporate name of the plaintiff as DTZ Winnipeg Ltd. ("DTZ").

[2] DTZ is a corporation incorporated pursuant to the laws of Manitoba and provides services of a commercial real estate broker.

[3] Brandt Properties Ltd. ("Brandt") and Brandt Tractor Properties Ltd. are subsidiary companies of Brandt Developments Ltd.

[4] In the summer of 2011, Polywest Ltd. ("Polywest") began searching for a suitable location in Winnipeg to construct a facility in which it could carry on certain aspects of its business. Its President and CEO, Ted Northam ("Northam"), contacted Guy Magnusson ("Magnusson"), a commercial real estate agent employed by DTZ, to assist in the search. The terms of the agency relationship between Polywest and Magnusson were based upon an oral agreement. The agreed commission to be paid by Polywest, if a suitable property was located, was two point five percent of the base lease rate for the first five-year term and one point five percent of the base lease rate for the following five-year term.

FACTS

[5] The parties filed a joint book of documents (Exhibit 1). The examination of the witnesses involved a review of the individual letters, emails and draft agreements set forth in Exhibit 1. I find it unnecessary to review each of these documents. However, the documents and the oral testimony paint a clear picture of what transpired between the parties and Polywest commencing in the summer of 2011 up to and including early September 2012.

[6] I find the documents disclose the following:

a) By December of 2011, Magnusson located two potential locations for Polywest. These were 3195 McGillivray Blvd. (the "McGarry location") and Unit B, 3700 McGillivray Blvd. (the "Brandt location").

b) Brandt Tractor Properties Ltd. was the registered owner of the Brandt location.

c) The McGarry location was in final negotiations where additional lands would be purchased to allow for the development. This purchase was concluded during the relevant time period.

d) Magnusson updated Northam as to the negotiations taking place at each location.

e) The McGarry location was, as described in the real estate trade, an open book transaction as Martin McGarry is the owner of DTZ. Kevin McGarry is a broker for DTZ. Magnusson at all material times was a sub agent of DTZ. In order to avoid any appearance of a conflict of interest, Magnusson was required to share any information received or developed by him during the course of the negotiations with both the prospective lessor (McGarry) and the prospective lessee (Polywest).

f) This level of disclosure was not required for the Brandt location as Magnusson was not working for Brandt.

g) The Polywest lease specification requirements changed throughout the process. The options considered included a takeover of an existing space, a new build that would share space with Brandt, and eventually a 48,015 square foot new build where Polywest would be the only tenant.

h) Northam advised Magnusson that any lease location required access to a major thoroughfare, and its signage would properly identify the building as a Polywest building.

i) Various term lengths were discussed for the McGarry and Brandt locations, but a ten-year term was the primary focus.

j) By mid March 2012, the outline of a potential lease with Brandt Tractor Properties Ltd. was in place, although lease rates had not been finalized.

k) By early April 2012, the McGarry location was no longer being considered by Polywest as a viable option. Talks had broken down over McGarry wanting to be paid a management fee over and above any negotiated lease fee. Northam was angered by this demand and advised Magnusson that there was only a five to ten percent chance the transaction could be resurrected.

l) In an Industrial Lease dated July 20, 2012 (Exhibit 1 - Tab 67), Brandt Tractor Properties Ltd. and Polywest entered into a 15-year lease for the Brandt location.

VIVA VOCE TESTIMONY

[7] The following witnesses testified for DTZ:

a) Guy Magnusson

b) Ted Northam

c) Wesley Ernest Schollenberg ("Schollenberg") – expert in Manitoba real estate leasing

[8] The following witnesses testified for Brandt:

a) Carmen Lien ("Lien"), Business Development Manager for Brandt

b) Gordon Scraper ("Scraper"), Vice-President of Developments for Brandt

Magnusson

[9] Magnusson advised the Court that he was no longer employed by DTZ. However, he confirmed that he had the authority to testify on its behalf.

[10] Magnusson testified that on or about November 28, 2011, he "cold called" Brandt's head office in Regina after discovering the Brandt location, to determine if the property was available for development.

[11] Magnusson was directed by reception to Lien. Lien advised Magnusson that he knew that Brandt owned land in Winnipeg, but he was unfamiliar with the property. He undertook to make further enquiries and get back to Magnusson.

[12] Magnusson explained the Winnipeg leasing marketplace to Lien. Lien advised Magnusson, and Magnusson agreed that if a lease was entered into that Brandt would not be paying a share of any commission from the lease.

[13] Magnusson acknowledged that, notwithstanding the July 20, 2012 Industrial Lease provided for a 15-year lease, his commission should be based upon a 10-year term. At the time of the filing of this claim, he was unaware of all the terms of the lease between Polywest and Brandt, but now that he has been made aware of the terms, the proper amount of the claim is now $123,600.

Northam

[14] Northam acknowledged that he should be considered as an advocate for Magnusson. He also acknowledged that he believed that Magnusson should be paid a fee for his involvement in the transaction. However, he was of the view that Magnusson was seeking more compensation than he was entitled.

[15] Under cross-examination, Northam disagreed that talks with Brandt and Magnusson were suspended after mid March 2012. He maintained that the Brandt location was always Polywest's fall back position. He testified that after mid March 2012, both projects were running parallel for consideration. Northam denied that after mid March 2012 until early April 2012, Magnusson was no longer involved with the Brandt location. He could not explain the lack of written communication in the joint book of documents.

[16] Northam testified that by April 10, 2012, Polywest was nearing the end of discussions with McGarry. However, his ongoing discussions with Brandt intensified resulting in the execution of the Industrial Lease.

Lien

[17] Lien testified that he was employed by the Brandt family of companies. He also confirmed that ongoing discussions occurred with Magnusson from about November 28, 2011 to mid March 2012.

[18] Lien testified that Northam advised him in early April that he was not to engage in any further discussions with Magnusson. He acknowledged that the only other discussion he had with Magnusson after mid March 2012 was on August 30, 2012. At this meeting, Lien offered Magnusson $10,000 as a gratuitous payment for bringing Polywest to the table. Magnusson rejected this offer outright.

[19] Lien advised that there was no written contract in place with Magnusson, but if there had been, he would have paid a commission to him.

Scraper

[20] Scraper confirmed that he had very little involvement in the Brandt location negotiations. He confirmed this was Lien's project throughout.

[21] Scraper detailed the Brandt corporate structure. At the time of this transaction, the Brandt structure had two companies at the top. Brandt Properties Ltd. held surplus lands owned by the Brandt family of companies.

Brandt Tractor Properties Ltd. owned lands where Brandt dealerships were located.

[22] Scraper testified that in order for an agent to earn a leasing commission the agent would need:

1) to facilitate an offer to lease that was signed by both the property owner and tenant;
2) to bring to the landlord a signed offer to lease that would eventually result in removal of any conditions precedent contained in the offer; and
3) a lease to be executed by both parties.

[23] As a result of these three steps, the tenant takes possession and occupies the building.

Schollenberg

[24] Schollenberg offered an expert opinion on Manitoba's commercial real estate transactions. He agreed that a written commission agreement is preferable in this type of transaction, however, there is no Manitoba law that requires it.

[25] Schollenberg acknowledged under cross-examination that when a client terminates an agent, such a termination must be respected.

[26] Schollenberg also agreed that, although he had been retained by DTZ to provide an expert opinion, he was not provided with the complete contents of Exhibit 1.

POSITION OF THE PARTIES

[27] The arguments advanced by counsel fall into these questions:

a) Was the correct defendant sued?

b) Was there a commission agreement, and if so, did DTZ, through its agent Magnusson, earn that commission?

c) Was DTZ entitled to a commission based upon the doctrine of *quantum meruit?*

Plaintiff's Position

[28] DTZ submits that Polywest, through its agent Magnusson, dealt with Brandt Properties Ltd. The agreed book of documents is replete with references to Brandt Properties Ltd. Brandt employed both Lien and Scraper. The registered owner of the Brandt location was Brandt Tractor Properties Ltd., however, Magnusson's communications with Lien were under the business name Brandt Properties Ltd. Magnusson was entitled to rely upon these representations.

[29] Brandt Properties Ltd. is the company in the Brandt family of corporations that is responsible for "property management".

[30] DTZ submitted that by mid March 2012, the major details of any proposed lease between Polywest and Brandt had been negotiated by Magnusson. As Magnusson had done the groundwork for the deal, it took only nine days for the parties to agree upon the final terms of the lease agreement for the Brandt location once Polywest started to deal with Lien. The final drawings attached to

the Industrial Lease had undergone minor revisions from those drawings exchanged in March 2012. DTZ acknowledged that the term of the lease had been extended from 10 years to 15 years. However, the details were ultimately the same as had been negotiated by Magnusson in mid March 2012.

[31] DTZ submitted that Brandt, by reading in questions and answers from Magnusson's examination for discovery transcript, had adopted those answers as part of its case. (Manitoba Court of Queen's Bench Rule 31.11(1)) Those questions and answers were as follows:

By Mr. Hadubiak

325 Q And that's what that meant to you. Did you discuss that with Mr. Lien that that's all you had to do to get your commission?

A In my mind I did, yes.

326 Q Well, no. Did you – I know what – you told me what is in your mind and I appreciate that.

Mr. Literovich: And I think that's all he can give you, though, is tell you –

By Mr. Hadubiak

327 Q No, what I'm asking is, did you discuss your understanding of what you had to do to get a commission with Mr. Lien? That you can answer for me. Did you discuss that with him?

A Yes.

328 Q You did?

A And the answer was if you bring the tenant that becomes the tenant in the building, you will get a half fee.

329 Q So in the McGarry deal that we were talking about you had a deal that was – an offer letter that was ready to sign, and I think you told me it has a provision in it that talks about your commission and the McGarry's [sic] paying your commission; correct?

A Correct.

[32] DTZ argued that the findings of the decision in ***Lebedynski v. Westfair Foods Ltd.***, 2000 MBQB 144 ("***Lebedynski"***), should be followed.

[33] DTZ submitted that a commission agreement did not have to be in writing. There was sufficient evidence before the Court to conclude that an oral contract for the payment of a commission had been finalized between Brandt and Magnusson.

[34] DTZ argued that the services provided by Magnusson were the effective cause of the Industrial Lease. Further, whether in contract or *quantum meruit*, Magnusson was the effective cause of the contract between Polywest and Brandt and he was owed the agreed commission.

Defendant's Position

[35] Brandt submitted that without a written contract DTZ's claim for commission is invalid. Brandt argued that Magnusson should have placed his commission demand in writing as he had done for the McGarry location. In support of this position, Brandt relied upon the decision of ***Real Estate***

Professionals Inc. v. Calgary Drop-In & Rehab Centre Society, 2015 ABQB 530, 20 Alta. L.R. (6th) 260.

[36] Brandt also submitted and relied upon ***HSBC Bank Canada v. 356533 B.C. Ltd.***, 2001 BCSC 1009, [2001] B.C.T.C. 1009; ***Tolley & Co. v. Skuce***, [1922] S.J. No. 72, 63 D.L.R. 602 (C.A.); and ***Coldwell Banker Pinnacle Real Estate v. Sun Life Trust Co.***, [2000] O.T.C. 5, 95 A.C.W.S. (3d) 5 (Ont. Sup. Ct.).

[37] Brandt contended that DTZ was not the effective cause of the Industrial Lease entered into between Polywest and Brandt Tractor Properties Ltd. Brandt quoted Freedman J. (as he then was) in ***Collette v. Olsechuk and Gutnik*** (1958), 26 W.W.R. 679 at 682, 16 D.L.R. (2d) 563 (Man. Q.B.), in support of its position:

> Subject to exceptions arising from the terms of special contracts, the general principle is plain and is supported by an extensive jurisprudence on the subject. The agent whose work is the effective case, the *causa causans,* of the sale is the one who is entitled to the commission. . . . [T]he court will sometimes find the work of the first agent, who introduced the ultimate purchaser, had spent itself, that the link between it and the ultimate sale made by another agent was broken, and that the efforts of the later agent brought about the sale and were the *causa causans* thereof. In such a case it is customary to speak of the work of the first agent as being merely the *causa sine qua non* but not the *causa causans* of the transaction.

[38] Brandt argued that once Northam terminated Magnusson's services, the continuity of the agency relationship had been broken, and absent this continuity, a commission could not be sustained.

[39] Brandt submitted ***Gordon and Associates Ltd. v. Devon Estates Ltd***. (1987), 77 A.R. 4, [1987] A.J. No. 59 (Alta. Q.B.), for the Court's consideration

and argued that this was not a traditional restitutionary *quantum meruit* claim as no implied contract existed.

[40] Brandt argued that Magnusson never established the terms of a contract with it, never had discussions on the commission expectations with Brandt, never documented the expectation he had about commission and that he never materially contributed to or facilitated the final deal between Brandt and Polywest. Further, DTZ's claim in *quantum meruit* also must fail.

ANALYSIS

[41] To understand the questions posed in this suit, it is important to set forth the framework for commercial leases for a property that is being developed by the lessor for a lessee. Prior to the signing of a lease, the parties must agree on a lease rate. The lease rate is established by estimating all costs of the proposed project, including land, construction, site preparation and what are referred to as soft costs. Soft costs include legal fees, zoning fees, building fees and commissions. In addition, an agreed rate of return for the developer is included in the calculation.

[42] An example of the costing structure is outlined in Exhibit 1 – Tab 36. If there is a change in the costs of the project, whether by virtue of increases or decreases during the negotiation stage, there will be a corresponding change to the lease rate. Exhibit 1 is replete with changes to the suggested building, including increases in square footage and multiple users versus single user. Each led to additional negotiations as to the appropriate lease rate.

[43] Commercial leases have a fixed term. If the lease is for five years, ten years, or fifteen years, the lessee is committed to lease the property for the duration. There is no early exit for the lessee. The lessor wants certainty that its costs will be recovered from the lessee. The lessee wants certainty of term to guarantee that its operations will not be interrupted.

WAS THE CORRECT PARTY SUED

[44] Brandt relies upon the Certificate of Title for the Brandt location (Exhibit 1 – Tab 2) in the name of Brandt Tractor Properties Ltd. in support of its position that DTZ sued the wrong party. I disagree. Magnusson made a cold call to Brandt's head office in Regina. He was placed in contact with Lien who confirmed that he was the person to speak with regarding the Brandt location. Lien's email signature referenced Brandt Properties Ltd.

[45] Magnusson provided Lien with a list of Polywest's building requirements. Lien provided Magnusson with a number of draft drawings for a proposed building to be constructed on the Brandt location. The drawings indicated that the drawings were prepared for Brandt Properties Ltd.

[46] Scraper testified that Brandt Properties Ltd. was the corporate entity that was the registered owner of excess properties for the Brandt family of corporations. He also testified that Brandt Tractor Properties Ltd. was the registered owner of the properties that were occupied by Brandt dealerships. I find that the Brandt location in its final form was solely developed for Polywest and, therefore, could not be considered a Brandt dealership.

[47] The Industrial Lease between Brandt Tractor Properties Ltd. and Polywest dated July 20, 2012 (Exhibit 1 - Tab 67) does not assist Brandt's position. The corporate decision as to the name of the landlord is not relevant because Lien made representations to Magnusson that he was dealing with Brandt Properties Ltd. Further, the Site Plan attached to the Industrial Lease continues to reference Brandt Properties Ltd.

[48] I am troubled by this inconsistency. This is in keeping with Scraper's testimony that Brandt Properties Ltd. would control any property that did not house a Brandt dealership. The Brandt location did not house a Brandt dealership. I find that any inconsistency must be resolved in favour of DTZ.

[49] Magnusson was entitled to rely upon the representations made to him by Lien. I agree that it may have been advisable for DTZ to amend its claim to include any and all Brandt corporate entities, but the fact that it was not done is not fatal to DTZ's claim.

WAS THERE AN AGREEMENT THAT A COMMISSION WAS OWED TO DTZ/MAGNUSSON

[50] Brandt argues it did not enter into a written contract with Magnusson, and therefore no commission is payable. I am not swayed by the case law submitted by Brandt that holds that the lack of a written contract is fatal to DTZ's position. This case law emanated from jurisdictions other than Manitoba where legislation mandated written real estate contracts. This is not the law in Manitoba. Properly formed oral contracts are permissible.

[51] The Canadian Real Estate Association, *The Realtor Code* (December 2011) (Exhibit 1 - Tab 6), suggests the importance of written contracts. I agree it is in the best interests of all parties to reduce an agreement to a written contract. However, in Manitoba written contracts are not mandated. This argument must fail.

[52] The McGarry location commission was specified in writing when an offer to lease had been prepared. This does not equate to Magnusson erring by failing to have a written contract for the Brandt location. I reject this argument.

[53] What I must decide is whether the parties entered into an oral agreement that commission was payable. Magnusson's testimony is that from the outset, he had discussions with Lien about the commission that would be payable if a lease agreement was concluded. I accept his testimony that Lien told him that Brandt would not pay a commission for its portion of the transaction. Lien's inability to remember the details of the conversation cannot be considered a denial. On the balance of probabilities, I accept Magnusson's evidence. It is more likely than not that Magnusson and Lien discussed commissions from the outset and the remainder of the dealings between them was based on this agreement.

[54] I agree with DTZ that by Brandt's counsel reading in questions and answers 325 to 329 from Magnusson's examination for discovery that the answers form part of Brandt's case.

[55] Manitoba Court of Queen's Bench Rule 31.11(1) reads:

> At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of,
>
> (a) the adverse party; or
>
> (b) a person examined for discovery on behalf of, or in addition to the adverse party, unless the trial judge orders otherwise;
>
> if the evidence is otherwise admissible, whether the party or person has already given evidence or not.

[56] It is true that the typical use for an examination for discovery is to impeach the credibility of the adverse party (Rule 31.11(2)). However, Beard J. (as she then was) discussed this issue in ***Lebedynski***, *supra*. She held that Rule 31.11(1) allows a party to read into evidence as part of the party's own case any part of the adverse party's evidence given on the examination for discovery. That is what occurred in this case.

[57] Beard J. also addressed whether once the party had read in portions of the examination for discovery transcript could that party be permitted to withdraw those unfavourable statements. At paragraphs 45 and 46 she stated:

> In this case, the defendant read in key statements from the plaintiff's discovery at the end of the defendant's case. Counsel for the plaintiff elected not to call any rebuttal evidence and completed his argument, in the course of which he discussed the read-ins by opposing counsel. After the plaintiff's counsel had completed his argument, the defendant's counsel began his argument with a concern as to the use to be made of his read-ins from the plaintiff's discovery. After a discussion of the issue, it was agreed that counsel for the defendant would complete his argument and they would argue the effect of the read-ins at a later date. On the return to argue the effect of the read-ins, counsel for the defendant presented the alternative solution of the withdrawal of the read-ins.
>
> As I stated at the time, it would have been inappropriate to allow the withdrawal of the read-ins at that point in the trial. Counsel for the plaintiff did not call rebuttal evidence and had already argued on the

> basis of the evidence as it stood, including the read-ins. Further, I had taken the precaution of warning both counsel of the effect of reading in from the discoveries when counsel for the plaintiff began his read-ins, so both counsel were forewarned. Thus, I found that the *Kirkby* decision [citation omitted] did not apply and that it would be unfair to the plaintiff and inappropriate to allow the withdrawal of the read-ins at that point in the trial.

[58] Brandt closed its case following the read-ins from Magnusson's examination for discovery. At that point, in reaction to what I presumed to be counsel for DTZ rising, I asked him if he had any concerns. Counsel for DTZ stated that he was considering the effect of the read-ins under the Manitoba Rules. I find that by this statement, counsel for Brandt was alerted to potential problems with the read-ins. Brandt made no effort to withdraw those read-ins at any time prior to the commencement of oral argument, nor was comment made with respect to that evidence.

[59] It is clear to me that the read-ins could never be considered contradictions in Magnusson's testimony that affected his credibility. These read-ins have the effect of confirming Magnusson's testimony.

[60] Therefore, I find that an oral contract existed between Brandt and Magnusson to pay a commission on the Brandt location.

WAS MAGNUSSON THE EFFECTIVE CAUSE OF THE LEASE ENTERED INTO BETWEEN POLYWEST AND BRANDT?

[61] Having noted that Northam testified as an advocate for DTZ, I find his testimony to be credible. That testimony is crucial to DTZ's case. By mid March, discussions between Brandt and Polywest had reached a critical juncture on the question of lease rate. In his evidence, Northam did not consider the Polywest

proposal at an end as he considered the Brandt location as his fallback position even though the lease terms were not agreed. I accept Northam's evidence that he did not consider this transaction at an end. Although the negotiations had stalled, they were not abandoned.

[62] I do not accept Lien's evidence that Northam told him that he should cease dealing with Magnusson. I prefer the evidence of Northam that he never told anyone at Brandt to cease dealing with Magnusson. I rejected Lien's testimony that he could not recall any commission discussions with Magnusson, and, at best, Lien's recollection on this conversation seems contrived. Therefore, I prefer Northam's evidence.

[63] The issue to be decided is not whether this conversation occurred, but whether Magnusson was the effective cause of the Industrial Lease entered into between Polywest and Brandt on July 20, 2012.

[64] Scraper's testimony as to when a commission would be earned is important. He said for a commission to be payable, the agent would need:

a) to facilitate an offer to lease that was signed by both the property owner and the tenant;

b) to bring to the landlord a signed offer to lease that would eventually result in removal of all conditions precedent contained in the offer; and

c) a lease executed by both parties.

[65] Finally, as a result of these three steps being accomplished the tenant takes possession and occupies the building.

[66] I find that Magnusson did facilitate the offer. By mid March 2012, the general parameters of the lease had been negotiated between McGarry and Polywest. The framework for the proposed lease was included in an email dated March 11, 2012 between McGarry and Magnusson (Exhibit 1 - Tab 35) for the McGarry location. The square footage was 48,015 and rate of return for the lessor was eight percent. Net rent would be $12.00 per square foot.

[67] On March 12, 2012, Magnusson forwarded to Lien similar numbers, but at a seven percent and seven point five percent rate of return (Exhibit 1 - Tab 36).

[68] In an email chain dated April 9 and 10, 2012 (Exhibit 1 – Tab 60), Northam proposed a 12-year lease with rates for the first seven years being $11.75 per square foot. The rate would increase to $12.50 per square foot for the last five years. Lien rejected that proposal and in response, Northam indicated he has another deal at $11.07 per square foot for five years and $12.07 per square foot for the next five years. Northam's numbers exactly matched the numbers proposed by Magnusson to Lien in Exhibit 1 - Tab 36.

[69] Two days later on April 12, 2012, Lien and Northam, in an exchange of emails, acknowledged that Polywest and Brandt had reached an agreement (Exhibit 1 - Tab 62). Although all of the terms were not specified in the emails, Brandt Tractor Properties Ltd. and Polywest Ltd. signed a lease on July 20, 2012 for approximately 48,000 square feet. The term of the lease changed to a

15-year lease, the agreed lease payments were $12.50 per square foot for the first five years, $13.50 per square foot for the following five years and $14.25 per square foot for the final five years.

[70] Returning to Scraper's evidence, although there was no signed offer to lease, the parties agreed in principle on the details of the lease in the email exchanges between Lien and Northam.

[71] I find the final negotiations that occurred in mid April 2012 between Polywest and Brandt were for the purpose of finalizing the terms of the lease and the quantum of the lease payments. Further, the terms of the agreement reached on April 10, 2012 were based upon the discussions between Lien and Magnusson which ended by mid March of 2012.

[72] If there were any conditions precedent to the acceptance of the lease they were not documented. However, it is obvious that any conditions would have been removed as Polywest and Brandt signed an Industrial Lease on July 20, 2012. The ultimate determining factor was that Polywest occupied the building following the execution of the lease. Applying Scraper's logic, Magnusson earned his commission as he was the effective cause of the lease agreement. Without him Brandt would not have known about Polywest's interest. He negotiated the outline of an agreement which only required financial terms to be negotiated.

[73] It is true that the term of the lease was increased to 15 years, but this can only be considered beneficial to Brandt. The lease rates were increased

through the course of negotiations between April 9 and 12, 2012. The original proposed rate set forth in an email dated March 12, 2012 (Exhibit 1 - Tab 36) presented to be a stumbling block, not a road block.

[74] The square footage was identical. The design of the exterior of the building was the same. I find that any changes that occurred after Magnusson and Lien communicated on March 12, 2012 were minor at best. This was not a new deal. There were only modifications to what Magnusson had presented to Lien.

[75] Brandt argued that the services Magnusson performed were not sufficiently substantial to entitle him to be paid the commission. In effect, he did not earn the commission he claimed was due to him. This argument cannot be sustained. Real estate commissions for commercial real estate are based upon percentages of the base lease rate.

[76] Witnesses referred to an old real estate adage that "what is not earned on the corners is made up on the straightaways". Magnusson invested a large amount of time in the McGarry location. As a lease was not executed by the parties, he received no compensation.

[77] At first glance, Brandt would have me believe that this was not the case for the Brandt location. However, there were differences between the two locations. The McGarry location was an open book transaction. All information and developments in the negotiations needed to be shared with both parties. This is the explanation for what, on its face, appears to be increased activity.

Magnusson had to document every step he took to avoid any complaints that he failed to disclose everything to each side. He was protecting all parties from apparent conflicts of interest.

[78] The Brandt location posed no such danger. Under cross-examination, Northam testified that he could not explain the absence of written communication with Magnusson from mid March 2012 to early April 2012. He maintained that the work was ongoing. I accept Northam's evidence that Magnusson continued to work on securing the Brandt location.

[79] Further, Polywest and Brandt never informed Magnusson that his services were no longer required. Northam confirmed he never terminated his services. The parties continued negotiating in hopes of reaching an agreement, while attempting to cut Magnusson out of the transaction.

[80] I find that Northam is far from an innocent party in the decision not to pay Magnusson's commission. He retained Magnusson to locate a property for Polywest. His silence on the question of commission speaks volumes. Northam knew precisely what was at stake. If the commission was eliminated or reduced, he would benefit from a reduction in the rental rate. Although Northam acknowledged during his testimony that he wanted Magnusson to receive a commission for his work, his expressed surprise at the amount being sought rings hollow. He knew exactly what the commission would be in the event that a lease for his new location was executed. Northam was a willing participant in attempting to squeeze Magnusson, and therefore DTZ, from the transaction.

[81] DTZ's counsel suggested that the commission payable should be based upon the full 15 years of the Polywest and Brandt lease. At the time the claim was filed by DTZ, Magnusson testified that he estimated the amount of the commission due to him as he unaware of the terms of the lease until the discovery phase of this litigation. By the time the trial started, Magnusson was aware of the details of the lease and he testified that DTZ's claim should now be limited to $123,600.

[82] I admire Magnusson's honesty. Although entitled to more, I am granting judgment in favour of DTZ in the amount Magnusson claimed during his testimony. Magnusson testified with the full authority to bind DTZ and his stated position is binding upon DTZ.

[83] Magnusson was the effective cause of the Industrial Lease dated July 20, 2012 between Polywest Ltd. and Brandt Tractor Properties Ltd. Therefore, he is entitled to his commission.

QUANTUM MERIUT

[84] I do not need to address the *quantum meruit* claim as a contract has been established. However, I would have reached the same conclusion as Brandt and Polywest knew that Magnusson, and thereby DTZ, were not rendering their services gratuitously.

WHY SHOULD BRANDT PAY ANY COMMISION WHEN IT TOLD MAGNUSSON THAT IT WOULD NOT PAY A COMMISSION

[85] Although this is not one of the questions posed by either party, it is important to address this issue.

[86] Commission may be payable to an agent by the lessor and lessee if an agreement is reached. Brandt was very clear that it would not pay a commission. Magnusson accepted this without reservation.

[87] However, Brandt's clear direction on not agreeing to pay a commission does not absolve it of paying the agreed commission. The commission was part of the soft costs of development.

[88] If Polywest had directed Brandt not to include the commission by indicating that Polywest would pay the commission directly, this may have resulted in a different conclusion.

[89] However, Polywest wanted to ensure that Magnusson was paid. I do not accept Lien's evidence that the offer of $10,000 was a gratuitous payment. I conclude that the offer was an attempt to undercut Magnusson's agreed commission and avoid litigation. Brandt was aware, through Lien, that it was responsible to pay Magnusson.

[90] Therefore, Brandt bears the responsibility for the commission.

CONCLUSION

[91] Judgment is granted in favour of DTZ in the amount of $123,600 as well as pre- and post-judgment interest at the prescribed rate. Costs are awarded in favour of DTZ.

[92] Although Magnusson testified that he is no longer employed by DTZ, any monies awarded would be subject to the terms of his compensation arrangement with DTZ that were in effect in 2012. It is ordered that DTZ fully pay the amounts due to Magnusson within 10 days of receipt.

[93] If counsel cannot agree on costs, they may schedule an appointment before me to speak to them.

_____ J.