SUPREME COURT OF NOVA SCOTIA

Citation: *HarbourEdge Mortgage Investment Corporation v. Can*Sport Incorporated*, 2024 NSSC 98

Date: 20240409
Docket: 467712
Registry: Halifax

Between:

HarbourEdge Mortgage Investment Corporation

Plaintiff

v.

Can*Sport Incorporated and Lee Adamski

Defendants

DECISION

Judge: The Honourable Justice Ann E. Smith

Heard: May 1, 2, 3, 4, June 14, 15, and 16, 2023, in Halifax, Nova Scotia

Counsel: Sara L. Scott and Adam R. Downie, for the Plaintiff
Chris Robinson, for the Defendants

By the Court:

Introduction

[1] This action concerns a claim by Can*Sport Incorporated ("Can*Sport") and Lee Adamski against HarbourEdge Mortgage Investment Corporation ("HarbourEdge"), the company that loaned them approximately two million dollars. This loan was to provide initial funding for the construction of a complex to house a hockey school, tenants and a multi-pad hockey arena in Bedford, Nova Scotia. I will refer to this as the "Project" or the "Complex".

[2] The building was never built; there were no tenants, no school, no new ice rinks and Can*Sport did not repay the loan. HarbourEdge wants its money back.

[3] Can*Sport and Lee Adamski say they owe nothing to HarbourEdge and claim close to five million dollars for breach of contract, loss of profits and other damages as though the Complex was up and running and turning a profit.

[4] The parties agree that the relationship between them is governed by the contract they signed, which was a "Letter of Commitment" or "Commitment".

The Position of the Parties in Brief

[5] Can*Sport and Adamski claim that HarbourEdge was solely responsible for its difficulties in completing the Project. They say that HarbourEdge acted in bad faith throughout the contractual arrangement and, in particular, at crucial junctures where it failed in its duties to them.

[6] HarbourEdge responds that the difficulties in completing the Project are the direct fault of Adamski, including delay and cost overruns.

[7] Part of the contractual arrangement was that Can*Sport would be advanced funds in three swatches, or "facilities", but there were preconditions which had to be met before each swatch would be advanced. The parties disagree as to whether those preconditions were met, and whether the preconditions for access to the third swatch of funds were waived by HarbourEdge. That third swatch, "Facility 3", was for funding the hard costs of construction in an amount close to eight million dollars.

[8] All of this started in the fall of 2014 when Can*Sport made a proposal for mortgage funding to HarbourEdge. HarbourEdge thought that the proposal looked interesting and eventually the parties entered into the Commitment on November 24, 2014. The term of the Commitment was two years, ending on December 31, 2016, or January 7, 2017 (nothing turns on this difference).

[9] By August 2016, with only four months or so left in the term of the Commitment, no construction had started. One of the initial contractors, Harbour Construction, which had been hired to do site work (breaking and clearing rock) had submitted another invoice for work it had done. That invoice was for an amount which exceeded the budget for site work provided by Can*Sport and was part of the Commitment.

[10] HarbourEdge was concerned. It took the position that there were cost-overruns and that the Project was not on track. Around the same time HarbourEdge learned that a proposed tenant of the yet to be built building had pulled out of the Project. This tenant had been a part of Can*Sport's initial proposal for mortgage financing.

[11] Shortly thereafter, in early November 2016, HarbourEdge learned that Harbour Construction had filed a lien against the property for non-payment of invoices totalling over $400,000. Lee Adamski had not advised that there were such invoices.

[12] Later in November 2016, HarbourEdge advised Lee Adamski that it would not advance more money to Can*Sport for the Project. Can*Sport could not find alternate financing. The Project was over.

[13] In March 2017 HarbourEdge demanded payment from Can*Sport and Lee Adamski for 100% of the loan balance, plus interest, fees and expenses. The demands included a Notice of Intention to Enforce Security under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c, c. B-3. At the date of demand, the amount owing under the loan was $2,478,132.12. Interest has been accumulating on that amount at a rate of 12.00 % per annum.

[14] In June 2021 HarbourEdge successfully moved before this Court to have a receiver appointed over the assets of Can*Sport, including the property. A receivership order was issued appointing MNP Ltd. ("MNP") as receiver of all of the assets and properties of Can*Sport. The recovery under the receivership order

has not yet been determined, including any amount that could still be owing by Can*Sport to HarbourEdge.

[15] This trial concerned only whether HarbourEdge breached the Commitment with Can*Sport and damages that flow from such breach.

The Witnesses

[16] The following witnesses gave evidence:

(a) Lee Adamski, the principal of Can*Sport

(b) Larry Dunn, the CEO of HarbourEdge

(c) Tim Dwyer, the President of HarbourEdge

(d) Alan Harlow, a principal of Jetco Holdings Inc.

(e) Kermit Phillips, the principal of Harbour Construction

[17] Other players in this matter were Michael Lawless, Jaime Ford and Victor Fisher. Michael Lawyer was a mortgage broker who assisted Lee Adamski obtain mortgage funding and facilitated Can*Sport's initial contact with HarbourEdge for the purpose of financing. Jaime Ford worked in the accounting department at HarbourEdge as its "Mortgage Administrator" and had initial review of invoices submitted for payment by Can*Sport. Victor Fisher was HarbourEdge's Atlantic Canada director or representative.

[18] None of these individuals testified at trial.

Issues

[19] In order to determine this dispute, the Court must resolve the following issues:

(a) Did HarbourEdge breach the Commitment it had with Can*Sport?

(b) If HarbourEdge did so, what damages flow from such breach?

[20] For the reasons set out below, Can*Sport and Adamski's claims, however framed against HarbourEdge, are dismissed.

Issue 1: Did HarbourEdge breach the Commitment?

The Parties

[21] Lee Adamski is the principal of Can*Sport. Can*Sport is a company whose purpose was to acquire land on which the Complex would be constructed, 44 Verdi Drive, Bedford (the "Property"). This land was owned at the time by St. Paul's Home. The Property already had a dome built on the site which housed a hockey rink, dressing rooms and related space (the "Dome"). Can*Sport's plan was to keep the Dome and build an additional multi-story building which would house two more ice surfaces and space for tenants who would be users of the facilities.

[22] Lee Adamski testified that in the fall of 2014 he had significant experience over many years in developing various residential and commercial projects in the Halifax Regional Municipality ("HRM") from conception to completion. His vision was to create and develop a sports training complex for high school level, elite athletes in HRM. His evidence was that there was nothing comparable at that time in HRM, and elite young athletes had to leave this Province to go out West to attend high school and receive such training. At the time, he was thinking of ice hockey for young men and women, but his vision was to include other sports as well. He envisioned a hotel-like residence and school where elite young athletes from anywhere in the world who excelled at sport could come, receive their education as well as top level training.

[23] Can*Sport needed funding to acquire the Property and build the Complex and approached HarbourEdge to borrow construction financing of approximately $11 million in order to do so.

[24] HarbourEdge is an extra-provincial corporation, based in Collingwood, Ontario. HarbourEdge is in the business of lending money, often to fund developments and other commercial projects. It has investors whose funds it uses for lending purposes. At the time of its dealings with Can*Sport it had approximately $25 million in its investment portfolio.

[25] Larry Dunn is the Chief Executive Officer of HarbourEdge. He testified that he had significant experience in developing and building commercial and industrial properties prior to joining HarbourEdge.

[26] Tim Dwyer is the President and Chief Operating Officer of HarbourEdge. He testified that his background prior to founding HarbourEdge was in banking and lending to the commercial and residential sectors.

[27] Bob Turbitt is a chartered accountant by training and practiced public accounting for many years prior to joining HarbourEdge.

[28] Tim Dwyer, Larry Dunn and Bob Turbitt each make up HarbourEdge's three-person credit committee. A decision of the credit committee could be made on the agreement of any two of these individuals.

[29] Lee Adamski testified that he first approached the Royal Bank ("RBC") and the Business Development Bank ("BDC") about construction financing for the Project, but neither was interested at that stage. He learned of HarbourEdge through business broker Michael Lawless, who introduced him to HarbourEdge. Lee Adamski's evidence was that he got BDB, RBC and HarbourEdge together and BDC expressed interest in providing take-out funding once the Project was up and running for at least six months. He said that BD conveyed to him that providing such funding, in those circumstances, would be a "no-brainer". He said that RBC expressed similar support. The Court understands from the evidence of Larry Dunn and Tim Dwyer that, in general, "take out financing" is provided by banks and other financial institutions at a much lower interest rate than the initial construction funding that a firm like HarbourEdge provides, given the up-front risks associated with construction projects.

[30] Larry Dunn testified that it would have "absolutely" been a consideration for HarbourEdge that Can*Sport was talking to BDB about take-over funding, although he personally was not at the meeting referred to by Lee Adamski. He described HarbourEdge as a construction lender, not a term lender. He said that HarbourEdge wanted to "get in, lend the money, get paid back out and move on to the next deal". His evidence was that if Can*Sport was having discussions about term financing, that was a positive consideration for HarbourEdge since its commitment would have a start date and an end date.

Can*Sport's October 2014 Request for Mortgage Funding

[31] Lee Adamski testified that the loan which he sought from HarbourEdge was in the range of $12.5 million. He intended to spend this money on an expansion of the existing two rink buildings and the central core building of the Dome, which

would house dressing rooms and a Zamboni area. The second floor would contain a gym, sports bar and restaurant, with the third floor being for the private school.

[32] Lee Adamski prepared a "Request for Mortgage Financing" dated October 2014 to support his request to HarbourEdge for a loan. His evidence was he put this proposal together with support from an architect, estimates from contractors and the assistance of Michael Lawless.

[33] Included in this proposal for funding were "letters of intent" from possible tenants. The first was from "O'Brien Sports Group" ("OBG") dated September 22, 2014 and the second was from Newbridge Academy ("NA") dated September 26, 2014. NA was the entity which pulled out of the Project sometime around August 2016.

[34] Lee Adamski's evidence was that Robert O'Brien of OBG was a sports trainer who approached him about building a 10,000 square foot gymnasium in HRM.

[35] The Letter of Intent from OBG ended by stating, "This letter does not include the terms of the transactions contemplated hereby and accordingly is not intended to be a legally binding agreement. Neither party will be bound until the execution of a mutually satisfactory definitive agreement setting forth all of the terms and conditions". Lee Adamski's evidence was that he understood this language to mean that it was a letter of intent and non-binding.

[36] When asked if he eventually entered into an agreement with Robert O'Brien Lee Adamski said "yes", "for ice use". He said this agreement was with a company which Robert O'Brien started up named Spud Island Holdings ("SIH").

[37] The Letter of Intent signed by the OBG referred to the lease of approximately 10,000 square feet of space for $12 per square feet. Lee Adamski said that he never entered into an agreement with the OBG for leased space in the Complex.

[38] The Letter of Intent from NA provided for a lease rate of $21,000 per month for approximately 12,000 square feet of space. Lee Adamski described NA as an academic and sports training school. Lee Adamski said that this letter stated that it was "non-binding", and that "neither party is under any legal obligation to the other unless and until a definitive Lease Agreement is executed". The Letter of Intent also stated, "No party is obligated to negotiate in good faith". Lee Adamski's evidence

was that he interpreted this Letter of Intent as being non-binding. At the time, NA was operating elsewhere in HRM.

[39] Lee Adamski said that Can*Sport did not ever enter into an agreement with NA, although he said that he tried to do so for one and one-half to two years once the Project got underway. He said that Can*Sport and NA parted ways in 2016.

[40] Can*Sport's funding proposal to HarbourEdge also included a draft Rink Use Agreement between Can*Sport and SPH whereby Can*Sport stated that it would guarantee "2400 hours per year of prime-time ice rentals and 600 hours a year of non-prime time ice rental". Lee Adamski's evidence was that SPH owned the land which Can*Sport eventually purchased from the loan advanced by HarbourEdge.

[41] Lee Adamski testified that he eventually entered into a signed agreement for ice rental with SPH in the existing facility, the Dome, and the future, proposed Facility.

[42] The proposal for funding by HarbourEdge also included a property appraisal of the Property prepared by Atlantic Realty Advisors dated March 30, 2014. The opinion expressed in that appraisal was that the fair market value of the Property was $8 million dollars.

[43] Can*Sport's October 2014 request for funding also included "preliminary drawings" of elevations, ice rinks, the school and common area as well as a "Preliminary Construction Budget" for "Stage One" and "Stage Two". Lee Adamski stated that he and Michael Lawless put the construction budget together, with the form being provided by Michael Lawless and the numbers provided by Lee Adamski.

[44] Lee Adamski's evidence was that he also provided HarbourEdge with "pro-forma" revenue and expense statements for years 1 through 5 of the Complex which he prepared using a form provided by Michael Lawless. These financials anticipated income from ice rental to be 50% more than any other form of income.

<u>The Commitment Letter</u>

The Facilities

[45] HarbourEdge accepted Can*Sport's request for mortgage funding and advanced funding under a commitment letter dated November 24, 2014. The

Commitment Letter sets out the terms of the parties' contractual agreement, including three facilities for financing, with preconditions to be met before funds were required to be advanced under each facility.

[46] The total amount of funding in the Commitment Letter was $11,372,000, broken down as follows:

- Facility 1, to finance land acquisition and closing costs - $1,210,000;
- Facility 2, to finance site works, soft costs and construction deposits - $1,743,375; and
- Facility 3, to finance hard construction costs of the Project - $8,418,625.

[47] Facility 2 and 3 refer to financing construction costs on a "cost to complete basis". Larry Dunn's evidence was that that was how HarbourEdge always loaned on construction projects. He stated that this entailed taking a look at the total cost of the building to be built (both underground and above ground). He said that that was the "total cost". From that would be subtracted any work done. The number reached is the "cost to complete".

[48] Larry Dunn said that the loan was structured in three facilities at the request of Lee Adamski and Michael Lawless. His evidence was that the loan came with a "commitment" or "lender fee" of $455,000. Larry Dunn said that the lender or commitment fee (he equated the two) is a fee paid to HarbourEdge by the borrower, Lee Adamski/Can*Sport. The amount of the fee is typically in the range of 2% of the loan per year. Larry Dunn said that HarbourEdge would use those funds to pay its general operating expenses.

[49] The Commitment also provided for a broker's fee of not more than $40,000 to be paid to the mortgage broker, Michael Lawless, in connection with Facility 1 and $135,000 to the point the loan was fully drawn.

[50] The Commitment also required the borrower, Lee Adamski and Can*Sport, to show equity of no less than $500,000 before any loan payments were made. Larry Dunn said that the purpose of this requirement was to ensure that the borrower had some "skin in the game". He stated that Lee Adamski advised HarbourEdge early on that he had a large investment in the Project at that time, in the range $500,000.

[51] The Commitment had a term ending on December 31, 2016. That was the date by which the construction of the Project was to be completed and the outstanding loan amount paid to HarbourEdge (the "Termination Date").

Security for the Loan

[52] Lee Adamski signed a Promissory Note on behalf of Can*Sport in favour of HarbourEdge in the principal amount of $11,372,000 on January 8, 2015.

[53] Lee Adamski also signed an unlimited guarantee dated January 8, 2015 in favour of HarbourEdge, guaranteeing payment of all debts and liabilities of Can*Sport arising pursuant to the Commitment Letter.

[54] The Loan was also secured by a General Security Agreement between Can*Sport and HarbourEdge, a Collateral Mortgage executed by Lee Adamski on behalf of Can*Sport dated January 8, 2015 providing for a fixed charge on the Property as well as an Assignment of Leases and Rents dated January 8, 2015.

Why Did HarbourEdge Agree to Advance Funds?

[55] When asked why HarbourEdge was interested in the Project, Larry Dunn's evidence was that initially he was impressed by Can*Sport's request for mortgage financing.

[56] When asked what factors HarbourEdge would have considered in determining whether to provide funding for a project, Mr. Dunn said that loan to value was of prime importance, that HarbourEdge had to protect its investors' money. He said that when he saw the land appraisal it seemed reasonable, and it was around $8 million dollars. He stated that HarbourEdge's initial exposure in Facility 1 for the borrower to acquire the land was $1.25 million on an asset that was worth $8 Million. He stated, "our loan to value" at that point was "very very low".

[57] Larry Dunn's evidence was that Tim Dwyer would have been most involved in reviewing this loan application, along with Victor Fisher. He said that Tim Dwyer would have asked him about matters on the construction side.

[58] Larry Dunn was asked about what sort of due diligence HarbourEdge did on receipt of this loan request. He said that the appraisal was the most important part to him. His evidence was that there were three potential tenants which was a good sign.

[59] Larry Dunn stated that he did a google search of NA and saw that it was a school with high performing athletes, and it looked very interesting. He said that he was told by Lee Adamski that the O'Briens had some affiliation to the Pittsburgh Penguins, and he thought they would be a really good addition. Larry Dunn stated that at the time he did not know much about SPH, other than that Can*Sport was buying the land from them. Larry Dunn's evidence was that HarbourEdge did not do a deeper dive in terms of due diligence about the O'Briens, NA or SPH because he felt it was not necessary at that time. He said that HarbourEdge's exposure under Facility 1 was $1.25 million on an asset worth $8 million.

[60] When asked whether HarbourEdge relied upon these three letters of intent or interest when making its decision to lend, Larry Dunn said that they could not rely; that these were expressions of interest. He said that Lee Adamski, as borrower, was very excited about them and that they were his anchor tenants. His evidence was that Lee Adamski led them to believe that he was going to sign leases with these three tenants or users of ice. He said that "tenants" and "users of ice" were interchangeable. He said that as long as these three were bringing in revenue, HarbourEdge would be happy.

The Facilities – Purpose and Preconditions

Facility 1

[61] On January 9, 2015, HarbourEdge advanced Can*Sport the full amount of Facility 1 - $1,210,000. The Commitment Letter provided that the purpose of Facility 1 was to "finance land acquisition and closing costs". The breakdown of the $1.2 million was as follows:

Land purchase	$1,007,000
Estimated legal fees/closing costs	$40,000
Interest reserve	$75,000
Lender fee (Facility 1)	$48,000
Broker fee (Facility 1)	$40,000

[62] Lee Adamski testified that he purchased the Property with the funds from Facility 1.

[63] The Commitment Letter also provided for ten requirements or conditions precedent for funding under Facility 1.

Facility 2

[64] This Facility was to provide total funding of $1,743,375. Its stated purpose was to "finance site works, soft costs and construction deposits".

[65] The breakdown for Facility 2 was as follows:

Interest reserve	$530,000
Architectural Mechanical/Electrical Drawings	$253,500
Steel fabrication deposit	$66,000
Concrete deposit	$114,000
Site work	$379,500
Foundation deposit	$33,375
Roofing deposit	$102,000
Lenders fee	$67,000
Municipal approvals, permits	$198,000

[66] These itemized amounts, apart from the lenders fee, came from Lee Adamski in his request for mortgage funding. Lee Adamski described the "site work" (budgeted at $379,500) as grubbing and rock excavation of the site to make it concrete pad ready for footings and foundations. His evidence was that this was the work a company called Whebby's and Harbour Construction were to perform. The next contractor on-site would be Jet Co. which would lay the foundations. Jet Co. never did this work.

[67] Lee Adamski's testimony was that Whebby's work cost approximately $75,000 with the remaining $280,000 for site work being in line with Harbour Construction's estimate.

[68] Both Facility 2 and Facility 3 funding also had loan advance requirements as follows:

1. All loan advances will be made against approved invoices excluding HST and will include a provision for required statutory holdbacks of 10%. (Note: The borrower will be required to fund the HST portion of the approved invoices and be responsible for their collection of all applicable HST rebates).
2. Borrower to provide the lender with copies of firm prelease agreements totaling no less than $1,000,000 per annum.
3. Borrower to provide the lender with existing copies of the following:

   (a) Site plan agreement

   (b) Detailed engineering estimates re: site servicing

   (c) Storm water management plan

   (d) Municipal approval to supply municipal water and wastewater services

   (e) Any other documentation or approvals deemed reasonably relevant by the lender.

[69] In addition, Facility 2 had the following requirements or conditions precedent for funding, “met to the lenders satisfaction”

1. Borrower to provide the lender with copies of firm prelease agreements totalling no less than $1,000,000 per annum.
2. Borrower to provide the lender with existing copies of the following:

   (a) Site plan agreement

   (b) Detailed engineering estimates re: site servicing

   (c) Storm water management plan

   (d) Municipal approval to supply municipal water and wastewater services

   (e) Any other documentation or approvals deemed reasonably relevant by the lender.

Facility 3

[70] This Facility was to provide financing of $8,418,625 for "hard construction costs of the Multi-Sports Complex on a cost to complete basis, up to a maximum of $7,958,625 with a lender/broker fee of $460,000.

[71] HarbourEdge provided no funding for this Facility, apart from $100,000 which it says was an advance which was part of the commitment fee and $60,000 which it says was a portion of a broker fee. Can*Sport claims that HarbourEdge waived the preconditions for Facility 3 funding at the end of September 2015.

The Interest Reserve

[72] Each Facility came with an interest reserve. For Facility 1, the interest reserve was $75,000, which was a component of the initial advance of $1.2 million. Larry Dunn described the interest reserve as being the amount set aside to pay 50% of the interest due on Facility 1. The borrower paid the other 50%. The 50% which is set aside is drawn down on a monthly basis by the borrower. Once that amount is depleted, the borrower is responsible for 100% of the interest.

[73] The terms of the Commitment included that Can*Sport was to pay its interest on Facility 2 on a monthly basis through the interest reserve of $530,000, which was allocated in the approved construction budget.

Facility 2 Draws

[74] HarbourEdge made certain advances to Can*Sport under Facility 2, but not the complete amount available. Lee Adamski claims that Can*Sport met all of the preconditions to access Facility 2 funding; HarbourEdge says that Can*Sport did not.

[75] The Court heard much evidence and argument on the issue of whether or not Can*Sport met the preconditions for Facility 2 funding, in particular whether Can*Sport met the precondition of having "firm prelease agreements" totalling not less than $1 million per year in place. Victor Fisher suggested in May 2015 to Lee Adamski that he had met the requirement to have firm preleases. HarbourEdge says that those were not firm preleases and that Victor Fisher did not have the authority to suggest that they were.

[76] Lee Adamski's evidence was that at no time did Tim Dwyer or Larry Dunn ever tell him that he had not provided firm prelease agreements for Facility 2.

[77] Larry Dunn testified that on occasion, HarbourEdge would advance funds if it was in the best interest of the particular project to keep it moving, even if the preconditions for a facility were not met. He said that it was all about loan to value. If HarbourEdge had advanced the entire amount of Facility 2 ($1.7 million) with that amount added to Facility 1, the total loaned of $3 million would still be protected because of the value of the Property, appraised at $8 million. Therefore, the money of HarbourEdge's investors would not be at risk.

[78] HarbourEdge decided to advance Facility 2 funding. Larry Dunn said it was a judgment call on the part of HarbourEdge to keep the Project going. He maintained that HarbourEdge was not obligated to advance funds under Facility 2.

[79] However, at the end of the day the whole issue of whether there were firm preleases in place or not for access to Facility 2 funding is somewhat in the nature of a red herring. The fact is that HarbourEdge chose to advance Facility 2 funding. Nothing in the Commitment prevented it from doing so, whether or not the preconditions for funding under that facility had been met. The Court accepts the evidence of Larry Dunn and Tim Dwyer that HarbourEdge made a decision to keep advancing funds in an attempt to assist Can*Sport to bring the Project along, hopefully to completion.

[80] HarbourEdge decided to stop funding the Project in November 2016, in part because there were not firm preleases in place to advance Facility 2 funding, but also because the entire Project had not, literally, gotten off the ground, with only a few months remaining in the term of the Commitment. Further, by August 2016, the excavator, Harbour Construction, was still on site. The foundation was not ready to be laid. Then Lee Adamski sent draw requests for payments for Harbour Construction in an amount which exceeded Can*Sport's construction budget.

[81] The trigger point for stopping funding, however, was when Harbour Construction put a $400,000 lien on the Property in November 2016. HarbourEdge learned about the lien, not from Lee Adamski, but as a result of reading a media report. HarbourEdge would not lend more money in the face of the lien.

[82] The Court will review these matters later in this decision.

<u>The Draw Down Process in General</u>

[83] Larry Dunn described the draw down process for Facility 2. He said that for each line item the borrower would submit a request for a draw for deposits or for

work done on the architectural and other drawings. That request would be processed by Jaime Ford on a cost to complete basis to make sure that the amount being requested was not over the budget allocation in the Commitment. Jaime Ford would complete the draw request and give it to Tim Dwyer. If she had questions about the request, she would gather information relative to it and provide that to Tim Dwyer. If there were issues, Tim Dwyer would discuss with Larry Dunn or Bob Tircott. If Tim Dwyer determined that there were no issues with the request it would go to the accounting department and be paid.

[84] Larry Dunn said that invoices submitted by Harbour Construction were for time and material. Can*Sport would send the contractors' timesheets and HarbourEdge would pay the time and material. Larry Dunn distinguished this basis for payment from a fixed price contract, where the amount set for the work was "fixed" in advance.

[85] Larry Dunn said that the typical turnaround time between the time a request for funding was submitted and the time it was paid by HarbourEdge was around a month. Larrry Dunn stated that the first few draw requests submitted by Can*Sport had no issues and were processed very quickly.

The Facility 2 and 3 Interest Reserve

[86] Facility 2 and 3 had an interest reserve of $530,000. Larry Dunn's evidence was that this entire amount was set aside, and the borrower did not pay interest on the interest reserve. On a monthly basis HarbourEdge would determine how much interest was due on monies drawn on Facility 2 or 3, and that amount would be deducted from the $530,000. His evidence was that the borrower could not access any of the undrawn interest reserve, that that reserve was solely for interest, and not for other purposes. He said that that reserve was needed to pay interest on the approximately $11 million dollars to be loaned in Facility 2 and 3, on advances as construction proceeded.

Preconditions for Funding Under Facility 2 – the Firm Prelease Agreements

[87] HarbourEdge says that the conditions for Facility 2 were not met by Can*Sport. In particular, it says that Can*Sport did not provide "copies of firm prelease agreements totaling no less than $1,000,000 per annum". Harbour Edge also says that the scope of the Project changed significantly in August 2016 and that

cost overruns were identified by HarbourEdge with little to no explanation or revised budget received from Can*Sport.

[88] Lee Adamski's evidence was that he had firm prelease agreements which he provided to HarbourEdge. He stated that the lessees were SIH and SPH. He referred to a signed agreement between Can*Sport and SPH which provided as follows:

> During the first Season following the closing of the APS (Agreement of Purchase and Sale for SPH land) and in each Season thereafter prior to Project completion, CS (Can*Sport) agrees to sell to SPH…a minimum of 1800 prime time hours of ice time. CS agrees that it will charge SPH or any community group user of the ice at a rate of $210 per hour plus HST (if applicable) (the "Discounted Rate").
>
> During the first Summer Season following the closing of the APS, CS agree to sell to SPH…a minimum of eight hundred prime time hours of floor time for lacrosse. CS agrees that it will charge SPH or any community group user of the floor time at a rate of $65.00 per hour plus HST (if applicable) (the "Discounted Rate"). Availability of the Project for lacrosse after the first Summer Season following the closing of the APS is ion the discretion of CS and is not guaranteed.

[89] Lee Adamski's evidence was that the expected revenue from the ice use agreement with SPH was in the range of $550,000. He said that SPH was an existing user of the Dome and that it wanted a guarantee that they would be able to continue to use that ice as well as ice in the new Facility.

[90] The Agreement with SPH went on to provide that following the first season and for the next nine consecutive seasons, Can*Sport agreed to sell to SPH a minimum of 2000 prime time hours of ice time on the new ice surfaces and on the existing ice surface, with Can*Sport agreeing to charge a rate of $210 plus HST per hour.

[91] The second "firm prelease agreement" which Lee Adamski pointed to in relation to the Facility 2 preconditions was an executed "Ice Rental Agreement" between Can*Sport and SIH dated April 21, 2015. This Agreement provided that SIH would rent no less than 2000 hours of ice time per year at the rate of $210 per hours, with the accumulated rent being no less than $420,000 per year for a proposed five-year term commencing July 1, 2016. Lee Adamski's evidence was that he anticipated revenue from this ice rental agreement of $420,000.

[92] Lee Adamski also referred to a second executed ice rental agreement between Can*Sport and SIH dated May 17, 2015. He described this agreement as reflecting Rob O'Brien's wish to have an upgrade in the ice hours for SIH, with the ice rental

hours increased from 2000 to 2400 at the same rate of $210 per hour. Lee Adamski said that expected revenue from this agreement was $504,000.

[93] With the projected revenue from SPH at $550,000 and the revenue from SIH at $504,000, Lee Adamski took the position that he had "firm prelease agreements totalling no less than 1 million".

[94] In an email to Lee Adamski dated May 15, 2015, Victor Fisher states:

> Hi Lee
>
> Thanks for the Zoning Compliance Letter. I know your (sic) ready to get moving on this project and we're down to one item to satisfy the requirements to fund Facility 2. We're $44,000 short of the $1,000,000 requirement and there was going to be a conversation with the Obrien Group about adding in more rink hours to make up the difference.

[95] Lee Adamski responded to this email saying that he had met with Rob O'Brien and that he would sign for more hours. Lee Adamski then confirmed with Victor Fisher that Rob O'Brien had agreed to sign another ice rental agreement with the 400 upgraded hours. Victor Fisher sent the following message to Lee Adamski on May 20, 2015, copied to Michael Lawless and Tim Dwyer:

> Hi Lee,
>
> Yes that will work. The additional $84,000 puts the leases over the $1,000,000 threshold as required in the commitment letter. So that we can move forward please send a signed copy as soon as it's been ratified.

[96] Tim Dwyer sent a message about an hour later to Victor Fisher, providing as follows:

> Thxs Vic
>
> You may as well get the draw summary vetted by Lee & Mike & submitted into Jaime, so we can process this draw as quickly as possible.

[97] Larry Dunn's evidence was that he understood Victor Fisher's email as saying that he had added up the revenue from the proposed leases and the quantum exceeded 1million. However, Larry Dunn testified that this did not mean that HarbourEdge was confirming that the preconditions for Facility 2 funding had been met. He said that HarbourEdge's credit committee (he, Tim Dwyer and Bob Tircott) was the only one who could make that decision, and they had not done so at that point. He said that Victor Fisher did not have the ability to make that decision.

[98] Larry Dunn's evidence was that the SPH agreement was not a firm prelease agreement because there was an obligation for Can*Sport to sell ice time, but no obligation for SPH to buy that ice time. Larry Dunn said that that message was certainly delivered to Victor Fisher, but he could not say whether Victor Fisher passed that information along to Lee Adamski.

[99] Larry Dunn also testified that he did not deem the proposed ice rental agreement with SIH (2400 hours per year) to be a firm prelease agreement. However, he said that the agreement was closer to what HarbourEdge was looking for. He noted that the agreement was dated May 17, 2015 and it was contemplated that SIH would be occupying the building by July 1, 2016. He said that he doubted that the building would be ready at that point, and the agreement did not provide for the right to change that date.

Delay - 2015

[100] Can*Sport made its first Facility 2 draw request on May 29, 2015. This was to pay deposits from the architect, engineer, steel manufacturer and others. The request also included the entirety of the $67,000 HarbourEdge lending fee in accordance with the Commitment Letter.

[101] At this point Can*Sport still did not have an HRM building permit. Lee Adamski's evidence was that he needed the architectural, mechanical and other design drawings to secure the permit. The evidence showed that the building permit from HRM was still not in hand by mid-July 2015. In fact, it was not issued until October 15, 2015.

[102] It is clear that the start of construction was significantly delayed. Each party now places blame on the other for certain of that delay.

[103] On September 24, 2015 Tim Dwyer sent an email to Michael Lawless expressing concerns about the delay in starting construction, stating:

> As you are aware we have committed a substantial amount of funds (+$8mm) to fund construction.
>
> Obviously we did not anticipate it would take close to 12 months to commence construction when we made the financing commitment.
>
> I am getting pressure from our credit committee to get a firm commitment (date) from Lee to draw down facility #3 as the term of the financing Dec 31/16 will likely not be achievable given further delays.

Can we discuss.

The September 25, 2015 Meeting at Tim Horton's

[104] Lee Adamski described a meeting where Facility 3 funding was discussed at a Tim Horton's restaurant in Bedford near the Dome. He testified that the discussions during this meeting with Tim Dwyer led to a September 30, 2015 agreement between Can*Sport and HarbourEdge, whereby HarbourEdge agreed to waive the preconditions for Facility 3 funding in exchange for receiving $100,000 of the $460,000 allocated for Facility 3 lenders and brokers fees.

[105] Lee Adamski's evidence was that at this time, he had not finished drawing Facility 2 funding and had not met any of the requirements or conditions for Facility 3 funding. Lee Adamski said that paying HarbourEdge's lenders fee was buying him access to Facility 3 funding.

[106] Larry Dunn's evidence was that he attended this September 25, 2015 meeting. He said that Lee Adamski attended, along with Michael Lawless and Victor Fisher. Larry Dunn said that Tim Dwyer was not present.

[107] Larry Dunn stated that he asked Lee Adamski at this meeting what was going on at the site. He said that Lee Adamski said that he was working on the construction schedule and on obtaining firm preleases.

[108] Larry Dunn also stated that he did not raise the lenders fee for Facility 3 being partially paid. He denied that he made threats to pull the loan.

[109] Larry Dunn insisted that he did not agree to waive the preconditions for Facility 3 at that meeting. He said that waiving preconditions would have been a major decision, especially at that point. He described the actual construction of the building as the riskiest part of the loan associated with the majority of the funding, i.e., Facility 3. He said that HarbourEdge at that point would want to know that there was enough money to build the Facility. He testified that HarbourEdge would require a very detailed construction budget (which it did not have at that point), with fixed price contracts with all of the major trades. He said that it would be illogical for HarbourEdge to waive the preconditions, that that would be putting HarbourEdge's reputation and its investors money at risk. Further, he said that only the Credit Committee could waive preconditions, and if they were to be waived, the details around such a waiver would be set forth in a formal document.

[110] The September 30, 2015 letter agreement following the Tim Horton's meeting was signed on October 1, 2015 by Tim Dwyer on behalf of HarbourEdge and Lee Adamski on behalf of Can*Sport and as guarantor and provides:

> Re: HarbourEdge Financing Commitment date November 24, 2014
>
> Dear: Mr. Adamski
>
> Further to our discussions of September 28, 2015 (Dwyer/Fisher/Lawless/Adamski).
>
> Facility #3 is currently uncommitted, as the facility remains undrawn nor has the commitment fee applicable to same been paid.
>
> To facilitate the Lenders formal commitment of Facility #3, it was agreed by all a portion of the Lenders fee would be drawn down under facility #3. Effectively this would be deemed to have formally triggered the Lenders full commitment of funds allocated to construction under facility #3, as set out under the terms and conditions in the November 24, 2014 agreement.
>
> We are proposing to draw down $100,000 of the outstanding commitment fee of $325,000 to formalize this agreement.
>
> Please use this letter as our formal acknowledgement of the above and provide your consent/acknowledge below.
>
> [Emphasis added]

[111] The evidence of both Larry Dunn and Tim Dwyer was prior to the September 25 Tim Horton's meeting, HarbourEdge wanted an understanding from Lee Adamski as to when the funds in Facility 3 would be needed. The Court heard evidence from them about "hard" and "soft" commitments. Tim Dwyer's evidence was that the distinction between the two was an allocation issue. He said that the $8 million dollars of Facility 3 was a significant portion of the unallocated funds that HarbourEdge held for investors at that time in the total amount of approximately $25 million dollars. Both Larry Dunn and Tim Dwyer were clear that HarbourEdge was very concerned with the pace of construction in September 2015. The building permit had not been issued and Can*Sport was already eight months into a twenty-four-month term loan. The commitment of Facility 3 was for HarbourEdge to have those funds committed, i.e., available when needed which Tim Dwyer and Larry Dunn said was not in any way a waiver of the preconditions required to access Facility 3.

[112] On February 23, 2016, Victor Fisher sent an email on behalf of HarbourEdge to Lee Adamski, following a meeting between them and Michael Lawless that day. In it, he said:

> Gentlemen,
>
> Thanks for the meeting today I think it was helpful to get an update and get us all on the same page regarding expectations, timelines and deliverables.
>
> My understanding of what we agreed upon is the following:
>
> In order to access FACILITY 3 funds the conditions as laid out in the commitment letter of November 24th apply:
>
> Borrower to provide the lender with a detailed budget, including hard construction cost estimates, site servicing costs estimates and detailed soft cost estimates in form and content satisfactory to the lender in an amount not to exceed $11,732,000.00 (**these are presently being worked on but I am waiting on final drawings and tender packages from the architect. See his letter attached. I have been in discussions with all applicable sub contractors who worked with CanSport throughout and will be able to provide their final costings within a week of receipt**).
>
> Borrower to provide the lender with fixed price contracts from all sub trades and material suppliers and consultants to support the budget estimate of $11,732,000.00 (**the fixed price contracts will be provided to HE after signing**).
>
> Borrower to provide the lender with evidence in form and content satisfactory to the lender, of firm naming rights and or sponsorship contracts in an amount of no less than $1,000,000.00 prior to the drawdown of facility 3 funds. (**Lee inquired about the possibility of providing $850,000 of the $1,000,000 to fulfill this condition and the response was that the review committee will consider it once there are firm committed contracts). (the Performance Sponsorship group has been working diligently on this, contrary, they say, to the way they usually do business. They are now solely focused on a major bank. We are working on having the presentation package in and presented by the end of next week. The bank is very interested (no guarantee) to date at the $$ that was budgeted**).
>
> Borrower to provide the lender with existing copies of the following:
>
> Copy of the building permit (**RECEIPT OF THE BUILDING PERMIT CONFIRMED**).
>
> Municipality approved and architect stamped "approved for Constructions drawings". (**These will be provided**).
>
> Any other documentation or approvals deemed reasonably relevant by the lender.
>
> The interest reserve for Facility 1 is $42.02 and all the postdated cheques have been cashed. Interest invoices for Facility 1 will now be sent out monthly with the February invoice due March 1 in the amount of $11,536.44 (see attached).

> There is $484,281.52 remaining of the Facility 2 & 3 interest reserve.
>
> The review committee will examine a reasonable request for a second mortgage as long as it doesn't appear to hinder the progress of the project or adversely affect the loan to value ratios beyond the lenders level of comfort.
>
> As discussed the loan is due December 31st, 2016 and all parties agreed that time is of the essence and that we're working together to bring this project successfully to completion. (**I agree**).
>
> [Emphasis added]

[113] The statements in this email contained within brackets and bolded were added by Lee Adamski and sent back to Victor Fisher by Lee Adamski on April 22, 2016.

[114] The content of Victor Fisher's February 23, 2016 email to Lee Adamski makes it abundantly clear that HarbourEdge was not waiving the preconditions to Facility 3. Similarly, none of the comments added by Lee Adamski suggest that he thought otherwise. In fact, they demonstrate that he was working to meet the requirements of accessing Facility 3 funds. Lee Adamski also agreed that time was of the essence and that the loan was due December 31, 2016.

[115] Victor Fisher sent this update provided by Lee Adamski on April 22, 2016 to Tim Dwyer and Larry Dunn on that same day, noting:

> Based on his update what stands out to me is
>
> There's no mention of tenants. Newbridge Academy and the Obrien Group were to be the 2 main tenants and the school is out and there's no signed commitment from the OG.
>
> There are no sponsors to date, only the hint that the bank might be on board.
>
> He's still working on a construction budget.
>
> Before responding to the update it would be helpful to have your input.

April 3, 2016 - The Loss of NA as a Tenant – The NA Sign, "Future Home of NA" Comes Down and the Interest Reserve

[116] On April 20, 2016 Lee Adamski sent a request for an advance of a funding draw.

[117] Larry Dunn testified that he learned through an email from Victor Fisher on April 3, 2016 that the NA sign had come down. There had previously been a sign on the site which said, "Future Home of Newbridge Academy". Larry Dunn said

that that was the first time HarbourEdge learned that NA would not be part of the Project. He said that upon learning that, HarbourEdge was very concerned. His evidence was that from Lee Adamski's very first submission, NA was to be part of the Project. He stated that NA was clearly important to the borrower, so it was important to HarbourEdge. He said that NA leaving was a big red flag to HarbourEdge, especially since they first found out by the sign being removed from the site. His evidence was that any such change would be a red flag and raise the question of why this potential tenant walked away from the deal.

Harbour Construction Invoices of March 31, 2016 and April 15, 2016

[118] On April 20, 2016, Lee Adamski sent a request for a funding draw to Jaime Ford for two Harbour Construction invoices dated March 3, 2016 (approximately $80,000) and April 15, 2016 (approximately $63,000).

[119] HarbourEdge did not pay these invoices until August 2, 2016.

[120] Can*Sport argues that the delay in paying these invoices had a hugely significant impact on the Project.

[121] On May 18, 2016, Can*Sport's legal counsel, Claire Milton K.C. sent an email asking why Can*Sport's April 20 draw request had not been released. Claire Milton sent another email on May 24, asking for a response. Victor Fisher responded by email on May 25 advising that he was waiting for direction from head office and would respond once authorized.

[122] However, Victor Fisher responded on May 25 in an email to Lee Adamski that he had not provided firm prelease confirmations. He stated that "we are now advised that both Newbridge and O'Brien tenants have been lost" and referred to this as a "material change and default in our agreement". Victor Fisher continued:

> On April 3rd you were specifically asked about the removal of the Newbridge Academy sign and you stated: "another opportunity has presented itself which I can now negotiate and is a more sound offering. I will advise". Nothing further was communicated and then on April 20th you were asked again and we were provided with an email on April 22, where no mention was made of replacement.
>
> This is a material change and default in our agreement. We have asked you to provide documentation to us indicating any and all replacement tenants you have obtained however, to date you have been unable to provide same.
>
> …

> Please provide us with a detailed status update on both of these items.

[123] In a further email message to Lee Adamski on May 30, 2016 Victor Fisher reiterated that no draw request would be completed without new lease agreements.

The Interest Reserve

[124] On April 25, 2016 Larry Dunn sent an email to Victor Fisher, copied to Tim Dwyer, which stated that HarbourEdge should consider requiring Lee Adamski to pay the interest reserve himself (contrary to the terms of the Commitment). This was in the context of HarbourEdge learning that NA had been lost as a tenant:

> If he has lost Newbridge and the Obrien Group without replacements this project no longer makes sense….I think we need to all him on it and if so force him to pay the interest out of his own pocket and not burn the interest reserve. If he has lost these two Tenants then that is a material change in our security. Tim…thoughts?

[125] Tim Dwyer did have thoughts and testified that ultimately he did not agree with this approach.

[126] Jamie Ford sent Can*Sport an invoice for the interest reserve on June 27, 2016 in the amount of $33,623.50. On July 6, 2016 Can*Sport's lawyer, Claire Milton K.C. wrote to Tim Dwyer expressing concerns about the requirement that Can*Sport pay this interest.

[127] On June 8, 2016 Victor Fisher sent an email to Lee Adamski, copying Larry Dunn and Tim Dwyer stating, "As previously stated the loss of (NA) as a main tenant on which the loan is funded as a material change to the loan". Victor Fisher also stated, "HarbourEdge will not fund the current draw request until the signed agreements comply with the conditions as set under which facility 1 was funded".

[128] On July 6, 2016 counsel for Can*Sport provided Tim Dwyer with copies of two offers to lease. The first was between Can*Sport and Ravensberg College and the second was between Can*Sport and Lepeno Productions.

[129] On July 19, 2016 Victor Fisher forwarded to Lee Adamski an email to Victor Fisher from Tim Dwyer which said:

> As you are aware, we approved and funded the initial draw based on our due diligence which included the strength of the Newbridge Group as a tenant. Without the strength of Newbridge as a tenant the initial advance would not have been made.

[130] In that same email of July 19, 2016 Tim Dwyer stated that "we were advised the borrower was under negotiations with PowerEdge and Maritime Hockey group". Tim Dwyer further stated:

> We completed due diligence on PowerEdge, however we are now informed the PowerEdge and Maritime Hockey group are not going to be tenants and Can Sport has negotiated new deals with Lepeno Productions and Ravensburg College, neither of which we are familiar with.
>
> We need to complete further due diligence on both tenants to ascertain how this change affects the underlying financial risk of the Project.
>
> We will need more information on the financial strengths of the tenants
>
> Updated project cash flows
>
> Updated cost to complete information regarding construction given the delays incurred.
>
> In the interim and on a completely "Without prejudice basis" we are prepared to process the current draw requests for works completed to date.
>
> …
>
> Please make it clear to the Borrower, we will require the updated project information noted above and the due diligence to be completed on Lepeno & Ravensburg before any additional draws will be approved.
>
> [Emphasis added]

[131] On August 2, 2016, HarbourEdge provided funds to Can*Sport to pay Harbour Construction's March and April 2016 invoices.

The August 6, 2016 Proposal Presented by Can*Sport

[132] Lee Adamski presented an August 2016 proposal to Can*Sport in response to its concerns about the loss of NA and the idea of new tenants. It was titled, "Requested info Mortgage Financing". The Court heard a significant amount of evidence from both parties as to the import of Lee Adamski's August 2016 proposal.

[133] HarbourEdge viewed this proposal as a change in scope for the Project. Can*Sport's view was that what it presented was not a change in scope for the Project but involved a change in the proposed ice space; that is, from the larger rink in its initial proposal to smaller ice surfaces. At trial its counsel made the point that the initial funding proposal was not tied to particular tenants, and that as long as the revenue was there from ice time or tenants, the preconditions to funding were met.

[134] The Court notes that included in the package of materials which Can*Sport presented to HarbourEdge on August 6, 2016 was an undated, unsigned letter to Lee Adamski from a company called "Adepa" which provided as follows:

> RE: CanSport Twin Pad Sports Training Facility, Bedford NS
>
> We are pleased to provide the following "budget" costs for the construction of a "Twin Ice pad Sports Training Facility" as per the preliminary drawings provided. The budget costs of construction is **$12,175,800 (Twelve million, one hundred seventy five thousand and eight hundred dollars). HST Extra**.
>
> [Emphasis that of Adepa]

[135] Can*Sport attempted to downplay the significance of this letter from Adepa, but the Court is left to wonder why it was included in the package provided to HarbourEdge without explanation. HarbourEdge, understandably, had concerns at this point about the scope of the Project. Tim Dwyer's evidence was that the allocated amount in Facility 3 to finance the "hard construction" costs was approximately $8.4 Million and the total amount of HarbourEdge's commitment was $11.3 Million. Yet this letter from Adepa of $12 million dollars plus, exceeded the total amount of HarbourEdge's commitment for all three facilities.

[136] The August 2016 proposal included a July 6, 2016 offer to lease between Can*Sport and Ravensberg College. The offer to lease was for the rental of space between 8000 and 17,000 square feet. Larry Dunn's evidence was that this did not qualify as a firm prelease because there was no specific square feet of rental space committed to. Larry Dunn also said that the term of the lease was eleven to twelve months away. He said that this was a concern based upon the rate of construction; he also said that the deposit Ravensberg was to make was $1.00 as opposed to a deposit in the amount of the first and last months' rent, the norm which HarbourEdge expected. Larry Dunn also had concerns with the last sentence of the offer to lease which provided that the tenant could occupy the space and leave the space without any liability. He said that that hardly provided comfort for HarbourEdge as a lender.

[137] Larry Dunn's evidence was that he raised all of these issues with Victor Fisher. He said that to his knowledge, Victor Fisher passed these concerns along to Lee Adamski.

[138] The August 2016 proposal also had an offer to lease with an entity called "Lepeno". Larry Dunn's evidence was that on review of this offer to lease he noted the term of the Lepeno lease started on January 1, 2017. His evidence was that it would be physically impossible at that point, with construction of the Facility not

started, to have Lepeno in the building by that point. Like the offer to lease with Ravensberg, there was a $1.00 rental deposit. The Lepeno offer also contemplated landlord work, with reference to a Schedule B for the landlord's work, but that Schedule was not attached. This offer to lease did not, according to Larry Dunn, constitute a firm prelease agreement.

[139] The August 2016 proposal also referred to an entity called "PowerEdge". Larry Dunn's evidence was that PowerEdge was like a franchise which would be bought and then run. He said that there was no guaranteed revenue to Can*Sport by being a franchisee of Power Pro, so he felt it was not relevant and was not a firm prelease.

August 2016 - The Sitework Budget is Exceeded

[140] Shortly thereafter, on August 19, 2016 Can*Sport made a request to HarbourEdge for an advance on Facility 2 to pay Harbour Construction for its work up to and including April 29, 2016. HarbourEdge communicated to Can*Sport that this invoice put the sitework over budget by approximately $20,000.

[141] There were further email exchanges between Lee Adamski in September and October 2016 concerning construction costs and the sitework budget. Lee Adamski did not respond to an email from Jaime Ford to him of October 20, 2016 which asked, "Why is Harbour Construction over budget by $20,115.25" and "How much site work is left to complete".

November 2016 – Lien on the Property - $400,000

[142] On November 1, 2016 HarbourEdge learned through a media report that a lien had been filed by Harbour Construction on September 30, 2016 and a Certificate of *Lis Pendens* registered against the Property on November 4, 2016.

[143] In the end, by November 8, 2016 HarbourEdge lost confidence that Can*Sport would be able to complete the Project and refused to provide further funding. Larry Dunn advised Lee Adamski in an email dated November 8, 2016:

> Lee,
>
> The fact that Harbouredge advanced funds in any facility does not necessarily mean that all preconditions had been met. The Offer to finance states that "The Lender shall not be **obligated to make any Loan advances**…". This does not preclude the Lender from making advances when the conditions are not met in their entirety.

> Neither does it obligate the Lender from making further advances until such preconditions have been met.
>
> Currently you have not fulfilled Condition 1 in Facility 2. Please correct me if I am wrong. In the absence thereof Harbouredge is unable to advance further funds on your project.
>
> [Emphasis in original (bold) and underlining (court)]

[144] Condition 1 in Facility 2 was the requirement that the borrower provide copies of firm prelease agreements totalling not less than $1,000,000 per annum.

Law and Analysis

The Obligations of Lender and Borrower

[145] Can*Sport's allegations of breach of contract primarily arise from two matters. The first is that HarbourEdge failed to continue to fund under Facility 2 and that HarbourEdge failed to provide Can*Sport with access to funding under Facility 3, in circumstances where Can*Sport alleges that HarbourEdge waived all of the preconditions for Facility 3 funding.

[146] In his closing arguments at the conclusion of trial, counsel for the Defendants argued that HarbourEdge failed to act in good faith throughout its dealings with Lee Adamski, and that it gave up on the Project at a point in time when it knew its financial position was protected. He points all of the blame for the failure of the Project on the bad faith actions of HarbourEdge.

[147] HarbourEdge denies any breach of contract and bad faith dealing. It says that that even if there were breaches of contract on its part, Can*Sport suffered no damages as a result.

Issue 1: Did HarbourEdge Breach the Commitment?

[148] Can*Sport claims breach of contract against HarbourEdge. It bears the burden of proof on a balance of probabilities.

The Obligations of Lender and Borrower

[149] In general, the relationship between a financial institutional lender and its customer borrower is a purely commercial relationship of creditor and debtor (*Pierce v. Canada Trustco Mortgage Co.,* 2005 CarswellOnt 1876 (OCA)).

[150] When there is a loan facility in place, a lender is obligated to advance the loan, absent any agreement stating that the lender is not so obligated (*Two Hills Rental Properties Ltd. v. First City Trust Co*., 1982 CarswellAlta 13 (AC QB) at paras. 29 and 46)).

[151] The Commitment Letter provides just that:

> **Loan Advances:**
>
> The loan will be advanced, provided all the terms and conditions as (sic) out in this Commitment Letter have been complied with, in accordance with the stipulated terms of the drawdown.

[152] The term of the contract ended on December 31, 2016 or January 7, 2016 (nothing turns on this difference in date). This timeline was provided by Can*Sport. The evidence at trial was that Lee Adamski, Larry Dunn and Tim Dwyer believed that the Project could be completed, from start to finish, within the term of the loan.

[153] The Commitment Letter provided that "all interim construction advances will be made on a cost to complete basis, in accordance with the preconditions stated herein and the following terms and conditions".

Facility 2 Funding – Specific Allocations

[154] Each of the three facilities had a certain amount of funding allocated for specific items, based on the budget provided by Can*Sport and accepted by HarbourEdge.

[155] Can*Sport does not allege that HarbourEdge breached the terms of Facility 1.

[156] In its Notice of Amended Statement of Counterclaim, Can*Sport alleges:

> 9. However, by April 2016, with roughly $700,000 remaining on Facility 2 upon which Can*Sport was entitled to draw, HarbourEdge reneged on the Commitment and began to refuse to honour further mortgage advances requested by Can*Sport to pay their contractors and suppliers for the ongoing work of building the Complex.

[157] Can*Sport pleads that HarbourEdge's breach of the Commitment "directly or indirectly resulted in the following impacts on the construction of the Complex":

(a) Can*Sport was unable to continue funding the site work, soft costs and other expenses that were the subject of Facility 2;

(b) Can*Sport's contractors and sub-contractors could not be paid to continue their work;

(c) Work on the Complex slowed and was ultimately halted;

(d) The land upon which the Complex was to be built was liened by an unpaid contractor; and

(e) Can*Sport has since been unable to resume the work of construction the Complex.

[158] Can*Sport pleads that HarbourEdge did not pay the balance of Facility 2 that it was owed, did not allow Can*Sport access to Facility 3 whatsoever, and by November 2016 HarbourEdge informed Can*Sport that it would not extend any further funds or extend the loan maturity date.

[159] These allegations in relation to Facility 2 are not made out by the evidence.

[160] Lee Adamski's evidence was that HarbourEdge cut off the funding under Facility 2. Can*Sport's claim says that there was $700,000 remaining in Facility 2 upon which Can*Sport was entitled to draw. In its pretrial submissions, counsel for Can*Sport states that, "By April 2016, with roughly $900,000 remaining on Facility 2, upon which Can*Sport was entitled to draw, HarbourEdge reneged on the Commitment and began to refuse to advance further mortgage advances requested by Can*Sport to pay their contractors and suppliers for the on-going work of building the Complex".

[161] Can*Sport says that it met all the pre-conditions for Facility 2, including having "firm prelease agreements totaling no less than $1,000,000 per annum".

[162] The second basis for Can*Sport's allegation that HarbourEdge wrongfully cut off Facility 2 funding is that Can*Sport believed that $700,000 remained available to it to be advanced under Facility 2, even though it had not met the pre-conditions for release of those funds.

[163] The third basis for Can*Sport allegation is that HarbourEdge's delay in paying construction invoices from March 21, 2016 and April 15, 2016 had a significant impact on the Project's schedule.

The Requirement for "Firm Pre-Lease Agreements"

[164] The Court heard a significant amount of evidence in this regard, as noted above.

[165] Can*Sport's position is that it met the firm prelease requirement by the summer of 2015. The Court heard the evidence of Larry Dunn and Tim Dwyer that the lease agreements presented by Lee Adamski were not firm and why, as reviewed earlier in this decision.

[166] Larry Dunn's evidence was that HarbourEdge was willing to advance funds under Facility 2 to keep the Project moving forward. This was because, according to his evidence, there was little risk to HarbourEdge or its investors at this time, given the amount of the Property appraisal. Larry Dunn's evidence, confirmed by Tim Dwyer, was that HarbourEdge wanted the Project to succeed.

[167] This Court finds that the whole issue of whether the requirement for Can*Sport to have "firm pre-lease agreements" for Facility 2 funding is somewhat in the nature of a red herring. Based on the evidence before the Court, HarbourEdge did advance certain funds under Facility 2. In fact, it paid all invoices submitted under Facility 2 until Harbour Construction's August 2016 invoices put the site work budget over the budgeted amount as set out in the Commitment Letter.

*The Allegation that there were Funds remaining in Facility 2 which Can*Sport was Entitled to Draw*

[168] In an email from Lee Adamski to broker Victor Fisher dated November 8, 2016 he suggested that there was approximately $500,000 remaining in Facility 2. The pleading refers to $700,000 and in his pretrial submissions counsel for Can*Sport suggests $900,000.

[169] In the end, these variations do not matter, because the assumption that these amounts were available for draw is unfounded on the evidence. The funds under Facility 2 were not free to be accessed by Can*Sport for any purpose, but rather for the specific purposes outlined in the Commitment Letter. Lee Adamski acknowledged in cross-examination that he understood that Facility 2 was not simply a pool of money sitting there upon which Can*Sport could draw at will.

[170] The budgeted amount for Facility 2 was $1,743,375. HarbourEdge advanced $900,674.04. Under Facility 2, $530,000 was allocated to the interest reserve. The undisputed evidence was that that amount was never to be advanced to Can*Sport

and never to be used for any purpose other than interest. The evidence disclosed that by February 23, 2016, $484,281.52 remained in the interest reserve.

[171] It was, or should have been, clear to Lee Adamski that that sum was there only for interest.

[172] The Commitment Letter provided for various allocations for different deposits:

1. Steel fabrication deposit	$66,000
2. Concrete deposit	$114,000
3. Foundation deposit	$33,375
4. Roofing deposit	$102,000

The total for those deposits was $315,375.

[173] The evidence was that some of those deposits had not yet been advanced, including the steel at $66,000 and the roofing at $102,000. Further, some of the deposits had not yet been fully funded. The concrete deposit was 98% funded and the foundation was only 45% funded.

[174] Under Facility 2, the amounts which had not yet been allocated to deposits remained for deposits and nothing else. They did not go into a general pot available to Can*Sport for other purposes.

[175] Under Facility 2 $253,500 was allocated for architectural/mechanical and electrical drawings. The evidence shows that that amount was funded up to 65%.

[176] The budgeted amount for sitework under Facility 2 was $379,500. The evidence before the Court was that two contractors submitted invoices for sitework. The first was Whebby's. Its invoice of $74,750 was paid. When that payment to Whebby's is subtracted from the budgeted amount for sitework, it leaves $304,750. That was the amount set for Harbour Construction. It is true that that amount was an estimate; however, it is important to note that Can*Sport used that estimate of Harbour Construction to set the construction budget amount for sitework that was submitted to HarbourEdge which then became part of the Commitment Letter for sitework under Facility 2. Once that amount was submitted, it became part of the Commitment and actually formed part of the construction budget, irrespective of whether it was originally an estimate.

[177] The Court heard considerable evidence about two invoices of Harbour Construction, the first dated March 31, 2016 and the second dated April 15, 2016.

[178] Larry Dunn's evidence was that upon receipt of these invoices HarbourEdge had concerns about how much work remained to be done by Harbour Construction.

[179] Subsequent invoices of Harbour Construction were submitted by Can*Sport to HarbourEdge on August 19, 2016 in the total amount of $49,432.05. Once those invoices were submitted the sitework budget was exceeded.

[180] The exceeding of the budget was an issue for Can*Sport. It was Can*Sport who submitted that estimate of sitework costs to form part of its budget. The Commitment Letter is very clear that any cost overruns were the responsibility of Can*Sport, or the guarantor, Lee Adamski:

> **Conditions Ongoing**:
>
> Any cost overruns identified will be funded by the borrower/guarantor prior to any Loan advances by the lender under this proposal. Cost overruns are defined as the amount reported in excess of the total approved construction budget.

[181] On September 27, 2016 Jaime Ford wrote to Lee Adamski concerning his request for a draw which included Harbour Construction's invoices amounting to $49,432.05 (Draw 7). In her email she notes:

> Total billed $302,292.11 + HST ($300,365.25 +HST) contract amount was $280,250.00 +HST.
>
> Thanks for looking into this.

[182] Lee Adamski responded a few weeks later on October 14, 2016:

> Thanks for your patience, it has been a hectic past number of weeks. Draw 7 request amount of $49,432.05 could be paid plus the hold back amount from Draw 5 - invoice of $5,977.75 and still leave a balance in the budget contract amount? The contractor has done extra work due to the volume of rock encountered and because I didn't want them to demobilize at the time. I will work with them to adjust the contract and invoicing in the interim to bring it within the confines of what was allowed for site work in Facility 2.
>
> Please advise.
>
> Regards, Lee

[183] Jaime Ford still had concerns and expressed these concerns in an email to Lee Adamski dated October 20, 2016:

> Hi Lee:
>
> Sorry, I have reviewed this twice and I am not sure I follow:
>
> The contracted amount for this job was $280,250 + HST, prior to draw 7 we had advanced under this contract $245,440.75 leaving $34,809.28 available under the contract, this invoice puts the contract over budget by $20,115.25.
>
> I am looking for the following:
>
> Why is Harbour Construction over budget by $20,115.25
>
> How much site work is left to complete?
>
> Holdback funds will be release (sic) once we can be sure Harbour Construction has completed all of the work and all funds have been paid to them except for the holdbacks.
>
> Thanks
>
> Jamie

[184] Nowhere in Lee Adamski's email of October 14, 2016 does he refer to the fact that he had been holding invoices totalling around $400,000 from Harbour Construction which were not submitted for payment and which arose from continued excavation work. Lee Adamski's evidence on this point was that he had been receiving the invoices and that he was disputing them. However, at no time did he forward them to HarbourEdge or even tell HarbourEdge that they existed. It was soon thereafter that Harbour Construction filed a lien against the Property.

[185] The allegation that there were still funds left to be accessed by Can*Sport under Facility 2 is not made out on the evidence. Any remaining funds were already allocated: for the interest reserve, unpaid deposits or not fully funded deposits and remaining amounts owing for mechanical and other drawings.

[186] The Court concludes that all available amounts allocated under Facility 2, as supported by submitted invoices, had been provided to Can*Sport.

[187] Contrary to Can*Sport's allegations, HarbourEdge did not arbitrarily stop funding the Project. In fact, HarbourEdge continued to fund until there was a question as to why there was a budget overrun. However, before that issue could be further questioned, Harbour Construction liened the Property.

[188] Both Larry Dunn and Tim Dwyer testified that HarbourEdge would not continue to fund in the face of a lien. The suggestion that they could do so is not a commercially reasonable notion.

[189] HarbourEdge submits that the law supports their decision in this regard. They refer to the decision of the Supreme Court of Canada in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 (SCC) where the issue before the Court was whether a common law duty of good faith performance applied in a long-term contract for waste removal and specifically the duty to exercise contractual discretion. Kaiser J stated:

> 4. The duty to exercise contractual discretion is breach only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes underlying the discretion. This will be made out, for example, where the exercise of discretion is arbitrary or capricious, as Cromwell J. suggest in *Bhashin* [2014 SCC 71] in his formulation of the organizing principle of good faith performance. According to *Bhasin*, this duty is derived from the same requirement of corrective justice as the duty of honest performance, which requirement demands that parties exercise of perform their giths an obligations under the contract having appropriate regard for the legitimate contractual interest of the contracting partner. Like the duty of honest performance observed in *C. M. Callow Inc. v. Zollinger*, 2020 SCC 45 (S.C.C.), the duty recognized here is one that applies in a manner Cromwell J. referred to as doctrine in *Bhasin*, i.e., the duty applies regardless of the intentions of the parties (*Bhasin*, at para. 74).
>
> 5. Carefully considered, the appellant's case does not rest on allegations that it fell prey to lies or deception. There is no claim that the respondent exercised its discretion capriciously or arbitrarily. The appellant does not point to, under the guise of allegedly unreasonable conduct, any identifiable wrong committed by the respondent beyond seeking its own best interest within the bounds set for the exercise of discretion by the agreement. The duty of good faith at issue here constrains the permissible exercise of discretionary powers in contract but, in so doing, it does not displace the detailed, negotiated bargain as the primary source of justice between the parties.
>
> 6. Importantly, the good faith duty at issue does not require the respondent to subordinate its interests to those of the appellant, nor does it require that a benefit be conferred on the appellant that was not contemplated under the contract or one which stands beyond the purposes for which the discretion was agreed. Here, the appellant decries conduct that is self-interested, to be sure, and that, it says, made it impossible to achieve the fundamental benefit for which it had bargained. But in seeking damages for this loss, the appellant does not allege that the respondent committed any actionable wrong in exercising the discretion provided for under the contract. While it is true the arbitrator characterized the long-term contract here as a relational one, he found that the situation giving rise to this dispute, however

> unlikely it may have appeared to the parties, was a risk that the parties had specifically considered in drafting their detailed agreement. In that context, whatever trust and cooperation that the parties might owe one another arising out of the long-term relational character of the contract cannot resolve this case in favour of the appellant by requiring the respondent to act as a fiduciary.
>
> 7. When the contours of good faith performance in this context are properly identified, it is plain that the respondent did not exercise its power to reallocate waste in breach of a good faith duty. In point of fact, in its call to be paid damages on the basis of the contractual duty of good faith owed to it by the respondent, the appellant is asking the Court to award it an advantage not provided for in the agreement between the parties in the absence of any appreciable breach of contract or identifiable wrong. This seems to me to confuse the requirements of good faith performance with an injunction to act selflessly in a way that stands outside the ordinary compass of social ordering by contract, in service of a notional solidarity between the parties based on a different theory of justice. Accordingly, I would dismiss this appeal.
>
> [Emphasis added]

[190] Accordingly, the duty of good faith does not require a lender such as HarbourEdge to subordinate their interests to that of a borrower such as Can*Sport. It simply is not commercially reasonable to expect a lender to do so.

Harbour Construction Invoices of March 31, 2016 and April 15, 2016

[191] The evidence established that requests for draws on a facility were required to be supported by invoices. Work was done, invoices were submitted, the amounts were compared with the construction budget and otherwise vetted by HarbourEdge personnel. If all was in order, HarbourEdge paid the invoice. The exception to that was a request for a deposit. Mr. Dunn's evidence was that in that case, provided supporting documentation was provided, funds were released.

[192] There appears to be no dispute about the requirement for invoices nor that HarbourEdge ever waived that requirement.

[193] The Court heard a great deal of evidence about HarbourEdge's delay in paying two Harbour Construction invoices of March 31, 2016 and April 15, 2016. HarbourEdge did not pay these invoices until August, 2016.

[194] Can*Sport argues that HarbourEdge's delay in paying the March 31, 2016 and the April 15, 2016 invoices had a hugely significant impact on the schedule of the Project and negatively affected Can*Sport's ability to pay its contractors and

suppliers for on-going work. Counsel for Can*Sport says that this constitutes bad faith on the part of HarbourEdge.

[195] It is important to note there that there is no evidence that there was a delay on HarbourEdge's part in paying any other invoices submitted by Can*Sport, apart from these two.

[196] It is also important to note that the evidence of both Kermit Phillips, the principal of Harbour Construction, and Lee Adamski was that in addition to these invoices, there were additional invoices from Harbour Construction that were not submitted by Can*Sport to HarbourEdge. These totalled in the range of $350,000 - $400,000 and formed the basis of Harbour Construction's eventual lien on the Property for $402,805.10 filed on November 4, 2016. There has been no adjudication of that lien.

[197] Larry Dunn agreed that there was a delay in paying these invoices. He said that part of the delay was because HarbourEdge was trying to get more information about the work behind them. He said that up to April 15, 2016 Harbour Construction invoices had totalled in the range of $250,000, with the contracted amount of $280,000. Harbour Construction had started its work on site in mid February 2016 and had at that point been there eight weeks, in a situation where their work was estimated to be complete in five to six weeks. Larry Dunn stated that he was concerned and wanted to know how much more costs were involved and how much more work was left for Harbour Construction to do. He stated that Whebby's had cleared grub for $75,000 and Harbour Construction was at $250,000 which amounted to $325,000 of the budgeted amount of $379,000. Harbour Construction was still doing excavation and rock removal work and site services were not put in. This resulted in HarbourEdge having questions which he said needed to be answered. He said that Jaime Ford was the person who would attempt to provide those answers.

[198] There was evidence of many email messages between HarbourEdge and Can*Sport wherein HarbourEdge was attempting to get more information from Lee Adamski about tenants and leases at this same time, i.e., April 2016. Larry Dunn testified that it was around this time when Victor let them know that the NA sign on the site had come down. He said that HarbourEdge wanted answers.

[199] Larry Dunn said that there was a correlation between the delay in paying in the Harbour Construction invoices and these other matters, including the lack of answers about the amount of rock on the site that remained to be broken and the fact

that the NA sign had been taken down. Harbour Construction was still on the site working. He testified that these kinds of changes were "red flags" to HarbourEdge as a lender. As a result, he said that the payment of those Harbour Construction invoices was a bit delayed. He said that HarbourEdge should have paid the invoices sooner, but he denied that this delay caused problems for the Project. He noted that at the time Harbour Construction was still on the site working. No other contractor was held up.

[200] Larry Dunn's evidence was that after the April 2016 invoice from Harbour Construction, HarbourEdge did not receive another invoice from Harbour Construction, despite the fact that it was still working on the site until August 2016. He testified that that invoice showed an amount that was approximately $20,000 over the estimate for its work. Since HarbourEdge's funding was on a cost to complete basis, this meant that the construction costs were going to exceed the budget. That budget was not an estimate; it was the fixed amount set by HarbourEdge based upon the number (estimate) presented by Lee Adamski.

[201] The Court finds that delay in paying Harbour Construction's March and April invoices did not cause delay. Harbour Construction stayed on site until shortly before it filed a lien. Harbour Construction continued to do work on site - significant work based on the amount of the lien it filed.

[202] The Court notes here that this was a two-year project. Larry Dunn's evidence in cross-examination was that the fact that excavation work was still ongoing halfway through the second year of a two-year project was concerning to HarbourEdge. This same time period coincided with the August 2016 proposal from Lee Adamski to change the prospective tenants.

<u>The Contingency</u>

[203] Mr. Dunn's evidence was that he had concerns about using the contingency for the second contractor on site. The first was Whebby's. The second was Harbour Construction. Mr. Dwyer's evidence was that the contingency amount would have been set in the construction budget. That construction budget had not yet been finalized, as it was one of the pre-conditions under Facility 3.

[204] Further, Can*Sport did not request HarbourEdge to apply the contingency towards the Harbour Construction invoices. There was never a change order.

[205] The Commitment Letter provided that cost overruns were an issue to be addressed by the borrower.

[206] The trial evidence was that Can*Sport had no independent funds and no line of credit; that is, very few alternative sources of funding. The evidence also disclosed that even before the Project began at the end of October 2015, Can*Sport owed $115,773.39 to Adepa Construction Management Inc. This is found in an email to Lee Adamski from Frank Belanger, the controller of Adepa. In his response Lee Adamski states:

> Hi Frank,
>
> I am in receipt of your email update concerning my debt to your firm. Further to our last discussion in your office, I had said I had to get my building permit before I can access my funds. I only just received my permit last week.
>
> I will start the process of drawing down funds for construction whereby I should be able to pay down or pay pout the debt by the end of January/16.
>
> I hope this meets with your approval. Please advise.
>
> Regards, Lee
>
> [Emphasis added]

[207] Lee Adamski's evidence on cross-examination was that he never used any funds from HarbourEdge to pay the debt he owed to Adepa, but this email certainly suggests that he was contemplating doing so. Further, it suggests that Can*Sport had little or no financial flexibility to deal with cost overruns on the Project.

Newbridge Academy

[208] NA had been a proposed tenant of the complex in Can*Sport's initial proposal to HarbourEdge. However, by August 2016, NA had dropped out of the picture. Again, the Court heard a significant amount of evidence as to the impact of the loss of NA as a tenant.

[209] CanSport's position was that NA was not needed for it to meet the condition of Facility 2 funding of "firm pre-lease agreements".

[210] However, it was clear from the evidence that HarbourEdge was concerned that NA was no longer part of the Project. Larry Dunn's evidence was that NA had been discussed by Lee Adamski as a large part of the Project. This was confirmed by the evidence of Tim Dwyer. Indeed, there was a sign at the Project site which

referenced the "Future Home of Newbridge Academy". Further, Can*Sport did not disclose to HarbourEdge that NA no longer intended to be a tenant. In fact, Victor Fisher was the person who first notified HarbourEdge when he noticed that the "Future Home of NA" sign had been taken down. In an email of May 18, 2016 to Tim Dwyer and Larry Dunn, Victor Fisher stated:

> Jaime [Ford] received an email from Lee's lawyer inquiring about the l last draw request that he submitted.
>
> I sent an email to you on April 24th with Lee's updated plan with (sic) was without the kind of substance I requested. Also I had inquired as to why the Newbridge Academy sign was taken down and the response was:
>
> > Hi Victor,
> >
> > I asked them to remove it until they sign. Since they did remove it and in anticipation of them removing it, another opportunity has presented itself which I can now negotiate and is a more sound offering. I will advise.
>
> I never heard back what the opportunity was..and his latest draw request hasn't been approved.
>
> How would you like to respond to the attorney's letter?
>
> [Emphasis added]

[211] The evidence was that the change in tenants was of concern to HarbourEdge because it could suggest that there was less support for the Project.

[212] Tim Dwyer's evidence was that HarbourEdge was not an operating lender and that they were not attractive as an operating lender given their interest rates. Part of HarbourEdge's concern was ensuring that tenants and ice users were there as well as revenues so that the borrower, Can*Sport, could obtain take-out financing. His evidence was that NA leaving the Project as a tenant was worrisome.

[213] The position of Can*Sport is that HarbourEdge should not have been concerned about the loss of NA because the preconditions for Facility 2 funding had been met.

[214] However, from HarbourEdge's perspective, at this point in time they were faced with delays in the construction schedule and a key change of tenants, both of which they felt could negatively effect the ability of Can*Sport to obtain take-out financing to repay HarbourEdge at the end of the two-year term of the loan.

The Capitalization of the Interest Reserve under Facility 2 and 3

[215] In its Counterclaim Can*Sport alleges that HarbourEdge breached the Commitment when it allegedly stopped the capitalization of the interest reserve amount under Facility 2 and 3. Its counsel calls this bad faith and "punishment" on the part of HarbourEdge.

[216] On the evidence, it is true that an issue arose between HarbourEdge and Lee Adamski about the interest reserve and its capitalization in June 2016. Larry Dunn wanted to require Lee Adamski to pay the interest himself, when the terms of the Commitment provided for an interest reserve of $530,000 under Facility 2 and 3. Indeed, Jaime Ford sent Can*Sport an invoice for interest payments on June 27, 2016 in the amount of $33,623.50.

[217] However, Can*Sport never paid this amount and this invoice, and any other invoices rendered for interest payable by Lee Adamski himself in June and July 2016 were reversed according to the evidence of Tim Dwyer, and with no penalties or fees. In fact, Tim Dwyer's evidence was that there would have been a nominal benefit received by Can*Sport during that time, in that the interest payments were not added to the overall loan amount for those two months. Accordingly, HarbourEdge says that there was no impact of this proposed requirement to make Lee Adamski pay interest out of his own pocket.

[218] There is no evidence that this had any significant impact on the Project. Larry Dunn was wrong to suggest that the interest reserve should have been capped. However, this never came to pass. Certainly a suggestion to do something does not rise to the level of a breach of the Commitment. Further, no damages flow from this alleged breach.

<u>The Alleged Breach of Facility 2</u>

[219] The Court finds that HarbourEdge did not breach the terms of Facility 2. It did not cease to advance funds under Facility 2 as alleged. It advanced under that facility until the lien was filed by Harbour Construction. HarbourEdge did not deprive Can*Sport of the benefit of Facility 2, because all of Facility 1 and Facility 2 funding that could have been advanced was advanced.

[220] In its written pretrial submissions, Can*Sport relies upon the decision of the Supreme Court of Canada in *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670 (SCC). The facts underlying this decision differ from the evidence before the Court in this trial.

[221] In *General Securities*, the lender failed to advance any of the funds it had promised to provide. Further, it was found as a fact that the lender had agreed to unconditionally finance the borrower's purchase.

[222] The language in the Commitment Letter before the Court is that Facility 2 funding was not being advanced unconditionally, but rather subject to the terms of the Commitment Letter, terms which Can*Sport had agreed to.

[223] In its pretrial submissions, counsel for Can*Sport refers to the 2004 decision of the Alberta Court of Queen's Bench in *Polar Developments Ltd. v. Metropolitan Trust Co. of Canada*, 2004 ABQB 721 as follows:

> 197 Polar relies on the decisions in *General Securities Ltd.*, [citations omitted]…
>
> 198 Don Ingram Ltd. had an existing relationship with General Securities. The latter had full knowledge of the former's circumstances and was in close touch with its business. It knew what Don Ingram was doing, what it required and that it depended on General Securities to provide financing. **Such was not the case here. This was a new business for Polar and Met was not kept informed by Polar of the various stages of completion of the project, the status of Polar's negotiations with Westfair or the various attempts by Polar to obtain financing elsewhere. In this case, there was no promise or agreement by Met to provide equipment financing to Polar let alone an unconditional one as found in Don Ingram Ltd.**
>
> [Underlining emphasis that of counsel for Can*Sport; Bold emphasis of the Court]

[224] Here the evidence before the Court is that HarbourEdge was not kept fully informed of the status of the Project. Certain Harbour Construction invoices were not submitted until months after the work was completed or at all. Nor was the lien by Harbour Construction disclosed.

[225] In his Affidavit, sworn June 17, 2020, Larry Dunn states:

> On or about November 1, 2016, HarbourEdge learned through a media report that a lien had been filed by Harbour Construction and registered against the property for the Project. At no time did anyone at Can*Sport inform HarbourEdge that the lien had been filed, although the lien was filed on September 30, 2016
>
> On learning of the lien, HarbourEdge stopped advancing any funding to Can*Sport.

[226] Further, Can*Sport failed to pay the property taxes on the property, despite making a specific request before the Project got underway that it be permitted to pay those taxes directly.

[227] Can*Sport did not disclose these various significant issues to HarbourEdge.

[228] The Court finds that HarbourEdge was not obligated to continue to advance funds in the face of non-compliance on the part of Can*Sport with the terms of the Commitment Letter.

[229] Counsel for Can*Sport posed many questions in cross-examination to Larry Dunn and Tim Dwyer about whether HarbourEdge "could have" done various things. For example, HarbourEdge could have called Lee Adamski and asked him whether the amount of Harbour Construction's lien was "bogus" or asked him about Adepa's $12 million dollar construction budget contained in Can*Sport's August 2016 package or discussed with Lee Adamski whether HarbourEdge could have advanced against the lien.

[230] However, what HarbourEdge "could" have done is different from saying what HarbourEdge was required to do pursuant to the Commitment Letter. Nor does what HarbourEdge could have done rise to a breach of contract or bad faith in the face of clear contractual negotiated terms as to each party's responsibilities.

[231] There is no evidentiary basis for this Court to find that there was $500,000, $700,000 or $900,000 remaining upon Facility 2 upon which Can*Sport was entitled to draw. Without a breach of contract there can be no damages and in fact, the Court finds that Can*Sport suffered no damages as a result of any actions of HarbourEdge with respect to Facility 2.

<u>Facility 3 – The Alleged Waiver of Preconditions</u>

[232] Counsel for Can*Sport says that the letter agreement signed by Tim Dwyer and Lee Adamski on September 30, 2015 had the effect of HarbourEdge waiving the preconditions for Facility 3 in exchange for HarbourEdge "paying itself" the $100,000 lenders fee otherwise payable once Facility 3 was accessed.

[233] Facility 3 was where most of the money for the loan was to be advanced, i.e. over $8 million dollars. Lee Adamski's evidence was that HarbourEdge waived those preconditions, although he was planning on meeting or providing the

preconditions in any event. He insisted that he was not required to do so because HarbourEdge had waived them.

[234] In its Counterclaim, Can*Sport alleges:

> 15. The Facility 3 lenders fee that HarbourEdge was to receive once that Facility's funds were accessed by CanSport was $325,000, and HarbourEdge wanted CanSport's agreement to pay itself $100,000 of their lenders fee in advance of the draw-down on Facility 3.
>
> 16. To press its demands for an advance of its lenders fee, HarbourEdge threatened to halt the payment of further advances under Facility 2, and also threatened to not allow CanSport access to Facility 3 regardless of whether or not the Commitment preconditions were met.
>
> 17. As a result of the representations of HarbourEdge regarding further access to Facilities 2 and 3, CanSport agreed that HarbourEdge could pay itself $100,000 of the lenders fee otherwise owed once Facility 3 was accessed.
>
> 18. On September 30, 2015 HarbourEdge, CanSport and Adamski signed an agreement whereby the Defendants permitted the Plaintiff to draw-down $100,000 of the lenders Facility 3 fee of $350,000, in advance (the "Agreement").
>
> 19. The Agreement was an amendment to the Commitment.
>
> 20. The Agreement stated that the funds to be paid to HarbourEdge were, "…deemed to have formally triggered the lenders full commitment of funds allocated to construction under Facility 3, as set out under the terms and conditions in the November 24, 2014 financing agreement".
>
> 21. The Agreement provided CanSport with HarbourEdge's unconditional commitment to Facility 3 and waived the preconditions stipulated in the Commitment, in exchange for the $100,000 advance of HarbourEdge's lenders fee.
>
> 22. HarbourEdge then paid itself the $100,000 advance of its lenders fee, but within six months it halted further draws on Facility 2, and denied CanSport access to Facility 3.
>
> …
>
> 25. HarbourEdge did not pay to CanSport the balance of Facility 2 that was owed, did not allow CanSport access to Facility 3 whatsoever, and by November 2016 HarbourEdge had informed CanSport that it would not extend any further funds agreed to in the Commitment, nor would it extend the Commitment beyond its maturity date of January 9, 2017.

[235] HarbourEdge agrees that the September 20, 2015 letter was an amendment to the Letter of Commitment. However, it says that all that letter did was to commit

HarbourEdge to have the Facility 3 funds available for draw, once the preconditions had been met.

[236] The case law is clear that any waiver of a contract in the lending context must contain express or unequivocal language or conduct. In *Northern Life Assurance Co. of Canada v. Reierson*, [1977] 1 S.C.R. 390 (SCC) the Supreme Court of Canada stated:

> 13. …Before one can find waiver there must be express and unequivocal language or conduct, which one does not find in the present case.

[237] Counsel for HarbourEdge refers to the decision of the Alberta Court of Appeal in *Federal Business Development Bank v. Steinbock Development Corp.*, 1983 ABCA 91 where the Court discussed the stringent test for waiver in the landing context:

> 20 The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

[238] The decisions of the Supreme Court of Canada in *Northern Life* and that of the Alberta Court of Appeal in *Steinbock Development* were considered by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 when it set forth the stringent test for waiver:

> 20 Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocable and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

[239] Obviously, a loan agreement cannot be varied unilaterally without agreement. See *Hyslip v. MacLeod Savings & Credit Union Ltd.*, [1988] A.J. No. 642 at para. 30.

[240] The evidence before the Court does not support the assertion that HarbourEdge waived the preconditions to Facility 3.

[241] As noted above, the Court heard evidence about a meeting at a Tim Horton's restaurant on September 15, 2015 which led up to the September 30, 2015 letter. Lee Adamski's evidence was that he felt threatened or was coerced into signing the September 30 letter, with the threat being that the funding would be cut off.

[242] Lee Adamaski appears confused about what happened during the meeting at Tim Horton's with Larry Dunn and a separate telephone call with Tim Dwyer. Lee Adamski's evidence on direct examination was that he never had a telephone conversation with Tim Dwyer and that he was sure that Tim Dwyer was at the Tim Horton's meeting from which the September 30 letter came to be. However, on cross-examination when Lee Adamski saw Tim Dwyer present in the court room, he suggested that Tim Dwyer had not been at the Tim Horton's meeting after all. Tim Dwyer's evidence was that he was not at the Time Horton's meeting on September 15, 2015, which was also the evidence of Larry Dunn.

[243] The Court finds that Lee Adamski's recollection of events from the September 15, 2015 meeting and the telephone call, and what took place arising out of all of that is not reliable; nor is his suggestion that he felt threatened into signing the September 30 letter credible. The Court notes that he had legal counsel during this time, Claire Milton K.C., who was well able to provide advice on any of these issues. There is no evidence before the Court that Ms. Milton advised HarbourEdge that it had waived the preconditions for funding under Facility 3.

[244] Further, Can*Sport's conduct after the September 30, 2015 letter belies Lee Adamski's suggestion that HarbourEdge had waived the preconditions to Facility 3 in exchange for $100,000 (the lenders fee).

[245] In an email dated May 18, 2016 from Claire Milton to HarbourEdge, Ms. Milton says "it", i.e., Can*Sport, "is in the process of finalizing the conditions precedent for the final drawn-down on the mortgage and Mr. Lawless will have to wait until Facility 3 is drawn for his fee". In an email dated April 22, 2016, where Lee Adamski responds to a February 23, 2016 email from Victor Fisher, Lee Adamski sets out a detailed response to the status of each of the preconditions for Facility 3, as noted earlier in this decision.

[246] Accordingly, while Can*Sport now alleges that all of the preconditions for access to the funds in Facility 3 had been waived, that is not what the written record before this Court shows during the relevant time. The parties, including Can*Sport, were not acting as though all of the preconditions had been waived.

[247] Both Tim Dwyer and Larry Dunn said, unequivocally, that they did not waive those preconditions. The Court finds that there was no waiver.

[248] However, the Court notes that the parties did agree to a change in which property tax would be paid, at the request of Can*Sport. In an email dated July 27, 2015 from Loretta Stanton of HarbourEdge to Michael Lawless, Ms. Stanton said that HarbourEdge's credit committee was prepared to accept confirmation of property taxes paid by CanSport on the Property for the period of the HarbourEdge mortgage. That was clearly a change to the terms of the Commitment Letter. It was clear, unequivocal and the parties were in agreement. There is no similar communication from HarbourEdge or Can*Sport confirming in writing that there was a waiver to the preconditions for Facility 3.

[249] By contrast, the Court finds that there was a clear agreement between the parties that HarbourEdge could access $100,000 in the lenders fees under Facility 3. That agreement is evidenced by the signed letter of September 30, 2015.

[250] Further, the Court accepts the evidence of Tim Dwyer and Larry Dunn that the September 30 letter advised that HarbourEdge had agreed to commit $8 million dollars to Facility 3. This was not the same thing as saying that that money was there for draw down without condition. It was money available for draw down when preconditions for its draw down were met. This is related to the lenders fee.

[251] When asked in cross-examination what Can*Sport was getting out of the September 30, 2015 agreement, Larry Dunn's evidence was that every loan HarbourEdge advances contains a lenders fee.

[252] The case law and the evidence of the HarbourEdge witnesses shows that the lenders fee is a commitment to have the funds available when they are needed – not to waive preconditions to the release of those funds. (See *Sherritt Gordon Mines Ltd. v. Minister of National Revenue*, [1968] 2 Ex. C.R. 459 at para 14 and Practical Law Canada Finance, "Financial Fundamentals: Standby Fees and Commitment Fees (2023), online: *Thomson Reuters Pracctical Law* at 6-161-4921).

[253] This Court finds that HarbourEdge did not breach the Commitment in relation to Facility 2 funding.

[254] Further, there was no breach of contract in relation to Facility 3. As was the case for Facility 2, the funds were not there to be drawn upon for any purpose by

Can*Sport. Draws under Facility 3 had to be supported by invoices and supporting documentation.

[255] However, the parties never arrived at the point where Facility 3 draws were required.

The Failure to Renew the Loan

[256] As part of its claim, Can*Sport also alleges that HarbourEdge failed to renew the loan.

[257] As noted, the loan had a contractual term and expired at the end of December 2016 or early January 2017. HarbourEdge was under no obligation to extend the term of the loan. There is neither an inherent nor implied right of extension to the terms. Any extension of the term was governed by the words of the contract. The Letter of Commitment does not contain any provision for the option to extend or renew the terms of the loan. Tim Dwyer's evidence was that it could be done, but it was not done here and there was no obligation for HarbourEdge to do so.

[258] The evidence before the Court confirmed that HarbourEdge provided Can*Sport with a significant time to obtain alternative funding after advising in November 2016 that the loan would not be renewed.

[259] Even though demands were made on March 17, 2017, this legal action was not filed until August 31, 2017. It is clear that HarbourEdge did not act precipitously and gave HarbourEdge time to obtain alternate funding, had Can*Sport been able to do so.

[260] This Court finds that all of Can*Sports claims, however framed, including allegations of bad faith conduct, are not made out on the evidence and are dismissed.

Issue 2: Did Can*Sport suffer Damages as a result of Breach of the Commitment

[261] Can*Sport and Lee Adamski claim for damages for "lost business, lost revenues and lost profits" and provided the Court with a series of estimates and profit projections that it suggests Can*Sport would have received, had the Project been completed.

[262] Damages must be proven. Can*Sport has not proven that it suffered any damages because the Court has found that HarbourEdge did breach Facility 2 and did not waive the pre-conditions for Facility 3. Accordingly, there are no damages arising from any breach.

[263] Further, even if there was a breach of a Facility 2 or Facility 3 (which the Court finds there was not), the damages claimed by Can*Sport are far too remote.

[264] In that regard, Can*Sport seeks damages including lost of profits, as though the Project had been fully completed, with the buildings constructed and tenants in place.

[265] In *Proving Economic Loss* (Toronto: Thomson Carswell, 1995-) (loose-leaf), 19-16, the authors note that the purpose of an award of damages for breach of contract is "to place the innocent party in the position he or she would have been in had the contract been carried to its completion".

[266] The valuations relied upon by Can*Sport assume a start date for the business commencing at the end of the term of the Loan (January 17, 2017). This is not supported by the evidence, which shows that it would have been impossible for the Facility to be up and running with paying tenants at that time.

[267] It is true, as argued by Can*Sport, that a Court is obliged to attempt to determine damages, even when they are inherently difficult to calculate. However, as noted by Finlayson J.A. of the Ontario Court of Appeal in *Martin v. Goldfarb*, 1998 CanLii 4150 (ONCA) at para 75:

> I have concluded that it is a well established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guess work. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

[268] Here, Can*Sport did not attempt to substantiate its damages by providing expert evidence as to losses of businesses similarly placed. Further, there was no evidence of any attempt on the part of Can*Sport or Lee Adamski to mitigate any losses they say they suffered.

[269] If the Court were to award damages, which it has found did not flow from any breach of the Commitment, it would award only nominal damages in the amount of one dollar.

Conclusion

[270] The Counterclaim is dismissed, with costs payable to HarbourEdge. If the parties cannot agree on costs, the Court will receive written submissions within 30 calendar days of their receipt of this decision.

Smith, J.