Claim No: SCCH - 465497

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Aguilar Capital Markets Ltd. v. Flatc Marine Offshore Ltd.,* 2018 NSSM 25

BETWEEN:

AGUILAR CAPITAL MARKETS LTD.

Claimant

- and -

FLATC MARINE OFFSHORE LTD.,
CAPTAIN FRANCIS BOAKYE and CAPTAIN MICHAEL NORTEYE

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on May 2, 2018

Decision rendered on May 10, 2018

APPEARANCES

For the Claimant	Brian Mutale Owner
For the Defendant	Geoff Franklin Counsel

BY THE COURT:

[1] The Claimant seeks the sum of $15,000.00 US, translated into Canadian funds, representing the balance said to be owing under a contract for services.

[2] The Claimant is the Nova Scotia based company through which Brian Mutale carries on business which can best be described as a type of investment banking and/or financial consulting. (The Claimant is sometimes referred to as "ACM.")

[3] The Defendant FlatC Marine Offshore Limited (sometimes "FMO") is a company incorporated in Ghana, which operates in the marine offshore business. The named individual Defendants, Captain Francis Boakye and Captain Michael Norteye, are the principals of that company. The claim against them personally has already been dismissed by a previous decision, although has not yet been reflected in an order. I will do so in the order that flows from this decision. All references to the Defendant will be to FMO and not the named individual Defendants.

[4] The current activity of the Defendant appears to be the operation of tugboats. However, in 2016 it aspired to the purchase of several supply vessels to service oil rigs in the burgeoning offshore oil industry off the coast of West Africa. The principals of the Defendant are both experienced marine captains, but this foray into the purchase of supply vessels would have been something of a stretch for them. They would have needed significant funding.

[5] Mr. Mutale met the principals of the Defendant in or about late 2016, and convinced them that he could acquire funding for them to purchase the two

supply vessels that they were then interested in. The amount of funding that they were looking for at that time was in the neighbourhood of USD $30 million.

[6] On December 30, 2016, an agreement was signed between the Claimant company and the Defendant company, which was referred to as a "Fund Raising Mandate Agreement".

[7] It is not necessary to reproduce the entire agreement. The important parts are the following:

> **2.0 COMPENSATION/OBLIGATIONS OF FMO**
>
> Loan facilitation fee (retainer):
>
> A facilitation fee totaling the sum of USD $30,000 is to be paid to the Advisor to cover the costs associated with sourcing for the loan. This money will be paid in two separate instalments.
>
> > i. $10,000 USD will be deposited into the Advisor's nominated account in Canada and this money or part thereof is to be used to conduct the study and prepare report to investors. This will be paid on or before January 15, 2017.
> >
> > ii. The second instalment shall be paid upon successful completion of the appraisal report and has been submitted to the potential investor(s) and a positive response is obtained from the potential investor(s) to the extent where investor has issued notification of desire to release funds to FMO pending the outcome of the tender bid by ENI. [ENI being the entity from whom the Defendant was seeking to buy the boats.]

[8] The agreement then proceeds to provide certain "success fees" as a percentage of money raised, which amounts (if achieved) would have dwarfed the aforementioned $30,000.00 retainer.

[9] The other paragraph of the agreement that is important is paragraph five:

> **5 TERMINATION**
>
> Either of the parties may terminate this agreement by giving the other 30 (thirty) days written notice thereof. This agreement shall also terminate if a party commits a material breach of its obligations under this agreement and, if remediable, shall fail to take all necessary action to remedy such breach within 14 (fourteen) days of the service of notice by the party complaining of such brief breach.
>
> In the event of termination of this agreement, advisor shall be entitled only to receive the fees stated as instalment i. covered in this Agreement in respect of services received by FMO prior to such termination.

[10] To summarize what came later, Mr. Mutale received the initial $10,000.00 retainer and travelled to Ghana in February 2017, to begin his work. It does not really matter what he did there, other than to recite the fact that he eventually succeeded in causing an institution known as National Standard to issue a letter dated 15 March 2017, expressing an interest in advancing to the Defendant a sum of almost USD $116 million. This letter appears to have represented a serious interest on the part of National Standard, but as a letter of intent, it was contingent upon many things. One of those contingencies was that it would have required the borrower, namely the Defendant, to advance National Standard a significant sum of money - USD $350,000.00 - toward due diligence and underwriting expenses. According to Mr. Mutale, such an upfront fee could not be avoided. He understood that the Defendant was looking for a loan arrangement that would not have required the advancement monies which they did not have, but he was convinced that this could be made to work and funds to cover this $350,000 could be found.

[11] All parties are in agreement that the sum of $115,000,000-plus was not what the Defendant was actually looking for. However, Mr. Mutale discovered through his efforts that major financial institutions would not be interested in such a “small” amount as $30,000,000. Mr. Mutale explained to the Defendant and its principals that, even though they had no immediate need for approximately $80,000,000 of the amount proposed, they might eventually wish to expand, and in the meantime something could be structured whereby this $80,000,000 would be invested in a bank in Ghana and that the interest generated could defray the cost of the entire loan with National Standard. Mr. Mutale believed that a favourable rate could be negotiated with a bank in Ghana, such that there would be a positive spread between the loan rate and the investment rate. He explained that this might be possible because Ghana is somewhat capital starved.

[12] The terms of the offer from National Standard were conveyed to the Defendant and its principals on or about March 14, 2017, namely one day before the letter of offer was dated. They did not immediately convey to Mr. Mutale that they were unhappy with his efforts, though after some consideration they did express their unhappiness with what the Claimant had procured.

[13] It bears mentioning that by this time, the Claimant had asked for and received a further USD $5,000.00 to help defray the expenses of Mr. Mutale’s trip, which had lasted longer than initially anticipated. This explains why the amount claimed is USD $15,000.00, rather than USD $20,000.00 as stated in the Fundraising Mandate Agreement.

[14] The Defendant and its principals eventually rejected the idea of proceeding with the National Standard proposal. Although it does not strictly matter why they elected not to proceed, I have no difficulty accepting that they did not wish to pay USD $350,000.00 toward an agreement, which amount would be non-refundable in the event that the deal fell apart for any reason. Also, I can accept that they were not really interested in borrowing such a large sum of money, which was almost quadruple what they were actually looking for.

[15] The Defendant elected to terminate the contract, and an email was sent dated April 13, 2017 stating as follows:

> "By invoking termination clause 5 paragraph two of the attached agreement duly signed by your good self, the contract with Aguilar Capital Markets is hereby terminated effective March 27, 2017 when you failed to carry out our mandate to source for only a limited amount of funds requested and also your inability to prepare the cost on cost assessment for us to present to our board. By the above-stated clause you only qualify for the initial payment of USD $10,000 and Flat C Marine shall take the necessary steps if required to recover the additional USD $5,000 paid to you while in Ghana.
>
> Having consulted with our financial advisors, a letter of intent by definition or a term sheet, is not a success letter, and LOI subject to further due diligence, at additional cost, and a secondary due diligence by a local mediation bank cannot be misconstrued (sic) to mean achievement of success.

[16] I note here that there is no counterclaim for the return of USD $5,000.00, but the Defendant disputes that the Claimant has strictly qualified to obtain the balance of the USD $30,000.00 mentioned in the agreement as the loan facilitation fee or retainer.

[17] On a fair literal reading of the agreement, the second instalment of the USD $30,000.00 fee would only have been payable upon a potential investor issuing a "notification of desire to release funds to FMO …"

[18] This agreement was drafted by the Claimant, in whole or in part, and it cannot escape the language that is used. Clearly the agreement contemplates a "done deal" in the sense of a funding commitment contingent only on confirmation that the Defendant was able to purchase the boats for which it was bidding. It is not a fair reading of the agreement to trigger the payment of the second instalment, or to consider that the tasks had been successfully completed, when all that was in hand was a term sheet or letter of intent that could have failed on so many different contingencies.

[19] The Defendant was entitled to terminate the agreement, and did so precisely within the terms of paragraph five of the agreement. The part of that clause invoked is quoted above, and essentially limits the Claimant to receiving only the initial USD $10,000.00.

[20] The claim for the balance of the USD $30,000.00 cannot succeed because the conditions precedent to that money being owed did not come to pass.

[21] It is unnecessary for me to say much about a lot of the evidence that came out on cross-examination of Mr. Mutale. Counsel for the Defendant attempted to cast serious aspersions on Mr. Mutale’s qualifications to consider himself an investment banker or financial consultant. None of that matters. Notwithstanding the lack of formal qualifications, Mr. Mutale presented as a

highly intelligent and determined gentleman, who appears to have had no problem speaking to major financial institutions in an effort to make this transaction happen. He did not misrepresent himself. His claim fails only because of the terms of the contract to which he was a party. As stated, no further compensation is payable because it is not within the terms of the contract.

[22] In the result, the claim is dismissed.

[23] The Defendant has asked that it be entitled to reasonable travel costs connected to the attendance in court of Mr. Boakye. I do not believe such costs are appropriate. There is nothing in the conduct of this case that would fault the Claimant. Furthermore, in this day and age, it could have been arranged to have Mr. Boakye's evidence heard by way of video conference or telephone, and his attendance for the hearing might have been avoided. Clearly the court benefited from having him in person, but that was not the only option. In my discretion, I do not find that there is cause to saddle the Claimant with any order for costs.

Eric K. Slone, Adjudicator