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Home Life/Realty 500 Inc. v. C. & R. Mattucci Ltd.

Home Life/Realty 500 Inc. v.
C. & R. Mattucci Limited et al.

[1994] O.J. No. 864

18 O.R. (3d) 118

39 R.P.R. (2d) 114

47 A.C.W.S. (3d) 901

Action No. 51914/90Q

Ontario Court (General Division),

Garton J.

May 2, 1994

Counsel:

E. Upenieks, for plaintiff.

T. Charney, for defendants.

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1 GARTON J.: -- The plaintiff seeks to recover from the defendants a commission for its services as a real estate broker. The plaintiff, through its agent, initiated and was involved in lease negotiations between the defendant owner of a building and a group of potential tenants. The plaintiff drafted several offers to lease, but none of these offers was ever signed by both the owner and the tenant group. Then, unbeknownst to the plaintiff, the owner and the tenant group, using the services of another real estate broker, continued to negotiate and eventually agreed on the terms of a

lease. The defendant company paid a commission to the second agent, but nothing to the plaintiff. The plaintiff argues that it is entitled to a commission for its services. The plaintiff submits that it "obtained an offer in writing that was accepted", within the meaning of s. 23(b) of the Real Estate and Business Brokers Act, R.S.O. 1980, c. 431.

2 The plaintiff also argues that it is entitled to certain moneys based on the principle of quantum meruit.

The Facts

3 In early December 1989, Fausto Sacchetti, the agent for the plaintiff, contacted the defendant, Rocco Mattucci, the principal of the defendant C. & R. Mattucci Limited, which owned 535 Millway Avenue in the Town of Vaughan. At that time, the building on this property was basically a shell structure designed for industrial use. It contained approximately 78,000 square feet. Mattucci wanted to either lease or sell it. When Sacchetti saw the "for sale or lease" sign on the property, he contacted Mattucci and eventually the two men met. Sacchetti wanted Mattucci to give him a listing agreement. Mattucci refused. Mattucci testified that he also refused to provide Sacchetti with broker protection -- that is, he would not guarantee Sacchetti any commission payment in the event that a tenant or purchaser originally introduced to Mattucci by Sacchetti used another broker or approached Mattucci directly. Sacchetti testified that he understood Mattucci had, in fact, promised him broker protection. According to Sacchetti, who already had a prospective tenant in mind for the property, he asked Mattucci if he was protected on this particular customer. Sacchetti testified that Mattucci told him: "Don't worry, anyone who brings me a customer is the one who gets paid in the deal." Mattucci testified that he only told Sacchetti: "Whoever makes the deal is the one who gets paid." Mattucci stated that he would sign a commission agreement as part of any signed offer to lease that was obtained by Sacchetti. He provided Sacchetti with blueprints of the building, and told him he was looking for a rent of $5.00 per square foot.

4 Sacchetti showed the building to and discussed the necessary leasehold improvements with a group of four prospective tenants ("the tenant group"). This group consisted of Angelo Tassone, Vito Cosentino, Joe Cordi and Antonio Montesano. Both Tassone and Montasano operated catering truck businesses; Cordi was in the coffee business; Cosentino owned the Rexdale Bakery Company. These four men were in the process of establishing a business to be called "Mr. Fine Foods", and were interested in leasing 535 Millway for the purpose of carrying on this new joint venture. However, the various offers to lease that went back and forth between the tenant group and Mattucci between December 18, 1989, and January 2, 1990, were under the name "Rexdale Bakery Co. Ltd. in trust", as Mr. Fine Foods had not as yet been incorporated. Tassone and Cosentino appeared to be the leaders of the group, or the two men with the most influence in terms of deciding where and on what terms their new company would be located.

5 Sacchetti spent a good deal of time with members of the tenant group as he attempted to negotiate a lease for 535 Millway. He met with them two or three times each week and spoke to one

or other of them on the telephone daily. He also met with Mattucci, or Mattucci's assistant in December.

6 Several draft offers to lease 535 Millway were prepared by Sacchetti.

7 The first offer, ex. 2, was only a working document. It had an expiry date of December 19, 1989, but was never signed by either the tenant group or Mattucci. The tenants proposed a lease with a five-year term and a rent which started at $4.00 per square foot for the first year, but which increased to $5.00 per square foot by year number five. The portion to be rented consisted of 39,229 square feet which, according to Sch. A of the offer, faced onto Millway Avenue (Unit No. 2). Schedule B partially listed certain leasehold improvements which the landlord was required to complete. Mattucci made several changes to this offer. The tenant had been named Rexdale Bakery Company Ltd. (In Trust). Mattucci crossed out "In Trust" because, as he explained it, he wanted to know exactly with whom he was dealing. He changed the term of the lease to 10 years, and changed the rent from $4.00 to $5.00 per square foot for the first two years, and $5.50 per square foot for years three, four and five. He also made some slight changes to the list of leasehold improvements, but "okayed" the rest. Mattucci did not sign the offer since the cost of the leasehold improvements had to be worked out.

8 The second offer, ex. 3, with the same expiry date of December 19, 1989, was signed by Vito Cosentino on behalf of the tenant group. The words "in trust" were once again part of the description of the proposed tenant, the term of the lease was for five years, and the rent was $5.00 per square foot for each year. This time the amount of space to be rented was 40,000 square feet, which fronted onto Jane Street. Schedule A, the floor plan of Unit No. 1, was prepared by Sacchetti and initialled by Vito Cosentino.

9 Mattucci testified that when he saw ex. 3, he thought the rent looked reasonable, but Sch. B, which listed the work the landlord was required to do, would bankrupt him. He did not sign the offer back. He asked Sacchetti to explain that he would require cash up front in order to complete the leasehold improvements that were being requested of him.

10 Sacchetti testified that a further offer to lease, ex. 4, was prepared either the same day or very close in time to ex. 3. It was signed and initialled by Cosentino on behalf of the tenant group, but was never signed back by Mattucci. The expiry date was once again December 19, 1989. The tenant was described as "Rexdale Bakery Company Ltd.". The portion of the premises to be rented was Unit No. 1 fronting on Jane Street. The term was for five years, and the rent was to be $6.00 per square foot. In order to meet Mattucci's concerns that the tenant pay for the leasehold improvements, Sacchetti suggested that the tenants obtain lease insurance. Mattucci wanted cash or a letter of credit. Neither the tenants nor Mattucci were familiar with insurance for leasehold improvements, although Sacchetti testified that such insurance is quite common. In any event, para. 4(a) of ex. 4 states:

> Lease Insurance

> The tenant shall be responsible to provide lease insurance at his own expense for the term of the lease.

11 Paragraph 11(a) of ex. 4 granted the tenant access for fixturing, and para. 13(a) gave the tenant the exclusive right to lease the remaining portion of the building at a rate to be negotiated.

12 Mattucci testified that ex. 4 was "not quite what I was looking for". He explained that if the leasehold improvements were to be amortized over a ten-year term, he would require $6.35 per square foot in rent. If the tenants paid cash for the leasehold improvements, he would be content with rent of $5.50 per square foot. Sacchetti spent some time at Mattucci's office discussing these concerns.

13 The handwritten changes made to ex. 4 by Mattucci are evident in ex. 5. Mattucci changed the term from a period of five to ten years. He changed the rent from $6.00 to $6.35 per square foot for the first five years and for years six through ten, the rent was "to be negotiated at the then current rate". Paragraph 8 originally stated that the lease "shall contain an Option to Purchase the said premises with Terms & Conditions to be mutually agreed to". Mattucci and Sacchetti changed this sentence to read as follows:

> It being understood by both parties that the said lease shall contain an Option to Purchase the said premises within the first two years of the lease at a purchase price of $7,845,800.00.

Mattucci denied ever seeing the agreement of purchase and sale attached to ex. 5, and which lists the sale price as $5,900,000. He stated that he never received any figure from the tenant group through Sacchetti for the sale of the property.

14 Mattucci placed the letters "OK" beside the paragraphs of the lease he found acceptable. He acknowledged that Sacchetti spent some time with him working on various aspects of ex. 5. Sacchetti also advised him that the tenant group did not appear to have the cash available to pay for the leasehold improvements being requested. It appeared that lease insurance, if available, might solve this problem.

15 Exhibit 1, dated December 28, 1989, is an offer to lease which reflects the various handwritten changes Mattucci had made to ex. 5. It was signed and initialled by Mattucci, and had an expiry date of January 2, 1990. It was never signed by the tenant group.

16 In ex. 1, the tenant is named as "Rexdale Bakery Company Ltd.". The term is for 10 years at a rent of $6.35 per square foot for years one to five, and at a rate to be negotiated for the balance of the lease. Under para. 4(a), the offer was conditional on the tenant obtaining lease insurance:

> Within 15 days after acceptance of this offer the tenant shall be responsible to provide lease insurance satisfactory to landlord at his own expense for guaranteeing payment of all rents for all the terms of the lease.

17 In para. 8, which deals with the tenant's option to purchase the property at $7,845,800 within the first two years of the lease, the following sentence has been added:

> If Lessee exercises option to buy at that time if there is a mortgage on the property, the Purchaser will accept.

Unlike ex. 5, there is no agreement of purchase and sale attached to the offer.

18 In ex. 1, Mattucci agreed to pay the plaintiff a commission of 7 per cent of the first year's base rental and 3 per cent of the base rental for the balance of the initial term of the lease. In the event that any option to purchase was exercised by the tenant, Mattucci agreed to pay a commission of 3 per cent of the purchase price, with the balance of the lease commission then being rebated to the vendor.

19 Having obtained Mattucci's signature on ex. 1, Sacchetti then met with the tenant group. Sacchetti felt the parties were close and that an agreement could be reached. The tenants wanted to pay a rent of $6.00 per square foot. Mattucci wanted $6.35 per square foot. Sacchetti discussed with the tenants the possibility of omitting some of the leasehold improvements in order to reduce the figure of $6.35. He knew that Mattucci would accept a rent of $5.00 per square foot if no improvements were required. The additional $1.35 per square foot represented the amortization of $300,000 worth of leasehold improvements over the 10-year term of the lease. Sacchetti testified that he called Mattucci or his assistant regarding the cost of, and with a view to eliminating, certain leasehold improvements. He testified that his efforts in this respect continued after the offer's expiry date of January 2, 1990.

20 On January 4, Mattucci left on vacation. Vito Cosentino was also away and not available for discussions during January. Sacchetti did continue speaking with the three remaining tenants. He advised them that if they could not successfully work out a deal with respect to 535 Millway, he would try to obtain a deal for them on a Jane Street property. Negotiations did take place regarding another building prior to January 20 and the return of Vito Cosentino. However, Tassone did not care for the Jane Street building, and much preferred the Millway property. It was Sacchetti's understanding that after Cosentino's return, negotiations with Mattucci for the lease of 535 Millway would resume.

21 When Mattucci returned from holidays, he called Sacchetti. He was advised by Sacchetti that he had not been able to get the tenants to sign Mattucci's December 28 offer, that he was showing the tenants another building, but that he would attempt to bring them back to the Millway property.

22 The evidence indicates that through January and part of February, the tenants had

disagreements among themselves as to which building they wished to pursue. On February 1, Sacchetti was instructed by them to work out a deal regarding the Jane Street building. This deal never materialized. One week later, their interest in Mattucci's building was rekindled. Sacchetti drove them back to 535 Millway to show them the property once again.

23 Sacchetti testified that sometime in early February he prepared and delivered to the tenants four copies of a further offer to lease, which he anticipated the tenant group would sign and submit to Mattucci. In this offer, the rent was stated to be $6.00 per square foot for the first five years, but one of the leasehold improvements had been omitted. Sacchetti testified that he never saw this offer again. He had not retained a copy of it for himself, and was unaware of what had happened to it.

24 Around the middle of February, Sacchetti left on vacation. He testified that he thought his last meeting with all four tenants was around February 15. Upon his return, he had difficulty making contact with Tassone.

25 In late March or early April, Sacchetti learned that the tenant group, under the new name "Mr. Fine Food Ltd.", had successfully negotiated a lease for 535 Millway Avenue with the defendant company. When Sacchetti confronted Mattucci with this news, Mattucci at first pretended that he did not know that Rexdale Bakery and Mr. Fine Food Ltd. were one and the same. Sacchetti had actually never physically introduced Mattucci to any members of the tenant group. However, Mattucci later acknowledged to Sacchetti that he did in fact realize he was dealing with the same tenant. He apologized to Sacchetti, and stated that Sacchetti was entitled to something, but that he should speak to Joseph Tersigni, the listing agent, in terms of recovering any commission. As far as Mattucci was concerned, when he received no further offers from Rexdale Bakery Ltd. after January 2, 1990, he assumed the deal was dead. On February 10, 1990, he signed an exclusive listing agreement (ex. 7) with J.D.F. Realty Ltd. for 535 Millway. Mattucci normally did not give listings to real estate agents, but testified he did so on this occasion as a way of helping out a friend, Joseph Tersigni, who is the principal of J.D.F. Realty Ltd. The listing was actually not for the lease, but for the sale of the property. The price listed was $7,457,500. In a chart below the two men's signatures, Tersigni had added the words, "lease 5.50 sq. ft.".

26 Some days after Tersigni obtained the listing, he and Mattucci happened to meet Angelo Tassone in a restaurant. Tersigni, who had known Tassone for several years, introduced him to Mattucci. Tassone indicated he was in the market for commercial space. As a result, Tersigni set up three or four meetings between Mattucci and the tenant group over the following three or four days. They met at Tersigni's office. These meetings lasted some four or five hours each.

27 According to Tersigni, the plaintiff's name, "Home Life", came up at the second meeting. The tenants advised Tersigni about the offers made through Sacchetti on the same property in December. Tersigni stated that he was not concerned, since the plaintiff had not had a listing for the property. Also, according to Tersigni, they had to start all over again on many of the more contentious issues in the offer to lease.

28 Tassone testified that he and the other tenants had been dissatisfied with Sacchetti's efforts to obtain a deal, and that they had therefore decided to change agents. However, they never advised Sacchetti to stop work on their behalf. No one ever told him that his services were no longer required. Tassone acknowledged that Sacchetti had introduced them to and had shown them the Millway property. He stated that during his negotiations at Tersigni's office, he asked Mattucci about Home Life and Sacchetti. According to Tassone, Mattucci told him, "Don't worry about it. Everything is taken care of."

29 Mattucci's evidence was that he asked Tassone about his relationship with the plaintiff, and was simply told that Sacchetti was no longer their agent.

30 The first product of the negotiations at Tersigni's office between the tenant group and Mattucci was an offer to lease dated February 16, 1990 (ex. 14). It was signed by both parties. The terms of ex. 14 are very similar to those of ex. 1 prepared by Sacchetti on December 28. In fact Mattucci acknowledged the similarity, but thought that from his point of view ex. 14 was "a little better". There can be no doubt that Sacchetti's earlier efforts played a significant role in the creation of ex. 14. Tassone testified that after meeting Mattucci and indicating his interest in leasing 535 Millway, Mattucci told him to make the "same or similar offer" as before. This was clearly a reference to ex. 1. It may be inferred from the evidence that in actual fact, ex. 1 formed the starting point or base of the negotiations between the parties at Tersigni's office. I note that despite the alleged duration of the meetings there, no draft offers to lease had to be prepared. There was obviously a heavy reliance on Sacchetti's earlier work. This was also apparent from the fact that although Mattucci, Tersigni and Tassone appeared to know very little or nothing at all about lease insurance, ex. 14 was conditional upon the tenant group obtaining such coverage. Clearly all parties were relying on Sacchetti's suggestion that this was one way to ensure that the landlord would be paid for the leasehold improvements without the tenants having to put the cash up front.

31 A further indication of reliance on Sacchetti's work is sch. "A" which was attached to ex. 14 and which is the proposed floor plan of the premises. It is actually a copy of the same sketch Sacchetti had prepared and attached to the earlier offers to lease (Exs. 1, 3, 4 and 5). It still bore the initials of Vito Cosentino from those earlier negotiations. In preparing Sch. "A" Sacchetti had contacted the City of Vaughan to ensure compliance with city by-laws.

32 The term of the lease in both exs. 1 and 14 is for 10 years. However, unlike ex. 1, the rent in ex. 14 is $6.37 as opposed to $6.35 per square foot for the first five years. Mattucci explained that this slight increase resulted from the tenant group's demand for three months of free rent. He agreed to the rent-free period, but then adjusted the rent accordingly. The deposit required for the first and last months' rent was therefore slightly higher than that required in ex. 1.

33 In ex. 14 the landlord's work was divided into Sch. "B", "Landlord's Work", and Schedule "C", "Landlord's Extra Work". There were a few minor differences or adjustments in this area from the landlord's work as outlined in Schedule "B" of ex. 1.

34 Paragraph 10 of ex. 14 gave the tenant group an option to purchase 535 Millway for $7,061,220 within the first two years of the lease.

35 Paragraph 11 of ex. 14 gave the tenant group the first right of refusal, although this paragraph appears to be incorrectly set out.

36 In ex. 14, Mattucci agreed to pay Tersigni a commission of 6 per cent of the first year base rental and 2 and one-half per cent of the base rental for the balance of the initial term of the lease.

37 As indicated earlier, ex. 14 was conditional upon the tenant group obtaining lease insurance for the landlord's leasehold improvements of $300,000. In the end, the tenants were unable to obtain such coverage. This led to the creation of a further and final offer to lease, ex. 15, which was again signed by both Mattucci and the tenant group. It bears the date of February 16, 1990, but was actually signed some time after that, and backdated by agreement of the parties.

38 In ex. 15, the rent was reduced to $5.00 per square foot for the first five years, but the tenant was required to make cash payments to the landlord totalling $300,000 for the leasehold improvements. Mattucci's agreement to pay a commission to J.D.F. Realty Ltd. remained the same, although the reduction in the rent from $6.37 to $5.00 per square foot substantially reduced the amount of the commission payable.

39 On February 27, 1990 Mattucci signed a separate commission agreement with J.D.F. Realty (ex. 17) wherein he agreed to pay a commission of 6 per cent of the first year's net rental and 2 and one-half per cent of the rental of the balance of the lease. Mattucci also agreed to pay a commission of 2 per cent of the sale price should the option to purchase be exercised.

40 The actual lease, ex. 19, is dated March 7, 1990, although the evidence indicates it was probably signed by the parties on or after May 3, 1990.

41 On May 31, 1990, Mattucci paid J.D.F. Realty Ltd. the sum of $31,383.20 in commission with respect to the leasing of 535 Millway. This amount is in accordance with the terms of both the final offer to lease, ex. 15, and the commission agreement, ex. 17.

42 Counsel for the plaintiff questioned whether Mattucci ever actually gave Tersigni a listing for 535 Millway Avenue. Counsel suggested that the February 10 document was manufactured or "cooked up" by Mattucci and Tersigni sometime after the two final offers to lease, exs. 14 and 15, had been signed, and after Sacchetti discovered that a deal had gone through without his knowledge or input. Counsel referred to several aspects of the evidence to support this submission. For example, Mattucci testified that he would probably not have signed a document on Saturday or Sunday, as he did not work on weekends. Yet the listing is dated February 10, 1990, which was a Saturday. Also, Mattucci acknowledged that he did not generally give listings to real estate agents. His reason for giving Tersigni the listing for 535 Millway Avenue was "to help him out". Yet he only gave Tersigni one listing, despite the fact that Mattucci owned many other properties. The

listing itself was for the sale, not for the lease of the property. There was therefore no commission rate established should Tersigni be successful in obtaining an offer to lease. Tersigni admitted altering the listing after Mattucci had signed it. He also whited out the Toronto Real Estate Board logo on his own copy. He knew he was not authorized to use the Board's forms since he was not as yet a Board member. It is doubtful that he ever informed Mattucci that he was not a Board member.

43 Mattucci, Tersigni, and the tenant group appear to have been unconcerned about recording the proper dates of their transactions. As already mentioned, ex. 15 was backdated to February 16. The date on the lease does not reflect the date it was signed. I also note that for some reason, Tersigni's original figures in his statement of account to Mattucci (exs. 23 and 23(a)) are based on the rent which was payable under ex. 14, rather than on the final offer to lease, ex. 15. However, in the end, the commission Mattucci paid to Tersigni's company in May was calculated in accordance with the terms of ex. 15.

44 The paperwork which reflected the dealings between Mattucci, Tersigni and the tenant group was no doubt sloppy in many respects. But on the evidence before me I am satisfied that Mattucci did not involve Tersigni in the Millway property and the subsequent negotiations with the tenant group with the purpose of avoiding the payment of a commission to Sacchetti. After January 2, the expiry date of ex. 1, Mattucci thought that any deal between the tenant group and himself was dead. The tenant group had not signed back what Mattucci described as "his last shot" at a deal. And when he spoke to Sacchetti after returning from his vacation later in January, Sacchetti informed him that the tenant group was actually looking at another property. Mattucci was free at that point to list the property with any agent of his choice. The issues which arise in this case stem from the fact that Tersigni, the second agent, happened to end up negotiating a deal with the same group of tenants whom Sacchetti had originally introduced to the property. I find that the meeting at the restaurant when Tassone encountered his former neighbour, Tersigni, and was then introduced to Mattucci, was in fact a coincidence. It was this meeting which led to further negotiations between Mattucci and the tenant group, and which ultimately culminated in the final deal whereby the tenant group leased and took possession of 535 Millway Avenue.

The Law

45 In order to succeed, the plaintiff must bring its claim within the provisions of s. 23(b) of the Real Estate and Business Brokers Act, which reads as follows:

> 23. Subject to section 32, no action shall be brought to charge any person for the payment of a commission or other remuneration for the sale, purchase, exchange or leasing of real estate,
>
> . . . . .
>
> (b) unless the broker or the broker's salesperson has obtained an offer in writing that is accepted.

46 The plaintiff submits that on the evidence, it is entitled to recover against the defendant because it "has obtained an offer in writing that is accepted".

47 Sacchetti did not obtain a listing agreement. However, Mattucci verbally agreed that he would pay a commission to Sacchetti should Sacchetti obtain a lessee or make a deal. This agreement led to the written commission agreement which was attached to ex. 1, the December 28 offer to lease signed by Mattucci. This particular offer was never signed by the tenant group, but was basically the same offer the group eventually signed on February 16 at Tersigni's office. When Mattucci was personally introduced to Tassone, he told him to make "the same or similar offer" as before (no doubt a reference to ex. 1) and that is exactly what happened. Both exs. 1 and 14 deal with the same parties and the same property. The term of the lease is for 10 years in each case. When one adjusts for the three-month rent-free period in ex. 14, the rent is the same. Both offers were conditional on the tenant group obtaining lease insurance. The proposed floor plan attached to both offers is the plan prepared by Sacchetti himself. Both contain an option to purchase the property within the first two years although the purchase price in the December 28 offer was $7,845,800 as opposed to $7,061,220 in the February 16 offer. The work to be done by the landlord is basically the same. It must be remembered of course that the February 16 offer was not the final offer signed by the parties. Since the condition with respect to obtaining lease insurance could not be met, the tenant group agreed to make a cash payment of $300,000 to Mattucci for the leasehold improvements. This resulted in the rent being adjusted downward to $5.00 per square foot. Several other clauses were also accordingly adjusted, including the agreement of purchase and sale. But other than these alterations, the February 16 offer, ex. 14, and the final offer, ex. 15, are the same.

48 In discussing the meaning of s. 23(b), the Ontario Court of Appeal in Cash v. George Dundas Realty Ltd. (1973), 1 O.R. (2d) 241 at p. 248, 40 D.L.R. (3d) 31, stated:

> The Court in interpreting and applying a statute must of course attribute to its provisions their plain meaning according to the understanding and practices of the times. A statute speaks continuously as though freshly enacted at the time the issue in question arose: s. 4 Interpretation Act, being R.S.O. 1970, c. 225; Craies on Statute Law, 7th ed. (1971), pp. 81-2. Courts are no longer concerned with the bygone canons of equitable consideration, the mischief rule and the many other aids and procedures formerly invoked in the interpretation of the legislation. We are now concerned only with applying the statute according to its plain meaning in the light of the current practices and standards of the community: Campbell College, Belfast v. Com'r of Valuation for Northern Ireland, [1964] 1 W.L.R. 912, per Lord Upjohn at p. 941, Craies, supra, p. 64.

49 Considering the evidence before me, and attributing to s. 23(b) its plain meaning in the context of the leasing of commercial real estate, I am satisfied that the plaintiff "has obtained an offer in writing" which was accepted. I find that Sacchetti was more than a mere instrumentality concerned in some pre-contractual stage with simply introducing the parties. His involvement went

far beyond that.

50 It was argued on behalf of the defendants that if one considers Tersigni's involvement, his coincidental meeting of Tassone, and his introduction of Tassone to Mattucci, it cannot be said that Sacchetti was the causa causans of the transaction, but merely the causa sine qua non. Counsel referred to the cases of Travis v. Coates (1912), 27 O.L.R. 63, 5 D.L.R. 807 (Div. Ct.), and McBrayne v. Imperial Loan Co. (1913), 28 O.L.R. 653, 13 D.L.R. 448 (C.A.). Can it be said in this case that only one or the other, either Sacchetti or Tersigni was the causa causans of the final deal? The problem of two brokers being involved in the same transaction is addressed in the text Real Estate Agency Law by William F. Foster (Toronto: Carswell, 1984), at p. 156:

> Where a principal expressly or impliedly employs the services of two or more brokers, the question which sometimes arises is which of the brokers is to be regarded as the effective cause of the occurrence of the event on which the commission is payable, because only the broker who can be said to be the effective cause is entitled to the commission.
>
> No problem arises where the different brokers introduce different potential purchasers to the principal and he sells, exchanges or leases his property to one of the persons so introduced. In such a circumstance, the broker who effected the fruitful introduction will be said to be the true effective cause. The real problem arises where two brokers, independently of each other, try to sell, exchange, or lease their principal's property to the same person -- and its solution involves a consideration of the same issues as where only one broker is involved.
>
> The problem, clearly, is not resolved by inquiring to whom the principal has paid a commission. Notwithstanding that the principal has paid a commission to one broker, another broker may still be found to be the effective cause of the transaction. For, as observed by Middleton J. in Robbins v. Hees, a "fisherman who actually lands the fish is entitled to it, even though it was first allured by the bait of another."
>
> However, there is nothing to prevent a court finding that two brokers, working independently of each other, jointly were the effective cause of the occurrence of the event on which the commission was payable.

The author continues at p. 157 as follows:

> Rarely has a principal had to pay two commissions since it is not often that two brokers have been found to be the effective cause of the event on which the

> commission becomes payable. More often than not, where a principal has been held responsible to two brokers, it has been found that he has arbitrarily paid one broker a commission without stopping to consider that another broker may have been the true effective cause of the transaction; or dismissed or ignored the broker who effected the introduction of the purchaser and used another broker (to whom he pays a commission) to assist him in negotiating the transaction.
>
> Generally speaking, of two or more brokers, the one who effects the initial contact between the purchaser and the principal, or his property, has the best claim to a commission provided he does not become uninterested in the transaction and abandon it as hopeless, or an obstacle does not arise which he could not remove, if given the opportunity, from the path of the transaction.
>
> If, in either of these situations, another broker picks up where the first left off, and the event occurs on which the commission is payable, the latter broker will have the stronger claim to the commission.
>
> . . . . .
>
> Finally, it would appear that the purchaser's preferences are irrelevant. Merely because a purchaser takes a dislike to, or for some other reason refuses to deal with, the broker who effects the initial introduction and insists on dealing with the principal through another broker, the first broker will not be denied his commission.

51 The problem of two brokers being involved in the same transaction was considered in Collette v. Olsechuk (1958), 26 W.W.R. 679, 16 D.L.R. (2d) 563 (Man. Q.B.). Mr. Justice Freedman at pp. 682-83 states:

> Many authorities have been cited to me by counsel both for the plaintiff and for the third party. Subject to exceptions arising from the terms of special contracts, the general principle is plain and is supported by an extensive jurisprudence on the subject. The agent whose work is the effective cause, the causa causans, of the sale is the one who is entitled to the commission. The application of the principle to a particular case is not always easy. In conflicts between two agents, as is the situation here, there are decisions on both sides. Sometimes the court will find that the first agent, by introducing the buyer to the property, interesting him therein and arousing his desire to acquire it, was the effective cause of the sale, even though the actual deal was made by a later agent. The latter will not be entitled to reap where the former had sown. An example of such a case, among many others, is Thorburn McKinnon Co. v. Dom. Life Assur.

> Co. [1941] 3 WWR 903. On the other hand the court will sometimes find that the work of the first agent, who introduced the ultimate purchaser, had spent itself, that the link between it and the ultimate sale made by another agent was broken, and that the efforts of the later agent brought about the sale and were the causa causans thereof. In such a case it is customary to speak of the work of the first agent as being merely the causa sine qua non but not the causa causans of the transaction. There are many examples of this type of case, including Taylor v. Silver Giant Mines Ltd. and Giant Mascot Mines Ltd. (1953), 9 WWR (NS) 407, affirmed by [1954] SCR 280; McKinnon v. Benjaminson Apartments Ltd. (1955) 15 WWR 161, 63 Man R 120; Corda v. Koszowski and Pybus (1957) 22 WWR 75, 64 Man R 232, and others.
>
> Bearing in mind that in a contest between two agents the work of one of them usually bears the character of causa sine qua non and that of the other the character of causa causans, I have tried to apply this formula to the resolution of the problem before me. I have found, however, that the customary formula does not admit of ready application to this case. I have accordingly addressed myself to another possibility: Can the combined acts of two agents be regarded as together constituting the effective cause of a transaction, its causa causans?
>
> That very conclusion was reached by Dysart, J. in In re Great West Permanent Loan Co. (in Liquidation); In re Allan Killam & McKay Ltd. and Aronovitch & Leipsic Ltd. [1945] 3 WWR 466, 53 Man R 306. . . .
>
> I cite this case simply to show that it is possible for the efforts of two agents, working independently, to be regarded as together being the effective cause of sale.

And at p. 685, His Lordship concludes:

> I have no doubt that in most actions by real-estate agents for commission it is possible to pinpoint a particular act and say that it was the crucial or decisive factor bringing about the sale. The language quoted will be appropriate in such a case. But exceptions from the norm may occur. Sometimes the court may be driven to the conclusion that a combination of one or more acts produced the sale. That is the conclusion which I have reached in the present case. I feel that I should give effect to it, notwithstanding that it may not fit into a formula which may be said to govern the usual case.

52 Having examined the roles which both Sacchetti and Tersigni played in the obtaining of the

final offer to lease, I am satisfied that they may both be said to be the effective cause of the transaction. They both played important and critical parts. To attempt to separate their roles and to declare one as being the effective cause of the transaction rather than the other, seems to me, in the circumstances of this case, highly artificial and unrealistic.

53 Counsel for the defendant argued that the continuity in terms of Sacchetti's dealings with the parties was broken by the fact that after January 2, 1990, the tenant group instructed Sacchetti to obtain a lease on another property. However, Sacchetti was not successful in this endeavour. Shortly thereafter, the group's interest was rekindled in 535 Millway Avenue. Sacchetti once again showed the property to them, and prepared a further offer to lease. This was in February and was obviously only a very short time prior to Tersigni's involvement and signing of ex. 14 by the parties. Sacchetti never abandoned the deal on 535 Millway Avenue as hopeless. He testified that he spoke to Vito Cosentino even while he was away on vacation. Upon his return, Sacchetti tried to contact Tassone, but without success. I find that Sacchetti was at all times prepared to make himself available to the parties in order to finalize the deal. The tenant group never informed him that they were dissatisfied with his work. He was never advised to discontinue his efforts. In these circumstances, I find that continuity was not broken.

54 It was argued on behalf of the defendants that the final offer was not executed in a direct sequence of events in which Sacchetti was intimately involved. It was submitted that unlike the situation in the Cash case, the activities of Sacchetti did not continue into the preparation of the final agreement. It is true that Sacchetti was not physically present at the offices of J.D.F. Realty when the final offer was signed by the tenant group. But the result of his substantial work and negotiations was certainly present, either in the form of ex. 1 or in the form of the last offer to lease which he had prepared but a copy of which he had failed to retain. The similarities between exs. 1 and 14 are more than a coincidence.

55 I would also note that there was a recognition by Mattucci himself that Sacchetti deserved credit for his role in effecting the final deal. After Sacchetti learned that an offer to lease had been signed, he confronted Mattucci, who acknowledged that Sacchetti was entitled to something. However, Mattucci told him to approach Tersigni. Mattucci had also assured Tassone during their negotiations that as far as Home Life was concerned, everything had been taken care of.

56 Having found that both Sacchetti and Tersigni were jointly the effective cause of the transaction, the question arises as to the appropriate quantum of commission payable to the plaintiff.

57 It would be inappropriate to grant the plaintiff the full amount of commission based on the rent as outlined in exs. 1 or 14. The final rent agreed upon was that as stated in ex. 15. The rate of commission which Mattucci had agreed to pay Sacchetti according to ex. 1 was 7 per cent of the first year's base rental and 3 per cent of the base rental for the balance of the initial term of the lease. Using the rental rate of $5.00 per square foot for the first five years of the lease and an area of 39,229 square feet, the commission payable by the defendants to the plaintiff is $37,267.55.

Judgment is accordingly granted to the plaintiff in that amount.

58 For the record, counsel referred in argument to the following authorities:

1. Banfield, McFarlane, Evans Real Estate Ltd. v. Hoffer, [1977] 4 W.W.R. 465 (Man. C.A.)
2. Brown v. Spamberger (1959), 21 D.L.R. (2d) 630 (Ont. C.A.)
3. C. and S. Realties of Ottawa Ltd. v. McCutcheon (1978), 19 O.R. (2d) 247, 84 D.L.R. (3d) 584 (H.C.J.)
4. Cash v. George Dundas Realty Ltd. (1973), 1 O.R. (2d) 241, 40 D.L.R. (3d) 31 (C.A.)
5. Central & Eastern Trust Co. v. Plymouth Holdings Ltd. (1980), 84 A.P.R. 1, 30 Nfld. & P.E.I.R. 1 (Nfld. S.C.)
6. Century 21 C.G. Realty Ltd. v. Trickett (1986), 47 Alta. L.R. (2d) 137, [1987] 1 W.W.R. 146 (C.A.)
7. Clark & Associates Real Estate Ltd. v. Winroc Corp. (1990), 76 Alta. L.R. (2d) 341 (S.C.)
8. Dani Real Estate Ltd. v. Tyschitschemko, [1959] O.W.N. 35, 17 D.L.R. (2d) 168 (C.A.)
9. Homelife Realty 500 Inc. v. Myland Developments Limited (unreported, December 10, 1992, Ont. Gen. Div., Steele J.)
10. James Squigna Real Estate Ltd. v. Northwest Car Wash Ltd. (1974), 3 O.R. (2d) 619, 46 D.L.R. (3d) 335 (H.C.J.) revd. (1975), 9 O.R. (2d) 55, 59 D.L.R. (3d) 381 (C.A.)
11. McBrayne v. Imperial Loan Co. (1913), 28 O.L.R. 653, 13 D.L.R. 448 (C.A.)
12. Murray Goldman Real Estate Ltd. v. Captain Developments Ltd. (1978), 18 O.R. (2d) 421, 83 D.L.R. (3d) 446 (C.A.)
13. Rooke v. Lillicroft (1974), 4 O.R. (2d) 436, 48 D.L.R. (3d) 204 (H.C.J.)
14. Roycom Realty Ltd. v. Heim (1981), 90 A.P.R. 364, 47 N.S.R. (2d) 364 (S.C.)
15. Travis v. Coates (1912), 27 O.L.R. 63, 5 D.L.R. 807 (Div. Ct.)
16. W.H. Bosley & Co. v. 353500 Ontario Ltd. (1980), 30 O.R. (2d) 759, 117 D.L.R. (3d) 409 (H.C.J.)
17. William Allan Real Estate Co. v. Robichaud (1990), 72 O.R. (2d) 595, 68 D.L.R. (4th) 37 (Ont. H.C.J.) and endorsement dated January 15, 1993 in the Ontario Court of Appeal [reported 11 O.R. (3d) 734, 98 D.L.R. (4th) 285].

59 Counsel indicated that they wished to address me with respect to the matter of interest and costs. This may be achieved by arranging an appointment through my secretary.

Judgment for plaintiff.