

Mortgage broker's fee: Borrower's lawyer not liable

By **James R.G. Cook**

Law360 Canada (April 8, 2024, 12:00 PM EDT) -- In a typical real estate closing, various parties may seek payment out of the proceeds of sale, including for any commissions that may be owing. Real estate and mortgage brokers will often require sellers or borrowers to pay commissions out of any funds received.

In Ontario, the standard form of residential Agreement of Purchase and Sale contains a term stating that: "I, the undersigned seller, irrevocably instruct my lawyer to pay directly to the brokerage(s) with whom I have agreed to pay commission, the unpaid balance of the commission ... from the proceeds of sale prior to any payment to the undersigned on completion, as advised by the brokerage(s) to my lawyer." Mortgage loan agreements may contain similar terms.



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In some situations, a brokerage may seek to blame the other party's lawyer for releasing funds without ensuring that the commission was paid. However, such claims face a significant obstacle as it is well-established in Ontario law that a lawyer generally owes no duty of care to a non-client in a transaction.



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This principle was illustrated in the Ontario Superior Court of Justice decision of *First Canadian Mortgage Corporation v. Djukic*, 2024 ONSC 1314, which arose out of a dispute between a mortgage broker and a borrower's lawyer over a mortgage for the purchase of a property in Cayuga, Ont.

In October 2021, the borrower entered into an Agreement of Purchase and Sale (APS) to purchase a property for \$1,325,000. The transaction originally had a closing date of Jan. 15, 2022, but was postponed repeatedly as the borrower was unable to secure mortgage financing.

A final closing date was arranged for Aug. 19, 2022. By that time, the borrower had provided a deposit of \$100,000 to the seller and secured a vendor take-back mortgage of \$325,000. A further \$900,000 was therefore owing, subject to adjustments.

A mortgage broker arranged a loan of \$750,000 from a private lender to the borrower, to be secured

with a first mortgage against the property, which was registered on the closing date.

The borrower signed a mortgage commitment wherein he agreed to pay a broker fee of \$37,500 to the mortgage broker for arranging the loan.

The borrower retained a real estate lawyer to act for him on the purchase and mortgage. The private lender had her own lawyer. However, the lender's lawyer mistakenly advanced all the mortgage monies, including the broker fees, to the borrower's lawyer. This error was discovered later the same day, and the lender's lawyer emailed the borrower's lawyer as follows: "I also forgot to deduct the broker fee of \$37,500. Please confirm you can send it back to me tomorrow before closing. Sorry about that."

The borrower then disputed the amount of the broker fee, claiming that he had already paid some funds to the mortgage broker. He told his lawyer that he would make arrangements directly with the mortgage broker to settle any fees owing after closing, as he did not have \$37,500 at that time. He instructed his lawyer to close the transaction. The lawyer did so and advanced all the mortgage monies, including the broker's fees, to his client.

The borrower did not pay the broker's fee. The mortgage fell into default and the lender commenced a power of sale action, seeking the total amount of \$820,769.69, which included the principal amount of \$750,000 and the broker fee of \$37,500.

The mortgage broker then commenced its own action against the borrower's lawyer to recover the broker fee, arguing that the lawyer had received funds in trust, which he breached by advancing the funds to his client. The broker's position was that the mortgage monies were advanced to the borrower's lawyer in trust pending closing, that he was advised of the error of the lender's lawyer in a timely manner and that he either negligently or purposefully took advantage of the error to benefit his client.

In response, the lawyer argued that there was no solicitor-client relationship with the mortgage broker and there was no irrevocable letter of direction executed by the borrower directing him (or the lender's lawyer) to pay the broker fee from the mortgage loan proceeds. The responsibility for paying the broker fee was that of the borrower, who disputed and refused to deliver the broker fee. Further, the lender had already commenced a separate action against the borrower, seeking, among other relief, the unpaid broker fee while the broker had failed to include the borrower as a co-defendant in the present action.

The broker then brought a motion for summary judgment.

In the decision, the motion judge noted that the creation of a trust requires three elements: 1) certainty of intent; 2) certainty of subject matter; and 3) certainty of object, citing *Air Canada v. M&L Travel Ltd.*, [1993] 3 SCR 787. Certainty of intention requires "an imperative obligation to hold property on trust for the benefit of another" (referencing *BA Energy Inc. Re*, 2009 ABQB 647, and *Accel Canada Holdings Limited (Re)*, 2020 ABQB 204).

The motion judge determined there was no certainty of intention to create a trust contained in the language of the mortgage commitment letter or the various emails exchanged between the lawyers, with regard to the broker fees. Nor did the circumstances surrounding the transaction indicate an intention to create a trust.

In addition to the lack of clear language or evidence in the circumstances of an intention to create a trust arrangement, there was no indication that the defendant's lawyer was acting, or had intended to act, in the role of a trustee with regard to the payment of the broker fee by his client to the mortgage broker.

The broker contended that the lawyer's conduct was in breach of his duty to act honourably and professionally in rule 2.1-1 of the *Rules of Professional Conduct*, under which a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

However, the motion judge found that there was no violation of this rule in the circumstances since

the lawyer had not affirmatively promised or otherwise indicated to the lender's lawyer that he would deduct the contested broker fee and return it and subsequently failed to do so.

In the circumstances, the lawyer owed a duty to his borrower client, not to the lender or the mortgage broker. It is well-established in Ontario law that a lawyer generally owes no duty of care to the opposite party in a transaction: *9383859 Canada Ltd. v. Saeed*, 2020 ONSC 4883. The mistake made by the lender's lawyer did not create a duty upon the borrower's lawyer to remedy it by disadvantaging or ignoring the instructions of his client.

Further, alleged violations of the *Rules of Professional Conduct* do not give rise to a civil cause of action as such matters are regulated by the Law Society of Ontario.

In the motion judge's view, the mortgage broker needed to look to the borrower for recovery of the disputed broker fee, not to the borrower's lawyer. The broker is not left without recourse, however, as the obligation of the borrower to pay the commission is subject to another ongoing action.

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