

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Citifund Capital Corporation v. Vintop
Development Corporation*,
2023 BCSC 408

Date: 20230317
Docket: S200952
Registry: Vancouver

Between:

Citifund Capital Corporation and Citifund (Good) Capital Ltd.
Plaintiffs

And

Vintop Development Corporation, Luning Yu, and Tracy Dong
Defendants

And

Citifund Capital Corporation, Citifund (Good) Capital Ltd., and John Good
Defendants by way of
Counterclaim

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

In Chambers

Counsel for the Plaintiffs and
Defendants by way of Counterclaim:

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Place and Dates of Trial:

Vancouver, B.C.
December 8–9, 2022

Place and Date of Judgment:

Vancouver, B.C.
March 17, 2023

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Introduction

[1] This is a summary trial application brought in the context of a dispute over whether a mortgage broker (Citifund Capital Corporation and Citifund (Good) Capital Ltd.; referenced collectively as “Citifund”) is entitled to a commission from a developer (Vintop Development Corporation, its president Luning Yu, and its director Tracy Dong; referenced collectively as “Vintop”).

[2] The parties entered into an agency agreement whereby Citifund undertook to try to locate lenders willing to provide funds to Vintop for a construction project. Their contract stated that if a lender is found who offers borrowing terms that are within certain guidelines or are otherwise acceptable to Vintop, then Citifund is to be paid a commission.

[3] Citifund says that it fulfilled its obligations under the agreement. The most significant aspect of its claim is that Citifund obtained a commitment from a lender, Trez Capital Limited Partnership (“Trez”), to loan money on terms that Vintop had earlier indicated were acceptable. Citifund argues that Vintop must therefore pay the promised commission.

[4] Vintop says that Trez’s terms were ultimately not acceptable to Vintop as they are commercially unworkable. In particular, the loan proposed by Trez presupposed that a Crown agency lender, BC Housing Management Commission (“BC Housing”), would provide further project financing while also accepting a subordinate lending position to that of Trez. However, BC Housing is precluded by legislation from lending on such terms. Vintop argues that it is not obligated to pay Citifund any commission at all.

[5] Citifund has commenced an action against Vintop for its alleged breach of the agency agreement. Vintop has counterclaimed against Citifund and one of its individual brokers, John Good, for their alleged breach of fiduciary duty. The latter breach is said to have occurred when Mr. Good and Citifund persisted in their efforts to secure a loan commitment from Trez even after Vintop had given notice to terminate the agency agreement.

[6] In this application, Citifund asks the Court to issue a judgment against Vintop for \$821,250 plus interest in respect of the commission said to be owing, and to dismiss Vintop's counterclaim. Citifund submits that its entitlement to such relief can be established on the basis of the evidence tendered in this summary trial application.

[7] Vintop disagrees. It says that there are conflicts in the evidence and that the dispute is unsuitable for summary trial. In the alternative, Vintop says that it should be granted judgment dismissing Citifund's claim. Vintop accepts that if such a dismissal is ordered, then Vintop's counterclaim may be dismissed as well.

[8] Having reviewed the application record and heard submissions of counsel, I am satisfied that this matter can be fairly adjudicated by means of a summary trial. I also find that Vintop did not obtain any lending commitments that fell within the terms of the agency agreement. As such, Citifund is not entitled to receive a commission from Vintop. Both Citifund's claim and Vintop's counterclaim will be dismissed.

[9] The detailed reasons for my conclusion are as follows.

Background

Factual Background

[10] Vintop is developing a real estate project in New Westminster called "Ovation" that involves the construction of two buildings: (1) a 32-storey tower with 204 market strata units; and (2) an eight-storey tower with 66 non-market rental units (the "Project"). The non-market building is being developed in partnership with BC Housing and the Performing Arts Lodge, a not-for-profit organization.

[11] On April 24, 2018, Vintop and Citifund entered into an exclusive agency agreement (the "Agency Agreement") for the purpose of obtaining a construction loan for the Project. It was signed by Mr. Yu and Ms. Dong on behalf of Vintop, and by Mr. Good on behalf of Citifund.

[12] The Agency Agreement provides that Citifund is to be paid a commission of 0.75% of the total value of the loan if, while the agreement is in effect, a commitment to loan is obtained by Vintop that either:

(1) is substantially in accordance with the following “Loan Guidelines”:

- (a) a loan amount of \$104 million to \$110 million;
- (b) an interest rate of prime rate plus 0.5% to 1%;
- (c) a term of 24 months, or as required; and
- (d) a lender fee of 1% to 1.5%;

or

(2) is on terms acceptable to Vintop.

[13] The initial term of the Agency Agreement was for 60 days, to be automatically extended for successive periods of 30 days unless and until the agreement is terminated by either party. In order to be effective, such termination had to be done in writing on no less than 10-days’ notice.

[14] The parties to the Agency Agreement understood that Project financing in relation to the market strata units would primarily involve the securing of a loan from a private commercial lender, as well as a deposit protection facility from an insurance company (“DPI”). I note parenthetically that a DPI is considered to be a form of financing in that it allows developers to release and access deposits received from unit pre-sales.

[15] It was also understood that the private loan and the DPI had to be integrated with the Project’s non-market rental unit financing to be provided by BC Housing, a public lender effectively owned by the provincial government. While Citifund was to seek out a commercial lender and a DPI provider, Citifund was not responsible for dealing with BC Housing. Instead, communication with BC Housing was done by

Vintop, its development agent (Richard Wittstock of Domus Homes), and Vintop’s lawyers. That said, Citifund was generally kept apprised of these discussions with BC Housing.

[16] For example, Citifund was aware of BC Housing’s views on how the latter expected to be ranked as a creditor for the Project financing. In an email dated May 24, 2018 that was copied to Mr. Good, Mr. Wittstock wrote to Ms. Dong about a meeting that took place earlier that day with BC Housing. During the meeting, a BC Housing official (Naomi Brunemeyer) stated that BC Housing would accept that its “draws will be pari-passu with the bank [i.e., the private lender]”, although BC Housing wanted its mortgage to be in first position. After Mr. Wittstock pointed out that it is unlikely that a “bank” would agree to be in second position behind BC Housing, Ms. Brunemeyer expressed a willingness to “go back and see what can be done about this”. On May 29, 2018, another BC Housing official emailed Mr. Wittstock that BC Housing “can enter into a co-lending arrangement” on the financing of the Project. This e-mail was also forwarded to Mr. Good by Mr. Wittstock, who wrote:

BC Housing has a couple of questions – they want to make sure our lender will be ok with a Co-Lending agreement.

[17] In October 2018, Citifund prepared a “Mortgage Presentation” for use in alerting prospective lenders to Vintop’s interest in obtaining financing for the Project. The amended version dated October 22, 2018 indicated that Vintop was seeking a construction loan of approximately \$80.5 million, net of a \$13.5 million DPI and a \$15 million second mortgage from BC Housing.

[18] In the fall of 2018, Citifund began to assist Vintop with negotiating a loan from Trez, a private commercial lender. On November 23, 2018, Trez issued a “First Letter of Intent” indicating that Trez was interested in providing Vintop a loan of \$80 million. It proposed that BC Housing’s mortgage would rank second in priority to Trez’s mortgage. The First Letter of Intent was signed by Vintop, although the specified deposit of \$170,000 required for Trez to proceed with its due diligence and to work towards preparing an actual loan commitment letter was not paid at that

time. Instead, Vintop, Citifund, and Trez had further discussions regarding the terms and modalities of a potential loan over the next six months.

[19] These discussions ultimately led to the issuance of an amended “Second Letter of Intent” indicating that Trez was interested in providing Vintop a loan of \$82.5 million. Like the first letter, the Second Letter of Intent proposed that BC Housing would take a second lending position to Trez. At some point in either May or June 2019, Vintop signed the Second Letter of Intent and paid Trez the \$170,000 deposit.

[20] At around the same time, Citifund arranged with a private surety company, Westmount West Services Inc. (“Westmount”), for a DPI in the amount of \$27 million. A commitment letter to this effect dated May 23, 2019 was obtained from Westmount. It indicated that such a DPI could be provided by Aviva Insurance Company of Canada (“Aviva”) if Vintop is interested.

[21] Notwithstanding the execution of the Second Letter of Intent, however, the matter of how to address the priority ranking of the contemplated loans from Trez and BC Housing was still unresolved. Communication was exchanged on this subject between representatives of Vintop, Citifund, Trez, and BC Housing. Their messages reveal a general awareness that neither BC Housing nor Trez wanted to be in a subordinate lending position, and a lack of agreement on how a co-lending *pari passu* arrangement acceptable to both lenders would work. Some creative potential solutions, such as establishing an “air space parcel” and staggering the timing of the financing, were proposed, but none came to fruition.

[22] By July 2019, Vintop had become concerned about the time it was taking for Trez to issue a commitment letter. Vintop was particularly worried that, unless all of the necessary financing arrangements were in place, Vintop would have to cease marketing the Project because of non-compliance with the requirements of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41.

[23] In order to try to address these concerns, further communications took place between representatives of Vintop, Citifund, and Trez. They included a June 28, 2019 email from Vintop’s solicitor (Edmond Luke) expressing the view that the Trez Second Letter of Intent, which contemplates a BC Housing second mortgage, is “useless” to Vintop. On July 3, 2019, counsel for Trez (Kevin MacDonald) responded that while Trez had not said it would do a co-funding *pari passu* security with BC Housing, it was open to the idea. Mr. MacDonald also expressed his view that the contemplated commitment letter from Trez is not “useless” to Vintop; rather, it is a significant offer to finance which can be used as a vehicle to ultimately reach an acceptable funding arrangement. In particular, Mr. MacDonald proposed that once Trez issues a commitment letter, Vintop would be free to accept or request changes to the funding model before acceptance, which Trez would then consider. Meetings were also held on July 26 and August 13, 2019 at which the importance and urgency of having Trez issue a letter of commitment to Vintop shortly were discussed.

[24] However, Vintop then lost patience with Trez and Citifund. Letters dated August 16, 2019 were sent by Vintop to both entities. The letter to Trez stated that Vintop had decided not to enter into a lending arrangement with Trez. The letter to Citifund stated that Vintop was providing 10-days notice of its termination of their Agency Agreement.

[25] Trez nevertheless proceeded to work on preparing a letter of commitment for Vintop. At 10:22 p.m. on August 16, 2019, a Trez official (vice-president Derek Wasson) sent an email to Vintop and Citifund reporting that internal approval of the Trez commitment letter was underway, and that it would likely be provided by August 20, 2019. Mr. Wasson’s email made no mention of Vintop’s letter dated August 16, 2019 which indicated that Vintop did not want to borrow money from Trez for the Project.

[26] Furthermore, on August 19, 2019, Mr. Good of Citifund sent Ms. Dong and other Vintop representatives the following very brief email message:

Our agency is in full force until September 17th 2019.

Trez will be issuing a commitment on Wednesday this week [i.e., August 21, 2019].

[27] On August 21, 2019, a Vintop representative (Coby Xiao) responded to Mr. Good's email with a message that included the following words:

...this will serve as formal notice to you and Citifund that:

- Regardless of whether the agreement is still in full force or not, you and Citifund are no longer authorized to represent Vintop on any matter, including misrepresenting to any third party that you have any authority as agent of Vintop or to communicate as our agent, including with Trez or any other lender.
- As you know, we have already delivered our written notice directly to Trez that we are no longer interested in entering into any financing arrangement, so we will not be interested in entertaining any commitment letter they may or may not issue to us today or afterwards for the Ovation Project.

[28] Trez nevertheless provided a "Letter of Commitment" to loan \$82.5 million to Vintop on August 22, 2019. The lending commitment was on essentially the same terms as those set out in the Second Letter of Intent. They indicated that Trez would have a "1st mortgage charge" that is "in 1st priority over the Subject Property". In addition, while the Letter of Commitment notes that BC Housing is to be one of the other sources of funding for the Project, it contains no express indication that Trez is willing to co-lend with BC Housing on a *pari passu* basis.

[29] On October 9, 2019, Citifund sent an invoice to Vintop demanding payment of a commission of \$821,250. The amount is based on both the August 22, 2019 Trez Letter of Commitment to lend Vintop \$82.5 million, and the May 23, 2019 Westmount commitment letter for the \$27 million DPI. The invoice effectively asserts that Vintop is obligated under the Agency Agreement to pay Citifund a commission of 0.75% on the total amount of these financing commitments (i.e., \$109.5 million) obtained while the Agency Agreement was still in effect.

[30] Vintop never accepted the Letter of Commitment, and did not borrow any funds from Trez. Instead, Vintop made financing arrangements with the Industrial Commercial Bank of China ("ICBK") through a loan agreement entered into

September 27, 2019. Ultimately, ICBK, BC Housing, and Vintop entered into priority agreements which provided that ICBK and BC Housing would be *pari passu* lenders allowing each to effectively hold first position mortgage security. Vintop also arranged for a DPI with Travelers Insurance Company of Canada (“Travelers”), and not with Aviva.

Procedural Background

[31] On January 27, 2020, Citifund filed its notice of civil claim against Vintop. The claim seeks contractual damages in the amount of \$821,250 for the unpaid commission allegedly owed by Vintop. In turn, Vintop filed its response to civil claim and counterclaim on March 5, 2020. The counterclaim seeks relief against both Citifund and Mr. Good personally for their alleged breach of fiduciary duties owed to Vintop. A response to counterclaim was filed by Citifund on September 18, 2020.

[32] In October 2021, Citifund advised Vintop of its intention to seek judgment by means of an application for summary trial. That application was filed on November 16, 2021.

[33] The summary trial took place over two days from December 8 to 9, 2022. The evidence consisted of affidavits made by Mr. Good, Ms. Dong, and legal assistants employed by counsel for the parties. The exhibits to these affidavits included copies of voluminous commercial correspondence, as well as an extract from a transcript of an examination for discovery of Mr. Good.

Analysis

[34] Citifund’s application raises a threshold question of whether this matter is suitable for adjudication by means of a summary trial. If the answer to this question is yes, then two further questions must be addressed:

1. Is Citifund entitled to be paid a commission by Vintop pursuant to the terms of the Agency Agreement, such that judgment should be granted on Citifund’s claim?

2. Did Mr. Good, acting on behalf of Citifund, breach any fiduciary duties owed to Vintop, such that judgment should be granted on Vintop's counterclaim?

Issue 1: Suitability for Summary Trial

The Parties' Positions

[35] Citifund submits that the parties' claims are suitable for summary determination. A breach of contract has been alleged, and there is no question surrounding the existence of that contract. Instead, this is a case where just contractual performance in relation to the terms of the contract is in dispute. Furthermore, there is a body of evidence before the Court containing reliable documentation of the parties' relevant communications. Citifund asserts that this evidence is adequate to decide all of the legal issues raised by the parties.

[36] Vintop, on the other hand, says that this matter cannot be decided by means of a summary proceeding. It says that there are direct conflicts on the evidence that will require a standard trial to resolve. Vintop notes in particular statements made by Mr. Good in his affidavit to the effect that Vintop agreed with the terms set out in the Letter of Commitment, statements which are contrary to documentary and other evidence tendered. Vintop also says it will need to compel testimony from Trez representatives in order to prove its breach of fiduciary duty counterclaim.

Discussion

[37] Rule 9-7(15) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides that:

- (15) On the hearing of a summary trial application, the court may
 - (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,

...

[38] The principles for determining whether a matter can be adjudicated by means of a summary trial application are well established and not in dispute. A particularly helpful distillation of these principles was provided by Justice Branch in *Arbutus Investment Management Ltd. v. Russell*, 2022 BCSC 72 at paras. 40–50. I will not repeat it here, but will highlight the following aspects:

- (a) the purpose of a summary trial is to expedite the early resolution of cases in which disputed questions of fact can be decided on the basis of affidavits, unless it would be unjust to do so;
- (b) a non-exhaustive list of factors that can be considered in deciding whether it would be unjust to grant judgment further to a summary trial include:
 - (i) the amount involved;
 - (ii) the complexity of the matter;
 - (iii) its urgency;
 - (iv) any prejudice likely to arise by reason of delay;
 - (v) the cost of taking the case forward to a conventional trial in relation to the amount involved;
 - (vi) the course of the proceedings;
 - (vii) the risk of wasted time and effort;
 - (viii) whether credibility is a crucial factor (although the fact that there may be a dispute on credibility does not mean that the matter cannot be dealt with by way of summary trial); and
- (c) as this is a trial, the parties must treat it as such by putting their best foot forward.

[39] The last of these points is worth emphasizing. As was noted by our Court of Appeal in *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at para. 64, a party responding to a summary trial application cannot frustrate the process by failing to take every reasonable step to put themselves in the best position possible to address the issues raised. There is no “respondent’s veto” over a summary trial.

[40] On my review of the application record, I have concluded that I am able to make the necessary factual findings to adjudicate both Citifund’s claim and Vintop’s counterclaim. Furthermore, after having taken into account the factors listed above, it is my view that it would not be unjust to perform such an adjudication within the context of this application.

[41] In particular, I agree with Citifund that the primary issue is whether there has been compliance with the terms of a written contract agreed to by the parties. It can be determined largely by reference to the parties’ communications, which were mostly made in writing or through discussions at meetings that were referenced in emails or minutes. I also disagree with Vintop that there are any significant direct conflicts on the evidence that can only be resolved through a credibility assessment of the deponents. While the amount of damages claimed is significant, it is not of a magnitude that might justify incurring the added expense of a conventional trial given the relatively straightforward nature of the arguments advanced by the parties. I am also not satisfied that Vintop’s lack of evidence from Trez in support of its counterclaim justifies allowing Vintop to effectively “veto” Citifund’s application.

[42] A summary trial of the parties’ claims will therefore be conducted.

Issue 2: Citifund’s Breach of Contract Claim for a Commission Payment

The Parties’ Positions

[43] Citifund acknowledges that under the terms of the Agency Agreement, there are only two “pathways” by which Citifund may be entitled to a commission payable by Vintop:

- (i) by obtaining a commitment to lend on terms substantially in accordance with the Loan Guidelines referenced at paragraph 12 above; or
- (ii) by obtaining a commitment to lend on terms acceptable to Vintop.

[44] Citifund says that it obtained two commitments to lend for Vintop while the Agency Agreement was in effect: (1) the August 22, 2019 Trez Letter of Commitment to lend \$82.5 million; and (2) Westmount's May 23, 2019 commitment to obtain a \$27 million DPI.

[45] With respect to the Trez Letter of Commitment, Citifund accepts that the proposed financing does not fall within the Loan Guidelines. However, Citifund argues that it does provide for a commitment to lend on terms that Vintop indicated were acceptable. This is because the Trez Letter of Commitment sets out the same terms that were in the Trez Second Letter of Intent. Vintop effectively accepted these terms when Vintop representatives signed the Second Letter of Intent and paid Trez a \$170,000 deposit.

[46] With respect to the Westmount DPI commitment, Citifund argues instead that it falls within the Loan Guidelines. Citifund does not argue that its terms were acceptable to Vintop.

[47] Accordingly, Citifund submits that it is entitled to a commission from Vintop calculated on the basis of the value of both the Trez Letter of Commitment and the Westmount DPI commitment.

[48] Vintop disagrees. It denies that Citifund obtained any commitments to lend money to Vintop on terms substantially in accordance with the Loan Guidelines. Vintop also says that the Trez Letter of Commitment was not on terms acceptable to Vintop. This is because the proposed loan does not contemplate a co-lending agreement with BC Housing and, as such, is commercially unworkable given the nature of the Project. As such, Citifund is not entitled to any commission under the Agency Agreement.

Discussion

[49] The fundamental question that must be answered is whether the conditions precedent for Citifund to be able to claim an entitlement to a commission under the terms of the Agency Agreement are present. In particular, consideration must be given to whether: (1) the Trez Letter of Commitment constituted a commitment to loan on terms acceptable to Vintop; and (2) the Westmount DPI commitment contained terms substantially within the Loan Guidelines.

[50] This exercise must be done in accordance with established principles of contractual interpretation. A concise statement of these principles can be found in the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. At para. 47, Justice Rothstein wrote:

... the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" ... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[Citations omitted.]

[51] Also worth noting are the words of Justices Côté and Brown written in the Supreme Court of Canada's decision in *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at para. 144, which were quoted recently by our Court of Appeal in *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117 at para. 42:

Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail ... While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided ... As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp.*, ... "[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary" ...

[Citations omitted.]

[52] I will begin with consideration of the Trez Letter of Commitment, and whether it constituted a commitment to lend on terms acceptable to Vintop.

[53] At first blush, there is some merit to Citifund’s argument that by signing the Second Letter of Intent and by paying the \$170,000 deposit in the spring of 2019, Vintop implicitly indicated that the loan terms set out in this document were “acceptable” to Vintop. However, in accordance with the binding jurisprudential guidance I have just cited, I must take into account all of the surrounding circumstances known to the parties. I must also interpret the Agency Agreement so that it furthers its commercial purpose and does not result in an absurdity.

[54] These surrounding circumstances included the parties’ collective understanding that any private funding secured for the Project had to be compatible with the public funding to be obtained from BC Housing. This included their understanding that BC Housing was insisting that its financing be provided on a *pari passu* co-lending basis with any private lender, and that BC Housing would not agree to have its loan secured by a second mortgage.

[55] This was not simply BC Housing’s preference. It is a legislative imperative prescribed by s. 3(f.3)(ii)(B) of the *British Columbia Housing Management Commission Regulation*, B.C. Reg. 490/79:

3 For the purposes of the *Housing Act*, any enactment and any Act of Canada, the commission may, in its own name,

...

(f.3) make a loan of money to a person, other than a person referred to in paragraph (f.2), for the purpose of facilitating a project, or a portion of a project, that is dedicated exclusively to building or repairing housing or developments that include housing intended for sale or rent to low, moderate or middle income households on the conditions that

(i) it is a term of the loan that the money be used only for that project or portion, and

(ii) a mortgage securing the amount of the loan

(A) is registered in the land title office as a charge against the title to the land on which the housing or developments that include housing are or will be located, and

(B) has a priority equal to or greater than the registered interest of any other lender to the project,

[Emphasis added.]

[56] Accordingly, I am unable to hold that the Agency Agreement contemplated that a commission would be payable for a commitment to loan by a private lender on the basis that its mortgage would be in first position and that BC Housing's mortgage would be subordinate. A commitment to loan on these terms would be commercially unworkable and necessarily unacceptable to Vintop.

[57] Since the August 22, 2019 Trez Letter of Commitment effectively proposed such an unworkable borrowing arrangement, I accept Vintop's position that Trez did not offer a loan on terms acceptable to Vintop. I also do not find that Vintop's position is fatally undermined by the fact that, a few months earlier, it signed the Second Letter of Intent and paid a deposit to Trez. To the contrary, I accept that this was done in the good faith belief that the final loan terms offered by Trez in the Letter of Commitment would accommodate and allow for BC Housing to provide its portion of the Project financing. Indeed, it is apparent that discussions to that effect then took place over the following weeks between representatives of Vintop, Citifund, and Trez. In the end, Trez chose not to make such an offer, even though it could have. This is demonstrated by the fact that co-lending terms acceptable to BC Housing were later obtained by Vintop from ICBK instead. Furthermore, while not determinative, it is also significant that even Mr. Good admitted on examination for discovery that he understood that the terms of the Trez Letter of Commitment would not be acceptable to Vintop.

[58] In sum, I conclude that Citifund's claim to be paid a commission in respect of the loan proposed in the Trez Letter of Commitment is unfounded.

[59] I turn now to the portion of Citifund's claim based on the Westmount DPI commitment involving Aviva. As a preliminary observation, I note that counsel for Citifund did not press this claim in their oral submissions, focusing instead on the Trez Letter of Commitment. Furthermore, Citifund does not argue that the

Westmount DPI commitment was on terms acceptable to Vintop. Instead, Citifund’s written submissions assert only that the Westmount DPI commitment met and exceeded the Loan Guidelines in terms of the interest rate, the term, and the lender fee.

[60] However, the Loan Guidelines also provide that the loan amount must be between \$104 million and \$110 million. The Westmount DPI commitment is only for \$27 million. I therefore find that it is not “substantially within the Loan Guidelines”. Furthermore, according to Vintop’s uncontested affidavit evidence, Vintop requested that Aviva make revisions to the Westmount DPI commitment, which were not made. Vintop ultimately arranged for a DPI with Travelers instead. As such, the Westmount DPI commitment cannot be said to be on terms acceptable to Vintop either.

[61] Accordingly, Citifund’s claim to be paid a commission in respect of the Westmount DPI commitment is also unfounded.

[62] Finally, it should be noted that, in reaching these conclusions, I have considered the three jurisprudential authorities cited to me by the parties involving other breach of contract claims made by Citifund for unpaid mortgage broker commissions. Specifically, Citifund urged me to follow *Citifund Financial Services Ltd. v. Sayani*, 67 B.C.L.R. (2d) 157, 1992 CanLII 773 (C.A.) and *Citifund Capital Corp. v. Wedge Plaza Development Corp.*, 2005 BCSC 1501, cases in which Citifund’s claims were allowed. Conversely, Vintop urged me to follow *Citifund Capital Corporation v. Empreus Holdings Ltd.*, 2021 BCSC 509, a more recent case in which Citifund’s claim was dismissed. However, I find that each of these decisions turned on their own specific facts and are not of assistance in adjudicating the case at bar.

Issue 3: Vintop’s Counterclaim for Breach of Fiduciary Duty

The Parties’ Positions

[63] Vintop’s breach of fiduciary duty counterclaim is founded upon the allegation that Mr. Good, acting on behalf of Citifund, prioritized his own interests above those

of Vintop, his client. Vintop says that even after it advised Trez that it was not interested in a lending arrangement and would be seeking financing elsewhere, Mr. Good and Citifund continued to encourage Trez to issue the Letter of Commitment. In doing so, Mr. Good ignored Vintop's express wishes in an effort to position himself to demand a commission and bring this litigation.

[64] Mr. Good and Citifund do not accept these assertions. They say that the Agency Agreement remained in effect until August 26, 2019, ten days after formal written notice was given by Vintop to terminate the agreement on August 16, 2019 (it is acknowledged that Mr. Good's email of August 17, 2019 wrongly indicated a termination date of September 17, 2019). Accordingly, Mr. Good and Citifund were entitled to perform their obligations under the Agency Agreement and attempt to obtain an acceptable loan commitment for Vintop prior to August 26, 2019, which they allegedly did by means of the August 22, 2019 Trez Letter of Commitment. Mr. Good and Citifund therefore deny that they owed any fiduciary duties to Vintop. In the alternative, if they did owe such duties, they were never breached.

[65] At the hearing, however, counsel for Vintop candidly acknowledged that the counterclaim had only been advanced in response to Citifund's claim for the purpose of asserting a set-off in order to claw back any damages that might be awarded to Citifund. Counsel for Vintop also accepted that if Citifund's claim is dismissed, Vintop's counterclaim ought to be dismissed as well. This is because, unless Vintop were to be ordered to pay a commission to Citifund, Vintop does not claim to have otherwise suffered any actual damages as a result of Citifund or Mr. Good's conduct.

Discussion

[66] I agree with Vintop's reasonable concession. I am also not persuaded on the basis of the evidence tendered on this application that Mr. Good or Citifund have breached any fiduciary duties they may have owed to Vintop pursuant to the Agency Agreement, or otherwise. Accordingly, given my conclusion that Citifund's claim is to be dismissed, Vintop's counterclaim will be dismissed as well.

Disposition

[67] For the reasons set out above, Citifund’s claim and Vintop’s counterclaim are both dismissed.

[68] With respect to costs, my view is that Vintop is the successful party here. These proceedings arose solely because Citifund asserted an entitlement to be paid a commission by Vintop, a claim which has been rejected. While Vintop’s counterclaim has also been dismissed, I find that it was brought for defensive purposes as a result of Citifund’s choice to instigate litigation, and was not seriously pressed by Vintop as an independent cause of action. In these circumstances, Vintop should have its costs of the application and the underlying action in accordance with Scale B. That said, if there are matters of which I am unaware, the parties are at liberty to contact the Registry to schedule a hearing to address costs provided they do so within 30 days of this judgment.

“Brongers J.”