COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Citifund Capital Corporation v. Vintop Development Corporation,* 2024 BCCA 209

Date: 20240531
Docket: CA48985

Between:

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

Appellants
(Plaintiffs/Defendants by way of Counterclaim)

And

Vintop Development Corporation, Luning Yu and Tracy Dong

Respondents
(Defendants)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated March 17, 2023 (*Citifund Capital Corporation v. Vintop Development Corporation*, 2023 BCSC 408, Vancouver Docket S200952).

Counsel for the Appellants:	T.D. Goepel
Counsel for the Respondents:	T.M. Pontin R. Schechter
Place and Date of Hearing:	Vancouver, British Columbia January 29, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 31, 2024

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Fitch

Summary:

The respondents engaged the appellants to act as their agent to secure financing for a condominium development. The parties' agreement provided that the appellants were to be paid a commission if they obtained a commitment to loan that was either within the agreement's loan guidelines, or was "on terms acceptable" to the respondents. The appellants obtained a commitment to loan that fell outside the loan guidelines that the respondents did not accept. The judge found the appellants were not entitled to the commission. The appellants argue the judge erred.

Held: Appeal dismissed. The judge did not err in his interpretation of the agreement, as the phrase "on terms acceptable" cannot be said to include only the subjects identified in the loan guidelines. Further, the judge did not misapprehend or ignore material evidence. The judge's conclusion that the commitment to loan was not on terms acceptable to the respondents was open to him on the record.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The issue on this appeal is whether the appellants are entitled to a commission for obtaining a third-party commitment to lend to the respondents. In particular, the appeal concerns the meaning of the words "on terms acceptable" to the borrower, and the type of terms contemplated by that phrase.

Background

[2] The respondent Vintop Development Corporation is a company involved in residential real estate development. The respondents Luning Yu and Tracy Dong are principals of the company. I will refer to the three respondents collectively as "Vintop".

[3] Vintop engaged the appellants, Citifund Capital Corporation and Citifund (Good) Capital Ltd., a mortgage brokerage, to act as its agent to secure financing for a presale condominium development in New Westminster. The appellant John Good represented Citifund. I will refer to the three appellants collectively as "Citifund". The project consisted of two residential buildings: a 32-storey high-rise tower with 204 market strata units, and an eight-storey building with 66 non-market rental units. The non-market building was developed in partnership with the British Columbia Housing Management Commission ("BC Housing") which was to provide financing secured by a mortgage on the property. Citifund was to arrange financing for the market

strata building primarily by way of a construction loan from a commercial lender, supplemented by financing from deposit protection insurance ("DPI"). DPI is a form of financing that allows a developer to release and access deposits received from unit pre-sales.

[4] Citifund and Vintop entered into an exclusive agency agreement on April 24, 2018 (the "Agency Agreement"). The Agency Agreement did not expressly state that the commercial financing had to be compatible with BC Housing's terms and conditions of financing. Nonetheless, it was understood by the parties that the private loan and DPI would need to be integrated with the funding provided by BC Housing for the non-market building. Although Citifund was not responsible for securing the loan from BC Housing, it was kept informed about discussions with BC Housing and, in particular, was aware that BC Housing sought a co-lending arrangement with a private lender on a *pari passu* basis.

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

1. was 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. was on terms acceptable to Vintop.

[6] In November 2018, Citifund located a lender, Trez Capital Limited Partnership ("Trez"), which issued a detailed letter of intent for a loan of $80 million on the basis

that BC Housing would rank as a second mortgagee, giving the Trez mortgage priority (the "First LOI"). Vintop signed the First LOI, but did not pay the requisite $170,000 deposit. Nevertheless, the parties continued to work on loan arrangements over the next six months.

[7] In May 2019, Trez prepared another letter of intent in which it expressed interest in providing a loan of $82.5 million to Vintop (the "Second LOI"). Like the First LOI, the Second LOI proposed that BC Housing would take a second lending position to Trez. At some point in May or June 2019, Vintop signed the Second LOI and paid Trez the $170,000 deposit. At about the same time, Citifund arranged with a private surety company, Westmount West Services Inc. ("Westmount"), for a DPI in the amount of $27 million. Westmount provided a commitment letter to this effect dated May 23, 2019 indicating that a DPI could be provided by Aviva Insurance Company of Canada if Vintop was interested.

[8] The parties continued to try to resolve the problem created by Trez's insistence on taking first priority for its mortgage and BC Housing's insistence on a co-lending agreement. BC Housing was prohibited by the *British Columbia Housing Management Commission Regulation*, B.C. Reg 490/79, s. 3 (f.3)(ii)(B), from taking mortgage security that did not give BC Housing "a priority equal to or greater than the registered interest of any other lender to the project".

[9] By July 2019, Vintop had become concerned about the time it was taking for Trez to issue a commitment letter—Vintop was coming up against the deadline by which financing arrangements had to be in place to avoid having to cease marketing the project as per the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41. Vintop made its concerns known to Citifund and to Trez, who promised to move forward expeditiously to secure a lending commitment acceptable to Vintop.

[10] By August 16, 2019, Vintop had lost patience with Trez and Citifund. It notified both parties that it had decided to seek financing elsewhere, and gave Citifund the ten-days' notice of termination required under the Agency Agreement.

[11] The judge described the reaction of Trez and Citifund to the termination notice as follows:

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

[12] Vintop sent Mr. Good another email confirming its position that Citifund was no longer authorized to represent Vintop, even if the Agency Agreement remained in effect. Both Mr. Good and Trez ignored these communications. On August 22, 2019, Trez provided a Commitment Letter to loan $82.5 million to Vintop. The terms were essentially the same as those set out in the Second LOI, including confirmation that Trez would have a first mortgage charge. Significantly, the Commitment Letter did not indicate a willingness on the part of Trez to co-lend with BC Housing on a *pari passu* basis: RFJ at para. 28.

[13] On October 9, 2019, Citifund sent an invoice to Vintop demanding payment of a commission of $821,250. That sum was based on both Trez's Commitment Letter to Vintop of $82.5 million, and Westmount's commitment letter for the $27 million DPI—i.e., a commission of 0.75% of $109.5 million.

[14] Vintop did not accept the Commitment Letter from Trez. Instead, it made financing arrangements with the Industrial Commercial Bank of China through a loan agreement entered into in September 2019. Ultimately, that lender, BC Housing, and Vintop entered into priority agreements which provided that the Industrial Commercial Bank of China and BC Housing would be *pari passu* lenders, allowing each to hold first position mortgage security. Vintop also arranged for DPI with Travelers Insurance Company of Canada, rather than through Westmount.

[15] When Vintop refused to pay the commission, Citifund commenced the underlying litigation. Following a two-day summary trial, the judge found that Citifund was not entitled to a commission under the Agency Agreement because it had neither obtained a lending commitment that was substantially within the Agency Agreement Loan Guidelines, nor a loan on terms acceptable to Vintop: at paras. 56–61.

On appeal

[16] Citifund contends the judge made two errors:

1. Interpreting the phrase “on terms acceptable” to include all terms in a lending agreement, rather than limiting it to terms covering the subjects identified in the Loan Guidelines; and

2. Failing to take into account material evidence demonstrating that Vintop accepted the lending terms proposed by Trez.

[17] The first ground of appeal involves contractual interpretation and is reviewable on a deferential standard, absent an extricable question of law: *Sandhu v. Sidhu*, 2019 BCCA 465 at para. 23. The second ground of appeal challenges the judge’s findings of fact and is reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.

1. Interpretation of the Agency Agreement

[18] It is common ground that there were only two pathways for Citifund to earn its commission:

(a) By obtaining a commitment to lend on terms substantially in accordance with the Loan Guidelines; or

(b) By obtaining a commitment to lend on terms acceptable to Vintop.

It is also common ground that the Commitment Letter Trez put forward did not meet the Loan Guidelines because the amount offered of $82.5 million fell below the

required range of $104 to $110 million; and because the interest rate proposed was the greater of 7.9% per annum and HSBC prime rate plus 3.95%, whereas the Loan Guidelines required an interest rate of prime rate plus .5% to 1%. It follows that the only pathway available to Citifund was establishing that it had obtained a commitment to lend "on terms acceptable" to Vintop.

[19] The judge acknowledged that it was not necessary for Vintop to have accepted the Commitment Letter from Trez; it was sufficient for Citifund to have procured a commitment from a lender on terms acceptable to Vintop: *Citifund Financial Services Ltd. v. Sayani*, [1992] B.C.J. No. 977, 1992 CanLII 773 (C.A.) [*Sayani*]. However, the judge found that Trez's commitment to lend was not on terms acceptable to Vintop because it contemplated Trez's mortgage taking priority to a BC Housing mortgage—an arrangement that was commercially unworkable and unacceptable to Vintop given the regulatory prohibition against BC Housing being in a subordinate security position.

[20] Citifund says it was not open to the judge to consider the priority provision in assessing whether the terms of the commitment to lend were acceptable to Vintop. Citifund argues the judge was required to assess only the terms addressing the subjects covered in the Loan Guidelines. The appellants say the judge fell into error because he ignored the ordinary grammatical meaning of the phrase "on terms acceptable" to Vintop which, read in context, can only sensibly encompass those subjects identified in the Loan Guidelines: loan amount, interest rate, term, lender's fee, Citifund commission, and guarantee. Citifund says that since Vintop had no objection to those terms as set out in the Commitment Letter, the terms proposed therein <u>were</u> acceptable to it, and Citifund had earned its commission.

[21] Respectfully, I cannot accede to this submission. It rests on the assumption that the word "terms" is tied to and defined by the "Loan Guidelines". However, in my view, nothing in the agreement supports such a reading. The provision in issue is set out immediately after the Loan Guidelines and reads:

> Upon a commitment to loan being given either to Citifund or the Borrower during the term of this exclusive agency substantially in accordance with the above Guidelines or on terms acceptable to the Borrower, the Borrower agrees to pay Citifund commission of (0.75%) of the amount of the loan (hereinafter referred to as the "Commission").
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> [Emphasis added.]

It would have been a simple matter to limit "terms" to the subjects identified in the Loan Guidelines, but that was not done here. A restrictive reading of "terms" is inconsistent with the plain and ordinary meaning of the word.

[22] Further, the appellants' interpretation is inconsistent with the commercial purpose of the "or on terms acceptable" provision of the Agency Agreement. Projects of this nature are complex, funding can be arranged in a multitude of ways, and financing requirements can evolve over time. The alternative pathway to a commission ensures that the mortgage broker receives a commission in circumstances in which the borrower ultimately accepts a loan commitment which falls outside of the original Loan Guidelines. In my view, this second pathway to a commission is intended to allow the parties the flexibility to agree on alternative financing terms, without constraining the parties in any way.

[23] Nor do I find the appellants' reliance on *Sayani* to be persuasive. In that case, Citifund obtained a commitment to loan which fell within the loan guidelines. When the borrower received the commitment to loan, it accepted the terms and paid the fee to the lender. The borrower suggested amendments to the terms of the loan but made clear that it accepted the terms as set out in the commitment letter. The borrower also acknowledged that Citifund had earned its commission and directed the lender to deduct the commission from the funds when advanced. Although the arrangements ultimately collapsed, and the borrower resiled from its earlier acknowledgement that the commission was payable, the Court found it was owed. The issue before the Court was whether a commission was payable even though the loan agreement was never finalized. The Court determined that Citifund had fulfilled its requirements and earned a commission at the point at which it obtained a commitment to loan that fell within the loan guidelines. That case does not stand for

the proposition that only the terms covered in the defined loan guidelines are relevant to a determination of whether a borrower has agreed to accept other terms.

[24] The appellants assert on appeal, as they did below, that the commitment they obtained from Westmount for the DPI loan met the Loan Guidelines and was in its own right sufficient to trigger payment of a commission. However, as in the court below, the appellants did not press this claim on appeal—other than to seek an order compelling payment of commission based on a loan of $109.5 million, which sum is made up of the $82.5 million Trez commitment and the $27 million commitment made by Westmount in relation to the DPI.

[25] The judge found that the Loan Guidelines required an amount between $104 and $110 million, and that the Westmount DPI commitment fell well below that. It was therefore not "substantially in accordance with" the Loan Guidelines. In addition, the judge found that Vintop requested revisions to the Westmount DPI commitment which were not made, establishing that the DPI commitment was not on terms acceptable to Vintop: RFJ at para. 60. The appellants have not identified errors in the judge's findings or analysis on this issue. There is accordingly no basis upon which this Court could interfere with them.

[26] In summary on this ground of appeal, the appellants have not established that the judge erred in his interpretation of the Agency Agreement.

2. Failure to take into account evidence that Vintop accepted the terms in Trez's Letter of Commitment

[27] The appellants say the judge failed to consider and give effect to material evidence demonstrating that Vintop accepted the terms contained in the Commitment Letter Trez delivered on August 22, 2019.

[28] The judge began by acknowledging that "[a]t 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.” But the judge continued, saying:

> [53] … 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.
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> [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.
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> [Emphasis added.]

[29] Citifund says the judge did not take into account evidence that Vintop insisted on Trez issuing a commitment letter in which Trez was to take priority over BC Housing’s mortgage. They say the judge did not appreciate that Vintop was willing to take Trez’s commitment in this form and assume the risk that it would not be able to negotiate a different priority agreement with Trez down the road. Vintop also assumed the risk that it could lose BC Housing funding, and could have to fill that gap either with self-funding or by finding another private lender.

[30] In making this argument, Citifund relies on uncontested evidence about what took place between the parties in July and August of 2019. It says the judge did not appreciate the significance of the meetings and communications between the parties in this seven-week period, saying only: “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.”

[31] Citifund contends the context and substance of the meetings were significant. First, as the deadline approached to have financing in place in order to meet *Real Estate Development Marketing Act* requirements, Vintop’s solicitor advised Trez’s solicitor and Citifund that all of Trez, Vintop and Citifund were “on the same page” and were “now just waiting for Trez’s Commitment Letter”. Vintop’s solicitor also confirmed that Vintop would proceed as follows:

(a) Vintop would await the issuance of Trez's commitment letter;

(b) Once Vintop had the Trez commitment letter, Vintop would request an amendment to it to allow for:

(i) Co-funding/*pari passu* security with BC Housing;

(ii) BC Housing delayed funding model with separate air space parcel security; and

(c) If BC Housing failed to fund under (i) or (ii), alternative funding options would be pursued.

[32] The appellants argue that it is significant that Vintop affirmed that it wanted a commitment letter based on the Second LOI even though its terms did not accommodate BC Housing's priority demand. This fact demonstrates, says Citifund, that Vintop found the terms acceptable and had decided to take responsibility for sorting out the financing of the non-market segment later.

[33] Second, Citifund says the judge did not consider that at the July 26, 2019 meeting between Vintop representatives, Trez and Citifund, Vintop reiterated that it required a commitment letter for a $82.5 million "soon" and that it preferred that a co-lending arrangement be confirmed in this commitment letter. Vintop also made it known that its fallback position was that if BC Housing financing could not be arranged in time, it wanted a further commitment from Trez for $11 million and that Vintop would contribute $6 million itself, which together approximated the amount of the BC Housing financing. Trez said it would make best efforts to arrange a shared security lending structure with BC Housing. It also advised that its commitment letter would allow Vintop to self-finance the BC Housing portion of the financing as requested by Vintop. That clause was added to the Trez Commitment Letter delivered on August 22, 2019.

[34] Third, Citifund says the judge did not give effect to the August 13, 2019 meeting, after which Vintop advised that it was "looking forward to getting Trez's

[commitment] letter soon." At this point Vintop expected that Citifund would be delivering a Trez Commitment Letter based on the Second LOI and knew that Citifund expected to be paid a commission for doing so.

[35] The appellants submit that if the judge had taken this evidence into consideration, he would have concluded inevitably that Vintop accepted the terms of the Second LOI for the purpose of obtaining the Trez Commitment Letter, intending to then proceed to make arrangements for the financing of the non-market segment either through BC Housing or by other means. Citifund contends that, by failing to consider these facts and their legal significance, the judge committed a palpable and overriding error.

[36] I would not accede to this submission. First, I cannot agree that the judge misapprehended or ignored the evidence of what transpired between the parties in the seven weeks leading up to the breakdown of their relationship in August 2019. The absence of detailed references to the meetings and emails does not establish a misapprehension or failure to consider material evidence.

[37] Second, the question on appeal is not whether there was evidence in the record which supported a contrary finding. It is, rather, whether there was evidence to support the finding the judge made. In my respectful view, the judge's conclusion that Trez's Commitment Letter was not on terms acceptable to Vintop was manifestly open to him on the record.

[38] In July 2019, in response to Vintop's assertion (through its solicitor) that the Second LOI was "useless" to it because of the mortgage priority issue, Trez's solicitor countered that it was not useless to Vintop because it represented a significant offer to finance which could be used as a vehicle to ultimately reach an acceptable funding arrangement. In particular, the parties agreed that discussions and negotiations would continue, predicated on the understanding that:

> (a) Vintop was not obliged to accept or pay any fees to Trez if the commitment to loan was issued on the same terms as the Second LOI; and

(b) Vintop would be free to request changes and amendments to the funding model before acceptance.

[39] Further, contrary to the appellants' assertion that by continuing to work with Citifund and Trez in the summer of 2019, Vintop had affirmed that a commitment letter based on the Second LOI was acceptable to Vintop, Vintop's solicitor expressly stated that Vintop agreed to continue discussions with Trez and to allow Trez to continue seeking its internal approvals based on the Second LOI "on the basis that: (a) the loan commitment fees will not be payable unless Vintop accepts the Commitment Letter; and (b) Vintop is under no obligation to accept Trez's loan commitment until it is satisfied with all of the conditions in the Commitment Letter".

[40] In short, Vintop was pressing Trez to issue the Commitment Letter based on the Second LOI because it knew Vintop would still have to work out substantial amendments before the commitment to loan would be in a form it could accept.

[41] Whether the terms in the Second LOI and the Commitment Letter were acceptable to Vintop is a question of fact. The judge recognized that Vintop had signed the Second LOI, paid the deposit, and asked for a commitment letter from Trez, but he was satisfied that Vintop did so as a basis to engage in further good-faith discussions to see if the parties could ultimately agree on a co-lending arrangement with BC Housing. In short, the judge found that the appellants, the respondents, and Trez all understood that the ranking of Trez's mortgage in priority to BC Housing's security remained a significant problem, and that the terms of any contract to lend would not be acceptable unless that impediment could be resolved. The judge also had before him the admission of Mr. Good on examination for discovery, as representative of Citifund, that he knew the mortgage could not go ahead with Trez in first position and that he understood that the terms of the Trez Commitment Letter would not be acceptable to Vintop on that basis.

[42] In summary on this ground of appeal, the appellants have not established a palpable and overriding error in the judge's assessment of the evidence.

Disposition

[43] I would accordingly dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Fitch"