

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Freedom Capital Inc. v. 661010 BC Ltd.* ,  
2025 BCSC 2074

Date: 20251023  
Docket: S224433  
Registry: New Westminster

Between:

**Freedom Capital Inc.**

Plaintiff

And

**661010 B.C. Ltd and Clive Kupritz**

Defendants

Before: The Honourable Justice Schultes

## **Reasons for Judgment**

Counsel for the Plaintiff:

S. Alimirzaee  
B. Shabib

Counsel for the Defendant:

J. Rotstein

Place and Date of Hearing:

New Westminster, B.C.  
April 8, 2025

Place and Date of Judgment:

New Westminster, B.C.  
October 23, 2025

**Introduction**

[1] In this summary trial application, the plaintiff Freedom Capital Inc. (“Freedom”) seeks judgment against the defendants 661010 BC Ltd. (“661”) and its sole director Clive Kupritz for a broker fee that Freedom says it is entitled to for arranging a mortgage on properties that are owned by 661.

**Evidence**

[2] Freedom is a mortgage broker. Its sole director is Parbinder “Pip” Dhaliwal.

[3] 661 is the registered owner of four lots in Delta.

[4] On October 29, 2019, Freedom and 661 entered into an agreement under which Freedom (and Mary Mestaghi, the broker who had referred the file to Freedom) were to act as 661’s exclusive agent to arrange a mortgage on the properties.

[5] Under the agency agreement, the amount of mortgage financing sought by 661 was stated to be \$2,280,000. The broker’s fee was to be 4% of the gross mortgage amount.

[6] The agreement also provided that:

**The above mentioned Brokerage Commission shall only become due and payable to Freedom Capital and Mary Mestaghi upon the closing from the Lender to finance.** In the event further that Freedom Capital Inc. provides a **commitment to finance** by its lender and has been accepted & executed by the borrower: and the borrower declines the same for whatever reason, then Freedom Capital Inc. shall be entitled to claim from the Borrower its full Commissions and all other damages incurred.

[Emphasis in the original.]

[7] Mr. Kupritz signed the agreement on behalf of 661 and in his own capacity.

[8] Sylvia Morelos, a senior mortgage specialist with Freedom, deposed that 661 required the loan because it was in default with its existing lender, and that there was a certificate of pending litigation filed against one of its properties, which the filing party refused to remove unless the \$287,000 that it was claiming was paid into

trust. She said that there was other outstanding litigation against 661, which also made securing a lender “challenging”.

[9] Freedom was successful in its efforts to find a lender however, and on November 12, 661 and Mr. Kupritz accepted an offer from 1 City Financial Ltd. (“1 City”) to loan 661 \$2,310,000<sup>1</sup>.

[10] The loan agreement, which was also referred to in the evidence as a term sheet and a commitment letter, contained a clause dealing with broker fees. In addition to such a fee being payable to 1 City itself, fees would be paid to Freedom (\$23,000) and to Ms. Mestaghi’s company (also \$23,000). The agreement indicated that funding of the loan was “expected to take place” by November 19.

[11] Also on November 12, 661 and Mr. Kupritz personally signed an agreement with respect to their obligation to pay the broker fee to Freedom, which was stated to be 2% of the mortgage amount.

[12] The agreement dealt with the timing of 661 and Mr. Kupritz’s obligation to pay the broker fee:

The mortgage Broker’s Fee is due and payable to Freedom Capital as follows upon the earlier of:

- A. The funding of loan
- B. The loan funding date specified in the Commitment Letter(s)
- C. The Cancellation of the Loan Commitments by the Borrowers.

[13] Attached as a schedule to the agreement was a promissory note requiring the defendants to pay \$46,000 (the combined amount of the fees owed to Freedom and to Ms. Mestaghi) to Freedom on demand.

[14] To facilitate the payment of the broker fee, 661 and Mr. Kupritz signed a “Lawyer Direction To Pay” to have the solicitor who would be conducting the loan

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<sup>1</sup> Some of the documents referred to an earlier version of the loan agreement, which appears to have been put forward on November 1. However, there was no suggestion that the parties acted on that agreement any further, or that it is relevant to the analysis of the agreements that are in issue.

transaction pay \$23,000 each to Freedom and Ms. Mestaghi “at the time of closing from the initial disbursements”. The cheque for the total fee of \$46,000 was to be made payable to Freedom.

[15] According to Ms. Morelos, a difficulty arose after that because the requirement in the loan agreement that 661 pay the amount of the CPL into trust meant that the company and Mr. Kupritz did not have enough funds to pay the broker fee. She deposed that in order to assist them and allow the loan to proceed, Freedom proposed that the broker fees be paid within eight months instead, secured by a second mortgage against the properties with an interest rate of 12%.

[16] At 7:07 pm on November 17 she sent an email to Mr. Kupritz, which had the subject line “Breakdown of Funds for New Proposal for [Mr. Kupritz] over [661’s properties]”. In the body of the email, she described the proposal being “subject to all parties agreeing”. The proposal contained in the email was similar to what she described in her affidavit, except that only half of the “total fees” due to the lender and broker was to be secured by the second mortgage. The other half was to be paid out of the mortgage proceeds. The \$46,000 broker fee payable to Freedom was not listed separately from the \$149,500 in total fees to the lender and broker that it formed part of, or from the half of that amount that was to be financed over eight months.

[17] The next day at 10:00 pm she sent another email to Mr. Kupritz, which contained the following:

As per your conversation with Pip today at 2:40pm, Pip stated that we needed to know whether you would be proceeding with the financing offer or not. You mentioned to him that you would get back to him before end of business day with an answer. We have not heard from you. Pip has also tried contacting you twice since you last spoke for an update and he was not able to reach you nor have you returned his calls.

After many attempts Clive, we think it’s safe to assume that you are no longer interested in the financing and we are letting the lender know now to cancel the file.

You will be hearing from all the lawyers.

[18] Freedom relied on Mr. Kupritz’s testimony at his examination for discovery, in which he agreed that he understood the term of the promissory note that set out the events that would trigger the payment of the broker fee, and also agreed that he had “cancel[led] the loan”.

[19] Freedom also sought to rely on evidence that the defendants made a deposit and paid for an inspection that were required under the loan agreement as a further indication of their steps in fulfillment of it, but during the hearing of the application its counsel conceded that this evidence was hearsay provided to it by the principal of 1 City, and inadmissible on an application for a final order.

[20] Mr. Kupritz’s version of events is that a few days before November 17, Ms. Morelos called him and asked him whether 661 was “taking the money” on the “initial lending transaction” with 1 City. He told her that he did not like the conditions of the transaction, which “did not make economic sense” because they made the loan too expensive. After telling him that she would talk to Mr. Dhaliwal about the issue, she called him back to say that Mr. Dhaliwal was “redoing the loan” and would give him a new proposal.

[21] Mr. Dhaliwal, whom he had not spoken to previously, called him “a couple of days” later and said that he would have a “fresh proposal”. They agreed to meet at a Starbucks in Surrey on the evening of November 17. Mr. Kupritz deposed that his “clear impression was that the previous loan arrangement with 1 City Financial Ltd. was no longer on the table”.

[22] They met after 8:00 pm on that date. Mr. Kupritz quoted Mr. Dhaliwal as telling him, “If you will not take the current loan then we will redraw the loan to make it more acceptable to you”. At the time he swore the affidavit, he was unsure whether Mr. Dhaliwal had a paper version of the new proposal with him during the meeting, but said that in any case they discussed the proposal in general terms.

[23] At 8:07 pm Ms. Morelos emailed him the details of the new proposal. He did not see her email until after his meeting with Mr. Dhaliwal. It is essentially a

formatted version of the new terms that were contained in the email that she had sent him an hour earlier. Once again, she described “the new loan proposal”, which was again “subject to all parties agreeing”.

[24] According to Mr. Kupritz, these new terms were even less economically sound for 661’s purposes. He said that he spoke to both Mr. Dhaliwal and Ms. Morelos on the phone the following day, and told them that the proposal was not an improvement. Despite their encouragement to do so, he told them that he would not be taking it. In his last call with Ms. Morelos, she told him that he would be hearing from their lawyers.

[25] He acknowledged having received Ms. Morelos’s final email on November 18, as she described in her affidavit, but maintained that her claim that he had not responded to their attempts to contact him was untrue.

[26] Having reviewed Mr. Kupritz’s affidavit, Ms. Morelos denied that a “new loan” proposal was ever made by Freedom. The proposal that it provided “was made in an effort to assist the [d]efendants in moving forward with the [l]oan”.

### **Positions**

[27] Freedom’s counsel characterizes this as a straightforward breach of contract. One of the conditions in the agreement for the broker fee becoming payable – 661 cancelling the loan – unquestionably occurred, and Mr. Kupritz admitted that he understood the applicable terms. Freedom carried out the work that was contemplated in the agreement, and is entitled to be compensated accordingly.

[28] As a preliminary matter, the defendants’ counsel identified some deficiencies in Freedom’s affidavit material, which they argue should lead to its exclusion.

[29] When this application was originally filed, the main affidavit in support of it was from another managing broker at Freedom, Rosaleen Ram, who failed to depose that she was authorized by the company to provide the affidavit, as required by *Bank of Montreal v. Brown*, (1956) 21 W.W.R. 287 (B.C.S.C.).

[30] Ms. Morelos's affidavit, which included that authorization and was clearly intended to remedy the deficiency in the previous affidavit, was delivered after the defendants' application response and Mr. Kupritz's affidavit, thus offending the prohibition against an applicant spitting its case: see, for example, *Ulrich v. Ulrich*, 2004 BCSC 95 at para. 41, and the restriction of subsequent affidavits by a summary trial applicant to rebuttal evidence in Rule 9-7(8)(b)(i) of the *Supreme Court Civil Rules*.

[31] Finally, Freedom failed to give proper notice of its intention to rely on Mr. Kupritz's discovery testimony, as required by 9-7(9)(a) of the *Rules*.

[32] On the substance of the application, the defendants say that none of the conditions requiring payment of the broker fee were fulfilled. As of November 18, when Freedom alleges the cancellation occurred, there was no evidence that 1 City had advanced the specified amount to its lawyers to fund the loan, and the funding date specified in the commitment letter had not yet arrived.

[33] In addition, rather than insist on the performance of the fee agreement, or accept a repudiation of it by the defendants, both of which would have entitled it to sue for damages, Freedom simply ended its involvement and said that it would instruct the lender to do the same. The defendants' position is that once Freedom did that, they owed it no further legal duties. In support of this proposition they rely on *Hadcock v. Georgia Pacific Securities Corp.*, 2006 BCCA 536 at paras. 41-57, in which the innocent party was found to have failed to exercise any of its options in the face of a breach of an agreement (including, in that situation, treating it as a fundamental breach), and also to have ended the contract before the time for performance had expired. The result was that the breaching party's obligations to the innocent party were ended.

[34] More fundamentally, the defendants submit that there is no evidence that they canceled the original loan that was the subject of the fee agreement. What Mr. Kupritz rejected was the new proposal that Freedom had put forward, and by

taking that action Freedom abandoned the proposal that was the subject of the defendants' actual obligation to pay the broker fee.

**Discussion**

[35] Dealing with the preliminary objections, I will say first that I do not think the deficiency in Ms. Ram's affidavit is relevant to the outcome of the application, because Freedom's counsel disavowed any reliance on it, in favour of the subsequent affidavit from Ms. Morelos.

[36] While it could be argued that Ms. Morelos's affidavit splits Freedom's case, and goes beyond rebuttal by remedying the defect in the original affidavit material, there was no prejudice to the defendants from it, because they had the opportunity to provide an amended application response after her affidavit was served. The expense connected with amending their response could certainly be a factor when costs are awarded, but in the absence of prejudice to the defendants' position there is no need to exclude the affidavit.

[37] Similarly, while the affidavit of a legal assistant attaching the discovery transcript was delivered without the required notice, the defendants' counsel himself made use of the transcript during the hearing, to provide context to the answers that Freedom was relying on<sup>2</sup>. As a result, whatever prejudice might potentially have resulted from the deficiencies in notice was balanced out by the benefits that the transcript provided to the defendants' case.

[38] Next, although the defendants did not object to this matter being decided by a summary trial, I am still required to determine its suitability for that form of resolution.

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<sup>2</sup> The defendants' counsel went beyond what was necessary to provide context to the answers that Freedom relied on, and strayed into discovery testimony that reinforced the nature of Mr. Kuprtiz's dissatisfaction with the loan, and since that additional testimony runs afoul of the prohibition against a party relying on their own discovery evidence (see *Lee v. Chau*, 2021 BCSC 70) I have not considered it.

[39] For the sake of convenience, I will rely on the summary of the applicable principles on that process that I provided in *Kushty Consulting Ltd. v. Wissman*, 2025 BCSC 336:

4...Pursuant to Rule 9-7(15) of the *Supreme Court Civil Rules*... I am able to grant judgment in favour of either party, on an issue or the entire matter, unless I am unable to find the facts necessary to decide the issues of fact or law, or I am of the opinion it would be unjust to decide the issues on the application.

5 With respect to finding the necessary facts, a summary trial almost invariably involves a resolution of credibility issues: *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, at para. 22. In appropriate circumstances it is perfectly acceptable for a summary trial judge to make credibility findings on affidavit evidence alone: *Amacon Alaska Development Partnership v. ARC Digital Canada Corp.*, 2023 BCCA 34, at para. 40, citing *Orangeville Raceway Ltd. v. Wood Gundy Inc.*, [1995] 6 B.C.L.R. (3d) 391 (C.A.). The court in *ARC* cited as an example its previous decision in *Newhouse v. Garland*, 2022 BCCA 276, in which a negative inference about credibility was drawn from the implausibility and vagueness of the affidavit evidence, and the finding with respect to credibility was supported by circumstantial evidence.

6 More frequently, a court is able to render judgment despite the conflict in the affidavits because there is other objective evidence, such as documents generated by the parties, or correspondence between them, which allows the conflict to be resolved: for example, *ARC*, at para. 42; *Orangeville*, at para. 43.

7 All of that said, where there is a head-on conflict on a credibility issue that goes to the heart of the dispute, and no principled or objective basis on which to resolve it can be identified, the case will likely require a full trial, with viva voce evidence and cross examination.

8 Relevant factors when deciding whether it would be unjust to decide issues on a summary trial have been found to include: "the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings... the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices": *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31, citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, (1989), 36 B.C.L.R. (2d) 202 (C.A.) at p. 215, and *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, aff'd 2006 BCCA 369.

[40] In this case, while there are some credibility issues raised by the competing versions of events offered by Ms. Morelos and Mr. Kupritz, I think that the essential

issues can be resolved by a consideration of the documentary evidence and the version of events that it renders the most likely.

[41] It was not disputed that the defendants entered into a valid and binding agreement to pay the broker fee on the occurrence of one of the three identified events. I do not think that the other agreements that dealt with the fee are applicable – the “closing of Lender to finance” set out in the agency agreement as the trigger for the obligation did not occur, and the defendants’ agreement with 1 City to pay it is not something that Freedom can enforce.

[42] With respect to the fee agreement, it is also clear that neither the funding of the loan nor the date on which it was to be funded under the loan agreement – two of the triggering events for the fee to be payable - had occurred yet when Freedom determined that the defendants were no longer proceeding with the loan and advised the lender to cancel it. If liability for the fee is to be found, it must be on the basis of the “Cancellation of the Loan Commitments” by the defendants.

[43] The terms of the new proposal strongly support Ms. Morelos’s version of events. Those terms provided a means of paying the broker fee on a delayed basis, as the defendants would have required if they were short of funds. Similarly, Mr. Kupritz’s contention that Ms. Morelos asked him if he was “taking” the loan, and that he responded that he did not like the conditions, fails to address the reality that he had already formally agreed to it, and that any objections to its conditions he had by that point would need to be addressed in the form of either the cancellation of the loan agreement or a renegotiation of its terms. I reject his account as implausible, including the statements that he attributed to Mr. Dhaliwal, and am satisfied that the new proposal for paying the broker fees and other associated ones was made to him because he was unable to afford the terms of the original fee agreement, despite having committed to the loan. I also reject his argument that when he did not accept the new proposal, that somehow left the original one unaffected, still capable of being accepted by him up to the time it was withdrawn. Instead, I infer from the

terms of the new proposal that he had already indicated his inability to fulfil it, hence the requirement for delayed payment.

[44] What this case really comes down to, in my estimation, is whether it can be said that Mr. Kupritz “cancelled” the loan commitments.

[45] In that regard I think that the new proposal is a bit of a red herring, because even if it can be said that it would also have altered the loan agreement by varying the basis on which the lender’s additional fees would be paid, with Freedom acting as the lender’s agent to present it, he did not accept it, so his original obligations under the loan agreement were not changed.

[46] I also do not see the factual conflict between Ms. Morelos and Mr. Kupritz about whether he spoke to her and Mr. Dhaliwal on November 18 as determinative, so that it needs to be resolved in order to render judgment. Even on his version of events he does not allege that he expressed his acceptance of either version of the fee agreement, or an intention to take the loan on its existing terms.

[47] My conclusion is that in the surrounding circumstances known to the parties, and in light of the purpose of the fee agreement, the objective intentions<sup>3</sup> underlying their use of the term “cancellation” of the loan commitment must have meant some kind of intentional conduct by the borrowers that prevented it from being carried into effect. That is the kind of protection a mortgage broker would want, to ensure that payment for its efforts was not thwarted by the borrower changing their mind, and that a borrower who wished to find a loan on the terms they were requesting would accept. Such intentional conduct must be distinguished from an inability on the part of the borrower to afford the agreed-to fees on closing, followed by a failure to accept more onerous terms for financing those fees over time, which I am satisfied is what happened here. If the parties had intended to capture the latter, and protect Freedom against any circumstances in which the loan was not carried out, they could easily have made the fee payable upon the failure of the loan to complete.

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<sup>3</sup> See *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, at paras. 47-48.

[48] In reaching this conclusion, I have kept in mind that Mr. Kupritz admitted at the discovery that he cancelled the loan, and that in his affidavit he presented himself as choosing not to follow through with it based on an economic analysis, as opposed to being unable to. But the facts I have found suggest otherwise. His subsequent positions are explainable as an attempt to deny the inescapable fact that he and 661 were in financially straitened circumstances throughout the transactions in question, while still enabling him to avoid liability.

[49] I will add that if I had been satisfied that the defendants' actions constituted a "cancellation" of the loan, I would not have acceded to their arguments that Freedom failed to either insist on the performance of the fee agreement or accept their repudiation of it, or that it prematurely deemed the defendants to have breached it. The first argument fails to recognize that the defendants' actions in cancelling the loan would not have been a breach of the fee agreement, but rather a triggering of its application. The question of insisting on performance or accepting a repudiation were for the lender, under the loan agreement. As to the second, if those actions had been a cancellation, they did not require the subsequent funding of the loan or the funding date in the loan agreement to trigger the broker fee.

[50] As a result, the action must be dismissed.

[51] Unless there have been offers to settle or other matters that would affect entitlement to or the scale of costs, in which case counsel may arrange to make written submissions, the defendants will receive their costs at the ordinary scale of difficulty.

"Schultes J."