

[5] I find that the Applicant failed to satisfy a condition precedent in the assignment agreement, but that the condition would have been fulfilled had Ms. Ma complied with her obligation to co-operate under the agreement. Under the terms of the assignment agreement, Ms. Ma's default results in the forfeiture of the Deposit.

A. FACTUAL BACKGROUND

1. Assignment Agreement

[6] On March 1, 2017, the Applicant entered into an agreement of purchase and sale ("**APS**") with SD Homes Inc. ("**Vendor**") to purchase a pre-construction townhouse in Toronto ("**Property**"). When it entered into the APS, the Applicant paid a deposit in the amount of \$214,485.00. The APS provided for a total purchase price of \$1,429,900.00.

[7] On May 25, 2017, the Applicant entered into an agreement with Ms. Ma to assign the right to purchase the Property under the APS to Ms. Ma for a new purchase price of \$1,700,000.00 ("**Assignment Agreement**"). Within 24 hours of the acceptance of the Assignment Agreement, Ms. Ma was required to deliver a deposit in the amount of \$62,000.00 to Homelife to be held in trust pending the completion or other termination of the Assignment Agreement. Both the Applicant and Ms. Ma retained Rex Cheng of Homelife as their real estate agent.

[8] The Assignment Agreement was drafted using an Ontario Real Estate Association form. It included the following standard clauses:

TIME LIMITS: Time shall in all respects be of the essence hereof provided that the time for doing or completing of any matter provided for herein may be extended or abridged by an agreement in writing signed by Assignor and Assignee or by their respective lawyers who may be specifically authorized in that regard.

[...]

APPROVAL OF THE AGREEMENT: In the event that consent to this Assignment is required to be given by the seller in the Agreement of Purchase and Sale attached hereto in Schedule "C", the Assignor will apply, at the sole expense of the Assignor, forthwith for the requisite consent and if such consent is refused, then this agreement shall be null and void and the deposit monies paid hereunder shall be refunded without interest or other penalty to the Assignee.

AGREE TO CO-OPERATE: Except as otherwise expressed herein to the contrary, each of the Assignor and Assignee shall, without receiving additional consideration therefor, co-operate with and take such additional actions as may be required by the other party, acting reasonably, in order to carry out the purpose and intent of this Assignment.

[9] The Assignment Agreement had a Schedule A that contained additional clauses, including the following:

This Offer is conditional upon the Assignor obtaining the written consent of the seller under the original Agreement of Purchase and Sale (the “Seller”) to this assignment of the original Agreement of Purchase and Sale from the Assignor to the Assignee before the earlier of 1. the Firm Occupancy Date as defined in the Tarion Addendum of the original Agreement of Purchase and Sale, or 2. April 1, 2019. The said consent shall confirm the amount of the deposits paid by the Assignor to the Seller, the original Agreement of Purchase and Sale is in good standing, and that the Assignee shall have the right to direct title or further assign the original Agreement of Purchase and Sale to his or her spouse, a member of his or her immediate family, or extended family, including aunts, uncles, cousins, or other relatives. If this condition is not fulfilled within the time period stated herein, this Offer shall become null and void and the deposit shall be returned to the Assignee in full without deduction.

The Assignor shall be responsible for all costs incurred for obtaining the written consent to the assignment from the Seller. (“**Vendor Consent Condition**”)

[10] Schedule A to the Assignment Agreement also provided as follows:

- a. The closing date for the Assignment Agreement was the date on which the written consent of the Vendor to the assignment was obtained.
- b. The Applicant and Ms. Ma acknowledged that prior to obtaining the Vendor’s written consent to the assignment, the total deposits to be paid by the Applicant to the Vendor pursuant to the APS would be \$214,485.00. The final deposit of \$71,495.00 was to be paid by Ms. Ma to the Vendor on the occupancy date as defined in the APS.
- c. Ms. Ma was to reimburse the Applicant for the total amount of deposits paid to the Vendor, being \$214,485.00, by certified cheque or bank draft to the Applicant’s lawyer in trust, within five (5) business days after the Applicant obtained the Vendor’s written consent to the assignment.
- d. Ms. Ma was to pay the balance of the payment for the Assignment Agreement in the amount of \$208,100.00 by certified cheque or bank draft to the Applicant’s lawyer in trust, within thirty (30) days upon the Applicant obtaining the Vendor’s written consent to the assignment.
- e. Ms. Ma irrevocably directed Homelife to release the Deposit to the Applicant upon the Applicant obtaining the Vendor’s written consent to the assignment, less any applicable real estate commission.
- f. In the event Ms. Ma did not complete the APS due to her default, Ms. Ma agreed that any monies paid to the Applicant under the Assignment Agreement was forfeited to the Applicant and the Applicant could complete the APS directly with

the Vendor, with no further obligation or liability to Ms. Ma of any kind whatsoever.

[11] Ms. Ma paid the Deposit to Homelife in trust. The Deposit continues to be held by Homelife.

2. Communications in December 2017 and in 2018

[12] On December 13, 2017, Ms. Ma sent the following e-mail to Douglas Hochglaupe, who is the Applicant's principal:

Hi Doug.

This is Moon.¹ About 5 month ago, my mom's business started facing difficulties (I told Rex about this). My mom and I think we can figure things out. But last week I received a phone call from China, that was from my aunt.

After my parents got divorced, I haven't really been in contact with my father and his side of family for long time. My aunt said that my father is in hospital now, they found a tumour on his liver. I've been thinking a lot recently. Even though I hate that he left me and my mom, he's still my father. I'm his only child and I have a responsibility to take care of him.

I heard his second relationship has not been going well. She basically took his money and house. I can't just watch him suffer through it. \$60000 is a lot in China, and that's the only thing I can think of that would help him. I've decided to go back to China for a period of time. Depending on my father's situation, it may be for a couple of months, or over a year.

Thanks for giving me an opportunity to invest in Briar Town. It is a wonderful place and I wish I could see it built up so I could move in someday. But unfortunately I need that deposit for serious family issue. Sorry for all the trouble I might cause you and hope you can understand the situation. With my father's health condition and potential falling of my mom's business I cannot purchase Briar Town in this moment. I wish we can solve this with a mutual release agreement.

Rex probably told you about my situation days ago. I'm thinking its [sic] better to contact you personally. I wouldn't ask you for this favor if I have any other choices.

Thank you very much

¹ Ms. Ma used the first name "Moon".

[13] On December 22, 2017, Ms. Ma, Mr. Hochglaube and Mr. Cheng had a telephone conversation to discuss Ms. Ma's situation. Mr. Hochglaube stated that he would get confirmation from his father, but that if Ms. Ma or Mr. Cheng could find another buyer to take over the Assignment Agreement at the same purchase price, Mr. Hochglaube would consider terminating the Assignment Agreement to help out Ms. Ma. However, Ms. Ma was unable to find another buyer to transfer the Assignment Agreement.

[14] In the first half of 2018, a lawyer retained by Ms. Ma, Garry Shapiro, exchanged correspondence with the Applicant's real estate lawyer, Heejung Alexandra Cho, regarding a potential resolution of this matter, including a mutual release. No agreement was reached between the parties.

[15] On July 4, 2018, Ms. Cho sent a letter to Mr. Shapiro enclosing correspondence from the Vendor advising of a delay in the first occupancy date from September 5, 2018 to October 31, 2019.

[16] As set out above, the closing date for the Assignment Agreement was the date on which the written consent of the Vendor to the assignment was obtained. Such consent had to be obtained before the earlier of the firm occupancy date or April 1, 2019. Given the delay in the occupancy date, the deadline to obtain the Vendor's consent and close the assignment transaction became April 1, 2019.

3. Vendor's consent

[17] On January 26, 2019, Mr. Hochglaube sent an e-mail to Selva Chelliah, the President of the Vendor. The Assignment Agreement was attached to the e-mail. Mr. Hochglaube asked Mr. Chelliah to provide him with "an email consent" stating that the Vendor consented to the Applicant's assignment of the Property. Mr. Hochglaube mentioned that he would then connect with the lawyer.

[18] On January 28, 2019, Mr. Chelliah responded as follows:

Hi Doug;

I don't see any issues with executing this assignment agreement. We are targeting above ground construction beginning of March 2019.

[19] On January 31, 2019, Mr. Hochglaube forwarded Mr. Chelliah's e-mail to Ari Katz, the Vendor's lawyer. On February 1, 2019, Mr. Katz confirmed that his office could prepare a vendor consent form.

[20] On February 21, 2019, Ms. Cho, sent a follow-up e-mail to Mr. Katz regarding the vendor consent form. Mr. Katz sent a document to Ms. Cho later that day, "for completion and signing" ("**Vendor Consent Form**").

[21] The Vendor Consent Form is a two-page agreement between the Applicant, Ms. Ma and the Vendor dated February 21, 2019. It contains 15 clauses, including the following:

5. The Vendor hereby consents to the within assignment from the Assignor to the Assignee.

[...]

9. The Vendor warrants and confirms that the Purchase Agreement is in good standing and all deposits paid by purchaser to date under paragraph I therein, totaling \$214,485.00 shall be credited to the Assignee on closing as part of the purchase price.

[...]

13. The Assignee shall not further assign the Purchase Agreement without prior written consent of the Vendor, which consent may be unreasonably or arbitrarily withheld in accordance with Paragraph 18 of the Purchase Agreement.²

[...]

[22] I note that section 13 of the Vendor Consent Form is inconsistent with the Vendor Consent Condition because the Vendor Consent Condition requires that the Vendor's consent confirm that Ms. Ma has the right to "direct title or further assign the original Agreement of Purchase and Sale

² Paragraph 18 of the APS provides as follows:

The Purchaser covenants not to list for sale or lease, advertise for sale or lease, sell or lease, nor in any way assign his or her interest under this Agreement, or the Purchaser's rights and interests hereunder or in the Unit, nor directly or indirectly permit any third party to list or advertise the Unit for sale or lease, at any time until after the Title Transfer Date, without the prior written consent of the Vendor, which consent may be arbitrarily withheld. The Purchaser acknowledges and agrees that once a breach of the preceding covenant occurs, such breach is or shall be incapable of rectification, and accordingly the Purchaser acknowledges, and agrees that in the event of such breach, the Vendor shall have the unilateral right and option of terminating this Agreement and the Occupancy Licence, effective upon delivery of notice of termination to the Purchaser or the Purchaser's solicitor, whereupon the provisions of this Agreement dealing with the consequence of termination by reason of the Purchaser's default, shall apply. The Purchaser shall be entitled to direct that title to the Unit be taken in the name of his or her spouse, or a member of his or her immediate family only (being limited to parents, siblings or children over the age of eighteen (18) years), and shall not be permitted to direct title to any other third parties.

to his or her spouse, a member of his or her immediate family, or extended family, including aunts, uncles, cousins, or other relatives.”

[23] On February 22, 2019, Ms. Cho sent the following e-mail to Mr. Shapiro’s law clerk:

Further to our telephone conversations yesterday and today, please find attached correspondence between our two offices in regards to the above-noted assignment transaction and a copy of the accepted Assignment Agreement between our two clients.

Please note that there is only one condition outstanding being our client’s obligation to obtain the vendor’s consent to the assignment before April 1, 2019. The vendor has agreed to provide consent to the assignment at this time. If you confirm that you are acting for the Assignee, I will forward the Vendor’s consent agreement for your review.

[24] Mr. Shapiro’s law clerk advised Ms. Cho that they would communicate with Ms. Ma to get confirmation on whether they were acting for her. Ms. Cho sent follow-up e-mails on February 26 and March 8, 2019. On March 8, 2019, Mr. Shapiro’s law clerk sent the following response:

We are unable to reach the Assignee and We [sic] do not believe the Assignee is retaining our office to continue on this matter.

If we hear back from the Assignee we will advise.

[25] Ms. Ma’s evidence is that she did not receive anything from Mr. Shapiro’s office.

[26] Later on March 8, 2019, Ms. Cho sent the following e-mail to Mr. Cheng:

Further to our telephone conversation last week:

Yin Zhang, the lawyer who originally helped the Assignee, Ke Ma, negotiate the assignment agreement has confirmed that she is no longer acting for Ke Ma.

Garry Shapiro, the lawyer that was retained last year by Ke Ma to try to get out of the assignment agreement has advised that they cannot reach Ke Ma and believe they are no longer retained to act for her in this matter.

As such, please reach your client to advise that the consent to the assignment has been obtained from the Vendor, SD Homes Inc. Please see attached Vendor’s consent to assignment agreement which must be executed by all three parties, the Assignor, the Assignee, and Vendor. I confirm that the Assignor, Douglas Holdings Inc., has fulfilled its obligations pursuant to the Assignment of Agreement of Purchase and Sale by obtaining the consent to the assignment before April 1, 2019. The Assignor has already executed the consent agreement. The Vendor will execute upon Assignee’s execution.

[27] The Vendor Consent Form attached to Ms. Cho's e-mail was the document sent by Mr. Katz on February 21, 2019, which the Applicant signed on February 22, 2019.

[28] Mr. Cheng forwarded Ms. Cho's e-mail to Ms. Ma on March 12, 2019, with the attachment. Mr. Cheng's e-mail simply stated: "Please review and reply". Ms. Ma's evidence is that she contacted a lawyer, Gerald Miller, shortly after receiving Mr. Cheng's e-mail. She thought that it was preferable to have a lawyer deal with Ms. Cho's correspondence. However, neither Ms. Ma nor Mr. Miller communicated with Ms. Cho before April 1, 2019.

[29] The Applicant and its lawyer did not communicate directly with Ms. Ma despite the fact that her phone number was included in the Assignment Agreement, and Mr. Hochglaube had Ms. Ma's e-mail address since at least December 2017.

4. No closing

[30] On April 1, 2019, Ms. Cho sent the following letter to Ms. Ma c/o Mr. Cheng at Homelife:

We are the solicitors for the Assignor. We have been recently advised by your most recent lawyer of record, Mr. Garry Shapiro, that he has not been able to reach you and therefore believes that he is no longer retained by you to act for you in regards to the above-noted matter. I am therefore sending this correspondence directly to you care of the real estate brokerage that acted for you as Assignee, Homelife Best Choice Realty Inc., Brokerage. If you have retained a new lawyer to represent you in regards to this transaction, please forward this letter to their attention.

I have attached a copy of the Assignment Agreement of Purchase and Sale (the "Assignment Agreement") for your reference. The Assignment Agreement is firm subject only to the condition that the consent to the assignment be obtained from the vendor of the original agreement of purchase and sale (the "Vendor") the earlier of 1. the Firm Occupancy Date as defined in the original agreement of purchase and sale, and 2. April 1, 2019. Such consent has been obtained from the Vendor. Please see attached copy of the Vendor's consent to the assignment agreement which must be executed by all three parties, the Assignor, the Assignee, and Vendor. The Assignor has already signed the consent agreement. The Vendor will execute upon Assignee's execution.

This shall serve as confirmation that the Assignor is ready, willing, and able to close this transaction, as evidenced by the consent to the assignment obtained from the Vendor. We expect that you will also honour your legal obligations under the Assignment Agreement to complete such transaction, failing which you will be in breach of the Assignment Agreement. If we do not receive a response from you by 5:00 pm on Monday, April 5, 2019 confirming that you will be proceeding with the Assignment Agreement, our client will endeavour to find another assignee in order to mitigate their damages and our client will proceed with further legal action for costs and damages as a result of said breach including the forfeiture of the deposit.

[31] On April 1, 2019, Mr. Cheng forwarded Ms. Cho's letter to Ms. Ma by e-mail. His e-mail stated as follows:

It is a second letter has sent you [sic]. Please have it reply and take care immediate [sic]. If you need any assistance, please contact me or my office any time.

[32] The new lawyer retained by Ms. Ma, Gerald Miller, responded to Ms. Cho's April 1, 2019 letter on April 4, 2019. Mr. Miller stated the following:

We have been retained by Ms. Ma. She has provided to us a copy of your letter dated April 1, 2019. Ms. Ma has instructed us to respond to your letter.

This matter seems to have been percolating for some time and we seem to be the third law firm engaged and have only just seen and reviewed some of the material.

[...]

We note in your April 1, 2019 letter that you allege to attach the Vendor's (the builder) consent to the Assignment which you correctly point out is a further condition precedent to the Assignment Agreement. There was no consent signed by the Vendor SD Homes Inc. as required by the Assignment Agreement. The only signature on the Assignment Agreement [sic] is the signature of the Assignee [sic]. Your letter actually confirms the Vendor would not sign the Consent until the Assignee signed it. That was not what the Assignment Agreement required. It simply required the written consent of the Vendor. The Assignment Agreement provides that the written consent of the Vendor shall be delivered to the Assignee before April 1, 2019 failing which the Assignment Agreement becomes null and void. No written consent was delivered prior to April 1, 2019 and, as such, the Assignment Agreement, if it was not already void, is now void. Pursuant to the Assignment Agreement the Assignee's deposit must be returned to her. We trust you agree and will facilitate the return of the deposit in short order.

[33] Ms. Cho and Mr. Miller exchanged further correspondence outlining their clients' respective positions. In a letter sent on April 9, 2019, Mr. Miller pointed out that the Vendor Consent Form provides no right of any further assignment without the consent of the Vendor, contrary to the Vendor Consent Condition in the Assignment Agreement which permits an assignment to a family member without consent.

[34] The Applicant sought to locate another potential assignee in order to mitigate its damages, but was unable to do so. The Applicant commenced this Application on December 13, 2019. The hearing of the Application was delayed as a result of the COVID-19 pandemic.

[35] Ms. Ma's evidence during her cross-examination was that she understood that upon the Applicant obtaining the Vendor's written consent to the assignment, she would have to be able to pay \$214,485.00 within five days. When asked whether she would have been able to pay this sum of money on April 6, 2019, she said: "I can think a way with my family." She confirmed that she

did not personally have the capacity to pay this amount, and that she did not have any pre-approvals for obtaining a mortgage for the purchase of the Property.

[36] On May 19, 2023, Mr. Chelliah provided affidavit evidence in support of the Applicant's position. His affidavit states, in part:

I confirm that by reply email dated January 28, 2019, [...] I told Mr. Hochglaube that I did not have any issue with SD Homes executing a consent to an assignment of the APS between SD Homes and Douglas Holdings.

Following my written confirmation in that email, I understood that all that was left to be completed to document SD Homes' consent, was the paperwork to be prepared by SD Homes' lawyer, and executed by the parties. I was prepared to execute such a consent to assign the APS to the assignee, Ke Ma. SD Homes never refused to consent to the assignment of the APS.

[...]

I have reviewed the Affidavit of Ke Ma, sworn April 26, 2023, and the Vendor's Consent Form dated February 21, 2019 attached thereto at Exhibit "E". I understand that a term of the Assignment Agreement, included at Schedule "A", required the Vendor's Consent Form to include a provision entitling the assignee to direct title or further assign the APS to her spouse, or a member of her immediate or extended family.

The requirement for such a provision in the Consent Form would not have caused SD Homes to refuse to provide its written consent. If Ke Ma or her lawyer had asked SD Homes to remove this provision I would have agreed, and instructed Mr. Katz to make the terms of the Consent form consistent with the provisions of the APS. There was no reason for SD Homes to refuse to consent to the assignment of the APS.

B. SUBMISSIONS OF THE PARTIES

1. Submissions of the Applicant

[37] The Applicant's position is that it is entitled to receive the Deposit because:

- a. Ms. Ma breached the Assignment Agreement by failing to respond in a timely fashion to, or communicate with the Applicant in respect of the closing of the Assignment Agreement; and
- b. Ms. Ma repudiated the Assignment Agreement by her actions and her refusal to communicate with the Applicant in advance of the closing date.

[38] The Applicant argues that Ms. Ma breached the explicit contractual obligation to cooperate, the “time is of the essence” provision and the implied duty of good faith in the execution of the Assignment Agreement when she failed to respond, communicate, provide any answer, or raise any objection that she may have had to the Vendor Consent Form well in advance of the closing date.

[39] The Applicant submits that a party cannot rely on a condition not being fulfilled when that party caused the other to be unable to fulfil it.

[40] The Applicant points out that the e-mails from Ms. Cho make it clear that the Applicant understood that the Vendor had consented to the Assignment Agreement, and that all that was remaining was to formalize the consent through completion of the Vendor Consent Form. The Applicant states that Ms. Ma was aware before the closing date of the deficiencies with the Vendor Consent Form to which she now objects, but she intentionally withheld that information with the intention of relying on these alleged deficiencies in support of her position that the Assignment Agreement was null and void. The Applicant notes that at no time between March 12, 2019 (i.e., when Ms. Ma received the Vendor Consent Form from Mr. Cheng) and April 1, 2019 did Ms. Ma or her lawyer raise objections regarding the Vendor Consent Form. According to the Applicant, the deficiencies in the Vendor Consent Form would have been cured before the closing date had Ms. Ma identified them in a timely fashion. Ms. Ma was not entitled to stay silent and then attempt to rely on the deficiencies.

[41] The Applicant argues that Ms. Ma was under an implied contractual duty of good faith, which encompasses a duty of honest performance. The Applicant states that the duty of good faith performance applies where one party seeks to evade their contractual duties by engaging in conduct that while not strictly prohibited by the letter of the terms of the contract, has the effect of defeating the other parties’ rights under the contract.

[42] The Applicant argues that the factual matrix makes it clear that Ms. Ma’s silence in response to the Applicant’s request for her signature on the Vendor Consent Form was a deliberate and intentional effort to escape her obligations under the Assignment Agreement. The Applicant submits that Ms. Ma’s reliance on strict compliance with the Vendor Consent Condition should be seen as a late-breaking attempt to avoid a firm deal. The Applicant points out that the Vendor provided evidence on this Application showing that it consented in principle to the assignment and would have been prepared to sign a consent that complied with the terms of the Assignment Agreement had Ms. Ma raised the issue at the time. The Applicant states that it was ready, willing and able to fulfil the Vendor Consent Condition. It also states that Ms. Ma would not have been able to pay the necessary funds after the closing because of her parents’ financial struggles.

[43] The Applicant submits that tender is not required from an innocent party when the other party has clearly repudiated the agreement. It argues that Ms. Ma demonstrated the intention not to close the assignment transaction and not to be bound by the Assignment Agreement by being nowhere to be found before the deadline.

[44] The Applicant states that the Assignment Agreement is clear that where the assignee defaults on their obligations under the Assignment Agreement, the Deposit will be forfeited. According to the Applicant, there is a sufficient basis for this Court to find that Ms. Ma's actions, in breach of her obligations under the Assignment Agreement, constituted repudiation of her obligations before the closing date. The Applicant argues that Ms. Ma's behaviour in the circumstances should not be condoned. The Applicant asked that this Court find that Ms. Ma breached and repudiated the Assignment Agreement and that the Applicant is therefore entitled to the Deposit.

2. Submissions of Ms. Ma

[45] Ms. Ma's position is that the Assignment Agreement between the parties was conditional, and the rights and obligations of the parties did not crystallize until the condition precedent – the Vendor Consent Condition – occurred. She submits that since the Applicant failed to obtain the required written consent of the Vendor to the assignment by the deadline, the Vendor Consent Condition was unsatisfied and the contract between the parties is null and void. As a result, she is entitled to the Deposit.

[46] Ms. Ma states that no written consent from the Vendor was provided to her before April 1, 2019. She points out that the Vendor Consent Form did not include the information required by the Assignment Agreement and was not signed by the Vendor to signify its written consent.

[47] Ms. Ma argues that the requirement that she sign the Vendor Consent Form before the Vendor was not a prerequisite to the Applicant obtaining the Vendor's consent under the Assignment Agreement nor was it a request made by the Vendor. Ms. Ma states that this requirement was created for an unknown reason by the Applicant or its lawyer when the Vendor Consent Form was sent to Mr. Cheng on March 12 and April 1, 2019.

[48] Ms. Ma submits that the Vendor Consent Condition is a true condition precedent and it was not waived. Ms. Ma further submits that because this true condition precedent was not satisfied by its completion date, the contract is void, and the rights and obligations that the Applicant is seeking to enforce never arose.

[49] Ms. Ma states that the cases relied upon by the Applicant are cases involving sole discretion clauses instead of true condition precedents. She argues that while a party's obligation of honesty and good faith has been recognized with respect to sole discretion clauses, it has not been recognized with respect to true condition precedents. Her position is that there is no duty of good faith with respect to a true condition precedent.

[50] Ms. Ma accepts that there is an implied duty of good faith between parties to a contract. She asserts that she acted reasonably and in good faith despite the fact that the Assignment Agreement was at an end before any rights or obligations arose.

[51] Ms. Ma argues that it was the Applicant and Mr. Hochglaube who acted in bad faith, made false statements and were the cause of the Applicant's alleged misfortune. Among other things, Ms. Ma states the following:

- a. Nothing prevented the Applicant from obtaining the Vendor's consent. The Applicant could have easily asked the Vendor to satisfy the Vendor Consent Condition any time between May 24, 2017 and before April 1, 2019. The requirement that Ms. Ma sign the Vendor Consent Form before the Vendor was not required in the Assignment Agreement and was not requested by the Vendor.
- b. While the Applicant alleges that Ms. Ma ignored its communications or refused to engage with it in a meaningful way, it never contacted Ms. Ma directly before April 1, 2019, despite having her cell phone number and e-mail address. Ms. Ma points out that Mr. Hochglaube made a number of false statements in this regard in his evidence.
- c. It is speculative for the Applicant to argue that she would not have had a source of funding available to close the transaction.

[52] Ms. Ma's position is that she did not repudiate or breach any obligations under the Assignment Agreement. She states that it was the Applicant who created its own obstacles and, in bad faith, is trying to blame Ms. Ma for its failures. She also states that tender could not happen given that the Assignment Agreement could not be performed until the Vendor's consent was properly obtained. Ms. Ma submits that the Court should not reward this behaviour by directing the release of the Deposit to the Applicant or granting the Applicant's Application.

C. DISCUSSION

1. Applicable legal principles regarding conditions precedent

[53] A true condition precedent exists where the rights and obligations of the contracting parties under the contract depend on a future uncertain event, the happening of which is beyond the control of the parties and depends entirely on the will of a third party. Until the event occurs, neither party to the contract has a right to performance. See *THMR Development Inc. v. 1440254 Ontario Ltd.*, 2018 ONCA 954 at para. 15.

[54] However, even where the consent of a third party is a condition of performance of a contract, each party is obliged to perform the contract pending the necessary third-party consent: see *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 328 at para. 94. Thus, the existence of a condition precedent does not preclude the possibility of some provisions of a contract being operative before the condition is fulfilled: see *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 at 1082.

2. Application to this case

[55] I agree with Ms. Ma that the Vendor Consent Condition was a true condition precedent since it depended entirely on the will of the Vendor. I also agree with Ms. Ma that the Applicant did not fulfil the Vendor Consent Condition before April 1, 2019, principally because the language of the Vendor Consent Form was inconsistent with the requirements set out in the Vendor Consent Condition.

[56] However, as stated above, this does not mean that Ms. Ma did not have any binding obligations under the Assignment Agreement until the Vendor's consent was obtained. For instance, as required by the Assignment Agreement, Ms. Ma paid the Deposit before the Vendor Consent Condition was fulfilled.

[57] In my view, the provision in the Assignment Agreement regarding the parties' obligation to co-operate was also intended to be operative prior to the fulfilment of the condition precedent. For ease of reference, I reproduce the relevant clause again:

AGREE TO CO-OPERATE: Except as otherwise expressed herein to the contrary, each of the Assignor and Assignee shall, without receiving additional consideration therefor, co-operate with and take such additional actions as may be required by the other party, acting reasonably, in order to carry out the purpose and intent of this Assignment. (“**Co-operation Clause**”)

[58] Interpreting the Co-operation Clause as being applicable prior to the satisfaction of the Vendor Consent Condition is consistent with its wording. The Co-operation Clause starts with the words “[e]xcept as otherwise expressed herein to the contrary”. Schedule A to the Assignment Agreement and the Vendor Consent Condition do not state that the obligation to co-operate does not apply.

[59] Such an interpretation is also consistent with, and commercially reasonable in, the context of a real estate transaction. The following statements of Richetti R.S.J. in *Nutzenberger v. Mert*, 2021 ONSC 36 at paras. 35, 37 demonstrate the importance, necessity and expectation of co-operation in the context of real estate transactions:

[35] Real estate transactions are complex transactions requiring at least two parties, usually through solicitors, to act in good faith to cooperate, prepare and exchange drafts and finalize numerous closing documents required to complete agreements of purchase and sale. It is not possible nor reasonable for one party to advise that they cannot close the APS and then do and say nothing until after closing, let the other innocent party do the best they can, not knowing what the defaulting purchaser is or is not going to do or knowing what documents or requisitions the defaulting purchaser wants on closing or does not / will not accept or wants amended. The closing documents, and the form of such documents, require the cooperation of both parties: what is the form of title? what are the objections to title? what is a proper Statement of Adjustments? what documents does the other party want or insist on? and many other closing details which need

to be worked out to close a real estate transaction. That cooperation is the good faith obligation each party owes to the other under the APS. [...]

[37] It is inequitable and the law does not permit a defaulting party to object to the lack or form of documents that would have been available on the Closing Date, despite not having requisitioned any closing documents, not prepared or cooperated in finalizing closing documents, not having a solicitor for the closing and later assert the agreement is at an end due to some technical, minor, temporary and curable breach in the documents required for closing.

[60] In my view, the spirit of these comments equally applies to the satisfaction of the Vendor Consent Condition in this case – especially since the fulfilment of this condition was the closing of the Assignment Agreement. Co-operation was required with respect to the finalization of the Vendor Consent Form, and it was reasonable to expect that documents would be exchanged and requests for amendments, if any, would be communicated prior to closing. When applied to the facts of this case, Richetti R.S.J.’s comments show that Ms. Ma failed to demonstrate the necessary degree of co-operation in the context of a real estate transaction, and as required by the Co-operation Clause in the Assignment Agreement.

[61] The following example further illustrates why the parties would have reasonably intended that the Co-operation Clause be operative before the fulfilment of the Vendor Consent Condition. The Vendor, after being approached by the Applicant about consenting to the Assignment Agreement, may have had questions or requested information before agreeing to provide its consent. Answering the Vendor’s requests could have necessitated the involvement and co-operation of Ms. Ma. It would not have been the parties’ intention that Ms. Ma could simply have refused to provide information reasonably requested by the Vendor, thereby preventing the Vendor Consent Condition from being fulfilled.

[62] I find that Ms. Ma did not reasonably co-operate with the Applicant in order to carry out the purpose and intent of the Assignment Agreement. While the Applicant acted sloppily in relation to the obtention of the Vendor Consent Form, this did not provide a justification for Ms. Ma to “lay in the weeds” and not raise the issues that she had with respect to the Vendor Consent Form prior to the closing date. Doing so is not acting reasonably “to carry out the purpose and intent of this Assignment [Agreement]”. Thus, Ms. Ma breached the Co-operation Clause.

[63] The fact that the Applicant did not communicate directly with Ms. Ma is irrelevant because it is clear from the record before me that Ms. Ma received Ms. Cho’s e-mail of March 8, 2019 and the attached Vendor Consent Form on March 12, 2019, when they were forwarded to her by Mr. Cheng. The Vendor Consent Form is a short, two-page document. Ms. Ma or her lawyer had ample time between March 12 and April 1, 2019 to respond to Ms. Cho’s e-mail and identify the deficiencies that Ms. Ma saw in the Vendor Consent Form. It was Ms. Ma’s obligation to do so under the Co-operation Clause, but she did not do it. Instead, she remained silent until after the closing date, and took the position that the Assignment Agreement was void and the Deposit had to be returned to her.

[64] Based on the evidence before me, including the affidavit of Mr. Chelliah, I find that had Ms. Ma complied with her obligation to co-operate with the Applicant and identified the deficiencies in the Vendor Consent Form in a timely fashion, the deficiencies in the Vendor Consent Form would have been cured and the assignment transaction would have closed. Thus, Ms. Ma's default under the Assignment Agreement caused her not to complete the APS which, under the terms of the Assignment Agreement, results in the forfeiture of the monies paid by Ms. Ma to the Applicant under the Assignment Agreement. Accordingly, the Applicant is entitled to the relief sought with respect to the Deposit.

D. CONCLUSION

[65] The Application is granted. This Court orders that: (a) Ms. Ma forfeit the Deposit to the Applicant; and (b) Homelife release the Deposit to the Applicant.

[66] Counsel advised at the hearing that they agreed that the costs of this Application should be on a partial indemnity scale. However, they had not reached an agreement on quantum. If costs cannot be agreed upon, the Applicant shall deliver submissions of not more than three pages (double-spaced), excluding the bill of costs, by January 29, 2024. Ms. Ma shall deliver her responding submissions (with the same page limit) by February 12, 2024. The submissions of all parties shall also be sent to my assistant by e-mail and uploaded onto CaseLines.

Vermette J.

Released: January 15, 2024