

# KEEPING CURRENT

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## Buyer breached duty of good faith in failing to complete assignment agreement

By James R.G. Cook

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Buyers of pre-construction properties in Ontario sometimes enter into an assignment agreement with another buyer before the completion date. Ordinarily, the developer's consent will be required to do so and there may be a fee involved. The assignment agreement is a separate contract between the original buyer, as assignor, and the assignee of the Agreement of Purchase and Sale (APS). The case of *Chandran v. Pannu*, [2022 ONSC 3278 \(CanLII\)](#), addressed the obligations and good faith duty of an assignor to complete an assignment transaction.

In August 2020, the respondent (GP) entered into an APS to purchase a pre-construction property in Caledon, Ontario, from the developer for \$1,060,990. GP was an experienced real estate investor and had sold two other homes in the same vicinity, making a profit of approximately \$1,269,600.00 on those sales in two months.

The APS contained an assignment clause that required GP to obtain the

prior written consent of the developer before assigning the APS and pay an "administration and processing fee" of \$5,000 and the fees for the builder's lawyer of \$550.

In March 2021, GP agreed to assign the APS to the applicants pursuant to a written Assignment Agreement which stated that GP shall request the consent of the developer to the assignment and pay any fees required. The Assignment Agreement further provided that in the event the developer refused to provide written consent to the assignment, then the Assignment Agreement shall become null and void and all deposit monies shall be returned in full.

The Assignment Agreement required the applicants to pay \$1,360,100 to GP on closing of the APS, with a \$41,000 deposit. They paid the deposit as required.

In July 2021, the developer increased the fees for assigning the APS to \$35,000. GP had not yet obtained the developer's consent to the assignment.

The completion date for the sale of the property by the developer to GP was extended into November and December 2021, due in part to the ongoing COVID-19 pandemic.

However, GP did not request the developer's consent to the assignment of his interest in the APS to the applicants. GP did not pay any fee charged by the developer for an assignment.

On November 29, 2021, GP amended the APS with the developer, substituting his wife, MG, as the buyer. MG was aware of the intended assignment of the APS to the applicants.

In December 2021, the applicants' lawyer wrote to GP's lawyer confirming that GP remained obligated to close the Assignment Agreement. In response, however, GP's lawyer advised that his office was never instructed by GP to seek an assignment from the developer.

The purchase transaction closed the next day, and MG became the registered owner of the property. The applicants had not been advised of the amendment to the APS substituting GP for MG as the buyer.

Throughout this period, the applicants had remained ready, willing, and able to close the Assignment Agreement, and they had provided mortgage approval documents to GP showing that they had financing in place.

Also during this period, the value of the property increased to approximately \$1,900,000, according to a Comparative Market Analysis.

The applicants subsequently commenced proceedings against GP and MG, alleging that GP failed to take all reasonable steps to complete the Assignment Agreement and thereby breached a duty of good faith owed to them in the circumstances. They sought

an Order requiring MG to transfer title of the property to them.

In response, GP argued that he was free to substitute MG as buyer of the property because the developer had not consented to the assignment of the APS to the applicants. GP further argued that he had entered into the Assignment Agreement on the basis that the developer's consent fee would be \$5,550 and that he was under no obligation to obtain the builder's consent once the fee increased to \$35,000.

The application judge rejected GP's arguments on the basis that a seller of property is under a duty to act in good faith and to take all reasonable steps to complete the transaction: *Nguyen v. Hu*, [2022 ONSC 2666](#), at paras. [61-75](#), citing *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978 CanLII 215](#) (SCC).

Based on the evidence, the court decided that GP breached his duty of good faith to the applicants by failing to request the developer's consent to the assignment of his interest in the APS to the applicants and by failing to pay the builder's fees for giving his consent.

The court found that the Assignment Agreement was not conditional on the developer charging \$5,550 for consent to the assignment and if a fee of \$35,000 was improperly demanded, then GP had a duty to either pay the increased fee or seek a court order relieving him of his obligation to do so. He did neither.

The amendment to the APS to substitute MG as the purchaser of the property was a further breach of the Assignment Agreement. MG, in turn, entered into the amended APS knowing that GP was in breach of the agreement to assign his interest in the APS to the applicants.



As a result, the court found that MG held title to the property in trust for the applicants and ordered her to transfer the title to the applicants upon their paying the balance of the \$1,360,100 purchase price, after applying the deposit paid by them to the broker.

Had the terms of the Assignment Agreement provided for future contingencies, such as the substantial increase of the developer's assignment fee, GP may have been able to avoid the result. The decision shows that once a buyer enters into an assignment agreement they generally have an obligation to take steps to complete the transaction rather than unilaterally deciding that they don't have to do so based on an unpredicted event.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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