

ARBITRATION TRIBUNAL
Constituted by virtue of *Regulation respecting the guarantee plan*
for new residential buildings
(O.C. 841-98 of 17 June 1998)

Under the aegis of
CENTRE CANADIEN D'ARBITRAGE COMMERCIAL (CCAC)
CANADIAN COMMERCIAL ARBITRATION CENTRE (CCAC)
Arbitration body authorized by the *Régie du Bâtiment du Québec* responsible
for the administration of the Building Act (R.S.Q., c. B-1.1)

C A N A D A

PROVINCE OF QUEBEC

File n°: GP 318624-1
File n°: S12-06200-NP

CHUN XIANG BAO

-and-

YUN XIAO ZHAU

"Beneficiaries" / Plaintiffs

v.

LES HABITATIONS DEMAX INC.

"Contractor" / Defendant

-and-

LA GARANTIE ABRITAT INC.

"Manager" of the Guarantee Plan

ARBITRATION AWARD

Arbitrator:

Me Tibor Holländer

For the Beneficiaries:

Mrs. Chun Xiang Bao
Mr. Yun Xiao Zhou (Absent)
Me Michel Jasmin counsel for the Beneficiaries

For the Contractor:

Les Habitations Demax Inc.
Mr. Maxime Vaskelis, President
Me Martin Cabanas counsel for the Contractor

For the Manager:

La Garantie Abrisat Inc.
Mr. Yvan Gadbois-Inspector (absent)
Me Patrick Marcoux counsel for the Manager

Date of Hearing:

30 October 2012 and 9 November 2012

Date of the Arbitration
Award:

11 January 2013

IDENTIFICATION OF THE PARTIES

"BENEFICIARIES"/PLAINTIFFS:

Mrs. Chun Xiang Bao
Mr. Yun Xiao Zhou (Absent)
873 Gamaroff Street
Saint-Laurent, Quebec
H4L 2C9

"CONTRACTOR"/DEFENDANT:

Les Habitations Demax Inc.
7161 Cousineau Blvd., suite 212
St-Hubert, Quebec
J3Y 3S5

**"MANAGER" OF THE GUARANTEE
PLAN:**

La Garantie Abrisat Inc.
5930, boul. Louis-H. Lafontaine
Anjou, Quebec
H1M 1S7

PRELIMINARY OBSERVATIONS

- [1] For the purposes of the present Arbitration Award, the Tribunal shall only set out, refer to and/or highlight those facts, documents and exhibits that are pertinent to the arbitration award that is being rendered.

MANDATE

[2] Plaintiffs filed a request for arbitration dated 20 June 2012 and the undersigned was named arbitrator on 26 June 2012.

CHRONOLOGY

- 2011.08.30 "*Contrat Préliminaire et Contrat de Garantie*" executed by Alain Gaboriault & Marie-Josée Vachon (collectively referred to as "**Gaboriault**" and Defendant Les Habitations Demax Inc., hereinafter referred to as "**Demax**" (Exhibit C-2).
- 2011.12.19 Plaintiff Chun Xiang Bao (hereinafter referred to as "**Bao**") meets with Defendant's representative Martin Daoust (hereinafter referred to as "**Daoust**"). Discussions relating to the purchase of a home, model "*San Diego*" to be built and located on lot 4431857 bearing civic address 4665 Lombardie, Brossard, Quebec (Exhibit C-5).
- 2011.12.19 "*Attestation D'Acompte-Down Payment Attestation*" dated 19 December 2011, acknowledging that Plaintiffs gave a deposit in the amount of \$10,000.00 to Demax in relation to the construction and purchase of a home on lot 4431857 bearing civic address 4665 Lombardie, Brossard, Quebec (Exhibit C-1 and Exhibit M-1).
- 2011.12.20 Cheque in the amount of \$10,000.00 remitted by Bao to Daoust representing the deposit (Exhibit B-2 and Exhibit M-2).
- 2011.12.20 Email (17:05:09) from Daoust to Bao (Exhibit B-4 and Exhibit C-3).
- 2011.12.21 Email (07:32) from Bao to Daoust (Exhibit B-4 and Exhibit C-3).
- 2011.12.21 Email (15:31:44) from Daoust to Bao (Exhibit B-4 and Exhibit C-3).
- 2011.12.21 Email (15:45) from Bao to Daoust (Exhibit B-4 and Exhibit C-3).
- 2011.12.22 Email (02:06:46) from Daoust to Bao (Exhibit B-4 and Exhibit C-3).
- 2011.12.22 Email (04:41:24) from Bao to Daoust (Exhibit B-4 and Exhibit C-3).
- 2011.12.22 Email (11:34) from Bao to Daoust (Exhibit B-4 and Exhibit C-3).
- 2011.12.22 Email (17:21:15) from daoust to Bao (Exhibit B-4 and Exhibit C-3).
- 2011.12.22 Email (5:26:06PM) from Daoust to Bao (Exhibit B-4).
- 2011.12.23 Email (12:35:27AM) from Danielle Buisson (RBC) to Bao (Exhibit B-4).
- 2011.12.23 Email (00:35:26) from Danielle Buisson (RBC) to Bao (Exhibit B-4).
- 2011.12.23 Email (12:46:41AM) from Bao to Danielle Buisson (RBC) (Exhibit B-4).
- 2011.12.23 Email (1:18:51PM) from Bao to Daoust (Exhibit B-4).
- 2011.12.28 The cheque in the amount of \$10,000.00 clears Bao's bank account (Exhibit B-2, Exhibit M-2 and Exhibit B-3).
- 2012.01.09 Email (16:36) from Daoust to Gaboriault (Exhibit M-4).
- 2012.01.09 Unsigned letter dated 9 January 2012 emanating from Daoust to Gaboriault (Exhibit M-4).
- 2012.01.16 Email (3:33:31AM) from Bao to Daoust (Exhibit B-4).
- 2012.01.17 Email (8:28:31PM) from Daoust to Bao (Exhibit B-4).

- 2012.01.23 Letter from Plaintiffs' attorneys addressed to Demax (Exhibit M-3).
2012.01.30 Email (14:18) from Daoust to Maxime Vaskelis, Demax's President (hereinafter referred to as "**Vaskelis**") (Exhibit C-3).
2012.01.30 Email (14:20) from Daoust to Vaskelis (Exhibit M-4).
2012.01.30 Email (16:07) from Daoust to Nathalie Roy, Vaskelis' assistant (Exhibit M-4 and Exhibit C-3).
2012.02.06 Letter emanating from Demax's attorneys addressed to Plaintiffs' attorneys (Exhibit C-1).
2012.05.02 Letter emanating from Demax's attorneys addressed to the Manager, Mr. Yvan Gadbois (Exhibit M-4).
2012.06.06 Decision by the Manager (Exhibit M-5).
2012.06.20 Email from Plaintiffs requesting arbitration (Exhibit M-6).
2012.06.04 Nomination of Arbitrator (Exhibit M-6).
2012.07.06 Receipt of the Manager's Book of Exhibits.
2012.07.10 Notice of Pre-trial conference.
2012.07.18 Pre-trial hearing held with the parties.
2012.07.23 Confirmation to the parties that the hearing shall take place on 7 September 2012.
2012.09.06 Email from Demax's attorneys requesting postponement of the hearing due to Daoust's unavailability.
2012.09.20 Hearing rescheduled on 31 October 2012.
2012.10.31 Hearing.
2012.11.09 Argument presented by the parties.

EXHIBITS

- [3] The Exhibits have been initially labeled and numbered "**M-**" in accordance with the numbering of the Book of Exhibits filed and produced by the Manager; the exhibits produced and filed by the Plaintiffs at the Hearing were numbered and labeled "**B-**" while exhibits produced and filed by the Defendant at the Hearing were numbered and labelled "**C-**".
- [4] The following Exhibits were produced and filed by the Manager and form part of the Book of Exhibits:
- M-1 Copy of an "*Attestation d'Acompte-Down Payment Attestation*" printed on the letterhead of La Garantie Abridat Inc. dated 19 December 2011 acknowledging that Plaintiffs gave a deposit in the amount of \$10,000.00.
- M-2 Copy of a cheque dated 20 December 2011 issued by Plaintiffs made payable to the order of Demax in the amount of \$10,000.00.
- M-3 Copy of a letter dated 23 January 2012 emanating from Plaintiffs' attorneys addressed to Demax.

- M-4 Copy of a letter dated 2 May 2012 emanating from Demax's attorneys addressed to the Manager; 20 December 2011 (17:05:09), 21 December 2011 (02:06:46, 15:31:44 and 15:45), 22 December 2011(04:41:24, 11:34 and 17:21:15), 9 January 2012 (16:36), 15 January 2012 (22:34), 30 January 2012 (16:07), 30 January 2012 (14:16, 14:20, 16:07 and 16:19); unsigned letter dated January 9, 2012 emanating from Demax to Mr. Alain Gaboriault and Ms. Marie-Josée Vachon *en liasse*.
- M-5 Copy of a "*Décision de l'Administrateur*" Yvan Gadbois dated 6 June 2012.
- M-6 Copy of a letter dated 26 June 2012 emanating from CCAC acknowledging the reception of Plaintiffs' request for arbitration and the nomination of Me Tibor Holländer as arbitrator; copy of an email dated 20 June 2012 emanating from the Plaintiffs requesting arbitration from the decision rendered by the Manager, *en liasse*.

[5] The following Exhibits were produced and filed by the Plaintiffs at the Hearing:

- B-1 Copy of an "*Attestation d'Acompte-Down Payment Attestation*" printed on the letterhead of La Garantie Abridat Inc. dated 19 December 2011 acknowledging that Plaintiffs gave a deposit in the amount of \$10,000.00; copy an "*Attestation d'Acompte-Down Payment Attestation*" printed on the letterhead of La Garantie Abridat Inc. dated 19 December 2011 acknowledging that Plaintiffs gave a deposit in the amount of \$10,000.00, with a copy of a business card of Mr. Martin Daoust, Defendant's representative; an "*Attestation d'Acompte-Down Payment Attestation*" printed on the letterhead of La Garantie Abridat Inc. dated 19 December 2011 acknowledging that Plaintiffs gave a deposit in the amount of \$10,000.00 with a stamp from APCHQ dated 16 April 2012 (Exhibit M-1), *en liasse*.
- B-2 Copy of a cheque dated 20 December 2011 issued by Plaintiffs made payable to the order of Demax in the amount of \$10,000.00, with a stamp from APCHQ dated 16 April 2012 (Exhibit M-2).
- B-3 Copy of Bao's bank account statement for the period ending 3 January 2012.
- B-4 Copies of a series of emails dated 20 December 2011 (17:05:09), 21 December 2011 (07:32, 15:31:44 and 15:45), 22 December 2011 (02:06:46, 04:41:24 and 5:26:06), 22 December 2011 (02:06:46, 04:41:24 and 15:45), 23 December 2011 (00:35:26, 12:35:27AM and 12:46:41 AM), 22 December 2011 (11:34 and 17:21:15), 23 December 2011 (1:18:51 PM), 15 January 2012 (22:28), 16 January 2012 3:33:31AM), January 17, 2012 (8:28:31 PM), *en liasse*.
- B-5 "*Le Plan de Garantie des Bâtiments Résidentiels Neufs*". The exhibit was not filed into the record (see objection).

- B-6 Letter dated 6 June 2012 emanating from the Manager, Yvan Gadbois enclosing copy of the "*Decision de l'Administrateur*" dated 6 June 2012, *en liasse*.
- B-7 Copy of a letter dated August 14, 2012 emanating from a Royal Bank of Canada branch confirming Plaintiffs' pre-approval for a mortgage. The exhibit was not filed into the record (see objection).
- B-8 Draft template of a "*Promesse d'achat d'un immeuble avec maison en construction*". The exhibit was not filed into the record (see objection).

[6] The following Exhibits were produced and filed by the Defendant at the Hearing:

- C-1 Copy of a letter dated 6 February 2012 emanating from Defendant's attorneys addressed to Plaintiffs' attorneys.
- C-2 Copy of a "*Contrat préliminaire et Contrat de garantie*" dated 30 August 2011 entered into by Mr. Alain Gaboriault and Ms. Marie Josée Vachon and Defendant.
- C-3 Copies of a series of emails dated: 23 December 2011 (08:19), 30 January 2012 (14:18 and 16:07), 22 December 2011 (02:06:46, 04:41:24, 11:34 and 17:21:15), 21 December 2011 (07:32, 15:31:44 and 15:45), 20 December 2011 (17:05:09), *en liasse*.
- C-4 Copy of a "*Registre des titulaires de permis de l'OACIQ*" confirming that Plaintiff Chun Xiang Bao is a real estate agent.
- C-5 Copy of Defendant's model home plan titled "*San Diego*".
- C-6 Copy of an architectural plan prepared by Defendant for Mr. Alain Gaboriault and Ms. Marie Josée Vachon in July 2011.

PRELIMINARY MOTIONS

[7] The parties did not challenge the competence or jurisdiction of the Tribunal and the jurisdiction of the Tribunal is therefore confirmed.

OBJECTIONS TO THE PRODUCTION OF EXHIBITS

- [8] Plaintiffs' attorney objected to the filing by the Manager of Exhibit M-4 and by the Defendant of Exhibit C-1, which objections are dismissed. Exhibits M-4 and C-1 form part of the record. In addition, having regard to the filing of Exhibit C-2, Plaintiff's attorneys requested to review the original contract, which was communicated to Plaintiffs' attorney, reviewed and subsequently a copy was produced and filed into the record.
- [9] The Manager's attorney objected to the filing by Plaintiffs of Exhibits B-5 and B-8, while the Defendant's attorney objected to the filing of Exhibit B-7. Exhibit B-5 reflects in general terms the guarantee plan relating to new homes, and is not relevant to the issue that the Tribunal will have to decide; consequently, the

objection is maintained. Exhibit B-7 represents an application made by Plaintiffs sometimes during 2012 to their bank to obtain pre-approval for a hypothecary loan. The application does not relate to the transaction that is in issue before the Tribunal and therefore the objection is maintained on the ground of relevancy. Finally, Exhibit B-8 represents a template of an offer to purchase an immovable property that has no relevancy to the issue to be decided by the Tribunal and therefore the objection is maintained.

FACTS

a. Preliminary Contract signed by Gaboriault

- [10] On 30 August 2011, Demax and Gaboriault signed a preliminary contract¹ for the construction and purchase of a house to be located on lot n^o 4431857 (the "Lot") that would bear civic address 4665 Lombardie, Brossard (Exhibit C-2); the purchase price was \$599,810.00 with a deposit of \$10,000.00 being made at the time.
- [11] The preliminary contract was conditional upon Gaboriault selling his own house, without any time restriction being attached to the condition relating to the sale of Gaboriault's existing house. Demax undertook to build and deliver the house within approximately four (4) months following the sale by Gaboriault of his own house.²
- [12] As at December 2011, the evidence adduced before the Tribunal establishes that the Lot was on the market and available to any prospective purchaser interested in acquiring a house to be built on the said lot. As a matter of fact, no house was built on the Lot until the spring of 2012 that was sold to a third party in June 2012.³
- [13] On or about 9 January 2012, the preliminary contract appears to have been terminated subsequent to a 72 hour notice given by Demax to Gaboriault⁴. Demax did not produce and file a copy of a cancelled cheque establishing that the deposit of \$10,000.00 provided by Gaboriault as per the terms of the preliminary contract⁵ was in fact reimbursed to Gaboriault subsequent to the 72 hour notice of cancellation.

¹ Exhibit C-2.

² Exhibit C-2, (see "*DATE OF OCCUPATION: L'immeuble vendu sera substantiellement terminé et prêt pour l'occupation à la date du +/- 4 mois après conditions compli*" and "*Annex «D» La nouvelle date de fin des travaux sera le +/- 4 moins après vente maison*"). In addition, Daoust and Vaskelis acknowledged that it usually takes between 3 to 4 months to build a house.

³ Testimony of Vaskelis.

⁴ Exhibit M-4(email of 9 January 2012 16:36 and letter dated 9 January 2012).

⁵ Exhibit C-2.

- [14] The Tribunal takes notice of the following statement made by Demax in its notice of 9 January 2012 to Gaboriault⁶:

"Malheureusement, ce terrain fait l'objet d'une offre sérieuse en ce moment, nous sommes donc dans l'obligation de vous demander une lettre d'approbation hypothécaire sans condition et ce dans un délai de 72 heures, sommes quoi nous serions dans l'obligation d'annuler ce contrat."

[Emphasis added]

b. The Down Payment Attestation (Exhibits B-1 and M-1)

- [15] During December 2011, Bao was interested in purchasing a house on the south shore (Brossard). At the time, Bao was the owner of an income generating property (where she resided with her family) located in the city of St-Laurent, which was hypothecated and she did not intend to sell.⁷ Based on the evidence adduced by Bao, Plaintiffs did not have the financial means to purchase a new house without obtaining a hypothecary loan in excess of \$400,000.00.⁸
- [16] On 19 December 2011, Bao went to Demax's place of business and met with Daoust. During their meeting and discussions, Bao expressed an interest to purchase and built a house⁹ on the Lot¹⁰. The discussions between Bao and Daoust revolved around the size of the house and the number of rooms.
- [17] At one point in time, Daoust asked Bao for a deposit to reserve the Lot and Bao signed the Down Payment Attestation ("**Attestation**") indicating her intention to purchase a residential home to be built on the Lot, which lot would bear civic address number 4665 Lombardie, Brossard (the "**House**")¹¹.
- [18] As appears from the Attestation, the purchase price amounted to \$652,000.00. Daoust completed the Attestation (with the exception of the name Yun Xiao Zhao that was inscribed by Bao). There are no conditions contained in the Attestation relating to the deposit or the purchase of the House.
- [19] On the following day, 20 December 2011, Bao returned to Demax and gave Daoust a deposit by way of a cheque in the amount of \$10,000.00¹² that cleared Bao's bank account on December 28, 2011¹³.

⁶ Exhibit M-4(email of 9 January 2012 16:36 and letter dated 9 January 2012).

⁷ Testimony of Bao.

⁸ It is interesting to note the testimony of Vaskelis who stated in cross examination that he does not know the financial condition of each buyer.

⁹ Exhibit C-5.

¹⁰ Exhibits B-1 and M-1.

¹¹ Exhibits B-1 and M-1.

¹² Exhibits B-2 and M-2.

¹³ Exhibit B-3.

- [20] On 20 December 2011, Bao did not have sufficient funds to cover the deposit and accordingly various bank transfers occurred to cover the deposit of \$10,000.00¹⁴.
- [21] The evidence is not clear as to whether on 19 December or 20 December 2011 there were discussions between Bao and Daoust relating to the deposit and purchase of the House being conditional upon Bao obtaining a hypothecary loan to finance the purchase of the House.
- [22] Nevertheless, the evidence establishes that Bao could not finance the purchase of the House without obtaining a hypothecary loan and Bao did take steps to obtain prior approval from a branch of the Royal Bank of Canada to finance the purchase of the House, though by 16 January 2012, Bao was unable to obtain such financing and therefore she informed Demax that she was not going through with the construction and purchase of the House and requested the return of the deposit¹⁵.
- [23] Between 19 and 20 December 2011, Demax did not have Plaintiffs sign a preliminary contract for the construction and purchase of the House. A preliminary contract was never signed by the Plaintiffs and Demax. According to Vaskelis, a preliminary contract is only signed following the preparation and acceptance of architectural plans¹⁶.
- [24] On 17 January 2012, Demax informed Bao for the first time that the deposit¹⁷ was "not refundable"¹⁸ and refused to reimburse the amount of \$10,000.00 on the ground that Demax cancelled the preliminary contract and released the Gaboriault deposit and therefore it lost a potential sale¹⁹.
- [25] The evidence relating to the execution by Plaintiffs of a preliminary contract and whether the deposit was unconditional and therefore not refundable shall be dealt within the context of the positions adopted by the various parties.

c. The period between December 19, 2011 and January 17, 2012

- [26] Bao met with Daoust on 19 December 2011. The discussions were general and it is clear that the parties did not come to an agreement as to what type of a House

¹⁴ Exhibit B-3.

¹⁵ Exhibit B-4 (email of 16 January 2012 at 3:33:31 AM).

¹⁶ Daoust and Vaskelis testified to the procedure used by Demax relating to the signature of a preliminary contract and guarantee. According to them, Demax first accepts a deposit from a purchaser followed by the preparation and completion of construction plans; once the construction plans are accepted by the purchaser, a preliminary contract and guarantee is signed and a purchaser provides an additional deposit prior to the start of construction.

¹⁷ Exhibits B-1, B-2, M-1 and M-2.

¹⁸ Exhibit B-4 (email of 17 January 2012 at 8:28:31 PM).

¹⁹ Exhibit C-1 (letter dated 6 February 2012) and Exhibit M-4 (letter dated 2 May 2012).

Demax would build²⁰ nor when the House would be constructed and delivered. According to Bao, Daoust requested a deposit of \$10,000.00 to "reserve" the Lot and she was assured by both Daoust and Vaskelis that the cheque would not be deposited without Bao's prior consent.

- [27] Bao further testified that she was assured by both Daoust and Vaskelis that the deposit would be reimbursed in full, provided that no architectural plans were prepared by Demax in which case, she would only be reimbursed the sum of \$7,500.00.
- [28] With respect to the execution of a preliminary contract, Bao stated that she was supposed to sign a preliminary contract on the following day, 20 December 2011, when she returned to give the deposit of \$10,000.00.
- [29] The evidence relating to the status of the deposit is contradictory, in that Bao claims that the deposit was conditional upon her obtaining financing, failing which the deposit would be refunded.
- [30] Daoust and Vaskelis stated that the deposit of \$10,000.00 was unconditional and not refundable. According to Demax, on 19 December 2011, Demax possessed a conditional offer made by Gaboriault. Though Gaboriault gave Demax a deposit of \$10,000.00²¹, Demax wanted to forge ahead with the construction of a house and sell the property.
- [31] Thus when Bao expressed an interest in the Lot, both Daoust and Vaskelis insisted that they proceed with the transaction without any conditions attached thereto. In as much as Gaboriault's offer was conditional upon the sale of his house, Demax was not interested in dealing with Bao on the basis of accepting another conditional offer. If Bao was interested to purchase the House, she had to make an unconditional non-refundable deposit to "reserve" the Lot.
- [32] According to Daoust and Vaskelis, the Gaboriault offer could be cancelled upon Demax providing a 72 hour notice which would be given once her deposit was cashed in.
- [33] On 20 December 2011, Bao returned to Demax and remitted a cheque in the amount of \$10,000.00²². Bao's bank statement establishes that various transfers of funds occurred to cover the cheque that ultimately cleared on 28 December 2011.²³

²⁰ Exhibit B-4 (email of 20 December 2011 17:05:09). Daoust is providing alternative prices for the house based on the size and type of work to be carried out by Demax.

²¹ Exhibit C-2.

²² Exhibits B-2 and M-2.

²³ Exhibit B-3.

- [34] On 22 December 2011, Bao communicated with Daoust to obtain the name of a bank officer at the Royal Bank of Canada branch, which was Demax's bank²⁴. Bao was of the view that it would be easier to obtain prior approval for financing if she dealt with the same bank used by Demax. Daoust complied and provided Bao the name of Danielle Buisson ("**Buisson**")²⁵.
- [35] On 23 December 2011, Bao communicated with Buisson and provided the information requested by Buisson. In addition, Bao requested confirmation that the application form relating to the credit verification would be forwarded for her signature²⁶. (As a matter of fact, Buisson did not send any documents to be signed by Bao.)
- [36] On the same day, 23 December 2011, Bao confirmed by email to Daoust that she provided all the information requested by Buisson to obtain a pre-approved hypothec. As appears from her email²⁷, Bao stated the following:

"I have faxed all the document requested to Danielle. She told me that she will try to process my file and get it approved asap. ...Once she send you the approval, you can go ahead to the next step. In order to avoid the 1% QST increase, we have to sign the contract this year, am I right? If so, I will sign the contract after Christmas and before the new year. We will come back to the details of the house plan once we have everything in order."

[Emphasis added]

- [37] The emails of 21 December to 23 December 2011²⁸ establish a number of facts. First, it is evident that Bao cannot purchase the House without additional financing. Therefore Bao seeks to obtain a hypothecary loan from the same bank as that used by Demax. Daoust assisted Bao in communicating with Buisson to obtain additional financing²⁹.
- [38] Second, as at 23 December 2011, there did not exist an agreement relating to the construction of the House. The architectural plans were not prepared. As a matter of fact, it is clear that the architectural plans would be prepared only following the confirmation of the financing to be received from the Royal Bank of Canada.
- [39] Third, Bao wanted to sign a preliminary contract prior to December 31, 2011. Bao testified that in addition to the email of 23 December 2011, she spoke to Daoust

²⁴ Exhibit B-4 (email 22 December 2011 11:34).

²⁵ Exhibit B-4 (email 22 December 2011 5:26:06 PM).

²⁶ Exhibit B-4 (emails of 23 December 2011 12:35:27 AM and 12:46:41 AM).

²⁷ Exhibit B-4 (email of 23 December 2011 1:18:51 PM).

²⁸ Exhibit B-4 (emails of 21 December 2011 07:32, 22 December 2011 11:34, 04:41:24 and 5:26:06 PM, 23 December 2011 12:35:27 AM, 12:46:41 AM and 1:18:51 PM).

²⁹ Exhibit B-4 (email of 22 December 2011 5:26:06 PM).

on 27 December 2011 and told him that she wanted to sign the preliminary contract, only to be told by Daoust that a preliminary contract would only be signed once the bank approved the hypothecary loan; in addition, according to Bao, Daoust told her that it was sufficient to cash the cheque given as deposit to establish Bao's intention to purchase the House.³⁰

[40] The cheque in the amount of \$10,000.00³¹ was in fact deposited on or about 27 December 2011, since it cleared Bao's bank account on 28 December 2011³².

[41] There were no further communications between Bao and Daoust until 16 January 2012, at which time Bao advised Daoust that she wanted the return of the deposit of \$10,000.00³³. As appears from Bao's email of 16 January 2012 (3:33:31 AM) the decision to withdraw her offer to purchase the House was expressed as follows:

"I phoned Danielle last Friday. I thought she already got an answer on the mortgage since I am waiting for her to call me. Since I called her, she told me that she needed to meet so that she can find a way to work out my case as she told me before that she can only approve \$200,000 after seeing all my relevant paper. I am not surprised with RBC as I had 2 times mortgage with them but each time they give me very lower amount of mortgage. That is probably the reason that she did not move my file any further while I was assuming that she had worked on it without problem.

I think again over the holidays about my reservation on lot #8. I think I had better withdraw it as we are not ready to move to that area at this stage of my family and mortgage approval situation. The big problem is for my kids' school and sports activities."

[Emphasis added]

[42] Though Bao in the email 16 January 2012 refers to the fact that she reflected over the holidays whether it was opportune to move to the south shore due to family considerations, the fact that she did not obtain confirmation from Buisson as to the bank's willingness to finance the purchase of the house remains nevertheless primordial, in that the procurement of sufficient financing to purchase the house was disclosed to Demax at the very start of the discussions and it was a known fact at the time that Demax deposited Bao's cheque.

³⁰ Bao's version of the conversation with Daoust held on 27 December 2011 was not contradicted by Daoust.

³¹ Exhibits B-2 and M-2.

³² Exhibit B-3.

³³ Exhibit B-4 (email of 16 January 2012 3:33:31 AM).

- [43] On 17 January 2012, Daoust informed Bao that "*Your deposit is not refundable we cancel a customer to put you in place on lot number 8 that is the reason we took are time and waited on your approval to deposit the check.*"³⁴
- [44] By letter dated 6 February 2012, Demax's attorneys informed Plaintiffs that the deposit of \$10,000.00 was non-refundable and seeing that the preliminary contract with Gaboriault was cancelled on 9 January 2012, it was willing to retain the deposit as liquidated damages and release Plaintiffs from any other claim of damages that it had against them³⁵.
- [45] On 2 May 2012, Demax's attorneys informed the Manager, that the deposit of \$10,000.00 was non-refundable and referred to the conditional offer that Demax accepted from Gaboriault. Accordingly, since the conditional offer was cancelled as at 9 January 2012 and seeing that the Lot "*n'est toujours pas vendue et notre cliente allègue avoir perdu une vente à cause des agissements de Madama Bao*" Demax was retaining the deposit as liquidated damages³⁶.
- [46] Though Demax during the month of May 2012 was professing that it had lost a sale in that the Lot was not sold, as a matter of fact, by May 2012, Demax was in the process of building a house on the Lot, the purchase of which was transacted in June 2012³⁷.
- [47] On 6 June 2012, the Manager rendered the Decision dismissing Plaintiffs' request for the reimbursement of the down payment for the following reasons³⁸:

"The Beneficiary did make a down payment of \$10,000.00, such that the Contractor cancelled the offer received from the said third party. In point of fact, the Beneficiary also indicated her intention to enter into the Deed of Sale between Christmas 2011 and the 2012 New Year. The gist of this timing was to avoid having to pay additional Quebec sales taxes at an increased rate that was to come into effect January 1st, 2012.

The Deed of sale was not signed during the Holiday break. On the contrary, the Beneficiary had determined that she was not ready to move at that stage of her family and mortgage approval situation; the big problem was with respect to her children's schools and sports activities.

³⁴ Exhibit B-4 (email of 17 January 2012 at 8:28:31 PM).

³⁵ Exhibit C-1.

³⁶ Exhibit M-4.

³⁷ Testimony of Vaskelis.

³⁸ Exhibit M-5

The Contractor maintains that it was willing and ready to go through with the sale to the Beneficiary, and that the Beneficiary's conduct ultimately led to the Contractor losing the benefit of the offer made by a third party. As the down payment was to be non-refundable, the Contractor asserts that it is entitled to retain it.

In light of the circumstances, the Manager finds that the Contractor has not failed to perform his legal or contractual obligations within the meaning of the guarantee plan. Consequently, the Beneficiary's claim is dismissed."

[Emphasis added]

PLEADINGS - PLAINTIFFS

- [48] Plaintiffs' position with regard to the reimbursement of the deposit can be summarized as follows. The deposit was made on the condition of obtaining financing from a bank to purchase the House and was refundable.
- [49] Since Plaintiffs were unable to obtain financing, Plaintiffs were entitled to cancel their offer and obtain the reimbursement of the deposit.
- [50] The failure to execute a preliminary contract within the meaning of the Regulation respecting the guarantee plan for new residential buildings³⁹ ("**Regulation**") is not a bar to the application of the Regulation and the protection afforded by the Guarantee Plan.
- [51] In addition, Plaintiffs ought not to be penalized by the fact that Defendant's internal policy did not call for the contemporaneous execution of the preliminary contract and guarantee at the time that the down payment was made by Plaintiff Bao.

PLEADINGS – DEFENDANT

- [52] Defendant argues that the deposit in the amount of \$10,000.00 was accepted unconditionally and constituted a non-refundable deposit.
- [53] Therefore, seeing as Plaintiffs expressed their intention not to go through with the transaction on the basis that it was not the appropriate time for the family to uproot their children and move to Brossard, Defendant was entitled to retain the deposit as liquidated damages.

³⁹ O.C. 841-98 of 17 June 1998

[54] In addition, Defendant supports the argument raised by the Manager that in the absence of a preliminary contract, Plaintiffs are not beneficiaries within the meaning of the Regulation and do not benefit from the protection afforded by the Guarantee Plan.

PLEADINGS - MANAGER

[55] The Manager argues that since Plaintiffs did not sign a preliminary contract, they are not beneficiaries within the meaning of the Regulation and the Guarantee Plan.

[56] It further argues that the deposit of \$10,000.00 constituted a deposit to reserve the Lot and not the purchase of a house; accordingly, a deposit made to reserve the Lot is not covered by the Regulation and the Guarantee Plan.

ISSUES

[57] Taking into consideration the facts of this case and the applicable provisions of the Regulations and corresponding clauses of the Guarantee Plan, when applicable, the following issues must be considered:

[57.1] what is the status of the Down Payment Attestation?

[57.2] was the deposit made to reserve the Lot or was it made in relation to the purchase and construction of a house on the Lot that falls within the meaning and application of the Regulation and benefit of the Guarantee Plan?

[57.3] was the deposit given unconditionally?

[57.4] was the deposit refundable?

[57.5] can the Manager revise its decision of 6 June 2012, wherein it found that the Defendant did not fail to perform its legal and contractual obligations within the meaning of the Regulation and argue that the absence of a signed preliminary contract bars Plaintiffs from the protection provided by the Regulation and the Guarantee Plan?

ANALYSIS

[58] The Tribunal will review the evidence in relation to the issues raised by the parties that flow from the Decision.

THE LAW

[59] For the purposes of facilitating the parties understanding of the decision that is being rendered, the Tribunal will highlight the relevant provisions of the Civil Code of Quebec herein referred to:

"C.C.Q.

6. Every person is bound to exercise his civil rights in good faith.

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

2803. A person wishing to assert a right shall prove the facts on which his claim is based."

2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof."

2811. Proof of a fact or juridical act may be made by a writing, by testimony, by presumption, by admission or by the production of material things, according to the rules set forth in this Book and in the manner provided in the Code of Civil Procedure (chapter C-25) or in any other Act.;"

a. BURDEN OF PROOF

[60] It is a well-established principle of law that the burden of proof rests on the shoulders of the party making a claim before the Tribunal. Article 2803⁴⁰ reads as follows:

"2803. A person wishing to assert a right shall prove the facts on which his claim is based."

⁴⁰ *Civil Code of Québec, LRQ, c C-1991*

[61] The appreciation of the evidence by the Tribunal is guided by the principles set out in Article 2804⁴¹, that reads as follows:

"2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof."

[62] Pursuant to Article 2811⁴² :

"2811. Proof of a fact or juridical act may be made by a writing, by testimony, by presumption, by admission or by the production of material things, according to the rules set forth in this Book and in the manner provided in the Code of Civil Procedure (chapter C-25) or in any other Act."

[63] The rules governing the burden of proof allow the Tribunal to weigh the evidence presented by the parties.⁴³

[64] In the case at Bar, Plaintiffs have discharged their burden of proof in relation to the facts and the evidence that will be analyzed in greater detail hereinafter.

b. Status of the Down Payment Attestation

[65] For the purposes of determining the status of the Attestation the Tribunal will consider the wording of the Attestation and the evidence adduced before it.

i. The Attestation

[66] The Attestation⁴⁴ constitutes a written document executed by the Plaintiffs and Demax. It identifies Demax as the holder of an RBQ license number 5600 4229 01 issued in virtue of the Building Act.

[67] The Attestation contains the following information:

[67.1] the deposit in the amount of \$10,000.00;

[67.2.] the contract price in the amount of \$652,000.00;

[67.3] the lot description being n° 4431857;

[67.4] the address being 4665 Lombardie, in Brossard;

⁴¹ Ibid

⁴² Ibid

⁴³ *Caisse populaire de Maniwaki v. Giroux*, [1993] 1 S.C.R. 282

⁴⁴ Exhibits B-1 and M-1.

- [68] The Attestation confirms that the deposit of \$10,000.00 constitutes “a payment on account for the purchase or the construction of the...building”, namely the one to be built on the Lot bearing civic address number 4665 Lombardie, in Brossard, Quebec.
- [69] The Attestation stipulates that “*The conditions and limitations to the protection for payments on account are provided for in the guarantee certificate for which the beneficiary(ies) has (have) received a copy.*”. As a matter of fact, no such guarantee certificate was provided by Demax to Bao.
- [70] The fact that a guarantee certificate was not provided by Demax to Bao does not change the contractual nature of the Attestation, its implication and application. The Attestation contains all the necessary information relating to an offer being made to purchase a house to be built on a specific lot for the contract price of \$652,000.00.
- [71] For the purposes hereof, it is not necessary for the Tribunal to consider whether the Attestation could replace the execution of a preliminary contract and guarantee, since Demax did not built a house on the Lot that was to be sold to Plaintiffs.
- [72] Nevertheless, the Attestation in the context of the present arbitration constitutes an offer. Though the offer does not contain all the terms and conditions agreed to by the parties, the parties through the evidence adduced by Bao, Daoust and Vaskelis explained the circumstances surrounding the execution of the Attestation (offer) that assist the Tribunal in the manner in which it is to be interpreted and applied.
- [73] The fact that the parties referred to the deposit being given to “reserve” the Lot, does not change the nature of the Attestation and the offer that was being made by Bao at the time.
- [74] If Demax intended to obtain a deposit from Bao merely to “reserve” the Lot, and not have the Regulation apply to the transaction, than it ought not to have used the Attestation for such purposes.
- [75] In using the Attestation to acknowledge the receipt of the deposit obtained from Bao, Demax represented to Bao that the deposit was intended to be subject to the Regulation and Guarantee Plan.

ii. The documentary evidence

- [76] The Tribunal refers to Exhibit C-1 representing a letter dated 6 February 2012, emanating from Demax's attorneys, wherein the following was stated:

“Votre cliente a été informée à plusieurs reprises qu’une promesse de vente conditionnelle existait sur l’immeuble mentionné en titre avec Monsieur Alain Gaboriault..., et qu’à cet effet seule une offre sans condition assortie d’un dépôt non remboursable de 10°000,00\$ pouvait être accueillie. Votre cliente a également été informée, et ce dans son propre intérêt, de l’importance de procéder à la clôture de la transaction avant le 31 décembre 2011, considérant la hausse de taxes de 1% prévue pour 2012.

Madame Bao s’est empressée de faire ledit dépôt le 19 décembre 2012 et jusqu’au 23 décembre dernier elle faisait encore pression sur les intervenants impliqués afin de conclure la transaction. Elle est ensuite demeurée silencieuse jusqu’au 15 janvier 2012 où, dans un courriel envoyé à un représentant de notre cliente, elle écrivait : «I think again over the holidays about my reservation on lot # 8. I think I had better withdraw it as we are not ready to move to that area rat this stage of my family and mortgage approval situation. The big problem is for my kids’ school and sports activities.»

Nous ne voyant pas là une résiliation liée à l’obtention d’un prêt hypothécaire, tel que vous l’affirmez dans votre lettre, mais plutôt une résiliation non fondée, basée sur d’autres motifs, et dommageable dans les circonstances.

En effet, le 9 janvier 2012, alors que votre cliente promettait toujours d’acheter la propriété, notre cliente a donné un avis de 72 heures à M. Gaboriault, tel que requis, afin d’annuler la Promesse conditionnelle...La Promesse étant désormais annulée depuis cette date, la propriété n’est toujours pas vendue malgré les meilleurs efforts de notre cliente. Celle-ci tient donc Mme Bao responsable des dommages découlant de cette résiliation injustifiée.

[Emphasis added]

[77] The Tribunal further refers to Exhibit M-4 representing a letter dated 2 May 2012, emanating from Demax’s attorneys, wherein the following was stated:

“Notre cliente avait informé Madame Bao, à plusieurs reprises, qu’une promesse de vente conditionnelle existait sur l’immeuble mentionné en titre avec Monsieur Alain Gaboriault... et qu’à cet effet seule une offre sans condition assortie d’un dépôt non remboursable de 10°000,00\$ pouvait être accueillie.

Elle est ensuite demeurée silencieuse jusqu'au 15 janvier 2012 date à laquelle elle fait parvenir un courriel à notre cliente, que vous nous transmettons sous pli. Nous attirons votre attention sur le paragraphe suivant dudit courriel : «I think again over the holidays about my reservation on lot # 8. I think I had better withdraw it as we are not ready to move to that area at this stage of my family and mortgage approval situation. The big problem is for my kids' school and sports activities.»

Nous ne voyant pas là une résiliation liée à l'obtention d'un prêt hypothécaire, tel que vous l'affirmez dans votre lettre, mais plutôt une résiliation non fondée, basée sur d'autres motifs, et dommageable dans les circonstances.

Entre temps, à savoir le 9 janvier 2012, alors que Madame Bao promettait toujours d'acheter la propriété, notre cliente a donné un avis de 72 heures à M. Gaboriault, tel que requis, afin d'annuler la Promesse conditionnelle...La propriété n'est toujours pas vendue et notre cliente allègue avoir perdu une vente à cause des agissements de Madame Bao. C'est pourquoi elle n'a d'autre choix que de conserver l'acompte à titre de dommages et intérêts liquidées, sans préjudice quant à tous ses autres droits et recours."

- [78] It is evident that Demax considered the Bao deposit to relate to the purchase of a house that was going to be built on the Lot and not a mere "reservation" of the Lot. The reference to Bao promising to purchase the property relates to the Attestation (that constitutes an offer) and the reference to the "propriété" relates to the house, since the purchase price of \$652,000.00 was for the Lot and the house, not the Lot alone.
- [79] Demax claims that the deposit was unconditional and non-refundable provided by Bao merely to "reserve the Lot". That means that Bao in December 2011 did not intend for Demax to build a house on the Lot. Accordingly, she could walk away from the transaction by forfeiting the deposit.
- [80] However, Demax's claim is contradicted by the letters of 6 February 2012 and 2 May 2012, wherein Demax admits that Bao promised to purchase the property, which meant the Lot together with a house that was going to be built on it.
- [81] In addition, the Tribunal cannot discount the importance attached by Demax to the fact that in cancelling the Gaboriault preliminary contract it allegedly suffered damages. Demax's position relating to the Gaboriault preliminary contract and its cancellation does not support its claim that the deposit related merely to "reserve" the Lot. If that would have been the case, then there would have been no need for

Demax to cancel the Gaboriault preliminary contract until such time that Bao was ready to make an offer to purchase a house.

- [82] However, Demax emphasized that it told Bao that it possessed a conditional offer to purchase the Lot and accordingly, if Bao was interested in the property it would have to make an unconditional non-refundable deposit. The unconditional non-refundable deposit could only relate to the purchase of the Lot and the construction by Demax of a house, a conclusion supported by the Attestation itself.
- [83] Accordingly, the deposit of \$10,000.00 was given on account for the purchase of a house and constitutes a down payment that is subject to the Regulation and is covered by the Guarantee Plan.

c. The status of Bao's deposit

- [84] The Tribunal is presented with contradictory evidence relating to the status of the deposit. Bao claims that the deposit was given on the condition that she obtains financing and in the absence thereof, the deposit was refundable. Demax claims that the deposit was given unconditionally and was not refundable.
- [85] Bao made an offer to purchase a house to be built on the Lot, evidenced by the execution of the Attestation. The analysis of the evidence leads the Tribunal to conclude that there existed a conditional offer to purchase in which case the deposit was not given unconditionally and therefore it is refundable.
- [86] Demax claims that it held a deposit of \$10,000.00 obtained from Gaboriault⁴⁵. The preliminary contract was conditional on Gaboriault selling his house. Once Gaboriault sold his house, Demax undertook to build a house on the Lot within approximately 4 months. There were no other conditions set out in the preliminary contract executed by Gaboriault and Demax.
- [87] The contract price was fixed at \$599,810.00, less the deposit of \$10,000.00 and the additional disbursement of \$15,000.00 to be remitted prior to the start of the construction of the house. Accordingly, the purchase price would be paid in full by Gaboriault without Gaboriault having to obtain additional financing from a financial institution.
- [88] Demax did not stipulate in the Gaboriault preliminary contract⁴⁶ that it had the right to offer for sale the Lot, nor that it could sell the Lot after having given a prior notice to Gaboriault calling upon him to confirm his intention to go through with the construction of a house on the Lot, failing which, Demax was free to offer the Lot for sale to any third party.

⁴⁵ Exhibit C-2.

⁴⁶ Exhibit C-2.

- [89] Accordingly, the Tribunal questions whether as a matter of fact, Demax on 19 December 2011 held a validly executed preliminary contract with Gaboriault that was allegedly cancelled on or about 9 January 2012.⁴⁷
- [90] On 19 December 2011, the Lot was available and Bao manifested an interest to purchase a house to be built on the Lot. Accordingly, Bao agreed to give a deposit of \$10,000.00 to Demax that was confirmed by the Attestation.
- [91] The evidence establishes that Bao did not have sufficient funds to go through with the purchase of the House without first obtaining financing from a financial institution. Based on Bao's testimony that was collaborated by the emails forming part of Exhibit B-4, Bao required more than \$400,000.00 to be able to complete the purchase of the House at a price of \$652,000.00.
- [92] On 22 December 2011, Bao being of the view that it would be better for her to obtain financing from the same bank that Demax dealt with, asked Daoust for the name of the individual at Demax's bank with whom she could communicate to obtain such financing.⁴⁸ Daoust complied and provided Bao with Buisson's name⁴⁹.
- [93] On 23 December 2011, it is evident that all discussions relating to the purchase of the House were suspended pending Bao obtaining confirmation from Buisson that the bank would provide sufficient financing.
- [94] If the deposit was unconditional and non-refundable, one would have expected Daoust and/or Vaskelis to have reminded Bao that independently of obtaining financing from a financial institution, Bao was bound to go through with the transaction, failing which, she would forfeit the deposit. However, Daoust and/or Vaskelis remained silent on the subject matter and did not communicate to Bao their understanding of the deal (unconditional non-refundable deposit) until 17 January 2012.
- [95] The Tribunal further notes that the cheque of \$10,000.00⁵⁰ was not deposited on or about 20 December 2011, but on or about 27 December 2011, following the telephone conversation between Bao and Daoust. According to Bao, on 27 December 2011, Bao called Daoust and told him that she wanted to sign the preliminary contract, only to be told by Daoust that a preliminary contract would only be signed once the bank approved the hypothecary loan; in addition, according to Bao, Daoust told her that it was sufficient to cash the cheque to establish Bao's intention to purchase the House in 2011.

⁴⁷ Exhibit M-4 (email of 9 January 2012 16:36 and unsigned letter dated 9 January 2012).

⁴⁸ Exhibit B-4 (email of 22 December 2011 11:34).

⁴⁹ Exhibit B-4 (email of 22 December 2011 11:34).

⁵⁰ Exhibits B-2 and M-2.

- [96] By 27 December 2011, Demax cannot claim that it was not aware that the contemplated transaction depended on Bao obtaining sufficient financing. It is important to note that Daoust did not contradict Bao's testimony relating to the telephone conversations of 27 December 2011. Daoust did not provide an explanation to the various emails that form part of Exhibit B-4 and his testimony merely affirms that according to him, the deposit was unconditional and non-refundable.
- [97] The Tribunal has difficulty appreciating the credibility of Demax's claim that on or about 9 January 2012, it cancelled the Gaboriault preliminary contract, because it had in its possession a "*serious offer*" from Plaintiffs.
- [98] The evidence establishes that on 16 January 2012, Bao cancelled her offer and requested the reimbursement of the deposit.
- [99] On 17 January 2012, Daoust informed Bao that her deposit was "... *not refundable...*" since Demax cancelled a "... *a customer to put you in place on lot number 8...*"⁵¹. The reference to the customer that was cancelled is Gaboriault and the preliminary contract that was signed on 30 August 2011⁵².
- [100] Demex communicated to the Manager a series of emails dated 9 January 2012, 30 January 2012 and a copy of an unsigned letter dated 9 January 2012 written by Daoust to Gaboriault⁵³ in support of Demax's claim that it lost the benefit of a sale and it therefore had the right to retain Bao's deposit as liquidated damages. In an email of 9 January 2012 that emanated from Daoust to Gaboriault the subject matter is titled "*Avis 72 heures*" and Daoust referred to "*Tel que discuter avant les fêtes voici un avis de 72 heures*".
- [101] Daoust did not testify on the discussions allegedly had with Gaboriault prior to the Christmas holidays of 2011, referred to in the email of 9 January 2012. Daoust merely stated that he did not have time during the Christmas period to send a 72 hour notice cancelling Gaboriault's preliminary contract.
- [102] The Tribunal is troubled by the content of the unsigned letter dated 9 January 2012 that allegedly represents the 72 hour notice of cancellation sent by Daoust to Gaboriault.
- [103] The preliminary contract⁵⁴ signed by Gaboriault did not provide for a 72 hour notice of cancellation. In the letter of 9 January 2012, Daoust refers to a "*serious offer*" understood as being a reference to Bao's offer (the Attestation) to purchase the House for the price of \$652,000.00.

⁵¹ Exhibit B-4 (email of 17 January 2012 8:28:31 PM).

⁵² Exhibit C-2.

⁵³ Exhibit M-4.

⁵⁴ Exhibit C-2.

- [104] The Tribunal questions the reference to a "*serious offer*" in contrast to the preliminary contract that allegedly was cancelled by Daoust. One can hardly categorize Bao's offer and deposit of \$10,000.00 as constituting a "*serious offer*", in that it was evident to Demax that unless Bao was able to obtain financing, she would not be able to go through with the transaction.
- [105] Contrary to the alleged existence of the Gaboriault preliminary contract, deposit of \$10,000.00 and the architectural plans (Exhibit C-2 and Exhibit C-6) on 9 January 2012, Demax did not have in its possession an unconditional preliminary contract signed by Bao nor did it prepare architectural plans for the construction of a house on the Lot.
- [106] As a matter of fact, as at 9 January 2012, the parties did not agree on the type of house that Demax was going to build, nor the time frame of construction and delivery of the house.
- [107] The Tribunal further questions the reference to "*nous sommes donc dans l'obligation de vous demander une lettre d'approbation hypothécaire sans condition et ce dans un délai de 72 heures, sommes quoi nous serions dans l'obligation d'annuler ce contrat.*".
- [108] Both Daoust and Vaskelis testified that Demax was obliged to give a 72 hour cancellation notice. Although the letter of 9 January 2012 refers to a 72 hour notice, it nevertheless does not appear to constitute an outright 72 hour notice of cancellation, since it was conditional upon Gaboriault providing a "*lettre d'approbation hypothécaire*".
- [109] If Demax had the right to cancel Gaboriault's preliminary contract, why was Gaboriault being asked to provide an unconditional "*lettre d'approbation hypothécaire*", especially when the preliminary contract did not provide for such a condition, failing which the preliminary contract was susceptible of being cancelled?
- [110] There are a number of explanations pertaining to the existence and cancellation of Gaboriault's preliminary contract. However, in the absence of evidence, the Tribunal will not speculate as to when Gaboriault's preliminary contract was in fact cancelled. Suffice to say that the best evidence establishing the cancellation of the preliminary contract and the reimbursement of the Gaboriault deposit of \$10,000.00 would have been the production and filing of the cancelled cheque, which Demax did not file before the Tribunal.
- [111] However, the evidence relating to the cancellation of Gaboriault's preliminary contract cast a shadow of doubt on the credibility of Demax's claim that the deposit was unconditional and non-refundable, a shadow that could not be chased away by the evidence adduced before the Tribunal.

[112] The Tribunal cannot ignore the facts and evidence adduced by Demax in support of its claim that it allegedly lost the benefit of the Gaboriault preliminary contract, and the impact that such evidence has on the credibility of Demax's claim, since the cancellation of the Gaboriault preliminary contract constitutes the justification for the retention of the deposit made by Bao.

[113] The Tribunal has already questioned whether the Gaboriault preliminary contract was factually cancelled on or about 9 January 2012.

[114] The credibility of Demax's claim is further affected by what was stated in its lawyers' letters of 6 February 2012 and 2 May 2012.

[115] The Tribunal takes into consideration Demax's position contained in the letter of 6 February 2012, namely:

"Votre cliente a été informée à plusieurs reprises qu'une promesse de vente conditionnelle existait sur l'immeuble mentionné en titre avec Monsieur Alain Gaboriault..., et qu'à cet effet seule une offre sans condition assortie d'un dépôt non remboursable de 10°000,00\$ pouvait être accueillie. Votre cliente a également été informée, et ce dans son propre intérêt, de l'importance de procéder à la clôture de la transaction avant le 31 décembre 2011, considérant la hausse de taxes de 1% prévue pour 2012."

[Emphasis added]

[116] The evidence establishes that Bao was not responsible for a preliminary contract not being signed prior to the end of December 2011. Both Daoust and Vaskelis testified that such a contract would only be signed once the architectural plans were prepared and approved by the purchaser.

[117] In addition, the evidence adduced by Bao before the Tribunal establishes that Bao was asking to sign a preliminary contract prior to the end of December 2011⁵⁵. Daoust did not reply to Bao's email of 23 December 2011 and Bao's testimony that Daoust told her that it was sufficient to cash the cheque to establish her intention to purchase the House in 2011 was not contradicted by Daoust.

[118] The Tribunal further refers to Exhibit M-4 representing a letter dated 2 May 2012, emanating from Demax's attorneys, wherein the following was stated:

"Entre temps, à savoir le 9 janvier 2012, alors que Madame Bao promettait toujours d'acheter la propriété, notre cliente a donné un avis de 72 heures à M. Gaboriault, tel que requis, afin d'annuler la Promesse conditionnelle...La propriété n'est

⁵⁵ Exhibit B-4 (email of 23 December 2011 1:18:51 PM).

toujours pas vendue et notre cliente allègue avoir perdu une vente à cause des agissements de Madame Bao. C'est pourquoi elle n'a d'autre choix que de conserver l'acompte à titre de dommages et intérêts liquidées, sans préjudice quant à tous ses autres droits et recours."

[Emphasis added]

[119] Though Demax during the month of May 2012 was professing that the Lot was not sold, as a matter of fact, by May 2012, Demax was in the process of building a house on the Lot⁵⁶.

[120] Since the property was sold in June 2012, Vaskelis admitted in cross-examination that the construction of the house sold to a third party commenced 3 to 4 months prior to June 2012, meaning that the construction commencing sometime in March or April 2012.

[121] The Tribunal takes into consideration Vaskelis' evidence that as a matter of policy, Demax signs a preliminary contract with a purchaser once the architectural plans were approved by the purchaser. In addition, Demax obtains a deposit and additional funds prior to the commencement of the construction of a house.

[122] Thus, by either March or April 2012, Demax possessed a duly executed preliminary contract by a third party, a deposit, and additional funds and was in the process of building a house on the property in question.

[123] While it is true that the property was not sold in May of 2012 in the sense that Demax did not yet deliver the house and title to the purchaser, the Tribunal is of the view that Demax was less than forthright in the representations made to the Manager in the letter of 2 May 2012⁵⁷.

[124] The letter of 2 May 2012, was addressed to the Manager and contains Demax's representations justifying the right to retain the deposit. The below statements:

"Entre temps, à savoir le 9 janvier 2012, alors que Madame Bao promettait toujours d'acheter la propriété, notre cliente a donné un avis de 72 heures à M. Gaboriault, tel que requis, afin d'annuler la Promesse conditionnelle...La propriété n'est toujours pas vendue et notre cliente allègue avoir perdu une vente à cause des agissements de Madame Bao. C'est pourquoi elle n'a d'autre choix que de conserver l'acompte à titre de dommages et intérêts liquidées, sans préjudice quant à tous ses autres droits et recours."

[Emphasis added]

⁵⁶ Testimony of Vaskelis.

⁵⁷ Exhibit M-4.

represent the facts that were being communicated to the Manager in justification for retaining the deposit of \$10,000.00.

[125] Demax referred the Manager to the cancellation of the Gaboriault preliminary contract caused by Bao's conduct (i.e. remittance of a deposit of \$10,000.00 together with the execution of the Attestion confirming Bao's intention to purchase the property). Thus Demax was induced to cancel the Gaboriault preliminary contract thereby losing the benefit of a sale of the property (to Gaboriault) which property was yet to be sold to a third party at the time that the letter of 2 May 2012 was written.

[126] The Manager retained the representations made by Demax and *inter alia*, held as follows:

The Contractor maintains that it was willing and ready to go through with the sale to the Beneficiary, and that the Beneficiary's conduct ultimately led to the Contractor losing the benefit of the offer made by a third party. As the down payment was to be non-refundable, the Contractor asserts that it is entitled to retain it.

[Emphasis added]

[127] However, in May 2012, based on the evidence adduced before the Tribunal, Demax did not lose the benefit of the sale to Gaboriault, since by May 2012, it was in possession of an executed preliminary contract by a third party, with a deposit, additional funds and was in the process of building a house on the property that was sold to a third party in June 2012. Therefore, one can hardly say that Demax had lost the benefit of a sale of the property in question.

[128] In view of the circumstances, the Tribunal is of the view that Demax misrepresented the unsold status of the property to the Manager, in a manner that breached its obligation to act in good faith, prescribed by articles 6 and 7 C.C.Q., thereby undermining the credibility of its claim to retain the deposit made by Bao on the ground that the deposit was given unconditionally and without the benefit of it being refunded.

d. THE MANAGER REVISES ITS DECISION

[129] The Manager argues before the Tribunal that since Plaintiffs did not sign a preliminary contract and guarantee, they are not beneficiaries within the meaning of the Regulation and the deposit given to Demax to "*reserve the Lot*" is not covered by the Guarantee Plan.

[130] For the reasons stated by the Tribunal in the section dealing with the status of the Attestation, the Tribunal has determined that the deposit related to the purchase of a property consisting of a lot and house.

[131] Therefore the only issue that remains to be decided is whether the absence of an executed preliminary contract and guarantee renders the transaction outside the application of the Regulation and the benefit of the Guarantee Plan.

[132] In order to raise such an argument, the Manager is obliged to revise its Decision, in that the Decision rendered by the Manager reads as follows:

"The Beneficiary did make a down payment of \$10,000.00, such that the Contractor cancelled the offer received from the said third party. In point of fact, the Beneficiary also indicated her intention to enter into the Deed of Sale between Christmas 2011 and the 2012 New Year. The gist of this timing was to avoid having to pay additional Quebec sales taxes at an increased rate that was to come into effect January 1st, 2012.

The Deed of sale was not signed during the Holiday break. On the contrary, the Beneficiary had determined that she was not ready to move at that stage of her family and mortgage approval situation; the big problem was with respect to her children's schools and sports activities.

...

In light of the circumstances, the Manager finds that the Contractor has not failed to perform his legal or contractual obligations within the meaning of the guarantee plan. Consequently, the Beneficiary's claim is dismissed."

[Emphasis added]

[133] The Manager was aware that a preliminary contract was not signed by the parties. Nevertheless, the Manager concluded that Demax did not fail to perform its "legal or obligations within the meaning of the guarantee plan."

[134] Can the Manager despite its finding that Demax did not breach its obligations under the guarantee plan, now argue that the failure to execute a preliminary contract and guarantee places the transaction outside the application and protection of the Regulation and Guarantee Plan?

[135] In the case of *Spooner c. Fournier*, 2009 QCCS 1652 (CanLII), the Honourable Justice Chantal Masse considered this issue and held as follows:

"[30] L'arbitre avait raison de vouloir assimiler la solution retenue le 24 mai 2007 à l'une de celles que La Garantie avait retenues dans sa décision du 2 novembre 2006. Une fois sa décision rendue le 2 novembre 2006, laquelle déterminait les correctifs possibles, La Garantie ne pouvait la réviser. Il n'existe en effet au Règlement aucune disposition lui permettant de réviser une décision déjà rendue²⁴. Il en découle que la décision du 24 mai 2007, ne pouvait modifier la décision du 2 novembre 2006 en imposant un correctif différent de ceux que La Garantie avait déjà déterminés."

[Emphasis added]

[136] In the case of *Brunelle entrepreneur inc. c. Leblanc*, 2005 CanLII 59103 (QC OAGBRN), arbitrator Alcide Fournier, expressed the same view when he stated that:

"[40] La décision du 24 mai 2005 constitue donc une révision de sa décision du 5 août 2004. Or, l'administrateur de la Garantie n'a pas selon le règlement, le pouvoir de réviser ses décisions."

[137] The Tribunal is of the view that the argument advanced by the Manager that the absence of a preliminary contract and guarantee places the transaction outside the application of the Regulation and the Guarantee Plan constitutes a revision of the decision rendered by the Manager on 6 June 2012.

[138] For the reasons stated by the Honourable Justice Chantal Masse and arbitrator Alcide Fournier, the Tribunal is of the same view and therefore holds that to accept the Manager's argument would constitute a revision by the Manager of its own decision, something that the Regulation does not provide for.

[139] Consequently, in view of the circumstances in this instance, the Tribunal rejects the Manager's argument that the absence of a preliminary contract and guarantee places the transaction outside of the application of the Regulation and of the Guarantee Plan.

CONCLUSIONS

[140] In view of the foregoing, the Tribunal is of the view that the deposit was made conditionally on Bao procuring financing in excess of \$400,000.00 to go through with the proposed transaction. The failure to obtain such financing brought an end to the relationship between the parties and Bao is entitled to be reimbursed the deposit in the amount of \$10,000.00.

[141] In accordance with article 123 of the Regulation, seeing that the Plaintiffs have obtained a favorable decision on the elements of their claim, the Tribunal determines the payment of the fees to be charged against the Manager.

[142] Consequently, the cost and fees of this arbitration, as well under law as under equity, in accordance with articles 116 and 123 of the Regulation, shall be borne by the Manager.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

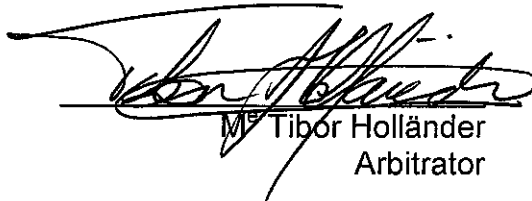
[143] OVERTURNS the decision rendered by the Manager on 6 June 2012.

[144] MAINTAINS the arbitration demand and claim formulated thereunder by the Beneficiaries/Plaintiffs;

[145] ORDERS the Defendant Les Habitations Demax Inc. to reimburse Plaintiffs forthwith the sum of \$10,000.00;

[146] ORDERS in accordance with article 123 of the Regulation that the costs of the present arbitration be borne by the Manager.

DATE: 11 January 2013



M^r Tibor Holländer
Arbitrator