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Case Number 332,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CONCERNED CITIZENS OF THE ESTATES OF FAIRWAY VILLAGE, An unincorporated association, JULIUS H. SOLOMON and PEGGY A. SOLOMON, his wife, EDWARD D. LEARY and LISA P. TORRINI LEARY, his wife, KENNETH P. SMITH And DENISE M. SMITH, his wife, and TERRY L. THORNES and CARMELA M. THORNES, his wife,	:	**No.: 332, 2020**
Plaintiffs Below/ Appellants,	:	ON APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN No. 2017-0924-JRS
V.	:	
FAIRWAY CAP, LLC AND FAIRWAY VILLAGE CONSTRUCTION, INC.,	:	
Defendants Below/ Appellees.	:	

CORRECTED OPENING BRIEF OF PLAINTIFFS BELOW/APPELLANTS

HUDSON, JONES, JAYWORK & FISHER, LLC

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DATED: December 3, 2020

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NATURE OF PROCEEDINGS

The Plaintiffs Below/Appellants include the Concerned Citizens of the Estates of Fairway Village, an unincorporated association of approximately 250 property owners in a residential planned community known as Fairway Village, located in Sussex County, and within the town of Ocean View, as well as several individuals who are property owners within Fairway Village as well. Collectively, they will be referred to as the Homeowners.

The Homeowners filed a Verified Complaint on December 28, 2017. A separate action was commenced on January 8, 2018 by 36 Builders, Inc. doing business as Insight Homes ("Insight"). Both Complaints sought Orders enjoining the Defendants below/Appellees, Fairway Cap LLC and Fairway Village Construction, Inc. (collectively "Fairway Cap"), from retaining ownership of at least 127 townhouse condominiums to operate as a commercial apartment complex within Fairway Village, and instead requiring sale of the units to third parties. The principal of both entities is Louis Capano, III.

All of the Plaintiffs moved for a Preliminary Injunction. The Court heard argument on both requests on March 20, 2018, and granted the Motion by enjoining Fairway Cap from further rentals pending trial. The transcript of the bench decision appears at A-45-64. The two actions were formally consolidated shortly thereafter.

In connection with the injunction, following submissions from the parties, the Court set bond at $354,000.00 (A-693), which was posted by way of surety by Insight Homes.

On July 13, 2018, Insight moved for approval to withdraw and terminate the bond after having reached a settlement with Fairway Cap (A-695). In a letter dated July 19, 2018, Fairway Cap acknowledged the settlement and that it included potential damages stemming from an injunction. Fairway Cap agreed that the bond could be released (A-701). The Court approved the release of the bond, but did not require the Homeowners to post a substitute bond (A-707). Despite the bond being released, Fairway Cap did not seek to have the injunction vacated.

Trial was held on August 28, 2018. Several depositions were admitted into evidence in order to complete the presentations in a single day. Following post-trial briefing and argument, the Court issued its Memorandum Opinion on March 6, 2019 (hereinafter "Opinion"), which included judgment in favor of Fairway Cap (Exhibit A). An Order implementing the Opinion was approved on March 14, 2019 (Exhibit B).

Fairway Cap thereafter filed a motion for damages allegedly incurred as a result of the wrongful injunction. The Homeowners disputed Fairway Cap's underlying right to seek damages since there was no longer a bond from which damages could be paid, and as a result of Fairway Cap's agreement to the release

of the bond, and its failure to request that the injunction be vacated. On August 16, 2019, the Court issued a Bench Decision by telephone, confirming Fairway Cap's right to seek damages (Exhibit C).

A hearing on damages was held on January 23, 2020, and after briefing, oral argument took place on June 9, 2020. On June 18 the Court sought a more concise statement of the damages claimed, and the positions of both parties as to the amounts in question (Docket #201). The decision as to damages was issued August 7[1]. The Final order in the underlying action was signed September 11, 2020 (Exhibit D). This Appeal followed.

[1] The amount of the damages is not an issue in this appeal.

SUMMARY OF ARGUMENT

I. The Homeowners contend that the Chancery Court erred when it interpreted the condominium contract so as to permit a large-scale rental apartment complex within a previously-approved residential planned community. The condominium documents were prepared at the developer's request by the attorney representing the company building homes for resale to the general public. That was how he established Fairway Village. The ten year history of development after the recordation of key community documents reflected that initial intent, and the individuals who purchased single-family homes and condominiums during that period were not given notice that the regime might be drastically changed several years later.

II. The undisputed evidence at trial was that the apartment rental complex creates a situation that eliminates the availability of reasonable mortgage financing. As a consequence of Fairway Cap's high ownership concentration, Fannie Mae and Freddie Mac will not guarantee and purchase mortgages, leaving future buyers, as well as owners seeking to refinance existing mortgages, with no options other than nonconforming mortgages requiring significantly higher interest rates and costs. Since Federally-backed mortgages make up the great majority of mortgage loans, it is impossible that the developer intended to allow for such an adverse consequence. In fact, the governing documents show that it

did not.

III. The operation of the commercial rental complex allows for Fairway Cap to avoid certain financial and governance obligations, which could not have been the original developer's intention. The governing documents grant Fairway Cap (as the successor developer) an exemption from all dues and assessments, creating a potential for third-party owners having to shoulder a disproportionately large share of the cost of operating Fairway Village. In addition, provisions that should have resulted in the condominium owners exercising control of the condominium and making decisions will never take place, meaning that numerous provisions of the original contract have been rendered illusory. In addition, Fairway Cap's mismanagement as a consequence of its ownership concentration had already manifested itself before trial, and the third-party owners were powerless to stop it.

IV. The Homeowners contend that the Court erred when it allowed Fairway Cap to seek damages following trial, after which the injunction was vacated. An injunction bond was originally posted by Insight Homes. When Insight settled with Fairway Cap just before trial, it naturally sought to withdraw its bond. The Insight Motion pointed out that its settlement with Fairway Cap included damages that might have arisen during the time Fairway Cap was enjoined from renting condominiums. Fairway Cap agreed to the withdrawal of

the bond. The Court approved the termination of the bond but did not require a replacement, and Fairway Cap never sought to have the injunction vacated. Delaware subscribes to the "Injunction Bond Rule", which limits recovery to the amount of the bond. Under the circumstances, Fairway Cap was not entitled to seek damages absent a bond.

STATEMENT OF FACTS

A. Creation of Fairway Village

In 2006, Caldera Properties, the initial developer of Fairway Village, recorded a record plan for a residential planned community known as The Estates of Fairway Village (Opinion, p. 5). Fairway Village, located within the town of Ocean View, Delaware, is spread over 121 acres, and was intended to include 166 single family homes, and 166 townhouse condominium units (Opinion, p. 5).

As part of establishing Fairway Village the developer recorded what it called a "Community Constitution Declaration of Covenants, Conditions and Restrictions" (the "Constitution")(A-65). The Constitution created the "Estates of Fairway Village Community Association, Inc." (the "Community Association"), comprised of all owners in Fairway Village, both single family and condominiums. The Community Association operates as something of an umbrella organization to govern the overall development. The Condominium was established by a separate Declaration (the "Declaration")(A-135), together with a Code of Regulations (A-182), both of which were recorded with the Sussex County Recorder of Deeds. Although a distinct legal entity, the Condominium also operates separately within the Community Association.

B. Early Development

After guiding the development through recordation and approval, Caldera

assigned the Subdivision to the Estates of Fairway Village, LLC, and its principals – Mario Capano, Frank Capano and Toni DiEgilio (Opinion, p. 5). Shortly thereafter, NVR, Inc., trading as Ryan Homes ("NVR" or "Ryan"), agreed to acquire several lots and to build homes and townhouses within the development (Opinion, p. 6). The early development of Fairway Village included Ryan constructing two buildings, each housing three (3) condominium units, in 2008-2009. Thereafter, construction of the condominium units ceased, and single family homes were built by both Ryan Homes, and by 36 Builders, Inc., doing business as Insight Homes ("Insight"). The single family homes were completed in early 2016 (Opinion, p. 5). Condominium construction resumed in or around 2013 (Opinion, p.5).

C. <u>Fairway Cap Assumes Control and Changes Direction</u>

Fairway Cap first sought to be involved in Fairway Village as a developer of certain designated lots (Opinion, p. 6). However, when Estates of Fairway Village, LLC defaulted on its loan to TD Bank, Fairway Cap acquired the delinquent loan and all remaining building lots by way of a deed in lieu of foreclosure, which allowed it to avoid State and County transfer taxes (Opinion, p. 6)(A-224). The transfer also bound Fairway Cap as a successor in interest to all of the communities' governing documents (Opinion, p. 6). Between 2013 and 2017 Fairway Cap developed, built and sold 13 of its twenty townhomes to third-party

buyers, and between 2015 and 2017, Insight, as a participating builder, built and sold 12 of its 16 townhomes to third-party buyers (Opinion, p. 7).

During the Summer of 2017, existing homeowners within Fairway Village began to see online advertisements for apartments to be known as "The Reserve at Fairway Village", along with online ads soliciting applications for an on-site rental manager (Opinion, p. 9-10). Several homeowners voiced objections at a September, 2017 Ocean View Town Council meeting, and continued to object in various ways (Opinion, p. 10).

In November of 2017, Fairway Cap, in furtherance of its plan, borrowed $18.2 million dollars from M&T Bank to finance construction of the rental units (Opinion, p. 9; A-237). The Mortgage specifically referred to the project as a commercial enterprise, and a "term sheet" referred to the rental units as "apartments." Section 1.5 of the Construction Loan Agreement referenced the construction of 34 "apartment buildings" (Opinion, p. 9). A Management Agreement dated June of 2017 provided that Capano Management, a company that manages commercial assets for Louis Capano, III and his father Louis Capano, Jr., would manage 127 rental units at Fairway Village (Opinion, p. 9).

Fairway Cap's new plan was to retain ownership of 76% of the condominium units. That high concentration of ownership rendered it a "non-conforming" community for purposes of securing mortgages that could be insured

by Federal National Mortgage Association ("Fannie Mae") or Federal Home Loan Mortgage Corporation ("Freddie Mac")(Opinion, p. 12-13). The lack of access to federally-backed mortgages renders the condominium units "unwarrantable", meaning that prospective purchasers or unit owners seeking to refinance will pay higher interest rates and higher points with lenders who offer products not insured by Fannie Mae or Freddie Mac (Opinion, p. 13).

In addition, property values will suffer because a community comprised largely of transient residents will be less attractive, and therefore less valuable, than a community comprised of homeowners (Opinion, p. 13). And higher mortgage payments caused by the lack of access to federally insured mortgages will shrink the pool of potential buyers, also reducing property values (Opinion, p. 13-14).

The rental project will also adversely affect Fairway Village's governance and management structure, and how the project is funded. Under Section 5.7 of the Constitution, the Developer is exempt from all assessments (Opinion, p. 14). As a result, Fairway Cap is legally free from any obligation to pay current or future assessments for the 127 condominiums it plans to retain (Opinion, p. 14). That will also include condominium fees payable directly for the maintenance and operation of the condominium. In addition, Section 5.10 requires the Community Association to create reserve funds for repair and replacement of community areas

and community property (Opinion, p. 14). Not only has that requirement never been satisfied by Fairway Cap, its continued ownership of the 127 units deprives the Association of operating revenues that would be generated if units were sold to the public (Opinion, p. 14-15).

Although incorporated in 2008, the Condominium Association did not hold an annual meeting until the fall of 2017 (Opinion, p.15). And contrary to the requirements of the enabling documents, two owner representatives have never been elected to the Condominium Council (Opinion, p. 15). And, as described in Section 4.3 of the Constitution, so long as Fairway Cap owns units in Fairway Village, it receives additional votes in the Community Association until 2023 (Opinion, p.15).

ARGUMENT

I. THE ORIGINAL DEVELOPER NEVER INTENDED TO ALLOW FOR A RENTAL APARTMENT COMPLEX.

A. Question Presented

The question presented is whether the Chancery Court committed legal error in interpreting the condominium contract so as to allow for the establishment of a large-scale rental apartment complex in a residential planned community. The question was raised throughout the litigation, and decided by the Court in its Memorandum Opinion (See pages 24-30).

B. Standard of Review

The interpretation of a contract is purely a question of law which the Supreme Court reviews *de novo*. *Rhone-Poulenc Basic Chemicals v. American Motorists Insurance Company*, 616 A.2d 1192 (Del. Supr. 1992).

C. The Merits

1. The Declaration does not permit the establishment and operation of a large-scale commercial rental complex

A condominium Declaration and its accompanying Code of Regulations together form an ordinary contract between unit owners (and, initially, the Developer) created under the framework of the Delaware Unit Property Act. *Council of the Dorset Condominium Apartments v. Gordon*, 801 A.2d 1 (Del. Supr.

2001). It is the Homeowners' position that the Court Below erred in interpreting that contract so as to allow the commercial rental complex. Although mindful that the governing documents reference the leasing of units by owners, that simple fact is not surprising given the proximity of Fairway Village to the Sussex County beaches. But the developer retaining at least 127 of 166 units to utilize as part of its operation of a commercial rental enterprise was never anticipated or forecasted.

As this Court has concluded in several decisions within the past few years: "In giving sensible life to a real-world contract, courts must read the specific provisions of the contract in light of the entire contract". *Chicago Bridge & Iron Company N.V. v. Westinghouse Electric Company LLC*, 166 A.3d 912, 913-914 (Del. Supr. 2017). Looking at a contract from a distance is critical "to ensure that neither side's arguments are in direct conflict with the spirit of the overall transaction" (*Schneider National Carriers v. Kuntz*, 2018 Del. Ch. LEXIS 1403 (del. Ch., December 20, 2018), and so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language. *LSVC Holdings, LLC v. Vestcom Parent Holdings, Inc.*, 2017 Del. Ch. LEXIS 865 (Del. Ch., December 29, 2017). It is vital that the Court determine the shared intentions of the contracting parties when they entered into their agreement. *Ray Beyond Corp. v. Trimaran Fund Management, L.L.C.*, 2019 Del. Ch. LEXIS 36 (Del. Ch., January 29, 2019). If a contract's plain meaning, in the context of the

overall structure of the contract, is susceptible to more than one reasonable interpretation, Courts may consider extrinsic evidence to resolve the ambiguity. *LSVC Holdings, LLC, supra.*

The Opinion suggested that the Homeowners were claiming a breach of a contract they thought they had made (Page 24). But the evidence revealed that the condominium contract simply did not sanction the establishment of a large rental apartment complex.

In its March 20, 2018 bench ruling following argument as to a preliminary injunction, the Vice Chancellor observed:

> "…the Court has to understand what the parties were trying to do before this Court sets about construing individual provisions of a contract, that the big picture is important in understanding what words mean in light of the manner in which parties use them in their agreements" (A-53-54).

Consistent with that "big picture" approach, it is important to recognize that the intent of the parties is determined not by what one party to the contract <u>now</u> claims it was intended to mean but, rather, by what intent is revealed by an objective, reasonable review of the contract – what a reasonable person in the position of the parties would have thought it meant. *Lorilard Tobacco Company v. American Legacy Foundation*, 903 A.2d 728 (Del. Supr. 2006). And, the appropriate time period to consider is the time at which the contract was formed.

In that regard Edward A. Tarlov, Esquire, a prominent Delaware real estate attorney, and the actual draftsman of the pertinent community and condominium documents, testified at trial. Tarlov has represented NVR, which trades in Delaware as "Ryan Homes", for many years (A-264).

Prior to Tarlov's actual involvement, Ryan's in-house attorneys had negotiated a lot purchase agreement and what they call a "building permit agreement" (A-265). With the former Ryan would purchase lots for the construction of single family dwellings which would then be sold to third parties. With the latter, Ryan would purchase the right to construct condominium units on sites as shown on the previously-approved Declaration Plan, again for eventual sale to third parties. At Fairway Village, Ryan went on to build many of the 166 single family homes (A-265).

That practice represents a typical Ryan role. What was unusual in this case was that Tarlov was asked to draft the community and condominium documents. Typically, the Developer's attorney prepares the documents (A-266). NVR, as Tarlov pointed out, is actually prohibited from being a Developer (A-269), making his role as draftsman for development documents even more unusual.

For his role, Tarlov was hired and paid by NVR (A-267). He had no contact with the Developer, and was not directed in any sense by the Developer's attorney (A-267-268). Although he shared drafts of his documents with Developer counsel,

it was not a "negotiation" (A-268). The concept for the Community Association and its relationship with the Condominium Association and the document to establish that relationship, came from NVR (A-269).

Because Ryan just builds and sells, Tarlov created a regime intended to do just that (A-270). There was never any consideration given to the Developer creating a large rental complex, and no one ever mentioned it to him (A-270). Tarlov did point out, though, that Ryan would not have wanted a subdivision that had units being rented. He emphasized the company's preference for uniformity based upon its observation that renters would not share the same pride of ownership, and would more likely violate development restrictions (A-271). That view was shared by other witnesses as well (Opinion, p. 13-14). Tarlov also observed that the concept of a Developer remaining involved in a community that it was developing runs contrary to the typical Developer role of completing development and moving on (A-272).

Finally, and importantly, Tarlov testified as to an issue that arose after the documents were recorded, and in which Fairway Cap's predecessor in interest actually raised the prospect of terminating the condominium regime and retaining the remaining condominiums as an apartment complex. He expressed his opinion

that it would be extremely difficult to do without the consent of the homeowners (A-273)[2].

When considering the time for determining the intent of the original Developer the focus is on 2008 when the Declaration and Community Constitution were drafted and recorded. Attorney Tarlov, drafting those very documents on behalf of NVR, made it clear that he was doing so from the perspective of a builder/seller of homes that was specifically prohibited from acting as a Developer (A-269). And, he emphasized that NVR's perspective did not include renting units (A-271).

If the original Developer had any contemplation of creating a rental complex it certainly did not make it known to Tarlov or anyone else. Thus it was that for ten years after the recordation of the Community documents the Developer never rented dwelling units (either single family homes or condominiums), but instead sold them to one of its preferred builders (Ryan or Insight), or did the same through its building entity, LC Homes. There was never anything to suggest that Fairway Cap would suddenly decide to retain the last 127 units to establish a rental complex.

A reasonable purchaser of a single family dwelling or condominium unit in Fairway Village prior to 2017 would not have ever imagined that the Developer

[2] Indeed, see 25 *Del. C.* §2229, which requires the unanimous consent of existing condominium owners in order to remove property from a condominium.

would commit 76% of the condominiums to a commercially-operated rental complex, and the Homeowners have said precisely that. Nor did the history validate such an endeavor.

The Homeowners also pointed out the Developer's original commitment to build and sell the condominium townhouses by way of Schedule D within the Declaration (A-169-171). That document recites that "Grantor will offer condominium units for sale to the public". But the Vice Chancellor dismissed that clear pledge of intent because (1) it was a recital not incorporated in the Declaration, and (2) "…it dangles in a peripheral document as a non-binding statement of intent to place the purpose of the easement in context" (Opinion, Page 30).

The Declaration was hardly a peripheral document. Indeed, a Declaration is the primary document necessary to create a condominium under the Delaware Unit Property Act (25 *Del C.* §2202). Schedule D was a part of the Declaration for Fairway Village. Additionally, the case cited by the Court, *Gray v. Masten*, 1983 Del. Ch. LEXIS (Del. Ch., August 16, 1983), addressed a recital that had appeared in a prior deed in the chain of title, and the Court held that it would not operate as an estoppel when an action was not based on that deed. That is not the case here – the recital was a part of the Condominium Declaration, upon which the Homeowners' suit was based.

In addition, the Trial Judge ignored his own words from his March 20, 2018 bench decision supporting the entry of a preliminary injunction. There he recognized (A-54) that "…parties use recitals to say what they mean and what they are trying to accomplish…" Here, as part of the Declaration, there was an affirmative statement that the condominiums would be sold to third parties, and without any hint of an apartment rental complex. And, the Vice Chancellor recognized on page 30 of the Opinion that the intention guiding performance of the contract was exactly what was expressed in Schedule D:

> "The evidence reveals Fairway Cap, like its predecessor, went into Fairway Village with the intent to sell every townhouse it constructed."

For more than ten years that is precisely how Fairway Village was developed, and included no less than 40 condominiums already constructed.

2. <u>The existing owners at Fairway Village were not given notice of Fairway Cap's plan to build, own and lease a significant number of townhouse units.</u>

As the Court also observed in the March 20, 2018 ruling,

> "It is reasonable to me that to attract people into a community, you [a Developer] would want to tell them what it is they are buying into in order to and give them some degree of comfort and confidence that what they are buying into is what will remain in place within the community" (A-54).

Those are almost the exact words of Vice Chancellor Brown in *Council of Unit Owners of Pilot Point Condominium v. Realty Growth Investors*, 436 A.2d 1268 (Del. Ch. 1981) *aff'd. in part* 453 A.2d 450 (Del. Supr. 1982)("*Pilot Point*"):

> "It seems that the public interest should require a unit property developer with such intentions [creating a regime different than that represented in the Declaration] to clearly state them of record in order that those considering the acquisition of a property interest in a potential condominium regime may know in advance that the entire scheme, architectural design and density of the project may be changed at any time without their consent." 436 A.2d at 1277.

Pertinent to this case, the decision addressed the issue of whether a properly established condominium regime could be altered without the consent of those persons who had already acquired real estate interests in the project under the terms of the documents as originally recorded.[3] Developers must clearly state their intentions on the record in order that those considering the acquisition of a property interest in the condominium may know in advance that the entire scheme may be changed at any time without their consent. In addition, the failure on the part of a developer to make its intentions clear is construed against the party who places the documents of record and those who succeed to his interests. *Id*.

[3] The original developer actually asked Tarlov for his opinion in 2010 about the possibility of a regime change that would have converted the condominium townhomes into an apartment complex for rental housing (A-291). His response was that he did not believe it was legally possible.

The Homeowners are mindful, as the Vice Chancellor pointed out, that the *Pilot Point* case can be distinguished on the facts. But the Opinion missed the point. When addressing the Homeowners reliance on *Pilot Point* he stated: "Instead, invoking *Pilot Point*, they appeal to the Court's sense of equity and argue it is unfair for Fairway Cap to retain ownership of so many units that it effectively can strip control of the Condominium Council from the other homeowners" (Opinion, p. 34).

The Homeowners did not invoke *Pilot Point* to specifically address control issues and other violence to the governance structure.[4] Rather, the Homeowners have relied consistently upon *Pilot Point* for its common sense approach to the interpretation of a condominium declaration, and the fact that neither Fairway Cap nor any of its predecessors in interest ever remotely hinted at the possibility that 76% of the condominiums would be effectively removed from third-party ownership, and converted into a large-scale commercial enterprise.

The Constitution establishing Fairway Village required the Developer to preserve and enhance property values, adopt and implement a common scheme of development to preserve and maintain a high quality of life, and provide opportunities to the <u>owners</u> to enjoy a community environment [See Article 1, Preamble (A-71-72)]. The Developer held out its role as one in which it would

[4] See Argument III, infra.

maintain those objectives "until the development process has been completed" (A-72).

In addition, Section 9(f) of the Declaration reads, in pertinent part:

> "Except for residential use permitted by paragraph (a) of this Section, no industry, business, trade, occupation or otherwise designed for profit … shall be conducted, maintained or permitted on any part of the Property, nor shall be conducted, maintained or permitted on any part of the Property,… (A-146)."

The Court found that section to be ambiguous during the preliminary injunction hearing (A-53). And although Fairway Cap's tenants are "residents," they are residents because they are part of a commercial enterprise owned and operated by Fairway Cap – a business clearly being maintained on the property.

It can hardly be argued that dedicating 127 of 166 units to a commercial rental project will not fundamentally alter Fairway Village. The existing owners had the right to know in advance that the 10-year old project would be turned upside down, such as to significantly impair the value of their dwellings, the ability to sell or refinance existing mortgages, and the other adverse consequences which are inevitable[5]. After all:

> Where the legislative act permits the interests of the purchasing public to depend upon the unbridled ingenuity of those hustling for a dollar in a real estate boom economy, it seems only appropriate that any doubt in the language of the recorded declaration be resolved against

[5] See Arguments II and III, *infra*.

the party who possessed the unfettered power to create the situation under the authority of the statute, and in favor of those who make their acquisition in reliance on the recorded documents." *Pilot Point*, 436 A.2d at 1277.

II. FAIRWAY CAP'S RENTAL APARTMENT COMPLEX IS A BREACH OF CONTRACT BECAUSE IT ELIMINATES THE AVAILABILITY OF REASONABLE MORTGAGE FINANCING.

A. Question Presented

The question presented is whether the undisputed fact that the rental apartment complex will eliminate the availability of Federally-backed mortgages amounted to a breach of the condominium contract. The question was raised throughout the litigation, and decided by the Court in its Memorandum Opinion (See pages 12-14, 26-30).

B. Standard of Review

The interpretation of a contract is purely a question of law which the Supreme Court reviews de novo. *Rhone-Poulenc Basic Chemicals v. American Motorists Insurance Company*, 616 A.2d 1192 (Del. Supr. 1992).

C. The Merits

The Homeowners contend that the Trial Court erred when it approved the rental complex despite the undisputed fact that it effectively eliminated the availability of mortgages to current and future condominium owners. The availability of federally-backed mortgages is a fundamental aspect of the contract between the developer and condominium owners. For example, Section 15.1 of the Code of Regulations (A-220-221) allows for an amendment without approval of the owners in the event a provision of the Declaration or Code of Regulations is

"… incorrect, defective, or similarly inconsistent, or as may be required by FMNA, FHA, VA, FHLMC, GNMA or by any governmental agency …".

The Homeowners presented evidence through their expert witness, Joseph Della Torre, a mortgage broker and area manager for Union Home Mortgage, a national mortgage firm (A-299). Della Torre explained in his report (A-556) that Fannie Mae and Freddie Mac will not purchase mortgages which are considered "non-warrantable". A condominium is considered non-warrantable for federal mortgage purposes if any one owner retains more than twenty percent (20%) of the units. Therefore, Fannie Mae/Freddie Mac loans, which make up more than 75% of mortgages nationwide (A-610-611), will be unavailable.

There was no dispute as to these facts. Defendants' expert, Anne Vogel Flaherty, a mortgage consultant with Prosperity Mortgage, submitted a report that was limited to answering very narrowly-crafted questions posed by Fairway Cap's attorneys (A-579). She confirmed in her answer to question number 3 that the majority of homeowners in the Bethany Beach/Ocean View/Millville area (including Fairway Village) use Fannie Mae/Freddie Mac qualifying loans (A-533). She was also familiar with the pertinent regulations and confirmed that the concentration of ownership by Fairway Cap will disqualify the condominium from such loans (A-541-542; A-597-598).

The issue is not unique to mortgage brokers. Plaintiffs' real estate appraisal expert, Lee Trice (of Valucentric) included in his report a reference to the unavailability of federally backed mortgages for purchases or re-finances in light of the concentration of ownership (A-610). Beth Umstead, the property manager for Fairway Village, was aware of the problem as well (A-650).

The consequences of disqualification are devastating to existing and future owners. Della Torre testified that interest rates and related costs for non-conforming loans would be much higher. In an exhibit referred to during his deposition (A-563) he pointed out higher interest rates (as much as 2%), as well as 1.75 points (1.75% of the loan amount)(A-315-316). A borrower could get a lower rate, but only by paying even more money up front. The end result was the payment of more than $100,000 in additional interest over the course of the loan (A-318).

Fairway Cap sought to argue that despite disqualification, there are non-conforming mortgages that have interest rates and fees that are comparable to the government backed loans. But there was no evidence to support that argument. The only alternative that Flaherty discussed in her report was a program she referred to as a "5/1 Adjustable Rate Mortgage" ("ARM"). But she admitted that such a loan would contain a fixed rate of interest for only 5 years. For the next 25

years the rate could rise at the whim of the markets and the Federal Reserve (A-542-543; A-602).

Flaherty said that by focusing on a 5/1 ARM she was not intending to suggest that there are no other loans available with similar rates (A-535-536). Yet given the opportunity at trial to detail other loan products, she was unable to do so. In fact, the suggestion that there are comparable products is undermined by Flaherty's own reports. After identifying the 5/1 ARM, her draft report (A-586) included the phrase "However, the Fannie/Freddie programs are 30 year fixed rate loans and not Adjustable Rate mortgages", essentially pointing out her true opinion that an ARM and a 30-year fixed rate mortgage are not at all comparable. That phrase was omitted from her final report.

But the comparison analysis is relevant only if a lender can actually be found to make such a loan. Della Torre suggested at his deposition that the chances of locating such a lender were no better than 50/50, and the two lenders he contacted considered Fairway Village too risky because of the significant developer ownership interest (A-566).[6] He continued to ask that question of lenders after the deposition. Four additional local banks (First Shore Federal, County Bank,

[6] Della Torre was asked at his deposition if there was anything in his report that he would change. His response was that he should not have suggested that there are mortgages available in Fairway Village, as the lenders with whom he had spoken would not do so (A-566).

Artisans, and Fulton) all declined a loan at Fairway Village because of the Fairway Cap ownership interest (A-312). Therefore, even if a lender could be located (and there was no evidence to suggest that one would) the cost of the loan in interest and points would be significantly greater than a loan that conforms to Fannie Mae/Freddie Mac regulations.

Flaherty made no effort whatsoever to determine if she could actually place a mortgage loan for the purchase and sale of a condominium, or a refinance of a condominium, at Fairway Village with other lenders (A-544). She didn't even inquire of her own employer, Prosperity Mortgage, as to whether it would make such a loan (A-544)[7]. Her excuse instead was that she wasn't asked to do so (A-544-545). Indeed, her testimony did nothing to vary Della Torre's analysis.

In Section E of its findings of fact (Opinion, pages 12-14) the Trial Court accepted the above facts as they applied to mortgages. The Vice Chancellor recognized that the high concentration of ownership rendered the condominium "non-conforming" for purposes of securing mortgages insured by Fannie Mae/Freddie Mac (Opinion, p. 12). He also recognized (in footnote 52, page 13) that other witnesses uniformly testified that access to government-backed mortgages would be problematic. But despite recognizing and accepting those facts, the Vice Chancellor ignored, without explanation, the effect in his final

[7] In fact, Flaherty's employer would not permit her to put the company name on her report (A-599).

analysis. It is impossible to disregard the adverse consequences of the loss of Federally-backed mortgages. The developer of Fairway Village could not have intended a planned community without them.

III. THE RENTAL APARTMENT COMPLEX ALLOWS FAIRWAY CAP TO AVOID ITS CONTRACTUAL OBLIGATIONS TO THE HOMEOWNERS AND WILL PERMIT FAIRWAY CAP TO VIOLATE ITS OBLIGATIONS IN THE FUTURE.

A. Question Presented

The question presented is whether Fairway Cap breached its contract because the rental apartment complex allows it to avoid its governance and financial obligations, rendering those obligations illusory. The question was raised throughout the litigation, and decided by the Court in its Memorandum Opinion (See pages 14-16, 31-36).

B. Standard of Review

The interpretation of a contract is purely a question of law which the Supreme Court reviews *de novo*. *Rhone-Poulenc Basic Chemicals v. American Motorists Insurance Company*, 616 A.2d 1192 (Del. Supr. 1992).

C. The Merits

The Trial Court similarly accepted as fact that both the Declaration and the Constitution established certain mechanisms for governing both the condominium and the overall development (Opinion, p. 14-16). One of the most important aspects of that plan is how community operations are funded. The original Developer created in Section 5.7 of the Constitution an exemption for itself as to payment of dues and assessments, presumably to allow it to dedicate its resources

to construction of the infrastructure (A-82). The intention was clearly not for the Developer to permanently retain ownership, but to sell the lots and condominium units to third party purchasers, all of whom would collectively assume the burden of supporting operations in the future. By retaining ownership of 127 condominiums and renting them, as opposed to selling them to the public, Fairway Cap can effectively remove 127 assessment obligations on a whim, creating a significantly greater financial burden on other owners (Opinion, page 14).

Section 5.9 of the Constitution established an initial assessment to both the community association and to the condominium association upon sale to a third party, which at the time of trial was $900.[8] The Developer is similarly exempt, thus creating potential deficits which other unit owners would likely be called upon to satisfy. In addition, each condominium owner has an ongoing annual assessment obligation to the community association and to the condominium association (A-195). The same Developer exemption applies to those obligations as well.

Moreover, both Section 5.10 of the Constitution and Section 5.1(d) of the code of Regulations require the Community Association and the condominium, respectively, to create certain reserve funds for the repair and replacement of community areas and community property. Since Section 5.7 frees Fairway Cap

[8] See Opinion, page 14.

from "any assessments or other charges", the failure to properly fund reserves will create a disproportionately greater financial burden for the living units owned by private individuals, including some of the Homeowners, in establishing and maintaining required reserves. The Vice Chancellor recognized that the exemptions deprived the community association of $114,000 in operating revenues that would be generated if the units were sold to the public.[9]

Yet despite recognizing the financial issues, the Trial Court simply stated that the Fairway Cap rental units would remain subject to all of the obligations imposed by the governing documents, "… including the obligation to pay the pro rata share of all assessments and fees in the community".[10] That conclusion is inconsistent with the governing documents and previous findings of fact. The Developer is exempt from all of the assessments. It is not obligated to pay any portion of community assessments and fees.

1. The Developer will never cede control of the development.

Both the Constitution (A-65) and the Declaration (A-135) included fairly detailed procedures whereby the Developer, consistent with the original plan, would turn over control of the development to the homeowners. If Fairway Cap builds and leases 127 condominium units, those procedures will be undermined and in some instances permanently eliminated. Ownership of 127 of 166

[9] Opinion, page 15.
[10] Opinion, page 34.

condominiums (76%) provides Fairway Cap with absolute and permanent control of the Condominium Association. Simply put, Fairway Cap will elect every member of the Condominium Council and operate the condominium to meets its needs, and without regard to the welfare of the Association as a whole. It can amend the Declaration at will, since amendments require just 67% (A-152). The condominium will never be governed by the residents, and any thought of actually having a role in the governance of the condominium, outlined in detail in the governing documents, will have been rendered illusory. That is clearly contrary to settled Delaware law, as the Court will not read a contract in a way that renders a provision or term meaningless or illusory. *Estate of Osborn v. Kemp*, 991 A.2d 1153 (Del. Supr. 2010).

Fairway Cap's continued ownership also limits the turnover provisions in the Constitution.[11] Because it will not sell all of its units to third parties, Fairway Cap will remain a Class B member under Section 4.3 of the Constitution, and will retain superior voting rights until 2023. That was highlighted in connection with the adoption of the 2018 budget, when Todd Moyer (Fairway Cap's representative) cast some 1100 votes on behalf of the Developer, overwhelming the third-party owners (Opinion, p. 16). But even after 2023, it will still own 38% (127 out of 332) of all dwelling units within the entire community, and will continue to retain

[11] The Vice Chancellor's citation to Section 4.3 of the Constitution confirms the Plaintiffs' assertions (Opinion, footnote 62).

all other rights reserved to the Developer so long as it owns any units (Opinion, p. 15).

Yet having recognized the inconsistencies created by the apartment plan and the various ways in which Fairway Cap will entrench itself in the governance process, the Trial Court simply concluded that the Developer, like other owners, possesses the right to vote the percentage interest of the units it retains. But such a conclusion misses the point. One of the consequences of a planned community such as Fairway Village is that it levels the playing field for the various owners. They share amenities, costs of maintenance and operation, and internal governance. That system, set out in great detail in the governing documents, will be forever distorted in Fairway Village.

In addition, the Court favorably referenced a condominium in Florida that limited investor purchasers by restricting rental percentages (Opinion, Page 35). But that was an amendment made by the condominium owners themselves, and not part of the original documentation. Owners at Fairway Village could approve a similar amendment except for the fact that Fairway Cap controls 76% of the condominium votes. Its own expert discussed similar potential remedies, but none of those can be established unless Fairway Cap approves, thus solidifying its position and insuring that third party owners will never enjoy the self-governance procedures guaranteed to them in the enabling documents.

2. Fairway Cap's mismanagement and improprieties will continue unchecked.

The problems created with respect to financial and control provisions highlighted above are not just theoretical. Consider, for example, Fairway Cap's control and management of the Condominium Association prior to the trial below. That Association was created with the recordation of the Declaration in 2008, and incorporated in that same year (Opinion, p. 15). In an October 6, 2015 email Todd Moyer related that Fairway Cap attorney Samuel Frabizzio had pointed out that contrary to the Declaration, Fairway Cap had not made provision for two owners to become council members (A-665).[12] But despite that admonition, Moyer, Fairway Cap's appointed representative to the Council, apparently made no effort to comply. In fact, as of the trial in this case more than three full years later, there were no owners on the Condominium Council (A-665).

Additionally, Delaware Law requires every corporation to hold at least one annual meeting[13]. Yet not until the fall of 2017 was a Condominium Association meeting ever scheduled.[14] And, that was apparently little more than a formality, since Beth Umstead, the hired condominium manager, testified that the Council does not hold any regular meetings (A-641). Rather, it is Fairway Cap, through Moyer, that continued to run the Condominium Association (A-641). In fact,

[12] Opinion, page 15.
[13] 8 *Del. C.* §211.
[14] Opinion, page 15.

Umstead has never even met the other two Capano-appointed condominium council members (A-641).

Fairway Cap's control over the finances of both the Condominium Association and the Homeowners Association is equally disturbing. Condominiums, by law, are required to create and maintain reserves for repair and replacement of common elements (A-643). Despite the fact that those reserves are not for the purpose of covering cash shortfalls in operations [see 25 *Del. C.* §81-103(39)], Umstead confirmed that Fairway Cap has done precisely that (A-645)[15].

In June of 2018, the HOA faced a critical cash shortfall. As Umstead observed, the shortfall was a result of Fairway Cap having included in the 2018 budget income from units which were "held back" by Fairway Cap (A-652). Although the Community Association Board recommended that Fairway Cap cover the shortfall because its decision to withhold units had created the deficit, that recommendation was vetoed by Fairway Cap and Moyer, which as noted hold more than 1,100 votes to the owners' 200 (A-662; 674). As a result, the Board was left with no alternative but to illegally "borrow" from the reserve fund with the hope that Fairway Cap would eventually release completed units so that they became subject to assessment like all others. Although the Trial Judge recognized that Fairway Cap operated contrary to governing documents by borrowing from

[15] Umstead also acknowledged that it is unlikely that the reserve account for the HOA has ever been properly funded (A-644).

reserves, even when it was the party responsible for those shortfalls, it did not enter into his decision.[16]

Difficulties stemming from insufficient reserves extend beyond budget considerations. In 2015 Umstead and Fairway Cap were made aware that its reserve fund was insufficient from the standpoint of Fannie Mae/Freddie Mac compliance (A-646). After two years, Fairway Cap had not corrected the situation, as another lender again pointed out the deficiency in the reserves (A-646-647). Although Umstead characterized it as a failure on the part of the Board (A-647), the Board and Fairway Cap are one in the same.

Fairway Cap's heavy-handed oversight is exactly the type of manipulation of the development that Plaintiffs have feared. Its decision to hold back units and the resulting lack of operating funds threatened to bankrupt the condominium and community associations. Despite its assertions that it was paying its fair share despite the exemption afforded the Developer in the enabling documents, Fairway Cap was clearly not doing so.

Even more problematic is the assertion by Fairway Cap that as the owner of 127 units it would be no different than any other single unit owner. One homeowner who goes bankrupt, or whose mortgage goes into foreclosure, or who otherwise fails to pay homeowner's or condo dues is a survivable risk in most

[16] Opinion, footnote 58.

communities. But if an owner such as Fairway Cap owning 76% of the condo units becomes insolvent, the entire community is at risk (A-504). In addition, its failure to pay dues and assessments for 76% of the units in full and on time will similarly render the Condominium Association, and likely the Homeowners Association, insolvent. Because they remain a decided minority, the other owners will be powerless to deal with the consequences. Indeed, Michael Morton, a real estate attorney called by Fairway Cap, testified that some of the associations he represents have sought to curtail renting altogether because "they wanted to stop the hemorrhaging from loss of assessments or payments" (A-502-503). The consequences of the loss of expected revenue from Fairway Cap's 127 units would be disastrous. Given Fairway Cap's control, any such change is impossible.

Capano took pains to testify that he has never failed to pay assessments in his other communities, and that forfeiture was unlikely (A-507). But circumstances can change overnight. It is unlikely that anyone would have predicted a global pandemic in 2020.

Moreover, when Fairway Cap borrowed $18.2 million from M&T Bank in November 2017, Capano admitted to paying debts owed by him in other unrelated developments (A-685). Yet the collateral for that large mortgage is Fairway Cap's ownership interest in Fairway Village, including the amenities, roads, and stormwater management ponds (A-685). Rather than utilize all of the funds from

M&T for Fairway Village, Capano essentially "borrowed from Peter to pay Paul". The dangers identified by the Homeowners are not at all far-fetched.

Once again, although accepting many of these violations as undisputed facts, the Vice Chancellor essentially ignored them in his decision, rendering large portions of the enabling documents meaningless.

IV. THE CHANCERY COURT ERRED IN AWARDING DAMAGES AFTER HAVING APPROVED THE RELEASE OF AN INJUNCTION BOND.

A. Question Presented

The question presented was whether the Court of Chancery committed legal error by allowing Fairway Cap to recover damages for a wrongful injunction in the absence of an injunction bond. The issue was raised post-trial and decided by the Chancery Court's August 16, 2019 decision (See Exhibit C, pages 3-12).

B. Standard of Review

The Supreme Court reviews issues of law *de novo*. *Klaasen v. Allegro*, 106 A.3d 1035 (Del. Supr. 2014).

C. The Merits

On July 13, 2018 Insight filed a Motion to Withdraw and Terminate Injunction Bond (A-695). In that Motion Insight stated, in paragraph 7:

> "On July 11, 2018, Insight and Defendants reached a confidential settlement agreement. As part of the settlement, Insight and Defendants have resolved the claims between them, including with respect to damages that might be claimed by Defendants against Insight" [Emphasis added].

Insight had obtained and paid for the bond, and upon settlement, naturally sought to have it cancelled. Although the content of the agreement between Insight and Fairway Cap was never disclosed, the Insight Motion makes it clear that

Fairway Cap agreed that it would not seek damages stemming from the injunction, and would not oppose the withdrawal or cancellation of the bond. Indeed, in a July 19, 2018, letter to the Court, Defendants represented that they did not object to the withdrawal of the bond (A-701-706).

On August 14, 2018, the Court terminated the bond, but did not require the Concerned Citizens Plaintiffs to post a substitute bond. And, despite the fact that there was no longer a bond, Defendants did not request that the injunction be vacated. Following the issuance of the Opinion the Court permitted Fairway Cap to seek damages occasioned by the "wrongful injunction". The Homeowners contend that decision was legally erroneous.

Chancery Court Rule 65(c) reads, in pertinent part:

> "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the Court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained".

Delaware subscribes to the "Injunction Bond Rule", articulated by then Vice Chancellor Steele in *Emerald Partners v. Berlin,* 712 A.2d 1006, 1011 (Del. Ch. 1997) – "the bond is the limit of the damages the defendant can obtain for a wrongful injunction". A party wrongfully enjoined may recover damages resulting

from the injunction, but that recovery is limited to the amount of the bond. *Guzzetta v. Service Corporation of Westover Hills*, 7 A.3d 467 (Del. Supr. 2010).

The early history from *Emerald Partners* is insightful. When the Court of Chancery entered its Preliminary Injunction to enjoin a proposed merger, it required Emerald Partners to post a cash or secured bond in the amount of $500,000.00 as security. Three days later, with Defendant's approval, the Court allowed Emerald to substitute a $500,000.00 irrevocable letter of credit. Later, and also with Defendant's approval, the Court allowed Emerald to substitute shares of stock for the letter of credit. When the shares were cashed out, though, the result was less than $100,000.00, or roughly 20% of the original bond. Over Defendant's objections, the Court ruled that Defendants were limited to the actual value of the bond (i.e. the substituted security), not the $500,000.00 figure originally determined.

The great weight of authority is consistent. See generally 30 A.L.R. 4th 273, *Recovery of Damages Resulting from Wrongful Issuance of Injunction as Limited to Amount of Bond*; *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983); *Research Foundation of State University of New York v. Mylan Pharmaceuticals Inc.*, 723 F. Supp. 2d 638 (D. Del. 2010); *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797 (3rd Cir. 1989).

The Third Circuit Court of Appeals in *Sprint Communications Company LP v. CAT Communications International Inc.*, 335 F.3d 235 (3rd Cir. 2003), offers a particularly good explanation of the process. Although a bond serves as a fund to pay out damages in the event the Preliminary Injunction proves wrongfully issued, it serves other functions as well. By limiting recourse to the bond itself, the bond generally limits the liability of the applicant and informs the applicant of the price it might pay if the injunction is wrongfully issued. When the amount of the bond is set, the applicant decides whether to accept the preliminary relief by posting the bond, or to withdraw its request. The applicant may base its decision on whether it wants to expose itself to liability up to the bond amount. If the injunction is later determined to have been wrongfully issued, the enjoined party may then seek recovery against the posted bond, but the recovery cannot exceed the amount posted.

In *Sprint* there was an application to retroactively increase the amount of the bond, which proved to have been inadequate at the outset. But the Court ruled that if a retroactive increase is permissible, it no longer fixes exposure or caps liability, and would instead subject the successful applicant to an unexpected and unanticipated liability. Consistent with that rationale is the rule that a bond cannot be increased after a preliminary injunction has been reversed. *Mead Johnson & Co. v. Abbott Laboratories*, 209 F. 3d 1032 (7th Cir. 2000).

Here, Insight and Fairway Cap settled the Insight Complaint, including any damages that might have been claimed by Fairway Cap to that point. As part of that settlement Fairway Cap agreed not to oppose the cancellation of the bond, even though they knew it was Insight's bond and that the Homeowners had not invested in it. Thereafter, the Court terminated the bond upon application by Insight, and by Fairway Cap's own admission, without their objection.

Although Fairway Cap may have assumed that the Homeowners would substitute a $350,000.00 bond (or that the Court would order a new one), there was no requirement that they do so. By virtue of their agreement with Insight, Fairway Cap took the chance that there might not be a bond going forward from which it could potentially recover. Once the Court approved the withdrawal and termination of the surety bond posted by Insight, it became the Homeowners option as to whether or not to post a bond of their own to continue the injunction, or to decline to post security and allow the injunction to be dissolved on Fairway Cap's motion. By not posting a bond the Homeowners effectively made that decision. The opportunity then passed to Fairway Cap, which failed to seek to vacate the injunction.

As the cases point out, Fairway Cap had every opportunity from that point on to move the Court to set aside the injunction absent a new bond, and after the Court declined to order a new one. Fairway Cap was presumably aware of the injunction

bond rule, and knew that the absence of a bond would foreclose any damage claim. By failing to seek to have the injunction vacated, and by apparently insulating Insight from any liability in their settlement agreement, Fairway Cap forfeited the right to seek damages it now contends were the product of the preliminary injunction.[17]

In its August 16, 2019 Decision the Court claimed not to have found Delaware authority directly on point (Exhibit C). But it did not even mention the *Emerald Partners* case, Delaware's primary authority on injunction bond issues. Instead, the Court relied upon two cases from the federal system, both of which had already been distinguished by *Emerald Partners*. Neither of those cases – *Atomic Oil Company of Oklahoma v. Bardahl Oil Company*, 419 F.2d 1097 (10th Cir., 1969); and *Factors Etc., Inc. v. Pro Arts Inc.*, 562 F. Supp. 304 (S.D.N.Y. 1983) – involved actions seeking damages directly from parties that had benefitted from wrongfully issued injunctions. As the Court in *Emerald Partners* pointed out in footnote 22, *Atomic Oil* was an independent action on a discharged bond, and *Factors* involved a motion to reinstate a discharged bond.

The Vice Chancellor believed that these two decisions "make sense" (Opinion, P. 6). But it is difficult to see how. The Vice Chancellor was certainly

[17] The Court in *Emerald Partners* pointed out that the Defendants submitted an affidavit that claimed damages of up to $1.5 million. Yet Defendants did not object when stock valued at substantially less than $500,000 was substituted. 712 A.2d at 1011 (footnote 25).

aware of the injunction bond rule, and that it serves to set a ceiling on any damage recovery. *Emerald Partners* made it clear that damages could not exceed the bond, and yet the defendant in that case acquiesced in the substitution of stock as security at a time when its value was substantially less than the original bond amount, and knowing that the amount of damages it might recover at a later hearing was significantly greater.

Here, Fairway Cap reached an agreement with Insight that included recognition that its damage claims had been resolved, and that as a result the bond would be withdrawn. Fairway Cap should have been held to decisions it made with respect to the bond, and should have been precluded from seeking damages following trial. The Chancery Court erred in permitting the damage action to go forward.

CONCLUSION

For the reasons set forth herein, the Decisions by the Vice Chancellor approving the commercial rental complex should be reversed.

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