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IN THE

Supreme Court of the State of Delaware

CONCERNED CITIZENS OF THE ESTATES OF FAIRWAY VILLAGE, JULIUS H. SOLOMON, PEGGY A. SOLOMON, EDWARD D. LEARY, LISA P. TORRINI LEARY, KENNETH P. SMITH, DENISE M. SMITH, TERRY L. THORNES and CARMELA M. THORNES,	)	No. 332, 2020
Appellants/ Plaintiffs-Below,	)	Trial Court Below: Court of Chancery for the State of Delaware
v.	)	C.A. No. 2017-0924-JRS (Consolidated)
FAIRWAY CAP, LLC, and COMMUNITY CONSTRUCTION, INC.,	)	
Appellees/ Defendants-Below.	)	

APPELLEES/DEFENDANTS-BELOW ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Appellants filed a verified complaint against Appellees on December 28, 2017, therein asserting claims for breach of contract, breach of fiduciary duties and fraud.

On January 25, 2018, Appellants filed a motion for preliminary injunction requesting that Appellees be enjoined from continuing construction of townhouse-condominiums in Community and conducting any leasing in Community (the "PI Motion"). A nearly identical motion for preliminary injunction was filed in a companion case brought against Appellees by builder, 36 Builders, Inc. d/b/a Insight Homes ("Insight"), which had purchased townhome condominium lots from Appellees in Community (the "Insight Motion"). The trial court heard oral argument on both motions for preliminary injunction on March 20, 2018 and granted the same in part, enjoining Appellees from entering into new leases for townhome-condominiums in Fairway Village. (A693-694). The Court required Insight and Appellants to post an injunction bond of $354,858 "to be allocated among the Plaintiffs as they deemed appropriate" as a pre-condition for the injunction. (A694). The preliminary injunction was entered as an order on April 6, 2018 (the "PI"). The injunction bond was posted solely by Insight on June 4, 2018. (B1-20, 304 at ¶ 3).

Appellants' claims for breach of fiduciary duties (Count II) and fraud (Count III) were dismissed in a bench ruling on April 19, 2018, upon motion of Appellees.

After mediation before retired Justice Randy J. Holland, Insight and Appellees reached settlement and voluntarily dismissed the claims they asserted against each other and Insight moved to release the injunction bond, which was unopposed. (A695-700). However, Appellees contended that Appellants should be required to post a matching replacement bond or, alternatively, that the PI should be released and reserved the right to pursue damages they incurred during the pendency of the PI. (A701-706). Appellants contended that at most they should be required to post a cash bond of $1,000. (B21-22, 41-44). By order dated August 14, 2018, the court released the existing bond, did not require a substitute bond and maintained the PI. (B45-47).

After a one-day trial and post-trial briefing and argument, the court issued a Memorandum Opinion on March 6, 2019, finding in favor of Appellees as to the single, remaining claim of breach of contract. (Appellants' Op. Br., Exhibit A). Appellants and Appellees submitted a proposed form of order of judgment, which was entered on March 14, 2019. (Appellants' Op. Br., Exhibit B). The order and judgment, which was jointly drafted and submitted, expressly reserved jurisdiction for the court to entertain Appellees' motion for an award of damages relating to the PI. (*Id*. at ¶ 4).

On March 29, 2019, Appellees filed a motion for an award of costs and/or consequential damages arising from the PI (the "Damages Motion"). (B48-247).

Appellants argued the Damages Motion was procedurally barred. (B248-301). The court issued a bench ruling on August 16, 2019, concluding that Appellees had the right to seek damages occasioned by the PI. (Appellants' Opening Br., Exhibit C). The Damages Motion proceeded through two rounds of briefing and oral argument before the court awarded Appellees $113,197.00, representing harm they sufficiently demonstrated was proximately caused by the PI. (Appellants' Opening Br., Exhibit D). The parties prepared and jointly submitted an amended form of final order that was entered on September 11, 2020. (Appellants' Op. Br., Exhibit D). Appellants brought this appeal on September 29, 2020.

SUMMARY OF ARGUMENT

I. The trial court correctly held that Community governing documents authorized any property owner to lease their unit, did not differentiate between any of the "developers" as owners and subsequent purchasers as owners, and did not limit the number of units any owner could control. The court reached this conclusion by objectively interpreting the subject contract, by confirming the contracting parties' intentions through examining the four corners of the governing documents and testimony of those involved in preparation of the documents, and by examining the contract in the context of the business relationship among the parties and as reflected in the market realities presented. In reaching these conclusions, the court correctly found that the governing documents formed a clear and unambiguous contract that did not prohibit Appellees from owning and leasing townhouse-condominiums in Community.

II. The trial court correctly held that neither Community governing documents nor any law or regulation imposed a limitation on the number of townhouse-condominiums any owner (including Fairway Cap) could own or lease. In reaching this conclusion, the court found that Appellants offered no basis in law or fact upon which the court could justify implying or inserting such an ownership restriction, retroactively. Appellants argued below that an ownership limitation should be imposed on Fairway Cap only (and not on themselves or their neighbors)

so that all owners could access federally backed mortgages. The court examined all of the governing documents and concluded that no such limitation was explicitly or implicitly imposed. Trial testimony by Appellants themselves and both sides' experts confirmed that it is commonly known that there are communities, unlike Community, that do have the ownership and leasing limitations Appellants seek to impose. In sum, Appellants knowingly chose or reasonably and objectively were deemed to have knowingly chose to purchase units in Community, which did not restrict the number of units anyone could own and lease; perhaps doing so under an unreasonable, subjective belief that the documents governing Community would later be amended to so restrict ownership and leasing.

III. The court correctly held that majority ownership of the townhouse-condominiums in Community would not permit Fairway Cap to violate provisions governing owners. There is no language in the Regulations or any other governing documents, nor precedent in law or equity, that supports Appellants' contention that Appellees were restricted from voting the percentage interests expressly assigned to such units on a pro rata basis. Appellants' subjective beliefs and misunderstandings of the impact of the governing documents are unreasonable in view of the clear language of the governing documents, which each of the Appellants received, reviewed and had the opportunity to discuss with their legal counsel before purchasing in Community. The trial court correctly reached this conclusion by

considering what an objective party would have understood upon review of the governing documents. Further, Appellants are protected by the Delaware Uniform Common Interest Ownership Act, which requires the Condominium Council to act with the appropriate degree of care and loyalty to the Condominium such that it may not be operated for the exclusive benefit of any owner, including Fairway Cap.

IV. The trial court correctly held that Appellees were entitled to recover damages for the wrongful issuance of the PI, even in the absence of an injunction bond posted by Appellants. The court's exercise of its discretion in determining that Appellants would not need to post security to maintain the PI (over the objection of Appellees) did not prevent the Appellees from later recovering damages when they prevailed after trial. In this regard, the trial court correctly determined that Appellees expressly reserved their rights to pursue damages occasioned by the PI post-trial, and awarded Appellees $113,197.00, which was less than original injunction bond amount of $354,858.00 (an estimated amount that projected loss rental revenue without the delays subsequently experienced in obtaining certificates of occupancy from the Town of Ocean View (*see infra* at 38)) that was posted by a party other than Appellants.

COUNTER-STATEMENT OF FACTS

I. Identification of the Parties

The Appellants, Plaintiffs-below ("Appellants"), are: (1) "Concerned Citizens of the Estates of Fairway Village", representing approximately 138 households owning single-family homes and townhouse-condominiums in The Estates of Fairway Village (the "Community"); and (2) eight individuals (who are also members of Concerned Citizens) who own units in Community.

Appellees, Defendants-below, are: (1) Fairway Cap, LLC ("Fairway Cap"), the "developer" of Community pursuant to Community's governing documents and the owner of a number of townhouse-condominiums in Community and undeveloped townhouse-condominium lots in Community; and (2) Fairway Village Construction, Inc. ("Fairway Construction"), the entity that constructs townhouse-condominiums in Community on lots owned by Fairway Cap.

II. Formation and Structure of Fairway Village

A. *Formation of The Estates at Fairway Village*

Community consists of single-family houses and townhouse-condominiums and is located in Ocean View, Delaware. Community was formed upon the recording of a subdivision plan allowing for up to 166 single-family houses and 166 townhouse-condominiums. The subdivision plan was subsequently amended and neither the subdivision plan nor the amendments thereto are contained in the parties'

appendices in this appeal because there is no dispute that these documents do not contain limitations on the rights of owners that are relevant to this litigation.

B. *Condominium Regime in Fairway Village*

A condominium regime (the "Condominium") was created for the 166 townhouse-condominiums planned for Community through the recording of a Declaration Plan (the "Enabling Declaration"). (A135-181). The initial "Developer" as defined in the Enabling Declaration was Estates of Fairway Village, LLC, an entity unaffiliated with Appellees. Accompanying the Enabling Declaration as Schedule D is a certain "Declaration of Easement" that allowed the Developer the ability to change the location of townhouse-condominium buildings to improve views and parking and to harmonize utilities. (A166-171).

The Enabling Declaration expressly permits owners of townhouse-condominiums in Community, including Fairway Cap, to rent their units. Specifically, Article 9(a) of the Enabling Declaration is titled "Use of Units and Common Elements" and provides that "that Developer shall be entitled to use a unit or units as 'Models' or 'Samples' for the purpose of selling or renting Units in the Condominium . . . ." (A145). Article 9(f) provides that "except for the Developer, its successors and assigns, and the agents thereof, no 'For Sale' or 'For Rent' signs or other window displays or advertising shall be maintained or permitted on any part of the Property or in any Unit therein without the prior written consent of the

Council. The right is reserved by the Developer or its agents to place 'For Sale' or 'For Rent' signs on any unsold or unoccupied Units or at suitable places in the Common Elements . . . ." (A146).

C. *Master Homeowners Association and Condominium Council*

Community is further governed by a master homeowners association -- Estates of Fairway Village Community Association, Inc. (the "Master HOA"). The Master HOA operates under the direction of a Board of Directors (the "Master HOA Board") and pursuant to guidelines set forth in a Constitution and By-laws. Each owner of a single-family home or townhouse-condominium is entitled to vote as a member of the Master HOA. Initially, all three members of the Master HOA Board were appointed by the Developer. (B410-411 at Art. III § 1; B412 at Art. IV § 1). Incrementally, as single-family homes and townhouse-condominium units are "occupied," the owners of the units are entitled to elect the members of the Master HOA Board and Developer will no longer appoint any members after a prescribed period. (B410-411 at Art. III)

The townhouse-condominiums in Community are further governed by a Code of Regulations (the "Regulations"), which were recorded to create an unincorporated, non-profit association (the "Condo HOA"). (A182-223). The Condo HOA initially operated under the direction of a three-member Council (the "Condo Council"), consisting of members appointed by the Developer pursuant to

the Regulations. (A221 at § 15.2). The Developer will no longer appoint any members to the Condo Council after a prescribed period. (A183 at § 2.2).

The Regulations do not prevent the Developer (or any other owner) from: (1) leasing a townhouse-condominium to residential occupants; or (2) owning more than a certain number of townhouse-condominiums. To the contrary, the Regulations anticipated rentals. For example, Article 5.16 is dedicated to leasing:

> "Section 5.16. Leasing.
>
> "The Developer or the Association may from time to time adopt rules and regulations pertaining to the rental of Units. Owners of rented Units shall be personally liable for the failure of a tenant or any invitee of a tenant to abide by rules and regulations pertaining to the use or occupancy of the Development. The Owners of any units shall obtain the approval of the Developer or the Association for any lease forms for the leasing of units within ESTATES OF FAIRWAY VILLAGE CONDOMINIUM." (A201-202).

Additionally, Article IX of the Regulations is dedicated entirely to sales, leasing, and alienation of units:

> "ARTICLE IX
>
> "Sales, Leases, and Alienation of Units
>
> "Section 9.1. No Severance of Ownership.

"No Owner shall execute any deed, lease, mortgage or other instrument conveying or mortgaging the title to his Unit without including therein the undivided interest of such Unit in the Common Elements, it being the intention hereof to prevent any severance of such combined Ownership and Interest. […]" (A211-212).

"Section 9.2. Payments of Assessments

"No Owner shall be permitted to convey, mortgage, hypothecate, sell, lease, give or devise his Unit unless and until he (or his personal representative) shall have paid in full to the Council all unpaid Common Expenses […]." (A212).

"Section 9.3. Registration of Leases and Rental Agreements.

"Every Unit Owner, within ten (10) days of entering into a lease or any other agreement for the occupancy or use of his Unit (including, but not limited to, any rental agreement that may be excluded under the Delaware Landlord Tenant Code under 25 *Del. C.* § 5102), shall supply a copy of any such lease or other agreement to the Council […]. Any such rental agreement shall also expressly provide that such rental agreement is subject to the provisions of the Act, the Declaration, this Code of Regulations and the Rules and Regulations and that any failure

of the lessee to comply with such provisions shall constitute a default under the rental agreement." (A212).

Further, the rental of townhouse-condominiums owned by the Developer were specifically addressed in Article XIII of the Regulations as follows:

"ARTICLE XIII

"Amendments to Code of Regulations

"Section 13.2.

"Notwithstanding the provisions of Section 13.1 above, so long as Developer owns one or more Units subject to this Code of Regulations, no amendment to this Code of Regulations shall be adopted which, in Developer's sole subjective and absolute opinion, may materially or adversely interfere with or affect (i) the lease, sale, other disposition or use of any Unit(s) owned by Developer […]." (A216).

III. Fairway Cap LLC Acquires the Developer's Rights

Fairway Cap acquired and succeeded to the rights of Estates of Fairway Village LLC, as "Developer," pursuant to a Sales Agreement dated June 24, 2011.

IV. Sales of Townhouse-Condominiums are Anemic, Causing Appellees to Decide to Retain and Lease Remaining Units

Fairway Cap and other builders had difficulty selling townhouse-condominiums in Community.

The original builder, NVR t/a Ryan Homes, constructed and sold only six townhouse-condominiums in Community over a two-year period before electing in 2010 to terminate their lot purchase agreement, which caused them to forfeit the right to build on an additional one-hundred and sixty lots and surrender $700,000 as liquidated damages. (A-442-443).

Likewise, Insight had difficulty selling townhouse-condominiums in Community. In fact, on two separate occasions Insight was sent notices of default because it failed to take down lots within time restrictions in its agreement with Fairway Cap. (A-460).

To generate sales, Fairway Cap constructed a model and several "spec" units, employed a sales team and aggressively advertised. (A-509).

Almost two years were required to sell the first four units constructed by Fairway Construction and an additional year before three of the next four units it constructed were sold. (B758). The third four-pack of units constructed by Fairway Construction took more than eleven months to sell, and only one of the four units in the next "pack" ever sold. (*Id*.). Sales were so slow that Fairway Cap's construction

lender declared that Fairway Cap owed an immediate payment on its loan for failing to meet sales covenants. (B467-476).

In the winter of 2016, after more than three years of attempting to sell townhouse-condominiums, Fairway Cap commissioned a "Preliminary Market Assessment" to evaluate options. This consultant concluded that it was financially viable for Fairway Cap to retain and lease townhouse-condominiums is had already constructed and failed to sell in Community and those it would construct on lots it controlled. (B809).

V. Appellants React Negatively to Appellees' Plan to Own and Lease

Appellants reacted negatively to Appellees' plan to own and lease in Community. As the initial effort to scuttle Appellees' plans, Appellants first sought to convince the Town of Ocean View to stop issuing building permits to Appellees because they were purportedly violating the terms of Community governing documents. Appellees' efforts succeeded in part because permits were temporarily delayed until the Town of Ocean View had an opportunity to speak with Appellants and review the controlling documents, which led it to conclude that Appellees' plan did not violate the terms of any recorded plans, documents or laws/regulations and was permissible. (B-429-443; B914-915) (noting on B915: "The fact that the developer has chosen to remain the owner of multiple townhouses, rather than sell them, doesn't change the law, the Code or the rights of individual homeowners. It

simply makes the developer an owner of multiple housing units, subject to the same rules and regulations as anyone else under the Town Codes. . . .").

Having failed to convince the Town of Ocean View that Appellees should be prevented from owning and leasing in Fairway Village, Appellants filed the complaint that initiated this litigation.

ARGUMENT

I. THE COMMUNITY GOVERNING DOCUMENTS EXPRESSLY AUTHORIZE FAIRWAY CAP OWNING AND LEASING TOWNHOUSE-CONDOMINIUMS

A. Question Presented

Did the trial court err in not construing Community governing documents, including the Condominium, as prohibiting Appellees from retaining ownership of and leasing townhouse-condominiums?

Appellees' Response: No.

B. Standard and Scope of Review

The construction of a contract is reviewed by the Delaware Supreme Court *de novo*. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Argument

1. *Delaware's objective theory of contract interpretation*

Delaware has long adhered to the objective theory of contract interpretation, which requires that a contract's construction be that which would be understood by an objective, reasonable third party. *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014). In objectively interpreting a contract, the fact finder is to give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions. *Id*. This Court has stressed that in interpreting contracts, the fact-finder must look to the language

contained within the corners of the written contract with a view toward the business relationship between the parties and the market realities in which the parties contracted. *See Heartland Payment Sys., LLC v. Inteam Assoc., LLC*, 171 A.3d 544, 557 (Del. 2017) (citing *Chi. Bridge & Iron Co. N.V. v. Westinghouse Electric Co. LLC*); *Chi. Bridge & Iron Co. N.V. v. Westinghouse Electric Co. LLC*, 166 A.3d 912, 926-27 (Del. 2017).

"While [Delaware courts] have recognized that contracts should be 'read in full and situated in the commercial context between the parties,' the background facts cannot be used to alter the language chosen by the parties within the four corners of their agreement." *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 820 (Del. 2018) (citing *Chi. Bridge & Iron Co. N.V.*, 166 A.3d at 926–27). When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract. *Salamone*, 106 A.3d at 370.

A condominium declaration and its accompanying code of regulations together form an "ordinary contract" between the unit owners, and, initially, the developer. *Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 5 (Del. 2002). As with any other contract, the intent of the parties that drafted a condominium's declaration and code of regulations and those that have purchased

units subject to the same must be ascertained from the language of the documents. Where the language in a condominium declaration is clear and unambiguous, the fact finder must accord that language its ordinary meaning. *Id*. "As with any other contract, the intent of the parties to a condominium declaration or code of regulations must be ascertained from the language of the contract. Where that language is clear and unambiguous, this court will accord that language its ordinary meaning." *Bethany Marina Townhouses Phase II Condo., Inc. v. BMIG, LLC*, 2017 WL 4512213, at *4 (Del. Oct. 10, 2017) (quoting *Council of Dorset Condo. Apartments*).

When interpreting a contract that allegedly contains restrictions on the use of real property, the court must remain mindful that the law will facilitate the free use of land when not otherwise validly restricted. *Gammons v. Kennett Park Dev*., 61 A.2d 391, 397 (Del. Ch. Sept. 2, 1948). Thus, Appellants bore the burden at trial to identify where Appellees were restricted in the use of their property, by positive law, contract or otherwise, and how those restrictions had been breached. *Id*. *See also Regency Gp., Inc. v. New Castle Cty*., 1987 WL 1461610, at *2 (Del. Ch. Dec. 3, 1987) (holding that restrictions on "the free use of property must be strictly construed.").

2. *The Community Governance Scheme and Initial Developer's Intent Regarding the Same Are Clear and Consistent and Support the Trial Court's Finding that Appellees Were Not Restricted from Owning and Leasing*.

There are no provisions in any of Community governing documents that prohibit any person, including Appellees, from owning any number of townhouse-condominiums and leasing them to residential occupants. Similarly, there are no provisions that prevent Fairway Cap from building to own and lease, and once a Certificate of Occupancy is issued, thereafter being an owner (as opposed to developer) of those units without having to perform the ministerial and transfer tax free act of conveying such units to a new entity. In fact, the governing documents expressly permit Fairway Cap to own and lease townhouse-condominiums as the trial court recognized.

Considering first the Constitution, it expressly contemplates the leasing of single-family homes and townhouse-condominiums to residential occupants. Article 3, titled "PROPERTY RIGHTS", provides as follows in Section 3.1: ". . . Any owner who leases his/her Living Unit shall be deemed to have assigned his/her right to utilize the Community Property to the lessee of the Living Unit." (A74-75). Further, in Article 10 titled "COMMUNITY CODES" Section 10.1 explicitly provides that: "Every provision of the Governing Documents, including the Community Codes, shall apply to all Owners, tenants, occupants, guests and invitees of any Living Unit. All owners who lease their Living Units shall include a notice provision in the lease

informing the tenant and all occupants that the Living Unit and Community Property are subject to the Governing Documents, including the Community Codes. [….]" (emphasis added) (A94-95). The trial court recognized that the foregoing provisions anticipated that persons other than owners might reside in Community. (Appellants' Op. Br., Exhibit A (hereinafter "Tr. Op.") at 18).

Similarly, Section 10.4 of the Constitution provides that: "No Community Code shall prohibit outright the leasing or transfer of any Living Unit, or require consent of the Association for transfer of any Living Unit." (emphasis added) (A97). The trial court also noted this provision barred any restriction on the outright leasing of any unit. (Tr. Op. at 19).

The Enabling Declaration further recognizes that units may be owned and leased by artificial entities. This intent is initially reflected in the definitions. Section 2 of the Enabling Declaration, defines "Unit Owner" as not just a natural person, but also corporations, partnerships, associations, trusts or other legal entity or combination thereof. (A138). Similarly, "building" is defined as "the buildings used or intended to be used for residential purposes (including leasing of units for residential purposes) . . . . " (A135).

Article 9 of the Enabling Declaration expressly contemplates Community "Developer" owning and leasing units. Article 9(a) requires all townhouse-condominiums be used for residential purposes and expressly allows Fairway Cap

to use a unit or units as "models" for the purpose of ". . . renting Units…." (A145). Likewise, Article 9(f) allowed Fairway Cap to place "For Rent signs or other window displays." (A146).

In light of these provisions, Appellees' reliance upon a recital in Schedule D to the Enabling Declaration as supportive of its claim is misplaced because: (1) the recital is not incorporated into the Enabling Declaration (*see Gray v. Masten*, 983 WL 142520, at *2 (Del. Ch. Aug. 16, 1983) (holding a recital is not a binding covenant)); (2) is not intended to be a binding commitment on the part of the Developer to never own and lease units, it merely reflected an initial intent to sell units; and (3) when considered in light of the overall language of the Enabling Declaration (versus in a vacuum), there is a consistent and clear intent to permit units to be leased by Fairway Cap or any other owner (*Chicago Bridge, supra*).

The Regulations are likewise explicit as to the ability of every owner to lease. Article 5.16 titled "Leasing" authorizes "[t]he Developer or the Association may … adopt rules and regulations pertaining to the rental of Units ...." (A201). Article IX of the Regulations titled "Sales, Leases and Alienation of Units" contains Article 9.1, which prohibits any owner from executing any lease without including therein the undivided interest of such Unit from the Common Elements. (A211-212). Additionally, Article 9.2 titled "Payments of Assessments" provides that "No Owner shall be permitted to . . . lease . . . unless and until he (or his personal representative)

shall pay in full to the Council all unpaid Common Expenses." (A212). Article Section 9.3 titled "Registration of Leases and Rental Agreements" requires "every Unit Owner, within ten (10) days of entering into a lease or other agreement . . . shall supply a copy of such lease or other agreement to the Council . . . ." (A212). The trial court cited to the foregoing sections of the Regulations in its post-trial Opinion.

In addition to the recorded documents, the trial court noted that Appellees' form purchase agreement used for the sale of townhouse-condominiums in Community also clearly supplied notice of their right to retain and lease units. (Tr. Op. at 21) (the purchase agreement provides: "Buyer further understands and agrees that Seller shall own, may vote in connection with, may further improve, and may rent any unsold unit, and in connection therewith shall have no lesser rights, privileges and powers than any other unit owner."

The trial court also weighed testimony regarding the original Developer of Condominium's intent that it be permitted to own and lease units. The court found Appellees' witnesses' testimony to be persuasive and consistent with the written documents. Legal counsel for the initial builder of townhouse-condominiums, NVR-Ryan, testified in an inconclusive manner as to the original Developer's intent despite his preparation of the initial drafts of the Enabling Declaration and Regulations. (Tr. Op. at 6-7). This is so because NVR-Ryan did not have a long-term commitment to Community, and, in fact, walked away from their option

contract after constructing only six townhouse-condominiums. (*Id*.). Accordingly, the trial court recognized that the interests and motivations of builder NVR-Ryan and the original Developer were distinct and not aligned, and, thus, the testimony of a representative of NVR-Ryan was of little value in demonstrating the intent of the actual party to the documents governing the Condominium, the Developer.

The original Developer's attorney, Mr. Frabizzio, was actively involved in the preparation of the formation and governing documents for Community and Condominium and testified that he provided NVR-Ryan's counsel with input on the same and ensured that they gave Developer (and subsequent Developers) maximum flexibility to respond to market conditions in constructing Condominium. (A447-452). The court assigned appropriate weight to, and frequently cited, Mr. Frabizzio's trial testimony in its post-trial opinion, as he could directly confirm the original Developer's intent. Such reliance by the trial court is a credibility determination that will not be set aside unless found to be clearly erroneous. *See Genger v. TR Inv'rs, LLC*, 26 A.3d 180, 190 (Del. 2011) (quoting *Cede & Co. v. Technicolor, Inc*., 758 A.2d 485, 491 (Del. 2000).

In sum, the trial court had ample evidence in the record to reject Appellees' contention that Appellants were not provided reasonable and clear notice that Fairway Cap (or any other party) may own and lease an unrestricted number of units in Condominium.

Appellants also claim that Appellees' decision to own and rent units "altered" the Condominium regime and required the approval of all owners in Condominium. (Appellants' Op. Br. at 20-22). Fairway Cap's decision to own and rent was not its original strategy and was a change to respond to market conditions. However, as the trial court recognized, Fairway Cap's decision to own and lease did not in any way alter the Condominium regime or require any amendments to Community's formation or governing documents. The trial court accurately concluded that the change in Fairway Cap's business strategy did not require any amendments to the "contract" between the Developer and owners, unlike the *Pilot Point* case cited by Appellants where the developer sought to rely upon a power of attorney executed by all purchasers in the subject community to unilaterally amend the community's governing documents to allow for the construction of more units than currently permitted. (Tr. Op. at 33-34).

Appellants' contentions that Fairway Cap's leasing of multiple units to long-term lessees constitutes a commercial enterprise, will hurt property values and negatively impact the Community's character is an unfortunate mischaracterization of renters, was unsupported by the evidence, and is ironic given that Appellants and many other Community owners regularly rent their units. The leasing of multiple residential units for profit in Condominium is not a forbidden commercial enterprise under the documents, laws and regulations governing Community. The trial court

did not delve into the merits of Appellants' assertions of harm because it concluded that Appellants failed to demonstrate that the governing documents or laws restricted Appellees from leasing in the manner envisioned.

II. THE TRIAL COURT CORRECTLY HELD THAT NEITHER THE COMMUNITY'S GOVERNING DOCUMENTS NOR ANY LAW OR REGULATION IMPOSED A LIMITATION ON THE NUMBER OF TOWNHOUSE-CONDOMINIUM UNITS AN OWNER COULD PURCHASE OR LEASE-OUT

A. Question Presented

Did the trial court err in not concluding that Appellees breached the terms of a contract with Appellants by planning to own and rent a number of townhouse-condominiums that may disqualify the Condominium from federally-backed mortgages?

Appellees' Response: No.

B. Standard and Scope of Review

The construction of a contract is a question of law that is reviewed by the Delaware Supreme Court *de novo*. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Argument

Appellants contend that the availability of federally-backed mortgages for the purchase of townhouse-condominiums in Community was a fundamental, but implied, aspect of the contract between the parties. However, Appellants cite no contract provisions or other precedent supporting such position. Rather, Appellants make a circuitous attempt to impose such an obligation through a tortured reading of a single provision of the Regulations that allows the Developer the ability to

amend the governing documents in its discretion in order to comply with governmental requirements. (Appellants' Op. Br. at 24). The subject provision cannot be objectively interpreted as a guarantee or requirement that the Developer ensure that the Condominium qualify for federally-backed mortgages for future purchases or refinancings. The trial court properly reached this same conclusion. (Tr. Op. at 12-13).

Appellants ignore a fundamental flaw in their position that Appellees have no obligation to ensure that Community be structured in such a way as to promote or guarantee compliance with federal mortgage programs. Further, there is nothing limiting any owners (including the Appellees) from owning any number of townhouse-condominiums and leasing the same to ensure that the Community remains qualified for federally backed mortgages. Appellants seek to unilaterally and retroactively impose such restrictions on Appellees despite the fact that certain Appellants testified at trial that they were aware that there are communities with governing documents that expressly impose such limitations or requirements. (A411-413). In fact, Appellants Lisa P. Torrini Leary and Edward D. Leary owned a unit in a Florida community at the time of trial that contained such limitations. (*Id*.). Ms. Leary testified that her Florida community amended its governing documents in 2014 to restrict: (1) the number of units that may be held by a single entity or person; as well as (2) the number of units that may be rented in the

community at any particular time. (A409-413). Appellants were free to purchase units in communities containing such ownership restrictions if they were concerned about the availability of access to federal mortgage programs. Their subjective belief/hope that Community governing documents would be amended in the future to include such restrictions is not an element of the "contract" between the owners and Developer. Rather, it is speculation.

Further, Appellants conceded at trial that the governing documents do not limit the number of units other non-developer owners can purchase and lease even though ownership concentration by any party would equally jeopardize access to the federal mortgage programs. (A413). Appellants selectively seek to impose such limitations and restrictions exclusively on Fairway Cap alone and not on themselves or their neighbors despite the fact that a limitation on ownership by any party would be required to ensure qualification for the federal mortgage programs.

Appellants ignore the flaws and inconsistencies of their argument and focus on the alleged and speculative harms they believe the owners of townhouse-condominiums will suffer if Community is deemed non-conforming for the federal mortgage programs. These speculative harms were disputed at trial, but were not addressed in detail by the trial court in its opinion because Appellees could not demonstrate that there was an applicable contractual obligation.

Nevertheless, Appellants conceded at trial and the parties agree that the owners of single-family homes in Community will not be impacted in any manner as to their ability to obtain conforming federally backed mortgages or refinancing based upon the number of townhouse-condominiums Appellees own and lease because single-family home ownership is evaluated differently under the guidelines. (A358; B446).

The trial court recognized Appellees' current plan is to retain ownership of and lease more than 76% of the townhouse-condominiums in Community. (Tr. Op. at 12-13). The court concluded, consistent with Appellants' expert, that Appellees' planned multi-unit ownership would render Community "non-conforming" for purposes of securing federally backed mortgage financing. (Tr. Op. at 12-13). At trial, Appellants and their experts conceded or did not dispute that other mortgage options beyond these federally-backed loans are available to purchasers or those seeking to refinance. (A335-346).

The documents forming and governing Community and Condominium are conspicuously silent with respect to unit ownership limitations or guarantees of mortgage availability. There are no such provisions imposing any obligation or restriction on the Appellees, as the successor developers, or any other owner for that matter. Similarly, there are no provisions that restrict the subsequent leasing of such units in a manner that disqualifies townhouse-condominiums in Community from

federally backed mortgages. Appellants ask this Court to re-write the parties' contract to impose such obligations and restrictions and to rule that Appellees guaranteed the availability of specific financing options.

The absence of any such restrictions or requirements in the governing documents is conspicuous. This is so because Appellants' own expert testified at trial that it is not uncommon for condominium formation and governing documents to contain a limitation on the number of units a particular owner may hold. Specifically, he testified that such a restriction is imposed in part so that an individual owner does not accumulate a concentration of units that may disqualify the community from meeting underwriting standards for federally-insured mortgages. (A350). As Appellants' mortgage expert testified, absent a restriction in the governing documents that limits the number of units a particular owner may hold, there is nothing prohibiting an entity or individual from acquiring, owning or renting-out any number of units. (A351).

Appellants argue that considering the limitations in the documents governing the Learys' Florida condominium is off-point because the 2014 changes made to those governing documents were accomplished by the unit owners after the developer ceded control over the condominium. (Appellants' Op. Br. at 34). However, this argument cuts against Appellants' contention that they were unaware of the Appellees' potential to own and lease and that Condominium had no controls

that limited the number of units that may be owned and leased by a party. Appellants' subjective hope that Community governing documents could be amended in the future to limit multiple unit ownership and to restrict rentals further undermines their notice arguments and cannot be relied upon to support this Court imposing such restrictions retroactively where is it clear that the existing documents do not currently contain such restrictions or promise the same in the future. (A413). *See Vituli v. Carrols Corporation,* 2013 WL 2423091 at *2 (Del. Super. Mar. 28, 2013) (court declined to impose one party's "unilateral intent" and refused to "cast aside basic contract principles, such as not forcing parties to a contract to do something they have not agreed to do."); and *Hough Assoc., Inc. v. Hill*, 2007 WL 148751 at *12-13 (Del. Ch. Jan. 17, 2007) (court declined to impose one party's "subjective perception" and opined that "the job of the judiciary is not to implement what appears after-the-fact to have been an optimal strategy. Rather, courts are charged with enforcing the deals that parties actually make.").

The trial court summed-up this analysis succinctly near the conclusion of its opinion:

> As Plaintiffs' [sic] expert, Michael Morton, Esquire, explained, and as seen in the governing documents for the Florida condominium owned by Plaintiffs Ed and Lisa Leary, the Community governing documents could have prohibited a single owner from owning more than a designated number of units, limited the number of units that an owner can rent, or limited the time in a given year that a unit may be offered for rent. They also could have

limited the number of votes any given owner could cast, and thereby limit the influence any one owner could wield over the homeowners or condominium associations. None of these restrictions appear in the Community governing documents. And Plaintiffs have offered no basis in fact, or in law, upon which the Court could justify writing these restrictions into the governing documents ex post. (Tr. Op. at 35-36, footnotes omitted).

III. THE TRIAL COURT CORRECTLY HELD THAT MAJORITY OWNERSHIP OF THE TOWNHOUSE-CONDOMINIUMS WOULD NOT PERMIT FAIRWAY CAP TO VIOLATE PROVISIONS GOVERNING OWNERS

A. Question Presented

Did the trial court err in failing to conclude that Appellees breached the terms of a contract with Appellants by planning to own and rent a number of townhouse-condominiums in Community because it will allow them to cast a large number of votes and avoid financial obligations, rendering Community's governance scheme and financial structure illusory?

Appellees' Response: No.

B. Standard and Scope of Review

The construction of a contract is reviewed by the Delaware Supreme Court *de novo*. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010).

C. Argument

Conceding as they must that the voting rights for the Condominium are clearly spelled out in the Regulations, Appellants do not allege that the prescribed voting rights are ambiguous or unfair on their face. Rather, they contend that it is inequitable for Fairway Cap to own so many units, retain a large voting block and exert voting control over Condominium HOA. (Appellants' Op. Br. at 29). Yet, Appellants do not and cannot point to any language in the Regulations or other governing documents, or any other precedent at law or equity, that supports their

theory. While Appellants may not have envisioned that there would be one party owning multiple or even a majority of the units, or that such owner would be Fairway Cap, the Appellants' subjective beliefs are unreasonable in view of the clear language in the governing documents, which Appellants each received and had the opportunity to review with their legal counsel before closing. These documents do not restrict Appellees or other owners from owning multiple units and voting the percentage interests assigned to such units pro rata. The trial court correctly reached its conclusion by considering what an objective party would have concluded from their review of these documents. (Tr. Op. at 25-26).

Appellants further argue that if Fairway Cap has the majority voting authority with respect to Condominium that they will operate the same to their exclusive benefit and to the detriment of all other owners. (Appellants' Op. Br. at 29-32). Appellants' concern regarding the potential for mismanagement of Condominium is speculative in nature, and such hypothetical harm is not a recognized form of damages. *See Coleman v. Garrison,* 327 A.2d 757, 761 (Del. Super. 1974) (*citing Laskowski v. Wallis,* 205 A.2d 825 (Del. 1961). Further, there are rules and requirements governing the operation of Condominium that are codified in the Delaware Uniform Common Interest Ownership Act (25 *Del. C.* § 81-101 *et seq*.) ("DUCIOA") and must be followed.

Among DUCIOA requirements is an obligation that Condominium Council act in the best interests of Condominium and perform its duties with a degree of care and loyalty. (25 *Del. C.* §81-303(a)). The duty of care obligates Condominium Council members to act in an informed and non-negligent manner. (*Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). The duty of loyalty requires Condominium Council members to protect the interest of Condominium and to refrain from conduct that would injure Condominium HOA or unit owners. (*Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985)). Thus, Condominium Council is required to perform their duties competently and for the benefit of Condominium at large.

Additionally, DUCIOA obligates a condominium association, through its board/council, to appropriately maintain, repair, and replace the condominium's common elements, and requires each unit owner to properly maintain and repair their unit. (25 *Del. C.* §81-307).

Given the rules and obligations imposed by DUCIOA, the mismanagement Appellants speculate might happen cannot occur without their being an available remedy. In short, Condominium Council cannot operate in a manner that is detrimental to the Condominium as a whole.

Appellants also argue that by retaining ownership of the majority of townhouse-condominiums and leasing them, Fairway Cap can effectively remove the assessment obligations attached to these units, creating a significant financial

burden on Community. (Appellants' Op. Br. at 31). Appellants wholly ignore that Appellees have paid all initial assessments and regular assessments for every unit it decided to own and lease and committed to paying all assessments for all units that will be constructed. (B437). Appellants speculate that Appellees could stop this practice in the future and harm Community's finances. However, it would make no sense for the largest owner of townhouse-condominiums, thus having the greatest financial interest in Community, to cause fiscal harm to Community. Further, Appellees confirmed, and the trial court acknowledged, that they have never missed an assessment for any residential unit in any community in which they own and lease units. (A507).

Fairway Cap paid the assessments for each unit in Condominium once it decided to retain and lease the same because it believed that the exception for assessments in § 5.7 of Constitution was no longer applicable, such exception having been intended to absolve the Developer of the requirement to pay assessments for units only during the period in which it was actively seeking to sell the same. The trial court implicitly agreed, holding that Fairway Cap's rental units would remain subject to all of the obligations imposed by Community governing documents, ". . . including the obligation to pay the pro rata share of all assessments and fees in the community." (Tr. Op. at 34).

Appellants further argue that Fairway Cap's ownership of a significant number of units will also cause financial harm to Condominium in the form of a depleted operating reserve. (Appellants' Op. Br. at 30-31). This operating reserve is funded from the regular and any special assessments, which Fairway Cap has paid and will continue to pay for all units it owns because the exception language in § 5.7 of the Constitution applies equally to the reserve fund and only exempted Fairway Cap during the period it was actively seeking to sell newly constructed units.

Appellants further allege that Condominium Council appointed by Appellees has "mismanaged" the Condominium during the "developer control period" and that such "mismanagement" will continue "unchecked" if Appellees are own multiple units. (Appellants' Op. Br. at 32). Despite this allegation not appearing as an element of their breach of contract claim and not being an issued preserved for this appeal, Appellants claim that Appellees have improperly constituted Condominium Council by failing to hold elections and mismanaged Condominium's reserve fund by borrowing from the fund to resolve a temporary cash shortfall was disproven at trial. (*Id.*).

Section 15.2 of the Regulations provides that until the expiration of Developer control period (which interpreted most favorably to Appellants expired after trial in November 2018 per § 3.1 of the Regulations because the first condominium was sold in November 2008 (B477)) Condominium Council shall consist of three persons

designated by Appellees. As of date of trial, Condominium Council consisted of three members designated by Appellees, consistent with the Regulations.

Appellants' complaint that Condominium faced a cash shortfall in June 2018 because of Appellees was also disproven. Condominium's 2018 budget was based upon a projection that thirty-six new townhouse-condominium units would be completed during the calendar year and that requisite initial contributions from the same would be made. (B455). Throughout 2018, and despite the PI preventing Appellees from leasing any new units, Appellees continued to construct units at a brisk pace as Appellants have admitted. However, there were delays in obtaining certificates of occupancy for certain new units because of employee turnover in the Ocean View municipal office. (A517-519). The delays were not the result of any gamesmanship on Appellees' part, as evidenced by the quick issuance of Sussex County secondary certificates of occupancy for the same units. (*Id*.). Further, Appellants did not offer any evidence that Condominium reserve fund would not be fully funded by the end of the 2018 calendar year at the amount budgeted despite the delays in obtaining certificates of occupancy from Ocean View.

Appellants also allege that as a result of the cash shortfall in June 2018, Condominium Council was forced to borrow from its reserve fund for operating expenses. (Appellants' Op. Br. at 36). As described in the foregoing paragraph, the "shortfall" was not the product of Appellees' actions, but rather due to Ocean View

staffing problems and Appellants' own actions in lobbying Ocean View to delay permit issuance. (B914-929). Condominium Council's decision to temporarily "borrow" funds from the reserve fund to meet operating expenses is not an uncommon practice as Community's independent property manager testified (B451) and the amounts "borrowed" were fully accounted for in Condominium's balance sheet.

IV. WHEN THE COURT OF CHANCERY EXERCISES DISCRETION AND DOES NOT REQUIRE SECURITY AS A CONDITION FOR IMPLEMENTING OR MAINTAINING A PRELIMINARY INJUNCTION, THE ENJOINED IS NOT BARRED FROM LATER RECOVERING DAMAGES IF THE INJUNCTION IS RENDERED "WRONGFUL"

A. Question Presented

Did the Court of Chancery commit legal error by allowing Fairway Cap to recover damages for a wrongful injunction in the absence of an injunction bond?

Appellees' Response: No.

B. Standard and Scope of Review

The Delaware Supreme Court reviews questions of law *de novo*. *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004).

C. Argument

Appellants ask this Court to set a new and inflexible rule that when the Court of Chancery exercises its discretion and does not require the posting of security as a condition for issuance or maintenance of a preliminary injunction, the enjoined is barred from recovering any damages proximately caused by the injunction should it later be rendered "wrongful." Appellants' position, if adopted, would strip the court of flexibility to balance the equities and manage the issuance of preliminary injunctions, an extraordinary remedy that must be considered on a limited record and with the potential to do significant harm to the enjoined. *See Levy v. Bd. of Educ. of the Cape Henlopen School Dist*., 1990 WL 154147, at *7 (Del. Ch. Oct. 1, 1990).

The issuance of a preliminary injunction pursuant to Court of Chancery Rule 65, which parallels the Federal Rule of Civil Procedure 65, is a discretionary exercise that requires the court to weigh a variety of factors. *See CBOT Holdings, Inc. v. Chicago Bd. Options Exch., Inc*., 2007 WL 2296356, at *5–6 (Del. Ch. Aug. 3, 2007). Delaware courts have long recognized that where a party enjoined by a preliminary injunction later prevails on the merits, it is deemed to have been "wrongfully" enjoined and is entitled to an award of compensatory damages for harm caused by the injunction. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1227 (Del. 1999); *City of Miami General Employees v. Comstock*, 2016 WL 4464156, at *23 (Del. Ch. Aug. 24, 2016) (citing *Emerald P'rs*).

When the court requires the applicant for a preliminary injunction to post security as a condition for issuance, it is recognized that the enjoined is limited to an award for damages occasioned by the wrongful issuance in an amount totaling no more than the value of the security. *Emerald P'rs v. Berlin*, 712 A.2d 1006, 1011 (Del. Ch. 1997). This rule is often referred to as the "injunction bond rule." Neither Chancery Rule 65 nor any other rule or case law compels the court to require the posting of security for issuance or maintenance or a preliminary injunction. Indeed, as the trial court recognized in this matter, such a rule would imprudently strip the court of discretion. (Appellants' Op. Br., Exhibit C, at 6).

Appellants' position that the Appellees are barred from seeking any damages occasioned by the PI is based upon a misstatement of Appellants' position taken at the time Insight settled, is unsupported by the Chancery Rules or any case law, and cuts against the policies behind preliminary injunctions.

Appellants inaccurately contend that Appellees waived their right to damages occasioned by the PI when they responded to Insight's motion to release the bond it posted. (Appellants' Op. Br. at 40-41). The trial court rejected this procedural challenge and determined that Appellees expressly reserved their rights to pursue a post-trial motion for damages. (Tr. Op. at 4-5). Appellants cite to language from Insights' motion that explained its settlement with Appellees addressed any "damages that might be claimed by [Appellees] **against Insight**." (A-695, ¶ 7) (emphasis added). In other words, the settlement agreement between Insight and Appellees addressed any damages that could be asserted between the parties to the settlement, not the third-party Appellants. Appellees did not object to Insight being released from the injunction bond that it had solely paid for and procured. Nothing in the record reflects an intent on the part of Insight or Appellees to address or resolve through their settlement the third-party Appellants' potential liability relating to the PI. In fact, as the trial court recognized, at the time Insight sought release of the injunction bond, Appellees: (1) asked that the Appellants be required to post a substitute injunction bond for the same value as the existing bond, or,

alternatively, that the PI be released; and (2) reserved the right to seek damages incurred as a result of the PI. (Tr. Op. at 4-5; B23-40). There was no waiver of damages on Appellees' part.

Appellants' position also finds no support in the Chancery Rules or case law. Delaware recognizes a presumption in favor of an award of costs and compensatory damages in cases of wrongful enjoinder. *See Emerald P'rs*, 726 A.2d at 1226-27; *City of Miami General Employees' and Sanitation Employees' Ret. Trust*, 2016 WL 4464156, at *23. By adhering to this presumption, the enjoined will typically recover damages in cases in which they prevail on the merits, thus discouraging parties from requesting injunctions on tenuous legal grounds. *See Coyne–Delaney Co. v. Capital Dev. Bd.*, 717 F.2d 385, 392 (7th Cir. 1983) ("... [this test] discourages the seeking of preliminary injunctions on flimsy (though not necessarily frivolous) grounds."). Furthermore, a presumption that damages will be awarded assures judges that enjoined parties will receive compensation for their damages in cases when it is later determined they were wrongfully enjoined. *See* Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 HARV. L. REV. 828, 838 n. 36 (1986). Appellants' position would render this presumption meaningless in cases when no security is required, imprudently rendering the injunction a riskless exercise for the applicant. Such a new policy would encourage parties to gamble to file motions with the hope of procuring a riskless preliminary injunction even where the

support is tenuous, burdening the court. Additionally, the court will have less discretion and flexibility to manage the equities of each case because it will be forced to make a choice between requiring an applicant to post security to obtain a preliminary injunction or forever barring the enjoined from recovering damages if it prevails on the merits, all on a preliminary, incomplete factual record.

Security for preliminary injunctions also serves other worthy purposes. The posting of security for a preliminary injunction supplies a readily available source of funds to collect against should it later be determined that the injunction was wrongfully entered. *See* Wolfe and Pittenger, DELAWARE CHANCERY COURT PRACTICE § 10-5 (2007) ("The purpose of Rule 65(c) is to ensure that a fund will be readily available from which an enjoined person can be reimbursed for costs and damages resulting from a interlocutory injunction…. The bond requirement can be viewed as an additional means of limiting the potential for undue harm to the party enjoined if the provisional injunction is ultimately found to have been issued improvidently."). The trial court determined that it was appropriate to release the existing injunction bond and not require Appellants to post a substitute injunction bond as a readily available source of recovery for Appellees, based upon an assessment of the timing of the case at the time Insight settled and the burden that would be imposed upon Appellants. (Appellants' Op. Br., Exhibit C at 4-5). Once the Appellees prevailed on the merits post-trial, the court correctly concluded that

the injunction bond rule could not be stretched in its application to provide that when no security was required to maintain the PI, Appellees were barred from pursuing damages occasioned by the PI. This is particularly appropriate given that Appellees requested substitute security or release of the PI and reserved their rights to pursue damages if the PI was not released. (Tr. Op. at 6-7). Rather, the injunction bond rule merely provides that when security is posted, the enjoined is limited to damages capped at the value of security. *Guzzetta v. Service Corp. of Westover Hills*, 7 A.3d 467, 469 (Del. 2010). Recognizing that Court of Chancery Rule 65 is modeled upon Federal Rule of Civil Procedure 65, the trial court considered federal case law and noted cases holding that when federal courts exercise discretion and do not require security as a condition for a preliminary injunction, the decision did not bar the enjoined from later seeking damages. (Tr. Op. at 6 (citing *Atomic Oil Co. of Okl. v. Bardahl Oil Co*., 419 F.2d 1097 (10th Cir. 1969) and *Factors, Etc., Inc. v. Pro Arts*, 562 F. Supp. 304 (S.D.N.Y. 1983)).

Appellants have not cited any case law in which a Delaware court concluded that an enjoined is barred from seeking damages when the applicant was not required to post security for maintenance of an injunction bond. Rather, they cite to inapposite case law that parses the application of the injunction bond rule when security was posted, but insufficient to fully satisfy a later award of damages in favor of the enjoined. (Appellants' Op. Br. at 43 (citing *Sprint Communications Co. LP*

v. CAT Communications International Inc., 335 F.3d 235 (3rd Cir. 2003) and *Mead Johnson & Co. v. Abbott Laboratories*, 209 F.3d 1032 (7th Cir. 2000)).

The case law cited by Appellants does highlight that injunction security also serves the purpose of putting the applicant on notice of the maximum allowable damages award that could be issued against it should the injunction later be rendered wrongful. (Appellants' Op. Br. at 43). However, this valuable function cannot be stretched to provide that where an applicant seeks and obtains a preliminary injunction and benefits from the same without having to post security, the enjoined is barred from pursuing damages for wrongful issuance because the applicant had no sense at the time of injunction of the scope of potential damages. Moreover, Appellants accepted the benefits of the PI with full knowledge in this case of the harm that could be suffered by Appellees because the trial court did require an injunction bond at the time the PI was issued. The trial court required an injunction bond in the principal amount of $354,858, based upon evidence of potential harm submitted by Appellees. (A-694 at ¶ 4). Appellants remained aware of Appellees' potential damages at the time Insight withdrew from the litigation and Appellees requested that Appellants post a substitute injunction bond or that the PI be released. The damages ultimately awarded to Appellees in this case for harm suffered because of the PI was $113,197, less than the injunction bond that Insight had posted. (Appellants' Op. Br., Exhibit D, at ¶ 4). The disparity between the amount of the

injunction bond and ultimate award was due in part to estimations made at the outset of the litigation, which could not account for the impact of subsequent delays by the Town of Ocean View in processing permit applications because of staff turnover. In sum, the award of damages in favor of Appellees was well within Appellants' expectations both at the time they initially sought and received the PI and when they later insisted that it remain in effect when Insight settled.

The Court of Chancery has discretion to determine whether to require security for a preliminary injunction, and to set its value and form. This discretion enables the court to equitably manage the case and is an important tool in the court's arsenal. Restricting this discretion as Appellants argue will hamper the court from ensuring equity is done and would cause Appellees to should the full-burden of harm they suffered as a result of the PI and despite prevailing at trial, a result that the trial court expressly stated it did not intend. (Tr. Op. at 5). Appellants' position that a wrongfully issued preliminary injunction is risk free to the party that sought and benefitted from the same unless the court requires security is not supported by the rules, case law or the principles behind preliminary injunctions that are aimed at ensuring the risks are fairly balanced among the parties. Preliminary injunctions are issued by the court on an incomplete record, and, thus, it must have maximum flexibility to set the terms for the same in order to "do equity" and ensure that the parties are protected and fairly allocated risk before the merits of the case are parsed.

CONCLUSION

For all of the foregoing reasons, the decision of the Trial Court below should be affirmed.

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