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developers and builders: make sure you get noticed!

Is your company subject to an agreement that permits one party to repair damages caused by the other if the other fails to do so within a certain time period? Such a notice provision was recently considered by the Ontario Superior Court of Justice in *Tas-Mari Inc. v. Dibattista*Gambin Developments Ltd.*[1] The case contains important lessons for developers and new home builders.

the facts

The defendant developer ("DBG") entered into agreements of purchase and sale ("Agreements") with three different builders (the "Builders") for the sale of lots in two residential subdivisions that DBG had developed in Brampton, Ontario. The Agreements were basically identical and required DBG to install all general services for the subdivision, including roads, sidewalks, water and sewer services, and utilities (the "Services"). The Agreements also required the Builders to be responsible for any damage they might cause to the Services during construction of homes on the lots they purchased and to indemnify DBG with respect to such damages. To back-stop these obligations, the Agreements required the Builders to make security deposits funded by irrevocable letters of credit ("L/Cs"). The Agreements entitled DBG to draw on the L/Cs from time to time in the event that it was required to repair damages to the Services caused by the Builders, and required the Builders to replenish the L/Cs after every draw.

Significantly, the Agreements also contained a provision requiring DBG to notify the Builders before repairing any damage to the Services caused by the Builders and to give the Builders time to repair such damage, before drawing on the L/Cs. The notice provision read as follows:

> 11.05 Notice: In no event shall [DBG], at [Builders'] expense, repair any damage or draw upon the Security Deposit, prior to providing to [Builder] written notice specifying the Damage or Default complained of and allowing seven (7) days for [Builder] to remedy such default or repair the damage or commence and diligently undertake repair of the damage or a cure of such default within

[1] *Tas-Mari Inc. v. Dibattista*Gambin Developments Ltd.* (2009), 85 C.L.R. (3d) 83 (S.C.J.).

> a reasonable time as determined by [DBG] but not exceeding 15 days from delivery of the written notice thereof by [DBG].

Soon after construction began, DBG started issuing invoices to the Builders for the cost of repairing various damages they allegedly caused. DBG did not, however, provide the Builders with the notice and opportunity to cure required by Section 11.05. The Builders initially paid many of the invoices without complaining that DBG had failed to provide the required notice. Eventually, the Builders stopped paying DBG on these invoices and DBG drew down on the L/Cs, exhausting the security deposits. Litigation then ensued.

The Builders argued that DBG's invoices were invalid because DBG failed to provide the notice contemplated by Section 11.05 of the Agreements, thereby depriving the Builders of the opportunity to complete the repairs themselves at a lower cost. The Builders sought an order requiring DBG to return the monies that they had previously paid.

In response, DBG counterclaimed for the amount of all outstanding invoices, as well as for amounts necessary to replenish the L/Cs. DBG argued that the notice provision was subject to an implied term that made it inapplicable to damaged Services located *outside the lot lines* of the lots purchased by the Builders. DBG argued that it was customary in the development industry for developers to retain control of repairs made to services common to the entire subdivision. Consequently, DBG argued that the notice provision did not apply to such repairs.

DBG also defended on the basis of promissory estoppel, arguing that the Builders had effectively waived the notice provision by paying invoices for a period of time, without raising the lack of notice as an issue. Finally, DBG argued that it should also prevail on the basis of unjust enrichment.

the court's decision

The court focussed primarily on construing the meaning of the notice provision contained in the Agreements. On this issue, the court rejected DBG's defences. The court found that DBG's invoices for damages caused to the Services by the Builders, to the extent that the Section 11.05 notice and opportunity to repair were not given, were invalid.

In finding for the Builders on this issue, the court held that the language of the notice provision was clear and unambiguous and capable of only one interpretation. Among other things, the court noted that if the parties had intended to restrict the application of Section 11.05 to those damages to Services *inside* the lots purchased by the Builders (as DBG argued), they could have easily included express language to that effect in the Agreements. They chose, however, not to do so.

The court reached this conclusion in spite of DBG's evidence about the general practice in the development industry. According to DBG's expert, repairs to services within a subdivision are typically performed by one contractor (preferably, the one who installed the services under contract with the Developer), for consistency and quality control. DBG argued that it would not make any commercial (or common) sense for separate, individual builders to repair damages to Services that are common to the entire subdivision. While the court acknowledged that its interpretation may not be the most efficacious, it found that no other interpretation was possible given the language of the Agreements.

As a result, the court disallowed those of DBG's invoices that related to the costs of repairing damages caused by the Builders to the Services. The court went on to reject DBG's waiver and unjust enrichment claims. Ironically, the court did so because of DBG's own evidence.

DBG argued that, because the Builders paid the invoices without complaining about lack of notice, the Builders induced DBG to believe that notice was unnecessary. DBG argued that the Builders were thereby estopped by their conduct from disputing the validity of the invoices. Here enters the irony.

The principal of DBG testified that he carefully considered every word of the Agreements in detail to ensure that they accurately reflected his intentions. He testified that, in his mind, the notice provision was only intended to apply to damaged Services located *inside* the specific lots purchased by the Builders. The notice provision did not apply, in his view, to damaged Services located *outside* the Builders' lot lines and common to the entire subdivision. This evidence ironically destroyed DBG's ability to mount an effective waiver defence.

The court began by acknowledging that a party can waive the strict language of a contract where, by its actions or representations, it leads the other to believe that those contractual rights will not be enforced. In this case, however, the court found that DBG did not alter its position *as a result of* any action or representation on the part of the Builders. To the contrary, nothing the Builders said or did induced DBG to act in a certain way. Instead, as noted above, DBG's own evidence was that it did not believe it needed to give notice under Section 11.05.

implications of the decision

The decision in *Tas-Mari* contains four important lessons for both developers and builders:

1. Before invoking a contractual provision based on what you *think* it means, read the agreement with a fresh pair of eyes to see what it *actually* says. Had DBG done so in this case, it almost certainly would have given the notice required by Section 11.05 and it could have avoided litigation.

2. A party's own, subjective, interpretation of a contractual provision's meaning is neither relevant nor admissible to assist the court in construing the contract. Rather, the court will give effect to the actual language the parties used in their written agreement, based on the cardinal presumption that the parties must have intended what they said. It was on this basis that the court in *Tas-Mari* rejected DBG's subjective interpretation about the applicability of the notice provision.

3. Ironically, however, a party's own subjective intentions can come back to bite them. Many of you might have thought that DBG had a reasonably good argument that, because the Builders paid the invoices without raising the lack of notice, the Builders should be estopped from doing so now. That argument might very well have succeeded, were it not for DBG's own evidence. One of the elements a party must prove to set up the defence of estoppel or waiver is that it altered its position as a result of something said or done by the other. In this case, nothing the Builders said or did induced DBG to act in a certain way. DBG acted according to its own subjective view about the applicability of the notice provision, and it did so at its own peril.

4. Finally, and possibly the most important lesson, do not assume that a standard industry practice will apply to a contractual provision, unless the contract *explicitly* says what that practice is and how it is to be applied. In *Tas-Mari*, DBG's principal assumed that what he viewed as a standard industry practice would apply to the Agreements, but that was *NOT* what the Agreements actually said, to DGB's detriment!

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a cautionary note