Legal Loophole

Builder thought he'd dotted all the i's, but then...

BY ROBERT BALES

"WHATEVER YOU DESIGN, I won't like it." With that comment from the buyers, things were off to a bad start to a $2-million custom home for a pair of first-timers who wanted to build a home with an in-law suite, backstopped by Daddy. Unfortunately, Daddy died before completion, but things weren't too bad for the builder until the job was finished. Certainly money was not the problem.

The project was a design-build, including the land, which was located in a small development north of the GTA. The builder started with a base price for a detailed design, but no specifications, offering the buyers one of two options: either a total fixed price after negotiations on changes and finishes, or a cost-plus approach—the base price plus all finishes and changes at cost—with a management fee on top. The buyers opted for a modified cost-plus, and away they went.

With a long family history in home building and personally boasting many years of experience in design and project management, the builder scrupulously detailed everything, confirmed telephone conversations in writing and kept an impeccable site log—in effect, a commercial level of project management.

The buyers were more absent than difficult, frequently too busy to visit the site to review over 100 change orders, even though they had signed them all. The builder had a perfect Tarion record, and he had no problems with the 30-day inspection.

And then the owners submitted almost 1,000 Tarion First-Year Warranty claims. It took a five-person Tarion inspection team almost a week to complete the conciliation review. A year later, there were 50 more items at the Second-Year Warranty Review. The builder fixed everything that Tarion requested.

A month later, the owners sued him, claiming they had paid almost $100,000 too much for the project. How can this happen in a cost-plus scenario, when all the change orders from the base design drawings were signed off by the owners? In a situation where the job is finished, paid in full and Tarion items are rectified, where can a lawsuit come from?

A cost report from a reputable quantity survey firm hired by the owners found that the invoiced costs as submitted by the builder did not fit with their material take-offs. This, however, was based on the *original* design drawings! So who would be surprised when they didn't take into account any of the subsequent change orders?

And the answer? The system allows an owner to sue a homebuilder for whatever and, in theory, it will all get worked out through the claim, defence, reply, discoveries, motions for this and that, mediation and trial. And if anything isn't right, there's always an appeal. This is fair? As this is a family magazine, all I can say is: "Horsefeathers!"

This builder will never again carry out a project without including in his contract a term that controls the litigation risk—specifying a mediator and arbitrator up front, imposing a duty on the arbitrator to control the scope, cost and duration of any disputes that may happen, and providing for no appeals. It was too late for this project, though.

Over three years, the builder stopped working and turned all of his attention backwards into a job that he had believed was long finished—doing an intensive review of all the project files, examining his take-offs and estimates, preparing document books, attending meetings with his lawyer, spending several days in discoveries, and spending over $30,000 in

legal fees and other costs.

After a frustrating mediation, with a slam-dunk of a case but facing at least two more years and a two-week trial, the builder walked away just to end the misery and re-focus on future business. He settled by paying half of what the owners were suing for—almost covering their legal costs—and leaving him to eat about $80,000, not to mention years of his time. Now a year down the road, settlement documents and releases have been signed and the owners are as happy as they will ever be.

What about the builder? He's damn good at what he does, but there are forces at play against him that combine to cut off his focus, his creativity and his competence. We can point our fingers and cry, "Evil lawyers!" all we like, but a lawyer's duty to his or her own client is "to raise fearlessly every issue, advance every argument..., however distasteful, which the lawyer thinks will help the client's case..." [1] Accept it—the owner's lawyer is simply not there to give you a helping hand!

Beyond the legal process, there are many other constraints, limitations and rules, some self-imposed by the home building industry itself, that govern—and limit—the creativity and resourcefulness of builders within the 'system' that is, after all, ours to build or to change. It doesn't help that there seem to be an unlimited number of agencies, departments, commissions, authorities, councils and boards to administer an esoteric array of regulations—and a bunch more that don't seem to be in writing—that impact builders, many of which hit the smaller builders the hardest.

Last but not least, our builder had to face just one more test: the owners made a seven-year structural claim to Tarion. Fortunately, Tarion rejected the claim. Perhaps now, six years after occupancy, the builder's odyssey is over.

The lesson? In your contract, control the litigation risk, and save both your company and your sanity.

1 Commentary, Rule 4.01, Law Society of Upper Canada, Rules of Professional Conduct

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