JUDGMENT : HER HONOUR JUDGE FRANCES KIRKHAM. TCC. 14th August 2002

1. This is an application pursuant to Section 67 Arbitration Act 1996 by George Wimpey UK Limited ("Wimpey") for an order varying the award of an arbitrator.

2. In 1994, Wimpey completed construction of the Granby Village Residential Development. This consisted of several blocks of flats together with a leisure club, areas of garden and an underground car park. Leasehold interests in the flats were sold between 1991 and November 1995. They were sold on a standard form of lease. There are said to be 238 individual lessees. The respondent to this application ("GVMC") was incorporated in 1990 to manage the development. It is a limited company. Its members are the leaseholders of the flats. In 1998 it purchased the freehold of the flats and common parts of the development.

3. GVMC allege that, amongst other matters, Wimpey built the car park in breach of the NHBC requirements and claim the cost of remedial work, which they put at over £650,000. Wimpey deny liability. Issues as to liability and quantum have yet to be determined.

4. GVMC's case is that the car park (part of the development) is protected by the National House Building Council ("NHBC") Buildmark Scheme. I refer to the NHBC Buildmark Scheme 1990 edition, with which we are concerned here, as "the Scheme".

5. GVMC served a notice of arbitration on Wimpey on 20 December 2001. On 1 February 2002 GVMC applied to the Chartered Institute of Arbitrators ("the Institute") for the appointment of an arbitrator. By letter dated 21 February 2002, Wimpey's solicitors wrote to the Institute, as follows:

   "It is apparent from the Notice of Arbitration that the claimant bases its claim on alleged breaches by our client of the provisions of an NHBC Buildmark Agreement. Indeed, the claimant relies on an Arbitration Clause in such an Agreement.

   While our client entered into Buildmark Agreements with the purchasers of individual properties at the Development (as defined in the Notice of Arbitration), it did not enter into a Buildmark Agreement with the claimant.

   It follows that our client is of the view that the arbitral tribunal lacks substantive jurisdiction to deal with this dispute".

6. Mr M D Joyce was appointed as arbitrator. He wrote to the parties on 22 February 2002 to say that, pursuant to Section 30 of the Act, he would rule on his own jurisdiction. In accordance with his direction, the parties delivered written submissions in April and May on the question of jurisdiction.

7. The arbitrator published his First Award on 29 May 2002. He found that the car park which is the subject matter of the dispute fell within the definition of "Common Parts". Wimpey do not challenge that. The arbitrator ruled that he did have jurisdiction to hear the dispute. Relevant paragraphs of his award read as follows:

   "6.3 It is not in dispute that the provisions, including that for arbitration, of the Buildmark Scheme apply to purchasers and subsequent purchasers. It is true that individual lessees purchased the leases of individual flats but on the basis of the evidence before me it was the claimant who purchased the common parts which are all part and parcel of the building. Just as a lessee has purchased an interest in part of the building then so too has the management company. I therefore find that it was a subsequent purchaser for the purpose of the Buildmark Scheme. Under this Scheme, which was in writing, the respondent builder is responsible for the proper construction of the building, including its common parts, and for submitting to arbitration in the event of a dispute with a purchaser.

   6.4 The application form for arbitration, whilst not part of Buildmark itself, states that it is the management company who should apply for arbitration in respect of disputes concerning the common parts. This it has done.

   6.5 In the light of the preceding paragraphs, I find that I have jurisdiction to hear the dispute."

8. Relevant features of the Scheme are described in the NHBC booklet as follows:

   A summary of rights and obligations under the Scheme is given in an introductory section headed "**Buildmark in brief**". This includes a summary explanation of cover offered during and after construction. Under the heading "**If you sell before the Buildmark cover ends,** the document reads:

   "Second and subsequent Purchasers are similarly insured against new Defects and Major Damage which appear for the first time after they buy the Home."

9. Under the heading "**Important notes**" the document states: *"The Buildmark is an agreement between the Builder, the NHBC and each Purchaser of the Home. The Purchaser is addressed in the Buildmark as 'you'."*

10. Definitions are set out in Part A. The following are relevant:

    "Acceptance Form

    The Acceptance Form which the First Purchaser completes and returned to NHBC accepting the Offer of Cover.

    Builder

    The person shown as such on the Offer of Cover.

    Common Parts

    In relation to any flat or maisonette, Common Parts means:

    (i) those parts of the building containing the flat or maisonette, and

    (ii) any drainage system, building, wall, path, drive or paved area serving the building and constructed at the same time as it

    for which the Purchaser shares responsibility with the owners or other flats or maisonettes in the building.

First Purchaser

The person or persons shown as such on the Acceptance Form.

Home

The house, bungalow, flat or maisonette referred to in the Offer of Cover together with the Common Parts (if any), the drainage system for which the Purchaser is responsible and any garage, permanent out-building, wall, path, drive or paved area build or sold under the original building contract or sale contract.

Home does not include any fence, temporary structure, swimming pool, lift or household appliance.

Purchaser

The First Purchaser and each subsequent Purchaser and any mortgagee in possession."

11. Part B sets out the warranties offered under the Scheme, including the following:

"The Builder's warranties

The Builder warrants to you that the Home has been or will be built:

(a) In accordance with the NHBC's Requirements;

(b) In an efficient and workmanlike manner and of proper materials and so as to be fit for habitation....."

12. Part C sets out matters concerning treatment of common parts:

"Common Parts

At the NHBC's request you must join with the owners of any other flats or maisonettes in the building in making a claim in respect of the Common Parts. If you do not do so, the NHBC's maximum liability under 1 above shall in any event be reduced by the amount by which it would have been reduced if you had joined in that claim."

13. Procedures for dealing with claims are set out in Parts D and E:

"What you must do when making a claim against the Builder

You must comply with the following conditions when making a claim against the Builder under Part B Section 2 otherwise the Builder will have the right to refuse all or part of the claim."

The document sets out requirements for written notice to the builder and then for a conciliation stage with recommendations by NHBC. If problems cannot be resolved by conciliation, Part D states:

"The arbitration stage

5. If you do not accept the NHBC's recommendation, the dispute between you and the Builder shall be referred to arbitration under Part E."

14. Relevant passages in Part E are:

"Arbitration

Any dispute between you and the Builder or between you and the NHBC arising under the Buildmark shall be referred to arbitration. The arbitrator will be appointed on the application of either party to the dispute by the Chairman or a Vice-President of the Chartered Institute of Arbitrators....."

15. The Institute administers the NHBC arbitration scheme. In broad terms, the Institute's role is concerned with receiving and sending out documents, receiving and making payment of appropriate fees, maintaining a panel of arbitrators able to decide disputes, and (by the Chairman or a Vice-President) nominating an arbitrator.

16. The Institute issued guidance notes applicable to the Scheme. Relevant passages in the guidance notes are as follows:

"These notes are given for general advice only. They are not a definitive interpretation of the NHBC Scheme or the law applying to disputes generally. They deal with disputes between home owners and the builder or the NHBC…

The Arbitrator is free to decide the approach to be taken… If the dispute is not complicated technically or legally the Arbitrator will generally adopt a simplified procedure. However, whether or not this procedure is adopted up to the Arbitrator. If he or she thinks, after looking at the papers sent with the application, that it would not be fair and reasonable to adopt the procedure [i.e. the procedure indicated by the guidance notes] *the parties will be told…*

Completion of the application form

When you return the completed form to the [Institute] it must be accompanied by a payment of £50 = VAT towards administration costs.....

If the claim is in respect of defects in the common parts or communal areas of a block of flats, the claim must be made by the Management Company or in Scotland, the Factor. If there is no such organisation the claim must be made by all the flat owners. If the latter applies the Arbitrator will want a list of all of the flat owners and their addresses..... The arbitrator may decide to accept production of one set of Scheme Documents as a specimen rather than requiring copies of all relevant Scheme Documents".

17. It emerged during the hearing of this application that individual leaseholders have now begun arbitration proceedings in relation to the car park. I understand that Mr Joyce has been appointed as arbitrator and proceedings are stayed pending the outcome of this application.

18. It is common ground that, for an arbitrator to have jurisdiction, there must be both a dispute between the parties and a valid arbitration agreement covering the dispute. GVMC's notice of arbitration identifies the dispute as being a breach of warranty under the Scheme and the arbitration agreement as being the arbitration clause

contained in the Scheme. By that notice, GVMC contended that the development and its common parts were "protected by the Scheme".

Wimpey's case

19. Wimpey's case is that there is no Scheme agreement between the parties under which a dispute has arisen. It never entered into a Scheme agreement with GVMC in respect of the car park or anything else at Granby Village. Wimpey gave no warranties to GVMC regarding construction of the car park. If no warranties were given, there can be no dispute between the parties for any breach of warranty. Without a Scheme agreement there is no effective arbitration clause.

20. The definitions of "Purchaser" and "subsequent Purchaser" are, Wimpey say, fundamental to the question whether or not there was a Scheme agreement in place between Wimpey and GVMC. The arbitration clause in the Scheme applies only to disputes between the Purchaser and the Builder or the Purchaser and the NHBC. The word "Purchaser" is a defined term under the Scheme. It means the First Purchaser and each subsequent Purchaser and any mortgagee in possession. GVMC accept that it is not and cannot be the First Purchaser as defined. Wimpey say that one cannot be a "*subsequent Purchaser*" of any particular property interest in Granby Village unless there has been a *"First Purchaser*" (as defined) of that same property interest. The phrase "*subsequent Purchaser*" can mean only a person whose interest is derived from a "*First Purchaser*", ie a person who subsequently buys a property interest which was initially bought by a First Purchaser. The only interest which GVMC has purchased is the freehold of the development including the common parts. It purchased the freehold directly from Wimpey itself. Accordingly, GVMC was an initial purchaser not a "subsequent Purchaser". There was no "First Purchaser" (as defined) of the freehold from whom GVMC purchased their interest so as to become a *"subsequent Purchaser"*.

GVMC's case

21. GVMC's primary submission is that it is a subsequent Purchaser for the purposes of the Scheme. The Scheme agreement is an agreement with each Purchaser, whether First or subsequent. By building a development and issuing the builder's warranties in the form of the Scheme, the builder and NHBC make an offer to a specified group of persons, namely the First and any subsequent Purchasers, during the Scheme warranty period, which each Purchaser accepts by purchasing the relevant property or part of it. GVMC say that the contract with subsequent purchasers may be viewed as a species of "unilateral" or "Carbolic Smoke Ball" type of contract. I am referred to Chitty on Contracts, volume 1, paragraphs 2.004 and 2.015.

22. Their case is that, because the car park is part of the common parts, it follows that the car park is a part of the Home as defined. Thus, artificially for the purposes of the Scheme, Buildmark deems each initial long leaseholder to be a purchaser not just of his own flat but also of the common parts in their entirety, including the car park. This is a contractual fiction but an essential one for the purposes of the Scheme. Since the "*Home"* consists of both (1) the flat and (2) the common parts, there is no conceptual difficulty in there being two subsequent Purchasers in relation to each flat at any one time, that is, (1) of the flat itself and (2) of the common parts. The First Purchaser of the common parts (being a part of the Home) was, by a contractual fiction, the first leaseholder of each flat. Accordingly, GVMC became a "*subsequent Purchaser*" of the common parts.

23. By participating in Buildmark, the builder thus offers to enter into and, upon someone becoming a subsequent Purchaser, does enter into Buildmark agreement with each Purchaser as defined. This is not a once and for all agreement which is subsequently assigned. The builder (here, Wimpey) makes an agreement directly with each "Purchaser" of the "Home" whether initial or subsequent. Thus, on GVMC becoming a purchaser of the common parts it became a subsequent Purchaser of the common parts for the purposes of Buildmark and, as such, is entitled to enforce the Buildmark warranties relating to the common parts on its own behalf.

24. This is entirely in accordance with the commercial purpose of the agreement which is intended to be an agreement for the benefit of subsequent purchasers/owners of the flats and common parts as much as for the benefit of the initial purchasers/owners. The builder/developer finds it easier to sell his development at the outset if he participates in this scheme because initial purchasers will also be able to take advantage of it. Having the benefit of warranties attaching to the common parts is, in a substantial block of flats such as this, at least as important as having the benefit of warranties relating to any particular flat. However, individual lessees do not expect to have to enforce warranties relating to the common parties individually: they expect to do this thorough the medium of the management company. Any other result in relation to a large block of flats (in this case 238 flats) would be commercially absurd.

25. GVMC has been a party to each individual lease from the outset. Under clause 4 and Schedule 4 Part 1 of the common form lease, GVMC covenanted with both the lessees and Wimpey to keep the common parts in repair. The lessees, in turn covenanted to pay the maintenance charge, which included not just the cost of keeping the common parts in repair but also any litigation costs incurred in so doing. It has, thus, been envisaged from the outset that GVMC would play an integral part in maintaining the common parts and, Mr Terry submits, enforcing the Buildmark warranties in so far as they apply to the common parts. In its submissions to the arbitrator, Wimpey acknowledged that the freehold was transferred to GVMC to *"enable the GVMC to carry out its management functions"*. Wimpey therefore clearly intended that GVMC, and not the individual leaseholders, should act as the subsequent Purchaser of the common parts, including the car park.

Conclusion

26. In my judgment, GVMC does not fall within the definition of "subsequent Purchaser" in the Scheme. That expression "subsequent Purchaser" is not defined in the Scheme. The meaning must be derived from the Scheme and its commercial purpose. In simple language, there cannot be a "subsequent Purchaser" unless there has been a previous Purchaser from whom the interest was derived. Here, there was no "First Purchaser" of the freehold. On a straightforward reading, therefore, GVMC cannot be a "subsequent Purchaser". GVMC is not and never has been a purchaser of a Home or part of a Home. It cannot be a subsequent Purchaser of a Home or part of one.

27. It is not open to a third party such as GVMC to rely on warranties and the arbitration clause in an agreement to which it is not a party.

28. I reject Mr Terry's submission that the NHBC Buildmark agreement is an agreement with each purchaser whether First or subsequent and that the benefit of the Scheme, including the right to arbitrate against a builder are available on the Carbolic principle. I do not accept that this case falls within the Carbolic category. It is clear from Chitty that this category of cases is rare. One cannot here identify an advertisement of the sort with which the Carbolic case was concerned. It is far fetched to suggest that any builder which holds itself out as an NHBC builder thereby makes a unilateral offer capable of acceptance by any purchaser of all or part of a building. On what terms would the parties contract? How would the builder be able to satisfy itself that the purchaser could comply with its obligations under the ensuing contract? To pose the questions reveals the untenable nature of the argument.

29. It is clear to me that the benefit and obligations of the Scheme are available only to those who, by agreement, have consented to submit to the Scheme. Wimpey have not so agreed with GVMC.

30. Mr Terry refers to the later (1999) edition of the NHBC Rules which now use the concept of *"Owner"* and *"subsequent Owner*" in addition to Purchaser and subsequent Purchaser. Mr Terry submits that, under the later edition, GVMC is a subsequent Owner of the common parts which form a part of the "*Home"*. He refers to rule 55c of the later edition which require the builder to submit to arbitration at the request of an "Owner" and to give written consent to the appointment of an arbitrator "*in whatever form is required"*. I do not find it helpful that NHBC may have adopted different definitions, possibly with different consequences, in the 1999 edition of the Scheme. Even if such were relevant, I have no information as to why any such changes were made. I confine myself to construing the terms of the 1990 Scheme rules without reference to the 1999 edition.

31. The commercial purpose of the Scheme is to be derived from the NHBC document itself. I have no other evidence. There is no express requirement in the Scheme that common parts claims must be pursued by a management company. To the contrary, Part C expressly envisages that individual leaseholders may pursue claims in relation to common parts. The only caveat is that NHBC may require individuals to join together to pursue such claims. It cannot be said that the commercial purpose of the Scheme is that a management company which is not a party to a Scheme agreement may, notwithstanding there is no contractual relationship, enjoy the benefits of the Scheme.

32. In all the circumstances I conclude that GVMC is not a subsequent Purchaser within the meaning of the Scheme. There is no contractual relationship between Wimpey and GVMC. Accordingly, GVMC do not have the benefit of NHBC warranties relating to the car park. There is no Scheme agreement pursuant to which there is a dispute or to which GVMC can require Wimpey to submit to arbitration.

GVMC's alternative case

33. GVMC's alternative submission is that, if the individual leaseholders (not GVMC) are the persons entitled to invoke arbitration, then the proceedings are nevertheless properly constituted in the name of GVMC so as to confer jurisdiction on the arbitrator. They put this on two bases. The first is on the ground that the Institute's procedures required a management company to be the party to arbitral proceedings relating to common parts. The second is on the ground that GVMC is acting in a representative capacity.

34. So far as the first ground is concerned, GVMC submit that any dispute between Wimpey and the leaseholders must be submitted to arbitration under the Scheme agreement, with the arbitrator to be appointed by the Institute on the application of either party. Both parties have therefore agreed expressly or impliedly to have their dispute resolved by arbitration in accordance with the NHBC arbitration scheme administered by the Institute. While GVMC accepts that it is always open to parties to agree the identity and appointment of an arbitrator to determine a dispute, Mr Terry submits that what he describes as the contractual obligation to seek an arbitral appointment from the Institute must carry with it the implied obligation to comply with such procedural requirements as the Institute might impose in order for an arbitrator to be appointed from its NHBC panel. This implied obligation is simply an aspect of a term which is to be implied, namely that the parties shall co-operate to ensure the performance of their bargain. If the parties have agreed to arbitrate and to submit to arbitration by an arbitrator appointed by the Institute, they have also impliedly agreed to co-operate in observing and complying with such procedural requirements as the Institute might see fit impose when carrying out the function which the parties have allotted to it.

35. The Institute's procedure includes a requirement that the claimant complete a pro forma application form. The Institute's guidance note makes plain that, if the complaint relates to the common parts, *"the claim must be made by the management company",* and only if there is no such entity, by *"all the flat owners"*. Accordingly, the Institute requires a reference to arbitration under the Scheme, which relates to the common parts of a block of flats, to be brought in the name of the management company where there is one.

36. Under the Scheme agreement each leaseholder agrees that he will, if required, join in with the other leaseholders in making a claim in respect of the common parts. However, where there is a management company to which the lessees have effectively delegated the function of maintaining the common parts for the common good, it is administratively more convenient and in accordance with good case management principles to require the claim to be brought in the name of the management company effectively on behalf of all the individual lessees. The Institute has imposed such a procedural requirement. Both parties have impliedly agreed to submit to this and co-operate with this procedure.

37. As to the second ground, where, as here, there is a management company of which the leaseholders are members and which has the responsibility for maintaining the common parts and recovering the costs from the individual lessees, the management company has the express or implied authority of its members to take such steps (including, in this case, litigious steps) as are deemed appropriate to keep the common parts maintained on behalf of the members/individual leaseholders. If the management company resolves to commence arbitration proceedings, it necessarily does so on behalf of all the members, alternatively, on behalf of the majority but on the basis that the others could be compulsorily joined in accordance with the Buildmark agreement if required.

38. Thus, even if the relevant cause of action is vested in the individual leaseholders, as Wimpey claims, and not in GVMC as subsequent Purchaser, the application is correctly brought in the name of GVMC for the purposes of the scheme.

Conclusion

39. In my judgment GVMC cannot rely on the Institute's guidance notes in this way. There is no contractual relationship between Wimpey and GVMC. Accordingly, there can exist no express or implied contractual obligation on Wimpey to submit to any Institute procedural rules.

40. Even if that were not so, the Institute guidance does not have the effect for which GVMC contend. The Institute's guidance notes do not contain requirements which override the parties' substantive positions with respect to locus.

41. The guidance notes and the application form for the appointment of an arbitrator do refer to claims in respect of the common parts of a development being brought by the management company. However, the guidance notes and the application form are produced by the Institute, not by the NHBC. They do not form part of the rules of the Scheme. There is no mandatory requirement of the rules of the Scheme that a dispute relating to the common parts must be made by the management company. The guidance notes are principally informative, explaining the nature of the arbitration process and the manner in which the form should be completed. The notes themselves state that they are "*given for general advice only. They are not a definitive interpretation of the NHBC Scheme or the law applying to disputes generally.*"

42. Their effect can be no more than to make clear that, if the management company is a party to a Scheme agreement, then the management company should pursue the claim relating to common parts. The guidance notes and the application form cannot and do not affect the contractual rights of the parties. GVMC are not party to a Scheme agreement with Wimpey. The guidance notes and application form cannot make them a party for the purposes of bringing arbitration proceedings. Any implied obligation which there may be, that parties co-operate to ensure the performance of their bargain, cannot be extended so as to give to GVMC a right to pursue a claim which it would not otherwise have.

43. The Institute's procedural requirements cannot affect contractual relationships or cure a defect in jurisdiction. GVMC has no substantive right under the Scheme to commence arbitration against Wimpey. That defect cannot be cured by the Institute's requirements as set out in their guidance notes.

44. At the time at which the guidance notes and application form arise for consideration, no arbitrator has been appointed. It is the arbitrator, once appointed, who has the right to provide for procedural rules. The arbitrator cannot retrospectively and by means of any procedural rules confer a legal right to bring arbitration proceedings where none existed previously.

45. I reject GVMC's submission that their claim is, in effect, brought in a representative capacity on behalf of the leaseholder.

46. It is clear from the notice that the arbitration is brought by GVMC for its own benefit. In its notice of arbitration and when completing the Institute's form, GVMC indicated that it was acting on its own behalf. It is not suggested in either document that GVMC was acting other than in its own right e.g. in a representative capacity on behalf of member/leaseholders. Indeed, GVMC did not rely on that argument in their submission to the arbitrator.

47. I am not referred to any authority to explain why it might be right here to ignore the normal approach to identifying and applying the separate rights of separate legal persons and maintaining the corporate veil.

48. Mr Terry submits that individual claims by 238 leaseholders will be more cumbersome than a claim by a management company. Whilst that is so, pursuit of claims by individual lessees is not an impossibility, as is demonstrated by the fact (as I am told) that individual claims have now been brought. It appears that the Institute has been able to process these claims. As the Institute's documents make clear, it is open to the arbitrator to decide the procedure for handling these claims including, if he considers it appropriate, use of specimen documents and/or proceedings to simplify matters.

49. It must not be forgotten that, between 1991 (when Wimpey began to sell flats) and 1998 (when Wimpey sold the freehold to GVMC) only individual leaseholders could have brought any claims in respect of the common parts. In any event, the fundamental defect in jurisdiction cannot be cured by concluding that a procedurally less cumbersome approach might be better.

Limitation defence

50. GVMC complain that Wimpey make this application purely for tactical purposes. If this application succeeds, they will no doubt raise limitation defences to claims by individual lessees. Wimpey are concerned that, if the current arbitration proceeds on the basis that GVMC are claiming in a representative capacity on behalf of leaseholders, their right to raise limitation defences will be impaired, possibly even removed. Wimpey submit that the availability of any limitation defence is not technical but a substantive right.

51. I am not persuaded that this point is relevant to the matters I must address in deciding this application. However, if it is a relevant matter, I conclude that the right to raise a limitation defence is substantive right, not merely a technicality. Reference to arbitration by individual leaseholders will enable Wimpey to raise any limitation defence it may have.

Conclusion

52. It follows that the arbitrator erred in law in concluding (1) that GVMC was a subsequent Purchaser for the purpose of the Scheme (2) that the effect of the Institute's application form was such as to require or permit a management company to commence arbitration proceedings and (3) that he had jurisdiction to determine the dispute.

Mr Philip Capon (instructed by Gateley Wareing) for the Claimant
Mr Jeffrey Terry (instructed by Pannone & Partners) for the Defendant