

Neutral Citation Number: [2005] EWHC 2744 (TCC)

HT-05-279

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
TECHNOLOGY & CONSTRUCTION COURT

Royal Courts of Justice  
Friday, 11<sup>th</sup> November 2005

Before:

HIS HONOUR JUDGE WILCOX

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B E T W E E N :

CAPTIVA ESTATES LTD.  
Claimant

- and -

RYBARN LTD.  
(In Administration)  
Defendant

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MR. J. MORT appeared on behalf of the Claimant.

MISS C. DOERRIES appeared on behalf of the Defendant.

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**J U D G M E N T**

1 JUDGE WILCOX:  
2

3 1 The claimant, Captiva, as owner of land at 45 Christchurch Road, Bournemouth, entered into a  
4 contract in writing with the defendant, Rybarn, a building contractor, dated the 11<sup>th</sup> July 2002,  
5 whereby Rybarn agreed to construct 28 residential flats together with underground and above  
6 ground parking for 28 bays. The consideration for payment by Captiva was a fixed sum of £1.15  
7 million and an option to purchase granted to Rybarn to take leases in respect of seven of the 28  
8 flats and the respective parking bays.  
9

10 2 Rybarn commenced adjudication proceedings against Captiva by notice of adjudication dated the 6<sup>th</sup>  
11 October 2005. A Mr. Nutson was appointed adjudicator on the nomination of the Chartered  
12 Institute of Arbitrators.  
13

14 3 Captiva, by these Part 8 proceedings, seek declarations that (a) the contract is excluded from Part 2  
15 of the Housing Grants Construction and Regeneration Act, (b) that the adjudication commenced by  
16 notice of adjudication of the 6<sup>th</sup> October 2005 is invalid, and (c) that Mr. Nutson had no  
17 jurisdiction.  
18

19 4 On the 26<sup>th</sup> October Rybarn notified Captiva that they would not be proceeding with the  
20 adjudication commenced by the notice of adjudication dated the 6<sup>th</sup> October 2005. This court  
21 therefore will not have to consider whether or not there was a reference comprising a single dispute  
22 or a number of disputes and like questions. The only live issue is whether the parties under the  
23 agreement have a statutory right to adjudicate. There is no express provision in the contract  
24 between the parties providing for adjudication and Rybarn has relied upon the contract as being a  
25 construction contract falling within the Act by which s.108 gives parties to construction contracts the  
26 right to refer a dispute to adjudication.  
27

28 5 The issue between the parties is whether the contract is a development agreement within the  
29 meaning of the Construction Contracts Exclusion Order 1998, Statutory Instrument 1998 No. 648  
30 (the Exclusion Order). The Exclusion Order excludes such agreements from Part 2 of the Act.  
31 Captiva argue that the contract falls within the ambit of the exclusion order. If Captiva is correct  
32 then parties do not have the right to refer disputes to arbitration. The Exclusion Order at para.6  
33 provides:  
34

35 "1. A construction contract is excluded from the operation of Part 2 if it is a development  
36 agreement within the meaning given below.  
37

38 2. A contract is a development agreement if it includes provision for the grant or  
39 disposal of a relevant interest in the land on which takes place the principal construction  
40 operations to which the contract relates.  
41

42 3. In paragraph 2 above a relevant interest in land means –  
43

44 (a) a freehold; or  
45

46 (b) a leasehold for a period which is to expire no earlier than 12 months after  
47 the completion of the construction operations under the contract."  
48

49 The question for the court is whether the contract between Rybarn and Captiva includes a provision  
50 for the grant or disposal of a relevant interest in the land on which the construction operations had  
51 been carried out by Rybarn. There is apparently no authority which considers the extent of para.6  
52 of the Exclusion Order.  
53

54 6 The contract has the following relevant provisions: first, in the definition section, at 1.1.2:  
55

56 "Building consideration means the sum of £1,150,000 and the consideration flats."  
57

1 1.1.4 provides that:  
2

3 "The consideration flats mean those units in the development identified on the approved  
4 plans as numbered 5, 11, 14, 15, 18, 21 and 26 with the associated above ground  
5 parking bays and underground bays.  
6

7 1.1.5. Development means the construction of the block of 28 residential flats together  
8 with the over ground parking, the 28 bays, in accordance with the planning permission,  
9 together with all other erections, structures, road surfaces, ancillary works and the  
10 creation of landscaping in accordance with the planning permission."  
11

12 Then at 1.1.13 reference is made to the s.106 agreement. At 1.1.15 there is a definition of what is  
13 included in the show flat. At 1.1.16 there is a description of the site by reference to the Land  
14 Registry plan, entitled "DT290012". Then the recitals in the agreement record (1) that Captiva is  
15 the estate owner in fee simple in possession, subject only to the first charge and the matters  
16 disclosed by the property register, proprietorship register and charges register of title DT290012 as  
17 at the 2<sup>nd</sup> October 2001 of the site; and (2) that the parties have agreed that Rybarn shall carry out  
18 the development on the following terms and conditions. If one then goes to para.3.1, this gives  
19 Rybarn a licence to enter upon the site for the purpose of constructing and completing the  
20 development. At 3.4:  
21

22 "In consideration of the work carried out by Rybarn under this Agreement Captiva agrees  
23 that Rybarn shall have the exclusive right to dispose of and retain the proceeds of sale of  
24 such of the consideration flats to which Rybarn may become entitled from time to time  
25 under the terms hereof.  
26

27 3.5. Rybarn agree with Captiva to appoint and commission the selling agents selected by  
28 Captiva for the marketing and sale of the consideration flats provided that Rybarn  
29 reserves the right to appoint its own marketing and selling agents after the 1<sup>st</sup> March  
30 2003 if it is not satisfied with the performance of the agents selected by Captiva.  
31

32 3.6. Sales of the consideration flats shall be completed in the form of the lease subject to  
33 any amendment approved by Captiva as may be necessary to suit the particular needs of  
34 each of the consideration flats or such variations as may be made to the development in  
35 accordance with the provisions of this agreement, such approval not to be withheld or  
36 delayed unreasonably.  
37

38 3.7. That subject to any revisions as specified in the preceding sub-clause, Captiva will  
39 on receipt of a notice from Rybarn exercising the option hereinafter referred to (to be  
40 supplied by Rybarn's solicitor to Captiva's solicitor) in the form of the lease or such other  
41 form as Rybarn may reasonably require leasing such of the consideration flats to which  
42 Rybarn may become entitled from time to time under the agreement terms hereof to  
43 purchasers introduced by Rybarn, and furthermore will on receipt of notice from Rybarn  
44 requiring it to do so execute stock transfers or procure allotment of shares, as the case  
45 may be, of shares in the management company."  
46

47 7 I now turn to the clauses that deal with payment in the agreement. These are at 3.8.  
48

49 "3.8.1. Captiva hereby grants to Rybarn an option to take a lease in the form of a lease  
50 in respect of each of the consideration flats.  
51

52 3.8.2. The option in respect of each of the consideration flats shall be treated as a  
53 separate option and shall be exercisable separately at any time within the option period.  
54

55 3.8.3. The option period for each of the consideration flats shall be the relevant date  
56 referred to in the third schedule or 9 years 11 months from the date hereof, whichever is  
57 the earlier, and shall terminate 10 years from the date hereof.

1  
2 3.8.4. Each option shall be exercisable by notice in writing from Rybarn to Captiva during  
3 the option period and following the receipt of each notice Captiva shall grant a lease  
4 between 5 and 15 working days thereafter at Rybarn's election to Rybarn or by way of  
5 sub-sale to a prospective occupier of the relevant consideration flat.  
6

7 3.8.5.1. Once the notice has been served upon Captiva a binding contract to grant  
8 a lease of the relevant consideration flat with vacant possession shall exist.  
9

10 3.8.5.2. The grant of each lease will be subject only to the entries in the register  
11 of title No. DT290012 as at the 2<sup>nd</sup> October 2001 save for any financial charges  
12 and otherwise in accordance with the National Conditions of Sale 3<sup>rd</sup> edition  
13 insofar as the same are not inconsistent with the terms hereof.  
14

15 3.8.6. No monetary consideration shall be payable by Rybarn to Captiva for the grant of  
16 each lease if the option contained in this clause is exercised by Rybarn which shall be  
17 granted in part consideration of Rybarn agreeing to construct the development in  
18 accordance with the terms of this Agreement."  
19

- 20 8 Section 4 of the agreement and the clauses there deal with the obligations of Rybarn in relation to  
21 such matters as insurance and the mechanics of conveyancing. Clause 4.1.3 has some materiality  
22 to this issue.  
23

24 "4.1.3. To pay half of the expenses incurred in accordance with Part 2 of the Second  
25 Schedule hereto and pro rata according to the ratio which the total number of  
26 consideration flats acquired by Rybarn or to which Rybarn may become entitled bears to  
27 the total number of units or the expenses incurred in accordance with Part 2 of the  
28 Second Schedule."  
29

30 Those expenses relate to the equipping of the show flat, landscaping, the s.106 agreement and  
31 National Housebuilding Registration costs, some pro rata and some equally.  
32

- 33 9 I turn to Part 3 of the agreement, and this deals with Captiva's obligations.  
34

35 "5.3. To forthwith deposit its land or charge certificate in respect of registered title  
36 DT290012 to facilitate registration of this agreement as a notice or caution and  
37 subsequent disposal of the consideration flats and to procure the consent of Barclays  
38 Bank plc to the creation of this agreement.  
39

40 5.6. To pay Rybarn the building consideration in the manner and upon the dates  
41 specified in the Third Schedule hereto.....  
42

43 5.11. Not to increase its borrowing facility with Barclays Bank plc without the consent of  
44 Rybarn which shall not be unreasonably withheld."  
45

- 46 10 Section 6 deals with agreements and declarations and governs the resolution of disputes and  
47 matters such as the service of notices and valuations. At 6.8 there is the provision:  
48

49 "For the avoidance of doubt the Agreement shall not create or be deemed to create a  
50 partnership between the parties."  
51

52 6.10 deals with the conveyancing provisions for the flats. 6.11 creates mutual rights of pre-emption  
53 as to the sale of each other's flats in certain circumstances.  
54

- 55 11 The first schedule is in tabular form and lays down a timetable for the stages of the development.  
56 The third schedule lays down a timetable for the stage payments of the £1.15 million consideration,  
57 with reference to the completion of each of the stages described in the first schedule. In relation to

1 the options granted in relation to the seven consideration flats described above, there is laid down  
2 by reference to the completion of the individual stages the commencement of the period during  
3 which the individual option must be exercised, by way of example: (1) upon completion of the first  
4 stage of the development by Rybarn to the retaining wall to the basement the option period in  
5 respect of Flat 14 will commence and Captiva will pay to Rybarn the sum of £165,000. The  
6 schedule then goes on to provide that in each case completion of any lease to Rybarn or its  
7 nominee shall be accompanied by consent to dealing executed by the mortgagee under the first  
8 charge, or, in the alternative, production of an open consent to dealing executed by the mortgagees  
9 effectively enabling the disposal by Rybarn of the relevant consideration flat or flats to a third party  
10 in accordance with the terms of this agreement.  
11

12 12 Miss Doerries, on behalf of Rybarn, submits that the option provision merely provides a mechanism  
13 by which Rybarn was to receive further payment for the construction works in addition to the fixed  
14 £1.15 million sum provided for in para.1.1.2. She contends that the contract does not provide for  
15 the grant or disposal of a leasehold or freehold as required by the exclusion order. It merely grants  
16 Rybarn the option to call for a leasehold interest in respect of seven of the flats for a period of 10  
17 years, and that there was no entitlement to exercise the option until the relevant stage of the  
18 construction works had been reached.  
19

20 13 Mr. Justin Mort, on behalf of Captiva, submitted that the contract reflects the clear intention of the  
21 parties that the leasehold interest in the flats built by Rybarn but owned by Captiva would be  
22 transferred under the terms of the contract. He points to clause 3.4 as specifically envisaging the  
23 defendants becoming entitled, pursuant to the terms of the contract, to exclusive rights over the  
24 flats, their disposal, and the retention of the proceeds of sale. He contends that the precise  
25 mechanism by which the defendant becomes entitled is irrelevant provided that the provision of  
26 such mechanism was contained in the material agreement, the contract, as in this case.  
27

28 14 Paragraph 6.2 of the order sets out the meaning of "development agreement" in wide terms.  
29

30 "A contract is a development agreement ..."

31  
32 Then the relevant words:

33  
34 "... if it includes provision for the grant or disposal of a relevant interest in the land on  
35 which takes place the principal construction operations to which the contract relates."  
36

37 I give emphasis to the words "includes provision for". There are many ways in which parties may  
38 arrange for or provide for the disposition of an interest in land or the grant of such an interest. It  
39 might be at some time in the future or subject to the fulfilment of some condition wholly within the  
40 control of a third party, such as a planning authority, a parent company or a lender. It might be  
41 subject to some condition within the control of one or both of the parties being satisfied, such as  
42 timely or satisfactory completion of works by the contractor, or the issue of the final certificate by  
43 an architect. Such provision or grant could be subject to the willingness of a third party to enter  
44 into the transaction or pursuant to a further document to be entered into by the parties.  
45

46 15 It seems to me that all such agreements would make provision for the grant or disposal of a  
47 relevant interest within the order. There is nothing in the order which, in my judgment, would  
48 import the requirement that the order is only concerned with unconditional agreements. Miss  
49 Doerries further contended that even if there was a provision for the disposal or grant of land within  
50 the contract it could still not fall within the terms of the exclusion order because the land on which  
51 took place the principal operations was the whole site comprising 45 Christchurch Road,  
52 Bournemouth. She submits that the plain purpose of s.6 of the Exclusion Order is to exclude  
53 contracts which provide both for the carrying out and the construction operations on the land and  
54 the grant of freehold or leasehold in excess of 12 months for the same land. Since the option was  
55 in respect of only seven of the flats she contends it did not relate to the relevant land which was  
56 the whole site. The qualifying adjective relates to the interest in land, that is relevant land. I do

1 not accept that where the word "land" is used in para.6.2 it bears such a restrictive meaning. The  
2 adjective "relevant" relates to interest and not to land.  
3  
4 16 The effect of the contractual provisions, particularly clauses 3.4, 3.8 and the Third Schedule, is to  
5 grant Rybarn options for the grant of leases for each of the seven consideration flats. These  
6 provisions ensure that on the due exercise of the option by Rybarn, Captiva, who is liable to grant  
7 the lease to the extent of the leasehold interest granted, has its estate or interest taken away  
8 without its consent and vested in another. The provisions in the contract creating that option give  
9 Rybarn an interest in land which, incidentally, is protected by clause 5.3 of the agreement which  
10 provides for the deposit of Captiva's land certificate in respect of the registered title to facilitate  
11 registration of the agreement as a caution or notice.  
12  
13 17 Mr. Mort, in my judgment, is right when he submits that this is the relevant interest in land for the  
14 purposes of the Exclusion Order, and that these provisions are for the grant or disposal of that  
15 interest, and are clearly provisions within 6.2 of the Exclusion Order. Furthermore, the contractual  
16 provisions satisfy the requirements of s.2 of the Law of Property Miscellaneous Provisions Act of  
17 1989: see Spino v. Glencrown Properties Ltd. [1991] Ch.537.  
18  
19 18 Thus, I declare that the contract is excluded from Part 2 of the Housing Grants Construction and  
20 Regeneration Act. It follows that the adjudication commenced was invalid and that the adjudicator  
21 nominated had no jurisdiction.  
22 19 I direct that there shall be a transcription of this judgment made available to the parties.  
23 Applications in relation to costs and any other applications can be made once the parties are in  
24 possession of the transcript, and time will not start to run until you receive the appropriate  
25 transcript.  
26