

ENGLISH HIGH COURT DECIDES NO THIRD PARTY RIGHT TO ADJUDICATION

Hurley Palmer Flatt Ltd v Barclays Bank Plc [2014] EWHC 3042

Introduction

In a decision handed down on 23 September 2014 in *Hurley Palmer Flatt Ltd v Barclays Bank Plc* [2014] EWHC 3042, the English High Court considered the extent to which the rights of a third party enforceable under the Contracts (Rights of Third Parties) Act 1999 can be determined by adjudication under an express term contained within the agreement between the original contracting parties.

Background

By a deed of appointment dated 28 January 2008 ("the Agreement") between Barclays PLC and the Claimant, Hurley Palmer Flatt Limited ("HPF"), HPF agreed to provide mechanical and electrical engineering design services in relation to the design and construction of a new data hall at a data centre for Barclays PLC. The Defendant in the present action, Barclays Bank PLC was deemed to be an affiliate of Barclays PLC and was therefore, under Clause 14.3, "entitled to enforce the terms of this Agreement as "Client" always provided that the Consulting Engineer shall be entitled [to] rely on the equivalent defences in respect of such liability which it has against the Client."

The Agreement provided that disputes would be resolved by adjudication, and the decision of the adjudicator would be binding on the parties unless and until the dispute was determined by legal proceedings or by agreement.

Disputes arose concerning the chilled water system, leading to a claim against HPF valued at over £4 million.

On 11 August 2014 Barclays Bank PLC gave a notice of adjudication seeking damages against HPF in relation to the claim of defects in the chilled water system based on rights as an Affiliate under the Agreement, and the dispute was referred to an adjudicator on 18 August 2014.

On 26 August 2014 HPF commenced proceedings seeking a declaration that Barclays Bank PLC was not entitled to commence adjudication proceedings against HPF and that consequently the notice of adjudication and referral notice were ineffective and the adjudicator did not have jurisdiction to determine the claims.

Decision

Mr Justice Ramsey held that:

(1) Barclays was not entitled to commence adjudication proceedings against HPF;

(2) Barclays' notice of adjudication dated 11 August 2014 and its referral notice dated 18 August 2014 were ineffective;

(3) the adjudicator did not have jurisdiction to determine such claims.

In his decision, Mr Justice Ramsey considered that on a proper construction of the Agreement, Barclays Bank PLC was not entitled to refer the dispute to adjudication - the reference to “such liability” in Clause 14.3 strongly indicated that the intention was that the rights to be enforced under Clause 14.3 were the rights giving rise to liability and not the procedural rights such as the right to adjudication.

Mr Justice Ramsey also considered the application of section 1(1) and 1(4) of the Contracts (Rights of Third Parties) Act 1999, and held that section 1(4) did not extend the adjudication clause to Barclays Bank PLC. *Section 1(1) provides, at relevant part, “(1) Subject to the provisions of this Act, a person who is not party to a contract (a “third party”) may in his own right enforce a term of the contract if (a) the contract expressly provides that he may...”* The Explanatory Notes to that Act state that under section 1(4), it was open to the parties to limit or place conditions on the third party's right; for example, if he wishes to enforce the right he is to do so by way of arbitration and not litigation.

In the present case, no such condition had been imposed. Further, without an equivalent of section 8 of the 1999 Act (which allows a third party to be able to enforce its rights under the contract by way of arbitration) so as to make the provision as to adjudication applicable to the relationship between Barclays as third party and HPF the terms of the adjudication provision would not be applicable.

For further information, please see our previous alerts on the interpretation of the Contracts (Rights of Third Parties) Act 1999 in relation to arbitration clauses [here](#).

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