

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION

BETWEEN

NIMO-LUPP INTERNATIONAL

-PLAINTIFF

HOLDING JOINT VENTURE

AND

BANK OF SIERRA LEONE

-DEFENDANT/RESPONDENT

AND

TROPICAL ENVIRONMENTAL

-THIRD PARTY/APPLICANT

DESIGN ASSOCIATES

RULING OF THE HONORABLE JUSTICE LORNARD TAYLOR DELIVERED
ON THE 5TH OCTOBER 2023

COUNSEL FOR THE THIRD PARTY/APPLICANT -Y.H. WILLIAMS

COUNSEL FOR THE DEFENDANT/RESPONDENT -E. PABS-GARNON

This action was commenced by writ of summons. The Plaintiff's claim is that it has executed services for the defendant for which it is yet to be paid. The defendant states that payment has not been made to the plaintiff because it was awaiting certification of the Plaintiff's work by its project consultant, Tropical Environmental Design Associates. On the 14th November 2022, the defendant issued a third party notice claiming indemnity for the Plaintiff's claim against Tropical Environmental Design Associates on the basis that this action is based on the neglect, failure and or refusal of the third party to perform its contractual obligation.

On the 13th March 2023, solicitors for the third party filed the present application praying that the third party notice issued by the defendant be struck out on the following grounds;

1. That the third party notice is an abuse of the court's processes.



2. That this court lacks jurisdiction to hear and determine any dispute between the defendant and the 3rd party as the contract between them has an arbitration clause.
3. That the issues raised by the defendant in the third party notice are res judicata.

I will take the liberty to consider first the issue whether or not this court has jurisdiction to hear and determine and dispute between the defendant and the third party based on its crucial nature.

On the 5th May 2013, the defendant and the 3rd party entered into a contract the terms of reference and scope of services of which are contained in document referred to as Annex A. It is not in contention that the third party was by the said contract saddled with the duty of a project consultant which would invariably mean that the third party was responsible for supervising the work of the Plaintiff herein and certifying completion. The third party's contention is that the said contract has a dispute resolution clause which states;

"Any dispute arising out of the contract, which cannot be amicably settled between the parties shall be referred to adjudication/arbitration in accordance with the laws of the republic of Sierra Leone".

By this clause, the third party maintains that by it being added as a party to the action, the defendant has evinced that there is a dispute between itself and that third party. If this is the case, this court therefore has no jurisdiction and that the issue ought to be referred to adjudication/arbitration. Counsel for the third party Mr. Williams went to great lengths to make this court understand that third party proceedings are in themselves disputes between the defendant and the third party and if this is the case, the matter must be referred to arbitration/adjudication.

Counsel for the defendant/respondent argued otherwise. He maintains that the object of third party proceedings is to avoid multiplicity of cases and for one court to get the opportunity to litigate the matter holistically all in a bid to avoid divergent judgments which in themselves will create a whole set of legal problems. Mr. Pabs-Garnon for the defendant also argued that as a matter of fact, the dispute resolution in the agreement referred to above does not limit the resolution of disputes to arbitration. Adjudication is also an option and in his opinion, the process and procedure before this court is precisely what could be defined as such.

In reply, counsel for the third party disagreed with these assertions. His argument is that court processes and procedures cannot be called adjudication. He asserts that adjudication is a process outside the purview of the court. Court processes are litigation and that these terms cannot be used interchangeably.

In all these arguments, one constant remains. The primary duty of the court in these proceedings is to enforce the contract as agreed between the parties. It is trite law that this court is not cloaked with jurisdiction to make fresh agreements for the parties but rather to give life to the intentions of the parties as at the point of their convergence. This was the decision of the court in the case of **Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38**, where the House of Lords held that the court's role in interpreting a contract is to ascertain the objective meaning of the words used by the parties in the contract. The court emphasized that it was not the role of the court to rewrite the parties' agreement or to make a new contract for them. Against this backdrop, the courts have always taken a largely conservative view when it comes to the application of implied terms of a contract lest they end up rewriting the agreement of the parties.

The parties agreed that;

"Any dispute arising out of the contract, which cannot be amicably settled between the parties shall be referred to adjudication/arbitration in accordance with the laws of the republic of Sierra Leone" and this court cannot do otherwise.

However, this does not in itself determine the issue presented before this court. The dispute resolution clause says what must be done in the event there is a dispute between the parties to the contract. However, a conclusion cannot be reached on this without a determination of the issue of whether third party proceedings are disputes between the defendant and the third party and whether the processes and procedures before this court can conveniently be termed adjudication.

Are third party proceedings disputes between the defendant and the third party? As rightly stated by Mr. Pabs-Garnon for the defendant, the object third party proceedings is to ensure that the court is not littered with a plethora of matters on a single issue when such issue could be determined between all the parties involved in one matter. Basically, third party proceedings are more appropriate in situations where the defendant does not deny liability, but rather states that satisfying that liability should be the responsibility of the third party. **Order 19 rule 1 (1) of the High Court Rules 2007** is clear on this. It states;

"(1) Where in any action a defendant who has entered appearance –

(a) claims against a person not already a party to the action any contribution or indemnity;

(b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or



(c) requires that any question or issue relating to or connected with the original subjectmatter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action,

then, subject to sub-rule (2), the defendant may issue a notice in an appropriate form (in this Order referred to as a "third party notice"), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined."

In the present matter, the defendant's claim is that it has not satisfied its obligations to the Plaintiff because the third party has refused to satisfy its obligations with the defendant. The third party claims that it owes no obligation to the defendant and in fact, if it did owe the defendant an obligation, investigation of same is subject to adjudication/arbitration. In making this assertion, is the defendant making a claim against the 3rd party?

I have no doubt in mind that this is so. **Order 19 rule 1 (1)(a) of the High Court Rules 2007** is quite unambiguous on this. Third party proceedings only arise in situations where the defendant is claiming indemnity or contribution against a person not already a party to the action. There has to be a claim of indemnity or contribution for a party to be made a party to the action. Such claim cannot be between the Plaintiff and the third party as in that case, the Plaintiff would have added the third party as a defendant. The only logical inference that can be drawn from this is that the claim that forms the basis of the proceedings has to be between the defendant and the third party. However, is a claim for indemnity or contribution subject to an adjudication/arbitration clause? By adding the third party to this action, is the defendant seeking to enforce its agreement with the third party before this court?

The object of dispute resolution clauses is to define how disputes between the parties to a contract must be resolved. They are an integral part of the contract and even the courts are bound to enforce them as agreed between the parties. In the present action, the defendant has a contract with the third party. By this contract, the third party was to deliver the services of a project consultant which includes but is not limited to inspecting the work of the plaintiff and certifying payment. The third party for reasons for which this court will not delve, neglected/failed and or refused to perform under the said contract. This creates a dispute between the defendant and the third party. That dispute is subject to adjudication/arbitration. This is what the parties themselves agreed and this court must respect that.

There is no question raised in this application on the interpretation of the word arbitration as contained in the agreement between the Defendant and

the third party. However, counsel for the Defendant argues that use of the word "adjudication" in the dispute resolution clause in its agreement with the 3rd party connotes the procedure undertaken by this court. Counsel argues that adjudication means court proceedings. As such, when the dispute resolution clause in the agreement states that disputes ought to be resolved by adjudication or arbitration, an aggrieved party is left with the option of proceeding to arbitration or instituting litigation because as counsel puts it, "the third party knew at all times that disputes could end up in court".

It is understood that by the nature of the services to be rendered by the third party, there is the likelihood that disputes between the defendant and its service providers are likely to end up in court. But is this sufficient reason for this court to interpret the word adjudication to mean litigation? I think not. The most apt description of adjudication I have witnessed in legal parlance is that contained in the case of **London & Amsterdam Properties Limited v Waterman Partnership Limited (BLR) 179** where the court stated "Arbitration and adjudication are dispute resolution procedures which have many similarities, they are privately conducted and confidentiality may attach to information received in relation to both. Arbitration gives rise to a final determination which is capable of registration for enforcement. Adjudication gives rise to a provisional determination which is only binding until the dispute is arbitrated, litigated or agreed. Adjudication is further subject to very restrictive time limits and no matter how complex the dispute, one size fits all".

It is quite clear from the above that adjudication does not mean litigation and neither is it to be equated with arbitration. They are all different forms of dispute resolution and one cannot be taken to mean the other. When included in contracts, the word adjudication refers to a formal dispute resolution process in which an independent third party, known as an adjudicator, is appointed to make a non-final binding decision on the dispute. This cannot be a description of this court.

The defendant and the third party have a contract that requires them to resolve disputes through adjudication or arbitration. This means that they have agreed to have their disputes decided by a neutral third party, called an adjudicator or arbitrator, rather than by a judge in court.

The third party proceedings before this court are intended to resolve disputes between the defendant and the third party. This means that the defendant is suing the third party in court.

However, proceedings before this court are not in the nature of adjudication or arbitration. This means that the court is not the forum that the defendant and the third party agreed to use to resolve their disputes.



Therefore, if this court upholds the addition of the third party and compels it to defend the allegations against it by the defendant, it will be violating the parties' right to be governed by their contract. This is because the court would be forcing the third party to participate in a dispute resolution process that it did not agree to.

In other words, the defendant and the third party agreed to resolve their disputes outside of court. If the court forces the third party to defend itself in court, it will be violating the parties' agreement.

In the circumstances, I make the following orders;

1. The Third Party Notice in this action dated 14th November 2022 is accordingly discharged.
2. The cost of this application is assessed at Le 75,000 to be paid by the defendant to solicitors for the Third Party.

A handwritten signature in blue ink, consisting of a large, stylized 'L' and 'T' with a horizontal line extending to the right.

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HONORABLE JUSTICE LORNARD TAYLOR