SUPREME COURT OF NOVA SCOTIA

Citation: *Omega Formwork Inc. v. 778938 Ontario Limited*, 2023 NSSC 308

Date: 20230925
Docket: Hfx No. 492560
Registry: Halifax

Between:

OMEGA FORMWORK INC.

Plaintiff

- and -

778938 ONTARIO LIMITED o/a STARFISH PROPERTIES and THE ROY BUILDING LIMITED

Defendants

- and -

ELLISDON CORPORATION

Third Party

DECISION ON MOTION TO CONSOLIDATE

Judge:	The Honourable Justice Scott C. Norton
Heard:	September 20, 2023, in Halifax, Nova Scotia
Written Decision:	September 25, 2023
Counsel:	Brendan D. Peters, for Nancy Rubin, KC for the Defendants/Applicants James D. MacNeil, for the Plaintiff/Respondent Christopher C. Robinson, KC, for the Third Party

By the Court:

Introduction

[1] The Roy Building Limited ("The Roy") and 778938 Ontario Limited operating as Starfish Properties ("Starfish") seek an Order from this court consolidating two related actions, Hfx No. 492560 (the "Omega Action") and Hfx No. 525995 (the "EllisDon Action").

[2] The motion came before me for hearing on September 20, 2023. I granted the motion with written reasons to follow. These are my reasons.

Background

[3] I begin with the following historical procedural summary:

(a) Both actions relate to claims arising from the construction of a residential condominium project in Halifax, Nova Scotia ("Project").

(b) Omega is the Plaintiff in the Omega Action that was commenced on October 2, 2019, seeking, among other relief, damages relating to various periods of delay. The Roy and Starfish filed a defence and counterclaim seeking, among other relief, damages as a consequence of Omega's failure to properly perform its work, in breach of the Omega Contract.

(c) The Roy and Starfish started a Third-Party Claim in the Omega Action against EllisDon claiming, among other things, that EllisDon contributed to any loss suffered by Omega by way of its breach of the EllisDon Contract and/or negligence on the part of EllisDon, capped at those damages that may be awarded to Omega.

(d) EllisDon issued a defence and counterclaim in response to The Roy and Starfish's Third-Party Claim, seeking damages for unpaid services rendered for the Project, among other things.

(e) In February 2021, the parties to the Omega Action exchanged Affidavits Disclosing Documents, and in March 2021 discoveries were conducted. On August 26, 2022, the parties participated in a Date Assignment Conference, setting the date of the Trial Readiness

Conference for October 11, 2024. Trial dates are scheduled for November 25-28, December 2-5, 9-12, and 16-18, 2024.

(f) On May 29, 2020, The Roy and Starfish commenced an action in Ontario by filing a Notice of Action, followed by a Statement of Claim on June 9, 2020, seeking, among other relief, damages relating to EllisDon's breach of the EllisDon Contract and/or negligence on the part of EllisDon ("Ontario Action").

(g) EllisDon did not file a defence, but instead brought a motion to stay the Ontario Action. On July 9, 2021, the Ontario Superior Court of Justice dismissed EllisDon's motion to stay the Ontario Action.

(h) On March 17, 2023, the Ontario Court of Appeal allowed EllisDon's appeal of the lower court's decision to dismiss the stay of the Ontario Action, finding that Nova Scotia is the more appropriate forum for the hearing, and awarding a stay of the Ontario Action on an interim basis, without prejudice to the parties returning before the Ontario Superior Court of Justice to argue that the stay should be lifted, once the status of the Nova Scotia proceedings is ascertained. *778938 Ontario Limited v. EllisDon Corporation*, 2023 ONCA 182.

(i) On August 11, 2023, The Roy and Starfish commenced the EllisDon Action in Nova Scotia, mirroring the substance of the Ontario Action, by filing a Notice of Action and Statement of Claim. EllisDon filed a defence and counterclaim on September 15, 2023. The defence to counterclaim is yet to be filed.

[4] In both Nova Scotia Actions, The Roy and Starfish are seeking relief against EllisDon Corporation ("EllisDon") arising from its alleged breach of contract and/or negligence, relating to EllisDon's alleged failure to, among other things, properly execute its responsibilities to manage, administer, and coordinate the construction of the Project.

[5] The Roy and Starfish submit that the consolidation of the Omega Action and the EllisDon Action is in the interests of justice. EllisDon does not oppose the motion for consolidation. Omega does oppose the motion. Omega says that the motion is premature because the EllisDon Action is not sufficiently developed and there is insufficient evidence before the court to determine that the two actions should be consolidated. It says that it would be unfair to jeopardize Omega's long scheduled trial dates set for the Omega Action starting November 25, 2024.

Law

[6] Motions for consolidation are governed by *Nova Scotia Civil Procedure Rule* 37:

> **37.02 Consolidation of proceedings**
>
> A judge may order consolidation of proceedings if the proceedings to be consolidated are of the same kind, that is to say, actions, applications, applications for judicial review, or appeals, and one of the following conditions is met:
>
> (a) a common question of law or fact arises in the proceedings;
>
> (b) a same ground of judicial review or appeal is advanced in the applications for judicial review or appeals and the ground involves the same or similar decision-makers;
>
> (c) claims, grounds, or defences in the actions or applications involve the same transaction, occurrence, or series of transactions or occurrences;
>
> (d) consolidation is, otherwise, in the interests of the parties.

[7] The Omega Action and the EllisDon Action are both actions, and therefore the requirement for the proceedings to be consolidated to be of the same kind is met.

[8] The condition in *Rule* 37.02(a) is met, as there are common questions of fact arising in both actions, specifically in regard to claims of breach of contract and negligence relating to delays in the Project.

[9] Furthermore, the condition in *Rule* 37.02(c) is also met, as the claims in both actions involve the same series of transactions or occurrences, namely those relating to the Project.

[10] In *Stone v. Raniere*, (1992) 117 N.S.R. (2d) 194 (S.C.T.D.), Justice Saunders (as he then was), adopted the reasoning in *Hillcrest Housing Limited et al.*, (1986) 56 Nfld. & P.E.I.R. 237 (P.E.I.S.C.), and set out six factors relevant to determining whether matters should be consolidated, summarized as follows:

(a) general convenience and expense;

(b) whether a jury notice is involved;

(c) how far the actions have progressed;

(d) whether the plaintiffs have separate solicitors;

(e) actions should not be consolidation where matters relevant in one action have arisen subsequent to the commencement of the other, and the actions have proceeded to a considerable extent; and

(f) where consolidation is otherwise proper, the fact that on discovery questions would be unobjectionable in one action which might be privileged in the other action is not a sufficient reason for refusing an order consolidation the actions.

[11] Subsection 41(g) of the *Judicature Act*, RSNS 1989, c. 240, provides general direction that the court should try to avoid a multiplicity of legal proceedings.

[12] The overarching consideration on a motion for consolidation is what is just and convenient to the parties and to the administration of justice: *Healy v. Halifax (Regional Municipality)*, 2016 NSCA 47, at paras. 35 and 38.

General Convenience and Expense

[13] A comparison of the pleadings filed in the Omega Action and EllisDon Action reveals that the allegations made by The Roy and Starfish, and by EllisDon, mirror each other. Both actions concern damages relating to EllisDon's breach of contract and/or negligence respecting its coordination, scheduling, and monitoring of the Project, and it is reasonable to infer that accordingly many common witnesses will be required in both actions.

[14] This was also the finding of the Ontario Court of Appeal. That court was considering the text of the Ontario Statement of Claim that was mirrored by the EllisDon Statement of Claim in Nova Scotia. The Ontario Court of Appeal found at para. 25 of its decision:

> [25] When a comparison between the respondents' third party claim and their Ontario action is made, it will be seen that the allegations in the respondents' statement of claim mirror those in the respondents' third party claim against EllisDon in the Omega action. While the respondents' third party claim for damages is capped at those damages that may be awarded to Omega, their allegations in support of their third party claim, as in their amended Ontario statement of claim, broadly encompass all of EllisDon's work on the project, specifically in the particulars set out in subparagraphs 11. (a) to (i) below […]

[15] Consequently, this factor favours consolidation.

Whether Jury Notice is Involved

[16] No jury was requested in the Omega Action and no party before me submitted that a jury might be sought in the EllisDon Action. This is therefore a neutral factor respecting consolidation.

How Far the Actions Have Progressed

[17] In the Omega Action, pleadings have closed, documents have been exchanged, discoveries have taken place and the matter has been set down for trial. There remain outstanding document requests, and expert reports have yet to be filed.

[18] In the EllisDon Action, EllisDon has just delivered a defence and counterclaim and pleadings have yet to close.

[19] Omega says that it would be unjust to order consolidation because the two actions are at vastly different stages and to place the existing trial dates at risk would be unfair to Omega.

[20] While the Omega Action has progressed further than the EllisDon Action, weighing against consolidation, this factor must be balanced against the risk of inconsistent findings as discussed below.

Whether the Parties Have Separate Solicitors

[21] The Roy and Starfish have retained the same solicitors for both actions, as has EllisDon. In *Foran v. Malek*, 2023 NSSC 29, the plaintiff in both actions to be consolidated had the same solicitor, and this was considered a neutral factor, or one mildly favouring consolidation.

Subsequent Matters Arising in One Action

[22] Both actions deal with matters that arose around the same time, out of the same Project and will require factual findings to be made regarding each party's role in the allegations of delay and costs arising from this delay. This weighs in favour of consolidation.

Privileged and Non-Privileged Discovery Questions

[23] Except for some outstanding document requests, discovery has concluded in the Omega Action. There is no issue of privileged discovery questions being improperly raised in the EllisDon Action as the result of consolidation. This weighs in favour of consolidation.

Is Consolidation in the Interests of Justice

[24] While the factors articulated in *Hillcrest*, and adopted in *Stone*, generally favour consolidation, Nova Scotia courts have stressed that the overarching considerations of what is "just" between parties, whether the actions are "inextricably intertwined", and whether there is a risk of inconsistent findings in the absence of consolidation, ultimately dictate whether consolidation ought to be granted.

[25] In *Healy, supra.*, Bourgeois J.A., for the Nova Scotia Court of Appeal, explained that the overarching consideration on a motion for consolidation is what is "just" between the parties:

> [35] […] Although many cases have articulated a series of factors for consideration in a consolidation motion, the overarching consideration has been, and continues to be, what is "just" between the parties. See for example *Stone v. Raniere* (1992), 1992, 117 N.S.R. (2d) 194, and the many cases in which it has been followed. Determining what is "just" may be aided by the court considering certain factors, but should not be dictated by a rigid set of criteria. […]

[26] The court in *R.C. v. Nova Scotia (Attorney General)*, 2016 NSSC 299, stated that the party seeking consolidation bears the onus of showing that the proceedings are "inextricably intertwined" and that "it would be just and convenient [sic] in the interests of justice to hear the matters together". Further, in *Jeffrie v. Hendriksen*, 2011 NSSC 351, Justice Rosinski noted that the risk of inconsistent findings or outcomes is a "good barometer of whether the proceedings are inextricably intertwined".

[27] In *Wright v. Sun Life Assurance Company of Canada*, 2023 NSSC 13, a recent motion to consolidate a tort action arising out of a motor vehicle accident and an action for payment of long-term disability benefits, the court did order consolidation, notwithstanding it would delay the long-term disability trial already set down, by a couple of years.

[28] In granting the order, Justice Campbell identified the risk of inconsistent findings, and not simply convenience, as a major factor in awarding consolidation:

> [19] Having one trial of one action would be substantially more convenient than having two trials dealing with many of the same issues. But it is not just a matter of "convenience". Having two trials dealing with such intertwined or linked issues presents the real risk of inconsistent findings. That is an issue that impacts on the administration of justice. A judge hearing the second trial is required to hear that trial fairly and impartially but could be faced with findings of fact made by another judge in a case involving the same parties and the same incident that are determinative of the issues in the trial before them.

[29] Omega referred me to the decision in *MacDonald v. McPhee*, 2022 NSSC 39, wherein Justice Gatchalian, after considering the factors in *Stone*, concluded, at paras. 21-22, that consolidation in that case would not be just:

> [21] Having carefully considered the circumstances as a whole, it is my conclusion that consolidation would not be just and convenient to the parties or to the administration of justice in this case for the following reasons:
>
> (1) The action against Dr. Westhaver is virtually ready for trial, whereas the action against Mr. McPhee is in its infancy.
>
> (2) While there will be some overlap in the evidence, that overlap is outweighed by the issues and facts that are unique to each case.
>
> (3) Consolidation will very likely require an adjournment of the scheduled trial dates in the action against Dr. Westhaver, will lengthen the trial, and cause Dr. Westhaver additional expense.
>
> (4) The action against Dr. Westhaver will be heard by a jury. We will not know for some time whether the action against Mr. McPhee will be heard by a jury.
>
> [22] I am especially concerned about the impact of further delay on the claim against Dr. Westhaver. If the trial proceeds on the scheduled dates in the spring of 2023, it will have been over fourteen years since the root canal and over twelve years since the claim was filed. Consolidation will likely add to what is already a very lengthy delay in getting that matter to trial. In my view, the prejudice to Dr. Westhaver and to the administration of justice caused by further delay outweighs any trial economy that would be achieved by consolidation. On the facts of this case, it would not, in my view, be just and convenient to Dr. Westhaver or to the administration of justice to consolidate the actions.

[30] The opposite conclusions by the courts in *Wright* and *McPhee* underscore that the decision to allow or reject consolidation is highly contextual. In my view *McPhee* is factually distinguishable from the present case. In that case, Dr. Joseph

Westhaver, a dentist, performed a root canal on James Todd MacDonald in 2008. Mr. MacDonald claimed that he suffered significant adverse health consequences as a result of Dr. Westhaver's negligent dental care. Mr. MacDonald retained a lawyer. The lawyer commenced an action against Dr. Westhaver in 2010. Almost ten years later, in August 2020, Mr. MacDonald sued the lawyer for alleged negligent legal representation. The lawyer sought to consolidate the two actions. The fact that the dental claim was scheduled for a jury trial and that it was unlikely that the lawyer negligence claim could be determined by a jury was a significant factor along with the substantial delay. Those factors do not exist here.

[31] While not binding upon me, I do take note that the Ontario Court of Appeal, in its decision to grant the interim stay of the Ontario Action, found that there was a likelihood of inconsistent findings if the stay were not granted.

[32] In determining what is just between parties in the context of consolidation, I must balance all of the foregoing factors weighing in favour of consolidation against the inherent impact consolidation would have on the interests of the parties.

[33] Consolidation will lead to a need for supplementary disclosure, additional days of discovery, and an elongation of time required for trial. Nevertheless, I believe that this can be achieved through active case management and cooperation of the parties. All parties acknowledged at the hearing that they consent to me ordering that a case management judge be appointed.

[34] I find that the risk of adverse findings in the present case is high and the negative impact of that on the administration of justice trumps the risk that the trial dates will be lost or lengthened because of consolidation.

[35] The motion to consolidate the Omega Action and the EllisDon Action is granted with no costs awarded. I order that The Roy and Starfish file their defence to the EllisDon Counterclaim on or before October 13, 2023. I order the Prothonotary to appoint a case management judge pursuant to *Rule* 26B.02.

[36] Order accordingly.

Norton, J.