

Judgment 25/2012

**Prism Architectural Limited and (1)
Jubilee General 2 Limited, (2) Jubilee
General 3 Limited
Civil Action File No 1574
Royal Court
6th June 2012**

Application for actions to be consolidated.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 6th day of June 2012 before Richard John Collas Esquire, Bailiff, alone

| | | |
|-----------------|---|-------------------------------|
| Between: | PRISM ARCHITECTURAL LIMITED | Plaintiff |
| | and | |
| | (1) JUBILEE GENERAL 2 LIMITED | |
| | (IN ITS CAPACITY AS GENERAL PARTNER OF JUBILEE SCHEME 2 LIMITED PARTNERSHIP) | |
| | (2) JUBILEE GENERAL 3 LIMITED | |
| | (IN ITS CAPACITY AS GENERAL PARTNER OF JUBILEE SCHEME 3 LIMITED PARTNERSHIP) | Defendants |
| | AND | |
| | CAPITA SYMONDS LIMITED | Plaintiff |
| | and | |
| | (1) JUBILEE SCHEME 3 LIMITED PARTNERSHIP | |
| | (2) JUBILEE SCHEME 2 LIMITED PARTNERSHIP | Defendants |
| | and | |
| | WOOLF LIMITED | First Third Party |
| | and | |
| | PEP CIVIL AND STRUCTURES LIMITED | Second Third Party |

WHEREAS the Bailiff considered an application on the part of Jubilee for the Prism Action to be consolidated with the Capita Action and heard thereon Advocate N J Barnes counsel for the Plaintiff (Prism Architectural Limited); Advocate P T R Ferbrache counsel for the First and Second Defendants; Advocate I C Swan counsel for the Plaintiff (Capita Symonds Limited) and for the First Third Party and Advocate M C Newman counsel for the Second Third Party the Bailiff this day handed down judgment in the terms attached hereto and DISMISSED the said application.

S M D Ross
H M Deputy Greffier

Approved Text
06.06.2012

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
ORDINARY DIVISION**

Between: PRISM ARCHITECTURAL LIMITED **Plaintiff**

and

**(3) JUBILEE GENERAL 2 LIMITED
(IN ITS CAPACITY AS GENERAL PARTNER OF
JUBILEE SCHEME 2 LIMITED PARTNERSHIP)**

**(4) JUBILEE GENERAL 3 LIMITED
(IN ITS CAPACITY AS GENERAL PARTNER OF
JUBILEE SCHEME 3 LIMITED PARTNERSHIP)**

Defendants

AND

CAPITA SYMONDS LIMITED

Plaintiff

and

**(3) JUBILEE SCHEME 3 LIMITED PARTNERSHIP
(4) JUBILEE SCHEME 2 LIMITED PARTNERSHIP**

Defendants

and

WOOLF LIMITED

**First
Third Party**

and

PEP CIVIL AND STRUCTURES LIMITED

**Second
Third Party**

Judgment handed down: 6th June 2012

Before: Richard John Collas, Esq., Bailiff

Advocate for the Plaintiff (Prism Architectural Limited):

Advocate for the First and Second Defendants:

Advocate for the Plaintiff (Capita Symonds Limited)

and for the First Third Party:

Advocate for the Second Third Party:

Advocate N J Barnes

Advocate P T R Ferbrache

Advocate I C Swan

Advocate M C Newman

Legislation & text referred to:

The Royal Court Civil Rules, 2007, Rules 31 and 1

The White Book, paragraphs 1.4.15 and 3.1.10

Introduction

1. In this judgment I refer to the various parties as “Jubilee”, “Prism”, “Woolf”, “Capita” and “PEP”; I use the term “Jubilee” to refer to both Jubilee entities and otherwise I adopt definitions used by counsel in their skeleton arguments.
2. This judgment is in respect of Jubilee’s application for the Prism Action to be consolidated with the Capita Action.
3. The facts are lengthy and complex. I will endeavour to summarise them briefly in so far as they are relevant to this judgment. Jubilee is the owner and developer of the former Royal Hotel site. These proceedings concern two parts of the development known as Royal Chambers (owned by the Jubilee Scheme 2 Limited Partnership) and Royal Terrace (owned by the Jubilee Scheme 3 Limited Partnership), comprising commercial and residential premises. Woolf was the construction manager; Capita provided architectural and engineering services; Prism designed, manufactured, supplied and installed various windows, curtain walling and other glazing; PEP is a structural engineer; and they were all involved in both parts of the development, in a similar capacity in each case. Capita and Woolf are both part of the Capita group of companies.
4. In the Prism Action, Prism seeks the payment of £136,168.92 being the balance of monies owed to it without prejudice to approximately £90,000 in respect of retention monies that were not due when the proceedings were issued. If I understood him correctly, I believe Advocate Barnes was suggesting that the claim may later have to be amended so as to include some or all of the retention monies. Jubilee alleges it is entitled to withhold payment because of Prism’s late completion of its works. Jubilee has counterclaimed for loss and damage suffered as a result of the alleged delayed completion.
5. In the Capita Action, Capita claims a total of nearly £3.2million is owed to it by Jubilee for fees, expenses and additional services. Jubilee has counterclaimed for £68million for losses arising from breaches and delays for which it holds Capita and/or Woolf and/or PEP responsible.
6. Prism seeks to consolidate the two sets of proceedings principally on the grounds that the delayed completion of the development, the causes of the delay and responsibility for the delays are central to the issues raised by Jubilee in both sets of proceedings. If the proceedings are not consolidated, there is a risk of inconsistent findings.
7. Prism objects, largely on the ground that the additional costs it will incur if it is part of the larger claim are disproportionate to the amount claimed against it by Jubilee.
8. Capita and Woolf support Prism in its opposition to consolidation. PEP is neutral and neither supports nor opposes consolidation.

The Law

9. The power to consolidate proceedings is contained in Rule 31 of the Royal Court Civil Rules, 2007:

- “31. (1) Where two or more actions or counterclaims are pending before the Court, and it appears to the Court that-*
- (a) some common question of law or fact arises in all of them,*
 - (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or the same series of transactions, or*
 - (c) for some other reason it is desirable to make an order under this Rule,*
- the Court may order the actions or counterclaims to be crochétées (consolidated), or to be tried at the same time, or one immediately after another, or that any of them shall be stayed until any other of them is determined.*
- (2) Where in the same action or counterclaim-*
- (a) there are claims in respect of two or more causes of action or there are two or more plaintiffs or defendants, and*
 - (b) it appears to the Court that inconvenience, embarrassment or delay may result,*
- the Court may order that the action or counterclaim be severed and that there shall be separate trials.*
- (3) An order under paragraph (2) may be made notwithstanding that the action or counterclaim has at some stage of the proceedings been consolidated under paragraph (1).”*

10. As the wording of the Rule indicates, the Court’s powers are discretionary. I am satisfied that in deciding how to exercise its discretion, the Court must have regard to the overriding objective in Rule 1 of the 2007 Rules. Such approach is consistent with the English Court’s approach to its similar powers, according to the commentary at paragraphs 1.4.15 and 3.1.10 of the White Book.
11. I am satisfied that because the requirements of Rule 31(1) are met in the present application. There is a common question of fact to be decided in both sets of proceedings. Both will involve evidence as to the cause of the delays to completion of the development contracts; the apportionment of responsibility for such delays between the architects, the designers, the suppliers and the contractors; and whether Woolf as the construction manager correctly certified appropriate extensions of time.
12. There will be some overlap between the two sets of proceedings in the evidence and in the issues to be resolved. In its defences to the counterclaim, Prism has blamed others for the delays but says it does not know exactly where responsibility lies. It has produced a schedule identifying the issues as best it can and invited Jubilee to respond and says it cannot do more in this regard without receiving a reply from Jubilee.
13. The issue for me is to decide how to exercise the Court’s discretion under Rule 31.
14. There have been considerable delays in hearing the application for consolidation due largely to difficulties in finding dates that were suitable to the Court and to all the parties. There were also two adjournments. In August 2011, Advocate Peter Ferbrache requested an adjournment because he had not joined all the necessary parties to the application. There was also an adjournment in December 2011 to enable Woolf to clarify whether there was any inconsistency between the Extension of Time certificates it had issued during the course of its engagement and the terms of its pleadings. I refer to this apparent inconsistency later in this judgment.
15. As for the procedural delays, an application for consolidation must be made as soon as it becomes apparent that it is necessary or desirable that it be made (see for example para 3.1.10

of the White Book). It follows that if there has been delay in applying, the Court may take account of the delay in deciding how to exercise its discretion. I am satisfied that in the present case, the reasons for the unfortunate delays that have occurred are such that they should not be taken into consideration in deciding the outcome.

The Parties' Submissions

16. The parties are agreed that in the exercise of my discretion, I am to have regard to the overriding objective. They have differing views as to how the objective can best be achieved.
17. Advocate Peter Ferbrache, on behalf of Jubilee, submitted that in light of the extent of overlap between the two sets of proceedings as to the issues to be determined in particular to establish responsibility for the cause and extent of the delays to the works, there should be a single determination. If the competing claims are examined separately in each action, there may be conflicting findings and there will be duplication in costs as the same witnesses, including experts, may be required in both.
18. On the other hand, Advocate Barnes raised concerns about the level of costs to be incurred by his client if the actions are consolidated. He said the length of the trial in the Capita Action has been estimated to be of the order of 6 months and there are also likely to be time-consuming interlocutory applications and considerable pre-trial activity. He submitted that the amount of time and effort that the parties will devote to a claim of nearly £70 million is different from what is appropriate to a claim of £200,000 or thereabouts. The preparations for trial in the Capita Action are likely to take longer than for the Prism Action. So, if the two are consolidated, he is concerned that there will be substantial additional cost and extra delay before his client's claim is resolved.
19. In response, Advocate Ferbrache stressed that although the Prism Action is for about £200,000 at most, Prism is a substantial company that had been paid in excess of £3.2 million for the work it had done on the two parts of the development.
20. In my view, the issue is not just about the respective resources of the parties, it is important to have regard to the amounts involved in the two claims. It would not be fair if Prism was put to such great expense that it would cost more to pursue its claim than it may expect to recover if successful. It is a well known fact that the recoverable costs normally awarded to a successful litigant do not represent the full costs incurred by the party. The Court has power to order indemnity costs in certain circumstances but no one has suggested it would be appropriate to do so in the present case. I have not received evidence as to the expected level of costs in the present case but I am satisfied it is right to take judicial notice that a six month trial to recover £200,000 is uneconomic. Even if 6 months is an over-estimate, I can see the resources that will be deployed in a complex claim for £68 million will be disproportionate to what a party will wish to deploy to recover £200,000.
21. That point was tacitly accepted by Advocate Ferbrache who suggested that Advocate Barnes would not need to be present throughout the trial. Whilst parts of the evidence in the trial of the Capita Action will not be relevant to the issues in the Prism Action, Advocate Barnes said it could be difficult to absent himself from any part of the hearing for fear that evidence may be given during his absence that is relevant to the Prism Action and that he would need to hear and/or to challenge. Hence, it was likely that he would have to be in attendance throughout most, and probably all, of the trial of the Capita Action.
22. Capita and Woolf both oppose the application for consolidation. They share Prism's concerns about the risks of delay and additional costs. Advocate Swan, on their behalf, also raised concerns about the cost and complexity of the disclosure process in the Capita Action. In an earlier affidavit, an employee of Woolf estimated that approximately 1 million documents had been created in the construction project. More recently, in correspondence between

Advocates it had been submitted that the disclosure process will involve searching in excess of 650,000 hard copy documents and extensive electronic documents estimated to be in the region of 150 gigabytes of data. The addition of further parties will add to the work involved in the disclosure exercise. On the other hand he submitted that in the Prism Action disclosure should be very much more limited.

23. I am not persuaded that Woolf and Capita will incur significant extra costs in carrying out disclosure if the Actions are consolidated. Delays and the causes of the delays will be an issue in both Actions. I have not received any evidence to suggest that there are any additional documents that will have to be disclosed if there is consolidation that would not be disclosable in the Capita Action if it proceeds alone.
24. I mentioned earlier in this judgment that the hearing in December was adjourned. During the course of counsel's oral submissions I had become aware of an apparent inconsistency in the reasons identified by Woolf as to the cause of delays to completion of the projects. In the course of its engagement as construction manager, Woolf issued certificates holding Prism responsible for part of the delays. Yet in its defence in the Capita Action, Woolf pleaded that Jubilee was responsible for all the delay.
25. After taking instructions during the adjournment, Advocate Swan explained that the nature of the delay is different in each case. He distinguished between critical delay to the overall project which Woolf attributed to Jubilee and other delay attributable to Prism for failure to meet contractual deadlines. As for the latter, he said that after issuing extension of time certificates, Prism made submissions as to the correctness of the certificates which Woolf was still considering when its appointment was terminated. If Woolf had remained involved it might have reassessed whether the certificates were properly issued or, if that was not possible, there could have been further negotiations.
26. Advocate Peter Ferbrache submitted there was no contractual provision that would have permitted a reassessment of the extension of time certificates. He said that Advocate Swan's explanations were themselves contradictory and indicate the confusion that may arise if the Actions are tried separately.
27. It is not for me at this stage to decide between the two explanations. However it is understandable that the evidence available to Woolf when it issued the certificates may be different from the evidence that will be available to the Court at trial. I can also appreciate that there may have been many causes of delay to the overall completion of the projects, attributable to more than one party. There could have been two or more concurrent delays, only one of which may have been critical to the overall completion.
28. It is therefore conceivable that it may eventually be determined that there is no inconsistency on Woolf's part and that Prism and Jubilee may have been responsible for separate delays, some of which may not have been critical to the final completion. I expect that Woolf's conduct will be closely scrutinised at trial and I cannot predict the outcome. However, I can say even at this stage that it may be permissible for Woolf to continue to maintain that the extension of time certificates were correctly issued on the information available at the time and to argue at trial that Jubilee is solely responsible for critical delays if the necessary evidence is available.
29. Advocate Ferbrache had indicated that if the application for consolidation were refused, he would seek to issue third party proceedings against Woolf and Capita. In reply, Advocate Swan said that such third party proceedings would be resisted on the ground that they are an abuse of process. In my view, it is not for me to speculate as to whether they could or could not be made third parties in the Prism Action and I will therefore exclude that from my consideration of the present application.

30. All parties are agreed that whether or not the actions are consolidated, they will require careful case management to ensure that issues are dealt with fairly and properly.

Conclusion

31. The principal factors I have to weigh in the balance in deciding how to exercise my discretion are on the one hand the additional cost that will be incurred by Prism if the application is granted and the risk of conflicting decisions especially in relation to the delay issues if they proceed separately.
32. The risk of conflicting decisions can be minimised through case management, for example, by ensuring there is full disclosure in both Actions before either of them goes to trial. However, it may not be possible to eliminate that risk completely.
33. As for the substantial additional costs that Prism will incur if the Actions are consolidated, it is more difficult to see how they could be minimised. Advocate Ferbrache suggested that the issues could be compartmentalised at trial in a way that would enable Prism and its Advocate to be absent from the court room when evidence is given on issues with which it is not concerned. I believe that will not be easy and may indeed be impossible. When witnesses are giving their evidence, they may not follow the orderly sequence that the examining Advocate may have planned and I doubt it would be possible to for the trial judge to prevent an Advocate asking a relevant question that may follow directly from a previous answer even though it may be on a topic that was not expected to be covered that day.
34. On balance therefore, I conclude that the risks and disadvantages associated with consolidation are likely to outweigh the risks and disadvantages that can presently be anticipated if the two actions are heard separately.
35. However, I am conscious that we are still at a very early stage in both sets of proceedings and that the issues in both cases may evolve in a way that no one is presently contemplating. Whilst I find that the aims of the overriding objective are best achieved by dismissing the application for consolidation, I am of the view that those aims also require that, wherever possible, the same judge should deal with the pre-trial case management in both cases. The judge will be required to give directions that give effect to the overriding objective. If he or she were later to decide that circumstances have changed to such an extent that a consolidated hearing may be appropriate, nothing in the order I am making now should prevent him or her from so ordering when the pre-trial preparations are more advanced and the issues have been more clearly defined.
36. For the reasons I have given, I dismiss the application for consolidation that is presently before me.