

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DONALD BEST

Plaintiff

- and -

GERALD LANCASTER REX RANKING, SEBASTIEN JEAN KWIDZINSKI,
LORNE STEPHEN SILVER, COLIN DAVID PENDRITH, PAUL BARKER
SCHABAS, ANDREW JOHN ROMAN, MA'ANIT TZIPORA ZEMEL, FASKEN
MARTINEAU DUMOULIN LLP, CASSELS BROCK AND BLACKWELL LLP,
BLAKE, CASSELS & GRAYDON LLP, MILLER THOMSON LLP,
KINGSLAND ESTATES LIMITED, RICHARD IVAN COX, ERIC IAIN
STEWART DEANE, MARCUS ANDREW HATCH, PHILIP ST. EVAL
ATKINSON, PRICEWATERHOUSECOOPERS EAST CARIBBEAN
(FORMERLY 'PRICEWATERHOUSECOOPERS'), ONTARIO PROVINCIAL
POLICE, PEEL REGIONAL POLICE SERVICE a.k.a. PEEL REGIONAL
POLICE, DURHAM REGIONAL POLICE SERVICE, MARTY KEARNS,
JEFFERY R. VIBERT, GEORGE DMYTRUK, LAURIE RUSHBROOK, JAMES
(JIM) ARTHUR VAN ALLEN, BEHAVIOURAL SCIENCE SOLUTIONS
GROUP INC., TAMARA JEAN WILLIAMSON, INVESTIGATIVE SOLUTIONS
NETWORK INC., TORONTO POLICE ASSOCIATION, JANE DOE #1, JANE
DOE #2, JANE DOE #3, JANE DOE #4, JANE DOE #5, JOHN DOE #1, JOHN
DOE #2, JOHN DOE #3, JOHN DOE #4, JOHN DOE #5

Defendants

FACTUM OF THE MOVING DEFENDANTS

(For the motion to set aside noting in default returnable March 13, 2015)

January 22, 2015

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PART I - INTRODUCTION

This is a motion to set aside a noting in default. The plaintiff unreasonably noted the moving parties in default less than six weeks after being notified of the Caribbean Defendants' intention to contest jurisdiction. Given this clear intention to defend, the noting in default should be set aside.

PART II – THE FACTS

Litigation Background

1. Mr. Best's battle with the Ontario justice system and a seemingly never-ending list of defendants has a long and well documented history. As noted in previous decisions of this Court, the origin of this case is a decades' long dispute over property in Barbados.¹ That dispute has spawned a number of proceedings over the years, eventually leading to an action commenced here in Ontario (the "First Ontario Proceeding").

2. The plaintiff in the First Ontario Proceeding was a company called Nelson Barbados Group Ltd. Mr. Best was the President of that company.² Little else is known about the company, as noted by Justice Shaughnessy.³

3. At the core of Mr. Best's allegations in this action is his continuing dispute with Justice Shaughnessy finding him in contempt. He has disputed this finding in every possible forum, including before Justice Shaughnessy in an attempt to purge his contempt, before the Ontario Court of Appeal, and in seeking leave to the Supreme Court of Canada (leave denied). He now seeks to re-litigate the very same results in the present action.

4. Despite repeated submissions by Mr. Best that the Court had somehow been misled, Justice Shaughnessy maintained his findings against Mr. Best. For example, Mr. Best continued to claim that he had no knowledge of the contempt proceedings. To the contrary, Justice Shaughnessy concluded that Mr. Best had actual knowledge of the proceedings and the orders of

¹ *Nelson Barbados Group Ltd. v. Cox*, 2009 CarswellOnt 2466, para 3, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit A

² *Ibid.*, para 30

³ *Ibid.*, para 30

5. the Court, noting that Mr. Best specifically wrote to the Trial Coordinator's Office that "the judge ordered me to appear tomorrow..."⁴

6. In the course of rejecting Mr. Best's arguments in relation to his attempt to purge his contempt, Justice Shaughnessy also referred to the evidence submitted by Mr. Best concerning the lawyers' and parties' conduct that had led to him being found in contempt. Justice Shaughnessy described it as a

a vitriolic attack of Mr. Ranking and Mr. Silver and their respective law firms and clients... There are accusations of false, fabricated, perjured affidavits related to the main proceedings and accusations of obstruction of justice, fabricating evidence, conspiracy and fraud upon the court by Messrs. Ranking, Silver, their law firms and clients.⁵

7. These are the very same allegations that Mr. Best continues to assert and attempts to re-litigate in the present action.

8. Justice Shaughnessy concluded:

Since the commencement of the within application and instead of attempting to comply with my orders and attempting to purge his contempt, Donald Best has engaged in a course of improper conduct as I have particularized, that has unduly complicated the proceedings, raised irrelevant issues, defamed lawyers and their clients, all in an attempt, I find, to avoid complying with my orders.

9. In the end, Justice Shaughnessy outlined a long list of egregious conduct by Mr. Best that led to the finding of contempt at paragraph 25 of the reasons, including Mr. Best's flagrant disregard for the orders of the Court. The reasons also include a long list of litigation in which Mr. Best has been involved, leading Justice Shaughnessy to conclude that Mr. Best was a

⁴ *Nelson Barbados Group Ltd. v. Cox*, 2010 ONSC 569, 2010 CarswellOnt 341, para. 16, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit B

⁵ *Nelson Barbados Group Inc. v. Cox*, 2013 ONSC 8025, para. 47, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit C

“seasoned litigator”.⁶ Justice Shaughnessy imposed a sentence of 3 months’ incarceration and a \$7,500 fine.⁷

10. Mr. Best went on to repeat his baseless allegations that the lawyers involved had misrepresented the evidence to the Court on the contempt proceeding at the Ontario Court of Appeal. He brought motions before the Court of Appeal requesting the removal of Mr. Ranking and Mr. Silver, and their law firms as counsel of record for their respective clients. In one of the Court’s decisions, Justice Feldman noted “[t]he allegations against the lawyers that are raised on this motion were raised and rejected by Shaughnessy J. in his May 3, 2013 ruling where he refused to withdraw the contempt order.”⁸ Mr. Best’s repeated allegations “in the face of a finding to the contrary” led Justice Feldman to order full indemnity costs to condemn Mr. Best’s conduct.⁹

11. Despite these repeated and clear findings against Mr. Best, it is clear from his 90-page statement of claim in this action that at the core of his complaint is his continued fight against Justice Shaughnessy’s contempt finding in relation to the First Ontario Proceeding.¹⁰

12. He also continues to complain about the issue of service in the contempt proceeding. At paragraph 44 of the statement of claim, he complains that he was not served personally with respect to the contempt application. However, Mr. Best has been challenging this Court’s Order

⁶ *Nelson Barbados Group Ltd. v. Cox*, 2010 ONSC 569, para. 33, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit B

⁷ *Ibid.*, para. 35

⁸ *Best v. Cox*, 2014 ONCA 167, 2014 CarswellOnt 6936, para. 3; and *Nelson Barbados Group Inc. v. Cox*, 2013 ONSC 8025, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit D

⁹ *Best v. Cox*, 2014 ONCA 167, 2014 CarswellOnt 6936, para. 10, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit D

¹⁰ Statement of Claim, para. 48, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit F

with respect to that service as far back as January 2010.¹¹ In a January 25, 2010 decision, Justice Shaughnessy found that the most unusual circumstances of Mr. Best's case required an alternative to personal service because Mr. Best had been "deliberately avoiding personal service of the contempt motion."¹²

13. The substantive motion underlying the eventual contempt order against Mr. Best was a jurisdiction motion in relation to the First Ontario Proceeding. After protracted proceedings, the parties (including three of the moving parties on this motion) had succeeded in obtaining a decision to stay the action on the basis of jurisdiction in the First Ontario Proceeding.¹³ Despite that finding, as Mr. Best commences this new action, there appears to be no end in sight.

14. It was in this context that many of the defendants in the present action have scheduled a motion to strike the claim, currently scheduled for three days beginning June 15, 2015. Justice McCarthy is case managing the matter, and has set a schedule for the exchange of materials on that motion.

This Motion to Set Aside Noting in Default

15. The five moving parties on this motion are PricewaterhouseCoopers East Caribbean, Marcus Andrew Hatch, Philip St. Eval Atkinson, Kingsland Estates Limited and Richard Ivan Cox ("the Caribbean Defendants"). Based on the history, and particularly, the successful jurisdiction motion on the First Ontario Proceeding, counsel for the Caribbean Defendants (Mark Polley) immediately told counsel for Mr. Best (Paul Slansky) of their intention to contest

¹¹ *Nelson Barbados Group Ltd. v. Cox*, 2010 ONSC 569, para. 12, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit B

¹² *Nelson Barbados Group Ltd. v. Cox*, 2010 ONSC 569, para. 12, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit B

¹³ *Nelson Barbados Group Ltd. v. Cox*, 2009 CarswellOnt 2466, paras. 4 and 120, Affidavit of Jennifer Gambin affirmed January 22, 2015, Exhibit A

jurisdiction in this case.¹⁴ This notice was given by letter dated October 24, 2014, and stated as follows:

We represent PricewaterhouseCoopers East Caribbean, Marcus Andrew Hatch, Philip St. Eval Atkinson, Kingsland Estates Limited and Richard Ivan Cox with respect to the above matter.

In the event that the motion to strike being brought by other defendants does not succeed, we intend to contest jurisdiction on behalf of our clients, and as a result do not intend to serve a Notice of Intent to Defend or a Statement of Defence. As such, we trust you will not note any of our clients in default.

If you have any questions about our position, please contact me.

16. Mr. Slansky did not respond to the October 24, 2014 letter. As such, counsel for the Caribbean Defendants wrote again on November 6, 2014, asking for confirmation that the plaintiff would not note these defendants in default based on their intention to bring a jurisdiction motion.¹⁵

17. On November 6, 2014, Mr. Slansky wrote that he did not agree with the proposal. Instead, he demanded a statement of defence or motion materials by November 25, 2014.¹⁶

18. Within a week of this, on November 14, 2014, Mr. Slansky then wrote to the Court, referring to the pending scheduling of “a jurisdictional challenge by 5 Barbados defendants,” which he proposed to discuss with Justice McCarthy on a case conference call.¹⁷

19. With a clear plan to discuss scheduling the jurisdiction motion with Justice McCarthy, Mr. Polley wrote again to Mr. Slansky on November 17, 2014, providing further reasons for his

¹⁴ Affidavit of Jennifer Gambin affirmed January 22, 2015, para. 3

¹⁵ Affidavit of Jennifer Gambin affirmed January 22, 2015, para. 4

¹⁶ Affidavit of Jennifer Gambin affirmed January 22, 2015, para. 5

¹⁷ Affidavit of Jennifer Gambin affirmed January 22, 2015, para. 6

proposal on the appropriate procedure, and asked Mr. Slansky to reconsider his position. If the parties still could not agree, Mr. Polley noted that he agreed with Mr. Slansky's "suggestion to seek the Court's directions in a case conference with Justice McCarthy."¹⁸

20. Mr. Slansky wrote back on November 20, 2014, and insisted on a deadline for serving and filing a statement of defence or motion materials before the case conference with Justice McCarthy.¹⁹

21. Mr. Polley responded on December 1, 2014, noting that a date of December 16, 2014 had been set for the case conference call with Justice McCarthy, and gave notice to Mr. Slansky that he would raise this issue with Justice McCarthy on that call. Mr. Polley again requested that Mr. Slansky allow Justice McCarthy to deal with the appropriate timing of steps, including the proposed jurisdiction motion, and not note any of the Caribbean Defendants in default in the interim.²⁰

22. It appears from the Court file that two days later, Mr. Slansky noted the Caribbean Defendants in default.

23. As anticipated, less than two weeks later, Justice McCarthy ordered a timetable for steps towards the various motions, including the jurisdiction motion, which Justice McCarthy scheduled to immediately follow the motion to strike in June 2015. His Honour also ordered a timetable for delivery of materials for those motions.²¹

¹⁸ Affidavit of Jennifer Gambin affirmed January 22, 2015, para. 7

¹⁹ Affidavit of Jennifer Gambin affirmed January 22, 2015, para. 8

²⁰ Affidavit of Jennifer Gambin affirmed January 22, 2015, para. 9

²¹ Affidavit of Jennifer Gambin affirmed January 22, 2015, para. 11

PART III – THE LAW AND ARGUMENT

24. Ontario Courts have recognized that an intention to challenge jurisdiction, as stated in correspondence from counsel, is “a clear intention to defend the action”.²²

25. As Justice Molloy has noted, motions to “relieve against defaults are frequently made and are typically granted on an almost routine basis. Usually, opposing counsel will consent to such relief as a matter of professional courtesy.”²³

26. In this case, the Caribbean Defendants demonstrated an intention to defend the action by a challenge to jurisdiction, and as such the noting in default should be set aside.

27. In exercising its discretion to set aside a noting in default, the Courts consider the full factual matrix, including (i) the behaviour of the plaintiff and the defendant, (ii) the length of the defendants’ delay, (iii) the reasons for the delay, and (iv) the complexity and value of the claim involved.²⁴

28. In the present case, everything supports granting the Order sought on this motion to set aside the noting in default. Just as was the case in the First Ontario Proceeding, Mr. Best has begun the same pattern of delaying the proceedings with meritless roadblocks to adjudication of the issues in a case that is already fundamentally meritless.

²² *Schreiber v. Mulroney*, 2007 CanLII 31754 (Ont Sup Ct), para. 24 [TAB 1] and *Nobosoft Corporation v. No Borders, Inc.*, 2007 ONCA 444, para. 7 [TAB 2]

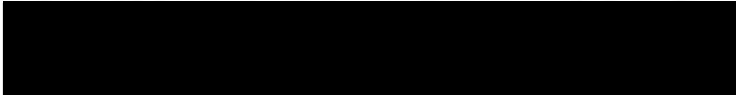
²³ *McNeill Electronics Ltd v. American Sensors Electronics Inc.*, 1996 CarswellOnt 3220 (Ont Sup Ct), reversed on other grounds (1998), 108 O.A.C. 257 (CA), para. 2 [TAB 3]

²⁴ *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd*, 1991 CanLII 7095 (ON CA) [TAB 4]

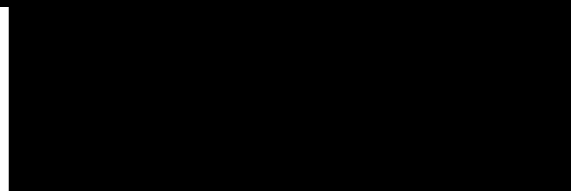
PART IV – ORDER SOUGHT

29. The Caribbean Defendants request the following relief:
- (a) an Order setting aside the noting in default of the Caribbean Defendants; and
 - (b) the costs of this motion on a substantial indemnity basis to sanction the reprehensible, scandalous and outrageous conduct of the plaintiff in forcing this unnecessary step.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd of January, 2015.


Mark Polley


Jessica Prince


Polley Faith LLP

Lawyers for the Defendants,
PricewaterhouseCoopers East Caribbean
(Formerly 'PricewaterhouseCoopers'),
Kingsland Estates Limited, Philip St. Eval Atkinson,
Richard Ivan Cox and Marcus Andrew Hatch

DONALD BEST

Plaintiff

-and-

PRICEWATERHOUSECOOPERS EAST CARIBBEAN
(FORMERLY 'PRICEWATERHOUSECOOPERS') et al.
Defendants

Court File No. 14-0815

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