

SUPERIOR COURT OF JUSTICE

B E T W E E N:

NELSON BARBADOS GROUP LIMITED

Plaintiff

- and -

RICHARD IVAN COX, et al.
(as listed in Schedule A)

Defendants

C O N T E M T H E A R I N G

BEFORE THE HONOURABLE JUSTICE J. B. SHAUGHNESSY
on January 15, 2010 at Whitby, Ontario

APPEARANCES:

H. Rubin

Counsel for the Plaintiff

L. Silver

Counsel for the Defendants

A. Roman

Counsel for the Defendants

G. Ranking

Counsel for the Defendants

E. Morse

Counsel for the Defendants

S. Clarke

Counsel for the Defendants

Schedule A

Nelson Barbados Group Limited Plaintiff

Heidi Rubin for K. William McKenzie and Crawford,
McKenzie, McLean, Anderson & Duncan L.L.P.

-and-

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Richard Ivan Cox
Gerard Cox
Alan Cox
Philip Vernon Nicholls
Eric Ashby Bentham Deane
Owen Basil Keith Deane
10 Marjorie Ilma Knox
David Simmons
Elneth Kentish
Glyne Bannister
Glyne B. Bannister
Philip Greaves a.k.a. Philip Greaves
Gittens Clyde Turney
R.G. Mandeville & Co.
15 Cottle, Catford & Co.
Keble Worrell Ltd.
Eric Iain Stewart Deane
Estate of Colin Deane
Lee Deane
Errie Deane
Keith Deane
20 Malcolm Deane
Lionel Nurse
Leonard Nurse
Edward Bayley
Francis Deher
David Shorey
Owen Seymour Arthur
Mark Cummins
25 Graham Brown
Brian Edward Turner
G.S. Brown Associates Limited
Golf Barbados Inc.
Kingsland Estates Limited
Classic Investments Limited
Thornbrook International Consultants Inc.
30 Thornbrook International Inc.
S.B.G. Development Corporation
The Barbados Agricultural Credit Trust
Phoenix Artists Management Limited

Schedule A

David C. Shorey and Company
C. Shorey and Company Ltd.
First Caribbean International Bank (Barbados) Ltd.
Price Waterhouse Coopers (Barbados)
Attorney General of Barbados
The Country of Barbados
John Does 1-25

5 Philip Greaves
Estate of Vivian Gordon Lee Deane
David Thompson
Edmund Bayley
Peter Simmons
G.S. Brown and Associates Ltd.
GBI Golf (Barbados) Inc.
10 Owen Gordon Finlay Deane
Classic Investments Limited and Life of Barbados
Limited c.o.b. as Life of Barbados Holdings
Life of Barbados Limited
David Carmichael Shorey
Price Waterhouse Coopers East Caribbean Firm
Veco Corporation
Commonwealth Construction Canada Ltd. and
15 Commonwealth Construction Inc.

Defendants

Lorne S. Silver; for the Defendants, Richard Ivan Cox, Gerard
Cox, Alan Cox, Gittens Clyde Turney, R.G. Mandeville & Co.,
20 Kingsland Estates Limited, Classic Investments Limited et al.

Gerald L.R. Ranking and Ms. E. Morse; for the Defendant,
PricewaterhouseCoopers East Caribbean Firm

Andrew Roman; for the Defendants Eric Ian Stewart Deane,
Estate of Colin Ian Estwick Deane

25 **Sarah Clarke;** for the Defendant First Caribbean International
Bank

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FRIDAY, JANUARY 15, 2010

THE COURT: All right; Mr. Ranking, Mr. Silver,
who else do we have?

MR. ROMAN: Roman.

MS. CLARKE: Sarah Clarke.

THE COURT: I'm sorry, I....

MR. RANKING: I'm sorry, Ms. Emmeline Morse, my
junior, Your Honour.

THE COURT: Sorry, I missed your name again?

MR. ROMAN: Andrew Roman...

THE COURT: Roman.

MR. ROMAN: ...for Deane and Deane.

THE COURT: You look different, have you lost
weight or something?

MR. ROMAN: Hopefully.

MS. RUBIN: Heidi Rubin for Bill McKenzie and
the law firm.

THE COURT: I'm sorry, the last name is?

MS. RUBIN: Rubin, R-U-B-I-N.

THE COURT: So, you're for Mr. McKenzie and who
else?

MS. RUBIN: And his firm.

THE COURT: Should I be looking at this
supplemental motion record now, or is it
necessary?

MR. RANKING: I think it will be necessary, Your
Honour, what I was going to do is lead off on
behalf of the defence.

THE COURT: So I take it, Mr. Ranking,
notwithstanding my great expectations for today
to finally see what Mr. Best looks like, I take
it he's not attended?

MR. RANKING: He has not attended.

THE COURT: Has he contacted any of the counsel that you're aware of?

MR. RANKING: He has not.

THE COURT: And has he - just to follow technicalities correctly, Madam Registrar, would you just have him paged three times, Donald Best, in the outside?

...MADAM REGISTRAR PAGES DONALD BEST.

THE COURT: All right, Mr. Ranking.

MS. RUBIN: Justice Shaughnessy, if I may just stand up for a moment, it might speeds things up...

THE COURT: Yes, Ms. Rubin.

MS. RUBIN: ...on Mr. Ranking's part. Finally we are able to come here today and take the position that we do not oppose the relief being sought against Mr. Best. The procedure - all - Mr. Best has been given all the procedural rights to ensure that he had notice and that he was able to retain counsel, had he wanted do so he would have and he had the opportunity to do all of that and be here today, and if he does not appear today we are in no position to oppose the order that Mr. Ranking and the other parties are requesting as against him.

THE COURT: Thank you, Ms. Ranking.

MS. RANKING: So, hopefully that will assist.

THE COURT: It will. If it helps too I've read all the materials that I had prior to today.

MR. RANKING: Right.

THE COURT: That's why I just asked about the supplemental motion record, but go ahead Mr. Ranking.

MR. RANKING: Your Honour, in view of the fact that Mister - let me tell you what I was going to do and see if this is in accord with your wishes. I was going to deal with the contempt motion from a factual perspective and just satisfy yourself that all of the materials have been properly served, and then go through the facts briefly and indicate why, in my respectful submission, a contempt order and a committal order was appropriate. I was then going to ask my colleague, Ms. Morse, to deal with the authorities and I know that Your Honour has dealt with these contempt matters in the past by reason of the comments you've made from the bench and it may be that you don't need us to deal with that. After that we have a draft order dealing with the production of documents by Mr. McKenzie in his cross-examination. I'm happy to say that we have made some amendments to that today and we have resolved that subject to one, and one issue only, that has to be argued which should take no more than ten minutes in my submission, both counsel I should think, and then we then have the issue of costs on the contempt motion which we will be seeking on a substantial indemnity scale and I have a cost outline, which I can hand up to you, and I would propose to do that after Ms. Morse's

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submissions on the law. So, I would speak to the contempt issue from a factual perspective, have Ms. Morse speak to the law, depending upon your order, of course, I could then speak to costs and then deal with the one hand up - I have a copy of the order which has been notated, hand up the draft order so you could satisfy yourself as to its' appropriateness and deal with the one outstanding issue that I have with Ms. Rubin.

THE COURT: Very good.

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MR. RANKING: All right. So, just dealing with satisfying the court of - with respect to the service of the materials and just to remind Your Honour how it is that we come before you, the motion record of December the 2nd, which is before you, that was, in fact - it's - the motion was returnable December 2nd, it's the notice of motion that was dated November 27th and that material was mailed and couriered to Donald Best on November the 27th, and the reference for that, Your Honour, is in the supplemental motion record at Tab 2. You will see at that tab at paragraph 3 it's an affidavit of Mr. Butler, one of my associates, that he refers to the affidavit of Joanne Burgos and states that, "I'm informed and do believe that on November 27th Joanne Burgos served Donald Best with the November 27th motion record", that's the motion record, Your Honour, returnable December 2nd, "by mailing and couriering a copy thereof to Donald Best", and then if you turn up the exhibit,

Exhibit A, Your Honour, you'll see the affidavit of service and you'll see in the first paragraph that the motion record was couriered to Mr. Best at 427 Princess Street, that's the post office box in Kingston, and turning to page - it was also sent by courier to Mr. Best at the Cloverdale Mall address, and it was also sent by mail, in paragraph 5, to the Kingston address. So, with respect to the motion returnable November - excuse me, returnable December 2nd it was served by courier to both addresses and by mail to the Kingston address, and as well - and I don't think I need to take you to it, but under Exhibit B it was also served on all counsel. That deals with the service of the motion record for the December 2nd attendance. Mr. Best did not attend on December 2nd, and on December 2nd your order - Your Honour made an order that appears under Tab C at page 31, and your endorsement appears under Tab D of the motion record and I pause briefly because this is the order in paragraph 3, Your Honour, which compels Mr. Best to attend and I refer you to paragraph 3 of that order. You provide for validation of service in paragraph 1, with respect to substitutional service in paragraph 2, and I'll come to the service that we have affected momentarily, but importantly for today you'll see your handwritten notes in paragraph 3 compelling Mr. Best to attend, and that paragraph also requires him to produce the documents referred to in paragraph 4 of the

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order. I should also say, and I think it was dealt with in our introductory comments, in a way in terms I haven't heard nor am I aware of any other counsel having heard from Mr. Best, but in all of my submissions none of the materials that were couriered or mailed to these addresses were ever returned. And you will also see, Your Honour, relevant for today's motion for contempt that paragraph 4 of your order, just to refresh your memory, that it was made clear to Mr. Best that the contempt motion would proceed and be argued before Your Honour today, the same date set for the hearing, that was if he were to attend, immediately following the hearing. So, there can be no doubt that certainly from the terms of your order that Mr. Best was aware that that was going to take place.

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Now, with respect to service of the order in the endorsement, just to ensure that we got this to him quickly, there were a number of communications with Mr. Best. The first appears under Tab E, which is my letter that was sent by mail to Mr. Best and that was in accordance with your order and I then served with him [sic] a copy of the handwritten and typed endorsement together with a copy of your order dated December 2nd. And you will see I was rather - I have another letter which is a little more fulsome, but on December 4th, I think it was a Friday, I wanted to get it out to Mr. Best, we

5 indicate that, "Justice Shaughnessy has ordered
you to appear to be cross-examined viva voce in
open court and the date for your attendance is
January the 15th." So, that was sent at least
five weeks before the return of today's motion.
The affidavit of service for that letter appears
under Tab F, and that is the affidavit, again,
of my assistant Ms. Oullette and it indicates in
10 paragraph 1, under Tab F, that Ms. Oullette
served Donald Best with the endorsement and the
order by sending two copies by regular mail to
Donald Best care of 427 Princess Street, and
again although not covered by Justice Eberhard's
order, but covered by your order, we also sent -
15 served it on paragraph 3, the top of page 56 of
the motion record, to the Cloverdale Mall
address.

20 So, that deals with the service of the order and
the endorsement, which we did quickly. Now, in
the rush to get materials pulled together I did
not include, and I'm going to pass up to the
court, a copy of my letter dated December 15th,
and this now deals with the further letter, once
25 I've had an opportunity to put together the
materials that now appear before you. And the -
what I what here, Your Honour, in the package
that I've handed up, I tend to put the affidavit
of service on the back. So, you see the letter
30 that I wrote, there is a notice of examination
requiring Mr. Best to attend today and then
there is the affidavit. What is not attached,

5 simply because it's already in the court file,
is the supplemental motion record, but if you
look at paragraph 1, firstly, this was served by
mail at both addresses, and I - in this I served
a further copy of the December 2nd motion,
because you'll recall, Your Honour, there was
short service of that. So, just to make sure
that he actually had all that material, I served
that again. I also served the notice of return
10 of amended motion, which is included in the
supplemental motion record and I enclosed the
notice of examination. I then went on - and to
the extent that Mr. Best might have some day
said that he couldn't understand the terms of a
court order, I went to some pains to explain to
15 Mr. Best that, "We expected him to attend",
reading from paragraph 2, "before His Honour on
January 15th with all documents in your
possession, power or control relating to Nelson
Barbados. We expect to examine you", and it
20 goes on. But what's important, I think, is the
last paragraph on the first page, "If you do not
attend I will proceed with the contempt motion
in your absence and seek a warrant for your
arrest. In addition I will be seeking an order
25 compelling Mr. McKenzie and his firm to produce
all books, contracts, letters, et cetera,
dealing with, or relating to, Nelson Barbados.
In other words, if you fail to attend on January
30 15th, or if you fail to produce the documents in
Nelson Barbados, I will be seeking such
production directly from Mr. McKenzie and his

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firm. You are therefore on notice of my intention to seek production of the document directly from your former counsel", and I refer to the amended notice of motion. So, that is the - and there's an affidavit of service, Your Honour, that is attached to that that was sworn December 16th, and you'll see if we turn that up, paragraph 1a, this is the second time I've served the motion record dated November the 27th, and you will also see at the top of page 2 that I served the supplemental motion record, that is before you, dated December 14th and the notice of examination. And again, as in prior occasions, I served both the Cloverdale Mall and the 427 Princess Street address.

Finally, Your Honour, and I don't know that I need to pass this up, but I also can advise you that we served the factum and book of authorities on December the 23rd and because that was served on the 23rd after the supplementary brief, the affidavit of Ms. Courtney Hermann (ph) should be in the court file. I have another copy if you'd like me to hand it up, but I can inform the court that we served Mr. Best with the factum and brief of authorities by regular mail, both the - excuse me, and this time - on this occasion we served the factum and book of authorities by regular mail to the Princess Street address, and in fact I believe that that - there's an error, because they - paragraph 1 and 2, I've only noticed this today,

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Your Honour, Ms. Hermann's (ph) affidavit indicates the same thing in paragraph 1 and 2, if you look at that paragraph, I certainly believe that the affidavit should read it was sent to the Cloverdale Mall address as well in accordance with our normal practice, but in any event the good news is that it was served at the address at 427, that's only dealing with the factum and book of authorities, but the reason I raise that is that we went to some pains to make sure that we got this material to Mr. Best before the Christmas break so that he would have view and ample opportunity to retain counsel and to attend today.

So, those are my submissions just going through the affidavits of documents. I now intend, Your Honour, just to speak briefly to the facts of the contempt. I'm not going to go through the facts in detail. You've indicated I've - we've delivered a factum, you have that factum. I think that - I do want to emphasize - really just a few points, and if I could ask you to turn up the December 2nd motion record? This was the motion record that was originally compiled for the purposes of the contempt and Your Honour is well aware of the orders that you made and I - as I say I'm not going to go through that. It's set forth in the factum. The terms of your orders really - everything starts at paragraph 6 of the factum, and I'm only going to take you to really two exhibits, which I think are

determinative of the issue of contempt and those exhibits are letters that Mr. Best himself wrote to the court to indicate, in my respectful submission, that he was well aware of the order to attend at Victory Verbatim and chose simply not to do so, and that letter is the letter of November 16th, Your Honour, and that appears at Tab K. If I could just ask you to turn that up, because I think this is a very significant letter for the purposes of the contempt. For your bench brief it was your order of November the 2nd. It required paragraph 3 that required Mr. Best to attend on November 17th and with that by way of backdrop Mister - we know that Mr. Best was served a number of times and on November the 16th he then writes to Ms. Jackie Traviss in the operative section, this is the day before he is to be examined, the operative section of the letter which I wish to bring to the courts attention is at page 2, paragraph 80 of the motion record, and in the third full paragraph you will see that Mr. Best states, and I quote - speaking - she's now referring to what Ms. Traviss told him; "Then you said that the judge ordered me to appear tomorrow, Tuesday 17th in Toronto at Victory Verbatim at 10:00 a.m. at 222 Bay Street to answer all questions from Sections A, B, C and D." And what Mr. Best is referring to is he is referring to paragraph 3 of your order of November the 2nd. The next operative paragraph is two down when he's then referring to Ms. - his discussions with Ms.

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Traviss, and he states, "You selected a further part of the order", and read that the judge said that, "I had to answer all questions. I replied that I have nothing to hide or fear and I always obey an order by a judge", I pause for the pregnant silence, "to the best of my ability and I would continue to do so, and if the judge says I am to be questioned by lawyers tomorrow 17th I will make myself available." That's the fourth full paragraph. Interestingly, I think the next paragraph is instructive in that Ms. Traviss had suggested that he might want to - Mr. Best might want to contact either Mr. McKenzie's office or Mr. Ranking's office as he was the one that took out the order. I can't speak to Mr. McKenzie, but I can inform the court that Mr. Best has never contacted my office and the only discussion I had with him was on the morning of the 17th at Victory Verbatim. And finally, the last paragraph on page 81 is relevant. "I want to emphasize that I will make myself available for questioning by the lawyers tomorrow, Tuesday November 17th, 2009." That's what the - the last paragraph of the letter, Your Honour.

THE COURT: I'm sorry, on page 3?

MR. RANKING: Yes. Your Honour, the only other letter I want to refer you to is my letter of November the 18th, that appears under Tab N, and I don't spend any time on any of the letter through the bottom of page two. That's certainly - I put my position on the record to Mr. Best, but what I think is important, again,

for the perspective of seeking a contempt order is our efforts to let Mr. Best know that we considered him to be in contempt. I can tell you that Mr. Silver and I had expressed that when we were speaking with him, and I indicate having not appeared, "You are now in contempt of Justice Shaughnessy's order dated November 2nd. You're very own letter dated November 16th confirms your knowledge of that order, which you flagrantly disregarded." Then I try to resolve it and we suggest November the 25th. We didn't want to come back immediately. I thought it would be appropriate for Mr. Best to try to purge his contempt and this is relevant from a contempt position, because while Mr. Best was not in contempt of any court order by failing to appear on November the 25th, it will in my respectful submission support a pattern of conduct which shows a flagrant disregard to the process of this honourable court and even though Mr. Silver and I offered him a number of different days that week, none of which were taken up, and even though we said, "Give us a date that you would like to come", and all of this is in the transcript in the materials, Your Honour, I won't take you to it, they weren't taken up we said, "Fine, let's just pick another date ourselves and we'll serve him", and Mr. Silver and I considered that to be the appropriate way, which is how we went before or proceeded. I then say, "This is a very serious matter. We urge you to retain counsel. Seek

5 the advice with respect to the matters in issue
and the seriousness of your having failed to
attend to be examined pursuant to a court
order." I don't think that Mr. Silver and I
could have done anything more than we did to
bring the gravity of the situation to Mr. Best's
attention, and I complete the second full - or
the first full paragraph, I should say, "But let
there be no misunderstanding we expect you to
10 appear to be examined on Wednesday, November
25th, and we will move forthwith for a contempt
order if you do not appear." And I then invite
him to attend on the other cross-examination of
Mr. McKenzie, which was ultimately adjourned.
So, needless to say Mr. Best did not attend, as
15 you well know, and the certificates of
nonattendance and the transcripts, et cetera,
are there. We have gone through those in the
past, Your Honour, I do not intend to - to take
you through them.
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So, we now appear and we not only have Mr. Best
in contempt of the December 2nd order, excuse me,
the November 2nd order by failing to appear on
November the 17th, but he is now in contempt of
25 the December 2nd order by failing to attend today
and while I will not take you back there you'll
recall that's the paragraph where in which you
handwrote January the 15th. So, I don't believe
in my respectful submission there can be any
30 case where the contempt is more palpable than
this one, but - and that's really all I have to

say and I'm going to turn to Ms. Morse and ask her to review the law, subject to your direction, but I want to finish with a few more observations which stand back from the unique and specific circumstances of the last couple of months. And I want to do this, because I think that it's important for this court to have the conduct of Mr. Best in perspective. We started down this road when I wanted to examine Mr. Best in support of a cost motion that was returnable November 2nd, 3rd and 4th, and that was adjourned by Your Honour when we filed affidavit material indicating that we had not been successful in being able to locate Mr. Best despite having retained a private investigator and despite the various efforts of my student, Sebastien Kwidzinski, doing motor vehicle searches, 411 searches, and the like, all of which are in the court record in the earlier motion records, but I make the point because this is the conclusion of what was otherwise a long process to try to find Mr. Best, and I also make the point that the information we were seeking to obtain, namely the books and records of Nelson Barbados, whether or not there was a legitimate business, whether or not there was any security or ownership interest in the very shares which formed the foundation to bring this case to Ontario, namely the interest alleged to be held by Nelson Barbados over the shares of Kingsland, we had been trying to secure that information for more than a year. And that fact is

5 relevant, I respectfully submit, in the context
of the contempt motion because it demonstrates a
pattern of conduct and the pattern of conduct is
that neither Nelson Barbados, at first instance,
and then Mr. Best, had any regard to the process
of the rules and procedure or the process for
the rules of this honourable court, and you will
recall, Your Honour, and I need only take you to
any of the motions where we deal with the
10 various attempts that were made and you will
recall that we first attempted to obtain this
information on a cross-examination of John Knox
on November 4th. Mr. Roman then attempted to
obtain information, and I'll give you the dates
and if you want me to go back and tie them in
15 for your pinpoints for your bench brief, I'm
happy to do it, but Mr. Roman's examination was
March the 20th in a Rule 39-03 examination.
Although the case had been dismissed as against
my client, so I wasn't present, I have read and
20 there is in the materials the transcript of your
request of Mr. McKenzie on April 7 and 8th, 2009.
Again, asking for production of the documents or
an affidavit from Mr. Best explaining why they
couldn't be produced. The fourth instance,
25 November the 17th; the fifth instance, November
the 25th, and the final instance today.

30 So, what we see is - and for your reference, is
the - while I won't take you to individual - in
the supplementary motion record you will see
that's how I actually drafted the notice of

5 motion, which has been before you a number of times, but if I just refer you, Your Honour, to page 3 under Tab 1, that may be just a handy reference and I can take you again to your transcripts, et cetera, if you'd like them, but if you look at the notice of motion, paragraph C, you'll see in subset (i)(ii) and (iii) those are the first three occasions.

THE COURT: I'm sorry, I'm at Tab 1.

10 MR. RANKING: This is the supplemental motion record.

THE COURT: Notice of return of amended motion.

MR. RANKING: Yes.

THE COURT: And then what page?

15 MR. RANKING: Page - it starts at the bottom of page 2, Your Honour, where....

THE COURT: Specifically - oh yeah, I see.

MR. RANKING: Exactly.

THE COURT: Right.

20 MR. RANKING: Specifically, and - and what I set forth there, these are - and I only take you there, because it is a handy summary of the - the first three attempts we tried to get the material and that was the - those dates that I've referred you to the November 4th, the March 20th and the April 8th, in fact you asked - you gave Mr. McKenzie two opportunities to try to get it from Mr. Best and he was not successful on either. That was the April 7th and 8th, we only refer to April 8th in the notice of motion.

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So, that's the request. There's also - the

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second point, again in the pattern of conduct, in trying to hide information is the fact that Mr. Best himself was not put forth as an affiant, remember it was Mr. Knox who was put forth as an affiant, and I say that that is entirely consistent with Mr. Best's desire and the desire of the plaintiff to shield information and not to be transparent and disclose relevant information to this honourable court.

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The third point, and I've alluded to this, is that we could not find Mr. Best despite the efforts of the private investigator.

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The fourth point, and this is well - again, goes to the highly irregular nature of this case, is despite Mr. Best, who is now together with his company facing a very significant cost award, he elects not to engage counsel and that is significant from this perspective, because had he engaged counsel he would have had someone representing him from whom we could have sought information, and counsel would have been quite clear to Mr. Best what his obligations were to this court, but instead Mr. McKenzie removes himself as counsel and presumably on instructions - and I'll come back to that momentarily, presumably on instructions provides a post office box, again highly irregular. This then comes to the matter of cost, because when we find out about the post office box number we

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then are required, again, to run around, try to find out why there's a post office box, we can't find out, and we're ultimately back before this court asking for a UPS Store to disclose information, which is ultimately disclosed, and what we then find is that's another sham, because the post office box was opened up two weeks before Justice Eberhard's order and all that mail is then returned to another post office box at Cloverdale Mall.

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Now, what I find even more offensive in the context of all of this history is that by contrast to, what I call now the, illusive Mr. Best and his self-serving conduct. We know full well that he knows of this court proceeding. He speaks to Jackie Traviss on the phone, and he seems to have no difficulty writing to the court, notwithstanding your admonition that he not do so, when it suits his purposes and I can refer you to his letter of October 30th and his other letters, they're in the record and I'm happy to pull them out, but Your Honour is well aware of them and I just say that having regard to the fact that Mr. Best seems to want to use this for his own purposes when it suits him and yet we can't find him. So, all of these factors I submit are relevant and important background facts to be considered in the nature of the contemptuous act. The contemptuous act being a disregard to the courts order, to its process and to the requirement to produce materials that

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have been so ordered that the rules of procedure require to be produced. It is a clear pattern of conduct that has been exhibited by Nelson Barbados and Mr. Best from the outset of litigation and the pattern of conduct is one of refusing to disclose any information with respect to Nelson Barbados or to permit us to do anything within our reasonable powers to find him. And it is with that context and that history that the current contemptuous behaviour must be assessed. It is not, in my respectful submission, a single or limited instance of contempt that can be explained. It is a continuation of a pattern of behaviour that has been contemptuous to the process of this court from the outset.

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Now, I make one other overriding concept which even adds to this. We're not dealing with a situation where somebody is at a family law proceeding and they don't understand the process and - and they're ignorant and they get caught in the middle of something. We dealt with those issues before. We are here dealing with a man who - we have no idea whether he's the principle of Nelson Barbados or not, but someone who is, on record, the principle of Nelson Barbados who has seen fit to commence a 500 million dollar action against no fewer than 64 defendants. The reason I emphasize that, Your Honour, in my submission, is we are dealing with a very significant claim where when it suited Nelson

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Barbados and Mr. Best they had no problem retaining counsel, suing numerous defendants, many high profile defendants including my own client, seeking very significant damages and making very serious allegations of conspiracy and misfeasance. Those claims required us, as defendants collectively, to retain no fewer than eight law firms. No expense was spared as we will speak to when we come back on the 22nd and 23rd and 24th of February, but eight law firms argued a motion for more than two years. So, it's just - in the context of what's good for the goose is good for the gander this gentleman sees fit to commence that type of proceeding and yet when it then comes time to pay the piper, Mr. Best is nowhere to be seen. But in my respectful submission Mr. Best, and Ms. Morse will speak to this, he ought to be fined, there ought to be a warrant for committal of three months, he has been on notice of that, and he ought to pay all costs that we have incurred on a substantial indemnity scale, and I'll come back....

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THE COURT: I don't - for how long did you say?

MR. RANKING: I beg your pardon?

THE COURT: How long did you say for the committal?

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MR. RANKING: Three months, Your Honour, and Ms. Morse will speak to a similar case where an order was made for 15 months and that's why I'm going to leave it to her to speak to those issues.

THE COURT: That's right. So, I interrupted you; that he ought to be fined, committal for three months, and what else did you say?

MR. RANKING: And substantial indemnity costs, and I will come back to speak to costs once we have Your Honour's decision. But I make also one final point; notwithstanding all of the efforts that we've had, and we've spent a lot of time having to try to run this down as you well know, we have never once received an apology. There's been no attempt. Notwithstanding the length of time this has been outstanding since our last attendance on December 2nd and the early service of the motion records for Mr. Best who knows Your Honour's email, who knows my email and fax numbers, there's been no attempt at contrition whatsoever and that, as Ms. Morse will refer to, is another factor which the court should and ought to take into consideration. Subject to Your Honour and any questions you may have, I'm going to ask Ms. Morse to deal with the law.

THE COURT: Thank you.

MR. RANKING: Thank you, Your Honour.

THE COURT: Ms. Morse.

MS. MORSE: Good morning, Your Honour. It's my intent to briefly walk through the main points of the factum that Your Honour has before you and read, and just spend some time dealing particularly with the factors that should be considered in just determining a remedy on a finding of contempt and as well the

appropriateness of committal as well as fines, given that that's the specific order that we're seeking. So, subject to any particular questions that's how I'm intending to proceed, is that helpful?

THE COURT: That's fine.

MS. MORSE: Just for Your Honour's reference the portions of the factum that address the law with respect to contempt are found at pages 6 through 13.

THE COURT: Right.

MS. MORSE: And the issue, just in short, that will be before Your Honour to determine is whether or not Mr. Best is in contempt and then if in fact it's found that he is in contempt, what the appropriate remedy is in light of the contemptuous behaviour. And quickly, Your Honour, the test for contempt as set out in our factum is a three part test. It has to be shown that the contemnor, or alleged contemnor, had knowledge of the terms of the order. The order must said to be - or shown to be directive and not simply permissive, and then there must be shown to be conduct in contravention of that order. And quickly, as set out in our factum, it's our submission that all three parts of this test have been satisfied in this case beyond a reasonable doubt, which is the standard of proof required on a contempt motion.

THE COURT: It's beyond a reasonable doubt.

MS. MORSE: Yes, or excuse me - yes, it must be established beyond a reasonable doubt. Excuse

me. So, as Mr. Ranking went through today we've established Part 1 of the test, which is that Mr. Best had knowledge of the orders and I just point out to Your Honour that the case law is clear that the alleged contemnor must only have knowledge of the terms of the order, he doesn't have to have the order expressly served upon him, and even - I make that reference to support Mr. Ranking's arguments with regards to the November 16th correspondence to this court in which Best confirmed that he was made aware of the contents of the order.

Part 2 of the test; the order is clearly directive. Mr. Best is ordered to attend and to produce documentation in both the November 2nd order and the December 2nd order, and finally as Mr. Ranking went through today, the conduct is clearly in contravention of the order. Also it's helpful, I think, to highlight the fact that Part 3 of the test requires that the conduct, or that the - that orders be followed both in letter and in spirit, and certainly neither have been followed in this case. I make that point particularly with regard to Mr. Best's failure to attend on November 25th, although that wasn't expressly set out in an order, it was certainly within the spirit of the order that he would appear for attendance.

I also would like to point out for Your Honour that it's not necessary to establish intent not

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to comply with an order in order to pass Part 3
of the test, that that is considered in the
remedy section. However, I submit to you that
based on Mr. Ranking's submissions earlier today
it's clear that Mr. Best intended not to comply
with the orders. Subject to any further
questions with respect to the test that need -
that's required to be met....

THE COURT: No, I'm satisfied and I hear you.

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MS. MORSE: I'm going to move on to the issue of
remedy. So, as set out in our factum at
paragraph 24 that the remedy in a contempt
motion - or where contempt is found, excuse me
Your Honour, is a two part purpose. First - the
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first purpose is set out to coerce individuals
into obeying court orders and the second purpose
is punishment. And at paragraph 25 of our
factum we set out a list of factors that the
court shall consider when determining remedies
where contempt is found, and I'd like to pay
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particular attention at this point with respect
to whether or not - it's in our factum at
paragraph 24, it's subsection (d), which is the
consideration of whether the breach is a single
act or an ongoing pattern of behaviour. As Mr.
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Ranking set out, and I won't review the facts,
we have a situation where two orders of this
court have been breached and in addition to that
the conduct of Mr. Best has in part of a series
of attempts to frustrate this court process. I
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would also note that it's an aggravating factor
when determining remedy if the contemnor

knowingly and deliberately breached the order, which again, is the case at bar.

And now I'm going to speak to the issue of specific remedies specifically with respect to, first, our request that Mr. Best be submitted to a correctional facility for three months and our second request that a fine of \$7,500 be ordered against Mr. Best. We have three cases in our materials in which the courts have determined that prison sentences are appropriate, and to those three cases, just for Your Honour's benefit, are the Sussex case.

THE COURT: Just one second.

MS. MORSE: It's found at Tab 2 of our brief of authorities.

THE COURT: Yes.

MS. MORSE: And just to provide Your Honour with a brief background as to the facts in that case. In that case there was a court order enjoining a particular employee from interfering with the business of a company and that company's interests, and particularly with regard to - and intentionally interfering with court appointed individuals and interim manager's duties with respect to that company. And the individual in question there in that case went on a - through a series of events sought to undermine the business of the company in question. In there the court found it appropriate to order six months incarceration. At paragraph 70 of that case, I'll just take Your Honour quickly to it; the court states that the incarceration is

appropriate in this - oh, excuse me Your Honour.

THE COURT: I just want - yes, I just want to catch up to you here. Paragraph 70, yes.

MS. MORSE: Paragraph 70; it reads,

"Incarceration is appropriate because of the deliberate willfulness in the contempt, because of the serious harm and prejudice to the applicant and the interim manager in fulfilling its court appointed mandate." Similarly in this case the evidence shows that the contempt has been deliberate and willful, and it has also provided serious harm to the defendants in their attempts to respond to the allegations and make submissions with respect to their cost submissions.

THE COURT: Just before - just because I don't want to forget it.

MS. MORSE: Mm hm.

THE COURT: You don't have to deal with it now...

MS. MORSE: Yes, Your Honour.

THE COURT: ...but I want to hear from you in due course. Can an order not be fashioned that the - there is a certain period of incarceration which is directed by the order, but the contempt may be purged by an attendance before me in compliance with my orders?

MS. MORSE: I - there's not a specific example of that in the case law that we've provided to you. However, I see nothing to suggest that we cannot craft an order in that fashion, and certainly there are cases - I can direct Your

5 Honour to them, where it was ordered a certain amount of incarceration as well as, and in addition to, the examination that was to take place. In fact, I believe that that was the case in the Lech case, which is the case I'm going...

THE COURT: Okay.

MS. MORSE: ...to direct Your Honour to now.

THE COURT: You'll bring me back to that then?

10 MS. MORSE: Yes.

THE COURT: Okay.

MS. MORSE: And just to dispense with the issue, it's my understanding from the case law that we can, in fact, craft an order that would allow....

15 THE COURT: Well, I think it's in everyone's best interest, quite candidly, if there's a way that an individual - if I grant the order, if there's a way he can purge his contempt, but also answer and comply with the orders of the court. It seems to me it's a win-win situation and so I'm probably signaling now that I would like to see that available, because what we ultimately want, or I would think the party's want, is the information. There's nothing to be
20 gained by having somebody languishing in a jail if they're otherwise prepared to come to grips and comply with the orders made by the court.

25 MS. MORSE: Certainly.

30 THE COURT: Okay.

MS. MORSE: And certainly with respect - and certainly if Mr. Best appears prior to the costs

hearing in this matter.

THE COURT: I'm not even worried about the cost component. I'm taking it to the next step that he's incarcerated. I would think that if he is incarcerated he comes up for a show cause hearing in the normal course...

MS. MORSE: Mm hm.

THE COURT: ...and that may not be before me, but it may be something that you want to have before me, but I'm not - I want to be very careful about that, because I won't be in the country for the month of March and presumably if the order was acted on and I'm out of the country I don't want somebody languishing in jail if the matter can be dealt with otherwise. In any event, I'm just casting signals to other counsel. You go ahead with your argument.

MS. MORSE: Thank you, Your Honour. Perhaps it might be useful then to move on to the case - the Lech case which is found at Tab 5 of Your Honour's brief of authorities, that's the Milligan re Lech case.

THE COURT: I think I know about this case, because I - Justice McKinnon is in our region. Yes, the repeat offender and disclosure issues. Go ahead, yes, go ahead.

MS. MORSE: So, as Your Honour knows based on your familiarity with the case, this is a case in which, as Your Honour just stated, there was a repeat offender for failure to attend and provide documents and therefore the facts are very similar to the facts that we're dealing

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with here today, and it is indeed - he had failed to comply at this point with two orders of the court and therefore in this particular judgment the contemnor was ordered to prison for an additional 15 months. This is on top of other sentences that have already been brought against him. The first sentences were first 8 months for contempt and then 15 months, this is an additional 15 months.

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THE COURT: Yes, but this is case where somebody - I mean, I may have glanced at it and I'm not sure that I did...

MS. MORSE: Mm.

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THE COURT: ...a month ago, but I thought this was a case where an individual had fleeced a number of people of their money...

MS. MORSE: Yeah, this....

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THE COURT: ...in a so called investment advisor and what the judge wanted was disclosure of his assets so that these parties could be recompensed to some degree and the individual willfully refused to do so.

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MS. MORSE: Yes sir, and that's my understanding. Although it's not on the facts of this particular decision, and this decision is just dealing with the....

THE COURT: Oh it is - the facts aren't in here. I see.

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MS. MORSE: No, unfortunately. I do, however, in my own notes have the facts - the earlier decisions in the Lech matter and I'm happy if on the break you would like me to take a look at

those and then provide Your Honour with a summary of the facts, just to ensure that they are....

THE COURT: Well, if it's wrong...

MS. MORSE: Indeed.

THE COURT: ...what I'm saying, you can correct me, but I - I think - I was the Regional Senior Judge when this matter took place and so I recall this particular individual and...

MS. MORSE: The situation.

THE COURT: ...what was happening in terms of appearances before Justice McKinnon. In any event, go ahead.

MS. MORSE: Thank you, Your Honour. And just quickly to point out then that - that in this case it was found that because there was no other appropriate way to compel attendance that all other approaches had been dealt with, other orders had been given in an attempt to have the contemnor either attend to purge his contempt, or attend to give the evidence that was at issue. Those attempts had been exhausted, and I suggest to Your Honour that similarly in this case we've exhausted the attempts to get Mr. Best to attend before this court, December 2nd, 2009 order was a second attempt to allow Mr. Best to attend, or even to contact counsel, or retain counsel, and begin a dialog. None of which happened.

And finally, Your Honour - just for Your Honour's benefit there was also an incarceration

awarded in the Oakley Manufacturing matter, which is found at Tab 7 of Your Honour's brief of authorities. The incarceration in the Oakley matter was significantly shorter incarceration. It was a 10 day incarceration that was ordered. However, in that case there were circumstances that mitigated in favour of a shorter prison sentence order primarily being that the contemnor attended to the court, he apologized to the court, there was no open defiance of the court.

THE COURT: Yes.

MS. MORSE: I'll just highlight for Your Honour that even that case where an apology was given and where the contemnor appeared before the court, the court still felt it was appropriate to give an incarceration of some amount of time, granted at a far reduced length than the other cases that I've drawn your attention to.

Subject to any further questions from Your Honour those are my submissions with respect to the appropriateness of the prison sentence.

THE COURT: Right. That's fine.

MS. MORSE: I'm just going to move quickly onto the issue of fines.

THE COURT: Yes.

MS. MORSE: As with the prison sentences the case law has many and varied fines, the range is quite large from the cases before Your Honour. The range begins at Canada Metal with fines for 700 and 350. That case is at Tab 1 of Your Honour's brief of authority.

THE COURT: What was it for Canada Metal?

MS. MORSE: Canada Metal, the fines against the individual were \$700 and \$350. So, fairly nominal. Granted that case was in 1974, I believe.

THE COURT: Mm hm.

MS. MORSE: On the other side of - or the higher side of fines being awarded the Boucher re Kennedy case at Tab 6 of Your Honour's bench brief, their fine was awarded of \$30,000.

THE COURT: There has to be an inquiry, though, about an ability to pay or information before the court as to an ability to pay, doesn't there?

MS. MORSE: Your Honour, that's one of the factors that is to be considered. It doesn't have - according to the case law before me and for Your Honour it's not something that has to - expect at an inquiry. It's just one of the factors that's enumerated in the list of ten factors.

THE COURT: Does the Ferrier outline those factors?

MS. MORSE: Factors are outlined....

THE COURT: Did I say Justice Ferrier? It's the Boucher case is what I'm referring to.

MS. MORSE: Yes. Yes, it's at paragraph 69 of the Boucher decision. Excuse me.

THE COURT: Yes. All right.

MS. MORSE: And I suggest to you that the case law where - where more significant fines are awarded against individuals or cases similar or

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more analogous to our case, there are cases where individual contemptnor's (ph) [sic] engaged in activity on a continued basis that was in direct contempt of court orders, and specifically showed a willful disregard for the courts' authority as opposed to a case such as Canada Metal, for example, where individual employee's at various marketing, or excuse me, television and radio agencies failed to properly edit material in accordance with an injunction. And those are my submissions with respect to the law in this matter, subject to any questions Your Honour may have.

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THE COURT: No, that's fine. Thank you. Mr. Silver?

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MR. SILVER: I have - very briefly, I support my friend Mr. Ranking and his colleague both in their written materials and in their oral submissions. I do note that, and it may be Mr. Ranking meant to cover this, but in terms of a pattern of conduct and knowledge of process and differentiating this case and this conduct from family law litigant who's thrown into a world that's new to them. I remind you of Mr. Kwidzinski's evidence that was filed for the November 2nd motion, an affidavit of Mr. Kwidzinski sworn October 27th where there's a whole section on the association between Mr. McKenzie and Mr. Best, and I stop there to point that - that I'm taking you to this to just highlight that Mr. Best is a seasoned litigator. He's been around the courts. He knows how to -

and I only go to the evidence that was located in respect of his association in lawsuits with Mr. McKenzie, it may go beyond that, but in Mr. Kwidzinski's affidavit starting at paragraph 22....

THE COURT: Just where do I find that? I'm sorry.

MR. SILVER: That's in the amended notice of motion and reply motion record, which was filed by my friend for the November 2nd motion, and I don't know if you have that or not.

MR. RANKING: We have a second file.

THE COURT: Thank you.

MR. SILVER: And it's at Tab 3.

THE COURT: Sorry, amended notice of motion and reply motion record of the defendant's?

MR. SILVER: Yes, for motions returnable November 2nd, 3rd and 4th.

THE COURT: Tab 3.

MR. SILVER: Tab 3, and page 8 of the affidavit of Mr. Kwidzinski.

THE COURT: Sorry, page 8?

MR. SILVER: Yes. Section E of the affidavit starting at paragraph 22, and you'll see that evidence is submitted of a close association between the two gentlemen that goes back and with reference to cases that both Mr. McKenzie and Mr. Best were involved in. Paragraph 23, Mr. Kwidzinski speaks of this ExpressVu case where Mr. McKenzie was the lawyer and Mr. Best was one of the affiants on behalf of the plaintiff, and then lower down the WIC premium

5 case, fresh evidence put in by Mr. McKenzie's
counsel whose affidavit evidence of Mr. Best,
that's a decision from the year 2000. And so
on, I note that at paragraph 28, the Fidelski
(ph) and Love (ph) case, Mr. McKenzie
represented the plaintiff as well as Mr. Best in
the Nelson Group Limited, and there was a whole
issue there about substituted service and
difficulties in serving Mr. Best and his
10 company, all of which is remarkably similar to
the difficulties that we're having. And so it
seems to me, in my submission, that what we're
really dealing with is a seasoned litigator who
knows the court, knows the systems, knows the
processes and to put it as frankly as I can,
15 we're being abused over here on this side of the
courtroom. Our clients have rights. We pursue
them through process, we get court orders and
they get ignored. I mean, it's a - and I don't
want to repeat Mr. Ranking's submissions, but
20 knows how to send a letter or to speak to a
trial coordinator, has at least 13 years of
experience in the Ontario Courts and Canadian
Courts, he knows the system, he knows the courts
and we're being abused, and the only remedy that
25 we have is in the nature of the request that Mr.
Ranking has advanced on all of our behalf's.

30 Secondly in respect of remedy, Your Honour, I
support the concept of still wanting to keep our
eye on what's really at stake, and in fact, in
my experience, my understanding, is that if you

imposed a court - a jail sentence, a period of incarceration, that doesn't, sort of, replace the obligations under the orders that were made. He could spend that time in prison and still come out and be obliged, and so - to comply with your orders, and so, a remedy that tackles both of them I - both aspects I think is appropriate, and so in my respectful submission, I support the request for a period of incarceration of three months, or such shorter period of time if Mr. Best purges his contempt by submitting to a cross-examination before you on a date prior to the return of the costs hearing which is now scheduled for February 22nd. And to be practical about it he can save some time, and we could have this information for the costs submission without delay of the cost submission. All of which assumes that we'll be able to serve him, or he'll be able to be served with the warrant for the committal, and we'll have to see how that goes and what affect that has on the proceeding. My instructions at present are to not seek any further postponements of the February 22nd date, and so, we'll have to see whether he can be found before February 22nd. But it doesn't change the submission I make on what the - what an appropriate remedy may be and that is three months or such shorter period of time if he purges his contempt before you prior to the start of the cost submission on February 22nd.

THE COURT: I've got to be very careful when I'm

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ordering people to jail. I - it's got to be a fixed term. I don't think I want to make any reference to a shorter time. It will be three months, if I grant the request, it will be three months with the proviso that the accused - that Mr. Best will be able to attend me to purge his contempt and at that time I may very well be able to vary the sentence, and I think I can, but I think I would be criticized if I had a sentence that was, sort of, open ended.

MR. SILVER: But - and....

THE COURT: But I want the element of purging there.

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MR. SILVER: I think that works just as well, and that - and then when - if he does that, when he does it, would dictate the submissions that we make and the determinations you make at that time.

THE COURT: At that time.

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MR. SILVER: That seems acceptable to....

THE COURT: All right.

MR. SILVER: So, those are the brief additional submissions that I have.

THE COURT: Thank you. Mr. Roman?

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MR. ROMAN: I just have a couple of points, Your Honour. Had I been bringing the motion Mr. Ranking brought I would have been seeking a considerably longer term of incarceration. My friends have clients like Mr. Silver's case, the Government of Barbados; Mr. Ranking's case, Pricewaterhousecooper's; my client is a small individual defendant who has spent half of his

adult life in this litigation, and if you look at the history of it it's always cost him a great deal of money, and all of the previous litigation has been chasing costs and trying to get costs for expensive proceedings which are eating up this individuals income. So what you see is Mr. Best with a history of hit-and-run tactics where those tactics are particularly punitive and prejudicial to the victims who are hit and then are unable to collect when he runs, and I would submit to you if there's any question about ability to pay the people who are willing to mount that litigation for other people in a proxy basis, where those other people do not appear themselves, can be handsomely paid for doing this kind of work. It's work that a lot of people are not willing to do, but if somebody's feeling sufficiently vengeful in a family feud, or for whatever reason, to try and impose these costs on other people that could be something for which compensation is sought. I don't think you have any evidence on the record before you, but it would seem to me remarkable if Mr. Best would put himself through all of this entirely gratuitously and with no compensation. So, there can be little doubt, I think, as a practical matter of being people of the real world that he has been compensated somewhere, somehow, for the risks he has taken and the inconvenience of having been the President of Nelson Barbados in this proceeding. So, I think

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you should be aware that there are large and small defendants and the impact on the small defendants is considerably greater than the impact on the large defendants and I'm sure Mr. Best must be aware of that, because it would have been he who gave Mr. McKenzie the instructions as to who to sue and who not to sue, and also as to who to discontinue against and who to take right to the wire, which was done, and if you recall from the final argument Mr. McKenzie presented in relation to our client, the only point he made was something to do with blogs in Barbados and made no point of substance as to why the court should have any jurisdiction over a resident of England. So, I put that before you because I think that my friends have sought a period of incarceration and a fine that is quite modest in the circumstances of this case and given all of the circumstances, and those are my submissions, Your Honour.

THE COURT: Thank you.

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MR. ROMAN: I'm sorry, just - I forgot one other note, if I may? Mr. Silver mentioned that he thought - or would suggest that the contempt could be purged by appearance before you for cross-examination; I would go one step further that given the history of refusals to answer questions that the contempt would be purged by appearing in cross-examination before you and answering all reasonable questions.

THE COURT: Well, I think that's implied.

MR. ROMAN: All right.

THE COURT: Since I would be presiding over that examination.

MR. ROMAN: Thank you.

MR. SILVER: It would actually be to answer the questions that you previously ordered, which were particularized...

THE COURT: Yes.

MR. SILVER: ...in the November 2nd and December 2nd.

THE COURT: I previously ordered and as set out in that notice of motion, in the supplemental notice of motion. Ms. Carr? [sic]

MS. CLARKE: Your Honour, I - as Mr. Silver, support the admissions of Mr. Ranking and Ms. Morse and echo Mr. Silver's request that we attempt to have Mr. Best examined before the cost motions in February so that these proceedings are no longer delayed. Other than that, those are my submissions. I know that - just as - that may not be possible depending on when and if Mr. Best is located, but if it is possible that he come before you before the cost motion at the end of February that would - those would be my submissions.

THE COURT: Ms. Rubin?

MS. RUBIN: As I said at the outset, Your Honour, I think at this point my client must step back and must be - take comfort in the fact that - to the extent he owed any duties to his former client that they have been met, and that the client has been afforded all of the fair

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procedural rights that he's entitled to, to appear here and to retain counsel to answer proper questions. And so, my client takes no position on the present motion apart to say that those procedural fairness requirements have been met and in my submission I believe this court can take comfort in that as well. As for - there is further relief being sought by the defence on this motion, and I wonder if, just to speed things up, I could make my submissions on those as well and we could hand up the draft order if there's no other submissions on the part of the defence?

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MR. RANKING: I have no difficulty with that, Your Honour, but I do have one comment with respect to your comment with - on the purging of the contempt.

THE COURT: Yes.

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MR. RANKING: I have no difficulty and I support what Mr. Silver said and Your Honour's point saying that there has to be a date certain for the committal. What I strenuously object to though is if, in my respectful submission, Mr. Best, if he's going to purge his contempt, has to do it, in my respectful submission, before the cost hearing on the 22nd of February, because if he doesn't then, in fact, he's achieved his objective, because we need, in our respectful submission, the defendants collectively, need that evidence with respect to Nelson Barbados and what it did or didn't do in its books and records in order to make - and it may or may not

change our submissions, but we need that information because they're pivotal, or could be pivotal, to our submissions on the 22nd, 23rd, and 24th of February. So that if Mr. Best gets this order, should it be granted, and he then says, "Well, that's fine, I can actually stay in the weeds until the motion is dealt with and then I'll attend before Mister Justice Shaughnessy and try to purge my contempt." I think it should be made clear that - that that - and certainly in my respectful submission would not be an appropriate outcome from the position of the defendants. So, I just wanted to make that submission, Your Honour.

THE COURT: I think what - if you don't mind, I'd like to break at this point. I'd like to decide the first issue, give an endorsement. It will be an endorsement with reasons to follow and then we can go on to Part 2.

MS. RUBIN: Okay. I think, Your Honour, point taken. I think we can get quickly past Part 2 and Your Honour could have the whole matter to mull over, over the break. It's a very...

THE COURT: All right.

MS. RUBIN: ...maybe three minutes of submissions. I don't think there's any more than that, but I'm in Your Honour's hands.

THE COURT: Is the staff alright for a few more minutes? All right.

MS. RUBIN: Okay. So, in terms of....

MR. RANKING: Your Honour, what we did - we prepared a draft order and I'm handing up the

original with my - my changes that we agreed to with Ms. Rubin.

5 MS. RUBIN: And so, just to speak for a couple of minutes about the draft order; on paragraph 1 to 5, those deal with Mr. Best, and as I said, my client takes no position on those. Paragraph 6 to 8, the amended paragraph 8, these are orders made against Mr. McKenzie. That's because Mr. Best did not appear to answer questions today about certain documents that Mr. McKenzie, despite any solicitor/client privilege or duty of confidentiality that may attach to these documents, this court's going to order that Mr. McKenzie produce these documents to the defendants, and there's a list of the documents there. My client, again, because of the actions of Mr. Best will abide by any order that's made by this court to produce the documents that are listed there. The only issue comes at paragraph number 9, and on that front the only issue that we do not have instructions to agree to that paragraph, it requires Mr. McKenzie to sit down and make a list of any documentation that has ever been, or he's ever - has ever been in his possession, or he no longer has, and in my submissions that's a proper question for cross-examination. Of course to the extent that we can - prior to Mr. McKenzie's cross-examination that we can produce documentation to the defendants to - in the interest of efficiency, we will make reasonable efforts to do so, and you know, as counsel do, but at this - today....

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THE COURT: You'll make reasonable efforts to do what?

MS. RUBIN: To produce any of this documentation to the defendants in advance of Mr. McKenzie's cross-examination. But I can't consent to a term in the court order that Mr. McKenzie does Number 9, and I can't commit on Mr. McKenzie's behalf to a specific date that anything will be produced, except to say that we will make our best efforts to produce this documentation to the defendants reasonably in advance of Mr. McKenzie's cross-examination.

THE COURT: Just give me a second so I can read 9.

MS. RUBIN: Yes.

THE COURT: Anything else, Ms. Rubin?

MS. RUBIN: No, that's it and the rest - as I said the rest of the order is fine with us. Number 8 - no, excuse me, Number 7, which has been added in, also fine, and that is that this court orders Mr. McKenzie, despite and privilege or confidentiality, to answer questions that are put to him with respect to the documents listed and we agreed.

THE COURT: Mr. Ranking?

MR. RANKING: Your Honour, with the greatest of respect to my friend I think that she's confusing two of the paragraphs. Paragraph 6 is the paragraph by which Ms. Rubin has agreed to have Mr. McKenzie produce the documents. Such production has to be made within seven days of the order. We've agreed on that...

MS. RUBIN: No, I'm....

MR. RANKING: ...and unless my friend is resiling from the agreement that we've got - and I'll finish my submissions first, if I might, Ms. Rubin. That is what is in paragraph 6. Paragraph 6 is what we agreed upon, and if my friend is now taking position different then she can advise me over the break and we'll take it up after the break. But paragraph 6 is intended to deal with the production of documents that we didn't get from Mr. Best that we're now seeking from Mr. McKenzie. Paragraph old 8, new 9, is not dealing with the production of documents at all. It is dealing with a requirement to prepare what we would otherwise say is a Schedule C to an affidavit of documents, stating, "If you don't have the documents, tell us what became of them because you incorporated the company, you should have put the documents together; did you, and if you did when did you do it, and if you no longer have them, what became of them, and to whom did you give them and when?" And so - and that's what we on the defence side are saying, "Okay, if you've got them you've agreed to produce them", subject to Ms. Rubin changing that position, but if you don't have them we would like to know - to be able to prepare and perhaps to bring further motions to see if these documents have been given to a third party, or to a non-party, we may well want to be before you to say, "Wait a minute, why did that happen? That individual

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wasn't listed as an officer or director why do they have the documents and have there been steps taken to try to get rid of these documents so we can't get them?" So, that's the purpose of paragraph 8, old paragraph 8, new paragraph 9 simply put, and we see no reason why Mr. McKenzie, as the solicitor and as the firm that prepared these documents, shouldn't be under an obligation, given the relevance of the documents should this court so find, to give us that kind of information before Mr. McKenzie is cross-examined.

THE COURT: Mr. Silver?

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MR. SILVER: The only thing I have to add is that we had an agreement where - on the date of Mr. McKenzie's cross-examination, which was February 3rd, and my respectful submission is that should find its way into the order, because it all then, sort of, connects - if you make an order that the firm produce the documentation within seven days then that will come before February 3rd and it's - because everybody's agreed on it, I think it should be in the order. February 3rd for Mr. McKenzie's cross.

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THE COURT: Mr. Roman?

MR. ROMAN: No. No submissions, Your Honour.

MS. CLARKE: No, Your Honour.

THE COURT: Ms. Rubin?

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MS. RUBIN: Your Honour, just to stand up. I agree with the February 3rd date for Mr.

McKenzie's cross-examination, that's not a problem, and it may have been a misunderstanding

5 on my part, I thought after we had discussed the
time - timing for delivering the documents that
I had come back into the courtroom and - after I
had spoken with Mr. Duart (ph) and confirmed
that we don't have these documents in our
office, and we believe Mr. McKenzie's out of the
country at present. So, I had thought that I
had relayed the message that we cannot commit to
10 a specific date, because we don't know what's
there and we don't have any of it. If I have -
if I didn't communicate that, I apologize, and I
don't mean to resile from any agreement that we
made, but it's - as a practical matter, I'm not
sure that the documents can be delivered within
15 seven days, but as I said, we would agree,
obviously, to deliver them reasonably in advance
of the cross-examination and make our best
efforts to deliver them as soon as possible.

20 THE COURT: Well - all right. I just want you
to help me for a second, because I'm getting
confused from your initial submissions to where
you are now. So, the documents you have in your
possession...

25 MS. RUBIN: Yes.

THE COURT: ...there shouldn't be any problem in
producing those within seven days of this order.

30 MS. RUBIN: We - okay, and I can confirm that
we, counsel for Mr. McKenzie, have no - none of
Mr. McKenzie's original file with respect to
Nelson Barbados in our - in our firm's
possession. So, all of the documents with
respect to this litigation are not in our

possession and there's nothing that I know of, standing here today, that we could produce from our files.

THE COURT: So, the hold up - or the hang up...

MS. RUBIN: Yes.

THE COURT: ...is seven days?

MS. RUBIN: Yes, that's all.

THE COURT: Right. Got that. So - so today is what? The 15th of January? So, the last time I remember there is 16 days left in this month, then you said the examination is 3, so that's 19 days. When is Mr. McKenzie expected back in the country?

MS. RUBIN: I don't - I don't know, I'm sorry. But I imagine that through channels with his former firm we could arrange some sort of reasonable timing on the delivery of the documents...

THE COURT: Well, what....

MS. RUBIN: ...otherwise - I just don't want to be committed to seven days, because I don't know...

THE COURT: All right.

MS. RUBIN: ...if that's possible.

THE COURT: It's not 7, and we can't go out beyond 19, so pick a number.

MS. RUBIN: Why don't we get - why don't we give us two weeks at the - and - and in that two weeks we will undertake to make our best efforts to deliver them as soon as possible.

THE COURT: Fourteen days then from today. So, that will put it just towards the end of the

month. That works?

MR. SILVER: That - well - sorry. Two weeks....

THE COURT: I haven't got to the second step yet. I want to come back now - then to paragraph 9.

MR. SILVER: Well, two weeks from today is the 29th...

THE COURT: Right.

MR. SILVER: ...which would be the Friday before the Wednesday the 3rd. Just because of my own schedule I would ask that it be the 27th, which is one week - a full week before. I happen to be out of the country on the....

THE COURT: So, you're asking to move it back two more days?

MR. SILVER: Back two more days and put - not seven days, but by or before January 27th, which would be exactly one week before the cross-examination.

THE COURT: Well, you may not be able to agree with it, but I think that's reasonable and I have to make the call, so that's reasonable. That gets that out of the way. So, it will be January 27th. Now, with respect to paragraph 9, is it the seven days is the issue there?

MS. RUBIN: I'm sorry, Your Honour, the only issue there is that I don't have Mr. McKenzie's consent to this term. I don't have instructions on this, and so to be - again, this is a consent order, I can't agree to it, and the reason - basis for my - what I say - one of the reasons in my submission Your Honour shouldn't make the

order is that this is a question for cross-examination, this is a question that can be asked to Mr. McKenzie on cross-examination.

THE COURT: You know, I'd be real obliging in that regard if I was talking to you and this was September with an examination to take place in February, but if I have to look back over two and a half years of this litigation and the number of stops and starts, and - I think it's extremely unfair to counsel and the other side. I think it's unfair to the parties, particularly, and frankly a little unfair to the court process to keep leaving things unattended and directed. This has got to come to conclusion. I have made the substantive decisions in the matter. This is coming down to cost, it's coming down to productions, I heard your submissions but nevertheless in terms of paragraph 9 I'm making it the same date, January 27th.

MS. RUBIN: And Your Honour, just so there's no misconception, my client also takes the position that the motion date in this matter should not adjourned again. That it should - that the matter - the motion on costs should be - ought to be heard on the February dates and that there....

THE COURT: Amen.

MS. RUBIN: Yes. Thank you.

THE COURT: Even when I hear it I have to write on it, and I think I told you I'm not going to be around for the month of March and things are

heating up in terms of other obligations. So, I mean, I've got to bring this to a conclusion. All right, anything else? I need a break, then I want to at least make an endorsement about what has been decided and with reasons to follow, and I'll put that - I guess I'll go back to the original motion record, will I? Where I have an endorsement of December 2nd?

MR. RANKING: Yes. I think that is where your endorsement is, Your Honour.

THE COURT: Right.

MR. RANKING: Sorry, which endorsement are you looking for, Your Honour?

THE COURT: I'm going to make an endorsement...

MR. RANKING: Right.

THE COURT: ...I just want to make sure I've got it on the right record, so it'll be on the December 2nd - where...

MR. RANKING: I think it's....

THE COURT: ...I've already made an endorsement on December 2nd. It's on the motion record, motion returnable...

MR. RANKING: Right.

THE COURT: ...December 2nd, 2009.

MR. RANKING: For the purposes of today it might be better that you make it on a supplemental motion record...

THE COURT: All right.

MR. RANKING: ...which is the motion record for....

THE COURT: January 15th.

MR. RANKING: I think January the 15th might be

more appropriate, Your Honour.

THE COURT: All right. Well, we're going to be a little longer than 15 minutes.

MR. RANKING: Thank you, Your Honour, for agreeing to sit.

THE COURT: All right. I'll be at least 25 minutes sorting this out and getting it in the form that I want.

MR. RANKING: Your Honour, you'll see - you'll see this when you read it. We have purposely left a period of incarceration blank, when you read the draft order.

THE COURT: Thank you.

R E C E S S

U P O N R E S U M I N G:

THE COURT: I've made the following endorsement on the supplemental motion record returnable this date; for written reasons to be delivered at a later date I find that Donald Best is in contempt of the orders of this court, namely the order of November 2nd, 2009, and paragraph 3 therein as well as the order of December 2nd, 2009, and paragraph 3 therein. I am satisfied on the material filed that Mr. Donald Best had actual notice of the orders of November 2nd, 2009, and December 2nd, 2009. I am further satisfied that Mr. Donald Best was on notice of this days motion for contempt yet he failed to attend to answer questions and make productions as detailed in the court order of December 2nd,

2009. I am satisfied that the three part test outlined in Sussex Group Limited v. Fangeat, [2003] OJ No. 3348, paragraph 53, have been satisfied. Mr. Best has contravened both the letter and spirit of this courts' orders. He has knowingly acted in a contravention of the court orders. I find that Mr. Best is intentionally contemptuous of the court orders and thereby he intended to interfere with the administration of justice. In determining the appropriate remedy I have considered, A) the nature the contemptuous act, B) the fact that the contemnor has admitted his breach, C) the fact that the contemnor has not tendered an apology to the court, D) the fact that the breaches are part of an ongoing pattern of conduct in which there are repeated breaches and E) the fact that the breach occurred with full knowledge and understanding of the contemnor and is not the result of a mistake or misunderstanding, F) the conduct of the contemnor exhibits defiance of the orders of this court. I've also considered the decisions in Milligan v. Lech [2006] OJ No. 3127; Boucher v. Kennedy [1998] OJ No. 1612 and Oakley Manufacturing Inc. v. Bowman [2005] OJ No. 5318 in considering the appropriate remedy. The material filed in this application indicates that Donald Best is a seasoned litigator and therefore has knowledge concerning the necessity for compliance with court orders and the consequences for noncompliance with court

orders. Therefore it is the order of this court that Donald Best be committed to a Provincial Correctional Institution for a period of three months. A warrant for committal to issue. Further it is the order of this court that in addition to the term of incarceration that Donald Best pay a fine of \$7,500. It is further an order of this court that Donald Best may apply to purge his contempt by appearing before Mister Justice Shaughnessy on or before February 22nd, 2010, and answering questions or making productions in terms of the orders of Justice Shaughnessy dated November 2nd, 2009, and December 2nd, 2009. I signed a draft order that has further provisions relating to the attendance of Mr. McKenzie on an examination now set for February 3rd, 2010. The cost hearing in this proceeding remains fixed to proceed on February 22nd, 23rd, and 24th, 2010 at Whitby. It should say - we're moving, aren't we? Is it February 22nd the moving date? I think it is, isn't it?

COURTROOM REGISTRAR: I believe it's the 21st.

THE COURT: 21st, for this court?

COURTROOM REGISTRAR: I believe so.

THE COURT: All right. I think I better correct that and say at Oshawa. All right, the issue we haven't dealt with is cost. I should - let's - just before we go onto that part. So, I - do you all have a copy of this order that - the draft order? If you don't I'll just pass down what I've got and let you look at it

collectively and tell me if it's fine. Is that better? I think Ms. Rubin might want to look at that, because it does affect her.

MR. RANKING: That's fine, Your Honour.

THE COURT: All right. Okay, costs.

MR. RANKING: Your Honour, I've prepared and handed up a cost outline. The cost outline deals with all the costs that were incurred to prepare for the various matters that unfolded over the months of November and December, and coming up to today's date. And I have provided for - in the cost outline the cost on a partial indemnity and a substantial indemnity scale. If I could just ask you to turn to the paragraph - excuse me, page 2, I can briefly take you through each of the paragraphs dealing - and we're seeking these costs as against Mr. Best and the reason for what I've identified here, why we are seeking costs on a substantial indemnity scale is that in furtherance of what Your Honour has just ruled, with respect to his contemptuous conduct, virtually all of the costs and they have been significant, have been incurred in order to try to deal with this matter. I also note by way of example that we were required to spend a lot of time and when you look to the next page, I'll come back to some of the factors momentarily, but if you look to the next page just with the individual lawyers while....

THE COURT: Sorry, for interrupting you.

MR. RANKING: Yes.

THE COURT: I've just looked at it this moment, but persuade me otherwise, but why shouldn't I then - if I look at page 2...

MR. RANKING: Yes.

THE COURT: ...the first box you're asking for costs against Best without prejudice to the right to seek recovery against McKenzie and if I'm going to deal with that, am I not February 22nd, 23rd, 24th? Should these costs not move over? I mean....

MR. RANKING: Your Honour, I think that....

THE COURT: You're not going to be collecting them.

MR. RANKING: No, I'm not going to be collecting them. I'm happy to put it over. I don't want to overstate my case. While I say that it's without prejudice to recovering some of the costs against McKenzie I think that a fraction of these costs may, in fact, be recovered against Mr. McKenzie. The lion's share of them are referable to Mr. Best. So, I put that in simply to preserve the ability if that - to seek some of the costs, but I can't stand before you and say that I would be advocating strenuously to recover these costs against Mr. McKenzie or his firm.

THE COURT: All right. Then continue.

MR. RANKING: So, it's really more out of an abundance of caution. The issue here, Your Honour, is whether we start with the efforts that I had with Mr. Kwidzinski, the student, trying to find this individual, finding people

in Kingston, looking at this UPS store, then having to bring on the motion for the UPS and then having to continue to coordinate - there was a lot of time. What I tried to do as senior counsel was I tried to delegate it as best I could, and if you look at page 3 I had Mr. Butler who when it came time to dealing with the UPS stores and putting that into evidence, I asked him as an associate to attend to that in addition to Mr. Kwidzinski, because I wanted to make sure that things were handled appropriately. But you'll see to the extent that I've used others; I've used a student, Mr. Butler a 2006 call, and to assist prepare for today and deal with the legal research and get things out in a timely fashion before Christmas I asked Ms. Morse, who was a 2009 call. So, that's how I dealt with the matter and I say while this - the matters that we had to deal with were not legally complex. I think they were factually complex. I can tell Your Honour that, you know, with respect to trying to get into social insurance numbers and telephone numbers and driver's licences, and things of that nature, we did a lot of work and that is what is reflected through this material. As well I asked you court clerk to hand up the materials of the separate folder of materials for the November 2nd motion to give you a sense, you actually did refer to some of that earlier, but to give you a sense of what it is we did. And then we had the various attendances and

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preparation at Victory Verbatim. And you'll also see attached to the bill of costs the disbursements, which in and of themselves are in excess of \$5,000 and I've attached the invoices from Victory Verbatim and the invoices for the private investigator, Mr. Van Allen. I will also make this other comment, while my client is not an individual like Mr. Roman's, I can tell you that the amount of costs that my client has incurred trying to move this forward has been - I don't want to say extraordinary, but they had been far more significant than any of us would have contemplated at first instance. It's one thing when you, you know, start a cost proceeding and are trying to recover costs against Mr. McKenzie for the reasons that we'll argue in later submissions, but when all you're trying is get some documents, when you start down that road you certainly never would have thought you would have been dealing with a matter that would have dragged out for another two to three months at solicitor client costs well in excess of \$100,000. So, that's my cost outline. I do want to refer you to two cases though, Your Honour, and they're cases that I think will be of assistance to you, and I don't need to spend much time on them, but if I could just ask you to turn to the brief of authorities in the contempt motion. You certainly referred to one of the cases, if not both of them, but the first case I'd ask you to turn to is the decision of Mister Justice Cumming in the Sussex

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Group case and I refer you to both these cases, Your Honour, because they stand for the proposition that where an individual is found to be in contempt it is appropriate to award costs on a substantial indemnity scale. And under Tab 2, if I could ask you to turn to the last page, page 16 of the decision, paragraph 78, where Mister Justice Cummings says, "Submissions have been made as to legal costs, a draft bill of costs has been considered. In my view costs are properly ordered to be on substantial indemnity bases given the deliberate and willful nature of the continuing contempt. I fix costs payable to the applicant on a substantial indemnity basis of \$45,000", and he deals with other matters in terms of the specifics of that case. But what is of significance, in my respectful submission, is that there was a finding there by Mister Justice Cumming that substantial indemnity costs were appropriate given the deliberate and willful nature of the continuing contempt. In a further case, which is certainly in terms of quantum more significant or closer to our case, is that in the decision of Oakley Manufacturing and Bowman, the decision of Mister Justice Stinson in 2005. In that case there was imprisonment of only ten days, but Justice Stinson deals with costs commencing at paragraph 25, and I think that his decision is helpful and I urge you to look at paragraph 25 and following, it's really paragraph 25 through to the end, but at paragraph 25 His Honour makes

the point that these contempt proceedings were occasioned entirely by the intentional decision of the defendants to disregard the order of Carnworth, J. (ph), that misconduct warrants the imposition of an order requiring them to pay the cost of the contempt proceeding on a substantial indemnity basis, and he then references the Sussex Group case to which I've already drawn reference. Here, Your Honour, we couldn't have gone to greater lengths to make sure that Mr. Best was aware of the contempt proceedings and his need to come to deal with them, and as Your Honour has so found he was in breach of two court orders and he's both in breach not only in the orders themselves, but in the spirit of the orders by not attending on the 25th. So, in my respectful submission the facts of this case fall squarely within the decision of Justice Cumming and Justice Stinson. Justice Stinson goes on, and while the facts clearly are distinguishable the concept, I think it's the same, in paragraph 26 the plaintiff was required to go to considerable length to gather the evidence necessary to prove its case. In this case I respectfully submit, without taking to all the facts, that the same applies. And what I think is significant is the last sentence of that paragraph, "To the extent the defendants find themselves facing a significant cost order, they largely have themselves to blame." Had Mr. Best come forward and simply proffered the information we wouldn't be here and none of this

would have been incurred. So, to the extent there is concern I actually rely on what Justice Stinson said, that that concern was brought to Mr. Best by his own doing.

Your Honour I don't think I need to take you through paragraphs 28 through 33. It talks about the defendants going to appear on two separate dates, the contempt motion, the same applied with respect to, you know, Mr. Best not attending and in this case, if you'd turn to paragraph 23, Mister Justice Stinson reached the conclusion that the amounts claimed in the bills of costs were fully justified and that it was fair and reasonable for the defendants to pay those sums and he fixed the costs of those contempt proceedings at \$97,000 inclusive of disbursements and GST. In my respectful submission the time and effort that we dedicated to the case was appropriate and we have been successful at each court attendance. Your Honour has adjourned the various earlier attendances through today. I've provided my cost outline and subject to any questions I would ask that the costs be awarded in favour of Pricewaterhousecoopers....

THE COURT: What - I mean I have it all in my computer, but I don't bring my computer to court, what did I award you in costs on the previous occasion where I - there was multiple submissions with respect to costs and we had to get into the entire issue of relating to the

security matter, and I know - I don't want to know - I know the disbursement for the expert was significant, but I - apart from that, what did I award you in fees?

MR. RANKING: My recollection that overall - the overall cost award was something in excess of \$200,000 for all parties...

THE COURT: I know that.

MR. RANKING: ...for all disbursements. If - I know that it is in the record, I can find it for you, my recollection was that you awarded Pricewaterhousecoopers something either in the low forties or high thirties together with \$25,000 for Dr. Sharon Smith's (ph) report. My recollection was that the - the net payment that had to be made by Mr. McKenzie's client was something around \$70,000 for Pricewaterhousecoopers.

THE COURT: That's my recollection. I just wanted to make sure I was on the page.

MR. RANKING: Yeah, and....

THE COURT: So, I think it was about forty, forty-five, and twenty-five, am I right?

MR. RANKING: Forty-five I think would be high. I think it was about - either the high thirty's or the low thirty's, Your Honour. And I can't remember, because there was some other disbursements in there...

THE COURT: Yes.

MR. RANKING: ...as to what the actual fee was, but certainly around forty, I think, is a fair ballpark.

THE COURT: Yeah. All right. Thank you. Mr. Silver?

MR. SILVER: In respect of that same question my recollection - my recollection was that they were varying amounts per counsel, because different people did different things, but that the award in favour of my client was in that same range, I think, forty-two to forty-five.

THE COURT: I actually think you were around thirty, if I recall, but I may be wrong.

MR. SILVER: No.

THE COURT: I don't know why I don't - we don't just look this up, because it's easy to look at, but....

MR. SILVER: I can find it.

THE COURT: In any event....

MR. SILVER: But it was partial indemnity.

THE COURT: Yes. What's your submissions now?

MR. SILVER: My - firstly Your Honour, I don't have a cost outline. I'm going to make one submission on substantial indemnity in addition to what Mr. Ranking has to say, and it sounds smart, but it's actually from case law that I don't have for you, but my recollection from a prior contempt proceeding is that substantial indemnity is the rule, or more the regular course, not only in situations where there's deliberate and intentional conduct, but also because - and the courts have recognized this, and it's in case law, that counsel are the parties who retain counsel to bring a contempt on are actually assisting the court in the

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administration of justice, and that compliance with orders is so fundamentally important to the administration of justice that where parties through their counsel bring on contempt proceedings successfully and there are findings that another party isn't complying with the court orders and process that the regular order for costs is substantial indemnity, because that part is assisting with the proper administration of justice and it's so important that orders be complied with, that the court recognizes that in the costs award to be made following the contempt hearing.

In respect of quantum there is no doubt, it's perfectly obvious to you and everybody else that Mr. Ranking carried the lion's share of the work. He did all the records and put the bulk of the material together, and so, my costs are - my time is significantly reduced from that of Mr. Ranking. Having said that I did prepare for, and attended, on November - in court on November 2nd, December 2nd and today. I also attended, as you know, on November 17th and then again on November 25th at the special examiner's office and I submit and certify as an officer of the court that in excess of six hours were spent in respect of those four categories. Namely November 2nd - I combine November 17th and 25th together, December 2nd and January 15th, and so, I'm seeking costs for 24 hours of my time at a substantial indemnity rate of \$525, which

amounts to \$12,600 plus GST of \$630 for a total cost award payable by Mr. Best of \$13,230. No disbursements.

THE COURT: Thank you. Mr. Roman?

MR. ROMAN: I think, Your Honour, I have to echo what Mr. Silver just said about Mr. Ranking doing the heavy lifting. There's no way my client could have done what his client did and we are grateful to him for having done it. I would submit in response to Your Honour's question about whether this should have been dealt with, or should be dealt with on the 22nd, and it's important that it be dealt with now because clients such as Mr. Ranking's who see the bills mounting, but don't see any orders for cost awards will be more reluctant to continue to pay those bills if there isn't any order from the court saying someone should pay them. With respect to the scale of costs I would take the proposition Mr. Silver made and take it one step further, I submit that it would be difficult to justify an order of partial indemnity costs in a contempt case such as this one. I don't have a formal cost order, Your Honour, I attended the last effort where we were trying to get Mr. Best to appear and I had to prepare for this event, I would be seeking the same hourly rate as Mr. Silver for ten hours.

THE COURT: What's the GST on that?

MR. ROMAN: Sorry, I don't have that. I can work that out though.

MR. SILVER: Well, it would be...

MR. RANKING: Five percent....

MR. SILVER: ...200 - it would be ten hours at 525 is 52.50 times five percent, which is about - I can give you that. It's 52.50 times .05, it's \$262.50, and so combined it's \$5,512.50.

THE COURT: Thanks, Mr. Silver. Ms. Carr? [sic]

MS. CLARKE: It's actually Ms. Clarke, Your Honour.

THE COURT: Clarke, I'm sorry.

MS. CLARKE: It's okay. I, like Mr. Silver and Mr. Roman, unfortunately do not have a cost outline for Your Honour today, but I attended as Mr. Silver at those of dates that he spoke to minus the preparation time for the anticipated examination of Mr. Best. So, a cost outline will be forthcoming to Your Honour, but I'm going to ask the courts indulgence and Mr. Silver's handy Blackberry to do some math for me, but I estimate my time to be roughly 20 hours, Your Honour, and my hourly rate at 335 an hour and I think that works out to roughly....

MR. SILVER: \$6,700.

MS. CLARKE: Thank you, Mr. Silver.

THE COURT: When were you called to the bar?

MS. CLARKE: 2009.

THE COURT: When was your call to the bar, Mr. Roman?

MR. ROMAN: 1973, Your Honour.

THE COURT: I thought so, good year. Thank you. I don't think you have a position on costs, would you?

MS. CLARKE: No. You're right, Your Honour, I'm

not going to claim our costs against Mr. Best, but I reserve the right to claim costs, should it be fit to do so, in the motion in February against the defendant's, Number 1.

THE COURT: Oh, I'm sure they're aware of that.

MS. CLARKE: Yes, Your Honour. And on a second front just insofar as the draft - cost outline which I haven't seen, makes any reference to Mr. McKenzie, as Your Honour pointed out at the outset of this, I would ask that no window be left open to claim these costs for the contempt motion as against Mr. McKenzie and so this order made today is made, for lack of better language, with....

THE COURT: Well, I - yeah.

MS. CLARKE: With prejudice.

THE COURT: Mr. Ranking really wanted to keep it open, but I don't think it's open. I'm making the order now.

MS. CLARKE: Right.

THE COURT: I'm making it now, it's now, and it's going to be against Mr. Best.

MS. CLARKE: All right.

THE COURT: So, let's sort of - that's the end of that story.

MS. CLARKE: Thank you, Your Honour.

THE COURT: All right. Under costs in the continuation of the endorsement, a bill of costs has been filed by Mr. Ranking and in light of the findings of a deliberate, willful and continuing contempt I find an award of costs on a substantial indemnity basis is appropriate.

Nevertheless, the guidelines provided under the rules as well as the principles of proportionality still must apply in this matter. It's apparent that Mr. Ranking did the substantial work in relation to this proceeding. After hearing submissions I hereby make the following order of costs on this proceeding as against Donald Best payable within 30 days. Number 1, to Mr. Ranking's clients - I had to do it that way, because I'm not - I know who you represent, but when I get into Mr. Silver it's a little bit more difficult. Mr. Ranking's clients cost of \$50,632.90 comprised of \$45,000 in fees and \$5,632.90 in taxable disbursements. To Mr. Silver's clients, \$13,230 inclusive of GST. To Mr. Roman's clients, \$5,512.50 inclusive of GST. To Ms. Clarke's clients, \$3,500 inclusive of GST. All right? And I've added that to the order, I've signed the order. MR. RANKING: I have one last housekeeping matter. Attached to the order is a schedule, being the warrant of committal. Can I pass up a warrant of committal and have Your Honour sign it so that we can....

THE COURT: Yeah, just on that though, I know the registrar was working on, because we sign all sorts of warrants and you're going to use his? You've looked at it? That's fine. I just want to make sure it's in the proper form.

MR. RANKING: It - well this, in fact, we've done in blank, Your Honour, because we didn't know the period.

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THE COURT: That's the order that goes back to them. It occurs to me, Madam Registrar, you could help us - I know you come from the family side of the court, but when we issue these warrants for committal in family proceedings is there not information that counsel provide for the arresting officers? The details; what the person looks like and other such criteria, do you have that here? Just before you leave, then, this registrar comes from the family section of our Superior Court and we make these orders from time-to-time, reluctantly, but we make them, usually for nonpayment of support and there is a form which, I think - just to make sure matters are expedited and perceived that she will perhaps secure for you where you provide the police with certain information and - relevant information that they need for the purposes of an arrest. If they don't have that then, you know, you can see what would happen. The committal might just find its way on a desk and collect dust and if I've issued the order - the committal I want it acted on as quickly as possible. So, I'll leave that to discuss with her. I'll be still in the courthouse if there's any problems in that regard.

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MR. RANKING: Sorry Your Honour, will you need to sign something other than what we put before you....

THE COURT: No, it's just information you should provide. So, there's the committals and get everything back to me, I'll be appreciative.


M A T T E R A D J O U R N E D

FORM 2

Certificate of Transcript
Evidence Act, subsection 5 (2)

I, Brenda Wakelin, certify that this document is a true and accurate transcript in the recording of Nelson Barbados Group Limited and Richard Ivan Cox, et al., in the Superior Court of Justice, held at 601 Rossland Road, Whitby, Ontario taken from Recording No. 2812-3-003/2010, which has been certified in the Form 1.

May 1, 2012
(Date)


(Signature of authorized person(s))

Brenda Wakelin, B.Sc., B.Ed., OCT, CCR, ICDR
Certified Court Reporter, CRAO
Internationally Certified Digital Reporter, IAPRT

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