

MODE = MEMORY TRANSMISSION

START=JAN-25 16:41 END=JAN-25 17:09

FILE NO. = 107

STN NO.	COM	ABBR NO.	STATION NAME/TEL.NO.	PAGES	DURATION
001	OK	5	914165917333	015/015	00:04'43"
002	OK	5	914166403018	015/015	00:05'29"
003	OK	5	914163647813	015/015	00:05'30"
004	OK	5	914165958695	015/015	00:05'07"
005	OK	5	914169470866	015/015	00:04'44"

-JUDGES CHAMBERS WHITBY -

***** -905 430 5822 - ***** - 905 430 5822- *****

Superior Court of Justice
 601 Rossland Road East
 Whitby, Ontario
 L1N 9G7
 Phone: (905) 430-5820
 Fax : (905) 430-5822



Fax

To: Heidi Rubin **From:** C. Turnbull, Judicial Secretary

Fax: (416) 591-7333 **Pages:** 15

Phone: **Date:** 1/25/2010

Re: *Nelson Barbados Group Ltd. v. Cox et al -* **Cc:**
 Court File No. 07-0141
 Lorne Silver - (416) 840-3018
 Gerald Ranking - (416) 364-7813
 Andrew Roman - (416) 595-8695
 Sarah Clarke - c/o Adrian Lang - (416) 947-0886

Urgent For Review Please Comment Please Reply Please Recycle

● **Comments:**

Counsel:

Attached please find Reasons on Motion for Contempt in the above matter of the Honourable Mr. Justice J.B. Shaughnessy, released on January 25, 2010.

C. Turnbull, Judicial Secretary

Superior Court of Justice
601 Rossland Road East
Whitby, Ontario
L1N 9G7
Phone: (905) 430-5820
Fax : (905) 430-5822

JUDGES CHAMBERS

Fax

To: Heidi Rubin **From:** C. Turnbull, Judicial Secretary

Fax: (416) 591-7333 **Pages:** 15

Phone: **Date:** 1/25/2010

Re: *Nelson Barbados Group Ltd. v. Cox et al* – **Cc:** Lorne Silver – (416) 640-3018
Court File No. 07-0141 Gerald Ranking – (416) 364-7813
Andrew Roman – (416) 595-8695
Sarah Clarke – c/o Adrian Lang – (416)
947-0866

Urgent **For Review** **Please Comment** **Please Reply** **Please Recycle**

● **Comments:**

Counsel:

Attached please find Reasons on Motion for Contempt in the above matter of the Honourable Mr. Justice J.B. Shaughnessy, released on January 25, 2010.

C. Turnbull, Judicial Secretary

Nelson Barbados 2010 ONSC 569

COURT FILE NO.: 07-0141

DATE: 2010/01/25

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Nelson Barbados Group Ltd.

Plaintiff

)
)
)
)

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

-and-

Richard Ivan Cox, Gerard Cox, Alan Cox, Philip Vernon Nicholls, Eric Ashby Bentham Deane, Owen Basil Keith Deane, 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., Cottle, Catford & Co., Keble Worrell Ltd., Eric Iain Stewart Deane, Estate of Colin Deane, Lee Deane, Errie Deane, Keith Deane, Malcolm Deane, Lionel Nurse, Leonard Nurse, Edward Bayley, Francis Deher, David Shorey, Owen Seymour Arthur, Mark Cummins, Graham Brown, Brian Edward Turner, G.S. Brown Associates Limited, Golf Barbados Inc., Kingsland Estates Limited, Classic Investments Limited, Thornbrook International Consultants Inc., Thornbrook International Inc., S.B.G. Development Corporation, The Barbados Agricultural Credit Trust,

Lorne S. Silver, for the Defendants, Richard Ivan Cox, Gerard Cox, Alan Cox, Gittens Clyde Turney, R.G. Mandeville & Co., 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

Sarah Clarke for the Defendant First Caribbean International Bank

**Phoenix Artists
Management Limited, 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, and John Does 1-25,
Philip Greaves, Estate
of Vivian Gordon Lee Deane, David
Thompson, Edmund
Bayley, Peter Simmons, G.S. Brown
and Associates Ltd.,
GBI Golf (Barbados) Inc., 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
Commonwealth Construction Inc.,**

Defendants

)
)
) **HEARD : January 15, 2010**
)
)

Justice J. Bryan Shaughnessy

REASONS ON MOTION FOR CONTEMPT

[1] The moving party PricewaterhouseCoopers East Caribbean and the other participating defendants have brought a motion for an Order finding Donald Best to be in contempt of the orders of this court dated November 2, 2009 and December 2, 2009.

[2] At the hearing of this application on January 15, 2010, I made a finding that Donald Best was in contempt of the orders of November 2, 2009 and December 2, 2009. I made a further finding that Donald Best had actual notice of the orders of November 2, 2009 and December 2, 2009 and that he also was on notice of this contempt application and yet he failed to attend on the return date of this matter to answer questions and make production as required and detailed in the orders of this Court.

[3] Donald Best is the President of the Plaintiff, Nelson Barbados Group Ltd. The substantive jurisdictional motion in this action was heard and Reasons were delivered dated May 4, 2009. Thereafter Counsel were invited to make submissions on the issue of costs. A cost hearing has been set for February 22, 23 and 24, 2010 at the Durham Regional Courthouse. The Defendants have put the Plaintiff and the Court on notice that they will be seeking a cost award against inter alia, K. William McKenzie and the law firm of Crawford, McKenzie, McLean, Anderson & Duncan LLP, former solicitors for the Plaintiff.

Order of November 2, 2009

[4] The Defendants brought a motion returnable November 2, 3, and 4, 2009 seeking an award of costs to the Defendants on a full indemnity scale, or in the alternative on a substantial indemnity scale, fixed and payable forthwith by the plaintiff, the plaintiff's officer Donald Best, K. William McKenzie and Mr. McKenzie's law firm, Crawford, McKenzie, McLean, Anderson & Duncan LLP on a joint and several basis. In addition thereto the Defendants sought an order, validating service of the motion material upon Donald Best and compelling Donald Best to appear on an examination on November 17, 2009 in Toronto to answer questions:

- (a) refused or taken under advisement at the cross-examination of John Knox (a non-party affiant produced by the Plaintiff) held on November 4, 2008 and all questions reasonably arising therefrom;
- (b) all questions refused or taken under advisement at the Rule 39.03 examination of Donald Best held on March 20, 2009 and all questions reasonably arising therefrom;
- (c) all questions which the Court directed to be answered at the hearing of the substantive motion on April 8, 2009 and all questions reasonably arising therefrom;
- (d) all questions relating to Donald Best's appointment and subsequent duties/responsibilities as an officer of Nelson Barbados Group Limited; his relationship, if any, to the matters pleaded in the within action (and the related actions in Barbados), and his association and/or relationship with K. William McKenzie and/or the law firm of Crawford, McKenzie, McLean, Anderson & Duncan LLP; and
- (e) all questions concerning the shares of Kingsland Estates limited, including without limiting the generality of the foregoing, the security over and ownership rights held by Nelson Barbados Group Ltd. in the common shares of Kingsland and all questions arising therefrom.

[5] There was also a request for an order compelling Donald Best to deliver two weeks prior to the examination, all documents by which Nelson Barbados Group Ltd. allegedly acquired security or an ownership interest in Kingsland Estates Limited, all trust documents, the minute book, director's register, shareholder's register, banking documents (including bank account opening documents, operating agreements and bank

statements) and all books of account, ledgers and financial statements from the date of incorporation of Nelson Barbados Group Ltd through to the present.

[6] The grounds advanced for the motion is that all the Defendants were forced to incur extraordinary legal expenses to respond to unmeritorious claims and what are alleged to be obstructionist tactics of the plaintiff and its counsel, Mr. William McKenzie. It is further alleged that this action was brought by a shell corporation with a head office address of Mr. McKenzie's law firm in Orillia Ontario and the action was devoid of merit and had no connection to Ontario and which issues were or continue to be the subject of civil proceedings in Barbados. Accordingly the Defendants seek "the highest scale of costs to compensate them for hundreds of thousands of dollars of legal fees thrown away."

[7] An Order issued from this Court on November 2, 2009 directing Donald Best to attend an examination in Toronto on November 17, 2009. A transcript of the examination indicates that Donald Best called into the special examiners office shortly before the examination was to commence. Mr. Best was placed into a conference call with the counsel present at the examiner's office. Mr. Ranking placed on the record of the examination a narrative of the conversation with Mr. Best, which is not disputed by counsel and which I accept as an accurate account. Mr. Best advised counsel that he was not going to attend the examination but he wanted the examination to take place over the telephone. It was explained to Mr. Best that this was not acceptable and was not in accordance with the order of the Court. Mr. Best asked if there was surveillance of him and he was advised that there was no surveillance. Mr. Best then made reference to blog entries concerning him and he was concerned for his own safety. Mr. Best was assured by Defense counsel present that they did not have any knowledge what he was referring to. Defense Counsel also offered to delay the examination to the afternoon of November 17/09 to which Mr. Best responded that he could not attend. Mr. Best refused to answer all inquiries as to where he resides. Counsel also offered other dates for the examination but Mr. Best refused to commit to another date. Mr. Best insisted that the examination proceed over the telephone. When Mr. Silver asked Mr. Best if he had the records of Nelson Barbados, Mr. Best refused to answer and he then asked Mr. Silver what his next question was. Counsel advised Mr. Best that this telephone conversation was not compliance with the November 2, 2009 order of the Court and the telephone call was terminated.

[8] Notwithstanding the non-compliance with the order of November 2, 2009 and despite the fact that Mr. Best did not attend the examination of November 17, 2009, Defense counsel served on him by mail another appointment for the examination on November 25, 2009. Mr. Best did not attend on this further appointment.

[9] Mr. Best never produced the documents detailed in the November 2, 2009 order.

Order of December 2, 2009

[10] On November 27/09 the defense served a motion record for a December 2, 2009 contempt motion by reason of the failure of Donald Best to comply with the order of November 2/09.

[11] On December 2/09 defense counsel attended at the Courthouse in Whitby to secure an order validating service of the November 27/09 motion record and authorizing substitutional service of the contempt motion. Donald Best did not attend the December 2, 2009 hearing although he was on notice of the same.

[12] The order of December 2, 2009 provided that the contempt motion was to be served upon Donald Best by an alternative to personal service. The endorsement of December 2, 2009 reads:

In the usual course a motion to hold a person in contempt should be served personally. However, the circumstances in the present case are most unusual.

Mr. Donald Best, the President, director and shareholder of the Plaintiff Corporation has set up a somewhat elaborate procedure for mailings and other communications. He has a UPS post box address in Kingston which in turn forwards all correspondence to yet another UPS post box at the Cloverdale Mall in Toronto.

Further, it is apparent from correspondence sent by Mr. Best, including conversations he states he had with the Trial Coordinator at Whitby, that Mr. Best is aware of all aspects of this proceeding including my order of Nov. 2/09.

Mr. Best called the Verbatim office on the day of the scheduled examination and attempted to conduct the examination over the telephone. Mr. Best has sent material to the Trial Coordinator and me which is not in Affidavit form.

Mr. Best refuses to provide any address where he resides but suggests he is out of the country. Extensive investigations have not resulted in locating where he resides.

I find that Donald Best is deliberately avoiding personal service of the contempt motion. There are no other steps that can be taken by the defendants to locate Mr. Best.

In these unusual and unique circumstances I find that an Order for substitutional service of the contempt application is appropriate and it is so granted.

Mr. Donald Best will be substitutionally served with the motion for contempt and my endorsement at:

- 1) the UPS address in Kingston Ont. as detailed in the order of Eberhard J.
- 2) at the UPS address at the Cloverdale Mall in Toronto.

The contempt motion is now set to be heard by me on January 15, 2010 at 9:30 am at Whitby Ont.

Costs of today's attendance and costs thrown away are reserved to the January 15, 2010 date.

The cross-examination of Mr. McKenzie has been delayed pending this aspect of the proceeding. Further, 3 days for the hearing of costs have been reserved for the end of February 2010. It is therefore necessary that dates and timelines be adhered to in order that this matter can be completed in both a fair and expeditious manner.

[13] The order of December 2, 2009 directed Donald Best to attend on January 15, 2010 at Whitby, Ontario to give evidence viva voce before Shaughnessy J and produce the documentation referred to in the November 2, 2009 order (and which is repeated in the December 2/09 order). The order further provides that the contempt hearing would also proceed on January 15 2010. It further provides that in the event that Donald Best fails to attend on January 15, 2010 the contempt motion will proceed in his absence.

[14] On December 4, 2009 the defense served Donald Best by mail addressed to the 2 UPS address boxes, the December 2, 2009 order and my endorsement. On December 15, 2009 Mr. Ranking on behalf of all participating counsel forwarded correspondence to Donald Best at both UPS addresses in Kingston and Toronto enclosing the Motion Record dated November 27, 2009; the Notice of Return of the Amended Motion; a Supplemental Motion Record dated December 14, 2009 and a Notice of Examination returnable before me on January 15, 2010. Once again the request was made to Mr. Best that he produce the documentation previously requested and detailed in the Court orders and the Notice of Examination. Mr. Ranking's correspondence of December 15, 2009 states that, if Mr. Best did not attend on January 15, 2009, "I will proceed with the contempt motion in your absence and seek a warrant for your arrest." On December 23, 2009 Mr. Best was served by mail with the defendant's Factum and Book of Authorities.

[15] Donald Best did not attend court on January 15, 2010 and he has not produced the documents that are the subject of the November 2 and December 2, 2009 orders.

Is Donald Best in contempt of the Court Orders of November 2, 2009 and December 2, 2009?

[16] I am satisfied, based on all the material filed including Mr. Best's correspondence to this court and the trial coordinator, that he has actual knowledge of these proceedings and the orders of this court. On November 16, 2009 Mr. Best wrote to the Trial Coordinator's Office:

.....the judge ordered me to appear tomorrow (Tuesday 17th) in Toronto at Victory Verbatim at 10am at 222 Bay Street to answer all questions from "sections a,b,c,d.

[17] Mr. Best did not attend on the examination of November 17/09 choosing instead to play a cat and mouse game over the phone. He also did not attend the November 25/09 date for the examination. On December 4/09 a copy of my order of December 2/09 and

my endorsement were forwarded to Mr. Best. He did not attend on January 15, 2010 as required by the December 2, 2009 order and he did not produce the documentation detailed under both court orders.

Law related to Contempt

[18] In *Canada Metal Co. Ltd. v Canadian Broadcasting Corp (No.2)* (1974), 4 O.R. (2d) 585 at 603(H.C.J.); *aff'd* (1975), 11 O.R. (2d) 167 (C.A.) Mr. Justice O'Leary stated the importance of obeying court orders:

To allow Court orders to be disobeyed would be to tread the road to anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn. Daily, thousands of Canadians resort to our courts for relief against the wrongful acts of others. If the remedies that the courts grant to correct those wrongs can be ignored, then there will be nothing left but for each person to take the law into his own hands. Loss of respect for the Courts will quickly result in the destruction of our society.

[19] There is a three part test for a finding of contempt:

- (a) the person has knowledge of the nature of the terms of the Order;
- (b) the Order is directive and not simply permissive; and
- (c) the person's conduct is in contravention of the Order.

[20] The principles governing contempt as detailed in *Canada Metal supra* and *iTrade Finance Inc. v Webworx Inc.* [2005] O.J. No.1200 (Ont. Sup.Crt.) at para. 12 can be summarized as follows:

- (a) an order must be implicitly observed and every diligence must be exercised to observe it to the letter;
- (b) the order must be obeyed, not only in the letter, but also in the spirit of the order; and
- (c) knowledge of the existence of an order is sufficient to obligate persons to obey it (including non-parties if they know the substance or nature of the Order.)

[21] I find that all of the above principles governing contempt are met in the present case. Mr. Best did not observe either order of this Court. He contravened both the letter and spirit of the orders. Donald Best had knowledge of the orders as evidenced by his November 16, 2009 correspondence to the Trial Coordinator.

[22] Contempt must be proven beyond a reasonable doubt, but it is not necessary to establish that the alleged contemnor is intentionally contemptuous or that he intends to interfere with the administration of justice. (*Re Sheppard v Sheppard*, (1976), 12 O.R. (2d) 4 at 8-9 (C.A.).

[23] The breach of an order is not excused because the person committing the contempt had no intention to disobey or deprecate the authority of the Court. The absence of contemptuous intent is a mitigating factor but not an exculpatory factor. It is not a defence that the breach was done reasonably, with all due care and attention, even where that belief is based on legal advice. (Canada Metal *supra* at 603).

[24] Mr. Best stated his intention not to appear on the examination of November 17/09 when he called counsel the same day. He also failed to attend the examinations of November 25, 2009 and January 15, 2010 all of which I find beyond a reasonable doubt are contemptuous acts.

Remedy

[25] In determining what sanctions should be imposed for a contempt of court the case law refers to a number of factors that should be taken into account:

(a) *the nature of the contemptuous act*: Mr. Best has flagrantly ignored the orders of this Court. He has caused the defendants to incur unnecessary costs and this Court to spend valuable resources to enforce compliance. Mr. Best's contemptuous acts strike at the heart of the administration of justice.

(b) *whether the contemnor has admitted his breach* : Mr. Best admitted his intention not to attend to be examined on November 17,2009.

(c) *the court should also take into account whether the contemnor has tendered a formal apology to the court* : Mr. Best has not tendered any apology to the Court.

(d) *the court must consider whether the breach was a single act or part of an ongoing pattern of conduct in which there were repeated breaches*: Donald Best is in contempt of two court orders. He also failed to attend an examination on November 25, 2009 which is indicative of a pattern of conduct that is not in keeping with the spirit of the November 2, 2009 order. Mr. Best has also refused to provide his contact information (address, e-mail, telephone number) or to provide alternative examination dates or to disclose his whereabouts all of which are actions calculated to frustrate these proceedings.

(e) *the court should take into account whether the breach occurred with the full knowledge and understanding of the contemnor such that it was a breach rather than as a result of a mistake or misunderstanding*: Donald Best knew that he was required to attend an examination on November 17, 2009. Mr. Best wrote to the Court on November 16, 2009. He confirmed in that correspondence that he knew he had to attend the examination on November 17/09 and that he would attend. Mr. Best in his correspondence has demonstrated that he is in receipt of court materials. He is also aware

that court materials are being sent to his UPS box in Kingston (which is re-directed to his UPS box at the Cloverdale Mall in Toronto). Mr. Best has also deliberately breached the court order of December 2, 2009 by not appearing before this court on January 15, 2010. His refusal to comply with the Court orders is flagrant and deliberate.

(f)the court must also consider the extent to which the conduct of the contemnor has displayed defiance. I find that Donald Best has been openly defiant of this Court's orders throughout these proceedings.

(g)the court should consider whether the order was a private one affecting only the parties to the suit or whether some public benefit lays at its root. I find that this contempt strikes at the heart of the administration of justice.

[26] In assessing the appropriate remedy the Court should consider a sanction that is commensurate to the gravity of the wrongdoing. The sentence should not reflect a marked departure from those imposed in like circumstances and the court must consider any mitigating and aggravating factors relating to the offender and the offence. However, as in the present case, the intentional violation of a Court order is an aggravating factor in the determination of an appropriate sanction.

[27] One of the purposes in sentencing in contempt proceedings is specific and general deterrence as well as denunciation of the conduct of the contemnor. I find that these principles of sentencing are of the utmost importance in the present case.

[28] The Supreme Court of Canada in *United Nurses of Alberta and Attorney General for Alberta* [1992] A.J. No. 979, 1992 Carswell Alberta Reports 10 at para.75 stated that the criminal contempt power should be used sparingly and with great restraint. It follows then that the civil contempt power should be used even more sparingly and only in the clearest of circumstances where it is required to protect the rule of law. I find that this is one of those special circumstances. Donald Best has been and continues to be in defiance of the orders of this court.

[29] The Court must consider as well all other sanctions other than imprisonment in considering an appropriate remedy. However, the willful, deliberate and defiant conduct of Donald Best in his refusal to comply with the orders of this Court and a consideration of the principles of sentencing lead me to the conclusion that the only appropriate remedy in the circumstances is a sentence of incarceration. I find that any other sanction would diminish, rather than enhance, respect for the administration of justice. Further, I find that other measures of ensuring compliance by Donald Best with the Court orders have been exhausted.

[30] There is filed in this proceeding the affidavit of Sebastien J. Kwidzinski, an articling student at Mr. Ranking's law firm, sworn October 27, 2009. This affidavit details that a search of the case law indicates an association of Donald Best and K. William McKenzie that dates back some 13 years and which is summarized as follows:

- (a) *Expressvu Inc. v NII Norsat International Inc.*, [1997] F.C.J. No. 276. This action involved certain parts of six affidavits filed by the plaintiffs. Mr. McKenzie represented the plaintiffs. Donald Best was one of the affiants on behalf of the plaintiffs. The Reasons note that Mr. Best's affidavit was sworn on October 30, 1996 indicating that he and Mr. McKenzie were acquainted at some point before this time.
- (b) *WIC Premium Television Ltd. v. General Instrument Corp.* (2000), 8 C.P.R. (4th) 1 (Alta. C.A.). This action involved an appeal brought by the defendants to appeal the dismissal of their applications to set aside service *ex juris* and to strike the claims brought against them by the plaintiffs. Mr. McKenzie represented the plaintiffs. Mr. McKenzie sought to introduce fresh evidence in the appeal. Part of this fresh evidence was the affidavit evidence of Donald Best.
- (c) *Bell ExpressVu. Ltd. Partnership v Rex*, [2002] 2 S.C.R. 559. This case involved an appeal to the Supreme Court of Canada brought by the plaintiffs relating to wording in the *Radiocommunication Act*. Mr. McKenzie represented the plaintiffs and he presented affidavit evidence of Mr. Best sworn November 15, 1999 and he cited Mr. Best in his factum.
- (d) *Kudelski S.A. v. Love*, [2002] MBQB 65. This matter involved a motion to extend service and to approve substituted service. Mr. McKenzie represented the plaintiffs as well as Mr. Best and The Nelson Group Limited. Mr. McKenzie, Mr. Best, and The Nelson Group Limited, among others, were third parties. Mr. Best had been retained to assist in the execution of an Anton Pillar order. The defendants were successful in obtaining an order for substituted service on Mr. Best and The Nelson Group Limited. The defendants were unable to locate Mr. Best. At paragraph 26 of the Reasons the presiding judge states : "Mr. McKenzie, when asked by me whether he knew where Mr. Best was, indicated that he "believed" that Mr. Best is now in Thailand. Mr. Best, according to corporate documents filed with the Companies Branch in Ontario, would appear to be the operating mind of The Nelson Group Limited." A corporate search of The Nelson Group Limited details that a "Donald Robert Best" is listed as a Director and Officer. The company was incorporated on March 15, 1993 and its last annual return was filed in 2003.
- (e) *CAMT Speed-I-Com Inc. v Pace Savings & Credit Union Ltd.* (2005) WL 2158674 (Ont. S.C.J.). This action involved applications by both parties for interlocutory injunctions as well as to request the appointment of a receiver. Mr. McKenzie represented the plaintiff. Mr. Best was involved in an accounting investigation on behalf of the plaintiff and he is described in the Reasons as being a retired police officer with some experience in forensic financial matters.
- (f) *Love v News Datacom. Ltd.*, (2006) MBCA 92. This matter involved an appeal to the Manitoba Court of Appeal brought by the plaintiffs after the motions court struck a third party notice as disclosing no reasonable cause of action. On the appeal, Mr. McKenzie was a third party respondent and he also

acted as representative to the other third parties in the action, which included Donald Best and The Nelson Group Limited.

[31] The affidavit material filed on this motion indicates that a motor vehicle license search was conducted on "Donald Robert Best" and which disclosed an address of 122-250 The East Mall, Apt. 1255 which is the address for the mailbox of the UPS store located in the Cloverdale Mall in Toronto.

[32] The information detailed in paragraphs 30 and 31 herein do not form any basis of the finding of contempt. The information is provided as a narrative of the context in which the defendants, in part, are advancing a cost award against Mr. McKenzie, Mr. Best and Nelson Barbados Group Ltd.

[33] However the information detailed in paragraphs 30 and 31 does lead me to the conclusion that Donald Best is a seasoned litigator and therefore is knowledgeable concerning the necessity for compliance with Court orders and likewise the consequences for non-compliance with Court orders.

Imposition of a Fine

[34] The defendants also seek the imposition of a fine as yet another measure to give effect to specific and general deterrence in relation to the proven acts of contempt. However, one of the first criteria is to determine whether the contemnor has the ability to pay a fine. Donald Best on behalf of the Plaintiff had the resources to commence this action against 63 defendants for \$ 500 million and pursue it to its conclusion on an application relating to jurisdiction. In relation to other interlocutory proceedings, costs awarded to the defendants and payable by the Plaintiff of approximately \$ 250,000.00 were in fact paid. Therefore I am satisfied that there is an ability of Donald Best to pay any fine imposed by this Court. In addition to a sentence of incarceration, I also impose a fine of \$ 7,500 payable by Donald Best.

Conclusion

[35] For the reasons provided, I impose on Donald Best a sentence of 3 months incarceration to be served in a provincial correctional institution. In addition to the sentence of incarceration I impose a fine of \$ 7,500 to be paid by Donald Best to the Treasurer of Ontario plus the statutory surcharge thereon. A warrant for committal to issue forthwith.


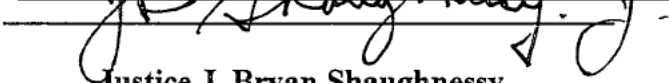
[36] It is further an order of this court that Donald Best may apply to purge his contempt by appearing before me on or before February 22, 2010 and answering questions and making productions as detailed in my orders of November 2, 2009 and December 2, 2009.

[37] I have signed an order that relates to the attendance of K. William McKenzie on an examination now set for February 3, 2010.

[38] I have heard the submissions of defence counsel on the costs for attendances and argument of this motion for contempt. In light of my findings of a deliberate, willful and continuing contempt on the part of Donald Best, I find an award of costs on a substantial indemnity basis is appropriate. It is acknowledged by defence counsel that Mr. Ranking and his law firm did the substantial work on this application. I have considered the guidelines under the Rules of Civil Procedure and the principle of proportionality in assessing the cost award. After reviewing the bill of costs and hearing the submissions of counsel I made the following award of costs payable by Donald Best within 30 days:

- (a) To Mr. Ranking's clients costs of \$ 50,632.90 inclusive of GST (comprised of \$ 45,000 in fees and \$ 5,632.90 in taxable disbursements).
- (b) To Mr. Silver's clients costs of \$ 13,230 inclusive of GST
- (c) To Mr. Roman's clients costs of \$ 5,512.50 inclusive of GST
- (d) To Ms. Clarke's clients costs of \$ 3,500 inclusive of GST.

Dated: January 25, 2010



Justice J. Bryan Shaughnessy

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Nelson Barbados Group Ltd.

Plaintiff

-and-

**Richard Ivan Cox, Gerard Cox, Alan
Cox, Philip Vernon
Nicholls, Eric Ashby Bentham Deane,
Owen Basil Keith
Deane, 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., Cottle, Catford
& Co., Keble
Worrell Ltd., Eric Iain Stewart
Deane, Estate of Colin
Deane, Lee Deane, Errie Deane,
Keith Deane, Malcolm
Deane, Lionel Nurse, Leonard Nurse,
Edward Bayley,
Francis Deher, David Shorey, Owen
Seymour Arthur, Mark
Cummins, Graham Brown, Brian
Edward Turner, G.S. Brown
Associates Limited, Golf Barbados
Inc., Kingsland
Estates Limited, Classic Investments
Limited,
Thornbrook International
Consultants Inc., Thornbrook
International Inc., S.B.G.
Development Corporation, The
Barbados Agricultural Credit Trust,
Phoenix Artists
Management Limited, 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, and John Does 1-25,
Philip Greaves, Estate
of Vivian Gordon Lee Deane, David
Thompson, Edmund
Bayley, Peter Simmons, G.S. Brown
and Associates Ltd.,
GBI Golf (Barbados) Inc., 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
Commonwealth Construction Inc.,**

Defendants

REASONS FOR JUDGMENT

Justice J. Bryan Shaughnessy