

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:**

**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, Elneith 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**

**BEFORE:** The Honourable Madam Justice J.E. Ferguson

**COUNSEL FOR THE PLAINTIFF:**

**William K. McKenzie, for Nelson Barbados Group Ltd.**

**COUNSEL FOR THE DEFENDANTS:**

**Paul Schabas/Ryder Gilliland**

Counsel for David Simmons, Peter Simmons, S.B.G. Development Corporation, David Shorey and David C. Shorey and Company, Philip Greaves, David Carmichael Shorey

**Lorne S. Silver,**

Counsel for Richard Ivan Cox, Gerard Cox, Alan Cox, Gittens Clyde Turney, R.G. Manderville & Co., Keble Worrell Ltd., Lionel Nurse, The Right Honourable Owen Seymour Arthur M.P., Mark Cummins, Kingsland Estates Limited, Classic Investments Limited, The Barbados Agricultural Credit Trust (more properly, Barbados Agricultural Credit Trust Limited), the Attorney General of Barbados, the Country of Barbados, The Honourable Elneth Kentish, Malcolm Deane, Eric Ashby Bentham Deane (also known as "Eric Deane) Owen Basil Keith Deane (also known as "Keith Deane"), Estate of Vivian Gordon Lee Deane, David Thompson, Owen Gordon Finlay Deane, Life of Barbados Holdings, Life of Barbados Limited and Leonard Nurse.

**Gerald L.R. Ranking**

Counsel for Price Waterhouse Coopers East Caribbean Firm.

**Lawrence Hansen**

Counsel for Glyne Bannister.

**Mannit Zemel,**

Counsel for Eric Iain Stewart Deane and the Estate of Colin Ian Estwick Deane.

**Paul Ivanoff/Jennifer Fairfax**

Counsel for Veco Corporation

**Jason Wadden/David D. Conklin**

Counsel for Commonwealth Construction Canada Ltd. and Commonwealth Construction Inc.

**David R. Byers/Adrian Lang**

Counsel for First Caribbean International Bank

**Robert Malen/David Bristow**

Counsel for Philip Vernon Nicholls and Cottle, Catford & Co.

**ENDORSEMENT**

[1] The Plaintiff seeks leave to appeal the order of The Honourable Justice Shaughnessy made on December 3, 2008, pursuant to Rule 62.02(4) of the *Rules of Civil Procedure*. I did not grant leave and these are the reasons that follow.

[2] In the motion before Shaughnessy J. the Plaintiff sought the release of copies of videotapes taken during cross-examinations of various affiants in Barbados and Canada, which videotapes had been sealed and deposited with the court pursuant to an earlier order made by Shaughnessy J. Only partial relief was granted by Shaughnessy J. arising from that motion, essentially allowing access.

## **BACKGROUND**

[3] This action was commenced in February 2007. The Plaintiff is an Ontario company.

[4] There are a multitude of named Defendants, most of which or whom are located in the Barbados.

[5] In May of 2007, approximately 37 Defendants, represented by seven different law firms, brought motions to challenge jurisdiction of the Ontario court. These motions were originally returnable on August 14, 2007.

[6] In May of 2007 Shaughnessy J. was appointed case management judge.

[7] The August 14, 2007 return date was postponed at the Plaintiff's request and new dates of January 14 and 15, 2008 were provided for the hearing of the jurisdiction motion.

[8] In August of 2007 an issue arose with respect to whether counsel for the Plaintiff and its affiant had received threats regarding their participation in the action. Particulars of the alleged threats were requested by some of the Defendants' counsel at that time. On November 19, 2007, counsel for the Plaintiff served motion materials with respect to directions regarding the location of the cross-examinations, providing particulars of the threats.

[9] Motions were heard before Shaughnessy J. on January 14, 15, 17, and 18 in 2008, not on the jurisdiction issue but on procedural matters. A lot of the time spent on submissions apparently involved the alleged threats.

[10] Shaughnessy J. made a number of orders, all of which the Plaintiff moved for leave to appeal. That motion was dismissed by Howden J. in June of 2008.

[11] There was a further motion in October of 2008 before Shaughnessy J. who ruled on the manner of videotaping the cross-examinations and the custody of the tapes. Shaughnessy J. was "concerned about the integrity of the process relation to this proceeding and the potential for the videotapes to be exploited by third parties". It is significant that that order was not appealed.

[12] The cross-examination of the Barbadian affiants proceeded in Barbados from October 27 until October 31 of 2008. Other affiants were cross-examined on November 3 and 4 of 2008 in Toronto. The tapes were sealed and filed with the court as had been ordered by Shaughnessy J.

[13] By letter dated November 5, 2008 counsel wrote to Plaintiff's counsel that Shaughnessy J.'s endorsement made it clear that any motions arising from the cross-examinations were to be

brought promptly and that Shaughnessy J. had indicated that he was not prepared to adjourn the hearing date for the jurisdiction motions scheduled for the week of December 8.

[14] By letter dated November 6, 2008, Plaintiff's counsel corresponded stating that he wanted to review all video tapes in order to prepare an opinion for his client and obtain instructions. He asked to have the videotapes circulated. The Defence counsel did not consent to this request by letter dated November 10, 2008.

[15] On November 26, 2008, Plaintiff's counsel delivered a Notice of Motion for a conference call with Shaughnessy J. scheduled for Tuesday, December 2, 2008, which sought an order releasing copies of all video tapes of the cross-examinations.

[16] In his reasons released December 3, 2008, Shaughnessy J. granted some access to the tapes. He again reminded counsel that materials from the action had found their way on to blogs and websites and indicated that he was prepared to take measures to protect the integrity of the process.

[17] Shaughnessy J. made an order by which a technician would be available each morning at 8:30 a.m. commencing on Monday, December 8, 2008, and every day thereafter until the motion was completed, allowing time to watch the videos.

[18] Mr. Silver communicated to the court at the hearing of this motion that access to the videotapes had been offered to Plaintiff's counsel every day following December 2, 2008, but that through no fault of Plaintiff's counsel, he was not available.

[19] The Plaintiff then sought leave to appeal Shaughnessy J.'s decision of December 3, 2008, which was heard before me on December 11, 2008. The December 8, 2008 date for hearing the jurisdiction motions was aborted as a result.

#### **PLAINTIFF'S POSITION**

[20] The Plaintiff's position is that on December 2, 2008, Shaughnessy J. was obliged to consider the sealing order afresh and that his failure to do so represents an error and one for which leave should be granted.

[21] He essentially re-argued the motion which was earlier argued before Shaughnessy J. for which an appeal of the order was not sought.

#### **DEFENDANTS' POSITION**

[22] The Defendants' position is that the Plaintiff's attack on the sealing order is essentially a corollary attack on the order made by Shaughnessy J. in October of 2008. It is their further submission that the tests for granting leave to appeal have not been met. They also submitted that Plaintiff's counsel could not and did not provide examples which establish any issues with respect to the accuracy of the transcripts and confirmed that Plaintiff's counsel was present at all cross-examinations.

## THE LAW

[23] Under Rule 62.02(4) of the *Rules of Civil Procedure* the moving party must show either:

- a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
- b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[24] Although asked at the very start of the motion as to which ground he was relying on and which facts he was relying on to support the ground, the court never really received a clear submission, other than that both grounds were being relied upon. Much time was spent by counsel for the Plaintiff re-arguing the issues that were clearly before Shaughnessy J. in October of 2008.

[25] The reality is that the Plaintiff is launching a collateral attack on Shaughnessy J.'s order of October 24, 2008 which was not appealed. The law is clear. Such collateral attacks are not permitted.

[26] What is before this court is not a motion for a sealing order. It is a motion for leave to appeal Shaughnessy J.'s order which essentially fine tuned his earlier order where sealing was granted, in fact on the consent of the parties.

[27] With respect to the first prong of the test, although there are decisions involving sealing orders, that is not what this leave application is about. It is about the procedure established by Shaughnessy J., who was trying to balance access to the courts and significant issues of delay with concerns about access to the videotapes.

[28] Transcripts of all of the cross-examinations are available. Further, Plaintiff's counsel arranged for Victory Verbatim, a reputable Toronto based reporting business who he selected to attend in Barbados during the cross-examinations. No issue as to the accuracy of the transcripts has been raised. Shaughnessy J. exercised his discretion properly and established a procedure for access.

[29] There is no conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal. In any event, even if there was, based on the facts before the court, it would not be desirable on these facts that leave to appeal be granted.

[30] With respect to the second prong, Shaughnessy J. properly and fairly exercised his discretion and came up with a procedure that balanced the interests of the parties. There is no good reason to doubt the correctness of his order. Shaughnessy J. has been involved in this matter as the case management judge almost from the start. He did not exercise his discretion arbitrarily or capriciously. He did not proceed on wrong or inapplicable principles of law.

[31] The matter does not stop here. Even if I felt Shaughnessy J. had erred, leave to appeal should only be granted if the matter involves matters of such importance that leave to appeal should be granted.

[32] Matters must be ones of general public importance that transcend the interests of the immediate parties so as to require a decision by the Divisional Court. This is not such a case. This is in fact a procedural matter within the context of a motion respecting jurisdiction. It does not involve a matter relevant to the development of the law and administration of justice.

[33] I indicated to counsel that should they not be able to agree on costs they can provide brief written submissions and that due to my schedule, I did not expect to receive same before the end of February.

  
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Madam Justice J.E. Ferguson

**DATE:** December 15, 2008