

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

Nelson Barbados Group Ltd.  
Plaintiff

)  
)  
) K. William McKenzie, for the 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

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

Paul Schabas, for the Defendants David  
Shorey, David C. Shorey and Company.

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

David Conklin, for the Defendants Veco  
Corporation, Commonwealth Construction  
Canada Ltd., Commonwealth Construction  
Inc.

Gerald L.R. Ranking, for the Defendant  
PricewaterhouseCoopers East Caribbean  
Firm

**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**

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)  
) **HEARD : APRIL 6, 7, 8, 2009**  
)

**Justice J. Bryan Shaughnessy**

**REASONS FOR JUDGMENT ON MOTION.**

[1] The Moving Defendants have brought motions for an order pursuant to s.106 of the *Courts of Justice Act* and Rules 21.03(1) and 17.06 of the *Rules of Civil Procedure* staying this action on the grounds

- (a) that the Ontario Court does not have jurisdiction over the action or
- (b) in the alternative, that Ontario is not the convenient forum for the action
- (c) setting aside service on the basis that the originating process was not properly served outside of Ontario in accordance with Rules 17.02 and 17.04(1) of the *Rules of Civil Procedure*.

## **BACKGROUND CIRCUMSTANCES**

[2] The Plaintiff in this proceeding, Nelson Barbados Group Ltd. ("Nelson Barbados") is an Ontario Corporation which was incorporated on November 15, 2005. The corporate filing indicates that the President of the company is Donald Best and the head office of the company is the same address as the Plaintiff's Counsel law firm in Orillia, Ontario.

[3] The Plaintiff's action relates to Kingsland Estates Limited ("Kingsland") and property that this corporate entity owned or owns in Barbados.

[4] The action was originally commenced against 62 defendants the majority of whom are resident in Barbados. Of these original defendants 37 moved to challenge the jurisdiction of the Superior Court of Justice of Ontario over this action. There were 9 separate motions brought and 8 individuals residents in Barbados swore affidavits on behalf of 33 defendants located in Barbados. Cross-examination of the Barbadian affiants took place in Barbados over a number of days in the fall of 2008. The defendant Eric Ian Stewart Deane was cross-examined in Toronto as was the Plaintiff's affiant John Knox. The cross-examination of the defendants Veco Corporation and Commonwealth Construction Canada Ltd and Commonwealth Construction Inc. took place in western Canada. The cross examinations were to be conducted pursuant to an Order of directions issued by this Court. ([2008] O.J. No.454).

[5] John Knox is the Plaintiff's principal affiant; however he is not a party to this proceeding. John Knox relates that his grandfather Estwick Ebenzer Deane and his wife Ilma Kathleen Ashby made a series of land acquisitions in Barbados. The Deanes had 7 children, one of whom is the defendant Marjorie Knox, the mother of John Knox. Marjorie Knox is presently 86 years of age and she resides in Barbados.

[6] In 1958 the Deane family incorporated Kingsland Estates Limited which purportedly had land holdings of approximately 1100 acres. It is the contention of John Knox that on the death of his grandparents the Deane siblings, including Marjorie Knox, were equal shareholders in Kingsland. The Statement of Claim alleges that three of the Deane siblings (excluding Marjorie Knox) sold off and disposed of lands in a manner that did not provide compensation to Kingsland. The Statement of Claim inter alia alleges a conspiracy whereby through a number of transactions the various defendants have transferred shares of Kingsland to themselves or others. In an affidavit, John Knox states that the defendants "had the intention and plan to take control of the lands and develop them in such a way that the value would be stripped from the company and the shares (of Kingsland) would be rendered worthless while others benefited."

[7] On March 23, 2009, shortly before this motion was scheduled to be heard, Counsel for the Plaintiff delivered a Notice of Discontinuance against 38 of the Defendants which inter alia included Sir David Simmons, the Chief Justice of Barbados, the present and former Prime Ministers of Barbados, the Country of Barbados, and the Attorney General of Barbados.

## THE PARTIES

[8] There are presently 5 remaining Defendants located in Ontario: Brian Edward Turner, Thornbrook International Consultants Inc., Thornbrook Industrial Inc., Phoenix Artists Management Limited and G.S.Brown and Associates Limited (which is also listed as G.S.Brown Associates Limited with a Barbados address).

[9] Veco Corporation is a United States corporation with its head office in Anchorage, Alaska. Commonwealth Construction Ltd. is a construction company incorporated in British Columbia with its head office in Burnaby, B.C.

[10] The Defendant Eric Ian Stewart Deane has resided in Great Britain since September 2006. He is a theatre producer and director. The Defendant, Phoenix Artists Management Limited is a corporation which is related to Eric Deane's theatrical work and it is where he has his mail sent. Otherwise, this Corporation has no connection to the issues in this proceeding apart from it being an asset of Eric Ian Stewart Deane.

[11] Eric Ian Stewart Deane is the primary beneficiary under the Last Will and Testament of his uncle Colin Ian Estwick Deane (one of the original 7 Deanes who inherited the shares of Kingsland) and the sole beneficiary of the residuary of the Estate. The Last Will and Testament of Colin Ian Estwick Deane was probated in Barbados on September 22 1982. At the time of his death the Testator, was a resident of Barbados and his entire estate was and continues to be located in Barbados.

[12] Eric Ian Stewart Deane resided in Canada from 1972 to 1982 and again from June 14 2001 to September 30, 2006. However he has not resided in Canada since September 30, 2006.

[13] Eric Ian Stewart Deane has filed an affidavit indicating that prior to 1998, all of Kingsland shares were owned by members of the Deane family including the Estate of Colin Ian Estwick Deane. Eric Ian Stewart Deane also states that he never personally held shares in Kingsland, but was registered in the records of Kingsland in his capacity as executor and personal representative of the Estate of Colin Ian Estwick Deane.

[14] The Defendant Classic Investments Limited is a company incorporated in Barbados with its head office in Barbados. It does not carry on business and has no assets in Ontario. All documents, electronic evidence and witnesses related to this defendant are located in Barbados.

[15] Richard Ivan Cox, Gerard Cox and Alan Cox are directors of Classic Investments Limited and since December 2005 have also been directors of Kingsland. All of these individuals reside in Barbados.

[16] Gittens Clyde Turney is a Barrister who resides in Barbados. He has no assets or business in Ontario. All documents, electronic evidence and witnesses of Mr. Turney are located in Barbados.

[17] R.G.Mandeville & Co. is a law firm in Barbados with its only office located in Bridgetown, Barbados. This law firm does not carry on business in Ontario and has no assets in Ontario. Its documents, electronics and witnesses are located in Barbados.

[18] Kingsland Estates Limited has been discussed above. This Barbados incorporated company was family owned and the shareholders were the Deane family, up to the time of a takeover by Classic Investments in 2005. It owns land only in Barbados and has no property or assets in Canada. All of its documents, evidence and witnesses are located in Barbados.

[19] David Shorey is a chartered accountant and management consultant and since 1987, he has carried on business as David C. Shorey and Co., Chartered Accountants. Apart from ten years studying and working in England in the 1960s and 1970s, David Shorey has lived and worked in the Barbados. He does not carry on business in Ontario. In 1992 or 1993 he was asked to do a feasibility study to build a golf course on lands owned by Kingsland. Several years later, in 1997 and 1998 Mr. Shorey entered into separate transactions with Richard Cox to purchase shares in Kingsland. However, David Shorey never formalized his arrangements with Richard Cox and consequently he never became a shareholder of Classic Investments Ltd. or Kingsland.

## **OVERVIEW**

[20] An overview of the transactions relating to Kingsland is required for an understanding of the facts relating to the Plaintiff's claim.

## **S.B.G. DEVELOPMENT CORPORATION**

[21] S.B.G. Development Corporation was incorporated pursuant to the laws of Barbados and registered on March 7, 1990 by its then solicitor David Simmons. The incorporating directors were Peter and David Simmons. David Simmons resigned as a director on September 7, 1994 although a change of directors was not filed until August 2007 shortly after this litigation was commenced.

[22] "S.B.G." is derived from the names of Peter Simmons, Glyne Bannister and Philip Greaves. The corporation was formed in 1990 to acquire the shares of Kingsland for the purpose of developing a golf course on the property. The funding for this transaction was to come through Brian Turner and Graham Brown both then located in Toronto but who met with the S.B.G. Development Corporation in Barbados. All meetings of S.B.G. and all of its activities relating to the proposal to acquire shares in Kingsland occurred in Barbados. The funding was expected to come from Europe, Cyprus or London.

[23] An offer to purchase was presented to Kingsland dated June 1, 1990 and a deposit of approximately U.S. \$200,000 ( \$400,000 Barbados dollars) was provided. The funds were provided by Messrs. Turner and Brown and were sent to Cottle Catford a Barbados law firm and solicitors for Kingsland. While the offer to purchase was accepted, the transaction did not close and the deposit was forfeited to Kingsland.

[24] David Simmons was elected Attorney General by 1994 and he terminated his private practice. Peter Simmons was appointed High Commissioner to the United Kingdom and moved to London.

[25] The S.B.G. Development Corporation proposal was terminated and no further steps were taken by the company and it has remained dormant.

#### CLASSIC INVESTMENTS LIMITED

[26] On or about 1997, after the failed S.B.G. Development Corporation bid, Classic Investments Ltd. offered to purchase the shares of Kingsland. All of the Kingsland shareholders, with the exception of Marjorie Knox, agreed to sell their shares of Kingsland pursuant to an offer made by Classic Investments Ltd. An action was commenced in Barbados with respect to the acquisition of the Kingsland shares, which was not resolved until 2005 after which the share purchase agreement was completed. The legal proceedings in Barbados will be discussed later in these Reasons.

#### THE AMENDED STATEMENT OF CLAIM

[27] The prayer for relief in the Statement of Claim seeks a variety of injunctive and other relief including an accounting, disgorgement, appointment of a Receiver against or relating to Kingsland. In the Amended Statement of Claim, Kingsland is described as a company incorporated in Barbados, with its head office in Barbados and which owns property in Barbados. There are numerous claims advanced in the Amended Statement of Claim. In summary the allegations are that the defendants conspired with one another to benefit themselves and thereby caused past, present and future economic loss to the Plaintiff. It is noted that in the Amended Statement of Claim the "defendants" are simply lumped together in general allegations and that they owed fiduciary duties to Kingsland which were breached and that the "defendants" conspired to deprive Kingsland of its investments or withheld information from Kingsland.

[28] The Amended Statement of Claim does not detail the Plaintiff's interest in Kingsland other than an assertion that it "has security over and ownership rights in common shares of the Defendant Kingsland" which it is pleaded, "includes the right to share in the increase in value of those common shares as well as the dividends or other payments to shareholders by Kingsland."

#### WHO IS THE PLAINTIFF ?

[29] The Plaintiff's affiant John Knox in an affidavit asserts that the Plaintiff has an interest in shares of Kingsland previously owned by John Knox's mother, Marjorie Knox (a named defendant who resides in Barbados.) It is stated that the shares in Kingsland have been transferred to a trust. The actual shares of Kingsland, John Knox states "are physically located in Canada." The trust documents were not produced on the cross-examination although John Knox is a beneficiary of the trust, his sister in Miami is the trustee and the trust documents "are lodged with a U.S. attorney in Miami."

[30] The Corporate Profile Report lists "Donald Best" as the President of the Plaintiff Corporation and that it was incorporated in 2005 in Ontario. Little else is known of the company. The affiant for the Plaintiff on the motion, John Knox, on the instructions of plaintiff's counsel, would not answer questions on his cross-examination as to the identification of shareholders, directors, officers, assets, business activity (other than this litigation), as well as information about Donald Best which demonstrates a connection to Ontario. It is apparent that the focus of the Defendant's questions in this regard were directed for the purpose of demonstrating that the Plaintiff was only incorporated in Ontario to assist with the attack on jurisdiction which is before this Court. Notwithstanding the refusals on the cross-examination of John Knox, this Court provided 2 opportunities to Counsel for the Plaintiff in the course of submissions on this motion to provide the information requested by the Moving Defendants or an Affidavit from Donald Best explaining why the information could not be provided. Mr. McKenzie declined the invitation of the Court and he "read from a statement" that the Plaintiff had instructed him to advise that it had produced all the information it was going to produce on the motion. There was no affidavit from Mr. Donald Best explaining why the information was not being produced.

[31] I find that the position taken by the Plaintiff (through its Counsel) on the cross-examination of John Knox and at the hearing of this motion directly impacts on the test relating to a real and substantial connection to Ontario as will be discussed later in these Reasons.

#### **HISTORY OF RELATED PROCEEDINGS IN BARBADOS**

[32] There have been a number of proceedings commenced in Barbados which the Defendants have detailed to the Court and which was not challenged by the Plaintiff.

[33] As previously outlined, following the S.B.G. Development failed transaction to purchase the Kingsland shares there was the 1997 Classic Investments Limited offer to purchase the same shares. Initially Ian Deane on behalf of the Estate of Colin Ian Estwick Deane rejected the offer. However, a short while thereafter he changed his mind and he agreed to the sale of the shares held by the Estate to Classic Investments Limited. Accordingly, all Kingsland shareholders, with the **exception of Marjorie Knox**, agreed to sell their shares of Kingsland pursuant to the Classic Investments Limited offer.

[34] An action was commenced in Barbados in respect of the Classic Investment Limited acquisition of Kingsland which was not resolved until 2005 after which the transaction was completed. The history of the proceedings in Barbados may be summarized as follows:

- (a) Suit No. 1805 of 1998 : an action brought by Marjorie Knox against the then shareholders and directors of Kingsland and Classic Investments Limited for a declaration that Marjorie Knox was entitled to certain pre-emptive rights to purchase the shares of Kingsland in priority to Classic Investments Limited and for an oppression remedy and other relief. The action was dismissed by Greenidge J. of the Barbados High Court on June 14, 2001.

- (b) Civil Appeal No. 17 of 2001: Marjorie Knox appealed Justice Greenidge's decision to the Barbados Court of Appeal. Her appeal was dismissed on April 16, 2003.
- (c) Suit No. 9 of 2004: Marjorie Knox appealed the decision of the Court of Appeal of Barbados to Her Majesty The Queen in Council (the Judicial Committee of the Privy Council). This final appeal was dismissed on June 28, 2005.

[35] Following the dismissal of Marjorie Knox's appeal to the Judicial Committee of the Privy Council, Classic Investments Limited, in December 2005, proceeded with the acquisition of 86.042% of the shares of Kingsland and Marjorie Knox held the remaining 13.958% of the shares.

[36] In January 2006, Kingsland new directors contracted to sell beachfront property called Maxwell Coast Road in the Parish of Christ Church. Marjorie Knox refused to sign a release of her share interest as a charge on the property in favour of the former shareholders of Kingsland, notwithstanding an offer of payment in full of all monies due to her by Kingsland.

[37] Originally, in Suit No. 1683 of 1993 in the High Court of Justice of Barbados, the owner of a charge on the land, Andefan Holdings Limited, obtained a judgment against Kingsland. That judgment was paid by the shareholders of Kingsland to whom the securities held by Andefan were assigned. Kingsland then made a successful application to redeem Marjorie Knox's share of the Andefan securities on payment of the debt owed to her. Notwithstanding a decision of Justice Goodridge in this regard dated July 24, 2006, Marjorie Knox refused to sign the release of her share of the Andefan securities and the Court therefore directed the Registrar of the High Court of Barbados to execute the release for and on behalf of Marjorie Knox following the payment into court of money due to her by Kingsland.

[38] Marjorie Knox appealed the Order of Justice Goodridge and this appeal was dismissed. However, in the course of these redemption proceedings Marjorie Knox swore and filed an affidavit dated May 3, 2006 in which she stated that Nelson Barbados Investments Inc. had been appointed a Receiver of Kingsland.\*

[39] On or about July 21, 2006 Marjorie Knox, apparently without any authority or consent, procured the appointment of joint receivers of all the undertakings and assets of Kingsland, by virtue of her share of securities in Andefan Holdings Limited. In the result, Kingsland commenced proceedings in the High Court of Justice of Barbados (Suit No. 1332 of 2006) and obtained an injunction to restrain the receivers from acting. The High Court of the Barbados held that the appointment of receivers was improper and awarded costs to Kingsland against Marjorie Knox.

\*On February 1, 2007 Plaintiff's counsel commenced proceedings as Court file No. 07-0110 at Barrie, Ontario with the Plaintiff named as "Nelson Barbados Investments Inc." and which entity is not an Ontario corporation. A Notice of Discontinuance in relation to that proceeding was filed on March 26, 2007.

[40] Marjorie Knox has also brought other proceedings against Kingsland and other defendants which are summarized as follows:

- (a) Suit No.993 of 2003: an action was commenced against Eric Ashby Bentham Deane, Owen Basil Keith Deane, Philip Vernon Nicholls and Kingsland alleging oppression and seeking disclosure of various documents, statements and records of Kingsland;
- (b) Suit No. 1379 of 2006: an action against Eric Ashby Bentham Deane, Richard Ivan Cox, Allan Cox and Kingsland for oppression, an injunction to restrain the sale of the Maxwell Coast Road property and the appointment of a receiver/investigator of Kingsland and other relief. This action was consolidated with Suit No. 993 of 2003. In Suit No.1379 of 2006 the Court refused to grant the relief requested and the Court of Appeal refused to grant leave to appeal the decision.
- (c) Suit No.2141 of 2006: an action was commenced against Eric Ashby Bentham Deane, Richard Ivan Cox, Gerard Cox, Allan Cox, Kingsland, the Attorney General of Barbados and PricewaterhouseCoopers for leave to bring a derivative action in the name of Kingsland against the Attorney General for compensation for the compulsory acquisition of certain lands of Kingsland in Barbados under the *Land Acquisition Act*, CAP 228 of the Laws of Barbados. This action has been discontinued and Marjorie Knox was ordered to pay costs.

[41] In addition to these proceedings there have been numerous affidavits filed in Barbados proceedings either by Marjorie Knox or her son John Knox on her behalf. On the cross-examination of John Knox in this proceeding there were 22 affidavits identified as sworn by John Knox or Marjorie Knox in the Barbados proceedings. For the most part these affidavits confirm the position taken in the present action, to the extent they are known, and are substantially similar and arise out of the same underpinning facts and circumstances addressed in the within action.

[42] It is also noteworthy that in the consolidated proceeding (Suit No.1379 of 2006 and Suit No. 993 of 2003) Marjorie Knox applied for a stay of the Barbadian action in favour of this Ontario action. This application was dismissed by the High Court of Barbados.

## **THE LAW**

### **JURISDICTION SIMPLICITER**

[43] The Moving Defendants submit that this action should be dismissed or a stay issued on the basis that the Ontario Courts do not have *jurisdiction simpliciter* over the proceeding.

[44] *Jurisdiction simpliciter* is the most basic form of jurisdiction that a Court must have before it can properly hear a matter. The determination of *jurisdiction simpliciter* is not a matter

for the Court's discretion; jurisdiction either exists or it does not (*Plant Technology International Inc. v Peter Kiewit Son Co.*, [2002] O.J. No.2305 (S.C.J.) at paras. 56-57).

[45] When assessing whether an action against foreign defendants shall proceed in Ontario, the Court must determine whether Ontario can assume jurisdiction, given the relationship among the case, the parties and the forum. (*Muscutt v Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) at pg.35-36; *Lemmex v Sunflight Holidays Inc.*, 60 O.R. (3d) 54 (C.A.) at p. 62).

[46] Where a plaintiff seeks to bring foreign defendants into an Ontario court, the burden rests with the plaintiff to establish that the Ontario court has *jurisdiction simpliciter* in the event that jurisdiction is challenged. (*Frymer v Brettschneider* (1994) 19 O.R. (3d) 60 (C.A.) at p. 84-85; *M.J. James Inc. v Kingsway General Insurance Co.* [2003] O.J. No. 4409 (S.C.J.) at para.27 aff'd [2004] O.J. No. 1087 (C.A.)

[47] The Supreme Court of Canada in *Morguard Investments Ltd. v DeSavoye* (1990) 76 D.L.R. (4<sup>th</sup>) 256 (S.C.C.) at p.278 moved away from the traditional conflict of law rules and set forth a new standard for establishing *jurisdiction simpliciter* based on the principles of order and fairness, the need for judicial constraint and the creation of the "real and substantial connection" test. While *Morguard* involved the enforceability of judgments as between provinces, the Supreme Court of Canada nevertheless has stated that the same "real and substantial connection" test will be applied in an international context.

[48] The "real and substantial connection" test is designed with the recognition that some limits must be placed on the exercise of jurisdiction and that the assumption of jurisdiction "must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections."(*Hunt v TLN p.l.c.* [1993] 4 S.C.R. 289 at p.325.

[49] In *Beals v Saldanha* [2003], 3 S.C.R. 416, the Supreme Court of Canada detailed that the connection between the action and the jurisdiction must be substantial:

The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that jurisdiction. **A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.** (emphasis added).

[50] The Ontario Court of Appeal in a number of decisions has provided further clarification and guidance as to how the "real and substantial connection" test should be applied in practice. (*Lemmox v Sunflight supra*; *Sinclair v Cracker Barrel Old Country Store Inc.* (2002) 60 O.R. (3d) 76; *Leufkens v Alba Tours International Inc.*(2002) 60 O.R. (3d) 84; *Gajraj v DeBernardo* (2002) 60 O.R. (3d) 68; and *Muscutt v Courcelles supra*). With the exception of *Muscutt v Courcelles* all of the other noted cases involved international jurisdictional issues.

However, common to all the cases is that the focus of the jurisdictional analysis is to be on the existence of connections between the issues raised in the proceeding, the parties and the forum.

[51] In *Muscutt v Courcelles*, the Ontario Court of Appeal recognized that the test for a real and substantial connection is, by necessity, a flexible one which defies reduction to a fixed formula. The Court of Appeal nevertheless acknowledged the need for clarity and certainty by detailing a list of 8 factors that should be considered in assessing whether a real and substantial connection with Ontario exists. The Court of Appeal also indicated that this list of factors was not to be considered exhaustive. These factors, of which no single factor is determinative, are as follows (*Muscutt v Courcelles* at paras. 75-110):

- (i) The connection between the forum and the plaintiff's claim;
- (ii) The connection between the forum and the defendant;
- (iii) Unfairness to the defendant in assuming jurisdiction;
- (iv) Unfairness to the plaintiff in not assuming jurisdiction;
- (v) The involvement of other parties to the suit;
- (vi) The Court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- (vii) Whether the case is interprovincial or international in nature;
- (viii) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

#### **Analysis of Jurisdiction Simpliter**

[52] I find that after applying the above noted factors and other factors in the circumstances of this proceeding, there is no real and substantial connection between Ontario and the subject matter of this action, or between Ontario and the parties to the action. Indeed, to the contrary, there is a real and substantial connection with the jurisdiction of Barbados where most of the Moving Defendants reside and work and where there has been litigation in respect of many of the same allegations made by the Plaintiff in the present action.

##### **(i) Connection Between the Forum and the Plaintiff's Claim**

[53] The Amended Statement of Claim of the Plaintiff in this proceeding is based in negligence, the tort of conspiracy and tortious interference with the Plaintiff's economic interest. The conduct or alleged tortious acts to support these claims occurred entirely in Barbados and not in Ontario. The Plaintiff's economic interests in issue as related in the Amended Statement of Claim are that it "has security over and ownership rights in common shares of the Defendant Kingsland" which it is pleaded "includes the right to share in the increase in the value of the common shares as well as the dividends or other payments to shareholders by Kingsland." The Plaintiff's affiant, John Knox, asserts that the Plaintiff has an interest in the shares of Kingsland, previously owned by his mother, Marjorie Knox, who is a named Defendant and resides in Barbados. It is also noted that her shares in Kingsland have been transferred to a trust. John Knox states that the actual shares of Kingsland "are physically located in Canada." However, the trust documents were not produced at the cross-examination of John Knox, notwithstanding that

John Knox is a beneficiary of the trust, his sister in Miami is the trustee of the trust and the trust documents are "lodged with a U.S. attorney in Miami."

[54] The Plaintiff, through its Counsel, has made a deliberate choice not to provide details that would demonstrate its connection to Ontario. The little that is known or disclosed is that the Plaintiff is an Ontario corporation with a head office and business address which is the same as Plaintiff's Counsel in Orillia, Ontario. While the Courts have recognized that Ontario has an interest in protecting the legal rights of its residents and providing a forum in which to litigate disputes, nevertheless the Courts have also consistently acknowledged that mere residency of the Plaintiff within Ontario, without something more, is an insufficient basis for assuming jurisdiction over an action. (*Muscutt v Courcelles supra* at para.79 and *Ioannides v Calvalley Petroleum Inc. 2006 CarswellOnt 4851 (S.C.J.)* at para 231).

[55] While damages suffered within Ontario is a factor which may be considered in the jurisdictional analysis to connect the Plaintiff to the forum, nevertheless, like residency, damages alone is an insufficient basis for assuming jurisdiction. It is only in limited circumstances that damages sustained within the jurisdiction, as a result of tortious conduct committed elsewhere, is accepted as a basis for *jurisdiction simpliciter*. (*Muscutt v Courcelles supra* at paras. 77, 80-81,105; *Leufkens v Alba Tours supra* at para 36; *Ioannides v Calvalley Petroleum supra* at para 23). In any event I find that there is no evidence presented which demonstrates any damage suffered by the Plaintiff in Ontario. Even if the plaintiff continues to suffer damages in Ontario after sustaining an injury outside the jurisdiction, this does not create a real and substantial connection between Ontario and the action. (*ECS Educational Consulting Services Canada Ltd. v Al Nahyan [2000] O.J.No.211* at para 26-27 (S.C.J.)

[56] The only information that the Plaintiff through its Counsel would provide relating to the connection between the forum and the Plaintiff's claim is the information previously outlined at paragraphs 53-54 of these Reasons. Further the corporate filing document relating to the Plaintiff indicates that it was incorporated in 2005. At the direction of Plaintiff's Counsel, the Plaintiff's affiant John Knox refused to answer any questions as to the identity, location or residency of any of the Plaintiff's officers, directors or shareholders. I have reviewed the transcript of the cross-examination of John Knox. The transcript reveals that Plaintiff's Counsel, Mr. McKenzie, by his repeated interjections and improper refusals prevented Defense Counsel from obtaining information directly relevant to the status of the Plaintiff, its business and interest in the action. The numerous attempts by the Moving Defendants to obtain information relevant to the real and substantial connection test were thwarted by Mr. McKenzie's actions to carefully control John Knox's answers and thereby limit information which was potentially prejudicial to the position of the Plaintiff. Mr. McKenzie repeatedly interjected and improperly refused to permit questions concerning the following subject areas:

- (a) whether John Knox's affidavits and his answers on cross-examination would bind the Plaintiff;
- (b) the nature of the business of the Plaintiff;
- (c) John Knox's relationship with Nelson Barbados Group Ltd;
- (d) the location of the directors register of the Plaintiff;

- (e) the location of the shareholder's register of the Plaintiff;
- (f) the location of the books and records of the Plaintiff;
- (g) the location of the banking records of the Plaintiff;
- (h) the location of the financial statements of the Plaintiff;
- (i) the Plaintiff pleads in paragraph 46 of the Amended statement of claim that it has "security over and ownership rights in common shares of Kingsland" however, Plaintiff's Counsel refused many questions relating to the security interest allegedly held by the Plaintiff.

[57] At the cross-examination of John Knox, Plaintiff's Counsel, without notice, produced a memory stick containing some 4,000 documents. Mr. McKenzie refused to identify which of the 4,000 documents he intended to rely upon for this jurisdictional motion. Perhaps what is even more remarkable is that it was disclosed that most of the documents on the memory stick were provided to John Knox by William McKenzie. In the course of reading the transcript, it became apparent that John Knox had not made any inquiry to produce relevant hard-copy documents in response to the Notice of Examination served on him. John Knox also admitted that he had other relevant documents in his possession that ought to have produced at his cross-examination. Indeed, he stated that he had 6 to 8 boxes of documents at his office in Barbados, in addition to the documents that were sent to him by Mr. McKenzie.

[58] I find that the evidence of the Plaintiff's affiant fails to disclose a real and substantial connection between the cause of action and Ontario. The Plaintiff alleges some sort of conspiracy between certain defendants who made a failed offer (and lost their deposit) to purchase all the shares in Kingsland between 1990 and 1994 (the S.B.G. Development Corporation offer) with subsequent actions by other defendants who did acquire a majority interest in Kingsland several years later led by Classic Investments Limited. However, the Plaintiff provides no particulars of the alleged conspiracy, which is denied by the parties involved in either the S.B.G. Development Corporation failed offer or the Classic Investments Limited transaction.

[59] In the result I find that there is no connection between the forum and the Plaintiff's claim.

(ii) Connection Between the Forum and the Defendants

[60] In assessing whether there is any connection between the forum and the Defendant the Court must consider:

- (a) whether the defendant did anything in Ontario which relates to the plaintiff's claim and
- (b) whether it was reasonably foreseeable that the defendant's actions would cause damage outside Ontario.

[61] The Court of Appeal in *Muscutt v Courcelles supra* (paras. 82-83) stated:  
[W]here the core of the action involves foreign defendants, courts should be wary of assuming jurisdiction simply because there is a claim against a domestic defendant.

[62] In the present case there is no evidence that any of the Moving Defendants have any substantial connection to Ontario. Most of the Moving Defendants are located in Barbados, with one also located in Alaska, another in British Columbia and yet another in London, England. All of the Moving Defendants without exception have requested that the trial of this proceeding take place in Barbados. Further, no specific allegations have been made that any conduct related to the subject matter of the Plaintiff's claims arises in Ontario. Only 5 of the existing Defendants are identified as being located in Ontario and about whom the Amended Statement of Claim says almost nothing and John Knox in his affidavits says little more. The very limited involvement of Brian Turner and Graham Brown in a failed bid, done entirely in Barbados to acquire Kingsland is not in my opinion a basis for finding jurisdiction. Finally, the fact that none of the Moving Defendants have any connection to Ontario, the Moving Defendants could not have reasonably foreseen that any conduct they were involved in Barbados would result in an action being commenced against them in Ontario.

[63] Therefore I find that this factor favours declining jurisdiction.

(iii) Unfairness to the Defendants in Assuming Jurisdiction

[64] The principle of order and fairness (*Muscutt v Courcelles* para 86) engages the Court to have regard to any other consideration which makes assuming jurisdiction unjust to the Moving Defendants.

[65] In analyzing whether it would be unfair to the defendants to assume jurisdiction, the defendants' reasonable expectations are relevant. (*Muscutt v Courcelles supra*, para 88; *Gajraj v DeBernardo* (2002) 60 O.R. (3d) 68 (C.A.). Where a defendant has confined its activities solely to another jurisdiction the court will generally consider it unfair and "unduly onerous" to require the defendant to defend an action in the home jurisdiction of the plaintiff. (*Lemmex v Sunflight Holidays Inc.* (2002) 60 O.R. (3d) 54 (C.A.) at para. 35).

[66] I find that it would be inherently unfair to the Moving Defendants to assume jurisdiction over the dispute for the following reasons:

- (a) the Moving Defendants reside or carry on business in locations outside Ontario and substantially in the Barbados;
- (b) most, if not all the witnesses reside outside Ontario and are located in Barbados;
- (c) the majority of the files and documentary evidence relevant to this case are located in Barbados and were prepared in Barbados according to Barbadian law and legal practice. Some of the documentation of non-Barbadian defendants is located in Alaska, British Columbia and England but not in Ontario.
- (d) the majority of the Moving Defendants would be required to re-litigate the issues in this proceeding as similar actions involving the same allegations and substantially the same parties which have been brought in Barbados.

(iv) Unfairness to the Plaintiff in Not Assuming Jurisdiction.

[67] In applying the real and substantial connection test to the facts of this case, the principles of order and fairness require a consideration of the Plaintiff's interest in accessing the Courts in its home jurisdiction. (*Muscutt v Courcelles supra* para 88).

[68] The concern of the Court in assessing possible unfairness to the plaintiff in declining jurisdiction evolves around whether it is reasonable to compel the plaintiff to travel abroad in order to litigate its claim and it involves an assessment of the inconvenience that would result (*Muscutt v Courcelles supra* para.90).

[69] I find in the present proceeding there is no unfairness to the Plaintiff if the Court does not assume jurisdiction in this matter. The Plaintiff has chosen to acquire an interest of some kind in shares of a Barbados company that owns land in Barbados and where all the other shareholders reside in Barbados and the transactions of that company have occurred in accordance with, or subject to Barbados law. I also accept the Moving Defendants argument that even if Ontario were to assume jurisdiction, the Plaintiff, if successful, could not execute a judgment of this court as the Moving Defendants have no assets or business in Ontario. Therefore, out of necessity, another action would have to be commenced in Barbados in order to execute on any judgment.

(v) Involvement of Other Parties to the Suit

[70] The Court will also consider the involvement of any other parties to the action in a jurisdictional analysis with a view to avoiding a multiplicity of proceedings and inconsistent results. The issue is whether the "core of the action" lies in Ontario. Accordingly, the presence of domestic defendants will not warrant taking jurisdiction over foreign defendants absent a strong connection between Ontario and the subject matter of the claim. (*Lemmex v Sunflight Holidays Inc. supra* para 41-43).

[71] I find that the core of this action lies in Barbados. The alleged tortious conduct occurred in Barbados and the action centres on a claim for damages suffered in Barbados principally as a result of the alleged conduct of the Barbadian defendants. While 3 of the Moving Defendants reside in British Columbia, Alaska and England, nevertheless the core of the action against them also lies in their alleged conduct in Barbados. The few defendants who reside in Ontario have limited involvement in the action and their alleged conduct relates to what they did in Barbados and two of them (Thornbrook and Turner) have made assignments into bankruptcy.

[72] Finally, assuming jurisdiction in this case has the potential to lead to a multiplicity of proceedings with inconsistent results as an action is presently pending in Barbados and which a Barbadian Court has declined to stay in favour of this Ontario proceeding.

[73] Therefore I find that this factor favours not assuming jurisdiction.

(vi) Willingness to Recognize and Enforce a Foreign Judgment Against an Ontario Resident Rendered on the Same Basis

[74] In considering the jurisdictional analysis a court must also have regard to whether or not it would recognize a foreign judgment against a domestic defendant rendered on the same jurisdictional basis as the facts in the proceeding. If the court would not enforce judgment against a domestic defendant, then jurisdiction should not be assumed. In *Muscutt v Courcelles supra* the Ontario Court of Appeal (para 93) underscored the importance of not exercising jurisdiction liberally:

Every time a court assumes jurisdiction in favour of a domestic plaintiff, the court establishes a standard that will be used to force domestic defendants who are sued elsewhere to attorn to the jurisdiction of the foreign court or face enforcement of a default judgment against them. This principle is fundamental to the approach in *Morguard* and *Hunt* and may be seen as a self imposed constraint inherent in the real and substantial connection test. It follows that where a court would not be willing to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis, the court cannot assume jurisdiction, because the real and substantial connection test has not been met. (emphasis added).

[75] I find that this Court would not recognize a foreign judgment against a domestic defendant rendered on the same jurisdictional basis as the facts in this proceeding. Therefore this factor weighs against assuming jurisdiction.

(vii) Whether the Case is Interprovincial or International in Nature

[76] The case law has held that the assumption of jurisdiction is more difficult to justify in international cases than in interprovincial cases.

[77] The present case is clearly international and therefore this factor weighs in favour of declining jurisdiction.

(viii) Comity and the Standards of Jurisdiction, Recognition and Enforcement Prevailing Elsewhere

[78] Comity requires that this Court take great care not to encroach on the judicial sovereignty of other nations.

[79] There is no evidence, that in similar circumstances, the Barbados Court would assume jurisdiction over Moving Defendants if they were almost all from Ontario and being sued for matters that occurred in Ontario. In the absence of evidence to the contrary, I find there is no reason to expect that the Barbadian rules of civil procedure are more generous than those prevailing elsewhere. Therefore I find that this factor weighs against finding a real and substantial connection on the facts of the present case.

### Summary on Jurisdiction *Simpliciter*

[80] Based on the analysis of the eight factors detailed above I find that *jurisdiction simpliciter* does not exist in this case. The only connection to Ontario is that the Plaintiff is "resident" in Ontario in that it was incorporated in Ontario. The defendants Thornbrook International Inc. and Brian Edward Turner have made assignments into bankruptcy and they together with G.S.Brown Associates Ltd. while "resident" in Ontario, have no real and substantial connection to Ontario in relation to the circumstances surrounding this action. The core of this action lies in Barbados. The alleged tortious acts, including conspiracy, occurred in Barbados and the action centres on a claim for damages suffered in Barbados primarily as a result of the alleged conduct by the Barbadian defendants.

[81] The real and substantial connection test has not been met by the Plaintiff on any of the eight criteria and in the result, it is the finding of this Court that any assumption of jurisdiction by Ontario would contravene the principles of order and fairness.

[82] Therefore the motion brought by the Moving Defendants is granted and this action is stayed on the grounds that the Ontario Court does not have jurisdiction over the action.

### FORUM NON CONVENIENS

[83] In the event I have erred in relation to my findings on *jurisdiction simpliciter*, I propose to consider the Moving defendants alternative argument that Ontario is not the convenient forum for the action.

[84] The test for staying the action on the ground of *forum non conveniens* is whether there is some other forum which clearly exists as the more convenient and appropriate forum for the pursuit of the action and for securing the ends of justice. The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the strongest connection with the action and the parties. (Anchem Products Inc. v British Columbia (Workers Compensation Board) [1993] 1 S.C.R. 897 at p.921; Frymer v Brettschnider *supra*).

[85] In *Muscutt v Courcelles supra* the Ontario Court of Appeal set out 7 factors which provide a guide to the Court in the exercise of its discretion in determining whether to assume jurisdiction in a proceeding. Once again the list of factors is not meant to be exhaustive. Similar to the factors guiding the *jurisdiction simpliciter* analysis, the test for *forum non conveniens* requires the factors to be weighed as a whole and is not meant to simply turn on which jurisdiction has the greatest number of factors. The 7 factors are outlined at paragraphs 114-115 of the *Muscutt v Courcelles* case. I propose to deal with each of the 7 factors however, in a much more abbreviated fashion, as the analysis somewhat overlaps the criteria already detailed in *jurisdiction simpliciter*.

(j) Location of the Parties

[86] The Plaintiff is incorporated in Ontario with its registered office located in Orillia, Ontario at the offices of Counsel for the Plaintiff. All questions with respect to the Plaintiff, its business, shareholders, officers or directors were refused by Plaintiff's Counsel. The majority of the Defendants are not resident in Ontario but are located in Barbados. The witnesses for the Barbadian Defendants and their documentary evidence are located in the Barbados. This factor weighs against assuming jurisdiction.

(ii) Location of Witnesses and Evidence

[87] The Moving Defendants have no witnesses located in Ontario and based on the material filed and the refusals on the cross-examination of John Knox it is apparent that the Plaintiff will have few, if any, of its own witnesses in Ontario. This action involves issues that relate to alleged misconduct occurring in Barbados, in respect of Barbadian companies and Barbadian real property. Most of the evidence will come from Barbados. This factor favours declining jurisdiction

(iii) Contractual Provisions that Specify Applicable Law or Accord Jurisdiction.

[88] The only agreements in issue in this proceeding as identified to date refer to Barbadian law and some contain jurisdiction and choice of law clauses following Barbados. Further, as detailed above, several proceedings have been commenced in Barbados. The issues raised or decided in Barbados are substantially similar and arise out of the same facts and circumstances as the claims, to the extent that they are describable, in the Ontario proceeding. This factor weighs against assuming jurisdiction.

(iv) Applicable Law and Its Weight in Comparison to the Factual Questions to be Decided

[89] The Ontario action is based on various torts alleged to have been committed by the Defendants. The law to be applied to a tort is the law of the place where the activity occurred. The Plaintiff also alleges specific breaches of Barbados statutes and treaties. While an Ontario court could apply the law of Barbados, nevertheless the foreign law would have to be proved through expert evidence which is costly and inconvenient.

[90] The paramount consideration in relation to this factor is the application and interpretation of Barbadian law which I find favours the action being brought in Barbados. Further there is no suggestion of any need to consider Canadian law in this action. I find that this factor favours not assuming jurisdiction

(v) Geographic Factors Suggesting the Natural Forum

[91] The real estate in dispute is in Barbados and all of the significant and material actions of individuals giving rise to the Plaintiff's claims occurred in Barbados. Therefore I find that Barbados then is the natural forum in this dispute.

(vi) Loss of Legitimate Judicial Advantage

[92] In *Amchem Products Inc. v British Columbia (Workers Compensation Board)* *supra* Justice Sopinka stated:

[T]he loss of juridical or other advantage must be considered in the context of the other factors.....A party can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation [have] little or no connection.

[93] While loss of juridical advantage is a factor to be considered within the *forum non conveniens* analysis, nevertheless as stated in the *Amchem Products* case:

[I]f a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping".

[94] Counsel for the Moving Defendants submit that the Plaintiff is blatantly "forum shopping". It is argued that the manner in which the Plaintiff has brought this proceeding, the persons sued and subsequently the Notice of Discontinuance served within days of the hearing of this motion together with the actions of Plaintiff's Counsel in refusing to allow questions relative to the Plaintiff's real and substantial connection to Ontario leads to the inference that the Plaintiff Corporation is a shell company, incorporated solely for the purpose of seeking a jurisdictional advantage. While I do not have to make the finding that there is "forum shopping" to determine whether there has been a loss of legitimate juridical advantage, nevertheless, based on the positions taken by Plaintiff's Counsel and all the evidence, I find that there is a reasonable inference to be made that the Plaintiff is in fact "forum shopping".

[95] In this case the Plaintiff's claim of jurisdiction of the Ontario court rests predominately on its own residence in the province. Since most of the parties to this action are located in Barbados and the allegations contained in the Amended Statement of Claim centre on conduct alleged to have occurred in Barbados, the Plaintiff can have no reasonable expectation that it is entitled to a finding that it has a loss of a legitimate jurisdictional advantage in the Ontario court.

[96] The Plaintiff has made allegations criticizing the Barbados justice system which will be discussed again in these Reasons. However, it is necessary to state at the outset that the Plaintiff's comments on the Barbados justice system, in the opinion of this Court, are scandalous and unfounded. Further, suggestions of delays and court backlogs in the Barbados courts has a familiar ring to the trial division of this Court in parts of Ontario. The Plaintiff's complaint

relating to court facilities simply ignores the acknowledgement by John Knox, the Plaintiff's affiant, of the opening of a state of the art courthouse in Barbados in 2009.

[97] The Plaintiff states that the lack of oral discovery in Barbados deprives the Plaintiff of a juridical advantage. However this submission is found to be lacking as the lack of oral discovery in Barbados makes it no different than England. It would be a most difficult challenge to suggest that one is at a juridical disadvantage by being required to sue in England rather than Ontario. Further, I have been directed to the testimony of Chief Justice Sir David Simmons on his cross-examination in this proceeding wherein he indicates that Barbados follows English rules of procedure and is adopting the Lord Woolf reform introduced in England in 1999.

[98] I find that there is no reliable evidence which establishes that the Plaintiff has suffered a loss of legitimate juridical advantage and accordingly this factor favours the Court refusing to assume jurisdiction.

#### **Summary on Forum Non Conveniens**

[99] I have considered all the factors guiding the jurisdictional analysis for *forum non conveniens*. Applying the test for a stay of proceedings on the ground of *forum non conveniens* I find that Barbados is the more convenient, appropriate and natural forum for the pursuit of this action and for securing the ends of justice. I further find that since the Plaintiff chose to become involved in the business affairs of Barbadian companies and individuals, it is appropriate and fair that it should be required to litigate in the jurisdiction that has the strongest connection with the action and the parties.

[100] In the result this action is stayed in Ontario on the basis that Ontario is not a convenient forum for the hearing of the present action.

#### **SETTING ASIDE SERVICE OF THE STATEMENT OF CLAIM**

[101] The Moving Defendants seek an Order setting aside service on the grounds that the originating process was not properly served outside of Ontario in accordance with Rules 17.02 and 17.04 (1) of the *Rules of Civil Procedure*.

[102] Where a foreign defendant has been served with an originating process on the basis of Rule 17.02, that party may challenge the jurisdiction of the court through any one of the following procedures:

- (a) A motion under Rule 17.06 (1) to set aside service or to stay the proceeding;
- (b) A motion to stay under section 106 of the Courts of Justice Act; and/or
- (c) A motion under Rule 21.01 (3)(a) to stay or dismiss the action where the court has no jurisdiction over the subject matter.

[103] The Moving Defendants submit that the Plaintiff's Amended statement of Claim fails to explain why service *ex juris* is applicable or authorized by Rule 17.02 of the *Rules of Civil Procedure*.

[104] Rule 17.04(1) states that any originating process served outside Ontario without leave of the Court must "disclose the facts and specifically refer to the provisions of rule 17.02 relied on in support of such service."

[105] The Plaintiff in response submits that there has been compliance with Rule 17.04(1) and 17.02 as the "contract between the Plaintiff and Marjorie Knox...was made in Ontario; [and] the contract provides that it is to be governed by or interpreted in accordance with the laws of Ontario; [and] the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract; [and] a breach of the contract has been committed in Ontario, even though the breach was proceeded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario" The Plaintiff further states that there has been compliance with the rules because "Tort committed in Ontario whereby the operating minds of the conspiracy to reduce the values of the shares of Kingsland and gain control over them took place(sic) [and] "Damages sustained in Ontario to the Plaintiff; and Necessary or proper party-against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario: which applies to the Moving Defendants as the action was properly brought against the Ontario Defendants (sic)." (The Plaintiff's Factum para. 52) The Plaintiff's factum then makes reference to Article 10 of the *Hague Convention* which appears to have no relevance to rules 17.04(1) or 17.02. The Plaintiff also refers to a contract which Plaintiff's Counsel refused to produce on the cross-examination of John Knox. The oral submissions of Plaintiff's Counsel on the hearing of this motion did not provide any clarity to the statements in the factum recited above.

[106] If it were not for the findings related to *jurisdiction simpliciter* and *forum non conveniens* this Court might have given the Plaintiff an opportunity to amend and effect proper service. However the exercise becomes rather academic in light of the above findings made by this Court. I find no merit in the Plaintiff's submissions on compliance with Rules 17.02 and 17.04(1). The Amended Statement of Claim does not provide the factual basis required by the *Rules of Civil Procedure* to support service *ex juris* under Rule 17.02. There is no reliable evidence to suggest there was a contract made by the parties in Ontario and the Amended Statement of Claim does not allege any facts to support a claim that there was a tort committed in Ontario or damages suffered by the Plaintiff in Ontario. Therefore I find, on the basis of improper service, this action should be stayed.

#### **THE POSITIONS ADVANCED BY THE PLAINTIFF ON THIS MOTION**

[107] The Plaintiff's position on this motion is "that there is no forum other than Ontario which has competent jurisdiction and which is appropriate for the trial of the action having regard to the interest of all parties and the ends of justice according to the tests of *jurisdiction simpliciter* or

Real and Substantial Connection, Forum *non conveniens*, and overarching considerations in regards to the interests of all parties and the ends of justice (sic)." (Plaintiff's Factum para. 59)

[108] Unfortunately, the Plaintiff submits to the court statistical information which is not relevant to the issues to be decided on this motion. (Plaintiff's Factum para 69). However, of greater concern to the Court is that there are numerous instances in the Plaintiff's Factum where the evidence is quoted out of context, the statements are not supported by the evidence, are inadmissible hearsay or there is no basis for the statements. There are also references made to case law which is incorrect or where the citation cannot be found. Further the Plaintiff's Factum makes several references to the actions of party defendants against whom this action was discontinued only a few days prior to the hearing of this motion. Consequently, the Court did not have the response of the discontinued party defendants to the Plaintiff's Factum. I do not propose to deal with each of the transgressions, except to outline some of the impugned paragraphs of the Plaintiff's Factum are 1, 3, 9, 10, 11, 12, 14 to 18, 23, 24, 60, 75, and 144.

[109] Mr. McKenzie also argued that it is not appropriate for the Court to draw the inference that because the Plaintiff did not produce evidence (documents) on the cross-examination, that this reflects on the strength or nature of the Plaintiff's case. Counsel for the Plaintiff maintains that most of the questioning by the Defendants related to the merits of the Plaintiff's claim and the particulars of the Amended Statement of Claim and was tantamount to a discovery of the Plaintiff's action. I do not find any merit to these submissions. A review of the transcript indicates that the Plaintiff's affiant was being asked questions which relate to the test and factors outlined in *Muscutt v Courcelles supra*. There were 125 refusals to answer questions over 350 pages of the transcript of the cross-examination of John Knox.

[110] In a somewhat disingenuous and inconsistent argument Counsel for the Plaintiff states that the Moving Defendants could have examined Donald Best on behalf of the Plaintiff but chose not to do so. Of course the Plaintiff chose John Knox, the son of Marjorie Knox, a Defendant in this proceeding, as the affiant on behalf of the Plaintiff. Mr. Best filed no affidavit. This argument does not assist the Plaintiff in relation to the issues that had to be decided on this motion.

[111] Counsel for the Plaintiff submitted that some of the defendants are resident in Ontario and that together with the fact that the Plaintiff is an Ontario Corporation satisfies the real and substantial connection test. Mr. McKenzie stated that the "venue" for this action in his submission should be "Toronto on the Commercial List." He also submitted that there is "nothing in the materials filed to suggest there is any complaint with Ontario" and that the Moving Defendants "are all adept people who travel." Mr. McKenzie in his submissions acknowledged that there is a proceeding in Barbados which "is going on and is not over." I take this comment as an admission that Marjorie Knox is litigating the same or similar issues in Barbados. However, the submissions of Counsel for the Plaintiff on this point are without merit and do not assist the Court in determining the issues relevant to this motion.

[112] In a separate hearing before Regional Senior Judge Brown, Ms. M Zemel, Counsel for Eric Ian Stewart Deane and the Estate of Colin Deane brought a motion against the Plaintiff and primarily against its Counsel, relating to the broadcasting, dissemination or transmission of spurious comments relating to the integrity and character of Ms. Zemel and which are characterized as defamation of character. The Regional Senior Judge rendered a decision on this application on April 3, 2009. Mr. McKenzie submits that as a consequence of bringing that application that the Defendant Deane and the Estate have attorned to the jurisdiction. I give no weight to this submission and I find that there was no attornment to the jurisdiction by these Defendants. The application before Regional Senior Judge Brown was a matter unrelated to these proceedings and in fact related to comments on the internet relating to the integrity of Ms. Zemel. That is a separate and distinct issue from any matter related to the motion now before me.

[113] In many of his submissions, Counsel for the Plaintiff dwelled on what can only be described as the fleeting or relatively unimportant connection to Ontario. He referred to the residency of Graham Brown, Brian Edward Turner, G.S.Brown Associates Limited and Thornbrook International Inc. in Ontario. The Plaintiff's own pleading gives little importance to these Defendants of which 2 have declared bankruptcy. Accordingly the Plaintiff's argument on this point is not persuasive.

#### **The Barbados Justice System**

[114] The Plaintiff states that it cannot obtain justice in Barbados because the government of Barbados is "so indebted or has become insolvent" and because "some of the conspirators are members of the judiciary and governing party." In his affidavit, John Knox makes vague and generalized allegations of concerns with the Barbados justice system, ranging from delays and court backlogs, to access to court reporters and transcripts and to the English practice followed in Barbados wherein there is no oral discovery. Only once does John Knox attest to information coming from a lawyer, Mr. Alair Shepherd (who is Counsel to Marjorie Knox) and a vague assertion that court facilities in the Barbados are "not sufficient and that often leads to the necessity of adjournments and postponements." The rest of Mr. Knox's evidence is unsupported and unsourced.

[115] The Chief Justice, Sir David Simmons, was cross-examined for two days by Counsel for the Plaintiff and wherein he related that a new courthouse in Bridgetown has been constructed and is scheduled to open in 2009. He refuted the allegation that he had rendered judgment in a case in which he had previously been counsel and which allegation he stated was "false in the extreme." The Chief Justice also testified that he "rarely" sits in the High Court and usually only in circumstances where it is a "heavy case" and sometimes at the invitation of the lawyers. There are 13 Supreme Court Judges in Barbados, five of whom sit on the Court of Appeal and eight on the High Court. Appeals from the Barbados Court of Appeal now go to the Caribbean Court of Justice. The Chief Justice has avoided ever sitting on matters to do with Kingsland Estates Ltd. He also testified that the civil rules under which Barbados operates are the same as those which existed in England between 1982 and 1999, prior to the reforms of Lord Woolf. Next year, the rules in Barbados will change to implement procedures based on the 1999 reforms, including Case Management. While there is no oral discovery, the Chief Justice detailed

the documentary discovery steps that are followed in Barbados as well as the “interrogatory” process of asking questions which must be answered. The Chief Justice also stated that the allegations made by the Plaintiff relating to corruption in the justice system of Barbados was “scandalous and offensive.” On his cross-examination the Chief Justice stated: (Cross-examination transcript pp 164-174)

[D]espite what you have alleged in your Statement of Claim...there has never been any allegation whatsoever, Mr. McKenzie, of any misconduct or corruption against any judges in Barbados. And international independent bodies have given Barbados’ judiciary the highest possible marks, and our judicial system, and the independence of the judiciary.”

[116] The Plaintiff discontinued this action as against Chief Justice, Sir David Simmons and his brother Peter Simmons (who is a former Barbados High Commissioner to Great Britain) on March 23, 2009 but then had the audacity to make submissions to this Court on April 8, 2009 to the effect that “the Chief Justice has a history” and that the Chief Justice is “a very powerful man” and “he and his brother are up to their necks in this matter of conspiracy.” All of the comments made by Mr. McKenzie are salacious, unfair, unsupported by any evidence and are based simply on Mr. McKenzie’s opinion of the Chief Justice, his brother and the justice system of Barbados. Mr. McKenzie’s opinions are of no importance to this Court. While Mr. McKenzie, inter alia, has formulated the intention to put the Barbados justice system on trial, nevertheless, he has failed on all accounts. I am more than satisfied that all the parties to this proceeding would receive a fair and impartial trial in Barbados.

[117] Counsel for the Plaintiff also argued, once again, the alleged lack of security in Barbados and threats made to Marjorie Knox, John Knox and Plaintiff’s Counsel, William McKenzie and his staff in the course of these proceedings and which were the subject matter of Reasons delivered by this Court in [2008] O.J.No.454. The allegations have been refuted for the Reasons provided in the earlier proceeding and accordingly, I find no merit in these submissions made by Plaintiff’s Counsel.

[118] The Plaintiff also referred again to the transcript of the examination of Mr. Nitin Amersay who was examined by Mr. McKenzie without any of the Defendants’ Counsel being present. At a much earlier time in these proceedings, Defense Counsel received very short notice by Mr. McKenzie that Mr. Amersay was going to be examined in the United States. Mr. Amersay is not a party to this proceeding and the thrust of his evidence related to the alleged corruption in the Barbados government and judicial system based on his own alleged experiences. I have again reviewed the transcript of the examination of Nitin Amersay by William McKenzie and again I conclude that it has no relevance to the issues in this proceeding. Further, I find the evidence of Mr. Amersay to be unsupported by any other evidence and it is largely a statement of opinion of Mr. Amersay unchallenged by any meaningful cross-examination.

[119] There are other confusing and irrelevant submissions made by Mr. McKenzie to the effect that a person who has been posting “nasty” comments on blogs on the internet in relation to this proceeding is BWWR (Black Woman Who Reads) and Mr. McKenzie submits to the

witnesses are being intimidated in the Barbados by the blog postings. There is no evidence to support these extraordinary and irrelevant submissions and I give them no weight.

### CONCLUSION

[120] Therefore it is the Order of this Court that this action is stayed in Ontario on the basis

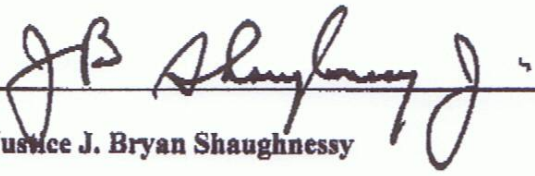
- (a) that this Court does not have the jurisdiction over the proceeding,
- (b) that Ontario is not a convenient forum for the hearing of this action and
- (c) that there has not been proper service of the Amended Statement of Claim in compliance with Rules 17.02 and 17.04(1) of the Rules of Civil Procedure.

### SUBMISSION BY MR. RANKING

[121] Mr. Ranking, who represents PricewaterhouseCoopers East Caribbean Firm, on behalf of his client and the other represented Defendants, attended at the commencement of the hearing of this motion and requested a date for the hearing of costs on behalf of all those represented Defendants against whom the Plaintiff filed a Notice of Discontinuance on March 23, 2009. Mr. Ranking further advised that he and the other represented Defendants would be seeking an award of costs on a substantial indemnity basis as against the principals of the Plaintiff Corporation and Mr. McKenzie, personally.

[122] I direct Counsel on behalf of the represented defendants as well as Counsel on behalf of the Moving Defendants and the Plaintiff to contact Ms. Jackie Traviss, the Trial Coordinator at Whitby, to arrange a date to speak to the issue of costs. I will expect a factum to be submitted by Counsel who make submissions on costs.

Dated: May 4, 2009

  
Justice J. Bryan Shaughnessy

**COURT FILE NO. :07-0141**  
**DATE: May 4, 2009**

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**NELSON BARBADOS GROUP LIMITED**

**PLAINTIFF**

**-and-**

**COX ET AL**

**DEFENDANTS**

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**REASONS FOR JUDGMENT ON A MOTION**

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**Justice J. Bryan Shaughnessy**

**Released: May 4, 2009**