

**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. PHILP 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 ESTATESLIMITED, CLASSIC  
INVESTMENTS LIMITED, THORNBROOKINTERNATIONAL CONSULTANTS  
INC., THORNBROOKINTERNATIONAL INC., S.B.G. DEVELOPMENT  
CORPORATION, THEBARBADOS 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 & 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, PRICEWATERHOUSECOOPERS EAST  
CARIBBEAN FIRM, VECO CORPORATION, COMMONWEALTH  
CONSTRUCTION CANADA LTD. AND  
COMMONWEALTH CONSTRUCTION, INC.**

**Defendants**

**AFFIDAVIT OF K. WILLIAM MCKENZIE  
(Sworn April 23, 2010)**

I, **K. WILLIAM MCKENZIE**, solicitor, of the Town of Orillia, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am a former partner in the law firm Crawford, McKenzie, McLean, Anderson and Duncan LLP, now known as Crawford, McLean, Anderson and Duncan LLP (the "firm"), and as such I have knowledge of the matters to which I hereinafter depose.

2. This affidavit replies to the affidavit of Jessica Duncan sworn April 22, 2010. I do not dispute those parts of Ms. Duncan's affidavit that describe the contents of the firm's files. As described in more detail below, I have not had access to the firm's files at all since December 31, 2009 and prior to that date I had very little contact or involvement with the physical files.

**A. RELATIONSHIP WITH THE FIRM**

3. I withdrew from the firm and have had no relationship with it since December 31, 2009. In the several years prior to my withdrawal, I travelled extensively and was often away from the firm.

4. On February 26, 2007, I advised my partners that I would be winding down my practice over the following two years and withdrawing completely in 2009.

5. Since giving notice, I have spent less and less time at the firm. I sold my half interest in the building where the firm is located in July 2008. I ceased to be a partner in the firm at the beginning of 2009, but remained associated with it, paying a monthly fee in return for the firm handling administrative matters on my behalf. I was very seldom at the firm in 2009 while I pursued personal interests and sought to finalize the referral and/or closing of my remaining files.

**B. JESSICA DUNCAN'S INVOLVEMENT WITH THE NELSON BARBADOS MATTER**

6. Ms. Duncan was involved in the Nelson Barbados file with regard to work relating to the security issues in 2008. In addition, she handled the motion heard by Senior Regional Justice Brown on April 1, 2009 and has remained in charge of that motion thereafter seeking costs (although that matter is in the process of being transferred to my solicitors, Kramer Henderson Sidlofsky LLP).

7. Since my departure from the firm at the end of 2009, Ms. Duncan has been in exclusive control of the physical Nelson Barbados file, with the exception of one box of documents which I have at my home containing several motion records and some accounting records.

8. When the defendants served the motion for costs against me and the firm in July 2009, we reported it to LawPro. Sean Dewart was appointed to represent both me and the firm. I dealt with Mr. Dewart in my own capacity and I understood that Ms. Duncan was dealing with him with respect to the firm's interests.

9. It was decided that the firm would be removed as solicitors of record for the plaintiff. I signed an affidavit in support of the motion prepared by Mr. Dewart, and Ms. Duncan took care of bringing the motion and obtaining the order.

10. Since August 2009, Ms. Duncan and I maintained a parallel relationship with Sean Dewart. I was seldom at the firm but dealt with Mr. Dewart and Ms. Duncan remotely doing the best I could to assist in the defence of the motion for costs. Throughout this period, Ms. Duncan was in charge of the physical file.

11. Because Ms. Duncan was the partner at the firm dealing with the matter on behalf of the firm, I assumed that Ms. Duncan received and reviewed my affidavit before it was filed and provided Mr. Dewart with her input. She had access to the firm files at all times. At no time did Ms. Duncan, Mr. Dewart or anyone else advise me of any apparent inaccuracies in my affidavit. If she or he had pointed out anything that appeared to be inaccurate, I would have corrected it as necessary. Alternatively, she could have filed an affidavit if her recollections or the contents of the file were different than what was set out in my affidavit. I am now advised that Ms. Duncan denies receiving or reviewing my affidavit before it was filed.

**C. CROSS-EXAMINATION TRANSCRIPT AND ANSWERS TO UNDERTAKINGS**

12. I travelled to Toronto to be cross-examined on February 3<sup>rd</sup> for one day and was then advised that I would have to return on February 8<sup>th</sup> which I did.

13. When I later received and reviewed the transcript, I noted some inaccuracies because they appeared out of context and also by then I remembered certain things that I had not recalled correctly or at all when I was being cross-examined.

14. I began to prepare a list of corrections but Mr. Dewart told me that I was not permitted to provide corrections or clarifications to the transcript because it was a cross-examination. Attached hereto as **Exhibit "A"** is Mr. Dewart's email to me confirming that advice.

15. Stacey Ball, a law clerk at the firm, independently reviewed the transcript and prepared a list of undertakings which she forwarded to me. There were certain undertakings which I could answer from memory and I gave her those answers. There were many other undertakings which had to be answered by reviewing documents in the files and speaking with the firm's accounting department.

16. As explained above, by this time, I had withdrawn from the firm and no longer had any access or control over the relevant files or records. I assumed that Ms. Duncan was supervising the obtaining of the answers which came from firm records. I presumed that she reviewed the transcript and was involved in gathering the answers from the firm records. I am now advised that Ms. Duncan did not do so.

17. I reviewed the answers to undertakings before they were sent to Mr. Dewart and I assumed that Ms. Duncan reviewed them as well. The entire physical file was always under her exclusive custody. It had been made clear to me by the staff at the firm that Ms. Duncan was in charge of accounting and financial matters at the firm and that I no longer had any authority or

control at the firm. At no time was I advised that she or anyone else had any questions or concerns with respect to any of the answers I had provided or any other answers which came from the firm records.

**D. RESPONSE TO DUNCAN'S AFFIDAVIT**

*(i) File History Relating to the Underlying Litigation*

18. It was always my understanding that there was one file at the firm dealing with the Nelson Barbados litigation -- ie. file number 568.

19. I had previously opened another file for Peter Allard which concerned the Barbadian litigation and other matters in Barbados unrelated to the Ontario litigation - ie. file number 543.

20. Once the Ontario litigation commenced, everything relating to it was supposed to have been docketed to that file.

21. I do not know why file 543 was replaced with file number 587 in April 2009 or why file 568 was replaced with file number 586 in February 2009. I never instructed anyone at the firm to open multiple files for the Nelson Barbados matter or to assign multiple file numbers to it.

22. I did not enter my own docket entries. Rather, I provided instructions to my assistant and she entered the docket entries.

**(ii) Incorporation of Nelson Barbados Group Ltd.**

23. I do not dispute the evidence given by Ms. Duncan at paragraphs 12 to 17 of her affidavit.

24. However, it remains my recollection that I instructed someone at the firm to incorporate Nelson Barbados Group Ltd. The docket entry that Ms. Duncan has produced at paragraph 16(b) of her affidavit confirms that the firm staff were working together to get this done.

25. In 2005, my wife Lisa James spent a great deal of time at the firm helping to supervise some renovations and with office administration. Ms. James is a lawyer who has an independent practice of law.

26. Ms. James advises me and I believe that while at the firm, she did the administrative work related to the incorporation of Nelson Barbados Group Ltd., assisted by Sunny Ware, a legal assistant in the office. All documentation relating to the incorporation of Nelson Barbados Group Ltd. was always at the firm until delivered to Mr. Best. Ms. James had no involvement with Nelson Barbados Group Ltd. after the incorporation.

27. It remains my recollection that I asked Ms. Duncan "who pushed the button to incorporate" Nelson Barbados Group Ltd. and that she told me that she did not know.

28. In any event, to the extent that Ms. Duncan's affidavit may suggest that I have any interest or connection with the ownership of Nelson Barbados Group Ltd., directly or indirectly, or through anyone related to me,

this is totally false. To my knowledge, Donald Best was always the owner and directing mind of that company.

***(iii) Internet Blogging***

29. I stand by my statements in paragraph 140 of my previous affidavit.

***(iv) My Email Address***

30. I dispute paragraph 21 of Ms. Duncan's affidavit. I have never referred to my email address as "KWM External". If others in the firm referred to my email address as "KWM External", that was unknown to me.

31. As far back as I remember, my email address has been lawyerbill@rogers.com. Many years ago I had a netrover.com email address, although I no longer have any record of it. I have no recollection of ever using the address wmckenzie@attglobal.net.

***(v) Stuart Heaslet***

32. The emails dated August 8 and 10, 2007 from Mr. Heaslet to me which are attached to Ms. Duncan's affidavit at Exhibit "H" did not come to my attention until August 11 or 12. I was returning from Alaska at that time and do not believe that I connected to my email account until the weekend of August 11.



33. To the best of my recollection, I did not know that Mr. Heaslet intended to call Peter Simmons on August 10, 2007, prior to that call taking place.

*(vi) Accounts*

34. Paragraph 6 (f) of the January 15, 2010 order of Justice Shaughnessy required production of "all professional accounts for service provided by Mr. McKenzie and/or his firm". The order did not require the production of trust statements and they were not sent.

35. At my cross-examination, I undertook to provide a summary of the amounts billed and collected. Stacey Ball compiled the documents to answer the undertakings. In the course thereof, she showed me a trust statement, contained in Exhibit "I" to Ms. Duncan's affidavit, which lists receipts and disbursements from April 20, 2007 to February 23, 2009.

36. This trust statement appeared inaccurate to me as it seemed to mix up entries from various files. I stated to Ms. Ball that the trust statement should not be sent out until and unless the firm cross-checked it against the bank records. At that time, the firm was awaiting delivery of the wire transfer records of the receipts which were required to determine the source of the funds.

37. I also expressed concern that the disclosure might inadvertently breach the solicitor and client privilege of Peter Allard.

38. Ms. Ball agreed to give the trust statement back to the accounting department to be cross-checked against the wire transfer records (once received). I believed that Ms. Duncan was supervising the collecting and finalizing of this documentation and that nothing would be sent to Mr. Dewart unless first approved by Ms. Duncan. Thereafter, to my knowledge and belief, it was Ms. Ball, who I assumed was acting under the direction of Ms. Duncan, who provided the answers to undertakings to Mr. Dewart for delivery to the defendants.

39. Although I do not have access to the bank records to reconcile the trust statement, it is apparent to me that it is inaccurate. For example, the trust statement shows a receipt of \$32,210.66 from Nelson Barbados on May 30, 2008, but the wire transfer records, which I saw for the first time on April 15, 2010, identify the source of the payment as Peter Allard. I have never before seen these records and at no time was I aware of the source of that payment or any other specific payment.

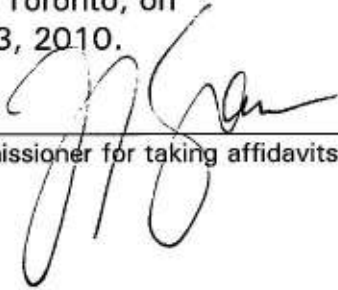
40. It appears to me that Ms. Duncan circulated the trust statement to Mr. Dewart in February without first confirming that it was accurate notwithstanding my request that it be checked against the bank records.

***(vii) Payment of Accounts***

41. My understanding from Mr. Best at all times was that my firm accounts were paid from or on the account of Nelson Barbados Group Ltd. I was vaguely aware that the ultimate responsibility for the payment was that of Kingsland Estates Limited via an indemnification in favour of Marjorie Knox which the company had issued. I had some notification of this by word of

mouth, and just recently I was given a copy of a claim issued in Miami Florida which documents same. A copy of the claim is attached hereto as **Exhibit "B"**.

SWORN before me at the  
City of Toronto, on  
April 23, 2010.



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A Commissioner for taking affidavits

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K. WILLIAM MCKENZIE