

SUPERIOR COURT OF JUSTICE

B E T W E E N :

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 ESTATES
LIMITED, CLASSIC INVESTMENTS LIMITED, THORNBROOK
INTERNATIONAL CONSULTANTS INC., THORNBROOK
INTERNATIONAL INC., S.B.G. DEVELOPMENT CORPORATION, THE
BARBADOS AGRICULTURAL CREDIT TRUST, PHEONIX ARTISTS
MANAGEMENT LIMITED, DAVID C. SHOREY AND COMPANY, C.
SHOREY AND COMPANY LTD., FIRST CARIBBEAN INTERNATIONAL
BANK (BARBADOS) LTD., PRICEWATERHOUSECOOPERS
(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

5

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

10

P R O C E E D I N G S O N M O T I O N

15

BEFORE THE HONOURABLE JUSTICE B. SHAUGHNESSY

on June 8, 2010

at OSHAWA, Ontario

20

25

APPEARANCES:

30

L. Silver
G. Ranking

Counsel for the Co-defendants
Counsel for the Co-defendant

1.
Submissions

TUESDAY, JUNE 8, 2010

THE COURT: Mr. Ranking, Mr. Silver, good morning.

MR. RANKING: Good morning.

MR. SILVER: Good morning.

MR. RANKING: I'm not sure if it's good news or bad news when I come into a courtroom and I don't need to fill out a counsel slip.

THE COURT: That's always good news I think.

MR. RANKING: Your Honour, we are here for the final chapter. I'm happy to report both on behalf of my friend Mr. Silver, and on behalf of all other counsel, that we have settled the case and the purpose of our attendance this morning is to - to file the Minutes of Settlement in court, together with an affidavit of Ms. Jessica Zagar. And I can take you through the Minutes of Settlement and explain what it is that we have done and why. And after doing so if I could just ask you, I was trying to find, I don't know if it was in your chambers. I was trying to find the joint motion record.

THE COURT: Oh, well here's what happened. I was joyful yesterday. Justice McEwen called me first thing in the morning, he didn't want to call me at night because the hockey game was on but he said the last one, Mr. Bristow, settled. I had heard - he had called me on the Friday to tell me that - how things had progressed wonderfully and I was so delighted and those boxes had been in the boardroom, which I didn't mind at the other courthouse. But they, you know there was eight of them in my new offices. I deplored looking at

2.
Submissions

5
10
15
them. I have no other boardroom that I can slip them into. So out of, I - I really overreacted and I got Tom Mills, my CSO, I said, "Tom, for God's sake, get a cart and get those boxes and ship them to Barrie. I don't want to see them again." Not that I mind you, the counsel involved, but it just seemed like I was never going to see the end of those banker boxes. And so I - we threw them prematurely - then it occurred to me, I knew you were coming in. And then it occurred to me later, oh my gosh, I didn't keep anything. So we - we grabbed the bill of costs of David Simmons, Philip Greaves, et cetera, the index - the actual bill of costs. I thought, I have to have something to write on. So it's my fault. Out of happiness to get rid of it, I - I overreacted and sent it off too quickly and I should have retrieved those two - that motion record, but...

20
MR. RANKING: Not to worry.

THE COURT: ...I'm sorry.

25
MR. RANKING: What I think Mr. Silver and I - because we were trying - one of the things we were doing this morning, we were trying to find this so you could endorse the - the back of the record. We are quite comfortable if you just want to endorse the Minutes of Settlement.

THE COURT: Great.

MR. RANKING: I think that's probably just as....

THE COURT: Okay. We'll do it that way.

30
MR. RANKING: But would you like to - would you like me to take you through the minutes first Your Honour?

3.
Submissions

THE COURT: Yes I would.

MR. RANKING: So these Minutes of Settlement, just so that I'm clear to begin with - these Minutes of Settlement only relate to Mr. Silver's clients and to my own. And the clients are - are set forth on page two. And you'll see that the first entry is PricewaterhouseCooper's East Caribbean Firm, obviously my client Your Honour. And the second group of clients, are those of Mr. Silver and then the other three parties to this settlement are Mr. McKenzie, and then the firm - and this is the successor firm, the Crawford McLean firm, not the prior firm, and Peter Allard. The first preamble speaks of the motion that was brought and that is the motion which was amended a number of times to add more parties and make further claims. The second preamble deals with the desire to resolve, and then the third preamble deals with the counsel for the various parties. Turning to - to page three Your Honour and I say this, before I start going through this and this will become more evident in my submissions. I can't inform you as to the settlements that were negotiated with the other parties because they're all confidential.

THE COURT: Oh.

MR. RANKING: Mr. Silver and I took the position in our negotiations, and it won't come as any surprise, that Mr. Silver and I agreed early on that - to stay joined at the hip. So we maintain that - that our - our settlement would not be confidential and I'll get to that momentarily. But one of the reasons why we were so adamant that our

4.
Submissions

5
10
settlement should not be confidential and there are a number of them as you can obviously imagine, given the conduct that we've seen here. But another important aspect of this, and I will get into this a little bit more when I get into the number of paragraphs in the Minutes of Settlement, is that through some very good work that Mr. Silver did in terms of going through boxes and - and his cross-examination of Mr. McKenzie, we actually got after Ms. Duncan, filed her affidavit, and the cross-examinations production of virtually the entire McKenzie file.

15
THE COURT: I - I had received that - oh not - I mean I received the briefs and summaries and the trust accounts.

MR. RANKING: Right and...

THE COURT: I was astounded when I....

20
25
30
MR. RANKING: ...and we got more and more and - and I'm going to get to this momentarily. But what you see and what we are filing through Ms. Zagar's affidavit are seven boxes of documents, which effectively are all of Mr. McKenzie's file. And they are contained in - in separate discs, which are being filed. And the reason that they are being filed Your Honour, is - and after I've gone through the Minutes of Settlement, I'm happy to take as much time as you'd like to give you background information and I've got a supplementary factum if you want me to review it. But the reason they are being filed Your Honour, and I think this is important to appreciate the context and why it is that we are obviously to be here to thank the

5.
Submissions

5
10
15
20
25
30

court for their time, but we felt it very important to file public Minutes of Settlement as well as to file these documents. Because one of the - one of the memos that we saw that passed between Mr. McKenzie and Mr. Allard, was a memo talking about forum shopping. And they talked about, are we going to pick Alaska, are we going to pick Cyprus, are we going to pick Ontario or are we going to pick Miami? And I can take you to the reference in the supplementary factum. But the very day after Mr. Dewart stepped down as counsel on the 23rd of February, the very next day, a proceeding was started in Miami.

THE COURT: I saw that. I just - I saw that. I couldn't believe it.

MR. RANKING: So we're here going, thankfully Ontario is out, but we have no comfort, none, that in fact this proceeding may not continue in Miami. And the documents that - that - so the Minutes of Settlement that we're filing, we want filed and endorsed as filed by Your Honour, so that they are a matter of public record should we need to have reference to them in the Miami proceedings and all of the documents which in fact underscore the abusive nature of this lawsuit to re-litigate issues from Barbados, similarly available to us, should either of our respective clients need to deal with that in - in Florida. So that's the - that's the backdrop. With that by way of backdrop, let me now take you through the paragraphs and I will not apologize, but I actually am quite pleased by the amounts that we were able to recover, which

6.
Submissions

is set forth in paragraphs a. and b. And I will say that those figures represent almost full indemnity for the costs that were incurred by PwC and by the Cox defendants. Paragraph two....

5 THE COURT: Just one second because I just want to make a note of it because to be candid, I asked Justice McEwen, so what did they - what did they settle for? And he said, "I don't know." And he said, "I forgot to ask." So I know he's going to call me to say - to ask about what happened. So I just want to get the numbers. And I realize that it isn't all of them.

10 MR. RANKING: Right. This - and Mr. Silver just wants he to make clear, these are the payments to our two firms.

15 THE COURT: Yes.

MR. RANKING: And does not include the others.

20 THE COURT: Is that - is that over and above what I ordered in costs and that you'd received previously?

MR. RANKING: Yes.

THE COURT: So that's - this is over and above?

MR. RANKING: This is - this is net of those payments. So there's no double recovery.

25 THE COURT: Okay.

MR. RANKING: You'll see - this will be become evident. It effectively, give or take our math, it's effectively 90 percent of our full indemnity fees.

30 THE COURT: I'm pleased.

MR. RANKING: Thank you Your Honour. I will say, on some levels I'm embarrassed to have costs as

7.
Submissions

high as they are. But they - they are what they are and - and....

5 THE COURT: Well I wouldn't be embarrassed. I know what went on here. I would have no difficulty - I don't know what I would have assessed them at, but I'm not at all shocked. It's what I was - more or less, had swirling in my own mind at the time.

10 MR. RANKING: Well thank you Your Honour. I will say, the one thing you'll find - this is kind of - well I don't know that you'll find it humorous, but I - I got specific instructions not, and you'll see this momentarily, not to release Mr. Best from his contempt or from his \$50,000 that you ordered him to pay. So....

15 THE COURT: I guess he'll come back to see me some day.

20 MR. RANKING: Well at some day, we - we may see that. But I think that, just so you understand the backdrop of that, I'm kind of getting ahead of myself. Mr. Best, first of all, his association with Mr. McKenzie I was able to find through the public record, and Mr. Kwidzinski's affidavit indicated going back...

25 THE COURT: I remember that.

30 MR. RANKING: ...some 13 years. Ms. Duncan was very, very informative. The friendship was considerably deeper than a professional friendship and in fact, Mr. McKenzie had traveled to Mr. Best's home and visited with his wife and I can't recall where that was, but it was - I believe it was South Korea or somewhere in - in Asia. And - and she spoke of the relationship and it was

8.
Submissions

5 clearly much closer than - than we initially
thought. But the reason frankly that we have not
released Mr. Best, has to do with the fact that he
was intimately involved through a company called
N.I.S. and the blogging, and rendered invoicing in
the blogging. And his wife Wam Pampagna, was also
intimately involved and in fact, rendered accounts
that were paid in the amount of some \$175,000. So
10 when we settled this, one of the concerns that I
discussed with my friend was, what is going to
happen with the Keltruth Blog and underground
Barbados and when is that going to raise it's ugly
head again? God forbid, hopefully never. But
there was that issue plus there was - because Mr.
Best was so intimately involved with Mr. McKenzie
15 in - in - in sitting in as the nominal plaintiff
for Nelson Barbados, would he in fact have very
germane evidence if compellable, to deal with the
action in Miami? So there is a backdrop, it's not
one of - of vindication or - or - we're not trying
20 to be vindictive. But there's knowledge that Mr.
Best has given - his association with the McKenzie
firm, and with Mr. McKenzie, and with the entire
forum shopping plan.

25 THE COURT: Yes and besides, I was thinking about
this morning with Mr. Best. His contempt is
contempt to the court. So no one, but no one, can
forgive that unless I do.

MR. RANKING: Right.

30 THE COURT: And it wouldn't - it would not be
something that I would agree to in any event, until
he properly appeared and I had his explanation and

9.
Submissions

had a full hearing on the matter. So, I'm not the least bit displeased about the way you're handling it.

5 MR. RANKING: If I could just turn, just because we're there, let me just turn to that paragraph so that you can see how we've - how we've dealt with it. The - the paragraph is paragraph three actually. It's the next paragraph...

THE COURT: All right.

10 MR. RANKING: ...where I indicate that, "PwC and the Cox Defendants confirm that payment of the above amounts satisfies all claims for costs in respect of the Action, against all respondents listed in paragraph 1 of the Further Further Amended Notice of Motion...including the Costs Motion", but then the important proviso, "except that PwC and the Cox Defendants do not release Mr. Donald Best (and shall be at liberty to pursue him) for the costs (respectively of \$50,632.90 and \$13,230.00) and contempt reflected in the order made by Justice Shaughnessy...", and we've attached your order as Schedule 'B' to the minutes.

15 THE COURT: Right.

MR. RANKING: So there could be no issue...

20 THE COURT: That's great.

25 MR. RANKING: ...whatsoever. And I should also say that the - the cost motion is attached as Schedule 'A'.

THE COURT: And I'm sorry?

30 MR. RANKING: The cost motion itself is attached as Schedule 'A'. So everything is there, so when we refer to the respondent's listed in paragraph one,

10.
Submissions

we can easily...

THE COURT: Fine.

MR. RANKING: ...have that for the court.

5 Paragraph four goes on to say, because they wanted
some assurance that we - we were not going to
pursue Mr. Best and what we were able to tell them
is that we do not currently have instructions to
pursue Mr. Best for the costs and contempt
reflected in the order and we do not currently
10 expect to obtain such instructions in the immediate
future. But such instructions may be forthcoming
in the future depending on the circumstances.

THE COURT: Well you also have my comments.

MR. RANKING: Yes.

15 THE COURT: That's my view and since it's my order
and it is contempt, I - it is - he is in contempt
of this court and he has an opportunity - had an
opportunity and I would still open the opportunity
to purge his contempt, but it requires attending
before me and I'm not - I don't know what I would
20 do because I'd - I'd have to wait until that
happens. But it certainly - a contempt order is
not, I don't believe, maybe both you gentlemen
could steer me otherwise, but I don't think you
have control over the contempt.

25 MR. RANKING: I totally agree.

THE COURT: It's an order of the court.

30 MR. RANKING: I totally agree and what I will do
and - and I should have thought of this earlier,
but in light of - in light of your observations
Your Honour, I will write to Mr. Best, through one
or - one of - through the post office boxes and I -

11.
Submissions

5 I will provide him with a copy of the Minutes of Settlement. I will inform him of the attendance today and I will indicate that - the comments that you've had and I will copy you and Mr. Silver with that correspondence.

THE COURT: All right.

10 MR. RANKING: Paragraph five, and this was an interesting paragraph because I said one of the preconditions and we went back and forth a lot on this, was I don't want Mr. Allard - and I should tell you Mr. Allard is a lawyer called to the bar of British Columbia in 1974. He practiced for two years in his own firm. He then set up - set up in private practice for two years, until '76. He then set up his own firm and practiced in B.C. until 15 1993. It was in 1993 that he took up residency in Barbados and then started to have interest in various different properties and got to know the Knox's. So that's the background. But what I find quite remarkable as well, he's a lawyer.

20 THE COURT: That's amazing.

MR. RANKING: He's now retired.

THE COURT: I'm astounded at that.

25 MR. RANKING: But he's a lawyer - he's a retired lawyer. But he is still a lawyer of the - of the B.C. bar. And in any event, this paragraph got its genesis because I said, I do not want to have - to be involved either directly or indirectly, if McKenzie has any further involvement. So Mr. McKenzie has to agree not to have any involvement whatsoever and Mr. Allard has to agree not to fund. 30 Regrettably I wasn't able to get that, to settle

12.
Submissions

5 this case. What I was able to get, which - is the assurance in paragraph five which is that, "Allard would not agree to fund any proceedings...against and/or involving PwC, its partners or related entities, in any jurisdiction other than the state of Florida concerning or related to Kingsland. If any proceedings or claims funded by Allard proceed in Florida against and/or involving PwC, Allard and PwC hereby agree, as a matter of contract, that the losing party shall indemnify and pay the reasonable attorney fees and disbursements of the prevailing party (to be agreed upon, or failing agreement, to be determined by the judge in Florida, following submissions by counsel for the parties). For greater certainty, the scale of costs that should be applied shall be akin to an Ontario award of costs on a substantial indemnity scale." That was my attempt to try to - to inject what I might say is reasonableness, into the conduct of the parties. I'm informed that in Florida there is - there are no similar cost consequences, that costs don't follow the event. So that, what I - while Mr. Allard has agreed that he - that he may fund, he has to fund in Florida. So we won't be going to Alaska or Cyprus. But if he does fund, the protection I was able to give PwC, is that the cost consequences of an Ontario action would apply, by way of contract. So that is the rational for - for that paragraph.

10
15
20
25
30 THE COURT: What about Mr. Silver's clients? It's not - is that coming up? Did you seek the same protection in Florida, or they're out of it and you

13.
Submissions

don't care?

5 MR. SILVER: No, neither. I - I addressed it in a different way because they're already in the litigation in Miami and so I addressed it through insisting on the filing of material but I'll speak to that.

THE COURT: Okay. Thank you. Go ahead, I'm sorry.

10 MR. RANKING: No, it's okay. Paragraph six is an acknowledgement that, "...Mr. Allard and the Responding Group acknowledge that nothing in this agreement constitutes attornment, and they accept that PwC contests the jurisdiction of the state of Florida...". Paragraph seven I think to be fair to my friend, I will let Mr. Silver speak to paragraph seven because Mr. Silver really was responsible for - for that paragraph. Paragraph eight goes on to deal with Mr. McKenzie and I - I don't know how you supervise this but I'm told that he will not be involved either directly or indirectly in any further claims, although he is entitled to appear as a witness in subsequent proceedings if he's properly subpoenaed.

15 THE COURT: Remind me to ask about - well I'll ask it. Is Mr. McKenzie now involved with the Law Society on a professional basis? Or do you know?

20 MR. RANKING: Well I can tell you this. Well I can tell you a number of things. First of all, when I got Ms. Duncan's affidavit, I was appalled. And within, I think I can fairly say, within a matter of days, if not hours, I had written to counsel for both Mr. McKenzie and the Crawford McKenzie firm and put them on notice that I expected them to

14.
Submissions

5
10
15
20
25
30

review the Rules of Professional Conduct and take appropriate steps which they considered, having regard to the rules. Because at that point in time, I was not - I did not feel it was an obligation that I had to report, but I thought it was important that I alert them to concerns and when I looked at it, the - and because the cross-examinations hadn't - hadn't yet taken place, I was unclear as to whether or not the rules, and I did look at the rules Your Honour, whether they obligated us to report Mr. McKenzie. I can tell you as an officer of the court that I do not know what happened as a consequence of that letter. But I can also tell you Your Honour, as an officer of the court, that I have taken it upon myself to speak to a number of my co-counsel and I certainly intend to draft a letter and my current intention, subject to the comments of my colleagues, is that the letter will be drafted by me, but it will be signed by all counsel that were involved in this case, if they share my view. This is a reportable matter that should be brought to the attention of the Law Society. If - and that's - that will happen within the next two to three weeks and I - I expect that I will deliver with that letter, my three factums that I filed in this case, together with an inventory and the transcripts and I will then obviously hear from the Law Society in due course as to whether or not they - they initiate an investigation. So that is what I intend to do. I think that I've been entirely candid with you. I have not spoken to all of my colleagues but I think

15.
Submissions

5
10
that what I wanted to do here, was - I think it's important if every counsel in this case - and it may change simply because some of the counsel were not that involved and they may not appreciate the gravity of what I believe to be very serious conduct. There may be that some of those counsel do not sign the letter because they don't feel that they are sufficiently informed to do that, but certainly I feel an obligation to report and I will be doing so with I know, with at least two other counsel.

THE COURT: I'm not surprised.

15
20
25
30
MR. RANKING: And I will say I've never done that and I don't take it lightly and - but I feel obliged and obligated I should say, to do it. And it's - I'll comment a little bit more about Mr. McKenzie's conduct but the short answer is, I will be taking those steps. Paragraph nine was really a belt and suspenders for me because I said I want a confirmation that if you're not agreeing not to sue - not to sue me, that you haven't given that similar assurance to anyone else. So Mr. Allard is still out there. He's agreed to do whatever. He's not given any assurance not to fund litigation against any of the other parties. And then the - the final paragraph and this goes to the confidentiality of which I spoke earlier Your Honour, is that the Minutes of Settlement and the actual facts of the settlement are not confidential. However, PwC and the Cox Defendants agree not to take any active steps to publicize the settlement - the Minutes of Settlement and its

16.
Submissions

5 terms. But the final phrase is very important, "in such a manner that would impugn Crawford or its partners." And I go back, Crawford is the successor firm, or its partners. There is no assurance whatsoever with respect to Mr. McKenzie.

MR. SILVER: Or Allard.

MR. RANKING: Or sorry?

MR. SILVER: Or Allard.

10 MR. RANKING: Or Mr. Allard, correct. Those are - I do have a number of other submissions but I think that it's more appropriate if you don't mind us jumping up and down...

THE COURT: That's fine.

15 MR. RANKING: ...to call upon Mr. Silver just to deal with paragraph seven, if I might.

20 MR. SILVER: Well I'll - I'll deal with paragraph seven, the context of just some brief remarks Your Honour. You will have appreciated because it's clear you - you appreciate not only the issues that you have to decide but the subtleties behind them. One of my clients is Kingsland, the company. And I act for the 86 percent shareholder of the company. Marjorie Know is the 14 percent shareholder and this Ontario litigation never got to a stage where any of those issues could be assessed because we were just talking about jurisdiction. And so moving away from this case, I act for clients that still are only 86 percent shareholders and have to deal with a 14 percent minority. This - this was just an incredible experience in so many ways and without getting into all of the details, and I know Mr. Ranking was going to comment on Jessica Duncan.

25

30

17.
Submissions

5
10
15
20
25
30

But when Jessica Duncan sat in the courtroom in February and heard what was going on and while she had some peripheral involvement before that, the light hit and she stepped to the line and assisted. In - through her affidavit, we got the dockets and the ledgers and we - and we could then examine the money flow and every penny came from this Mr. Peter Allard, directly or indirectly. And as Jerry - and as Mr. Ranking said, we got an opportunity to cross-examination and get into the details and in - and we're producing documents. But what appears to have happened and I think it's conclusive, that coming out of - it's exactly as we had submitted, and you had indicated in the jurisdiction motion, that there's a strong hint of forum shopping that might include Miami. Well what we've - what we've discovered was that coming out of the privy council decision in 2005, July 2005 and then the deal was completed with - the 86 percent was closed in December of 2005. That's exactly when Mr. McKenzie got involved, on behalf of Mr. Allard, who had loaned money to Marjorie Knox and took an interest in the outcome in Barbados. And they hatched a plan to move it off the island. It's as simple as that and I think the evidence is conclusive. As Mr. Ranking stated, it wasn't just Ontario. It was also Miami and they had considered other places. There were the meetings that I put into evidence. In 2006, Mr. McKenzie had claimed that he - he didn't get involved until sort of at the end of the year. But we proved that he had been meeting with Mr. Cox in the early part of 2006 - and seeing if

18.
Submissions

5 there could be a settlement with threats that if
there wasn't, there was going to be this great
global explosion. Well that's - that's exactly
what happened. That didn't settle the case and the
records show and these are the correspondence
files. We made sure to file compendiums of answers
to undertakings and other filings, all the trust
records. It shows that in late 2005 and 2006, they
were taking a multi-pronged approach to the fight.
10 One was clearly, move it off the island. Two was a
blogging strategy, just - I think there's about a
thousand hours of Mr. McKenzie's time docketed to
blogging. Nelson Barbados, this apparent
plaintiff, was really a client through N.I.S.
Nathan, which Mr. McKenzie, when I first asked him
15 about Nathan in his dockets, he said "Oh, it
doesn't ring a bell." It turns out that's a code
name for Donald Best and reflects all the
discussions that he - he was having. And the plan
included Miami. They met and retained lawyers, two
20 sets of lawyers. One to set up this trust document
that was signed in March of 2007 and that's the
genesis of the current litigation, which we'll deal
with in - in Miami. But it's all part of the same
plan. They were also contemplating anti-
25 racketeering and you know, aggressive commercial
litigation in Florida, which we never found out
why, but it was never launched. All part of a
plan. All confirmed in - in the lawyers records.
30 And so, as the negotiation developed, certain terms
were - were proposed for - by - by Pricewaterhouse
and by me. But what was clear was that my client's

19.
Submissions

5 interest was best served by making sure that this whole plan is exposed here through the filing of - of documents that are now part of a public record. And - and we'll deal with Miami in Miami. In fact, there's now a jurisdiction challenge being launched and it sort of has the hint of starting over, but it's hoped that - that we'll get to the finish line there a little bit quicker than here. So paragraph seven then, as Mr. Ranking teed up for me, is a paragraph that deals with ensuring that anything that came out of and still may come out of, the cross-examinations and answers to undertakings be treated by - as filed. In fact, we - this affidavit, you'll see on the back, was served yesterday. Unfortunate - it's like every file, but these discs were inspected in the middle of May, but these discs didn't become available to us until Friday afternoon, no fault really of anybody. That's a big job to - there are seven boxes - there are actually eight complete boxes of the lawyers correspondence files, plus additional documentation from other files. So it's a big job and it was delivered - we picked it up in - in Orillia on Friday. And therefore have to deal with it in this way and what we're requesting is that it be filed. I guess it has been, in advance of or - or at the same time as the Minutes of Settlement. And then paragraph seven deals with the preservation and maintenance of those files, and who gets access to them and on what terms. Because obviously we - we need to protect those files. And to the extent that we want to go in and look and find more

20.
Submissions

5
10
15
20
25
30

documentation, we're entitled to do that and get extra copies and have that treated as filed as well. That's what paragraph seven deals with and we've also got them to agree - the law firm to agree in cooperating and proving up the documents, if required, in Florida. So that's what paragraph seven is about. This - this cost motion really was about Mr. McKenzie's conduct and Mr. Allard's conduct. On behalf of my client, we're satisfied with the settlement that's reached. You should know that on my rough math, it may be of interest to you that there's approximately 1.7 being paid to Mr. Ranking - Mr. Ranking's client and mine. There were two - there was - that's in addition to \$265,000 that was already paid, \$250 approximately on the motion for directions and your cost endorsements. And then they appealed the motion for direction to Justice Howland, and paid about \$14,000 of costs. There's also Justice Ferguson - they sought leave to appeal and they paid some costs for that. And then I don't know what the settlements were with - there's the Chief Justice and related parties that Paul Schabas acted for. Adrian Lang acted for the First Caribbean Bank. David Bristow acted for that Cottle, Catford law firm and Philip Nicolls. Mr. Hansen acted for Glynn Bannister. And David Conklin followed Osler in acting for the company out in Alaska, VECO and Commonwealth.

THE COURT: Yes.

MR. SILVER: I don't know the numbers. I know what they put in for their bills of costs on a

21.
Submissions

5
substantial and full indemnity basis. My best
guess is if it's a dollar, it's about - it's got to
be about \$700,000 that they're paying to that group
collectively, and - which brings the total that
they're paying to about \$2.7 million dollars for
the cost of this exercise in forum shopping, proven
beyond any doubt. And so, those are the brief
comments that I make. I just want to thank the
court, the staff of the court, Mr. Ranking in
particular, for being such a pleasure to work with
on this file. It's not just the details of this
file that I'm so proud to have been involved in but
I act for clients that include the current Prime
Minster, the Attorney General. I think I've said
this to you before, not to put more pressure on
you, but there were a lot of eyes from far away...

10
15
THE COURT: Oh I felt that.

MR. SILVER: ...watching this and I'm proud to have
been involved in - in a result and - and I've got
to give thanks to the new counsel who came on - who
came on board because they assisted in not dragging
this out any further and putting an end to it. And
on behalf of all my clients, I thank you and the
staff and it's been a pleasure to appear before
you.

20
25
THE COURT: Thank you Mr. Silver.

MR. RANKING: I - I have a few - a few other
comments - some as those of my friend. I - I do
want to make just a few observations with respect
to Mr. McKenzie's conduct and I - I will say, I'm
not going to take you through the supplement - the
further supplementary factum. It's detailed - in -

22.
Submissions

5
10
15
20
25
30

in - in detail in there. But I do want to really juxtapose and make a couple of comments with respect to Mr. McKenzie because this is why I feel compelled to - to pick up on the point you said with respect to the Law Society. When my friend cross-examined Mr. McKenzie to start with, about his initial involvement, I had started it - we obviously were working collaboratively. And he said under oath that he had not become involved in the Kingsland matters prior to December of '06, or the fall of '06. He also said that because when he produced the accounts that you ordered to be produced, he produced them without the trust statements. He also produced his dockets that began in April of '07. All very conveniently done because that was going to be consistent with his position that things didn't start, that his involvement didn't start until the fall of '06. We now know all of that to have been a complete charade. A complete charade that ultimately was uncovered because of Ms. Jessica Duncan coming forward and hearing the submissions that we made before you in another courtroom in this courthouse in February. And this is of obvious concern to us. The other point that I have to focus on in particular, because I was in court when you asked the questions of Mr. McKenzie, and Mr. McKenzie represented on more than one occasion about his involvement with blogging. And I'm only going to refer you for your bench brief, to paragraph 65 of the supplementary factum. The ledgers disclose and I quote from the factum, "The ledgers disclose that

23.
Submissions

5
10
15
20
25
30

Mr. McKenzie in fact spent 922.6 hours and \$393,074.00 on blogging related activity, beginning in October, 2005." Now he has to this day denied, and I say that in paragraph 66, he has to this day denied to this day continues to stand by the statements in his previous affidavit. But in addition to that, we also know that Mr. Best through N.I.S. was involved in blogging and Mr. Best's wife was involved in blogging. And there are many things that I can overlook, but - but misrepresenting information to this court is not one of them and I simply felt compelled to bring that to your attention. And there's one other issue that I feel compelled to bring to your attention, and it has to do with conduct which I was - I've always felt uncomfortable about, I always go back to. And it's these Heaslet telephone calls that I - that I have dealt with at paragraph 61 and - 61, 62 and 63, not in any great detail. But it was always troubling to me that we had these security threats and you recall that I was able to retain Sharon Smith who spoke about those. But how did we have this surreptitious tape recording? And there were the two calls. But the one thing which - which Ms. Duncan did disclose was a series of emails and again for your bench brief, it's paragraph 62, where prior to the August 13th, the second call, Mr. McKenzie who'd said he never suggested taping, in fact wrote an email that said - significantly, on August 12, McKenzie wrote and said, "Shouldn't this be taped?" So you know and I regret, and I say this as well, I regret in some

24.
Submissions

5
10
15
20
25
30

respects that we settled this case. And I want Your Honour to also appreciate the dynamics that happened here. We were very happy to be in your courtroom Your Honour. We were very happy to be in your courtroom and I'm going to speak momentarily about our client's happiness to be in your courtroom because we knew that justice would be done. It is of considerable regret from my perspective that we were paid as much as we were because had they not been as reasonable as they were with new counsel and I share my friend's view, we would have had an appropriate judgment, that could have been used both for the Law Society and it could have been used and tendered as evidence in Florida. And I share that with you because one of the very serious issues that Mr. Silver and I debated and debated at length was the advantage of having a very well crafted judgment from His Honour Justice Shaughnessy, versus money. And we spend a long time debating that and at the end of the day, the money was simply so extraordinary that we of course, are here filing the Minutes of Settlement. But I did want you to be aware of that. I have spoken of Mr. McKenzie and taken you to a number of - of - of areas where I have regrettably had to impugn Mr. McKenzie's character and his reputation as a senior member of the Ontario bar. I won't say anything further about Mr. McKenzie, but if I'm going to comment on counsel, I do want to comment and single out two other counsel. And I'm fortunate not to be critical of these counsel, but rather to commend them. The first is Lawrence

25.
Submissions

5
10
15
20
25
30

Hansen. You may not remember Mr. Hansen but I was in Barbados with him - and I don't know Lawrence. I've never had a case on with him other than this case. But I was very concerned about the representations that had been made over the directions motions by Mr. McKenzie with respect to security and all of these issues. And we were just chit chatting and it turned out that Mr. Hansen was the only lawyer that was staying at Mr. McKenzie's hotel. And through our idle conversation, he indicated to me that you know, security didn't seem to be a big issue for him. And as I reflected on that and as the case continued and security concerns continued to be raised, I went back to Mr. Hansen and I said, "Would you be prepared to file an affidavit?" I was - I didn't do that lightly but I was very concerned that an officer of the court may have misrepresented matters. And I want to commend Mr. Hansen formally before you, because he recognized his obligation as an officer of the court and he stepped up to my request and he filed the affidavit, which put into issue, whether or not there were any legitimate concerns. And he in fact filed a reply affidavit as well. He didn't need to do that and I therefore felt it appropriate in my closing submissions, to recognize his efforts and to thank him formally before you. The second lawyer is Jessica Duncan. She had referred in her cross-examination, and I don't know that we've put this in the factum, to Mr. McKenzie as the 500 pound gorilla. That was her - her comment. And whatever criticisms I have for Mr. McKenzie, I have

26.
Submissions

5 to recognize and commend Ms. Duncan, as a complete
counterpart to Mr. McKenzie's conduct. In
extraordinarily difficult circumstances, she stood
up and she confronted her senior partner for many
years, and she did so to ensure that the court and
the parties were not misled. And I'm sure it was
neither pleasant or easy. Like Mr. Hansen and in
furtherance of her obligation to the court and the
profession, she did what was right. And I will say
10 having lived this with Mr. Silver and seeing and
writing letters and asking for stuff, she took
considerable time for which she was not getting
paid, to go through reams of files, prepared a
detailed affidavit with two volumes of supporting
material and she was then cross-examined and came
15 to Toronto for those cross-examinations for three
days. Unquestionably, her evidence is what broke
the case and gave us the evidence that we can now
say, uncontrovertibly, allowed us to get the
settlements that we got. And I therefore say on
20 the one hand how - how unfortunate and - and
distasteful it is to speak of Mr. McKenzie, but
conversely I'm very proud to be a member of the bar
with Ms. Duncan. Finally I would be remiss if I
didn't recognize Jackie Traviss. She has made
25 filing and getting reams and reams of material that
we would have rather not filed, filed through
circumstances where - with her health failing and
she's come back and is terrific. If we could steal
her in Toronto, we'd do that.

30 THE COURT: You haven't got a chance at that.

MR. RANKING: And also your court staff, who have

27.
Submissions

5 always been wonderful to deal with. And finally
Your Honour, last but not least, we wish to thank
you. I - I speak on behalf of those that aren't
here and I echo Mr. Silver's comments. I speak on
behalf of PwC. Our client never thought there was
a lot of merit to this but it's been involved in a
lot of lawsuits in a lot of different places. The
Caribbean firm hasn't, but clearly PwC has. And
the Ontario justice system was on trial. And Mr.
10 Silver very eloquently and accurately indicated how
his clients feel and I wish to echo those comments
and to say that the PwC partners were all looking
at this case and they were all very impressed with
Ontario and they were very comfortable to be here
and they don't have the same comfort with the court
15 in Miami, I can tell you that. So I just simply
want to say again, thank you. I also want to thank
Mr. Silver. Mr. Silver and I had never had a case
on before, and it's been a real pleasure to work
with Mr. Silver. But most importantly I wanted to
20 thank the court because I really think that we have
accomplished a - a good result but would not have
done it Your Honour, without your very helpful
guidance and your many hours of work both hearing
us and perhaps hearing us whinge on far longer than
25 you would have liked and then retiring and writing
very persuasive reasons that permitted us to get
there. Because I think I can say that one of the
reasons that the money came up as much as it did,
was the - the parties who did not act quite
30 appropriately did not want to see your pen go back
to work again in terms of the judgment you may have

28.
Submissions

rendered. So with that, I - I apologize. I've perhaps gone longer than I should have but I'm very grateful. Thank you Your Honour.

5 THE COURT: Just let me make some brief comments as well on the record and madam reporter, I think I want to order this transcript. I don't normally, but this is an exceptional case with exceptional counsel. You know, I sent to Justice McEwen just two decisions, one on jurisdiction and one on security just so he'd have the background information going into the pre-trial. And he called me back and he said, "You know, this reads like a John Grisham novel." And I can't say I disagreed with him. Frankly I got tired of Grisham's novels after reading seven or eight of them because I thought it just became too fantastic. But it - this case proved to me that the - the truth is often stranger than fiction. I obviously had not decided anything in this matter of costs. And so I'm not saying what my decision would have been if I had decided the issue of costs. And my comments are to be taken on that basis but it's sort of bitter sweet, the result here. The sweet result is yes, I - I did feel the system of justice was on trial and - and that's very unnerving. I've been a judge for 13 years but it's - in a system that you love and are dedicated to, it's startling to think that it could be sabotaged and hi-jacked in a manner that would reflect so terribly on our system of justice and on our democracy. I - it's - it's bitter too. As I say, I did not decide any issue. I'm - you're

10

15

20

25

30

29.
Submissions

5
10
15
20
25
30

quite right, I didn't want to put the pen to paper but if I had to I would. I would have to do what I have to do and the oath I've taken is to administer justice fairly and equitably, but detailing the facts as I saw them. And I have to tell you, I gave a speech a few years ago here at the Durham bar and I said it and I meant it, right from the bottom of my heart. Lawyers are my heroes and frankly, having Schabas, Ranking, Silver and the other counsel, but most noticeably the three that I mentioned, in front of me, that is why lawyers are my heroes. You were so well organized, so committed, so reasonable, so well prepared and presented the case so clearly that you'd helped me immeasurably. And I frankly stood, quietly stood in awe of just how you conducted this. I was so pleased and frankly, I'm honoured by your - by both of your presence, Mr. Ranking, Mr. Silver. Today, but throughout the case, because frankly you were the leaders. You took the ball and you led this through and you coordinated the other counsel in a way that I will use as a precedent in any other cases that I have to handle, hopefully none as complicated as this. It's also bitter because - because lawyers are my heroes, I - I find no satisfaction frankly in - in having to write about the conduct of a lawyer and frankly the reply material as it started coming in, and the Jessica Duncan affidavit, just knocked me off my feet. I - to be candid with you, Mr. Allard - I didn't speak about Mr. Allard because I - I speak about evidence. But did I think that Mr. Allard had a

30.
Submissions

pivotal role in this throughout the case? I did. But I wasn't going to state that or make any comments because the evidence had to take me there. And obviously appellate review would - would suggest that judges don't make comments or idle comments unless it's backed up by evidence. But it - it frankly disheartens me to see a lawyer who sells his soul to the devil, who for the sake of the almighty dollar, sacrificed a career. It is so sad and I was finding no joy in having to write a decision on this. I would have to do it if required. And I would do it. But I found no joy in it whatsoever. But I - overall, it's the type of case that didn't - couldn't be shortened in any other way. It had to go out to a point to where I thought frankly resolution was in - in the works. There was obviously policies of insurance that were coming up and available. There were now pockets with the addition of Peter Allard into the proceedings. I thought that the moment had come where the parties deserved the justice. And you know, it's the parties too that gave me great concern. I - did any, I'm sure you have, but as a judge I kept putting myself into the shoes, not just because I'm in the judiciary, not just the Chief Justice, but all of those other parties. Sitting there, day after day, the costs mounting to astronomical levels. I mean, it would shock me. I personally would have to declare bankruptcy. I couldn't afford to litigate this type of case or - and be a defendant in it. And I grew increasingly concerned about them throughout and - and so I hope

31.
Submissions

5
10
15
you forgive me but at the end, finally near - in the latter few weeks, I just decided that you know, enough is enough. These parties have endured uncertainty, they've endured having to instruct lawyers on - over three years and - and were frankly, I think, put in a very, very inappropriate position throughout. And I - so my heart went out to them. I thought frankly, they - this is not healthy for anyone psychologically, emotionally, or any other way. And financially, it's a heartbreak. And so, I'm very pleased it's over. But it's over because of very, very fine counsel who are involved. You are, and I've said this to my fellow judges, I - I had the great fortune of having the leaders of the bar present a case before me and they've presented it in a magnificent fashion. So I don't deserve thanks. The thanks goes to you and your colleagues. Now, with that said, what kind of endorsement do I put down here?

20
MR. RANKING: I think the easiest way to deal with it Your Honour, is if you could endorse that the cost motion, I think to be fair to - the cost motion has settled with all parties.

THE COURT: All right. Just a minute. Yes?

25
MR. RANKING: And I think it would be appropriate to say that the - the - the settlement of....

THE COURT: The Minutes of Settlement are filed.

30
MR. RANKING: Yes, well I was going to say, the settlement with respect to the clients of Mr. Ranking and Mr. Silver...

THE COURT: Right.

MR. RANKING: ...are - are not confidential...

32.
Submissions

THE COURT: The settlement - yes?

MR. RANKING: ...and are embodied in the Minutes of Settlement executed June 7, 2010, filed.

THE COURT: What was that date again?

MR. RANKING: June 7, 2010, Your Honour.
Yesterday's date.

THE COURT: Yes.

MR. RANKING: I would also ask Your Honour, if you could also say, in accordance with the Minutes of Settlement, the affidavit of Jessica Zagar, Z-A-G-A-R, and attached CD's, has also been filed with the court.

MR. SILVER: Yes, I think there's one other - I think there's one other point Your Honour. And it's also in accordance with the Minutes of Settlement, paragraph seven, that it's contemplated that there may be subsequent filings and we're going to check the record. There's one affidavit of Mr. McKenzie in response to Jessica Duncan's. I'm not sure if it's filed or not, but if it isn't, we're going to file it. But - but maybe it could also say, also in accordance with the Minutes of Settlement, further filings are contemplated and should be allowed. I mean, I don't know. That might help that it's in the endorsement, if we run into a problem filing anything, Jackie will certainly understand that. That would be it I think.

MR. RANKING: Yes. The only other point Your Honour, I don't know that this is clearly in your discretion, is to whether you wish to make any comment with respect to Mr. Best's contempt. I - I

33.
Submissions

will write that letter but I'm not sure that you need to have it in your endorsement.

THE COURT: No.

MR. RANKING: But...

THE COURT: I...

MR. RANKING: ...that's the only other....

THE COURT: ...I don't think it is because it's - you didn't try to take away my powers. You didn't try to deal with the - my own order of contempt. So, it's - it's alive.

MR. RANKING: Right.

THE COURT: And I don't think anything has to be said in that regard.

MR. RANKING: Great.

THE COURT: Is there anything else gentlemen?

MR. RANKING: That's all Your Honour.

THE COURT: All right. Let me just read it over before I sign it. "Cost motion has settled for all parties. The settlement for Mr. Ranking's and Mr. Silver's clients are not confidential and are embodied in the Minutes of Settlement executed June 7, 2010, filed. In accordance with the Minutes of Settlement, the affidavit of Jessica Zagar, sworn June 7, 2010 and attached CD's, are also filed with the court. Also, in accordance with the Minutes of Settlement, further material are to permitted to be filed."

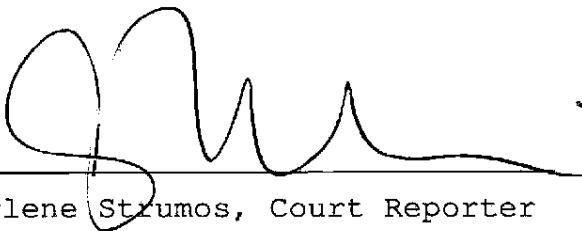
M A T T E R C O N C L U D E D

* * * * *

CERTIFICATE OF TRANSCRIPT
EVIDENCE ACT, SUBSECTION 5 (2)

5 I, Charlene Strumos, certify that this document is a true
and accurate transcript to the best of my skill and
ability, of the recording of Nelson Barbados Group Ltd. v.
Cox et al, in the Superior Court of Justice, held at 150
10 Bond Street in Oshawa, on June 8, 2010, taken from
recordings No. 2812-207-400760-20100608-0932, which has
been certified in Form 1.

15 June 21, 2010



Charlene Strumos, Court Reporter

20

25

30