

2
3 ONTARIO

4 SUPERIOR COURT OF JUSTICE

5 B E T W E E N:

6 NELSON BARBADOS GROUP LTD.

7 Plaintiff

8 - and -

9
10 RICHARD IVAN COX, GERARD COX, ALAN COX, PHILIP VERNON NICHOLLS,
11 ERIC ASHBY BENTHAM DEANE, OWEN BASIL KEITH DEANE, MARJORIE ILMA
12 KNOX, DAVID SIMMONS, ELNETH KENTISH, GLYNE BANNISTER, GLYNE B.
13 BANNISTER, PHILIP GREAVES, a.k.a. PHILP GREAVES, GITTENS CLYDE
14 TURNEY, R.G. MANDEVILLVE & CO. COTTLE, CATFORD & CO., KEBLE
15 WORRELL LTD, ERIC LAIN STEWART DEANE, ESTATE OF COLIN DEANE LEE
16 DEAN, ERRIE DEANE, KEITH DEANE, MALCOLM DEANE, LIONEL NURSE,
17 LEONARD NURSE, EDWARD BAYLEY, FRANCIS DEHER, DAVID SHOREY, OWEN
18 SEYMOUR ARTHUR, MARK CUMMINS, GRAHAM BROWN, BRIAN EDWARD
19 TURNER, G.S. BROWN ASSOCIATES LIMITED, GOLF BARBADOS INC.,
20 KINGSLAND ESTATES LIMITED, CLASSIC INVESTMENTS LIMITED,
21 THORNBROOK INTERNATIONAL CONSULTANTS INC., THORNBROOK
22 INTERNATIONAL INC. S.B.G. DEVELOPMENT CORPORATION, THE
23 BARABADOS AGRICULTURAL CREDIT TRUST, PHOENIX ARTISTS MANAGEMENT
24 LIMITED, DAVID C. SHOREY AND COMPANY, C. SHOREY AND COMPANY
25 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, cob as LIFE OF BARBADOS HOLDINGS,
LIFE O BARBADOS LIMITED, DAVID CARMICHAEL SHOREY,
PRICewaterhouseCOOPERS, EAST CARRIBEAN FIRM, VECO CORPORATION,
COMMONWEALTH CONSTRUCTION CANADA LTD. AND COMMONWEALTH
CONSTRUCTION, INC.

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1 --- A SHORT BREAK

2 BY MR. RANKING:

3 1088 Q. Mr. McKenzie, I have passed across to you
4 the first volume of your motion record of December 3rd.
5 Before I ask you questions, I am also passing across a
6 letter dated November 19th to all counsel. I take it
7 that this was the letter by which you served the two
8 volume motion record, Volume 1 of which I just passed
9 across to you?

10 A. It looks to me like Stacey Ball sent
11 Volumes 1 and 2 to all of these lawyers, yes.

12 1089 Q. All right, if we could mark that as the
13 next exhibit, that will be Exhibit No. 18 and Ms. Ball's
14 letter dated November 19th, 2007 serving the two volume
15 motion record.

16

17 --- EXHIBIT NO. 18: Vol. 1 Motion Record, Letter from
18 S. Ball dated November 19, 2007

19 BY MR. RANKING:

20 1090 Q. Now, I have put before you the first
21 volume, and I have opened up the transcript of the
22 second conversation between Peter Simmons and Stuart
23 Heaslet on August 13th to assist your recollection of
24 matters. You will recall that I examined you previously
25 on the call that took place on August 10th. Did you

1 speak with Mr. Heaslet with respect to his taping this
2 second call on August 13th?

3 A. Yes.

4 1091 Q. When did you speak to him?

5 A. You will have to refresh my memory. What
6 is the date he swore the affidavit?

7 1092 Q. He swore his affidavit...

8 A. Mr. Heaslet swore an affidavit, so I
9 would have talked to him about it in that period.

10 1093 Q. Mr. Heaslet swore his affidavit, if I am
11 not mistaken, on September 12th. So it is your evidence
12 that you spoke to Mr. Heaslet about the telephone call
13 in connection with him swearing his affidavit on
14 September 12th?

15 A. Yes, I did.

16 1094 Q. Did you speak to him at any time prior to
17 September 12th with respect to the call he made to
18 Mr. Simmons on August 13th?

19 A. I don't recall.

20 1095 Q. Do you recall discussing the fact that
21 Mr. Heaslet was going to call Mr. Simmons a second time
22 before Mr. Heaslet placed the call on August 13th?

23 A. No.

24 1096 Q. You did not. Am I correct?

25 A. I said no.

1 1097 Q. Right. So I take it if you didn't
2 discuss the call that you had no discussion with Mr.
3 Heaslet that the second call he was proposing to make to
4 Mr. Simmons would be transcribed?

5 A. I was aware that it had been transcribed
6 probably around the time that I received the transcript.
7 I think there was disks of the call attached.

8 1098 Q. That wasn't my question. My question
9 was, before Mr. Heaslet made his second call on
10 August 13th to Mr. Simmons, did you discuss with him the
11 transcription of the second call?

12 A. No.

13 1099 Q. And we established that Ms. Sonny Ware
14 reviewed the transcript of the first call on
15 August 12th. Do you know when you received this
16 transcript that has been produced as an exhibit to
17 Ms. Ball's affidavit under Exhibit C from Mr. Heaslet?

18 A. I don't think I got it from Mr. Heaslet.
19 I think my office presented it to me but...

20 1100 Q. Do you know when your office got it?

21 A. No.

22 1101 Q. Do you know who in your office got it?

23 A. Stacey Ball was in charge of the file, so
24 by default I say whatever came in on that file would
25 have found its way to her.

1 1102 Q. Could you make inquiries of Ms. Ball and
2 let us know when you received the second transcript,
3 being the transcript of August 13th?

4 U/T MR. DEWART: Yes.

5 MR. RANKING: Could you also make inquiries of
6 Mr. Ball and Ms. Ware as to whether there was a
7 cover e-mail from Mr. Heaslet with respect to
8 the transcript?

9 MR. DEWART: I thought I heard the witness say
10 something about a disk, which suggests to me it
11 wasn't sent by e-mail.

12 MR. RANKING: That's fair. I am just
13 interested in whether there was a cover letter
14 or communication, Mr. Dewart.

15 U/T MR. DEWART: Fair enough. "Yes" is the
16 answer. Just let me make a note of it.

17 MR. RANKING: Thank you.

18 MR. DEWART: I have it written down.

19 BY MR. RANKING:

20 1103 Q. Do you have any knowledge, information or
21 belief how Mr. Heaslet came to make these two calls to
22 Mr. Simmons from Peter Allard's condominium in
23 Vancouver?

24 MR. DEWART: Didn't we cover that at length on
25 Thursday?

1 MR. RANKING: It was Wednesday. I don't think
2 I asked that question. I asked whether he had
3 any discussions with respect to how he came to
4 be in Mr. Allard's condominium and he indicated
5 he had not.

6 MR. DEWART: Sorry...

7 MR. RANKING: Mr. Dewart, this is the
8 difference. Mr. McKenzie, I believe has given
9 evidence that he did not discuss the calls with
10 Mr. Heaslet, or their taping before they were
11 made.

12 MR. DEWART: Right.

13 MR. RANKING: I am now asking the question does
14 Mr. McKenzie have any knowledge, information or
15 belief as to how Mr. Heaslet came to make the
16 calls from Mr. Allard's condominium.

17 MR. DEWART: I thought you had also canvassed
18 that but rather than use up time arguing about
19 it, just go ahead and answer it and perhaps he
20 is answering for a second time. Go ahead.

21 THE DEPONENT: I think I have lost you but...

22 MR. DEWART: Repeat the question. Go ahead.

23 I'll shut up.

24 BY MR. RANKING:

25 1104 Q. Do you have any knowledge, information or

1 belief as to how Mr. Heaslet came to tape the calls with
2 Mr. Simmons from Mr. Allard's condominium in Vancouver?

3 A. He gave me that information.

4 MR. SILVER: What was that?

5 MR. DEWART: "He gave me that information" was
6 the answer.

7 BY MR. RANKING:

8 1105 Q. When did he give you that information?

9 A. There is an e-mail which we looked at the
10 other day, an interview with him to prepare his
11 affidavit. That is the best I can do for you. I
12 presume it would be some time in that period.

13 1106 Q. I am not asking you to tell me if you
14 knew that he taped the calls from Mr. Allard's
15 condominium, Mr. McKenzie. What I asking you is did
16 Mr. Heaslet discuss with you why he taped the calls from
17 Mr. Allard's condominium in Vancouver?

18 A. This is recollection. It was along the
19 lines of "Why me? Why am I in the middle of this?"

20 1107 Q. What did you understand him to mean by
21 that?

22 A. Well, exactly what he said. He is not
23 that kind of guy. Why was he picked to relay this kind
24 of message to me. That is all.

25 1108 Q. But my question, sir, related to why the

1 taping of the conversations took place from Mr. Allard's
2 condominium in Vancouver. Did you discuss that with
3 Mr. Heaslet?

4 A. I had no idea. I don't know where they
5 were taped or if they were taped in a condominium, why
6 that location was chosen, if that is your question.

7 1109 Q. Well, you do know they were taped in Mr.
8 Allard's condominium because Mr. Heaslet told you that.

9 A. That's what he told me.

10 1110 Q. What I am asking, and I will just ask it
11 one last time and I will move on, it is your evidence
12 that you have no knowledge, information and belief as to
13 why it is that Mr. Heaslet taped these calls from a
14 condominium in Vancouver. Is that your evidence?

15 A. I can't add anything to what I have said.

16 1111 Q. All right, now, I have been assuming for
17 the purpose of my questions that when I am asking if you
18 have any knowledge, information or belief that that
19 applies equally to other partners or staff at your
20 office. Is that a fair assumption for me to make?

21 A. Nobody else would know what is going on
22 in this lawsuit, except Stacey who kept track of stuff.
23 She is a law clerk. You have law clerks. You
24 understand what I'm saying.

25 1112 Q. But certainly Mr. Heaslet did not

1 disclose to her any details about making calls to Peter
2 Simmons or anything about the essence of which I have
3 been asking you questions today.

4 A. That's not what they do. They wouldn't
5 talk to people, well, I shouldn't say that either but...

6 1113 Q. So I'm clear on your evidence then, that
7 with respect to the both August 10th call and the August
8 13th call, the decision to make the call to Peter
9 Simmons, to tape the call and to initiate the calls from
10 Mr. Allard's condominium, were entirely the decision of
11 Mr. Heaslet, is that correct?

12 A. Not my decision.

13 1114 Q. Now, we have produced and marked as
14 Exhibit No. 10 the brief of accounts. If you have got
15 an extra copy, good...

16 MS. MORSE: I do.

17 BY MR. RANKING:

18 1115 Q. If I could ask you to put that brief
19 before you, I am going to ask you a number of questions.
20 First of all, before turning to Exhibit 10, I wrote to
21 Mr. Dewart by letter dated February 1st with respect to
22 certain accounts that were missing and those accounts
23 related to four specific time frames and Mr. Dewart
24 wrote back to me on the 2nd of February indicating that
25 we have received all of accounts and they have now been

1 put forth in the document being marked as Exhibit 10.
2 The first account that you will see under tab 1 is an
3 account dated April 20th. We know that the Statement of
4 Claim in this case was issued on the 9th of February,
5 2007. Can you tell me, sir, why accounts have not been
6 produced prior to the first docket entry on the April
7 20th account of April 2nd, 2007?

8 A. All I can tell you is that I asked my
9 office, former office now, to dig out every account on
10 this file. They gave me some stuff. I said: "That
11 doesn't look like all of it. Look harder." They gave
12 me more. I still said etc. and what you have is the
13 best they have got as far as I understand. That is all
14 I can tell you.

15 1116 Q. With whom were you making inquiries to
16 have these accounts produced?

17 A. Stacey Ball.

18 1117 Q. Did you bring to her attention the fact
19 that there were accounts that I have certainly
20 identified in Exhibit 11 to be missing?

21 A. I said: "It doesn't look like they are
22 all here. Look harder".

23 1118 Q. Yes. What did she say to you?

24 A. Yes.

25 1119 Q. She agreed there were accounts missing?

1 A. No, she said "I'll look harder".

2 1120 Q. As a consequence of her search was she
3 able to locate any further documents?

4 A. I have produced everything. I don't
5 think she has withheld any and...

6 1121 Q. Do you know the individuals to whom she
7 made inquiries?

8 A. Last I heard there is a lady that is,
9 does these things, Julie Jones, and somewhere there I
10 got a note from her that said along the lines they have
11 been purged, but she is newer and, you know, "I would
12 have not done it that way" or something...

13 1122 Q. Do you have a copy of that note?

14 MR. DEWART: That note may be privileged
15 insofar as I'm concerned. It may be part of a
16 litigation privilege on this motion, but I
17 don't want to be accused of coaching the
18 witness. My understanding, and you tell me if
19 I am right or wrong, my understanding is that
20 all of the paper accounts that the firm has and
21 that we produced to you, there was an attempt
22 the print them again, print the missing ones
23 from the server and when the accounts were
24 rendered and posted they somehow got purged
25 from the server so they couldn't be reprinted.

1 THE DEPONENT: That sounds like about what I...

2 MR. DEWART: That is my understanding.

3 THE DEPONENT: They looked as hard as they
4 possibly could. I was, don't think, I was
5 adamant.

6 MR. DEWART: Is what I just said correct as far
7 as you understand?

8 THE DEPONENT: That sounds about right.

9 MR. DEWART: Now, wait for the next question.

10 BY MR. RANKING:

11 1123 Q. Who was it that was asked to print
12 electronic copies of the accounts who supposedly then
13 had those accounts purged?

14 MR. DEWART: No, no, no. They were purged when
15 they were posted originally.

16 THE DEPONENT: They don't exist any more. I
17 don't even know what "purged" means. "Get the
18 darn accounts" I said a number of times and
19 they have done it and that is all we get.

20 MR. DEWART: They weren't purged after you
21 asked for them, Mr. Ranking, that would be bold
22 on our part. My understanding is they were
23 purged when they were originally posted, so for
24 the pre April, '07 accounts, they would be
25 purged at some point in early 2007.

1 MR. RANKING: Is there any evidence from the
2 computer to indicate that is the case?

3 MR. DEWART: I have no idea.

4 MR. RANKING: Would you make inquiries?

5 MR. DEWART: What would the inquiry be?

6 BY MR. RANKING:

7 1124 Q. I take it you have, where were the
8 accounts actually physically located?

9 A. Sorry, the paper?

10 1125 Q. Yes.

11 A. Stacey Ball's file. I mean there is,
12 they do what they do.

13 1126 Q. But is there also not a duplicate copy of
14 the account that is maintained for the purposes of the
15 Law Society with your accounting department?

16 A. Way out of my league now.

17 1127 Q. Because it is my understanding that you
18 have to retain accounts for seven years, both for GST
19 audits and the Law Society?

20 MR. DEWART: I am not sure that the latter is
21 correct, but in any event...

22 MR. RANKING: Let's leave it here. Would you
23 make inquiries...

24 MR. DEWART: They have already been made. They
25 have been made. I tell you the inquiries have

1 been made. There was an order requiring the
2 witness to produce, among other things, all of
3 the accounts and diligent efforts were made to
4 get them and there are no further inquiries
5 which can be made.

6 BY MR. RANKING:

7 1128 Q. I just want to make sure and if you are
8 telling me, of course I take your word on it,
9 Mr. Dewart, but have inquiries been made of the
10 accounting department in addition to the law clerk and
11 people directly involved in the file?

12 A. Yes.

13 1129 Q. All right. If the accounts themselves no
14 longer exist, I take it that dockets were maintained by
15 the various time keepers? That was a question.

16 A. I don't mean to be cute. What is a "time
17 keeper"?

18 MR. DEWART: A lawyer or clerk working on the
19 file.

20 THE DEPONENT: They enter them into...

21 BY MR. RANKING:

22 1130 Q. How are their dockets maintained? Are
23 they maintained manually or electronically?

24 A. I think they just post them on a
25 computer, don't they?

1 1131 Q. I don't know what your practice is at
2 your office. That is why I am asking the question.

3 A. They all have computers and they are
4 supposed to be docketing their work and they do because
5 you get it at the other end when the account gets
6 printed out.

7 1132 Q. What I would like to know, while the
8 accounts may have been purged...

9 U/T MR. DEWART: I will undertake to ask Stacey
10 Ball if there are paper or other versions of
11 docket entries before they were entered into PC
12 Law.

13 MR. RANKING: Thank you.

14 MR. SILVER: Does that include electronic
15 version, paper or other version?

16 MR. DEWART: No, the electronic version will be
17 the one in PC Law.

18 MR. SILVER: I don't know what that means. If
19 somebody docketed a file, there might be an
20 electronic record of their docket if the
21 account got purged, notwithstanding that the
22 account got purged so, the inquiry is to
23 produce manual or electronic dockets to the
24 file. I don't know how manual comes up because
25 Mr. McKenzie said it is all in computers.

1 U/T MR. DEWART: Well, but Mr. Ranking was
2 inquiring, fairly enough I thought, he wanted
3 to satisfy himself that there may be a written
4 document. I am going to undertake to ask Ms.
5 Ball if she can produce the original docket
6 entries for the periods for which the accounts
7 are missing.

8 MR. RANKING: Thank you.

9 MR. DEWART: Let me just get it down.

10 BY MR. RANKING:

11 1133 Q. Do you recall, Mr. McKenzie, when you and
12 your colleagues started docketing time to this file?
13 Was it in or about the fall of 2006 when you signed the
14 retainer agreement?

15 A. Well, it would be later on. I mean the
16 retainer agreement, then somewhere along the line I
17 would get back there and say "Open a file" and I guess
18 that is when they start keeping track.

19 1134 Q. Would you make inquiries and produce your
20 opening account form for this file?

21 U/T MR. DEWART: Yes.

22 THE DEPONENT: I don't think, I don't know if
23 such exists.

24 MR. DEWART: Premised on obviously, the answer
25 to the undertaking might be...

1 MR. RANKING: Let me just ask you to turn to
2 tab 1. There is a file number that is
3 referenced at that tab, and it has the moniker
4 "bmc" in small letters, "568". Do you see
5 that?

6 THE DEPONENT: I do.

7 BY MR. RANKING:

8 1135 Q. I take it that was the file number that
9 was assigned to this particular piece of litigation,
10 correct?

11 A. I can't disagree with you.

12 1136 Q. What does "bmc" stand for?

13 A. Bill McKenzie. I think the files that I
14 open start with "BM".

15 1137 Q. Yes and if you have to open a file and it
16 is assigned a number, I suggest there is a piece of
17 paper that is filled out and signed or not signed to
18 open the file.

19 U/T MR. DEWART: I have undertaken to look for
20 that. That is not a foregone collusion. You
21 can open it directly on PC Law without creating
22 a piece of paper.

23 MR. RANKING: I take that. That is a fair
24 comment.

25 U/T MR. DEWART: I will undertake to have Ms. Ball

1 search for and produce the form, if we have it.

2 MR. RANKING: Thank you.

3 BY MR. RANKING:

4 1138 Q. Is this the only file to which docketts
5 were posted with respect to the subject matter of the
6 Nelson Barbados Group litigation?

7 A. There is only one file.

8 1139 Q. I am assuming that, before I start asking
9 questions on the accounts, that to the best of your
10 knowledge, information and belief that the entries that
11 are set forth in the statement of account are true and
12 accurate?

13 A. They do their best.

14 1140 Q. One last question. With respect to these
15 accounts that were produced, were these made from paper
16 copies or were these printed from electronic copies,
17 "these accounts" being the ones that were set forth in
18 Exhibit 10?

19 MR. DEWART: The ones that were provided to
20 you.

21 THE DEPONENT: The ones that are signed were
22 paper. Once the paper gets spit out they are
23 paper. That is it.

24 BY MR. RANKING:

25 1141 Q. I take it that these accounts are in the

1 same form as they were delivered to the client?

2 A. I have no reason to believe otherwise.
3 Nobody has told me otherwise. That is ones with the
4 signatures on them, by the way. I think there are a
5 couple there where they thought they couldn't find them,
6 so they found something that had no signature on it. I
7 would not want an account to go out that wasn't signed.
8 I suppose it could happen.

9 1142 Q. So your evidence on that point, to the
10 extent that you were unable to find a hard copy, that it
11 was then printed and produced to your counsel, that
12 there would not be a signed copy in Exhibit No. 10, is
13 that fair? Actually, looking at these accounts most of
14 them appear to be signed.

15 A. The signed accounts I can say are the
16 real ones, because a signature wouldn't go on there
17 without me signing it.

18 1143 Q. So if I can just ask you to turn to tab
19 1, these accounts, I take it, were rendered to Nelson
20 Barbados and left at your reception?

21 A. That would be correct.

22 1144 Q. Just dealing with the payment, the
23 account of April 20th in the amount of \$27,000, I take
24 it that was paid?

25 A. I imagine it was, yes.

1 1145 Q. And can you tell me who paid the account?

2 A. The client would pay the account.

3 1146 Q. That's Nelson Barbados Group Ltd.?

4 A. Yes.

5 1147 Q. How did Nelson Barbados Group pay the
6 account?

7 A. I was told they were done by wire.

8 1148 Q. Do you know the wire details, terms of
9 where the funds came from in order to pay the accounts?

10 A. I just know funds got wired into the
11 account. In other words, I got paid.

12 1149 Q. I take it you, I haven't done an exacting
13 calculation, but I think the total aggregate of these
14 accounts is something in the area of about a million
15 dollars. That wouldn't surprise you?

16 A. I will agree that there was a total, I
17 mean million dollars more or less sounds about.

18 1150 Q. Do you have a summary of the amounts
19 billed and collected? While you may not have copies of
20 all of the accounts, do you have summary of the amounts
21 billed and collected with respect to this litigation?

22 A. I don't.

23 1151 Q. Would that not be shown in your system,
24 Mr. McKenzie?

25 A. Every now and then I know how much I

1 billed, is the information that comes to me. I suppose
2 if one doesn't pay an account I get yelled at. That is
3 what I do.

4 1152 Q. But in your computer system you would
5 have a summary by year of the amounts named to the
6 Nelson Barbados file, number bmc568, correct?

7 A. I don't know.

8 1153 Q. Would you make inquiries and advise?

9 MR. DEWART: Sorry. How is that relevant?

10 MR. RANKING: Because one of the issues which I
11 think I am going to hear from Mr. Dewart at
12 some point later this month is that our
13 accounts were excessive. One of the tests that
14 the courts have acknowledged they will look at
15 is the amount of time that opposing counsel has
16 spent on a particular matter, so I am
17 interested to know the total amount that
18 Crawford McKenzie billed with respect to this
19 litigation.

20 MR. DEWART: Well, you can get that sum of the
21 documents in your hand and admittedly there are
22 some periods in which the accounts are missing.

23 MR. RANKING: That is exactly the reason for my
24 question, Mr. Dewart, and the reason I say that
25 is because there are periods that are missing

1 that span close to, if not in excess of, a
2 year.

3 U/T MR. DEWART: I will undertake to ask if there
4 is a summary of the amounts billed and
5 collected on this file and produce the
6 information if it is available.

7 MR. RANKING: It may not be that it is in a
8 summary. It may be that the Crawford McKenzie
9 firm has to pull it together from different
10 sources, but I think the reality is that it
11 should either be in information that Mr.
12 McKenzie would be providing from his accounting
13 department, or it should be in the trust ledger
14 based on payments made from the trust account
15 or in some other document.

16 MR. DEWART: I don't think there is an
17 accounting department. I assume there is a
18 bookkeeper.

19 THE DEPONENT: If you want the ballpark total,
20 they can dig it out for you somehow.

21 MR. SILVER: What is that, sorry?

22 MR. RANKING: "If they want a ballpark total,
23 they can dig it out for you."

24 MR. SILVER: I know, but you asked for more
25 than that.

1 MR. RANKING: I understand. I think Mr.
2 McKenzie is confirming that the information
3 will be produced.

4 MR. SILVER: Without detracting from the
5 request, he has added that you could have a
6 ball park but the request is...

7 MR. RANKING: Yes, Mr. Silver.

8 MR. DEWART: What the three of you, and I
9 include Mr. McKenzie, have demonstrated is why
10 one wants to be precise in asking for and
11 giving undertakings.

12 MR. SILVER: Exactly.

13 MR. DEWART: So far I have agreed to ask if
14 there is summary of amounts billed and
15 collected on the file. I will make further
16 inquiry to determine --and I am sorry, then Mr.
17 Ranking said, well, it may not be a summary.
18 It may be available from other sources and if
19 it is available from other sources, that will
20 be provided to you. That is why I give the
21 undertakings so that they are precise and we
22 don't end up in a dispute what the undertaking
23 is. Next question.

24 THE DEPONENT: Point taken. Thank you for
25 reminding me, counsel. It is difficult after

1 30 years.

2 MR. DEWART: Just wait for the next question.

3 BY MR. RANKING:

4 1154 Q. With respect to the source of the funds,
5 I understand that the funds were wired to your office.
6 Do you know the source of the actual funds?

7 MR. DEWART: He has answered that. He said it
8 was Nelson Barbados.

9 THE DEPONENT: The client pays the bill.

10 BY MR. RANKING:

11 1155 Q. But you also told me you didn't know
12 where the funds were wired from. Is it the fact that
13 Nelson Barbados paid the bill or did someone else pay
14 the bill on behalf of Nelson Barbados? That is my
15 point.

16 A. Mr. Best told me that it was Nelson
17 Barbados Group Ltd. covering me or paying me.

18 1156 Q. Mr. Best, as I understand it, was a
19 police officer. How could he possibly come up with
20 funds in excess, close to or in excess of, a million
21 dollar to pay legal fees in this lawsuit. Do you have
22 any knowledge information or belief to answer that
23 question?

24 A. He wasn't a police officer.

25 1157 Q. What was he?

1 A. Number two...

2 1158 Q. What was he?

3 A. ...a business man and the answer is I
4 can't do any more than say I got paid.

5 1159 Q. Am I incorrect that Mr. Best was a police
6 officer?

7 A. At the time of this case?

8 1160 Q. No, I didn't say that. He was a former
9 police officer.

10 A. Once a upon a time I believe, yes, he was
11 a police officer.

12 1161 Q. Right. Okay with respect to the funds
13 that were wired, do you keep that information at your
14 office to determine the origin of the wire transfer and
15 who was actually paying the funds?

16 A. I don't.

17 1162 Q. Will you make inquiries?

18 U/T MR. DEWART: So I am going to ask again if we
19 have information which identifies the source of
20 the funds which were wire-transferred into the
21 account.

22 MR. SILVER: And to produce same if you have
23 that.

24 MR. DEWART: You can take that as a given. If
25 I give that sort of undertaking, you will not

1 get a childish answer.

2 BY MR. RANKING:

3 1163 Q. If I can just ask you to turn to tab 3,
4 you will see that payment that was transferred from
5 trust. Do you see that?

6 A. I see that.

7 1164 Q. Can you explain to me, sir, if the
8 account was being paid by Nelson Barbados Group, why was
9 it being paid into the trust account and then being
10 transferred from your trust account into your general
11 account?

12 A. I have no idea how these things work.

13 1165 Q. Could you make inquiries and advise Mr.
14 Dewart?

15 MR. DEWART: I am not sure I understand. I
16 told you I will produce information about the
17 source of the wire funds, but I'm not sure what
18 exactly you are asking. The trust account...

19 MR. RANKING: Because if you are unable to give
20 me an answer to the source of the funds, it may
21 indeed be informative to hear why it is that
22 funds are being paid into a trust account. It
23 is not a trick question. I get paid from time
24 to time from foreign clients by wire transfers.
25 Those wire transfers come into my general

1 account and they pay off my account and we move
2 on and we render another account. In each of
3 the instances that we are dealing with here,
4 the payments are made into trust and they are
5 then transferred from trust to pay off the
6 account.

7 MR. DEWART: Sorry to interrupt. I am going to
8 cut this short. What I am going to do is
9 undertake to ask, who would have this
10 information within your office?

11 THE DEPONENT: I would ask Stacey Ball.

12 U/T MR. DEWART: Ask Stacey Ball if she is aware
13 why the funds were apparently paid into the
14 trust account. Of course I'm not sure that a
15 departure from your personal practice on this
16 topic really sheds much light on things.

17 MR. RANKING: It may not, Mr. Dewart, but it
18 may.

19 MR. DEWART: I have given the undertaking.

20 BY MR. RANKING:

21 1166 Q. Thank you. If I could just ask you to
22 turn up the first account of April 20th. On April 9th
23 there is a docket entry for you which I think you
24 traveled to Barbados to prepare for meeting with "CJ and
25 HC". Can you tell me, sir, who are the individuals

1 identified by the initials "CJ" and "HC".

2 A. I can't remember.

3 1167 Q. If I could ask you to turn to the fourth
4 page of the account your business disbursement, two
5 -thirds of way down, you will see air fare in the amount
6 of \$2,610 and I take it that is air fare for you to fly
7 to Barbados re a meeting with Chief Justice Simmons.
8 Does that refresh your recollection?

9 A. I guess "CJ" must stand for "Chief
10 Justice". My recollection is yes, I did travel and I
11 did meet with Chief Justice Simmons around the beginning
12 of the lawsuit.

13 1168 Q. You have identified the initials "CJ".
14 Do we know who the initials "HC" are, or to whom they
15 refer?

16 A. No.

17 1169 Q. Do you recall a meeting with the chief
18 justice?

19 A. I do.

20 1170 Q. Where did you meet with him?

21 A. In his office.

22 1171 Q. This is Sir David Simmons?

23 A. Sir David Simmons.

24 1172 Q. Is that at the courthouse?

25 A. Yeah, I think sort of stuck on the

1 courthouse.

2 1173 Q. Who attended that meeting with you?

3 /R A. I think I should stop here. I may
4 have already breached my confidentiality
5 arrangement that led up to that meeting and
6 if the defendants can go and all get
7 permission to waive all of these
8 confidentialitys off the record without
9 prejudice, I promise I won't tell anybody,
10 I would feel much more comfortable. I'm
11 having trouble right now.

12 1174 Q. This is a confidentiality agreement you
13 have with the Chief Justice Sir David Simmons with
14 respect to this meeting?

15 A. There you go.

16 1175 Q. I am just trying to understand the reason
17 for your refusal.

18 A. The circumstances are as I said.
19 Meetings have been held throughout this file regarding
20 matters that are off the record without prejudice. I
21 gave my undertaking.

22 1176 Q. This is an undertaking you gave to Sir
23 David Simmons?

24 A. I have to say the same answer which is he
25 would know and I do know the circumstances. I don't

1 think anybody involved wants me to breach their
2 confidence. As I say, get all of the defendants to sign
3 off on that, I could change my mind, but I feel very
4 strongly when I give my word like that.

5 1177 Q. All right. I will take that up with
6 Mr. Schabas and we will see where that goes. If I could
7 just ask you to turn to tab 5, the entry log of August
8 27th, 2007.

9 A. Say again?

10 1178 Q. Tab 5.

11 A. Yes.

12 1179 Q. August 27th, the top of the second page?

13 A. Correct.

14 1180 Q. This is going back to this cooperation
15 agreement. That talks of the continued cooperation and
16 possible settlement scenarios. I'm taking, and you can
17 correct me if I am wrong, that your cooperation with
18 Marjorie Knox occurred from outside the litigation?

19 A. Pretty well when she was served as a
20 defendant these kind of things would happen.

21 1181 Q. What kind of things would happen?

22 A. Well, these off the record discussions
23 about trying to, cooperate.

24 1182 Q. I take it that Marjorie Ilma Knox, with
25 the benefit of her counsel, Alair Shepherd, agreed to

1 cooperate with you?

2 A. That's fair.

3 1183 Q. I think that one question I didn't ask is
4 we were talking last time about whether you confirmed it
5 in writing. I am taking it that that cooperation
6 agreement was never confirmed in writing?

7 MR. DEWART: You canvassed this at length.

8 MR. RANKING: I never asked the final
9 question, actually, Mr. Dewart, whether it was
10 actually confirmed in writing.

11 MR. DEWART: I think he told you it hadn't
12 been, but he anticipated it would be if the
13 litigation got past the...

14 MR. RANKING: That's fine. I stand to be
15 corrected.

16 BY MR. RANKING:

17 1184 Q. Now...

18 MR. DEWART: Now you are making me nervous.
19 Was that your evidence?

20 THE DEPONENT: Sounds about right. You are
21 asking me to remember what I said on the
22 transcript? I don't. But I am saying...

23 MR. DEWART: Don't worry about what you said.
24 Is what I just said correct or not correct?

25 THE DEPONENT: Maybe I should put it in my

1 words, which is we did not end up to the point
2 where we had a formal written agreement as to
3 how we would deal with Marjorie Knox as a
4 defendant because we never got that far.

5 BY MR. RANKING:

6 1185 Q. Can you tell me what the terms of your
7 cooperation agreement were?

8 MR. DEWART: That I'm positive you asked.

9 BY MR. RANKING:

10 1186 Q. Can I ask you to turn to tab 20? You
11 will see that this account has all of the hourly rates
12 at zero. Can you tell me what occurred, why it is that
13 all of these entries are now at zero?

14 MR. SILVER: What date is that?

15 MR. RANKING: Account of February 23rd, 2009.

16 THE DEPONENT: I have no idea how these.

17 BY MR. RANKING:

18 1187 Q. Did you continue to render accounts after
19 the 23rd of February, 2009 even though you haven't been
20 able to locate them?

21 A. Sorry?

22 MR. DEWART: Sorry, say that again. Do you
23 mean is this the last account? Is that the
24 question?

25 MR. RANKING: Put a different way, yes.

1 MR. DEWART: I have got one at tab 21 for
2 March 23rd.

3 MR. RANKING: So I do too. I missed that one.

4 MR. DEWART: So I guess really, if I can speed
5 this up once again, is there a missing account
6 after March 23rd? That is the question. Is
7 one of the accounts which is missing rendered
8 after March 23rd? That is the question.

9 MR. RANKING: Well, one would have thought
10 there would have to be given the fact this case
11 was argued on April 7th and 8th.

12 MR. DEWART: Makes sense to me.

13 MR. RANKING: But you can't assist as to why
14 the rates on this account are put in at zero.

15 THE DEPONENT: I don't know what they do. I
16 mean, with respect to them it's...

17 MR. DEWART: Do you know or not know?

18 THE DEPONENT: I don't know.

19 MR. DEWART: That is the answer.

20 THE DEPONENT: I don't want them to think I am
21 yelling at them on the transcript. They do a
22 good job.

23 MR. RANKING: I am going to move on to now go
24 into the affidavit and I have certain questions
25 on the affidavit, but it might be a convenient

1 time to break.

2 --- DISCUSSION OFF THE RECORD

3 --- LUNCHEON RECESS

4 BY MR. RANKING:

5 1188 Q. If I could ask you to put your affidavit
6 before you, Mr. McKenzie.

7 A. Thank you.

8 1189 Q. If I could ask you to please refer to
9 paragraph 17. You are referring there to a conference
10 call with Justice Shaughnessy on August 14th. Were you
11 actually on that call, sir?

12 A. No.

13 1190 Q. Would it come as a surprise to you if in
14 fact it was only one counsel, Mr. Bristow, that made a
15 comment indicating that it wouldn't be necessary to seek
16 costs against you personally if the plaintiff posted
17 security for costs?

18 MR. DEWART: I can assist. Is that paragraph
19 17?

20 MR. RANKING: Yes, it is.

21 MR. DEWART: I don't know if it is. That
22 paragraph should be on information and belief
23 from me and my recollection coincides with what
24 you just said.

25 BY MR. RANKING:

1 1191 Q. Thank you. Yes, with respect, I think I
2 can say, Mr. Dewart, generally speaking I am not going
3 to go back to the compendium. You and I can talk about
4 that if there are going to be some issues, but I do have
5 a number of documents I would like to make sure that
6 they are in evidence and I can just, I have a package
7 here for you that I made on the lunch hour and I will
8 hand those across and I would like to quickly go through
9 them and have them identified and then we will mark them
10 as exhibits and I am happy to either mark all of them,
11 the bundle, as an exhibit or each of them as an exhibit,
12 whichever is easiest. Let's see how we go. I'm
13 passing across to you the package of the documents. The
14 first is a letter of May 17th from yourself to
15 Mr. Gilliland. I take it, Mr. McKenzie, you received
16 this letter?

17 MR. DEWART: Sorry, I haven't shown it to the
18 witness yet. Can I suggest the following? I'm
19 sure there is no issue about authenticity
20 within the meaning of whatever rule it is, Rule
21 50, I think, so just take one second, review
22 the entire pile of documents and let Mr.
23 Ranking know if there is any suggestion that
24 the document was not sent and received around
25 the date it purports to be sent and received

1 and if there is any dispute about whether or
2 not it was sent by the person purported to have
3 sent it or received in your office and so
4 forth.

5 THE DEPONENT: I can't see any.

6 MR. DEWART: Well, just go through all of them.

7 THE DEPONENT: I don't think I can dispute they
8 were sent and received.

9 BY MR. RANKING:

10 1192 Q. I take it, to the extent that they have
11 fax cover sheets, that they were received at your office
12 as reflected in the fax cover sheets. Is that fair?

13 A. I'm sorry, counsel, I don't see any fax
14 cover sheets.

15 MR. DEWART: I think it is the fax track across
16 the top. Is that what you are...

17 THE DEPONENT: No, that is me sending it from
18 my office.

19 BY MR. RANKING:

20 1193 Q. There can be fax cover sheets from the
21 Crawford McKenzie firm which indicates when they were
22 sent, as Mr. Dewart has indicated there is a cover
23 sheet?

24 A. I see.

25 1194 Q. Then a number of letters from Blakes has

1 a fax cover sheet attached to the back of the letter.

2 A. Oh, I see. I'm not going to argue with a
3 transmission report.

4 1195 Q. All right.

5 A. I mean I don't...

6 MR. DEWART: So the first thing we have tied
7 down is authenticity.

8 BY MR. RANKING:

9 1196 Q. I take it as well, sir, that to the
10 extent these letters, and when we come to the truth of
11 their contents just so it is clear, I am not asking you
12 to admit the contents of the letters for what, were we
13 counsel at trial, would be the truth of their contents
14 because there are positions being taken here by counsel
15 on behalf of their clients. You take a position on
16 behalf of Nelson Barbados. Mr. Schabas and
17 Mr. Gilliland take a position on behalf of his client,
18 but I take it that we can agree that the positions that
19 are set forth accurately set forth the positions that
20 counsel, you on the one hand and Mr. Schabas and
21 Mr. Gilliland on the other, were setting forth as of the
22 dates the letters were written.

23 MR. DEWART: Yes. Yes, and that's all I was
24 trying to say the other day.

25 MR. RANKING: I think we are in agreement.

1 Why don't we do this. I don't think there is
2 any need, given our desire to move forward
3 expeditiously as possible, to mark all of the
4 letters as exhibits. What I propose to do,
5 with your concurrence, Mr. Dewart, would be to
6 mark this group as the next exhibit, but I will
7 identify the letters so that we have them
8 identified for the purpose of the record.

9 MR. DEWART: Yes, and so Exhibit 18....

10 MR. RANKING: It will be Exhibit 19.

11 MR. DEWART: ...will be the correspondence
12 between May 17th and...

13 BY MR. RANKING:

14 1197 Q. What I will do is give the court reporter
15 the actual dates of the letters and we will mark it as
16 one exhibit and I will give you the total of the letters
17 at the end and I will just count them as I go through.
18 This is a series of correspondence passing between the
19 Blake's firm and Mr. McKenzie's firm. They constitute
20 the first letter of May 17th, 2007 from Mr. Gilliland to
21 Mr. McKenzie. The second letter, dated May 22nd, from
22 Mr. McKenzie to Mr. Gilliland, the third letter, dated
23 May 22nd from Mr. McKenzie to Mr. Schabas and
24 Mr. Gilliland, the fourth letter from Mr. Schabas to Mr.
25 McKenzie dated May 23, 2007, the fifth letter from Mr.

1 McKenzie to Mr. Gilliland, dated May 23, 2007 which
2 enclosed a Notice of Examination, the sixth letter dated
3 May 23rd from Mr. McKenzie to Mr. Schabas, the seventh
4 letter from Mr. McKenzie to Mr. Schabas and
5 Mr. Gilliland, dated May 24th with an enclosed Notice of
6 Motion, the eighth letter, this letter is dated May 25th
7 I believe incorrectly from the fax cover sheet and
8 should be dated May 24th, from Mr. Schabas to Mr.
9 McKenzie, the ninth document, which is a string of
10 e-mails commencing from Stacey Ball to Mr. Schabas and
11 Mr. Gilliland on the 25th of May and ending with Mr.
12 McKenzie's e-mail to Mr. Schabas on May 26th, the tenth
13 document being a letter from Mr. McKenzie to Mr. Schabas
14 and Mr. Gilliland, dated May 28th and an attached series
15 of e-mails and the final letter being a letter from
16 Mr. Schabas to Mr. McKenzie, dated October 16th, with
17 the attached endorsement of Justice Weakes. That bundle
18 of documents I will mark the next exhibit which is
19 Exhibit No. 19.

20
21 --- EXHIBIT NO. 19: Bundle of Documents

22
23 MR. RANKING: Just while we are on that point,
24 because I don't want to take more time, I have
25 a similar bundle of documents with respect to

1 documents that are not in the joint compendium,
2 Mr. Dewart.

3 MR. DEWART: Sorry that are not in the...

4 MR. RANKING: Sorry, I misspoke, that are in
5 the joint compendium but not referenced to a
6 particular motion record. If I could pass
7 those across to you and ask for, my colleague
8 is going to organize them into separate piles.

9 MR. DEWART: I expect that I am quite happy to
10 make the same concession as to authenticity and
11 as to the fact that the correspondence sets out
12 the parties' position at the time.

13 MR. RANKING: Thank you, Mr. Dewart. What I
14 will do then in order not to entrench upon
15 Mr. Silver's time, why don't we save that line
16 of questions for the break. I will give you
17 the package of documents at the break. You can
18 look at them and if we have a problem we will
19 deal with it at that point.

20 BY MR. RANKING:

21 1198 Q. Mr. McKenzie, if I could now take you to
22 paragraphs 79 to 83, skipping over one section, but we
23 are dealing with the evidence that you obtained from
24 Nitin Amersey. I am showing to you a letter dated
25 December 17th, 2007. I take it that is the first letter

1 that you sent to counsel advising us of Mr. Amersey and
2 your intention to conduct a Rule 39.03 examination?

3 A. Yes, I sent that letter.

4 MR. RANKING: If we can mark that as the next
5 exhibit? That will be Exhibit No. 20.

6

7 --- EXHIBIT NO. 20: Letter dated December 17, 2007

8

9 MR. RANKING: And in response to that letter I
10 am showing to you a letter dated December 28th,
11 which I wrote to you, and you will see from the
12 first paragraph I am responding to your letter
13 dated December 17th. I take it you received
14 and reviewed that letter shortly after December
15 28th.

16 THE DEPONENT: Okay.

17 MR. RANKING: Right. Mark that as the next
18 exhibit. That will be Exhibit 21.

19

20 --- EXHIBIT NO. 21: Letter dated December 28, 2007

21

22 BY MR. RANKING:

23 1199 Q. Now, there are various other documents
24 that appear in the compendium under tabs 47 through 50,
25 47, 48, 49 and 50 and I take it there is no issue that

1 those were the subsequent letters on the issue of Nitin
2 Amersey that were exchanged between you and I,
3 Stikeman's at tab 49 and Blake's at tab 50?

4 MR. DEWART: I am not aware of any issue. I
5 can't tell you one way or the other if that is
6 the complete exchange of correspondence on that
7 topic.

8 MR. RANKING: But certainly, to the extent that
9 there is correspondence, I take it there is no
10 issue as per the earlier line of questioning,
11 Mr. Dewart.

12 MR. DEWART: There is no issue as to
13 authenticity and there is no issue that the
14 correspondence sets out the parties' position
15 at the time.

16 BY MR. RANKING:

17 1200 Q. Thank you. Now, just in the context of
18 that I want to now ask you to turn up Exhibit 10, which
19 are the accounts that you rendered, and if I could ask
20 you to look to tab 5, the entry of September 7th, this
21 is the account of September 24th. At the bottom of page
22 7, I take it that you are aware of the existence of
23 Mr. Amersey as early as September 7, '07?

24 A. Yes.

25 1201 Q. You then follow up with him on

1 October 23, '07. I refer to your account dated
2 November 23, page 2.

3 MR. DEWART: Date, sorry?

4 MR. RANKING: Tab 7, the account of November
5 23rd.

6 MR. DEWART: Page 2.

7 BY MR. RANKING:

8 1202 Q. Page 2, the October 23, '07 entry?

9 A. Okay.

10 1203 Q. I take it that is an accurate reflection
11 of your speaking with Mr. Amersey on that date?

12 A. Yes.

13 1204 Q. And you followed up again with him on
14 October 31st as reflected on page 5 of your account?

15 A. Okay, yes.

16 1205 Q. I take it on that day that you had
17 prepared, or were in the course of preparing, your
18 examination of Mr. Amersey, correct?

19 A. Correct.

20 1206 Q. Yet, sir, you waited another, over a
21 month to in fact notify counsel of your intention to
22 examine Mr. Amersey, correct?

23 A. I forget what the date was.

24 1207 Q. Can you explain why you waited, sir?

25 A. He was in a surgical, big surgical

1 problem. I was hoping to bring him to Toronto and then
2 it all fell apart.

3 1208 Q. Sir, when did it fall apart?

4 A. I couldn't get him to come and then we
5 had a date to meet and so we were running out of time.

6 1209 Q. Sir, you never brought a motion to secure
7 the appropriate order under the Rules, did you, to
8 examine him?

9 A. Until I presented it.

10 1210 Q. You never moved for the appropriate
11 order, sir, correct?

12 A. I think I got it validated when I
13 presented it to the court.

14 1211 Q. No, we didn't object subject to
15 Mr. Justice Shaughnessy ultimately ruling it to be
16 irrelevant, to having it put in, but you never moved for
17 the appropriate order under Rule 34 to permit you to
18 examine a witness outside of the jurisdiction?

19 A. I never brought a formal motion before
20 that time in court, correct.

21 1212 Q. And I am going to suggest to you, sir,
22 based on your own docket entries and your knowledge of
23 what evidence that Mr. Amersey might provide, that there
24 was ample time for you to have brought that motion had
25 you been so inclined?

1 A. I hoped he would come to Toronto and I
2 wouldn't need a motion and we ran out of time. You guys
3 wouldn't, we had motions to argue, the defendants'
4 motions on a date and we ran out of time.

5 1213 Q. If I could ask you to turn to paragraph
6 92, which deals with the encryption of the recording or
7 transmission from Barbados. When you say in paragraph
8 92 that you arranged for an encrypted line, am I not
9 correct that what you did was you actually transmitted
10 the communication via Skype?

11 A. I did, right.

12 1214 Q. What knowledge do you have that that line
13 is encrypted?

14 A. I think I sent the memo to Mr. Schabas...

15 1215 Q. There was a letter indicating...

16 MR. DEWART: I don't think the witness had
17 finished.

18 THE DEPONENT: Just that there was a print out
19 from my advisors that said it is encrypted. It
20 got set up for me.

21 BY MR. RANKING:

22 1216 Q. You didn't send that to other counsel,
23 did you?

24 A. I've got to check. I'm not sure.

25 1217 Q. I have never seen the letter that you say

1 you sent to Mr. Schabas. In any event, it is your
2 position that Skype is an encrypted line?

3 A. I'm told there is no way you guys, I mean
4 you guys, anybody else could have listened in on it.
5 That is what...

6 1218 Q. In paragraph 94 you go on to say that
7 "Security is maximized by not revealing the source code
8 or encryption technology that one is using", but may I
9 just ask, this goes back to the questions Mr. Schabas
10 was asking of you before these cross-examinations began,
11 how could there have been any concern with your
12 disclosing the fact that you were transmitting over
13 Skype to counsel whose clients are being examined?

14 A. The strongest way to protect something is
15 not tell anybody where you are hiding it.

16 1219 Q. Right, but I am just having some trouble
17 here with paragraph 94 because the people you would be
18 telling are the very people who were interested to
19 ensure that the line was encrypted. Isn't that correct?

20 A. I don't agree.

21 1220 Q. In paragraph 95 you go on to say that
22 there was limited time for these cross-examinations. Am
23 I not correct that the examinations were in fact
24 completed well before the time that had been set aside?

25 A. At the beginning I was very concerned.

1 As time wore on and the subject matter got shut down by
2 refusals we were fortunate we finished one day ahead of
3 the schedule, very fortunate.

4 1221 Q. And we finished approximately a day and a
5 half a head of schedule?

6 A. I don't agree.

7 1222 Q. How much ahead of schedule?

8 A. I think we had scheduled for Saturday and
9 we were still packing and dealing with the video guy
10 later on Friday, so it took all day Friday, or we
11 finished late Friday.

12 1223 Q. So there was at least a day left over, is
13 that fair?

14 A. Yes, as I say, Saturday was an extra day.

15 1224 Q. With respect to certain questions I was
16 posing, you had asked that questions be put in writing.
17 I am handing across to you a document that I think you
18 refer to at paragraph 95. You confirm that you asked
19 that the questions be put to you in writing?

20 A. I did, yes.

21 1225 Q. You will agree, sir, that is not
22 customary?

23 A. I disagree.

24 1226 Q. Is it your practice to ask counsel to put
25 questions in writing?

1 A. The first counsel was Mr. Schabas and
2 there was a whole table full of counsel launching
3 questions in circumstances where I was very concerned
4 we were short of time...

5 1227 Q. That wasn't my question. That wasn't my
6 question.

7 A. And...

8 MR. DEWART: Let him, it is responsive.

9 MR. RANKING: No, it is not responsive if it is
10 not responding to my question. My question was
11 is it your practice to ask counsel to put
12 questions in writing.

13 MR. DEWART: And he was explaining...

14 THE DEPONENT: Absolutely and mostly they were
15 courteous enough to do it before you get there
16 when they know you are pressed for time.

17 BY MR. RANKING:

18 1228 Q. In what other case have you asked for
19 questions to be put in writing? You are rolling your
20 eyes. Is it a genuine question. I have never seen it
21 happen in my 25 years of practice, Mr. McKenzie. Have
22 you ever done it in any other case?

23 A. Procedural questions.

24 1229 Q. No, questions such as the questions that
25 I was asking you on that cross-examination?

1 MR. DEWART: Those are procedural questions.

2 MR. RANKING: I don't see whether someone is
3 relying on an affidavit to be a procedural
4 question.

5 THE DEPONENT: The first question is the kind
6 of interaction that goes on among counsel all
7 of the time. It doesn't need to be done at an
8 examination with counsel on a transcript when
9 you have flown 3,000 miles. Do you see what I
10 mean? That is a perfectly good question, but.

11 BY MR. RANKING:

12 1230 Q. It is a perfectly good question when my
13 client is about to be cross-examined I need to know the
14 evidence upon which you are going to be relying.

15 A. If you had sent me a letter a week
16 earlier it would have been a lot easier on everybody.

17 1231 Q. In any event my question stands. Will
18 you answer it or not?

19 A. What is the question again?

20 1232 Q. Have you in any other case asked
21 questions of this nature to be put in writing?

22 A. I am of the view and constantly want to
23 know things ahead of time and in writing is the best
24 way. Can I recall doing it? No.

25 1233 Q. I would like to mark the handwritten

1 document that I, first of all I take it these were the
2 questions I passed across to you in accordance with your
3 request that they be put in writing, Mr. McKenzie.

4 A. Well, you have given me a copy. I don't
5 have the original.

6 MR. DEWART: Mark it if you want, just, I
7 thought, subject to what the witness will say,
8 I thought this was already on the record.

9 MR. RANKING: Honestly, with the amount of
10 paper, Mr. Dewart, you may be right.

11 MR. DEWART: Go ahead. Identify it.

12 BY MR. RANKING:

13 1234 Q. I take it these are the questions that I
14 put to you on the first day of the cross-examinations in
15 Barbados?

16 A. This letter has your writing and my
17 writing on it and you did give it to me. I'm not sure
18 exactly when you did, but it was, sooner or later you
19 did in there.

20 1235 Q. I think the transcript of the
21 cross-examinations will reflect when it was handed
22 across. If that could be the next exhibit, that will be
23 Exhibit 22.

24 --- EXHIBIT NO. 22: Mr. Ranking's Questions in Writing

25 BY MR. RANKING:

1 1236 Q. The handwriting which appears beside my
2 handwriting, I take it this is your answer where you
3 addressed it to me, Mr. Ranking, on the left-hand side.

4 A. Mr. Ranking, possibly and then the last
5 three lines are my writing. I think the rest is your's.

6 1237 Q. When you answered the first question I
7 asked: "Will you be relying upon the affidavit of
8 Stuart Heaslet?". Your answer was "Possibly". Is that
9 fair?

10 A. Yes.

11 1238 Q. Did you ever supplement that answer in
12 any way to tell me whether or not you would be relying
13 on Mr. Heaslet's affidavit?

14 A. In writing?

15 1239 Q. Yes.

16 A. Somewhere in there I said everything
17 would go in.

18 1240 Q. I see. Was that addressed to all
19 counsel?

20 A. I don't recall how that was communicated,
21 but there was never a doubt in my mind.

22 1241 Q. It was never...

23 MR. DEWART: "A doubt in my mind".

24 THE DEPONENT: Not to anybody who asked.

25 BY MR. RANKING:

1 1242 Q. Did you ever tell me, sir, you would be
2 relying on everything?

3 A. I don't recall.

4 1243 Q. The second question is: "Will you be
5 putting documents to any of the affiants to be
6 cross-examined?", and your answer is "Yes" correct?

7 A. Correct.

8 1244 Q. Then I go on to say: "And, if so, will
9 you please produce them to counsel today, Monday,
10 October 27th?" Do I correctly summarize your response
11 " ? Is there an obligation to do? Case Law?"

12 A. That's what it says.

13 1245 Q. You then say: "Thanks. A letter will
14 follow". You never sent a follow up letter, did you
15 sir?

16 A. Did not.

17 1246 Q. Thank you. Now, at paragraphs 100
18 through 106 you deal with certain issues regarding
19 security. You refer to Marc LeMieux. I take it he was
20 your articling student?

21 A. He was.

22 1247 Q. He has sworn affidavits in this action?

23 A. If you say so. I can't remember
24 everything.

25 1248 Q. But you are not possibly going to suggest

1 to me that you don't know that Mr. LeMieux swore
2 affidavits sir?

3 A. I can't recall.

4 1249 Q. So it wouldn't come as a surprise to you
5 if I said, not only did he swear one, but he swore more
6 than one affidavit. That wouldn't come as a surprise to
7 you.

8 A. No.

9 1250 Q. Is he still employed with your firm?

10 A. No.

11 1251 Q. Is he working as a lawyer?

12 A. As far as I know.

13 1252 Q. Do you know his current whereabouts?

14 A. More or less.

15 1253 Q. There is no reason he couldn't have sworn
16 an affidavit in this proceeding?

17 A. He could swear an affidavit.

18 1254 Q. At paragraph 102 you say: "He stayed
19 with me throughout the trip to Barbados except at night
20 when he stayed in a hotel room directly across from
21 mine", but I take it he was acting as your articling
22 student assisting you with the case, correct?

23 A. Partly, yes.

24 1255 Q. I take it he was doing what any other
25 articling student would do, which is assisting you with

1 documents and research and helping you organize
2 materials?

3 A. Not so much as, partly.

4 1256 Q. All right. You go on at paragraph 102,
5 to say that you infer that Barbadian officials had
6 learned of security threats. That is your speculation,
7 correct?

8 A. Correct.

9 1257 Q. I'm going suggest to you, sir, that early
10 in the week he is referring to the first day of the
11 cross-examination when Sir David Simmons was being
12 cross-examined. Is that the time frame you are
13 referring to in paragraph 103?

14 A. Early in the week of the
15 cross-examinations.

16 1258 Q. Right.

17 A. Correct.

18 1259 Q. When you speak about a police officer
19 appeared at the Hilton Hotel, I take it, sir, that that
20 was when Sir David Simmons, the Chief Justice, was to be
21 cross-examined, correct?

22 A. He came before that.

23 1260 Q. He came in conjunction with Mr. Simmons'
24 attendance.

25 MR. DEWART: That is not a question. Ask a

1 question. The witness said he came before that
2 and then you made a statement. Ask a question.

3 THE DEPONENT: The police officer came in...

4 MR. DEWART: He has answered the question.

5 MR. RANKING: He came in before the Chief
6 Justice Sir David Simmons arrived, correct?

7 THE DEPONENT: Correct.

8 BY MR. RANKING:

9 1261 Q. On that same morning, correct?

10 A. Correct.

11 1262 Q. And I am going to suggest to you, sir,
12 that at no other time, other than prior to the
13 attendance of the Chief Justice to be cross-examined,
14 was there a police officer in attendance in the Hilton
15 hotel?

16 A. I don't agree with that.

17 1263 Q. Did you ever make any arrangements for
18 any police officers to attend the Hilton hotel?

19 A. I did not.

20 1264 Q. Did you ever make any arrangements for
21 any private security guards to attend at the hotel?

22 A. I did not.

23 1265 Q. Did you ever make arrangements for any
24 police officers to attend with you or with Mr. LeMieux
25 as you traveled back and forth between the Savannah

1 Hotel and the Hilton hotel?

2 A. I did not.

3 1266 Q. Did you ever make arrangements for any
4 private security guard to attend with you and
5 Mr. LeMieux as you traveled back and forth between the
6 Savannah Hotel and the Hilton hotel?

7 A. I did not.

8 1267 Q. So when you make reference to police
9 officers being close by, I take it those were your
10 observations of the Barbadian police, correct?

11 A. I saw police officers, yes.

12 1268 Q. And you saw them in the course of them
13 carrying out their duties as police officers in the
14 Country of Barbados, isn't that fair?

15 A. I saw them.

16 1269 Q. Right. You had no reason to believe
17 whether they were there for you or for anyone else or
18 whether they were simply performing their duties under
19 the Police Act, isn't that fair?

20 A. I just saw them.

21 1270 Q. Right, after the first day when police
22 officers were there for the cross-examination of the
23 Chief Justice were police officers there on any of the
24 other five days?

25 A. Yes.

1 1271 Q. Can you tell me when?

2 A. I can't be specific as to when I saw the
3 police officers.

4 1272 Q. Right. Now, you say in paragraph 105
5 that you never left the Savannah Hotel except to travel
6 the short distance to the Barbados Hilton where the
7 examinations took place. Do you see that?

8 A. I see it.

9 1273 Q. I am passing across to you a map which
10 was printed off Google maps and the dot immediately
11 above the words "Highway 7" above "St. Lawrence Gap" is
12 the location of the Savannah Hotel and the dot on the
13 left-hand side by Needham's Point is the location of the
14 Barbados Hilton. Now, you have been to the Barbados
15 Hilton on any number of occasions, correct?

16 A. A few, yes.

17 1274 Q. And you have been at the Savannah Hotel
18 certainly for the week that you were in Barbados in the
19 fall of 2008, correct?

20 A. Correct.

21 1275 Q. I take it that that map is a fair
22 representation of the map setting forth the road that
23 runs between the two hotels.

24 A. It looks totally inaccurate to me.

25 1276 Q. Why is that, sir?

1 A. That is not where the Savannah Hotel is.

2 1277 Q. Why don't we actually just give you a
3 copy of the Savannah Hotel. I am passing across to you
4 a Google map which indicates the Savannah Hotel as
5 identified by the balloon marked "A" above Highway 7 and
6 do you see that indicates "Hotel, The Savannah" and
7 "Hastings, Christchurch, Barbados"?

8 A. I see it.

9 1278 Q. Do you have any reason to believe that
10 the document I have just passed across to you is
11 inaccurate in reflecting the location of the Savannah
12 Hotel?

13 A. Yes.

14 1279 Q. You do. On what basis do you say that is
15 inaccurate?

16 A. Well, that is not where it is.

17 1280 Q. Where is it, sir?

18 A. Well, I'm no geographer, but I know you
19 can walk and you see where it says "Garrison Savannah"
20 over here, right near the...

21 1281 Q. Yes.

22 A. I am sorry, what hotel are we at?

23 1282 Q. The Hilton hotel.

24 A. That's where I would put the location.

25 1283 Q. Would you like to mark that down with a

1 pen?

2 MR. DEWART: No, you haven't proven this
3 document.

4 MR. RANKING: Well, it is okay, it is a
5 document, I want to know where, I want to mark
6 this as an exhibit and where Mr., no, no, no
7 don't shake your head, Mr. Dewart. I want your
8 client to identify on this map where he says it
9 is and I will tender further evidence.

10 MR. DEWART: You won't tender further evidence
11 because he is cross-examined and you have not
12 proven the document.

13 MR. RANKING: Don't fold it up. I'm entitled
14 to know if you are going to object to it, that
15 is fine, but I want to know where Mr. McKenzie
16 says the Savannah Hotel is.

17 MR. DEWART: No.

18 MR. RANKING: You won't allow your witness to
19 identify on the map where he says the Savannah
20 Hotel is located?

21 MR. DEWART: You don't know what this is a map
22 of.

23 MR. RANKING: I have just told you it is a
24 Google map which comes off of the Google map
25 site of the Savannah Hotel and the Hilton

1 hotel.

2 MR. DEWART: You are already far too much of a
3 witness in this matter.

4 MR. RANKING: I am not a witness at all. I am
5 a lawyer asking questions with respect to
6 documents that have been printed off Google
7 maps. Nothing more, nothing less. Will you or
8 will you not permit your client to mark where
9 he says the Savannah Hotel is on this map?

10 MR. SILVER: He has already said on the record.

11 MR. RANKING: I understand, Mr. Silver. All
12 right, I will be seeking leave, so you are on
13 notice, to tender this evidence before the
14 court. It will be under separate affidavit and
15 you will receive it in due course. If you
16 would like a copy of this material, Mr. Dewart,
17 I'm happy to let you have a copy.

18 MR. DEWART: I expect that if you are seeking
19 to file anything that I will get a copy.

20 MR. RANKING: I will leave a copy with you
21 right now. It is right there. What this shows,
22 the third document that I am going to be
23 passing across, is a document which is also on
24 Google maps, which indicates that the distance
25 between the two hotels is a distance of 5.1

1 miles, 5.1 kilometres, I stand corrected and I
2 have highlighted the document.

3 MR. DEWART: Just so you know, I am on line as
4 we speak and I have got the Savannah Hotel at a
5 different place than on one of the documents
6 you just handed me.

7 MR. RANKING: We have identified the Savannah
8 Hotel. If there is going to be an issue, then
9 we will make it an issue. You can send me the
10 document you are referring to and we will see
11 if...

12 MR. DEWART: It is on my screen, so I caution
13 you about the reliability of Google maps.

14 MR. SILVER: How far is it from the Hilton?

15 MR. DEWART: Where is the Hilton? I don't have
16 the Hilton.

17 MR. RANKING: The Hilton is at the other point.

18 MR. DEWART: This is not the proper way to, if
19 you think this is really going to assist the
20 court in any way on the motion, this is not the
21 proper way to put the evidence in.

22 MR. RANKING: Given the fact that Mr. McKenzie
23 has, on his own admission, has traveled to
24 Barbados some 40 times, I don't think there is
25 anything wrong with putting a map to the

1 witness and asking him to accept it or not
2 accept it. So for you to suggest there is
3 anything improper, I just totally disagree.

4 MR. DEWART: Ask him how far apart the hotels
5 are.

6 MR. RANKING: He had an opportunity to put that
7 in his affidavit which he chose not to do. He
8 chose instead to use subjective words and
9 adjectives, which is exactly why I am entitled
10 to do what I am doing, with the greatest of
11 respect.

12 MR. DEWART: Tender reply evidence.

13 BY MR. RANKING:

14 1284 Q. Now, when you were going for your run,
15 sir, I take it that you were running on Highway Number
16 7. You were running on the main road outside the
17 Savannah Hotel, correct?

18 A. No.

19 1285 Q. So where were you running and before you
20 answer the question, you are saying in a circle?

21 A. I am just going...

22 1286 Q. Sorry, you lost me. Where were you
23 running when you went for a run in the mornings?

24 A. I was jogging in the close area of, the
25 Savannah Hotel is like a compound.

1 frustrated.

2 THE DEPONENT: I was on that road.

3 BY MR. RANKING:

4 1292 Q. Thank you.

5 A. Jogging.

6 1293 Q. Thank you. That is the main road that
7 travels from the Savannah Hotel into Bridgetown,
8 correct?

9 A. I can't say.

10 1294 Q. It is a road that travels into
11 Bridgetown.

12 A. They all do.

13 1295 Q. Thank you.

14 MR. RANKING: I have lots of further questions,
15 but time does not permit me to ask them, so
16 subject to the questions I have, Mr. Dewart,
17 with respect to the additional documents in the
18 compendium, I am going to defer so that Mr.
19 Silver can ask questions of your client.

20 --- DISCUSSION OFF THE RECORD

21 BY MR. RANKING:

22 1296 Q. Let's clarify this. If there is a
23 misunderstanding, then I want to make sure that we
24 clarify the misunderstanding. What is the address of
25 the Savannah Hotel where you were staying?

1 A. I don't know the address.

2 1297 Q. Will you advise me?

3 /R MR. DEWART: No.

4 CROSS-EXAMINATION BY. MR. SILVER:

5 1298 Q. Mr. McKenzie, I have got a couple of
6 questions that directly flow from Mr. Ranking's
7 cross-examination and to the extent I'm repeating any
8 question it is just for the purposes of ensuring that I
9 understand you properly because I don't have an
10 intention of repeating questions, but in the focus of my
11 questions at first instance are on this Nelson Barbados
12 Group Ltd. company and your involvement with it at the
13 outset of this matter, okay? So, you said that
14 Mr. Best instructed your office to incorporate a company
15 that ultimately became Nelson Barbados Group Ltd.,
16 correct?

17 A. Correct.

18 1299 Q. That would have been just prior to the
19 date of incorporation in November of 2005?

20 A. Correct.

21 1300 Q. You said that he gave you a few names and
22 he asked for a quick and dirty shelf company and one of
23 the names that he gave you was "Nelson Barbados Group
24 Ltd.", or "Nelson Barbados Group". The "Ltd." gets
25 added on on incorporation, right?

1 A. I don't recall exactly the words, but it
2 is about right.

3 1301 Q. Well, but that is how that company got to
4 be incorporated because you didn't make up the name. He
5 gave you some names and that had to be one of them.

6 A. Correct.

7 1302 Q. Right and am I right, sir, at that time
8 he also gave you "Nelson Barbados Investments" or not or
9 you don't remember?

10 A. I really don't remember exactly.

11 1303 Q. To your knowledge that company was never
12 incorporated, Nelson Barbados Investments, was never
13 incorporated in Ontario?

14 A. To my knowledge.

15 1304 Q. Correct?

16 A. Correct.

17 1305 Q. Or in Barbados?

18 A. I don't know that. To my knowledge?

19 1306 Q. Right. You have no knowledge that it was
20 ever incorporated in Ontario or Barbados?

21 A. I have no knowledge.

22 1307 Q. I just want to confirm this that you
23 said, Mr. Ranking asked you if you knew of the reason
24 for incorporation and I think you said "He didn't tell
25 me, I did not know specifically why the company was

1 incorporated". Then Mr. Ranking asked: "Did you know
2 that it was in any way related to Barbados or Kingsland
3 Estates and the issues that are in the action" and you
4 said: "Not at the time of incorporation". Is that
5 right?

6 A. I don't remember what I said, Mr. Silver.

7 1308 Q. From three days ago?

8 A. Correct.

9 1309 Q. So is that true what I just said? I
10 think it is what you said.

11 MR. DEWART: I have the transcript in front of
12 me. I can give you the exact, what is the
13 question?

14 MR. SILVER: At the time of incorporation
15 Mr. Best didn't tell him and he didn't know why
16 the company was incorporated and he didn't know
17 at the time that it had anything to do with the
18 issues that find their way into the action.

19 MR. DEWART: "QUESTION: Did you know if it had
20 anything to do with matters involving Barbados
21 and litigation concerning the shares of
22 Kingsland Estates? ANSWER: This is at the
23 time? No."

24 BY MR. SILVER:

25 1310 Q. This is at the time of incorporation and

1 the answer is no and I am going to suggest to you, Mr.
2 McKenzie, that you knew at the time of incorporation
3 that this was a company that might be used for the
4 purposes of issues relating to Barbados and Kingsland
5 Estates Limited. You say what and that your answer that
6 Mr. Dewart just read was incorrect.

7 MR. DEWART: No, no, that is not fair. That is
8 so not fair.

9 MR. SILVER: Well, I am asking a question.
10 What is unfair?

11 MR. DEWART: There is a false premise to your
12 question.

13 MR. SILVER: What is it, although I really
14 don't want to get into debates about false
15 premises, but what is it in this case?

16 MR. DEWART: The question that was put to him
17 by Mr. Ranking had to be whether or not it was
18 incorporated for the purpose of litigation and
19 you are suggesting in that question and you are
20 saying that is not true when you say that it
21 wasn't incorporated for the purpose of dealing
22 with the shares. Two separate issues.

23 BY MR. SILVER:

24 1311 Q. Sir, did you know or understand at the
25 time of incorporation that that was a corporation that

1 was intended to have some involvement with Kingsland and
2 its shares?

3 MR. DEWART: Go ahead.

4 THE DEPONENT: I don't think so.

5 MR. SILVER: You didn't know at the time that,
6 what is "I don't think so". It is either "I
7 knew" or "I didn't know" or "I can't
8 remember."

9 MR. DEWART: No, that is an answer. Come on,
10 Mr. Silver, that is an answer.

11 MR. SILVER: "I don't think so", it is not an
12 answer that anybody can make any use of or that
13 provides any meaning to the court.

14 MR. DEWART: I completely disagree. You have
15 asked a question. He said he didn't think so.

16 BY MR. SILVER:

17 1312 Q. Mr. McKenzie, again, I just want to
18 clarify if I understand this correctly, when Mr. Ranking
19 asked you about Mr. Best and your involvement as his
20 counsel in this matter, you indicated that he came to
21 you with a problem in the fall of 2006 and you were
22 retained in the fall of 2006. Am I right? I have got
23 that right?

24 A. I think that is right, yes.

25 1313 Q. Am I to understand from that that you had

1 no involvement on Mr. Best's behalf or any other basis
2 before that time?

3 A. No.

4 1314 Q. You didn't?

5 A. No.

6 1315 Q. These were all new issues to you in the
7 fall of 2006?

8 A. Correct.

9 1316 Q. Before the fall of 2006 you hadn't
10 travelled to the Barbados in respect of any of the
11 issues that form part of the litigation, is that right?

12 A. Correct.

13 1317 Q. You hadn't met with anybody in respect of
14 issues that subsequently form part of the litigation?

15 A. Correct.

16 1318 Q. You hadn't conducted any investigations
17 prior to the fall of 2006 with respect to issues that
18 subsequently became part of the litigation?

19 A. Correct.

20 1319 Q. So, under oath, you say that "When
21 Mr. Best approached me these were new issues to me in
22 every respect" and that was in the fall of 2006,
23 correct?

24 A. What he brought to me was the first time
25 I had heard about his problem.

1 1320 Q. I don't know "what he brought" to you
2 means. Am I right that when he came to you in the fall
3 of 2006 you had no involvement with these issues or the
4 players in any respect, is that correct?

5 A. The issues in the litigation, I had not
6 turned my mind to them.

7 1321 Q. Is that the same as you didn't have any
8 involvement in any respect?

9 A. I'm trying, he brought me the stuff,
10 talked to me about it and that's when I started to focus
11 my mind on the issues at hand.

12 1322 Q. And as the corollary before that time you
13 had never turned your mind to those issues, or had any
14 involvement of any kind in those issues?

15 A. I just can't remember.

16 1323 Q. You can't remember. So now it is
17 unclear. You may have been involved in these issues
18 before the fall of 2006 when Mr. Best came to you with
19 his problem as you put it, right?

20 A. As a problem no, but aware...

21 MR. DEWART: Sorry, finish the answer.

22 THE DEPONENT: Aware...

23 MR. DEWART: You interrupted him.

24 MR. SILVER: Sorry, I did not. He said "as a
25 problem, no" and anyway he threw up his arms.

1 THE DEPONENT: I was there in Barbados many
2 times on many things. Did I hear about this
3 before?

4 BY MR. SILVER:

5 1324 Q. Yes. How about that?

6 A. I can't say specifically yes or no about
7 Mr. Best's problems. He brought them to me.

8 1325 Q. These problems. I am not talking about
9 Mr. Best's problems. You know that we don't accept that
10 these are Mr. Best's problems. I will get to that, but
11 I am just trying to get a clear answer and I will ask it
12 one more time. Before the fall of, or we may have to do
13 it the long way. Maybe that is better. Before the fall
14 of 2006 had you been to Barbados before that?

15 A. Yes.

16 1326 Q. Many times?

17 A. Often.

18 1327 Q. 20, 30 times?

19 A. I don't keep count, but I have been there
20 a lot.

21 1328 Q. That was all in respect of the sanctuary?

22 A. No.

23 1329 Q. What other issues were you dealing with
24 in Barbados other than vacation?

25 A. Other clients, things, business goes on.

1 1330 Q. Were any of them related in any way to
2 Kingsland Estates Limited?

3 A. I don't recall.

4 1331 Q. You knew Mr. Allard before the fall of
5 2006?

6 A. I did, yes.

7 1332 Q. I take it that before the fall of 2006
8 you never spoke to Mr. Allard about any issues that in
9 any way involved Kingsland Estates Limited, is that
10 right?

11 A. I don't recall any conversations.

12 1333 Q. Right, your conversations with Mr. Allard
13 before the fall of 2006 dealt with other matters
14 unrelated to Kingsland Estates Limited in any way,
15 right?

16 A. I did converse with him about other
17 matters.

18 1334 Q. I didn't ask that, sir. That's why this
19 examination takes so long. You know what I asked.
20 Please answer my question. Your answer is evasive with
21 the greatest of respect.

22 MR. DEWART: Now, it was fair up to then and
23 you start editorializing.

24 BY MR. SILVER:

25 1335 Q. He knows the, the question was prior to

1 the fall of 2006 had you had any discussions with
2 Mr. Allard at any time that had anything to do with
3 Kingsland Estates Limited, please?

4 A. I can't recall.

5 1336 Q. So you may have is what you are saying?

6 A. Yes.

7 1337 Q. Did you ever represent Mr. Allard before
8 that time in respect of issues which in any way related
9 to Kingsland Estates Limited?

10 A. No.

11 1338 Q. Prior to the fall of 2006 had you ever
12 met John Knox?

13 A. I can't recall.

14 1339 Q. To the extent that you had met John Knox
15 before the fall of 2006, what was it in connection with?

16 MR. DEWART: He can't recall if he met him.

17 How could he recall what it was about?

18 MR. SILVER: I am trying to trigger a memory as
19 to whether or not he met him by trying to
20 address it a different way, namely through the
21 subject matter.

22 MR. DEWART: To the extent, whatever.

23 MR. SILVER: Can you answer that question?

24 THE DEPONENT: Sorry?

25 BY MR. SILVER:

1 1340 Q. What other issues did you have dealings
2 with Mr. Knox on other than as might be related in some
3 way to Kingsland Estates Limited?

4 A. The National Park Nature Sanctuary.

5 1341 Q. He was involved with that? John Knox was
6 involved in that?

7 A. Yes.

8 1342 Q. Do you recall having those discussions,
9 sorry, anything else other than the sanctuary and the
10 National Park?

11 A. I don't recall.

12 1343 Q. Is it your recollection that your
13 discussions with John Knox with respect to the National
14 Park and the sanctuary preceded the fall of 2006 or came
15 after?

16 A. I can't remember specifically.

17 1344 Q. You know that one of my clients is
18 Richard Ivan Cox...

19 A. Yes.

20 1345 Q. ...the first-named defendant on the style
21 of cause. Have you ever met Richard Ivan Cox in person?

22 A. Yes.

23 1346 Q. When did you meet him? Firstly on how
24 many occasions did you meet Mr. Cox in person?

25 A. I think once. Again, you are about to

1 tread on areas where I have...

2 1347 Q. Well, you don't...

3 A. ...undertaken that I won't even say that
4 things, meetings took place and I will repeat what I
5 said earlier. If all counsel and their clients will
6 give me a blanket release I will start answering these
7 questions.

8 1348 Q. I am not giving you any release. I am
9 asking you a question. On how many occasions have you
10 met in person with Richard Cox?

11 MR. DEWART: The witness answered that he has
12 given some sort of undertaking not to discuss
13 these matters.

14 MR. SILVER: So it is a refusal on that basis.

15 /R MR. DEWART: Yes.

16 BY MR. SILVER:

17 1349 Q. What was the undertaking you gave and to
18 whom? I take it you gave it to Mr. Cox?

19 /R A. I'm refusing...

20 1350 Q. You are refusing.

21 A. ...on the point that I have made promises
22 and undertakings. I apologize for my phone going off.

23 1351 Q. To the extent that I speak on behalf of
24 Mr. Cox, I can assure you that he has got absolutely no
25 concern about your undertaking of confidentiality that

1 you may or may not have given to him and has
2 specifically instructed me to direct questions to you
3 with respect to discussions that you had with him and an
4 e-mail exchange that you had with him, so I hope that
5 satisfies you because I would like to review them.

6 A. Unfortunately, and I'm sorry this came up
7 and it hasn't been raised before. I am going to refuse.
8 You can take this up with my counsel because I'm not
9 going to...

10 1352 Q. Do you want to take a break and take it
11 up with your counsel?

12 A. No.

13 1353 Q. I'm offering you now to take a break to
14 consult with counsel. After doesn't help us.

15 A. Unless I see something in writing and I
16 think, Mr. Silver, you among all defendants and counsel
17 would understand that I need to see something in writing
18 revoking certain things that have happened...

19 1354 Q. Let me ask...

20 A. ...excuse me, because of the nature and
21 parties involved.

22 1355 Q. Let me ask a different question, and I
23 think maybe this should help you. How many times did
24 you meet with Mr. Cox before the Statement of Claim was
25 issued?

1 /R A. I refuse on the same basis. I am just
2 going to say please understand and respect
3 that I'm not going to be able to, with the
4 greatest of, I wish it had been resolved
5 before but it hadn't, so I'm sorry.

6 1356 Q. I want to make it clear that the
7 questions I am going to ask, and if you are going to
8 refuse, I will get those refusals as I ask the
9 questions, are all focussed on the time period before
10 the issuance of the Statement of Claim in court file
11 number 07-0141, which claim was issued, I think Mr.
12 Ranking said February 9th, 2007 and if that wasn't clear
13 before, that was my fault. Okay? That's the only
14 period that I am focussing on now and so that you have
15 it specifically in respect of your evidence that you
16 first became involved in the fall of '06 and I want to
17 cross-examine on that. Okay? So prior to when the
18 Statement of Claim was issued on February 9th, 2007, how
19 many times had you met Richard Cox?

20 /R A. Refuse.

21 1357 Q. You are refusing?

22 A. I'm just saying, confidential.

23 1358 Q. Do you agree with me, sir, without, for
24 the purposes of this question, getting into the content
25 of any discussion, do you agree with me that you met

1 with Mr. Cox, without focussing on how many times, you
2 met with him before the Statement of Claim was issued.
3 Is that true?

4 A. I don't recall.

5 1359 Q. Do you agree with me that before the
6 Statement of Claim was issued you corresponded through
7 e-mail with Mr. Cox?

8 A. I don't recall.

9 1360 Q. You may have. Is that you are saying?
10 You just don't remember?

11 A. I don't recall.

12 1361 Q. Well, "I don't recall" could mean "I have
13 a clear memory that I didn't" or "an imprecise memory as
14 to whether or not I did", so that is why "I can't
15 recall" confuses me. "I can't recall ever doing that",
16 so I want to know, which is it? Do you have a clear
17 memory that you didn't or an imprecise memory as to
18 whether or not you did. Mr. Dewart can help you. He
19 understands the distinction I am making.

20 MR. DEWART: Clarify what you mean by "I don't
21 recall". Are you saying you have no present
22 recollection of doing so and it might have
23 happened, or are you saying you don't believe
24 it happened.

25 THE DEPONENT: I just don't have a present

1 recollection of what you said happening.

2 BY MR. SILVER:

3 1362 Q. I take it that if you saw an e-mail you
4 would be able to refresh your memory and confirm or deny
5 whether or not you sent a particular e-mail or received
6 one, right?

7 A. That's an "if" question. If you have an
8 e-mail, it may help.

9 1363 Q. Sir, you did say that in your
10 investigations after Mr. Best retained you you came to
11 know of certain circumstances of the litigation that had
12 been going on in Barbados. Did I get that right?

13 A. I became aware of litigation in, the
14 existence of litigation.

15 1364 Q. At some point you became aware that
16 Ms. Knox brought a court case in Barbados asserting a
17 preemptive right to buy the shares that were proposed to
18 be sold to Classic Investments, another one of my
19 clients?

20 A. I do recall I was aware of that at some
21 point in time.

22 1365 Q. You are aware that that got dismissed in
23 the lower court in Barbados, right? You were aware of
24 that?

25 A. I read the Privy Council judgment. I

1 think it summarized...

2 1366 Q. Right and the Privy Council judgment came
3 out in June of 2005. Is that consistent with your
4 memory?

5 A. I don't know.

6 1367 Q. Justice Shaughnessy dealt with all of
7 this in his reasons. You don't take exception to the
8 findings he made in his reasons, do you?

9 A. With the greatest of respect...

10 MR. DEWART: Is there any issue, you don't need
11 to prove the law. It must be in the Law
12 Reports. You can find out when the Privy
13 Council handed down its decision.

14 MR. SILVER: I know when it handed down. I want
15 to get the timing right for the purposes of
16 cross-examining your client. Do you have
17 Justice Shaughnessy's reasons handy in the
18 jurisdiction motion? Does anybody else have an
19 extra set that I could put in front of the
20 witness?

21 MR. DEWART: Mr. Silver, if you tell me that
22 Justice Shaughnessy held in his reasons that
23 Privy Council handed down its decision...

24 MR. SILVER: On June 28th, 2005.

25 MR. DEWART: Do you have any information to

1 the contrary, Mr. McKenzie, or any reason to
2 believe it is incorrect?

3 THE DEPONENT: I have no information.

4 BY MR. SILVER:

5 1368 Q. And you knew that date at some point in
6 time?

7 A. I read the Privy Council decision.

8 1369 Q. You can't tell me when you read it?

9 A. No.

10 1370 Q. You read it before the Statement of Claim
11 was issued?

12 A. I can't say.

13 1371 Q. You might not have read it until after?
14 You issued your claim without reading the Privy Council
15 decision? That is what you are saying? That is a
16 possibility?

17 A. Possibility.

18 1372 Q. Justice Shaughnessy also finds that,
19 following the dismissal of Ms. Knox's appeal to the
20 Privy Council in December of 2005, the transaction, the
21 purchase of shares by Classic was completed and I
22 suggest to you you knew that as well at some point.

23 A. That the judge had ruled that, you mean?

24 1373 Q. No, after ruling of the Privy Council in
25 June, in December of 2005 the transaction whereby

1 Classic became a shareholder was consummated?

2 A. I don't know that.

3 1374 Q. You don't know that. Well, you knew it
4 at some, you still don't know that today?

5 A. It never got that far to discoveries.

6 1375 Q. You pleaded in the Statement of Claim
7 that commencing in or about 2005 shares of Kingsland
8 were transferred from some of the shareholders of
9 Kingsland to Classic?

10 A. That's what I was told.

11 1376 Q. So you knew that before the Statement of
12 Claim was issued. Somebody told you that?

13 A. Right.

14 1377 Q. Who told you that?

15 A. Probably John Knox.

16 1378 Q. Sir, specifically I am going to suggest
17 to you that you knew this in December or before
18 December, 2005?

19 A. Knew what, sir, sorry?

20 1379 Q. You knew that some of the shareholders of
21 Kingsland transferred shares to Classic and you knew
22 that in or before December, 2005?

23 A. I did not know that.

24 1380 Q. You didn't know that. You are sure about
25 that under oath. You are sure about your recollection

1 on this point sitting here under oath.

2 A. I did not know that.

3 1381 Q. I'm going suggest, sir, that you knew
4 that some of the shareholders had sold their shares to
5 Classic, not only at December, 2005 but on the date that
6 Nelson Barbados Group Ltd. was incorporated, so I am
7 bringing it back an extra month into November, 2005,
8 right?

9 A. I still don't know it.

10 1382 Q. You still don't know what?

11 A. That shares were transferred on any
12 specific date.

13 1383 Q. You still don't know that.

14 A. Correct.

15 1384 Q. Oh, but you justify the pleading because
16 that is what somebody told you. Is that the distinction
17 you are making because you pleaded it?

18 MR. DEWART: No, no, no, no, he did not plead
19 that he knew that when the company was
20 incorporated.

21 MR. SILVER: No, he didn't, of course not.

22 MR. DEWART: Well, of course not.

23 MR. SILVER: But he pleaded in 2005 shares were
24 transferred and I'm suggesting to him that he
25 knew that as late as late November, early

1 December, 2005. Whatever, whoever told you
2 this, they told it to you before or in the time
3 frame November, 2005, December, 2005 and not,
4 as you suggest, in the fall of 2006 and
5 following. Am I right about that?
6 THE DEPONENT: I think I lost you, but if you
7 are saying that I knew something, no, I was
8 told things and they found their way into the
9 pleadings and hopefully...

10 BY MR. SILVER:

11 1385 Q. I'm going to suggest...

12 A. ...we could be successful on the claim.

13 1386 Q. I am going to suggest to you whoever told
14 this to you, they told it to you in the November,
15 December, 2005 time frame about a year before you were
16 suggesting you started to find out this information in
17 response to Mr. Ranking's questions. Am I right?

18 A. I just can't remember when I was told.

19 1387 Q. So it is possible, sorry...

20 A. Let me finish.

21 1388 Q. Sorry.

22 A. But the reality of the pleading was the
23 time I would focus on, fall '06.

24 1389 Q. Would you agree with me that, to the
25 extent that you met with Mr. Cox before the Statement of

1 Claim was issued, at the time you met with him you knew
2 that the shares had been transferred to Classic, he
3 being the principal of Classic?

4 A. To be clear, I never knew the shares had
5 been transferred.

6 1390 Q. By the time you met with Mr. Cox prior to
7 the issuance of the Statement of Claim you had been told
8 that the shares had been transferred to his company,
9 Classic?

10 A. I go back to the confidentiality issue to
11 say I would not like to answer that question.

12 1391 Q. What does it have to do with anything
13 confidential? I am asking you about the timing when
14 knowledge was given to you in relation to a meeting that
15 you have had with Mr. Cox. I respectfully suggest that
16 this confidentiality thing is just an out for you. It
17 is your only way to avoid answering questions that will
18 show that you were less than perfectly forthright in
19 your prior answers.

20 MR. DEWART: That is not a question. Don't
21 argue with the witness, Mr. Silver, just put
22 your question.

23 BY MR. SILVER:

24 1392 Q. I will put it one more time and give you
25 an opportunity to answer. Am I right, sir, that before

1 you first met with Mr. Cox prior to the issuance of the
2 Statement of Claim you had been told that Kingsland
3 shares had been transferred to his company, Classic,
4 right?

5 /R A. I adopt my last answer.

6 1393 Q. Which you refuse to answer it on the
7 basis of some confidentiality that exists between
8 yourself and Mr. Cox and I'm telling you that needn't be
9 your concern.

10 A. As I said, if you can bring me a blanket
11 release from all of the defendants to say it is okay to
12 talk about this stuff, I will consider it.

13 1394 Q. Why is it important that you get a
14 release from anybody or an assurance from anybody but
15 Richard Cox whom I act for and I'm speaking for here
16 today?

17 A. Because of the nature of the
18 confidentiality I gave.

19 1395 Q. Now, I have since your last, you were
20 cross-examined on Wednesday, February 3rd, correct?

21 A. Right.

22 1396 Q. And I made inquiries after Wednesday,
23 February 3rd about events that might have preceded when
24 you said you first became involved in the fall of 2006
25 and I would like to show you this document, which I will

1 explain for your benefit and Mr. Dewart's, Christine
2 Barbison is my secretary, so as you pointed out when you
3 see a name like that at the top, it just means it was
4 pulled off her computer. Below that you will see
5 "Judith Cox", who is my client's wife, and she sent me
6 an e-mail on February 4th, they are in Bequia, which
7 made it a little more difficult because they are not in
8 Barbados. Of significance, if you look at the second
9 page of this document, just because e-mails, the trail
10 starts at the back and moves forward. So dealing with
11 the second page if I may?

12 MR. DEWART: If I'm reading this correctly the
13 second page of this e-mail is, purports at
14 least, to be an e-mail from my client to
15 whoever "JSI" is.

16 BY MR. SILVER:

17 1397 Q. Richard Cox, dated December 22nd, 2005 at
18 12:39. Mr. McKenzie, did you send that e-mail to
19 Richard Cox on that date?

20 A. I don't recall.

21 1398 Q. "wmckenz@global.net" was an e-mail
22 address that you used in that time frame?

23 A. I don't recall that address.

24 1399 Q. You don't. So are you suggesting that
25 this is made up, that this is made to appear to be an

1 e-mail that you sent to Richard but really isn't, or you
2 are just saying "Maybe I sent it, I just don't remember
3 it"?

4 A. I'm not saying any of those things.

5 1400 Q. So what are you saying? I am asking
6 whether you recall sending an e-mail to Richard in the
7 form that I am putting in front of you.

8 A. You are showing me a document and I am
9 saying I don't recall sending the document.

10 1401 Q. The second page...

11 MR. DEWART: That is what I'm looking at.

12 BY MR. SILVER:

13 1402 Q. Okay, so, is that the same as saying "I
14 didn't send it". I am trying to understand what "I
15 don't recall" means again. Is it "I have a clear
16 recollection that that isn't a document that I sent it"
17 or "My memory isn't clear. I may have sent it. I may
18 not. I can't recall"? So is it door A or door B?

19 A. I just don't recall that I sent such an
20 e-mail.

21 1403 Q. On the first page you will see what
22 appears to be Mr. Cox's response to you of the same date
23 4:30 p.m. "Dear Bill, Thanks for your call. I'm sure we
24 can resolve in a short period of time etc. I hope you
25 will be fully instructed by Peter prior to arrival". Do

1 you recall receiving that response from Richard Cox on
2 or shortly after December 22, 2005?

3 A. I don't recall. In other words, you are
4 saying this e-mail was sent on December 22nd, 2005?

5 1404 Q. That was sent to you in response to your
6 e-mail both, all of which took place on December 22,
7 2005. That is what I'm saying.

8 A. I don't recall.

9 1405 Q. So you are not denying it.

10 MR. DEWART: This document is less clear.

11 MR. SILVER: I know. Are you denying these two
12 e-mails were sent and received? I take it not.

13 THE DEPONENT: I'm not denying it.

14 MR. SILVER: I would like to mark this two page
15 document as an exhibit and Exhibit 23.

16

17 --- EXHIBIT NO. 23: Two Page E-mail

18

19 BY MR. SILVER:

20 1406 Q. What I am going to suggest to you, using
21 this document to refresh your memory, that by
22 December 22, 2005, at the very latest you knew that
23 Kingsland shares had been transferred to Classic and
24 that Richard Cox was the principal of Classic, right?

25 A. Did not.

1 1407 Q. You did not. So, why were you proposing
2 to have a meeting with Mr. Cox in that time frame?

3 A. Now you are back to the confidentiality
4 issue.

5 1408 Q. You are refusing to answer that?

6 U/T A. For that reason, yes.

7 1409 Q. I would like to give you another, what I
8 tried to do is as best as I could, put e-mail trails
9 together. So again let's, each one of these I think we
10 have got to start at the back. You will see on December
11 24th the document purports to be an e-mail from Richard
12 Cox to you at that e-mail address that I talked about on
13 Saturday, December 24th at 8:04 a.m speaking about not
14 being able to travel to Miami, then Mr. Cox speaks about
15 having had a brief chat with Johnny Knox, a limited
16 window of opportunity and he is really trying to set up
17 a meeting. Do you recall receiving this e-mail from
18 Mr. Cox?

19 MR. DEWART: Read from there to the end and
20 then the question is do you recall receiving
21 such an e-mail?

22 THE DEPONENT: I don't recall the e-mail.

23 BY MR. SILVER:

24 1410 Q. If you look right above it on the second
25 page, the middle page of this three page document, it

1 purports to be an e-mail actually starts at the bottom
2 of the first page, and I apologize for that, appears to
3 be an e-mail from you at that e-mail address to Richard
4 on the same, or two days later where the content reads:
5 "Richard, seems we both want to enjoy our holidays with
6 family and friends" and you are proposing lunch at
7 Champers at noon on 7th "Regards, Bill". I take it that
8 was an e-mail that you sent to Richard Cox?

9 A. I don't recall.

10 1411 Q. You don't recall, but you don't deny it?

11 A. That's the same thing, isn't it?

12 1412 Q. I want to make sure it is the same thing.
13 So you don't deny you received Mr. Cox's e-mail and you
14 responded as I have just indicated.

15 A. "I don't recall" says I can't confirm or
16 deny it, right.

17 1413 Q. Perfect. Then on the first page, and
18 again because they are away I understand that it is less
19 than perfect, but the subject line reads "Rick" which is
20 Richard Ivan Cox, to McKenzie, Wednesday, December 28th,
21 2005, 10:01. Mr. Cox writes back to you and says:
22 "Lunch will be fine at Champer's at around 12:30.
23 Unfortunately South Seas doesn't open for lunch..." etc.
24 Did you receive that e-mail from Mr. Cox on or about
25 December 28th, 2005?

1 A. I don't recall.

2 1414 Q. I would like to mark this document as
3 Exhibit No. 24.

4

5 --- EXHIBIT NO. 24: E-mail dated December 28, 2005

6

7 BY MR. SILVER:

8 1415 Q. I am showing you another e-mail trail
9 consisting of four pages and the first e-mail in this
10 trail starts at the second page on the bottom appears to
11 be an e-mail from Mr. Cox to you, dated December 28th,
12 2005 and it now has a subject line of "Kingsland Estates
13 Limited, Meeting January 7th, 2006". Do you see that?

14 A. I see that. I just read the whole thing
15 and I tell you I do not recall these e-mails.

16 1416 Q. You don't recall these e-mails but you
17 are not denying but they were sent and received as
18 indicated?

19 A. Same answer which is I'm not going to
20 deny or confirm. I just don't recall. Sorry.

21 1417 Q. Does any of this assist you in recalling
22 that your involvement with issues relating to Kingsland
23 Estates preceded when you say Mr. Best came to you in
24 the fall of 2006? You are just wrong about that, aren't
25 you? You forgot about, at least you forgot about these

1 meetings.

2 A. Litigation, which is what we were talking
3 about with Mr. Best, came to my attention in the fall of
4 06, when I started to hone in on it.

5 1418 Q. Okay, but the point is that you were
6 involved in the issues that you started to hone in on in
7 the fall of '06 long before that, namely as late as
8 December of 2005. Isn't that right?

9 A. I disagree with that.

10 1419 Q. You disagree with that and so you can't
11 explain these e-mails. Why would you be...

12 MR. DEWART: Just a minute. One question at a
13 time.

14 BY MR. SILVER:

15 1420 Q. Can you explain these e-mails that you
16 don't recall but don't deny?

17 A. It is hard for me to explain something
18 that I can't remember but...

19 1421 Q. Isn't it a fact, sir, that in...

20 MR. DEWART: No, no, let him finish. "It is
21 hard for me to explain something I can't recall
22 but..."

23 THE DEPONENT: I will stand by going back to
24 the confidentiality issue.

25 BY MR. SILVER:

1 1422 Q. So you won't answer the question. So we
2 don't know whether you recall being involved in these
3 issues. It almost sounds like your answer is "Yeah, I
4 now recall, but I'm not going to give you any of the
5 details because of the confidentiality", in which case
6 I'm an easy going guy. I will take little bits. I
7 will take what I can get. You now do recall a greater
8 involvement then before Mr. Best brought the issue to
9 you, but you don't want to review what that involvement
10 was because of your concerns about confidentiality.
11 Have I got it right?

12 A. I didn't have an involvement in Nelson
13 Barbados' issues...

14 1423 Q. You had...

15 A. ...until '06.

16 1424 Q. You had involvement in Kingsland Estates
17 issues before that time, though, right?

18 A. I don't think that is exactly right.

19 1425 Q. Am I close? We can do "Hotter, hotter,
20 colder", I'm getting warmer, aren't I? I suggest to
21 you, sir, that prior to the fall of '06, not only did
22 you have involvement in the issue, the Kingsland Estates
23 issues, but as indicated in Exhibit 23, in the very
24 first e-mail that you had that involvement on behalf of
25 the Knox family and Peter Allard, exactly what your

1 December 22nd e-mail says.

2 MR. DEWART: It isn't exactly what it says at
3 all.

4 THE DEPONENT: That is incorrect.

5 BY MR. SILVER:

6 1426 Q. It says: "I am as eager as you to make
7 an arrangement that would resolve all disputes involving
8 the Knox family and Peter Allard". Mr. Best isn't
9 mentioned at all in here. Am I right that to the extent
10 you before sending e-mails in that time frame, you were
11 representing the interests of the Knox family and Peter
12 Allard, correct?

13 A. I don't think that is correct.

14 1427 Q. Who were you representing in that time
15 frame? Your own interest?

16 A. The interest of resolving Nelson
17 Barbados' issues we have talked about...

18 1428 Q. Sir...

19 A. ...talking about bigger picture things.

20 1429 Q. You were talking about bigger picture
21 things in December and January, '05, '06, right?

22 A. No, I didn't say that.

23 1430 Q. What are you saying about '05 and '06
24 then? What role were you playing and on whose behalf?

25 MR. DEWART: One question at a time.

1 BY MR. SILVER:

2 1431 Q. It is two prongs to the same question.

3 A. That is again the confidentiality
4 problem.

5 1432 Q. Sir, with the greatest of respect I don't
6 accept your confidentiality out, you know that, but how
7 is it confidential to tell me who you were representing
8 in the context of e-mails that appear to have taken
9 place in that time frame?

10 A. That is the terms of the confidentiality.

11 1433 Q. This confidentiality isn't in writing
12 that you are relying?

13 A. Some are.

14 1434 Q. What about the ones that you are relying
15 on to refuse my question?

16 A. They are all mixed up.

17 1435 Q. How many confidentiality arrangements do
18 you have that were reduced to writing?

19 A. I'm not quite sure.

20 1436 Q. Can you produce the ones that were
21 reduced to writing?

22 A. That would breach the confidentiality
23 agreement.

24 1437 Q. I don't think it does. Of course I
25 wouldn't know until I see it, but why don't you redact,

1 produce them but redact anything that breaches your
2 version of the confidentiality? Will you do that?

3 A. Same problem.

4 1438 Q. So refusal, you won't do that?

5 /R A. Yes, I'm not capable. As I said the
6 solution would be a blanket release from
7 your side of the table.

8 1439 Q. I have told you Richard Cox has no
9 problems with you answering all of my questions in
10 respect to this time frame before the Statement of Claim
11 was issued.

12 MR. DEWART: The witness is saying he needs it
13 from all of the defendants.

14 MR. RANKING: Just, for the record, I share the
15 view expressed by Mr. Silver to the extent that
16 there are confidentiality agreements specific
17 to individuals, I don't see that all defendants
18 need to pile on. He needs a release from the
19 individuals who are subject to the various
20 agreements.

21 BY MR. SILVER:

22 1440 Q. In any event, let me just get through
23 this. I am dealing with the next document, we marked 23
24 and 24 and then we have got one that we haven't marked.
25 You have told me you don't receiving this e-mail from

1 Mr. Cox which starts on the second page, the December
2 28th, is that right?

3 MR. DEWART: Yes, I believe that was his
4 answer.

5 BY MR. SILVER:

6 1441 Q. Then if you look above that, you will see
7 again an e-mail that appears to be from you,
8 wmckenz@global.net.

9 MR. DEWART: "This all sounds doable"?

10 BY MR. SILVER:

11 1442 Q. "This all sounds doable", right.
12 December 31, 2005. Firstly, can you undertake to
13 confirm for me that you in fact had or still have an
14 e-mail account with an address "wmckenz@global.net"?

15 MR. DEWART: He has already said that he
16 doesn't recall that address. "Are you
17 suggesting the e-mail is made up?" And he said
18 he is not saying any of those things.

19 MR. SILVER: But he must have a way of
20 confirming that that was an e-mail address that
21 he used at a period in time and I am asking him
22 to make that inquiry and advise us.

23 MR. DEWART: First of all, it is not clear to
24 me where do you want to check? Do you have a
25 way of determining if you had that e-mail

1 address five years ago?

2 THE DEPONENT: No.

3 MR. SILVER: Just to be clear for the record
4 "Wmckenz@attglobal.net."

5 MR. DEWART: I think that is already on the
6 record.

7 THE DEPONENT: Can I give best efforts?

8 BY MR. SILVER:

9 1443 Q. All undertakings are best effort. So you
10 will make your best effort to confirm that you had or
11 didn't have that account.

12 THE DEPONENT: I am asking my lawyer...

13 U/T MR. DEWART: Yes, we will undertake to
14 determine if he had that e-mail address four
15 years ago and a month.

16 BY MR. SILVER:

17 1444 Q. He may still have it now. We will find
18 out. Then this e-mail says: "Thanks Richard, This all
19 sounds doable. I will look forward to meeting your
20 sons. I will bring someone along as well, not the
21 Knox's lawyer as I agree with you this is off the record
22 and business related, scheduled to meet the Knox's at
23 ten." Sir, do you recall that, do you agree with me
24 that you sent this e-mail that I'm reviewing to Mr. Cox
25 on or about December 31, 2005 as indicated?

1 A. I think I said I reviewed the entire
2 Exhibit 25 and could not recall. So if it included in
3 there...

4 1445 Q. We haven't marked it...

5 MR. DEWART: I anticipated you would mark it.

6 MR. SILVER: We will mark it as Exhibit 25.

7

8 --- EXHIBIT NO. 25: E-mail dated December 31, 2005

9

10 BY MR. SILVER:

11 1446 Q. You don't remember any of these e-mails
12 and similarly you don't remember the one on the first
13 page of January 1st, confirming the meeting at 12:30 and
14 who might be there.

15 A. Same answer. This whole pile.

16 1447 Q. You will see in Mr. Cox's e-mail of
17 January 1st he says in the middle: "The facts of life
18 are that", it is "the" but I imagine he meant "they"
19 "...have lost at all three levels incurring substantial
20 costs on the way for which they are responsible." I
21 take it that the "all three levels" he is referring to
22 are that lawsuit we talked about where Mrs. Knox lost it
23 in the lower court, the Court of Appeal and the Privy
24 Council, right?

25 A. Do you want me to agree...

1 1448 Q. That is what he is referring to?

2 A. Do I?

3 1449 Q. I am suggesting to you you know that now
4 and you knew that on receipt of his e-mail.

5 A. I can't agree or disagree. Is that what
6 he meant...

7 1450 Q. Skipping a sentence, "Peter also needs to
8 understand that he has backed a loser which carries a
9 cost as well". I take it you understood the "Peter" he
10 is referring to is Peter Allard, right?

11 A. I don't recall these e-mails, so I don't
12 recall what he is referring to here any better than I
13 recall the e-mails.

14 1451 Q. Sir, I suggest to you also that you knew
15 as late as January 1st, 2006 that Peter Allard had
16 advanced money to the Knox's to pursue this litigation,
17 correct?

18 A. Then? I don't recall.

19 1452 Q. You knew at some point.

20 A. Ultimately I know Mr. Allard registered a
21 security interest that indicated he had advanced money.

22 1453 Q. But...

23 A. ...to the Knox, whoever it was.

24 1454 Q. For the purposes of pursuing litigation
25 in Barbados?

1 A. That's the part I don't know for sure.

2 MR. SILVER: We will formally mark this next
3 series of e-mails we have just reviewed as
4 Exhibit 25.

5 MR. DEWART: We have done that.

6 BY MR. SILVER:

7 1455 Q. I would like to show you another one
8 which again because it is coming from Bequia, that is
9 B-E-Q-U-I-A, doesn't have the specific e-mail header,
10 but it appears to be an e-mail that was sent on January
11 9th, 2006 from you to Richard Cox that says: "Thank you
12 for the opportunity to meet with you and your son and
13 have the opportunity to have a candid off the record and
14 without prejudice communication which allowed us to
15 explore many options. While we didn't come to a
16 resolution I think we did open up some things to think
17 about, including Ted Hawken's suggestion which will
18 hopefully help you and Mrs. Knox reach a settlement
19 before the adversarial process continues too much
20 further". Do you see that?

21 A. I do.

22 1456 Q. Am I right you did, in fact, send that
23 e-mail to Richard Cox on or about January 9th, 2006?

24 A. I don't recall that.

25 1457 Q. Am I right, sir, that you in fact met

1 with Richard Cox and others on January 7th, 2006 at
2 Champer's Restaurant in Barbados, right?

3 A. That's the confidentiality thing again.

4 1458 Q. I don't know if it is confidential. All
5 I am asking you, sir, is did you have a meeting with
6 Richard Cox and others on January 7th, 2006?

7 A. Yes, as I said, I'm not going to be able
8 to answer that question because of the same
9 confidentiality issue I'm talking about.

10 1459 Q. So you are not answering the question.
11 You are refusing to answer it?

12 MR. DEWART: I would have thought at least that
13 much is clear, Mr. Silver.

14 MR. SILVER: Well, it isn't. It isn't because
15 there would be nothing to refuse if the meeting
16 didn't happen, so, I am taking from that answer
17 that "The meeting happened, but I won't answer
18 any questions about it". Is that accurate?

19 MR. DEWART: No.

20 MR. SILVER: No, so that's why I'm clarifying
21 it.

22 MR. DEWART: The witness has said he can't
23 answer the question you have posed about
24 whether or not the meeting took place without
25 breaching some sort of undertaking he has

1 given. That is all you have so far.

2 MR. SILVER: And I asked whether the agreement,
3 the confidentiality agreement is in writing
4 with my client and you said...

5 MR. DEWART: You asked all of this.

6 MR. SILVER: I can't remember whether...

7 MR. DEWART: Some were in writing. Some
8 weren't in writing. He can't.

9 MR. SILVER: Was this one in writing?

10 MR. DEWART: With your client?

11 MR. SILVER: Right.

12 MR. DEWART: I don't know. I don't think you
13 asked that specific question.

14 BY MR. SILVER:

15 1460 Q. Was the confidentiality agreement that
16 you are relying upon with my client in writing?

17 /R A. I can't answer for the same reason.

18 1461 Q. Confidentiality. You can't even tell me
19 whether the confidentiality agreement is in writing
20 because it is so confidential, have I got it? It is
21 ridiculous, with the greatest of respect. I may as well
22 say that now because I am going to argue it before
23 Justice Shaughnessy so I want to give the witness an
24 opportunity to consider the answers before we get before
25 Mr. Justice Shaughnessy, that's all.

1 MR. DEWART: Mr. Silver, you have hit the nail
2 on the head. It is the difference between
3 argument and cross-examination.

4 BY MR. SILVER:

5 1462 Q. Who is Ted Hawken?

6 A. Same issue.

7 1463 Q. Ted Hawken, it can't be that you can't
8 tell me. Let me start, do you know a man named Ted
9 Hawken?

10 A. I do.

11 1464 Q. Is he a person who resides in Ontario?

12 A. He does.

13 1465 Q. Is he a lawyer?

14 A. No.

15 1466 Q. Is he somebody that travelled with you to
16 Barbados on any occasion?

17 A. He has.

18 1467 Q. What does Mr. Hawken do for a living?

19 A. Entrepreneur.

20 1468 Q. What is your relationship with
21 Mr. Hawken?

22 A. I know him.

23 1469 Q. How do you know him?

24 A. I have known him a long time.

25 1470 Q. Am I right, sir, he travelled, at least

1 on one occasion he travelled to Barbados with you in
2 respect of Kingsland Estates Limited related issues?

3 A. I think he has been in Barbados a number
4 of times.

5 1471 Q. In respect of?

6 A. Of which I have been with him a few
7 times.

8 1472 Q. On each of the times that you were with
9 him was it at least partially in respect of Kingsland
10 Estates Limited related issues?

11 A. I can't say each time, but I think some
12 time the topic came up.

13 1473 Q. I would like to mark the January 9th,
14 2006 e-mail as Exhibit 26.

15

16 --- EXHIBIT NO. 26: E-mail dated January 9, 2006

17

18 BY MR. SILVER:

19 1474 Q. Do you know a man named Tony Hoyos,
20 H-O-Y-O-S?

21 MR. DEWART: You have given me two documents
22 here, Mr. Silver.

23 MR. SILVER: Did I?

24 MR. DEWART: I am not sure which one...

25 BY MR. SILVER:

1 purports to be.

2 BY MR. SILVER:

3 1481 Q. This does not purport to be between,
4 involve Richard, but so I am going to mark this one for
5 identification.

6 MR. DEWART: As you see fit. Just to be clear
7 the others, don't take it from that that I have
8 accepted the other's as properly proven.

9 MR. SILVER: I am sure we will have a healthy
10 argument over that. So I will mark that and
11 then go straight to this next one.

12

13 --- EXHIBIT NO. A: E-mail Exchanges Feb 21, 22, 23

14

15 MR. RANKING: Just so I am clear, this is an
16 e-mail dated February 23, 2006.

17 MR. SILVER: Thank you. You are keeping a set.

18 MR. RANKING: Yes.

19 MR. DEWART: Sorry, what is the number on that,
20 27?

21 MR. RANKING: We have identified this as
22 Exhibit A.

23 MR. SILVER: Exhibit A is e-mail exchanges of
24 February 21, '22 and 23 between Hoyos and
25 Richard Cox. The next one I am looking at is

1 an e-mail from Hoyos to Cox dated February 27th
2 which says at the top "Richard Gerard". You
3 know who Gerard is. That is a question. You
4 know that Gerard Cox is Richard Cox's son.

5 THE DEPONENT: Gerard Cox? Yes, I think he is.

6 BY MR. SILVER:

7 1482 Q. You met with Gerard was at the meeting at
8 Champer's on January 7th, correct, as the e-mails
9 indicate?

10 /R A. Confidentiality issue.

11 1483 Q. Can't answer that. Then coming to
12 February 27th Mr. Hoyos is sending to Cox, he says
13 "Richard Gerard, here is text of my e-mail to Bill
14 McKenzie today". Then it says: "Bill..." then it goes
15 down to Tony with a closed quote. Am I right, sir,
16 that...

17 MR. DEWART: Well, just a...

18 BY MR. SILVER:

19 1484 Q. I will ask the question. Am I right that
20 on or about February 27th, Mr. Hoyos sent to you an
21 e-mail with the contents set out in the document that
22 I'm showing you?

23 A. Sorry, your question was did Mr. Hoyos
24 send me an e-mail.

25 1485 Q. With the contents set out in the document

1 I am showing to you.

2 A. I don't recall getting an e-mail from
3 Mr. Hoyos.

4 1486 Q. Can you search your records and advise me
5 whether on or about February 27th you received an e-mail
6 from Tony Hoyos? This in '06?

7 MR. DEWART: I have no difficulty with the
8 undertaking, subject to what the witness tells
9 me about whether or not it can be done.

10 "Search records" is kind of vague so where
11 would you look for such an e-mail?

12 THE DEPONENT: Are you asking me or Mr. Silver?

13 MR. DEWART: I am asking you.

14 THE DEPONENT: I can't do it.

15 BY MR. SILVER:

16 1487 Q. Why not?

17 A. You are saying all of this happened in
18 2006.

19 1488 Q. Correct?

20 A. I have no records of e-mail in 2006.

21 1489 Q. Where did they go?

22 A. If they happened?

23 1490 Q. If they happened.

24 A. If that is my address which I'm going to
25 check as I understand.

1 1491 Q. Let's assume both of those the answer is
2 yes. They happened and that is your address. Can you
3 check to see if you can produce the e-mails?

4 A. Yes, I will make my best effort, sure.

5 MR. DEWART: To do what?

6 THE DEPONENT: To see if I can produce the
7 e-mails. Is that what he said? You are the
8 undertaker.

9 BY MR. DEWART:

10 1492 Q. To see if he can produce e-mail between
11 you and Tony Hoyos in that time frame from him and to
12 him. Will you do that?

13 U/T MR. DEWART: We will use best efforts to see if
14 he can produce e-mails exchanged between he and
15 Tony Hoyos in the period in February, 2006.

16 MR. SILVER: Well, no, in the period before
17 the issuance of the Statement of Claim.

18 MR. DEWART: Okay.

19 MR. SILVER: Will you go the same with respect
20 to e-mails to and from Richard Cox?

21 U/T MR. DEWART: Yes.

22 MR. SILVER: Thank you. I would like to mark
23 the document we were just looking at as the
24 next Exhibit 27.

25 --- EXHIBIT NO. 27: E-mail dated February 27th

1 MR. SILVER: You will see at the bottom of
2 this document which, for the ease of
3 identification, we will mark as Exhibit 28.

4

5 --- EXHIBIT NO. 28: E-mail dated March 3rd, 2006

6

7 MR. RANKING: Sorry, which document?

8 BY MR. SILVER:

9 1493 Q. The next one, which is March 3rd. You
10 will see at the bottom there is an e-mail from Tony
11 Hoyos to Richard and Gerard Cox "Re K.L. update R./G."
12 which I imagine is Richard and Gerard. "This is the
13 text of Bill McKenzie's reply to me yesterday". Do you
14 see that?

15 A. I see it.

16 1494 Q. If you flip over the page there is, says:
17 "Thanks, Tony. Maybe this is a nonstarter for you. I
18 agree that all sides have managed to escalate." Do you
19 recall sending an e-mail with that content to Tony Hoyos
20 on or about March 3rd, 2006?

21 A. No.

22 1495 Q. No, you don't remember or you don't have,
23 you are clear that you didn't send that e-mail, is that
24 what you say or you don't remember whether you did or
25 you didn't?

1 A. When I say I don't recall, it means I
2 have no recollection.

3 1496 Q. I know...

4 A. I don't want to quibble with you,
5 counsel. I am just saying how can you put me to now say
6 yes or no. I don't recall.

7 1497 Q. No, the difference for me is that I have
8 no recollection. I am going to say this again "I have
9 no recollection" could mean "It is clear in my mind that
10 I didn't send that e-mail. I have no recollection of
11 sending that e-mail" or it could mean: "It is not
12 clear. Maybe I did. Maybe I didn't. I don't have a
13 recollection", so when somebody says "I don't have a
14 recollection", there are two options, so I want to make
15 sure I know which one it is when you say "I have no
16 recollection". I take it it is the same as the other
17 one where you might have, you might not have. You are
18 not sure. You can't remember? Is it that?

19 A. I can't remember.

20 1498 Q. Right. Mr. Dewart, correct me if I'm
21 wrong, but I am going to take that to mean he might
22 have, he might not. He doesn't remember, as opposed to
23 he is clear that he didn't.

24 MR. DEWART: I understand the witness to be
25 saying he has no recollection of it. You have

1 not heard an adamant denial that it could have
2 taken place. Is that right?

3 MR. SILVER: Thank you.

4 MR. DEWART: Is that what you are saying?

5 THE DEPONENT: An adamant denial? Something
6 that happened five years ago?

7 BY MR. SILVER:

8 1499 Q. You are not adamantly denying that you
9 sent this e-mail?

10 MR. DEWART: You are just saying you have no
11 recollection of having done so. That is your
12 evidence.

13 THE DEPONENT: Yes.

14 BY MR. SILVER:

15 1500 Q. The next one, which we will mark as
16 Exhibit 29.

17 --- EXHIBIT NO. 29: E-mail (March, 2006)

18 BY MR. SILVER:

19 1501 Q. Is a, really what it is Tony Hoyos
20 describing to Richard an e-mail exchange that Tony Hoyos
21 had with you, so at the top he says, he is writing to
22 Richard "Yesterday I shared with Bill your reaction to
23 the e-mail and he then replied this morning 'Tony, good
24 work. One small step is a good start.' I'm encouraged
25 that you... Regards, Bill". Did you send an e-mail to

1 Tony Hoyos in or around March with that content?

2 A. I don't recall.

3 1502 Q. In the middle it says: "Also please
4 e-mail a copy of the valuation done by Nick P." Do you
5 know who "Nick P.", is purportedly out of your e-mail?
6 Do you know who Nick P. is?

7 A. I don't think so. I have heard the name.
8 I just can't remember.

9 1503 Q. Is Nick P. an evaluator in Barbados?

10 A. Could be.

11 1504 Q. To the extent this is your e-mail you
12 would have known that in March of 2006. Otherwise...

13 A. Two problems. I don't recall and if I
14 correct and...

15 1505 Q. Then this e-mail...

16 A. ...there is still the confidentiality
17 issue.

18 1506 Q. Then this e-mail says, "Once I have these
19 I will be fully instructed and it may be a good time for
20 us to meet". Again, I guess I have to take a little bit
21 of a hypothetical in here, but here is my question. To
22 the extent you sent this e-mail and you said what I just
23 read, am I right that at that time you weren't receiving
24 instructions from Donald Best? He came later.

25 A. We are picking a point in time...

1 1507 Q. March...

2 A. Your question is had I received
3 instructions to commence litigation? No, I had not.

4 1508 Q. No, I didn't say that. Sir, if you
5 would, because we will get out of here quicker, if you
6 follow these e-mails with me when I point out sentences,
7 it will assist in answering the question that I have on
8 the sentence, so again, looking at the body of this
9 e-mail there is a sentence, do you see where it starts
10 "Once..." Do you see that? How can you see it if you
11 are not looking at it?

12 A. I read it.

13 1509 Q. Well, you read it but then you answered
14 the question. It says: "Once I have these", referring
15 to valuations done by Nick P, "I will be fully
16 instructed and it may be a good time for us to meet".
17 Okay? Am I right that in March of 2006 you weren't
18 getting any instructions from Donald Best yet. He only
19 came to you in the fall of '06?

20 A. He came to me in fall of '06. I had no
21 instructions from Donald Best.

22 1510 Q. And to the extent that you said "I will
23 be fully instructed", you weren't referring to
24 instructions from Donald Best, correct?

25 A. All I can tell you is Mr. Best approached

1 me with his issue in the fall of '06, so I think it is
2 logical to say on March '06 that he had not given me any
3 instructions to do something, start a litigation. I
4 agree with that.

5 1511 Q. Who were you referring to when you said
6 in this e-mail "I will be fully instructed"? Who was
7 instructing you in March of '06?

8 A. Recollection is a problem.
9 Confidentiality remains a big problem.

10 1512 Q. I'm not asking about confidentiality of
11 discussions with my client. I am asking you, who were
12 you getting instructions from in March of '06?

13 MR. DEWART: If he is getting instructions
14 from someone other than the plaintiff,
15 confidentiality is absolutely a problem. If it
16 is a client other than the plaintiff, then
17 plainly confidentiality and privilege are a
18 problem.

19 BY MR. SILVER:

20 1513 Q. Okay, so I take what I can get, and so
21 what I have is in March of '06 you were getting
22 instructions in respect to issues relating to Kingsland
23 Estates Limited from somebody other than Donald Best and
24 you won't tell me who it was that was giving you
25 instructions because of concerns over confidentiality.

1 Have I got it right? Is that right Mr. Dewart?

2 A. I don't agree with that.

3 1514 Q. That is what Mr. Dewart just said. What
4 don't you agree with, Mr. McKenzie? What don't you
5 agree with?

6 A. What you just said.

7 1515 Q. What aspect of what I said do you not
8 agree with?

9 A. I will try to put it in my words.
10 Confidentiality issues, not to mention counsel just
11 pointed out there may be privilege issues, which prevent
12 me from answering your question. I have given you the
13 solution. Get a blanket release then it won't be a
14 problem. I am just saying...excuse me. Let me finish,
15 so that can guide you on all of these questions. I'm
16 just trying to help you move along trying to get this
17 finished.

18 1516 Q. I don't accept that so why am I going to
19 let it guide me and to the extent that guides me, that
20 seems to be with respect to your route in respect to
21 answering questions about discussions with my client. I
22 am not asking you about discussions with my client now.
23 I am asking you about who were you referring to when you
24 said that if A happens ie "...I get these valuations, I
25 will be fully instructed". I am just asking you who

1 were you getting instructions from at that time? That
2 is not about a discussion with my client. Mr. Dewart, I
3 thought, said, well, that is a different
4 confidentiality. It is the confidentiality owed to the
5 person who was instructing me, which is what I put to
6 you and you disagreed.

7 MR. DEWART: Correct. I am not asking you to
8 agree with this but just maybe once again to
9 cut things short, what the witness has said
10 repeatedly is that he has given various
11 undertakings in respect to the confidentiality
12 of these discussions and that he doesn't feel
13 that he can discuss or give evidence on the
14 matters at all unless all of the defendants
15 permit him to do so.

16 BY MR. SILVER:

17 1517 Q. And you know that?

18 MR. DEWART: He keeps repeating that and you
19 keep repeating that is not acceptable to you
20 and we are wasting valuable time. I understand
21 you don't accept that position.

22 MR. SILVER: I know, but I am off that, I don't
23 accept that position at all and we will argue
24 what Justice Shaughnessy should make of that
25 position when we get to the argument, but I

1 don't accept that at all in respect to this
2 because this speaks about being instructed by
3 someone else and has nothing to do with
4 discussions with Cox, which is his out on my
5 questions about those discussions.

6 MR. DEWART: Please don't be argumentative
7 because then I have to respond to the fact that
8 it is not an out. He has given you, blah,
9 blah, blah, so let's drop the editorialization.
10 He has said the same thing. He said he cannot
11 answer your question about who was providing
12 instructions because of these undertakings he
13 has referred to.

14 MR. SILVER: Thank you.

15 THE DEPONENT: May I have a two-minute break?

16 --- DISCUSSION OFF THE RECORD

17 BY MR. SILVER:

18 1518 Q. With reference to Exhibit 29 in March,
19 2006, who were you receiving instructions from in
20 respect to matters relating to Kingsland Estates
21 Limited?

22 A. Perhaps it would be okay just to put the
23 questions on the record because I keep giving the same
24 answers. I don't mean to interrupt you but I know we
25 are pressed for time and I am just saying it is the

1 same...

2 1519 Q. So you are refusing.

3 A. ...problem throughout.

4 1520 Q. Are you refusing?

5 /R A. Same issue as I raised the last time.

6 1521 Q. You have raised any number of issues. In
7 on that specific question, in March, 2006, who were you
8 receiving instructions from in respect of matters
9 relating to Kingsland Estates Limited?

10 MR. DEWART: He has given you his answer. You
11 may not like it.

12 BY MR. SILVER:

13 1522 Q. He has refused on the basis of
14 confidentiality of the person who was giving you those
15 instructions?

16 MR. DEWART: It is broader. What he has
17 described is broader.

18 BY R. SILVER:

19 1523 Q. Was it Peter Allard and or the Knox
20 family?

21 /R A. Refusal. Same answer.

22 BY MR. SILVER:

23 1524 Q. You see, I don't want to make speeches,
24 but I want this to be perfectly clear. The theory on
25 this side of the table, at least my theory is, that you

1 were involved in this back in '05 and through '06 and
2 that it had nothing to with Donald Best, that you were
3 either directly involved, as some of e-mails indicate,
4 for acting on behalf of Peter Allard and the Knox family
5 and when that, the discussions didn't result in a
6 settlement, you caused Best to become involved as some
7 sort of straw man to be the principal of the company to
8 start an action in Ontario that you knew would be
9 subject to a jurisdiction attack which is in fact
10 exactly what happened. Isn't that true, Mr. McKenzie?

11 A. I disagree.

12 1525 Q. I would like to show you another e-mail
13 this time in April, 2006. Again it is the form where
14 Tony Hoyos is sending to my clients the contents of an
15 e-mail that he received from you. Do you see that?

16 A. Yes.

17 1526 Q. "Thanks for that, Tony. Sorry for the
18 delay." Did you send that the contents of that e-mail
19 to Tony Hoyos in or about April, 2006?

20 A. I don't recall.

21 1527 Q. Then if you flip to the second page, the
22 third paragraph, I would like to review that with you.
23 I would like to mark that as Exhibit 30.

24 MR. RANKING: E-mail dated April 24, 2006.

1 --- EXHIBIT NO. 30: E-mail dated April 24th, 2006.

2

3 BY MR. SILVER:

4 1528 Q. Thank you. The second page, third
5 paragraph, I will read it. "I will target the week of
6 April 17th...", this is apparently purports to be you
7 talking to Tony Hoyos. "I will target the week of April
8 17th to visit Barbados if that will help and it will
9 give you time to go over things with Richard. The thing
10 is we are running out of time until things ramp up in
11 the litigation scene outside of Barbados and it may then
12 be more complicated to settle". Do you see that?

13 A. I see it.

14 1529 Q. What "litigation scene outside of
15 Barbados" were you referring to?

16 A. I have said I don't recall this e-mail.

17 1530 Q. You don't recall what litigation out of
18 Barbados you were referring to, is that right?

19 A. The answer is I don't recall that I ever
20 said that. Isn't that what you are asking me?

21 1531 Q. You are not denying that you said that,
22 are you?

23 A. I'm not accepting or rejecting.

24 1532 Q. I will suggest to you, sir, in the
25 simplest terms that what you were referring to at that

1 time was the potential for litigation in Ontario and
2 what you were saying is "You better settle this now to
3 avoid litigation outside of Barbados", which turned out
4 to be Ontario. Isn't that right?

5 A. I don't recall the e-mail so...

6 1533 Q. You can't answer that?

7 A. That ends the speculation.

8 1534 Q. Exhibit 30. Clearly by April 24th you
9 had not had any discussions with Best. Mr. Best hadn't
10 come to you with his problem yet, correct?

11 A. He didn't come with his problem of the
12 litigation until the fall of '06.

13 1535 Q. You hadn't talked to Mr. Best about
14 Kingsland Estates Limited in any regard until the fall
15 of 2006, right?

16 A. I don't recall that.

17 1536 Q. Sorry, I didn't hear your answer.

18 MR. DEWART: He said "I don't recall that".

19 BY MR. SILVER:

20 1537 Q. Just while I remember, can you produce
21 your passport, please, for the time period that includes
22 '05, '06 and '07? I would like to see what it indicates
23 in terms of entry and exist from Barbados?

24 A. No, I can't.

25 1538 Q. Why not?

1 A. I just got a new one.

2 1539 Q. Where is your old one? Produce your old
3 one.

4 A. Shredder, I think.

5 1540 Q. You shred your old passport? Why do you
6 do that, sir? You get one every five years and...

7 A. I will check but I think you are supposed
8 to, aren't you?

9 1541 Q. I have never shredded one but that
10 doesn't mean I shouldn't, so will you make inquiries and
11 produce...

12 MR. DEWART: Sorry, he has given evidence that
13 he came and went to Barbados a great deal. How
14 does it assist matters to get the exact date?

15 MR. SILVER: Well, it might assist in proving
16 that he was there on January 7th, '06.

17 MR. DEWART: Have you asked him?

18 MR. SILVER: I did.

19 MR. RANKING: Furthermore there are meetings
20 that Mr. McKenzie has said, relative to these
21 e-mails, he can't recall the e-mail, can't
22 recall whether he was there so by way of
23 example...

24 U/T MR. DEWART: Fair enough. He will determine
25 if he still has and produce a copy of his

1 passport.

2 BY MR. SILVER:

3 1542 Q. Thank you. The last e-mail I have for
4 review is, which I will mark as Exhibit 31, is actually
5 one that appears to have been sent directly from Mr.
6 McKenzie, although we don't have the e-mail address, to
7 Mr. Cox on August 10th. Might be a good time to renew
8 our off the record discussions. "Now, I understand..."
9 and I am reading -- firstly, do you recall sending this
10 e-mail to Mr. Cox?

11 A. No.

12 1543 Q. But you don't deny that you might have.

13 A. Same answer.

14 1544 Q. You see it says: "Now I understand that
15 there are motions next Wednesday that may very well see
16 a court appointed receiver installed at Kingsland." I
17 take it that that refers to the Nelson Investments
18 Company?

19 A. I don't know what you, Mr. Silver, you
20 keep doing this. I say "I don't recall" and then you
21 say, "You said this" and then you say "I take it refers
22 to something". I don't follow your reasoning. I just
23 want to put you straight. I don't recall saying it, so
24 the second question is, how can you ask me, with the
25 greatest of respect.

1

2 --- EXHIBIT NO. 31: E-mail dated Aug. 10th

3

4 BY MR. SILVER:

5 1545 Q. Was your cell phone number 705-233-5833?

6 A. Always has been.

7 1546 Q. It is now...

8 A. As long as I can remember.

9 1547 Q. It is now and was in August of 2006?

10 A. I'm pretty sure it was.

11 1548 Q. You can leave Exhibit 31 up and you will
12 recall when I cross-examined John Knox I had put a whole
13 bunch of affidavits that had been filed in the Barbados
14 proceeding to him. You were his counsel at that cross-
15 examination. Do you remember that?

16 A. No.

17 1549 Q. What I'm putting in front of you are
18 exhibits to the cross-examination of John Knox conducted
19 on November 4th and these documents formed part of the
20 record that we put before the judge on the jurisdiction
21 motion. They were actually, remember we marked all of
22 the records. They were records 30 and 31 and I would
23 like you to turn to Exhibit 5 in here, please.

24 A. I'm going to take your word for it.

25 Again, I don't recall, Mr. Silver, but I will take your

1 word for it.

2 1550 Q. You have a funny memory.

3 MR. DEWART: Okay, Mr. Silver.

4 BY MR. SILVER:

5 1551 Q. Exhibit 5 are a series of affidavits in a
6 court file that is numbered 1683 of 1993 and, sir, I
7 would like you to find and maybe I could find it for
8 you, if you don't mind, it will just be quicker, in the
9 affidavits that were put to John Knox in respect to that
10 and related actions and defend matter you will see an
11 affidavit of Marjorie Knox that I have turned up for you
12 that if you go to the last page of the affidavit, it was
13 sworn on May 2nd, 2006. Do you see that?

14 A. I don't know, what do you want me to do?
15 Sorry?

16 1552 Q. Confirm that you have in front of you an
17 affidavit of Marjorie Knox sworn May 2nd, 2006.

18 A. I have a document in front of me that is
19 halfway through tab 5 you just produced to me. I got
20 it, okay.

21 1553 Q. If you look at the fourth page of that
22 affidavit...

23 A. Yes.

24 1554 Q. Marjorie Knox says: "In exercising my
25 remedies I have appointed a receiver, Nelson Barbados

1 Investments Inc., who have inspected the properties and
2 taken possession of them. They have been instructed to
3 sell all of the properties and have done so, although
4 the transaction is only now in the process of closing".
5 Do you see that?

6 A. I see it.

7 1555 Q. Is that the same company you were
8 referring to in the e-mail that we marked as Exhibit 31?

9 A. Sorry. This is the e-mail, 31, I have it
10 in my hand. I don't recall it. Now, show me what you
11 are talking about, please.

12 1556 Q. In this e-mail it speaks of motions next
13 Wednesday that may very well see a court appointed
14 receiver installed in Kingsland. What I am suggesting
15 to you, sir, is that you had knowledge of the
16 proceedings in Barbados in that time frame and knew that
17 this company, Nelson Barbados Investments Inc., Marjorie
18 Knox was seeking to install it as a receiver, right?

19 A. I know now, in other words, there was a
20 receivership in Barbados. That is the best I can do.

21 1557 Q. I am suggesting you knew that as late as
22 August of 2006 if not before, so when you say you know
23 now, I am trying to put a time when you knew that. I am
24 suggesting to you from your e-mail, which is Exhibit 31,
25 you knew that as late as August, 2006?

1 MR. DEWART: I am just not clear. I have not
2 looked at this document, Mr. Silver, so help me
3 out here. She is talking that she has
4 appointed a receiver which sounds like a
5 private appointment and the e-mail is referring
6 to a court appointment.

7 MR. SILVER: Yes, but I think that this is in
8 May and we are talking about August and her
9 attempt to privately appoint failed and so she
10 brought a motion to appoint which you would
11 know if you had been involved throughout.

12 MR. DEWART: Which, mercifully for me, I have
13 not.

14 MR. SILVER: Right.

15 MR. DEWART: But I'm...

16 MR. SILVER: But it is in these affidavits.

17 MR. DEWART: I am not arguing with you, but I
18 am just not sure, it doesn't look, just on its
19 face, as if they are referring to the same
20 thing.

21 BY MR. SILVER:

22 1558 Q. Well, my question is to Mr. McKenzie, I'm
23 suggesting to him he knew in the summer of 2006 that
24 Marjorie Knox was involved with Nelson Barbados
25 Investments Inc., a company that she was hoping to have

1 act as a receiver of Kingsland Estates Limited. Isn't
2 that right?

3 A. I don't recall, so I can't say that is
4 right.

5 1559 Q. And you can't say it is wrong, right?

6 A. That covers it, I guess not right or not
7 wrong is I don't recall.

8 1560 Q. You can't say it is...

9 A. Yes.

10 1561 Q. You will agree with me that given the
11 content of Exhibit 31 it appears to be right that in the
12 summer of 2006 you were involved in these issues enough
13 to know what was going on in Barbados, right?

14 A. August '06?

15 1562 Q. Yes, before August or before, or after,
16 the point I am trying to make is your evidence that you
17 gave to Mr. Ranking that seemed to indicate that you
18 only got involved in this in the fall of 2006, is
19 clearly not complete. You had more knowledge earlier
20 than your answer to Mr. Ranking suggested.

21 A. You lost me there. All I can say is I
22 focussed on this to the extent necessary when it was
23 brought to me as a problem by Mr. Best to start his
24 lawsuit. I mean that wasn't until the fall of '06, yes.

25 1563 Q. I guess I should mark, quite frankly I'm

1 going to make reference to all of these exhibits on the
2 motion, but I think I should mark specifically the May
3 2nd affidavit that we referred to as Exhibit 32.

4

5 --- EXHIBIT NO. 32: May 2nd Affidavit - M. Knox

6

7 MR. SILVER: If you want to keep those two
8 books, Mr. Dewart, you can. They have been...

9 MR. DEWART: Just to be clear, for the record
10 today you are marking the affidavit of Marjorie
11 Knox...

12 MR. SILVER: As Exhibit 32, May 2nd.

13 MR. DEWART: May 2nd. Exhibit 32.

14 MR. SILVER: And so that the record is
15 clear, I am going to refer to all of the
16 exhibits, or I may refer to all of the exhibits
17 referred to at the cross-examination of John
18 Knox at the argument of the costs motion.

19 MR. DEWART: I am reserving my rights on that
20 topic.

21 MR. RANKING: Will you let us know your
22 position in advance...

23 MR. DEWART: Well, my position in advance is
24 you have to prove them. I don't see how you do
25 that otherwise than by introducing an affidavit

1 and you start cross-examination.

2 MR. SILVER: They were proven on the motion for
3 jurisdiction.

4 MR. DEWART: That may well be the case.

5 MR. SILVER: And this is a cost argument in
6 respect so I don't have to prove everything
7 that was proven on the motion.

8 MR. DEWART: This is a separate motion as
9 provided for in Rule 57.07. Let's not use up a
10 lot of time on this now.

11 MR. SILVER: Well, I am not using up a lot of
12 time other than say I disagree with you. This
13 is a cost submission following a jurisdiction
14 motion that includes a motion under Rule 57.07.
15 It also seeks that the court exercises its
16 discretion under its inherent jurisdiction,
17 etc., so it not just...

18 MR. DEWART: Inherent jurisdiction is
19 supplanted by a specific statutory amendment
20 which you have under Rule 57.07 which says it
21 is a separate motion.

22 MR. SILVER: We will argue that.

23 MR. DEWART: Well, if you don't want to argue
24 it now, don't argue it then.

25 MR. SILVER: We will argue that then.

1 MR. DEWART: Let's argue it then. Next
2 question.

3 MR. RANKING: Just so it is clear, our position
4 is that Rule 57 is not a codification of the
5 common law and the cases are quite clear on
6 that.

7 MR. DEWART: I think you will find that
8 inherent jurisdiction is displaced by any
9 statutory act.

10 MR. RANKING: I disagree.

11 MR. SILVER: We disagree.

12 MR. DEWART: Directly on point, Justice Farley
13 handed it down. I will draw it to your
14 attention. Now have you had enough argument?
15 Do you have more questions?

16 MR. SILVER: I have more questions.

17 MR. DEWART: Go.

18 BY MR. SILVER:

19 1564 Q. Mr. McKenzie, I take it that you were
20 aware of, or at some point became aware of, other
21 proceedings that were commenced in Barbados dealing with
22 these same parties and Kingsland Estates Limited, all as
23 reviewed by Mr. Justice Shaughnessy in his reasons?

24 A. I became aware of some proceedings in
25 Barbados.

1 1565 Q. The pre-emptive rights proceeding which
2 also had oppression combined with it. You were aware of
3 that?

4 A. I read a lot of stuff and all I can
5 remember reading actually is the Privy Council thing but
6 I am sure I read it.

7 1566 Q. You were aware that Ms. Knox sued my
8 client and others in a separate action for oppression
9 and for disclosure of various records, that is action
10 993 of 2003. You became aware of that at some point?

11 A. As I said, I know there was action
12 specifically recalling them now. I read the stuff so...

13 1567 Q. You were aware of an action 1379 of 2006
14 where she sued for oppression and an injunction
15 restraining the sale of the Maxwell Coast property?

16 A. Again, vaguely.

17 1568 Q. You were aware that in that proceeding in
18 November of 2007 a motion was brought to stay that
19 proceeding in favour of the Ontario proceeding?

20 A. I seem to remember sending some stuff to
21 Mr. Shepherd which sounds about right.

22 1569 Q. Right and you sent stuff to Mr. Shepherd
23 and you knew that you were sending it to further a
24 motion to seek to stay the Barbados proceeding in favour
25 of the Ontario proceeding.

1 A. I think he asked me for some stuff and I
2 sent it to him. That sounds about right.

3 1570 Q. You not suggesting you didn't know why he
4 was asking or why you sent the stuff, are you?

5 A. I am pretty sure I was aware that he was
6 seeking to stay the action if that is what you mean, but
7 again I'm not sure.

8 1571 Q. You were aware of an action against, this
9 is 2141 of 2006, where your client sued mine, including
10 the Cox's and KEL, but also sued the Attorney General
11 and Price Waterhouse Cooper. You were aware of that?

12 A. You said my client sued somebody?

13 1572 Q. Well, Marjorie Knox. Sorry, that was a
14 Freudian slip. Of course, I don't know if she was your
15 client because that is confidential. Marjorie Knox sued
16 my client, Ian Deane and the Attorney General, and Price
17 Waterhouse Cooper.

18 MR. DEWART: Do you know that?

19 THE DEPONENT: I acknowledge there were
20 actions. I don't have a specific recollection
21 who was suing who. There was a limited number
22 of parties. I know that.

23 BY MR. SILVER:

24 1573 Q. You when you started the claim in
25 Ontario, you knew that there was a claim outstanding

1 against the Attorney General, and Price Waterhouse
2 Cooper. Would you agree with that?

3 A. I don't recall when I knew what I knew,
4 but there has been some actions going on there, back and
5 forth.

6 1574 Q. Mr. Justice Shaughnessy says at paragraph
7 41 of his reasons, in the last sentence of 41 he says:
8 "For the most part these affidavits..." and he is
9 referring to all of these documents in the two books
10 that I gave to Mr. Dewart, "...confirm the position
11 taken in the present action to the extent they are known
12 and are substantially similar and arise out of the same
13 underpinning facts and circumstances addressed in the
14 within action." Do you take exception with that
15 finding?

16 MR. DEWART: That is not a proper question...

17 THE DEPONENT: With the greatest of...

18 MR. DEWART: No, no, no, no, no, that is not a
19 proper question. He is counsel. His client
20 has not appealed, or I gather did appeal but it
21 was dismissed as abandoned or something, so
22 counsel's opinion about the correctness of
23 factual finding is not relevant.

24 BY MR. SILVER:

25 1575 Q. I will accept that. Am I right, sir,

1 that for the most part you knew about all these other
2 actions at the time the Statement of Claim in the
3 Ontario action was issued, for the most part?

4 A. Generally speaking whatever had happened
5 I would have reviewed.

6 1576 Q. Have you ever incorporated other
7 companies for Donald Best other than plaintiff?

8 A. I might have told him how to do it, but
9 I'm not sure.

10 1577 Q. I am asking whether you ever did it in
11 the manner, or similar to the manner, that you did it
12 for Nelson Barbados, ie, your office actually actively
13 was involved in incorporating the company.

14 A. I don't think so.

15 1578 Q. Do you ever act for him other than in
16 respect of the litigation at hand?

17 A. Him?

18 1579 Q. Him or companies.

19 A. I don't think so.

20 1580 Q. Did you know that the address that he
21 provided that found its way into the first corporation
22 profile report was a postoffice box?

23 MR. DEWART: This is Princess Street in
24 Kingston? Go ahead.

25 THE DEPONENT: Sorry, did I know?

1 BY MR. SILVER:

2 1581 Q. That was a postoffice box?

3 A. That kind of happened after my time. I
4 don't know that it is a postoffice box.

5 1582 Q. When he gave it to you, whenever it
6 happened, did you know it was a postoffice box?

7 A. No.

8 1583 Q. No. You only found out after?

9 A. From you guys.

10 1584 Q. You had said that John Knox reviewed and
11 signed off, that is my word, but sort of reviewed and
12 approve the claim before it was issued. Is that right,
13 just confirming what you have already said?

14 MR. DEWART: Let me call it up.

15 MR. SILVER: You don't have to call it up
16 unless he has got a problem with what I have
17 just suggested. I can go to my notes.
18 I have checked them and that is what he said.

19 MR. DEWART: Notes are not always a model of
20 accuracy, Mr. Silver. Sometimes they reflect
21 your wishes...

22 THE DEPONENT: My notes?

23 MR. DEWART: ...as mine do too.

24 MR. SILVER: Well, I am trying to save time
25 but...

1 MR. DEWART: Maybe this helps. He definitely
2 said, maybe this helps. He absolutely, the
3 witness gave evidence that Mr. Knox reviewed,
4 saw the claim in draft form, I think.

5 MR. SILVER: Before it was issued.

6 MR. DEWART: Yes.

7 BY MR. SILVER:

8 1585 Q. Because you issued the claim in the name
9 of "Investments" first by mistake, I suggest to you that
10 the document that John Knox reviewed was the Investments
11 Statement of Claim and that is the one that he approved
12 or gave you comments on, right?

13 A. I can't say that. I would have asked him
14 to review the guts, see if he saw any inaccuracies.

15 1586 Q. So what you are saying, you might have
16 put the guts of the Statement of Claim together and sent
17 that down to him without who the parties were?

18 A. No.

19 1587 Q. Well, then, it has got to be as I
20 suggested because you issued the Statement of Claim in
21 the name of Investments and then only switched it
22 because you say you made a mistake. I think it is
23 logically flows that John Knox reviewed the version of
24 the Statement of Claim where the plaintiff was Nelson
25 Barbados Investments, right?

1 A. It is likely that would have been and I
2 would have asked him to read the defendants' and I erred
3 there and he didn't catch that either and then I would
4 just say: "Is there anything wrong with what is in
5 there?", more than right.

6 1588 Q. In looking at all of the proceedings in
7 in Barbados and all of the issues that are raised in
8 those proceedings, and looking at the Statement of Claim
9 in the Ontario proceeding, would you agree with me that
10 the only significant difference in the material facts
11 that give rise to the pleadings there and here is this
12 Ontario angle and SBG and related issues?

13 A. Not at all. I wouldn't agree with that.

14 1589 Q. You don't agree with that. Where did you
15 get the information necessary to make claims against or
16 involving SBG?

17 A. By reviewing some documents.

18 1590 Q. Who provided those documents to you?

19 A. Knox provided me with some. Others may
20 have been dug out from places.

21 1591 Q. Donald Best didn't give you any of the
22 documents relating to Ontario defendants, correct?

23 A. I don't agree with that.

24 1592 Q. What did Best give you then? I had just
25 asked you who gave you documents and you didn't say

1 Best, so what did Best give you?

2 A. Sorry, you have got me confused. You
3 were asking me about SBG which is a defendant that
4 has...

5 1593 Q. I'm talking about....

6 A. Excuse me, both Ontario and Barbados
7 defendants, as I recall. I think Mr. Best informed me
8 of some of that.

9 1594 Q. What did he inform you about some of
10 that?

11 A. Well, he had his own, I suppose, views of
12 the problems and challenges that had arisen.

13 1595 Q. Am I right, sir, that and this is just a
14 summary of what I heard you say to Mr. Ranking, that you
15 don't have a single note of any of your discussions,
16 whether in person or by phone or electronically, with
17 Donald Best.

18 MR. DEWART: I don't think that is what he said
19 at all. I thought he gave an undertaking.

20 MR. RANKING: He did give an undertaking.

21 MR. DEWART: There has been a lot of questions
22 and answers. I thought he gave that
23 undertaking after he said that he might indeed
24 have such notes.

25 MR. SILVER: Okay. Is that your recollection?

1 You might have notes of conversations with Mr.
2 Best?

3 THE DEPONENT: Whatever the undertaking was.

4 MR. RANKING: I think he said he wasn't sure,
5 but he was going to give you an undertaking.

6 MR. DEWART: Something like that. Anyhow, I
7 don't recall him giving a sort of categorical
8 or making the categorical assertion you are
9 suggesting, Mr. Silver, and while I have
10 interrupted you, I point out to you it is ten
11 to five. I told you I was going to stop at
12 4:45. I have also told you I'm not producing
13 the witness for a third day without an order
14 compelling me to do so.

15 MR. SILVER: So what else are you telling me?

16 MR. DEWART: That is it really.

17 MR. SILVER: That is it.

18 MR. DEWART: I have forgotten the name of
19 counsel from Miller Thomson.

20 MR. RANKING: Andrew Roman.

21 MR. DEWART: Thank you. Mr. Roman left us
22 about half an hour ago, more or less, so I have
23 got to assume that he really isn't that keen on
24 asking any questions.

25 MR. SILVER: I wouldn't draw that conclusion.

1 MR. DEWART: Well, it is the second time he
2 has done that. He will speak for himself.

3 MR. RANKING: Can I just deal with a
4 housekeeping matter while Mr. Silver is looking
5 at his notes?

6 MR. SILVER: Sure.

7 MR. DEWART: You have handed me a pile of...

8 MR. SILVER: But I want to respond to Mr.
9 Dewart, because maybe Mr. Dewart isn't saying
10 he is leaving now.

11 MR. RANKING: I am sorry. I didn't mean in any
12 way to interrupt, Mr. Silver, if you want to
13 respond.

14 MR. SILVER: I propose to finish my cross-
15 examination of Mr. McKenzie today. I don't
16 think I will be much longer, but I do need
17 another 15, 20 minutes maybe a half an hour at
18 most and I propose to complete that today. I
19 know you have indicated you had to stop at 4:45
20 to which I asked you earlier today if you could
21 extend that deadline so we could get through
22 it. You are not saying you are leaving, so I
23 am not sure what to, other than to ask my next
24 question once Mr. Ranking has clarified
25 something. I don't know how else you want to

1 deal with it.

2 MR. DEWART: Well, what I also said, the part
3 you have forgotten is what I also said when I
4 told you I wanted to stop at 4:45 was that I
5 would be flexible and if you told me that you
6 were within a few minutes at the end, that I
7 wouldn't stand up and leave. If you are
8 telling me that you can be done by 5:30 and
9 that we don't face the prospect of coming back
10 for a third day, then I will stay until 5:30
11 and I can send an e-mail now to make
12 arrangements to do that. What I don't want is
13 to sit here until 5:30 and then for you to say,
14 "Well, actually, I'm not finished as it turns
15 out and we are coming back for a third day"
16 so...

17 MR. SILVER: For me to get a third day we have
18 got to bring a motion, so I'm hoping to avoid
19 that. If at 5:30 you walk out and I'm not
20 finished, then I will take my instructions on
21 whether I have to bring a motion or not, but my
22 expectation would be to do everything I can to
23 finish by 5:30 so I don't have to bring a
24 motion to compel a third day.

25 MR. DEWART: Well, we still have the problem

1 of Mr. Roman.

2 MR. SILVER: Well, Mr. Roman, he will have to,
3 as you said perfectly, he will have to speak
4 for himself. I think he wanted an hour with
5 the witness and he is not getting it today. He
6 should speak for himself and I don't think we
7 should eat up any more of my minutes talking
8 about what he may say for himself.

9 MR. DEWART: I certainly agree with that.
10 Let's deal with Mr. Ranking's housekeeping
11 matter and let me think about this. Go ahead.

12 MR. RANKING: I have put some 30 letters to you
13 that were extracted from the compendium and I
14 was just hoping that we would agree to deal
15 with these letters in terms of both their
16 authenticity and the contents on the same basis
17 as we did for the letters we marked as
18 Exhibit 19.

19 MR. DEWART: Yes, we can.

20 MR. RANKING: When Mr. Silver has finished his
21 questions, I will indicate the details for the
22 record.

23 MR. DEWART: Or if this helps, the same is true
24 with respect to all of the correspondence in
25 the compendium, ie there is no issue about

1 authenticity and there is no issue that it set
2 out the parties' position at the time it was
3 sent, so that may save you reading all of these
4 dates on the record.

5 MR. RANKING: Thank you.

6 BY MR. SILVER:

7 1596 Q. Mr. McKenzie, Mr. Ranking asked you
8 questions about paragraph 46 of the Statement of Claim
9 and this security that the plaintiff has over the
10 ownership rights in the common shares. You said you saw
11 a document but you don't have it.

12 A. Correct.

13 1597 Q. Would it be within your expectations that
14 a member of the Knox family would have a copy of that
15 agreement?

16 A. I don't know.

17 1598 Q. To your understanding that was an
18 agreement between members of the Knox family or Marjorie
19 Knox and Donald Best through his company?

20 MR. DEWART: Once again he gave a lot of
21 evidence about his recollection as to the
22 parties to the agreement on the prior occasion.

23 MR. SILVER: So it should not be so hard for
24 him to remember what he said.

25 MR. DEWART: But I don't want you repeating all

1 of the previous questions.

2 MR. SILVER: No.

3 MR. DEWART: But if the question is did members
4 of the Knox family have it, he is not asking
5 them. You or Mr. Ranking can ask them.

6 MR. SILVER: I am actually going to ask for an
7 undertaking that Mr. McKenzie ask the Knox
8 family through Alair Shepherd, whom we
9 understand he has had communications with
10 respect to these issues, to produce a copy of
11 the security agreement.

12 MR. DEWART: You can ask Alair Shepherd and you
13 can tell Alair Shepherd that there is no
14 objection on my client's part to the production
15 of the document.

16 MR. SILVER: And that your client encourages
17 them to make that available expeditiously and
18 in time for arguments that are going to start
19 on February 22nd.

20 MR. DEWART: As I say you can tell them there
21 is no objection on the part of my client. They
22 will do as they see fit to protect whatever
23 interest they are paid to protect.

24 MR. SILVER: To be frank, my problem is that I
25 think that if you ask on Mr. McKenzie's behalf

1 we have got a better shot of getting it than if
2 any of us ask and that is why I am asking...

3 MR. DEWART: I have no idea if that is right or
4 not but that is not my client's obligation.

5 MR. SILVER: Well, I am asking you to ask and
6 you can refusing, suggesting I just do that
7 myself, right.

8 /R MR. DEWART: Right.

9 BY MR. SILVER:

10 1599 Q. To your knowledge, sir, did the rights
11 that the plaintiff acquired have anything to do with the
12 rights that Allard had, and in that respect you will
13 remember you told Mr. Ranking last week that Allard had
14 loaned money to Marjorie Knox and took security. That
15 was the question. Your answer was he had a charge over
16 Marjorie Knox's shares of KEL and other things. Do you
17 remember giving that answer to Mr. Ranking?

18 A. Mr. Allard had some kind of claim over
19 assets. I do agree with that.

20 1600 Q. He had some kind of claim over Marjorie
21 Knox's assets, including Marjorie Knox's shares?

22 A. I think it was a general agreement of
23 security.

24 1601 Q. Which included her shares?

25 A. Presumably.

1 1602 Q. Was there any connection between Allard's
2 charge over her assets including her shares and the
3 rights that you say Mr. Best acquired through agreement
4 with the Knox family, or were they, to your knowledge,
5 free standing separate arrangements?

6 A. In Ontario language, which I don't think
7 is the same, I think it is more like one is on top of
8 the other. Maybe that is the best way to put it.

9 1603 Q. I'm an Ontario lawyer and I don't know
10 what that means.

11 A. That is the best I can do. I am
12 saying...

13 MR. DEWART: Let him finish, "I'm saying..."

14 THE DEPONENT: I am saying my recollection is
15 vague, but I just think of it as a first and
16 second.

17 BY MR. SILVER:

18 1604 Q. Who is first, Allard?

19 A. Well, that is what I can't be clear
20 about.

21 1605 Q. So one of them has an interest that is
22 subject to the other interest?

23 A. No, I didn't say.

24 1606 Q. Well, then, tell me what you saying. I
25 don't understand what you are saying. Let me ask you a

1 different question. Sorry, go ahead.

2 A. What I was prepared to prove I thought
3 with the evidence I had that Nelson Barbados had an
4 interest.

5 1607 Q. Was it the same interest that Allard
6 acquired that Allard assigned to Nelson Barbados?

7 A. That would be for trial, right? In other
8 words, we have to get documents.

9 1608 Q. I am asking a question.

10 A. I can't recall. You should ask them...

11 1609 Q. You don't know.

12 A. ...how it all interacted.

13 1610 Q. I am asking you, sir. Was it your
14 understanding that the interest that Best, Nelson
15 Barbados got, was that an assignment of the interest
16 that Allard had acquired?

17 A. That I don't recall. That is what I'm
18 saying.

19 1611 Q. Did you ever look at documentation that
20 reflected the interest that Allard had?

21 A. Sorry?

22 1612 Q. Did you ever review documentation that
23 reflected the interest that Allard had?

24 A. Peter Allard. I don't recall. I know
25 there was an interest. That's as far as I can...

1 1613 Q. So you know...

2 MR. DEWART: Let him finish.

3 BY MR. SILVER:

4 1614 Q. He did.

5 A. That is as far as I can recall.

6 1615 Q. So you know that Allard had an interest.

7 You know that Best had an interest but you don't know if
8 it was the same interest and you don't know, if it
9 wasn't the same interest, how each stood in relation to
10 the other. Is that right or is that too much for you to
11 follow?

12 A. I can't recall. I'm just saying...

13 1616 Q. You said, here is it. This was toward
14 the end of the day last time Mr. Ranking asked you about
15 this agreement that Best, the security interest that
16 Best had acquired, paragraph 46. You said, he asked you
17 "What was the consideration for the agreement?" and you
18 answered "Money".

19 MR. DEWART: Yes.

20 BY MR. SILVER:

21 1617 Q. Then Mr. Ranking asked you, "What benefit
22 did the parties obtain. ANSWER: Money was paid. How
23 much? ANSWER: Six figures, very limited recollection.
24 To whom paid and by whom", you don't know. Is that all
25 accurate?

1 MR. DEWART: I am looking at the transcript.
2 It is astonishingly accurate, Mr. Silver. "To
3 whom was it paid?" and he said "I don't know
4 who paid".

5 MR. SILVER: Or to whom paid?

6 MR. DEWART: Well it, yes, that is fair
7 summary.

8 BY MR. SILVER:

9 1618 Q. So I just want to make sure I understand
10 this, because what you are saying is you don't know that
11 Donald Best, directly or indirectly, paid the money to
12 acquire the interest that is described in paragraph 46,
13 correct?

14 A. I don't know...

15 1619 Q. That Donald Best directly or indirectly
16 paid the money that gave rise to the interest pleaded in
17 paragraph 46, correct?

18 A. I don't recall.

19 1620 Q. You knew at one time, but you don't
20 remember now?

21 A. There you go. I am just saying...

22 MR. DEWART: Really, Mr. Silver, you are making
23 this a lot longer than it needs to be.

24 MR. SILVER: No, I am not because I am
25 getting evasive answers and I'm trying to stop

1 him before he gets more evasive so that I can
2 deal with the evasiveness of the last response.
3 MR. DEWART: Regardless of whether or not you
4 like the answer you consider to be evasive, let
5 him finish it and then pose your next question
6 and it will go more quickly.

7 BY MR. SILVER:

8 1621 Q. Am I right, sir, that you don't know that
9 Donald Best, directly or indirectly, paid any money to
10 acquire the interest pleaded in paragraph 46 of the
11 Statement of Claim?

12 A. I didn't see him, was not a witness to
13 that company paying money period.

14 1622 Q. And he never told you that he paid that
15 money.

16 A. I don't agree with that.

17 1623 Q. He did tell you that he paid it.

18 A. I don't recall.

19 1624 Q. And you don't recall the other side,
20 which is you don't know that Marjorie Knox received this
21 consideration that resulted in the assignment of rights
22 that are pleaded in paragraph 46 of the Statement of
23 Claim, right?

24 A. I was confident with what I had heard and
25 by the time we got through into the discovery process I

1 could prove that paragraph. That is the best I can do
2 for you.

3 1625 Q. Why were you researching Champerty and
4 maintenance as reflected in your accounts?

5 MR. DEWART: Take him to the account, please.

6 MR. SILVER: Do you need me to take him to the
7 account?

8 MR. DEWART: I need you to take him to the
9 account. If you are going to ask him a
10 question about a document, take him to the
11 document.

12 MR. SILVER: Yes, but you knew that I wouldn't
13 be able to find it. I mean I have seen it in a
14 couple of different places.

15 THE DEPONENT: It is okay.

16 MR. DEWART: Let's go off for a second.

17 --- DISCUSSION OFF THE RECORD

18 MR. DEWART: You have drawn the witness'
19 attention to an entry on June 11th, 2007.

20 MR. SILVER: Yes.

21 MR. DEWART: And it is in the document at tab 2
22 of Exhibit 10. So review that entry.

23 MR. SILVER: And then there is more on the next
24 page, June 14th and 15th, '07. So I am just
25 wondering why.

1 THE DEPONENT: Sorry...

2 BY MR. SILVER:

3 1626 Q. Champerty was in issue.

4 A. June 11th.

5 1627 Q. Right. "KM" is Kendra McKenzie?

6 A. Krista.

7 1628 Q. Krista. That is your daughter?

8 A. She is a lawyer that worked at my law
9 firm at the time.

10 1629 Q. Who is also your daughter?

11 A. It is not relevant, but yes, she is.

12 1630 Q. I knew she was a lawyer who did work. I
13 just want to confirm, okay?

14 A. I'm just saying...

15 1631 Q. So why was she researching? I take it
16 she was working on your instructions on this file. You
17 were the lead lawyer?

18 A. I was the lead lawyer.

19 1632 Q. So what was she researching Champerty
20 about?

21 A. I wasn't aware that she was and I don't
22 really have a clue at this point.

23 1633 Q. But you felt confident that it was of
24 value to the client because you billed it to the client
25 under an account that you signed? Right?

1 A. She did work. I billed it. If she
2 docketed, I billed the client.

3 1634 Q. To your knowledge prior to the issuance
4 of the Statement of Claim was Kingsland Estates ever put
5 on notice of the security rights that are pleaded in
6 paragraph 46 of the Statement of Claim?

7 MR. DEWART: Sorry, was who put on notice?

8 MR. SILVER: Kingsland Estates Limited.

9 MR. DEWART: Go ahead.

10 THE DEPONENT: Sorry, say that again.

11 BY MR. SILVER:

12 1635 Q. To your knowledge prior to the issuance
13 of Statement of Claim was Kingsland Estates Limited ever
14 put on notice of the security interest and rights that
15 are pleaded in paragraph 46 of the Statement of Claim?

16 A. I don't know.

17 1636 Q. I am suggesting to you that they weren't
18 and I take it you are in no position to contradict or
19 deny that?

20 A. I don't know.

21 1637 Q. You said in your evidence that when Best
22 came to you he told you he had made some deal and it
23 wasn't going well. What did he say to you about it not
24 going well? What did he say in that regard? How it is
25 not going well?

1 MR. DEWART: When he first came to him in the
2 fall of '06?

3 MR. SILVER: Yes.

4 MR. DEWART: Go ahead.

5 THE DEPONENT: He was of the view that he had
6 made a deal that would quickly work out the way
7 he wanted it to and I guess he found out there
8 were layers to it that were much deeper that
9 were preventing this.

10 BY MR. SILVER:

11 1638 Q. Did you tell him when he came to you that
12 you had spent months trying to negotiate a resolution
13 with Richard Cox and that you had failed to reach a
14 settlement with Mr. Cox?

15 A. Confidentiality is a problem here. I
16 think that as far as I can go.

17 1639 Q. Can you explain that answer and how it
18 assists me in understanding the answer to the question
19 that I asked? Did...

20 A. I would not have told, I would give, if
21 Mr. Best asked me a question that would contravene any
22 confidentiality or issues, I would not respond if you
23 see what I mean.

24 1640 Q. Did Best know when he came to you in the
25 fall of '06, did he know that you had been in

1 discussions with Richard Cox about settling these issues
2 previous to that?

3 A. He would have come to me and there are
4 problems. I would have nodded my head and said "I will
5 look into your problems".

6 1641 Q. I know but...

7 A. If you are asking me whether I would have
8 gone further and...

9 1642 Q. Told...

10 A. ...discussed with him things that
11 theoretically according to you I knew and had promised
12 theoretically confidentiality, the answer is I wouldn't
13 do that, would I?

14 1643 Q. So how did you consider the issue of
15 conflict when Mr. Best came to you? It seems to me if
16 all of that is true, you couldn't act for Best.

17 MR. DEWART: It is, you know...

18 BY MR. SILVER:

19 1644 Q. Did you review the issue of conflict,
20 before you accepted the retainer from Mr. Best or his
21 company directly or indirectly? Did you clear conflicts
22 with any other party?

23 MR. DEWART: I am having trouble with the
24 relevance of that.

25 MR. SILVER: It goes to credibility, amongst

1 other things. It goes directly to credibility
2 and in my respectful view kind of drives a
3 wedge through the whole story we have been
4 hearing for two days, in my view.

5 MR. DEWART: I am afraid you lost me,
6 Mr. Silver.

7 THE DEPONENT: That is probably not surprising
8 but can you answer my question? You might get
9 it when I argue it.

10 MR. DEWART: I'll wait for that.

11 MR. SILVER: Probably not, though.

12 MR. DEWART: Probably not.

13 MR. SILVER: But can you just answer my
14 question?

15 MR. DEWART: No, not unless you can satisfy me
16 that it is relevant which with your rapier wit
17 you have not done yet.

18 BY MR. SILVER:

19 1645 Q. Who is, there is a "KD" referred to in
20 your accounts. Is that Kathy Davis?

21 A. Could be.

22 1646 Q. You had discussions with Kathy Davis?

23 A. I have had discussions with Kathy Davis.

24 I don't know if there is anybody else with a "KD". That
25 is all.

1 1647 Q. Well, that's what I want to know.

2 A. Can you point me to something? Maybe it
3 will refresh my memory.

4 1648 Q. There is more than one but, for example,
5 on your November 23, 2007 for October 19th, '07 it says:
6 "E-mail from and to KD".

7 A. So can you...

8 1649 Q. November 23rd...

9 A. What tab is it?

10 1650 Q. I don't have the same book as you.

11 MR. DEWART: Can you give me the date again?

12 MR. SILVER: November 23rd, 2007.

13 MR. DEWART: I have it now. For the record...

14 MR. SILVER: October 19th...

15 MR. DEWART: For the record...

16 MR. SILVER: The entry date is October 19th.

17 For the record it is tab...

18 MR. DEWART: You asked him about November 23,
19 '07, I believe.

20 MR. SILVER: Yes.

21 MR. DEWART: That is tab 8 of Exhibit 10.

22 MR. SILVER: Okay and there is an entry for
23 October 19th.

24 MR. RANKING: I think it is tab 7.

25 MR. DEWART: October is, oh, I see there are

1 two entries on November 23rd. Yes, all right.
2 So tab 7 is an account dated November 23rd and
3 in there there are entries on October, what did
4 you say...

5 BY MR. SILVER:

6 1651 Q. 19th. The first page of the account. As
7 an example and it happens to be an entry of your's, 1.8
8 hours. It is your entry right? That is what "BM"
9 means, yes?

10 A. That's me.

11 1652 Q. It says "e-mail from and to KD".

12 A. Yes.

13 1653 Q. That is Kathy Davis?

14 A. Likely.

15 1654 Q. Then, for example, on your, so, during
16 the piece not only were you communicating regularly with
17 John Knox and Jane Goddard, two of Marjorie Knox's
18 children, you were also communicating with her third
19 child, Kathy Davis, from time to time?

20 A. I did communicate with her.

21 1655 Q. And, then, I'm not sure where we got to
22 with this Nathan, but at the beginning of the accounts
23 there seems to be a communication with a "Nathan" in
24 Florida. Have you had a chance to reflect better on who
25 that is and can I suggest that it is somebody who works

1 with Kathy Davis?

2 A. Likely. Likely.

3 1656 Q. Right, so when you are communicating with
4 Nathan, you are using an in between an assistant, but
5 the communication is really intended to be from and to
6 Kathy Davis, right?

7 A. More or less.

8 1657 Q. Was she related to him, Nathan and Kathy
9 Davis, are they related?

10 A. I can't say.

11 1658 Q. But more or less a communication with
12 Nathan would have been a communication with Kathy Davis?

13 A. Yes, more or less.

14 1659 Q. "DB" in your accounts will you agree with
15 me that there is only one in all of these accounts that
16 you have sent us and there are probably more, there are
17 more that we haven't got, there is only one reference to
18 "DB" and that is on June 12th, 2007, right?

19 MR. DEWART: If you are saying it...

20 BY MR. SILVER:

21 1660 Q. I have, but you know what, I would like
22 an undertaking if there are other references to "DB" to
23 be advised of them because that is the only one we could
24 find?

25 A. So, June 12th.

1 1661 Q. It is not even your entry. It is "SB".

2 Who is that?

3 A. Stacey Ball.

4 1662 Q. Stacey Ball. It says, don't close it. I
5 have got questions about it.

6 A. Go ahead.

7 1663 Q. June 12th, it says Stacey Ball it says
8 "review of e-mail from KWM to DB". So, in light of your
9 evidence that you never sent e-mails Donald Best, can we
10 assume that the "DB" referred to isn't Donald Best. It
11 is somebody else?

12 MR. DEWART: He has said that is not his docket
13 entry but Mr. Ranking went over this at some
14 length at question 644 and following.

15 MR. SILVER: What did the witness say.

16 MR. DEWART: They went back and forth a long
17 time about the witness' docketing practice and
18 his conversations about various deals.

19 MR. SILVER: Sorry, Sean, I don't want to waste
20 time. I am looking at the specific entry for
21 June 12th. It says "Review of e-mail from KWM
22 - DB" Is that an e-mail between you and Donald
23 Best? You don't know. Can you produce the
24 e-mail that is referred to in this...

25 MR. DEWART: June 12th.

1 BY MR. SILVER:

2 1664 Q. June 12th. "Review of e-mail from KWM".

3 That is you?

4 A. "KWM". That is me.

5 1665 Q. And "DB", you don't know who "DB" is in

6 that context. You can't motion with your hand.

7 A. No, no, I am just going, I can't.

8 1666 Q. Can you make inquiries and tell us who

9 the "DB" is and if it is Donald Best can you produce the
10 e-mail in question?

11 MR. DEWART: That is an entry by Stacey Ball,
12 so we are going to ask Stacey Ball who the "DB"
13 is in her June 12, 07.

14 MR. SILVER: I am not limiting inquiry to
15 Stacey Ball.

16 MR. DEWART: Well, it is her docket so that is
17 who I am going to ask.

18 MR. SILVER: She might not know and if you pull
19 out the e-mail, you will find out.

20 U/T MR. DEWART: Sorry, well, no, that is part 2.
21 I am going to ask Stacey Ball who the "DB" is
22 in her June 12th docket entry and to produce
23 the e-mail referred to in the docket entry.

24 MR. SILVER: Okay. The last undertaking in
25 that respect, if we have missed any other

1 references to Donald Best in all of these
2 accounts, can you please tell us where they are
3 and highlight them for us? Otherwise we will
4 go on the basis that that reference is the only
5 reference to DB and whether or not it is Donald
6 Best will be subject to the answers to the
7 undertakings that we get.

8 MR. DEWART: Well, no, I am not going to
9 undertake to do that. You have made it clear
10 that I accept that you say you reviewed these
11 things yourself and you don't see any other
12 references to "DB" or Mr. Best, you will make
13 submissions on that basis.

14 MR. SILVER: Well, if you are going to make
15 submissions, there are more entries that
16 involve Donald Best I would like you to let us
17 know in advance of the motion.

18 /R MR. DEWART: I don't think I am required to do
19 that.

20 BY MR. SILVER:

21 1667 Q. You were mentioning today "Joe", the
22 accountant. Is that Joey Ward? You were looking for a
23 last name?

24 A. Ward.

25 1668 Q. Ward.

1 A. That is it.

2 1669 Q. That is who you were referring to. Have
3 you ever been to Donald Best's house?

4 A. I went to a house where he was a long
5 time ago.

6 1670 Q. But you don't know that it was his house.
7 It was a house that he was living in?

8 A. He was...

9 1671 Q. Was he living there?

10 A. I went there to see him at this house.

11 1672 Q. Because that is where he lived?

12 A. I can't say. I'm just saying "I will
13 meet you there", drove there.

14 1673 Q. Did you know it to be someone else's
15 house other than Donald Best?

16 A. I don't know whose house it was.

17 1674 Q. Where was the location of his house?

18 A. Mississauga Brampton area.

19 1675 Q. Do you have an address?

20 A. No.

21 1676 Q. When did you visit him at this house?

22 A. 10, 15 years ago.

23 1677 Q. So unrelated to this litigation?

24 A. Correct.

25 1678 Q. Has he ever been to your house or houses?

1 A. I don't think so.

2 1679 Q. You own a house in Orillia?

3 A. I live in my wife's house.

4 1680 Q. You live sometimes in your wife's other
5 house in Florida?

6 A. He has never been, to my knowledge, to my
7 houses to the best of my recollection.

8 1681 Q. Either here or in Florida?

9 A. Either here or in Florida.

10 1682 Q. Or anywhere else you or your wife own
11 houses?

12 A. That's correct.

13 1683 Q. Mr. Ranking asked you about the file
14 number BMC 568.

15 A. Correct.

16 1684 Q. I take it that that was open...

17 MR. DEWART: Hold it. I lost about half an
18 hour's notes. Don't anyone move.

19 MR. SILVER: Good. I will get extra time then.

20 MR. DEWART: I just recovered it. Mr. Ranking
21 asked for the file number.

22 BY MR. SILVER:

23 1685 Q. "bmc 568". That is the file number for
24 this file? It is shown on your accounts...

25 A. But I am just saying it doesn't mean

1 anything.

2 MR. DEWART: So far all he said is Mr.
3 Ranking asked you about that and the answer to
4 that question is, yes, Mr. Ranking did ask you
5 about that. That is the only question so far.
6 The next question is...

7 BY MR. SILVER:

8 1686 Q. I take it that file number bmc 568 would
9 be the file opened after bmc 567 and before the file bmc
10 569?

11 A. Sounds logical.

12 1687 Q. Mr. Ranking gave an undertaking to
13 provide the materials collected at the time the file was
14 opened and the file opening form and any other documents
15 that confirm the date that the file was opened. To the
16 extent that none of those exist, can you provide us with
17 the date the file was opened by reference to the file
18 numbers that precede and follow bmc 568?

19 MR. DEWART: The short is answer to the
20 question is yes but...

21 MR. SILVER: Yes.

22 U/T MR. DEWART: I don't remember the undertaking
23 to be as broad as you just said. Obviously it
24 is matter of record what the undertaking was,
25 but subject to that clarification if we can't

1 produce the file opening sheet, we will
2 undertake to see if we can determine the date
3 this file was opened by reference to the
4 immediately preceding and subsequent file
5 numbers. Just let me write that down. Go
6 ahead.

7 BY MR. SILVER:

8 1688 Q. Am I right that you never did a reporting
9 letter to Donald Best?

10 A. I don't think so.

11 1689 Q. And never sent him an e-mail?

12 MR. RANKING: That is an equivocal answer.

13 MR. SILVER: I don't think so.

14 MR. RANKING: You said "Am I right that I never
15 said..."

16 MR. SILVER: I said "Am I right?" and you said
17 "I don't think so" which means...

18 MR. DEWART: I understood the witness to say
19 that he does not believe he provided a report
20 to....

21 MR. SILVER: He ever wrote a reporting letter.

22 MR. DEWART: Is that your evidence?

23 THE DEPONENT: I have lost all of you guys. My
24 reports to him were oral.

25 BY MR. SILVER:

1 1690 Q. Your meeting with him were not docketed,
2 right?

3 MR. DEWART: That is his evidence.

4 BY MR. SILVER:

5 1691 Q. And I am not sure about the undertaking
6 that was given, but I want to clarify the undertaking
7 that I want is for him to produce any document record of
8 any kind that flowed between Donald Best and Bill
9 McKenzie, and his office and all the members of his
10 staff relating in any way to this lawsuit.

11 MR. DEWART: Apart from the accounts that you
12 already have.

13 MR. SILVER: Apart from what I already have.
14 Do I have that undertaking?

15 MR. DEWART: Undertake to search for and
16 produce documents exchanged between...

17 MR. SILVER: Documents or records.

18 MR. DEWART: What is the difference?

19 MR. SILVER: Well, a document, some people
20 interpret a hard copy as a document, whereas a
21 record is more, is all encompassing, includes
22 e-mails, texts.

23 MR. DEWART: A document within the meaning of
24 the Rules between Mr. McKenzie and his firm...

25 BY MR. SILVER:

1 1692 Q. And Best and/or his company relating in
2 any way to the subject matter of the action. I just
3 want to go to these transfers from trust and...

4 A. Hold on for a second. The pleadings, all
5 of these papers I have to produce them again? We've
6 said you have got them all.

7 1693 Q. No, we want to see, if you sent it to
8 Mr. Best with a covering note, "Here is my pleading.
9 Review it", that is what we want to see.

10 MR. DEWART: In fairness, what the witness has
11 indicated previously that the client would have
12 been provided with a copy of all of the
13 pleadings and all of the correspondence
14 exchanged between counsel, in other words, that
15 the client would have had copies of everything
16 that you have got.

17 MR. SILVER: Well, he never said that.

18 MR. DEWART: He has indicated that to me, so I
19 am telling you that now. So the question is
20 apart from that. You don't want me to send you
21 another copy of the Statement of Claim, for
22 example.

23 MR. SILVER: No, but I would like you to send
24 me a copy of the document that proves that he
25 sent a copy of the Statement of Claim to his

1 client for review, or a copy of the documents
2 that prove he sent copies of the correspondence
3 between clients, between counsel to his
4 clients.

5 MR. DEWART: I think he can shed light...

6 THE DEPONENT: There are none. If a motion
7 record arrived, for instance, to a drawer under
8 "N" would be gone, so I presume it got picked
9 up. Correspondence, I would not necessarily
10 give him a copy of everything. There was a lot
11 of...

12 MR. DEWART: I misunderstood.

13 THE DEPONENT: ...surplusage. In fairness, but
14 I could summarize about lot of letters that
15 were exchanged between counsel that were
16 posturing that wouldn't be necessary go to...

17 BY MR. SILVER:

18 1694 Q. But am I right, sir, that you don't have
19 any reporting letters or transmittal letters or memos or
20 documents that prove or reflect the transmittal of other
21 documents?

22 A. As I said, my way was...

23 1695 Q. I didn't ask that.

24 A. I'm just saying, oral.

25 1696 Q. The answer is, no, you don't have any

1 reporting letters or evidence of transmittals,
2 documentary evidence of transmittals of other documents?

3 A. That sounds right, yes.

4 MR. DEWART: It is 5:32, Mr. Silver.

5 MR. SILVER: I know but you wasted about four
6 minutes so I get another four.

7 MR. DEWART: I have saved you so much time
8 today. I have saved you from yourself.

9 BY MR. SILVER:

10 1697 Q. I want to just make sure...

11 MR. DEWART: No, we are done, Mr. Silver.

12 MR. SILVER: You are walking out?

13 MR. DEWART: I told you I would stay until
14 5:30...

15 MR. SILVER: Okay, well, so...

16 MR. DEWART. ...it is 5:32, unless you are
17 telling me you have one more question.

18 MR. SILVER: I have one more area.

19 MR. DEWART: All right, well, we will see how
20 quickly you can do an area because I am really
21 walking out soon.

22 BY MR. SILVER:

23 1698 Q. The transfers from trust that Mr. Ranking
24 questioned you about, did the money come in from
25 whomever in specific amounts to pay specific accounts,

1 or did you get a larger amount that you then used to
2 satisfy specific accounts, which may explain why it went
3 to into trust. Like if my client sends me...

4 MR. DEWART: No, we got it. We got it.

5 MR. SILVER: Well, he doesn't. I am
6 questioning him. He is nodding. You are
7 typing. You are not watching his expressions,
8 Mr. Dewart.

9 THE DEPONENT: When a bill went out, the amount
10 would arrive as far as I understand for less.

11 MR. DEWART: Hold it.

12 MR. SILVER: Specific to that bill. An amount
13 would arrive for that bill or less.

14 THE DEPONENT: I think so, yes.

15 MR. DEWART: That can't be right if there is a
16 trust transfer shown on the account, can it?

17 MR. RANKING: Yes.

18 MR. DEWART: How?

19 MR. RANKING: I don't want to debate.

20 MR. SILVER: Don't use up the four minutes.
21 You counsel is trying to help you.

22 MR. DEWART: I am just trying to get to the
23 bottom of it.

24 THE DEPONENT: I am just telling you to the
25 best of my knowledge. You got it.

1 BY MR. SILVER:

2 1699 Q. And this money would come in, you said,
3 by wire transfer from a wiring bank to your bank?

4 A. I gather that is how it is done.

5 1700 Q. What do you mean you gather? It is your
6 firm. You would know this.

7 A. We receive a wire.

8 1701 Q. Which bank did you use to receive wires?

9 A. Our bank is TD Canada Trust.

10 1702 Q. An Orillia branch?

11 A. Right.

12 1703 Q. To the extent, I'm very interested, and I
13 know you gave some undertaking, but I am very interested
14 in knowing from whom the wire transfer came, when and
15 the precise amount of each wire transfer and to the
16 extent I think the undertaking didn't go so far as
17 making inquiries of your bank if that information wasn't
18 available in the law office and so I am asking that the
19 undertaking be extended to the bank as well, because
20 clearly the bank would have records of wire transfers...

21 MR. DEWART: We don't know what is clear with
22 the bank, but what you are asking me is to
23 ask...

24 MR. SILVER: We use the same bank at Cassels
25 Brock, so I do have some knowledge as to what

1 the TD Bank Canada Trust can provide in respect
2 of wires and trust accounts.

3 U/T MR. DEWART: And how far back it goes, so, we
4 will undertake, if the information is not
5 available from the firm's records, to ask TD
6 Canada Trust from whom wire transfers are
7 received and the amount of each wire transfer
8 with respect to payment of the accounts marked
9 as Exhibit 10.

10 MR. SILVER: Well, no, that and any other
11 accounts that are not in Exhibit 10, the full
12 amount.

13 MR. DEWART: Yes.

14 BY MR. SILVER:

15 1704 Q. Is there a receivable on the account on
16 this file or are you paid in full?

17 A. Mr. Best and I had a disagreement at one
18 point.

19 MR. DEWART: Is there a receivable on the
20 account? I think that was your question, was
21 it not?

22 BY MR. SILVER:

23 1705 Q. What I am getting from his answer is
24 there might have been a receivable that was written off?

25 MR. DEWART: That would be the answer.

1 THE DEPONENT: There you go.

2 MR. DEWART: So that is the answer.

3 BY MR. SILVER:

4 1706 Q. So there was a balance outstanding in the
5 middle that was written off on one account?

6 A. I wrote it off.

7 1707 Q. But it was in the middle of the
8 relationship, not at the end of the relationship, is
9 that right?

10 A. I can't remember when. I think you are
11 right.

12 MR. SILVER: Subject to the undertakings and
13 the refusals, those are my questions.

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1 REPORTER'S NOTE:

2
3 Please be advised that any undertakings,
4 objections, under advisements and refusals are provided
5 as a service to all counsel, for their guidance only,
6 and do not purport to be legally binding or necessarily
7 accurate and are not binding upon Victory Verbatim
8 Reporting Inc.

9
10 I hereby certify the foregoing to be a true and
11 accurate transcription of the above noted proceedings
12 held before me on the 8th day of February, 2010 and
13 taken to the best of my skill, ability and
14 understanding.

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17
18 }
19 } Certified Correct:
20 }
21 }
22 }
23 } _____
24 } Darlene Harrison
25 } Verbatim Reporter
}