Court File No. 14-0815

SUPERIOR COURT OF JUSTICE
(CENTRAL EAST REGION: BARRIE)

DONALD BEST

Plaintiff (Respondent on Motion)

- and-

**GERALD LANCASTER REX RANKING; SEBASTIEN JEAN KWIDZINSKI;
LORNE STEPHEN SILVER; COLIN DAVID PENDRITH;
PAUL BARKER SCHABAS; ANDREW JOHN ROMAN; MA'ANIT TZIPORA ZEMEL;
FASKEN MARTINEAU DUMOULIN LLP; CASSELS BROCK & BLACKWELL LLP;
BLAKE, CASSELS & GRAYDON LLP; MILLER THOMSON LLP;
KINGSLAND ESTATES LIMITED; RICHARD IVAN COX;
ERIC IAIN STEWART DEANE;
MARCUS ANDREW HATCH; PHILIP ST. EVAL ATKINSON;
PRICEWATERHOUSECOOPERS EAST CARIBBEAN (FORMERLY
'PRICEWATERHOUSECOOPERS');
ONTARIO PROVINCIAL POLICE;
PEEL REGIONAL POLICE SERVICE a.k.a. PEEL REGIONAL POLICE;
DURHAM REGIONAL POLICE SERVICE;
MARTY KEARNS: JEFFERY R. VIBERT;
GEORGE DMYTRUK; LAURIE RUSHBROOK;
JAMES (JIM) ARTHUR VAN ALLEN;
BEHAVIOURAL SCIENCE SOLUTIONS GROUP INC.;
TAMARA JEAN WILLIAMSON;
INVESTIGATIVE SOLUTIONS NETWORK INC.;
TORONTO POLICE ASSOCIATION;
JANE DOE #1; JANE DOE #2; JANE DOE #3; JANE DOE #4; JANE DOE #5
JOHN DOE #1; JOHN DOE #2; JOHN DOE #3; JOHN DOE #4; JOHN DOE #5**

Defendants

RESPONDENT'S FACTUM
(Re motion to set aside Noting in default)

PART I- STATEMENT OF THE CASE

1. The Applicant Defendants in Barbados refused to serve and file anything in response to the Statement of Claim. They proposed that nothing be done until a motion to strike,

scheduled to be heard in June 2015, was heard and determined. They then claim that they would then file a jurisdictional motion. The Plaintiff insisted that they serve and file their jurisdictional motion now, but was willing to extend time to do so (twice) and was willing to have the Case Management judge determine when it should be heard. The Applicant Defendants were warned three times that if they failed to do so, they would be noted in default. The Applicant Defendants refused to do anything before the last extended deadline. They were noted in default.

2. The Applicants move to set aside the noting in default, relying on an affidavit of his assistant enclosing primarily correspondence between counsel. The Respondent seeks to strike or have ignored this affidavit in that it fails to provide any evidence, *inter alia*, aside from hearsay assertions in letters, that the Applicants had any intention to defend or bring a motion to challenge jurisdiction before they were noted in default. In the alternative, the Respondent seeks to examine two of the Respondents, Richard Cox and Marcus Hatch, by telephone pursuant to Rule 39.03. Finally, the Respondent submits that it would not be appropriate for the Court to exercise its discretion in setting aside the noting of default under all of the circumstances.

PART II - RESPONSE TO FACTS

3. The Respondent does not accept the facts as stated in the Applicant's factum.

4. Most of these "facts" are argument.

5. Most of these "facts" and this argument are irrelevant, dealing with issues of issue estoppel and abuse of process which will be the subject of a motion scheduled for June 2015. The “facts” with respect to that issue are false and/or misleading. All that will be said about this issue now is that the original contempt order was made based on lies and misleading of the Court by these and other Defendants and when evidence was presented to set aside the contempt, the judge refused to consider the evidence, indicating that it was a matter for fresh evidence on appeal. Accordingly, no findings based on evidence, other than false and misleading evidence presented by these and other Defendants. This is not a situation in which issue estoppel or abuse of process can be applied to preclude the portion of the litigation (1 of 4 aspects of the lawsuit) from proceeding. This is addressed in the Respondent's affidavit[1] and this paragraph to a limited extent to rebut the Defendant's offensive submissions. Since this is not what the present motion is about, this will not be further addressed in this factum.

6. The "facts" and arguments about jurisdiction are relevant but premature and false and/or misleading. However, there is a link between the applications by these Defendants in previous Ontario litigation (2009 to 2014) in which these Defendants invoked the jurisdiction of the Ontario Courts to:

(a) seek costs, not only against the Plaintiff in that case, Nelson Barbados Group Limited, but to seek to pierce the Corporate veil and obtain costs against the Plaintiff;[2]

[1] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 42 to 58
[2] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 46, 47, 48, 49

(b) Seek to obtain documents and examine him, purportedly for purposes of costs, but as later admitted (when all costs had been settled) for purposes of assisting the Barbados defendants in litigation in other jurisdictions;[3]

(c) institute and continue contempt proceedings against the Plaintiff in a way that was, *inter alia*, dishonest, abusive and malicious.[4]

By so invoking the assistance of the Ontario Courts, it is clear that the torts committed by these Defendants related to the manner of such litigation initiated by these defendants in Ontario have a substantial connection to Ontario. The assertion in paragraph 11 of the Applicant's factum re is an admission of jurisdiction.

7. There are no facts or no admissible facts regarding the issues relevant to the exercise of discretion to set aside a noting in default. For instance, the Applicants assert that the Respondent was "notified of the Caribbean Defendants' intention to contest jurisdiction". There is no evidence of the Defendants' intention. There is merely the assertion by their counsel that he says that they planned to serve and file a jurisdictional motion some time many months in the future. They were asked to serve and file the motion. They were given several extensions of time. They refused to serve and file anything. In such circumstances, it is clear that, had they been advised of the Plaintiff's position, these Defendants made a deliberate decision to default with full knowledge of the consequences. Even after being noted in default, at the Case Management Conference on December 16, 2014, they still did not want to serve and file this motion until after the motion to strike brought by others was

[3] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 47 through 49
[4] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 35i, 45 through 50

completed.[5] In order to prove the intention of the Defendants to defend before being in default, they must present evidence from the Defendants themselves about their intention. Letters from counsel are not evidence of the intention of the clients. There is no evidence from them about whether they were made aware of the Plaintiff's position, extensions and warnings.

8. As will be discussed further infra, the relevant factual issues on a motion such as this are:

(1) the **behaviour** of the plaintiff and of the defendant,
(2) the **length** of the defendant's delay,
(3) the **reasons** for the delay,
(4) the **complexity and value of the claim** involved
(5) the **intent to defend** in the relevant time period; and
(6) the **existence** of a **defence** (generally not the strength)

9. The evidence on this motion from the Plaintiff's affidavit and some of the documents in the Moving Party' Record in respect of these issues is:

1) The Barbados Defendants deliberately chose to ignore several warnings and extensions. Yet, all that was sought by the Plaintiff was that the jurisdiction motion be served, filed and scheduled by Justice McCarthy, not that it necessarily be argued in advance (which is reasonable per *Nobosoft* (para 7). Had this been done, there would have been no noting in default. By refusing to do so, time must be spent dealing with this issue before any other steps can be taken;[6]

[5] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 7, 8, 17, 18
[6] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 4, 5, 14, 37

2) The delay proposed by the Defendants was from default in November 2014 (60 days after service in August/September) until June or July 2015 before they would even file anything. It was and remains a distinct possibility that either side may appeal an adverse ruling on the motion to strike.[7]

3) The Defendants purported reasons for delay was to avoid costs. Their counsel said that it would be a waste of money to bring the jurisdictional motion when the motion to strike might end the case. The motion to strike has little chance of disposing of the entirely of the Claim. Even if this were otherwise, refusing to act because of cost is not a legitimate basis to default in respect of pleading deadlines.[8]

4) With respect to the complexity and value of the claim: this is not key here since the Plaintiff did not insist that a Statement of Defence be served, but proposed the serving and filing of the jurisdictional motion. There is no great complexity to the jurisdiction motion;[9]

5) The refusal of the Defendants to file anything before June or July 2015, until directed to do so by Justice McCarthy, after they were already in default, indicates a lack of intent to defend within the time period (November, 2014);[10]

6) In respect of the context (jurisdictional challenge), the position of the Defendants (paragraph 11 of their factum) that the present lawsuit flows from Ontario litigation, is a concession that there is a substantial connection to Ontario and no legitimate jurisdictional issue.[11]

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[7] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 7, 8
[8] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 33, 35,
[9] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 38, 59
[10] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 6, 7, 8, 20, 21 (3rd last paragraph)
[11] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 38, 59

Accordingly, on each relevant issue on this motion it is clear that discretion should not be exercised to set aside the default. The delay in filing caused by the default has unjustly prejudiced the Respondent by limiting his time to respond to the motions to strike. They had to be squeezed into the schedule between March and June instead of January to June.[12]

PART III - ARGUMENT

A. MOTION TO STRIKE OR DISREGARD AFFIDAVIT OF JENNIFER GAMBIN

10. The affidavit of Jennifer Gambin is merely a vehicle to submit documents and correspondence. She has not knowledge of the relevant factual issues, i.e., the intentions of the Defendants. At best, she has read (and perhaps typed) letters of Counsel for the Defendants asserting his stated intentions. The assertions by Counsel are that his stated intentions in the letters were the intentions of his clients. This is a conclusory use of the letters as statements in the affidavit. Such conclusory statements should be struck or ignored.[13]

11. The statements in the correspondence incorporated as the substance of Ms. Gambin's affidavit are out of court statements being used for the truth of their contents (hearsay) on

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[12] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 33, 37, 41

[13] A position of a party is not properly part of an affidavit under Rule 4.06(2) and is attacked on that basis under rule 2.02 and 25.11, *Singer v. Shering-Plough Canada Inc*. (2010) 87 C.P.C. (6th) (S.C.J.). In the alternative, pursuant to *Singer* and *R & G Draper Farms (Keswick) v. 1758691 Ontario Ltd.,* [2013] O.J. 4330 these passages should be disregarded by the judge hearing the motion. See also *Ferrier v. Sheriff of Wellington County*, (2003) 40 C.P.C. (5th) 344 (S.C.J.)

the very issues in dispute on the motion. The hearsay issue is concerned with the inability to effectively cross examine on a disputed fact. In this regard, in Isakhani, on a motion, Justice Moldaver ruled, albeit in obiter, that an attachment being relied upon on a key and disputed issue should not be admitted as hearsay because there could be no effective cross-examination. He said:

> **37** That brings me to the second concern about the Amnesty International Report, namely, whether it **constituted inadmissible hearsay evidence**.
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> **38** Given my conclusion that the Report was otherwise inadmissible, I need not finally resolve the hearsay issue. I would simply point out that where a document like the Amnesty International Report **is being tendered for the truth of its contents in respect of contested facts** (be they adjudicative, legislative or social) **that are at the centre of the controversy** between the parties, the reliability and trustworthiness of the document takes on added importance. To that end, I believe that trial and motion judges should be guided by the principles set forth by Binnie J. in *R. v. Spence* (2005), 202 C.C.C. (3d) 1 at paras. 60-61. Although Binnie J.'s comments were directed to the issue of judicial notice, I believe that they are apposite to situations like the one at hand. Thus, in this case, the closer the Amnesty International Report came to the dispositive issue, namely, whether the wife and child would be adequately protected by the Dubai justice system, the closer scrutiny it deserved.
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> **39 Here, that could well have translated into a need to submit evidence from witnesses with firsthand knowledge of the Report who could be subject to meaningful cross-examination. No such witnesses were available here**. The Report was appended to the affidavit of Mr. Robert Alexander Neve, Secretary-General of Amnesty International, Canadian Section. As is apparent from Mr. Neve's affidavit, he did not participate directly in the drafting of the Report; hence, he could only attest to the fact that it had been prepared "in conformity with Amnesty International's exacting quality control standards".
>
> **40** Without questioning the adequacy or legitimacy of those standards, it is apparent that **Mr. Neve could not have been questioned about any of the details underlying the Report**, including basic matters such as the people who were interviewed and, perhaps more importantly, those who were not.[14]

[14] *Isakani v. Al-Saggaf*, [2007] O.J. No. 2922 (C.A.)

Here Ms. Gambin does not attest to having knowledge but merely attaches the documents and correspondence. Cross-examination of Ms. Gambin would be of no utility. As such, her affidavit should be struck or ignored.[15]

B. PROPER APPROACH TO A MOTION TO SET ASIDE NOTING IN DEFAULT

12. The proper approach to a motion to set aside the noting of a defendant in default is discussed in three Court of Appeal cases: *Metro Toronto Condominium Corp. 706 v. Bardmore Develpments*, [1991] O.J. No. 717 (C.A.); *Nobosoft v. No Borders*, [2007] O.J. No. 2378 (C.A.); and in *Flintoff v. von Anhalt*, [2010] O.J. No. 4963 (C.A.) (para 7 "non-exhaustive list")). In *Bardmore* , the Court said:

> **18** ... Rule 19.03 provides that a **noting in default "may be set aside by the court on such terms as are just"**, and rule 19.09 provides that a default judgment "may be set aside or varied by the court **on such terms as are just**". It seems clear that the language in both cases is intended to leave the matter within the discretion of the court ... rather than specific and detailed rules, **it is the context and factual situation in which the discretion arises which should determine its application**. **Such factors as the behaviour of the plaintiff and of the defendant, the length of the defendant's delay, the reasons for the delay, and the complexity and value of the claim involved are all relevant factors to be taken into consideration.** However, I consider that it would only be in extreme situations that a trial judge would exercise his discretion to require an affidavit as to the merits of the defence on a motion to set aside a noting in default.[16]
> [emphasis added]

Older cases discussed in *Bardmore* also require that there be a an **intent to defend in the relevant time period** and the **existence of a defence** (see paras 11-18; albeit except in

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[15] *Singer, supra; Draper, supra* .
[16] *Metro Toronto Condominium Corp. 706 v. Bardmore Develpments*, [1991] O.J. No. 717 (C.A.);

"extreme cases", not the strength of the defence). In *Nobosoft*,[17] the Court held that it is reversible error to decide having regard to only one factor. In *Flintoff*,[18] the Court made it clear that the 4 factors highlighted in paragraph 18 of *Bardmore* are not meant to be exhaustive, but merely some factors that may be relevant.

13. Accordingly, the issue is whether it is **just** to set aside the noting in default in light of the **factual context.** The Court should consider factors **such as**:

(1) the **behaviour** of the plaintiff and of the defendant,
(2) the **length** of the defendant's delay,
(3) the **reasons** for the delay,
(4) the **complexity and value of the claim** involved
(5) the **intent to defend** in the relevant time period and
(6) the **existence** of a **defence** (generally not the strength)

C. EVIDENCE RE ISSUES

1. RULE 39.03

14. If the motion to strike the affidavit of Ms. Gambin is granted, the Court could merely dismiss the motion. However, the Court might do so without prejudice to a new motion with proper affidavits. The Respondent takes the issue that this would not be appropriate since the Defendants were specifically warned about this position.[19]

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[17] *Nobosoft v. No Borders*, [2007] O.J. No. 2378 (C.A.);
[18] in *Flintoff v. von Anhalt*, [2010] O.J. No. 4963 (C.A.), at para 7
[19] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 19, 20, 21, letter dated Jan. 14, 2015 (Exhibit 'C' to Best February 5, 2015 affidavit.)

15. Instead of dismissing the motion, with or without prejudice, the Court could allow the examination of 2 of the Defendants (Cox and Hatch) by telephone pursuant to Rule 39.03. This would get the necessary evidence before the Court expeditiously. As Justice Moldaver indicated:

> [39] ... **a need to submit evidence from witnesses with firsthand knowledge** of the Report who could be subject to **meaningful cross-examination**. No such witnesses were available here

D. PROPER EXERCISE OF DISCRETION

16. Generally, the Defendants were warned and made a deliberate decision to default. They wanted to delay any filing for close to year if there was no appeal of the motion to strike or probably over a year if there was such an appeal. Although the jurisdiction motion is now scheduled, this was done over the objection of the Defendants after they were already in default. Further, by taking this position, the Defendants have restricted the time for the motion to strike. Had they complied in December, there would have been time between January and June (almost 6 months) to get the June motions perfected. Because of the deliberate default, this must now be squeezed into a 3 month period on a tight schedule. If that schedule is not met, the June motion dates may be lost and the entire process delayed.

17. The position of the Defendants was not only deliberate and prejudicial it was not in accordance with the legal duty to bring any jurisdictional challenge as soon as possible. Justice Riopelle in *Sault College of Applied Arts and Technology* said:

> [8] ...there has been attornment, not just by the filing of legal documents, but also an attornment by lack of conduct — **it is incumbent on a party who intends to rely on a right not only to insist on that right but to protect it. Parties are expected to act diligently and not "sleep on their rights".** For reasons that will be clear when we deal with forum non-conveniens, Agresso's delay in enforcing its right was too long, inexcusable and amounts to attornment in fact.[20]

Accordingly, the Defendants, in seeking to delay the filing of the jurisdictional motion failed to give the jurisdictional adequate priority. Whether this goes to the point of attornment need not be decided in this motion.

18. Dealing with each of the factors:

1. The Barbados Defendants deliberately chose to ignore several warnings and extensions. Yet, all that was sought by the Plaintiff was that the jurisdiction motion be served, filed and scheduled by Justice McCarthy, not that it necessarily be argued in advance (which is reasonable per *Nobosoft* (para 7). Had this been done, there would have been no noting in default. By refusing to do so, time must be spent dealing with this issue before any other steps can be taken;[21]

2. The delay proposed by the Defendants was from default in November 2014 (60 days after service in August/September) until June or July 2015 before they would even file anything. It was and remains a distinct possibility that either side may appeal an adverse ruling on the motion to strike.[22]

3. The Defendants purported reasons for delay was to avoid costs. Their counsel said that it would be a waste of money to bring the jurisdictional motion when the motion to strike might end the case. The motion to strike has little chance of disposing of the entirely of the Claim. Even if this were otherwise, refusing

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[20] *Sault College of Applied Arts and Technology v. Agresso*, [2006] O.J. No. 5265 (S.C.J.), para 8
[21] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 37
[22] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 8

to act because of cost is not a legitimate basis to default in respect of pleading deadlines.[23]

4. With respect to the complexity and value of the claim: this is not key here since the Plaintiff did not insist that a Statement of Defence be served, but proposed the serving and filing of the jurisdictional motion. There is no great complexity to the jurisdiction motion;[24]

5. The refusal of the Defendants to file anything before June or July 2015, until directed to do so by Justice McCarthy, after they were already in default, indicates a lack of intent to defend within the time period (November, 2014);[25]

6. In respect of the context (jurisdictional challenge), the position of the Defendants (paragraph 11 of their factum) that the present lawsuit flows from Ontario litigation, is a concession that there is a substantial connection to Ontario and no legitimate jurisdictional issue.[26]

Accordingly, from the 'big picture' perspective as well as in respect of each of the factors, it is clear that discretion should not be exercised to set aside the default.

PART IV - ORDER REQUESTED

19. The Applicant requests an order:

(a) striking the Affidavit of Jennifer Gambin and the consequent permanent dismissal of the motion; or

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[23] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 21, 33
[24] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 59
[25] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 7, 8, 20, 21,
[26] Affidavit of Donald Best, sworn Feb. 5, 2015, at paras 38, 59

(b) In the alternative, striking the Affidavit of Jennifer Gambin and ordering the examination of Mr. Cox and Mr. Hatch by telephone;

(c) Upon the evidence on the motion being complete, the dismissal of the motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT TORONTO, this 5th day of February, 2015.

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Court File No. 14-0815

SUPERIOR COURT OF JUSTICE

(CENTRAL EAST REGION: BARRIE)

DONALD BEST

Plaintiff (Respondent on Motion)

- and-

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Defendants

RESPONDENT'S FACTUM
(Re motion to set aside Noting in default)

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