

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **CIVIL DIVISION**

3  
4 **CAUSE NO: G 247 OF 2014**

5 **BETWEEN:**

6 **VISTA DEL MAR DEVELOPMENT LTD**

7 **Plaintiff**

8 **AND**

9 **(1) JANET FRANCIS**

10 **(2) DWIGHT CLARKE**

11 **Defendants**  
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14 **Appearances:**

15 **Ms. Gemma Newell of Maples and Calder for the Plaintiff**  
16 **Mr. Hector Robinson from Mourant Ozannes for the**  
17 **Defendants**

18 **Before:**

19 **Hon. Mr. Justice Richard Williams**

20 **Heard:**

21 **16 February 2016**

22 **Circulation of Draft**

23 **Ruling:**

24 **17 February 2016**

25 **Date of Ruling:**

26 **19 February 2016**  
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30 **RULING ON COSTS**

31 **The Summons**

32 1. On 16 February 2016 the Plaintiff's Amended Summons dated 19 January 2016  
33 came on for hearing. The parties had resolved the issues regarding the discovery  
34 sought in the Amended Summons prior to the date of the hearing. At the outset  
35 of the hearing the Plaintiff indicated that it was no longer seeking an order for  
36 the Defendants to verify their disclosure by way of affidavit pursuant to Grand  
Court Rules ("GCR") O.24, r.7. However, the Plaintiff still seeks an order for

1 the costs of the Summons/Amended Summons to be paid by the Defendants on  
2 the indemnity basis. The Defendants opposed the making of a costs order  
3 against them, whether it be on the indemnity or standard basis.

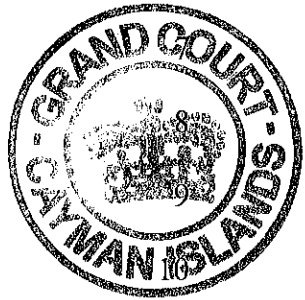
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5 2. Although no formal application was made the Court gave agreed directions in  
6 relation to the Defendants' proposed Amended Defence and Counterclaim.

Leave was given to the Defendants to file the same by 4pm on 16 February  
2016. The Plaintiff was directed to file any Amended Reply and Defence to  
Counterclaim by or on 23 February 2016. The Defendants were directed to serve  
any further documents to be disclosed by or on 19 February 2016. As a  
consequence of the leave given to the Defendants the deadline for the parties to  
file and exchange witness statements of fact was extended to 1 March 2016,  
with the deadline for replies to the witness statements extended to 11 March  
2016. I ordered that no further witness statements could thereafter be filed  
without leave of the Court. It was sensibly agreed that the Defendants would pay  
the Plaintiff's costs of and incidental to the filing of the Amended Defence on  
the standard basis.

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19 **Nature of Costs Hearing**

20 3. I received oral submissions from both Counsel on the issue of costs. I have also  
21 considered the content of the Written Submissions submitted by Ms. Newell on  
22 behalf of the Plaintiff.

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1    **The Plaintiff's Submissions on Costs**

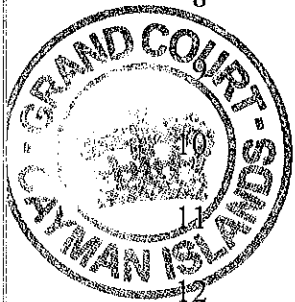
2    4.    The plaintiff's position is that the Summons had to be issued due to incomplete  
3    disclosure by the Defendants and their failure to fulfil their obligation to give  
4    ongoing disclosure of documents that ought to have been disclosed and were  
5    always within their possession, custody and control.

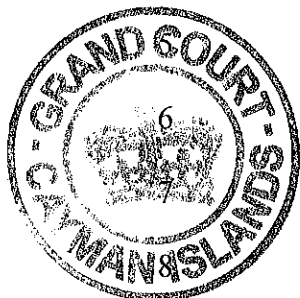
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7    5.    It is contended that the disclosure of the document on 23 December 2015, after  
8    the Defendants were aware of the draft Summons which been served on 18  
9    December 2015 and the documents disclosed on 28 January 2016 and on 3  
10   February 2016 after the Amended Summons had been served, means that the  
11   Plaintiff has succeeded on its Summons/Amended Summons. It is further  
12   contended that the costs should not be awarded on the standard basis, but on the  
13   indemnity basis for the Defendants' *"unreasonable conduct with respect to this*  
14   *application and these proceedings."*

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16   **Defendants' Submissions on Costs**

17   6.    The Defendants submit that they have not been dilatory with disclosure and  
18   repeat what was said in the letters to the Plaintiff's attorneys, namely that they  
19   had provided documents in their possession or power relevant to the matter in  
20   issue in the proceedings and that they had abided by their continued disclosure  
21   obligations.

22





1 7. The Defendants contend that the cause of the delay in the recent disclosure  
2 partly lies at the door of the Plaintiff. It is submitted that confusion arose  
3 because the Summons dated 21 December 2015 made reference to a non-  
4 existent schedule attached to the First Affidavit of Arek Joseph sworn on 18  
December 2015<sup>1</sup>. It is submitted by the Defendants that if the Summons had  
correctly referred to the schedule attached to Rachel Baxendale's affidavit, then  
that would have been complied with in shorter order. The Defendants contend  
that they were not aware that the Summons sought the specific disclosure  
attached in that schedule and that they felt they were complying with the  
Summons referring to Arek Joseph's affidavit. They also contended that the  
disclosure has been fully given and that there has been no knock-on effect on the  
hearing date in early April 2016.

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14 8. The Court was not given an adequate explanation from the Defendants, when  
15 invited to comment on why disclosure of the Butterfield Bank loan application  
16 form, which had been requested on a number of occasions since at least May  
17 2015, was not forthcoming until the Summons was filed.

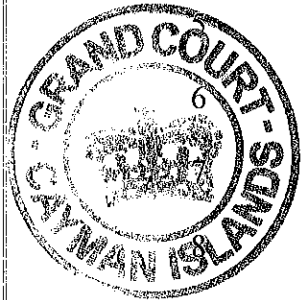
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19 9. An understanding of the background and procedural history is necessary to put  
20 the Plaintiff's submissions into context.

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<sup>1</sup> No issue has been taken due to the fact that the affidavit appears to have been sworn on 21 December 2015 rather than 18 December 2015.

1 10. On 6 March 2009 the parties entered into a Written Agreement (“the  
2 Agreement”) in which the Defendants agreed to purchase a parcel of land from  
3 the Plaintiff. In these proceedings the Plaintiff seeks to rely upon clauses in the  
4 Agreement purportedly requiring the purchaser to commence and complete  
construction of a home on the parcel within a specific period of time. It is  
contended that the Defendants have failed to comply with this obligation and the  
Plaintiff seeks to exercise the option of repurchasing the land at the original sale  
price.



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10 11. The Defendants deny a number of the allegations in the Statement of Claim. At  
11 paragraph 23 of the Counterclaim, the Defendants claim that they have not been  
12 able to carry out construction work due to the unwillingness of financial  
13 institutions to give them financing on the property as is subject to this litigation  
14 brought by the Plaintiff.

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16 12. On 1 May 2015 the Plaintiff's attorneys wrote to the Defendants' attorneys  
17 concerning paragraph 22 to 24 in the Counterclaim. After setting out extracts  
18 from those paragraphs in the letter they requested copies of:

19

*".... all correspondence/documents between the Defendants and (i)  
20 the Plaintiff and (ii) Scotiabank or Butterfield Bank (the Banks")  
21 evidencing:*

22

*1 That Butterfield's decision to refuse the Defendants'  
23 application for financing for the construction of the  
24 property was communicated to the Plaintiff; and*

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*2 That the Banks (or either Bank) were made aware of  
26 the existence of the Plaintiff's Writ of Summons (the  
27 "Summons").*

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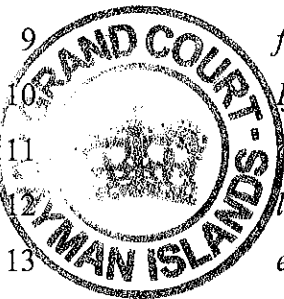
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1 They went on to request:

2 *"... any correspondence between the Defendants and the Banks in*  
3 *respect of the Summons and any further emails received by the*  
4 *Defendants from Scotiabank after 2 December 2014 in respect of*  
5 *the Defendants' mortgage application.*

6  
7 and they sought confirmation:

8 *"... by return that disclosure of any subsequent documentation*  
9 *further to this letter will be provided by no later than 8 May 2015.*



10 *If no further disclosure is forthcoming we call upon your client to*  
11 *admit as fact that they cannot get the requisite financing from a*  
12 *lending institution for the construction of the Property and that the*  
13 *existence of the Proceedings has no bearing on the Defendants'*  
14 *ability to secure financing for this purpose."*

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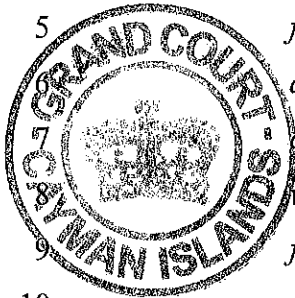
16 13. On 11 May 2015 the Defendants' attorneys replied indicating that they had  
17 made discovery of all documents in their possession or power relevant to the  
18 matter in issues in the proceedings. It appears from the recent disclosure that this  
19 was an incorrect statement. They indicated there was no basis for the admissions  
20 sought in the 1 May 2015 letter. The information was rightly sought by the  
21 Plaintiff having regard to the content of the Counterclaim.

22

23 14. On 29 September 2015 the Plaintiff's attorneys again wrote to the Defendants'  
24 attorneys, this time to comment on the Defendants' answers to the  
25 Interrogatories sworn 16 September 2015. They rightly requested identification  
26 of the further information which had been provided to Butterfield Bank and

1 requested that the Defendants' witness statements set out to whom at the Bank  
2 the further information was provided. They went on to appropriately explain the  
3 relevance of the disclosure sought stating:

4 *"Although your clients claim to have made applications for*  
5 *financing from two banks, they have not disclosed any loan*  
6 *application forms. It is our client's contention that the reason your*  
7 *clients breached their obligations is not because the proceedings*  
8 *were commenced but rather because they did not have the*  
9 *financial means to do so and chose not to restructure their*  
10 *financial affairs so as to be able to obtain financing."*



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12 15. On 1 December 2015 the Plaintiff's Summons for directions dated 26 October  
13 2015 came on before me. By agreement, an order for certain disclosure from the  
14 Plaintiff was made and directions to a final hearing were given. These directions  
15 included the requirement for any necessary interlocutory applications to be filed  
16 by 24 December 2015 and witness statements to be exchanged by 29 January  
17 2016.

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19 16. On 4 December 2015 the Plaintiff's attorneys again wrote to the Defendants'  
20 attorney again referring back to the replies to the Interrogatories. This letter was  
21 emailed to the Defendants' attorneys at 4:28 PM on 4 December 2015. In that  
22 letter they quite properly reiterated:

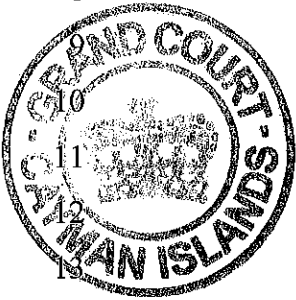
23 *"Your clients claim to have made applications for financing from*  
24 *two banks, yet they have not disclosed any loan application forms*  
25 *or supporting documentation to these loan applications. These*  
26 *documents are referred to in the Butterfield Bank and Scotia Bank*

1                    *correspondence and replies to the first interrogatories (specifically*  
2                    *at paragraphs 2.2 and 2.4 of the Affidavit of Janet Francis sworn*  
3                    *16 September 2015) yet have not been provided and plainly fall*  
4                    *within disclosure requested of all documents passing between the*  
5                    *Defendants and Butterfield Bank (and any other financial*  
6                    *institution with which the Defendants engaged) set out in your*  
7                    *letter dated 23 January 2015 (emphasis added).*

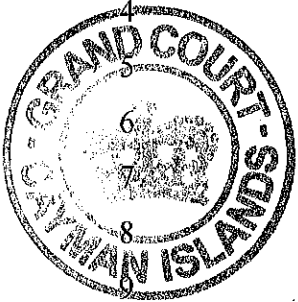
8                    *.... please confirm as a matter of urgency that the Defendants'*  
9                    *witness statements (due on 29 January 2015<sup>2</sup>) will deal with these*  
10                    *points and the Defendants will provide on or before exchange: (i)*  
11                    *the actual loan application submitted to Butterfield Bank and at*  
12                    *Scotia Bank (the "Loan Applications"); (ii) all supporting*  
13                    *documentation requested and submitted with the Loan*  
14                    *Applications; and (iii) the further documents provided to*  
15                    *Butterfield Bank (as referred to in paragraph 2.2 of the affidavit of*  
16                    *Janet Francis).*

17                    *We reserve all rights in relation to your clients' failure to address*  
18                    *Interrogatories and any failure to provide the documentation*  
19                    *sought, including our client's right to bring an application for*  
20                    *specific discovery for this documentation. Bearing in mind the*  
21                    *timeline given in the Agreed Court Order for interlocutory*  
22                    *applications, we would appreciate confirmation that the*  
23                    *documentation sought will be provided either before the exchange*  
24                    *of witness statements (or on exchange so that these can be*  
25                    *addressed in any reply) by close of business Monday 7 December*  
26                    *2015.*

<sup>2</sup> Apparent error in letter, as should be 2016.



1 17. At 5:34 PM on 8 December 2015 the Plaintiff's attorneys emailed the  
2 Defendants' attorneys, attaching a letter. In that letter they referred back to the  
3 letter of 4 December 2015. In the letter they stated:



4 *"Please confirm by return email whether the confirmation sought*  
5 *will be forthcoming; failing which our client intends to bring an*  
6 *application for specific discovery for this documentation without*  
7 *further notice to you. We will rely on the contents of this letter and*  
8 *letter of 4 December 2015 in order to seek the costs of any such*  
9 *application against your clients."<sup>3</sup>*

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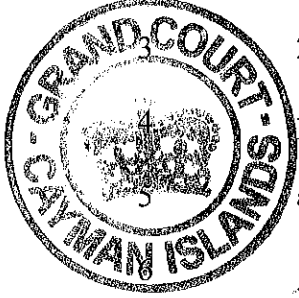
11 18. Upon receipt of this letter and the aforementioned letters, the Defendants should  
12 have been aware of the nature of the disclosure sought and importantly they  
13 were explicitly warned about the potential cost implications if an application had  
14 to be made to enforce compliance with their obligation to disclose.

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16 19. The Defendants' attorney replied with a standard out of office email indicating  
17 that he would be returning on 10 December 2015 and would respond as soon as  
18 he had the opportunity. The Defendants' attorney, promptly on his return to the  
19 office, replied at 6:41 PM on 10 December 2015 indicating that he had been  
20 unable to respond on 4 December 2015 because he was otherwise heavily  
21 engaged on an urgent matter which required his full attention during that  
22 evening. He reiterated that he had been out of the office from 7 to 9 December  
23 and he only had the opportunity to review his correspondence today and that he  
24 would *"respond on the issues shortly."*

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<sup>3</sup> My emphasis by underlining.



1 20. At 6:56 PM on 10 December 2015 the Plaintiff's attorney quite rightly again  
2 wrote to the Defendants' attorney referring back to the letters of 4 December  
3 2015 and 29 September 2015 and required confirmation of the Defendants'  
4 position by the following day due to the limited time to file and serve an  
5 application for specific discovery for the documentation by 24 December 2015.

7 21. Regrettably, no response to that communication was received from the  
8 Defendants' attorneys. With the cut-off date for filing of interlocutory  
9 applications rapidly approaching, the Plaintiff, understandably, felt compelled to  
10 bring the matter before the Court to seek specific disclosure of the documents  
11 mentioned in the abovementioned letters. On 18 December 2015 a copy of the  
12 draft summons was served on the Defendants' attorneys. The Summons was  
13 filed on 22 December 2015.<sup>4</sup> This was followed up by a letter emailed to the  
14 Listing Officer at 9:50 AM on 23 December 2015. That correspondence was  
15 emailed to the Defendants' attorneys at 11:08 AM on 23 December 2015.

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17 22. The email correspondence to the Court on 23 December 2015 appears to have  
18 spurred the Defendants' attorneys into action, because at 2:20 PM on the same  
19 day they emailed a letter to the Plaintiff's attorneys to which the Defendants'  
20 application to Butterfield Bank for a personal loan/mortgage dated 4 July 2014  
21 was attached. It is not clear when the affidavit sworn by Arek Joseph on 21

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<sup>4</sup> See email to Mrs. Allenger sent by Plaintiff's attorney at 9:54 AM on 23 December 2015 and the Court stamps on the face of Summons dated 21 December 2015.



1 December 2015<sup>5</sup> and the affidavit sworn by Rachel Baxendale on 18 December  
2 2015 were served on the Defendants. In the Defendants' attorneys' 23 December  
3 2015 emailed letter to the Plaintiff receipt of Arek Joseph's email is  
acknowledged as is the fact that no schedule was attached to the affidavit. They  
went on to say in the letter under the heading "*Further Disclosure*" that their  
Second Supplementary List of Documents, which comprised only the Butterfield  
Bank personal loan and mortgage application, was attached and that the Scotia  
8 Bank application had already been disclosed as an attachment to an email from  
9 the First Defendant to that bank dated 2 September 2014, document number 310  
10 in the Defendant's List of Documents. However, upon hearing from Counsel, it  
11 is clear that the statement was not correct as the application to Scotiabank had in  
12 fact not been disclosed, the Defendants having only served copies of the emails  
13 without the attachments on the Plaintiff.

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15 23. When one looks at the summons, although it wrongly refers to a schedule  
16 attached to Arek Joseph's affidavit, it clearly states that the Plaintiff was seeking  
17 an order that:

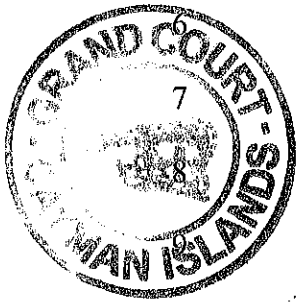
18 *"The Defendants make and serve on the Plaintiff a further and*  
19 *better list of Documents ("Supplementary List") which are or have*  
20 *been in its possession, custody or power relating to all*  
21 *communications with and documents previously provided to*  
22 *Butterfield Bank and Scotia Bank to the purposes of applying for*  
23 *finance, such documents are to include, without limitation<sup>6</sup>, the*

<sup>5</sup> The Written Submissions of the Plaintiff wrongly state at paragraph 19 that the affidavit was sworn on 18 December 2015.

<sup>6</sup> My emphasis by underlining.

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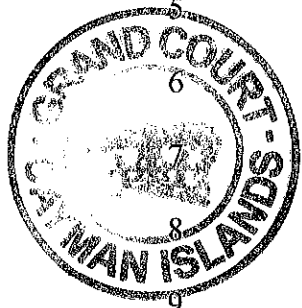
*documents listed in the Schedule to the first affidavit of Arek Joseph sworn on 18 December 2015”*



24. Paragraph 6 of Arek Joseph’s Affidavit makes it clear that his affidavit is made in support of the Summons for disclosure, and that the disclosure sought is the specific documents which have been referred to in disclosure exchange between the parties pursuant to GCR O.24, r.2. A similar statement is contained in paragraph 3 of Rachel Baxendale’s affidavit before she goes on to analyse the background of the failure to disclose, as well as being more specific about the documents in paragraph 19.

25. If the Summons is considered in the context of these two affidavits and the previous correspondence, as one might have expected, at the very least the nature of the documents sought should have been clear to the Defendants. It is evident that the Defendants recognised, despite the absence of a schedule attached to the affidavit, that they were being asked to and were obligated to provide loan application forms.

26. There was no reply by the Plaintiff’s attorney to the Defendants’ letter of 23 December 2015 until mid-January 2016. I do not criticise Counsel who has conduct of the Plaintiff’s case for the delay in replying as she had very valid reasons for being out of the office. However, I note that a paralegal with the Plaintiff’s attorneys was, during that period of time, in communication with the Listing Office trying to fix the hearing date.



1 27. On 11 January 2016 the Plaintiff's attorneys wrote to the Defendants' attorneys  
2 indicating that they should expect to be contacted by the Listing Officer with  
3 dates to avoid concerning the listing of the Summons. Due to the absence of any  
4 communication from the Plaintiff until 11 January 2016, the Defendants'  
5 attorneys may have wrongly deduced that the Plaintiff was content with the  
6 disclosure given on 23 December 2015. This may be why, on 12 January 2016,  
7 the Defendants' attorneys wrote to the Listing Officer stating that they had  
8 served the only document requested by the Plaintiff in the Summons and which  
9 was in their possession or power and that they had formed the view that the  
10 Plaintiff would not be proceeding with the Summons.

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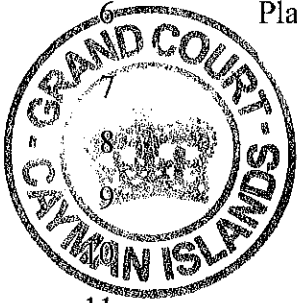
12 28. It was not until 18 January 2016 that a detailed response was received by the  
13 Defendants' attorneys from the Plaintiff's attorneys. In that letter it is conceded  
14 that the Summons should have stated that the schedule was the one attached to  
15 Rachel Baxendale's affidavit and as a consequence an amended summons would  
16 be promptly filed<sup>7</sup>. It was reiterated in the letter that the Defendants had a copy  
17 of the Baxendale Affidavit which clearly set out the documents sought. An out  
18 of office standard email reply was sent from the Defendants' attorney on the  
19 same day, which indicated that he would not be returning to the office until 27  
20 January 2016.

21

22 29. On Mr. Robinsons' return to the office on 27 January 2016 it appears that the  
23 attorneys had a telephone communication in which he stated that the Defendants

<sup>7</sup> It was filed on the following day, namely the 19 January 2016.

1 were reviewing their records to search for documents set out in the schedule.  
2 This was repeated in a letter from the Defendants' attorney on 28 January 2016,  
3 to which five identified documents were attached. Further disclosure was given  
4 by the Defendants' on 3 February 2016 following a chase up email from the  
5 Plaintiff's attorneys sent on 2 February 2016. In the 2 February 2016 email the  
6 Plaintiff's attorney also stated:

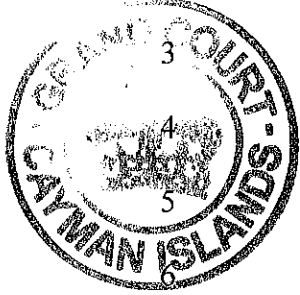


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*"Our client's position with respect to the summons dated 22  
December 2015 (as amended) is reserved, we need to know your  
clients' position with respect to the documents sought soon in  
order to prepare submissions or bundles (if necessary)"*

12 30. On 3 February 2016 the Defendants' attorney sent a separate letter to the  
13 Plaintiff's attorneys indicating that they proposed at the hearing of the Summons  
14 to make an application for leave to amend their Defence.  
15

16 **Conclusion - Principle of Costs**

17 31. I am satisfied that were it not for the issue of the Summons and the Amended  
18 Summons the relevant and appropriate disclosure, which had been sought by the  
19 Plaintiff from at least May 2015, would not have been forthcoming. The  
20 Defendants have now provided the disclosure, and its relevance to the issues in  
21 this case is quite rightly not in question. The Summons and Amended Summons  
22 became necessary due to the failure to disclose not only basic materials such as  
23 loan application forms but other documents relating to the applications for  
24 finance which the Defendants should have known were relevant, were in their



1 possession or control and should have formed part of ongoing disclosure. The  
2 Plaintiff has in reality succeeded on the Summons/Amended Summons which  
3 they had to issue due to the lack of disclosure despite a number of written  
4 requests for it over an extended period of time. I am also satisfied that the  
5 Plaintiff in seeking that disclosure has acted in an economical, expeditious and  
6 proper manner.

7

8 32. Accordingly, I am satisfied that the Defendants should pay the Plaintiff's cost of  
9 the Summons/Amended Summons.

10

11 **Indemnity Costs**

12 33. The issue for me to now determine is whether those costs should be on the  
13 standard or indemnity basis. The Defendants were opposed to any cost order at  
14 all being made against them, but also submitted that there was no basis  
15 established for the exercise of my discretion to award indemnity costs.

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17 34. The parties did not make detailed submissions on the law in relation to  
18 indemnity costs. This may be because the applicable principles governing the  
19 exercise of my discretion to make an order for indemnity costs are not in doubt.

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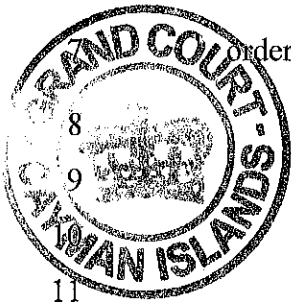
21 35. The general rule in litigation is that costs follow the event and that the successful  
22 party will be awarded costs on a party and party basis. It is recognised that this  
23 can leave the successful party out of pocket. The gap between the amount of

1 costs in fact paid by a successful litigant and the amount of party and party costs  
2 which are recoverable can be substantial.

3

4 36. As highlighted by Henderson J. in *Sagicor General Insurance (Cayman)*  
5 *Limited and another v Crawford Adjusters (Cayman) Limited* Cause No. 78 of  
6 2006 GCR, O.62 r.4(11) provides an alternative basis upon which costs may be

ordered. The rule provides in respect of costs ordered on an indemnity basis that:



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*"The Court may make an inter-partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."*

11

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13 37. The discretion under the rule is not fettered or circumscribed, and it must be  
14 exercised judicially in the light of the particular facts of each case. There are  
15 many cases which have considered the appropriate principles to be applied in  
16 exercising the discretion to award costs on the basis other than party and party.  
17 It is accepted that something special or unusual must be demonstrated in order to  
18 justify a departure from the ordinary costs order.<sup>8</sup> These include where a losing  
19 party has misconducted itself in relation to the proceedings, where the institution  
20 of the proceedings was plainly unreasonable or where the proceedings were  
21 issued for multi-collateral purpose.

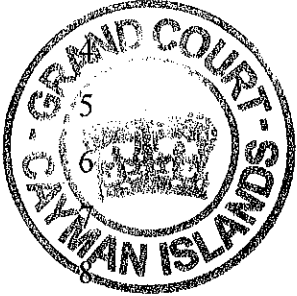
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<sup>8</sup> *Billson v Residential Apartments Ltd* [1992] 1 AC 494.

*160219 Vista Del Mar Development Ltd v Janet Francis & Dwight Clarke - Ruling on Costs*

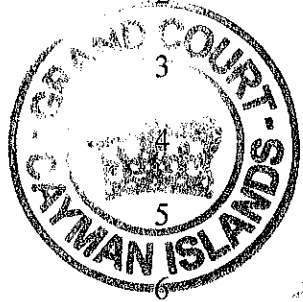
1 38. The award of costs on indemnity basis is generally reserved to cases where the  
2 Court wishes to indicate its disapproval of the conduct of the paying party. In  
3 the words of Halsbury's Laws, 4<sup>th</sup> Edition (2007) Volume 10, para 23, Note 8:



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“Indemnity costs may be awarded against the party whose conduct has been unreasonable, even though the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation: *Reid Minty (A Firm) v Taylor* [2002] 2 All ER 150.”

9  
10 39. I accept that failings in relation to the discovery of documents may fall under the  
11 category of unreasonable conduct. For example in *Robert Banks and Others v*  
12 *Esau Brooks* Cause No. 817 of 1997 Henderson J. made an order for costs on  
13 indemnity basis where there had been a failure to comply with an unless order. I  
14 would not equate the matter before me with the circumstances in that case.

15  
16 40. It is right that I have been, to a degree, critical of the Defendants’ failure to  
17 make the disclosure sought prior to the issue of the Summonses. For example,  
18 the Scotiabank loan application form was clearly in the possession of the  
19 Defendants and they failed to disclose it. Although it is regrettable that the  
20 Defendants did not comply with their ongoing discovery obligations in relation  
21 to that document, I do not find that it was deliberately withheld, but it may have  
22 been overlooked as the email which it was supposed to be attached was  
23 provided. Although the response to the initial incorrectly drafted Summons was  
24 not as complete as one might have expected and hoped, if the Defendants had  
25 taken more care to consider the Summons in context with the previous



1 correspondence in which the same disclosure was sought and to read the  
2 Baxendale Affidavit, the Summons was not ignored. The Butterfield Bank  
3 application form was then disclosed. The further disclosure was provided within  
4 a reasonable time after the Amended Summons was filed, there having been no  
5 response from the Plaintiff's attorney to the Defendants' attorney's letter of 23  
6 December 2015 until mid-January 2016.

7

8 41. I note that a formal warning of an intention to claim indemnity costs can make  
9 the awarding of indemnity costs more likely. This is illustrated by the Australian  
10 case of *Huntsman Chemical Co. Aust. Pty Ltd v International Pools Aust. Pty*  
11 *Ltd* (1995) 36 NSWLR 242. The Plaintiff did give a formal costs warning in the  
12 matter before me, albeit not one on the indemnity basis, and this warning which  
13 was not heeded formed part of my consideration when making a costs order  
14 against the Defendants in principle.

15

16 42. The conduct of the Defendants as litigants in this case has not been sufficiently  
17 unreasonable or a meritorious so as to justify departure from the ordinary rule as  
18 to the basis of assessment of costs. If the disclosure had not been made prior to  
19 this hearing, especially following the Amended Summons which correctly  
20 highlighted the disclosure sought, my conclusions may well have been different.  
21 The recent disclosure, made within a reasonable time after the issuing of the  
22 Summons and the corrected Amended Summons, has not cause any disruption to

1 the final hearing. Although it has caused understandable annoyance to the  
2 Plaintiff, it will not cause any prejudice to them at the hearing.

3

4 43. Accordingly, I order that the Defendants should pay the Plaintiff's cost of the  
5 Summons/Amended Summons on the standard basis.

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10 **Honourable Mr. Justice Richard Williams**  
11 **JUDGE OF THE GRAND COURT**

