THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

NEVHCVAP2023/0018

BETWEEN:

BANK OF NEVIS INTERNATIONAL TRUST SERVICES INC

Appellant

and

BELMONT HOLDINGS SKN LIMITED

Respondent

Before:

The Hon. Mr. Mario Michel	Chief Justice [Ag.]
The Hon. Mde. Vicki Ann Ellis	Justice of Appeal
The Hon. Mr. Gerard St. C. Farara	Justice of Appeal [Ag.]

Appearances:

Mr. Michael Fay KC for the Appellant
Ms. Kurlyn Merchant for the Respondent

2024: June 17;
November 15.

Interlocutory appeal – Rule 15.2 of the Civil Procedure Rules 2023 - Summary judgment – Principles for the granting of summary judgment – Whether learned master failed to apply the principles of summary judgment – Counterclaim – Real prospect of successfully defending counterclaim - Part 34 of the Civil Procedure Rules 2023 - Request for information – Applicable test for granting Part 34 application - Whether learned master erred in determining application for information - Rule 64.6 of the Civil Procedure Rules (Revised Edition) 2023 - Costs – Deviation from general rule of costs – Whether learned master erred in awarding costs to the appellant

Belmont Holdings SKN Limited ("Belmont"), on the one hand, and Bank of Nevis International Limited ("BONI") and Bank of Nevis International Trust Services Inc ("BONITS"), on the other hand, entered into an agreement for BONI to finance the construction of some units in a development owned by Belmont known as the Belmont Gardens Condominium Development ("the Development"). The terms of this agreement were set out in a Facility Agreement dated August 2020. Clause 1 of the Facility Agreement provided that as consideration for the novation, sale and transfer by Belmont of its interest in 27 shares representing 6 units in the Development to BONITS, BONI would make available to Belmont a loan in the total sum of US$875,000.00 for the development and construction of Belmont Gardens Block G, 50% of which was to be drawn down by way of loan to Belmont and the remaining 50% to represent project equity investment to be held by BONITS in trust for BONI under an agreement to convert the sum as equity for BONITS. Clause 2 provided that upon completion of the agreement, Belmont shall deliver up to attorneys representing BONITS an executed Memorandum of Transfer transferring its interest in the twenty-seven (27) shares in Block G of Belmont Gardens Inc representing six (6) units which together shall vest in BONITS upon completion of construction representing the legal and beneficial ownership of six units.

The initial 50% of the loan facility (US$437,500.00) was disbursed to Belmont and Belmont executed and delivered the Memoranda of Transfer. However, Belmont claims that the agreement broke down when BONI failed to disburse the second 50% of the loan facility (USD$437,500.00) thereby breaching the Facility Agreement by failing to make available the total facility of US$875,000.00.

In April 2021, Mr. Michael Prest on behalf of BONI and BONITS, demanded that all monies owed by Belmont be repaid by 30th June 2021. Belmont complied and repaid all outstanding amounts owed to BONI by 16th June 2021, but requested that all security documents held pursuant to the Facility Agreement be returned, namely, the six (6) Memorandum of Transfer documents deposited with BONI/BONITS. On 26th July 2021, BONITS returned all security documents, which were described as Blank Certificate Title Forms (12 sets) and Memorandum of Transfer (of the 6 units in the Development). Belmont contended that this marked the termination of the Facility Agreement with neither party having any continued obligations under the said agreement.

On 18th August 2022, Belmont received notice that the sum of US$160,000.00 had been removed from its accounts as monies due to BONITS which Belmont says was unauthorised. Belmont disputed the payment alleging that the loan Facility Agreement had been rescinded and demanded the return of the sum of US$160,000.00, which demand BONI did not comply with. Belmont eventually filed a claim against BONI for, inter alia, breach of agreement, breach of mandate, fraudulent misrepresentation, and breach of fiduciary duty.

In its counterclaim, BONITS pleaded that it was not obliged to return any documents relating to the 27 shares or 6 units of Belmont Gardens Block G to Belmont and had done so by mistake. BONITS' argument was essentially that Belmont held the security documents on resulting and/or constructive trust for BONITS and/or as nominee for BONITS and failed to deliver the said documents, in breach of the trust.

On 14th July 2023, BONITS filed an application for orders for specific information pursuant to rule 34.2 ("the Part 34 application") and for summary judgment pursuant to rule 15.2 of the Civil Procedure Rules (Revised Edition) 2023 ("CPR"). BONI also filed on the same day its application seeking summary judgment against Belmont on the grounds that Belmont lacks a realistic prospect of succeeding in its defense against BONI's counterclaim, Both applications came on for hearing before the learned master on 4th October 2023. By judgment dated 27th November 2023, the learned master dismissed both applications for summary judgment and for specific information, with costs. BONI has not appealed the dismissal of its summary judgment application. In respect of BONITS's summary judgment application, the learned master found that there were triable issues and thus the matter was unsuited for summary judgment. In relation to the Part 34 application for information, the learned master found that all matters in dispute on the pleadings could be resolved in the usual course of disclosure and the filing of witness statements in the proceedings.

Being dissatisfied with the judgment of the learned master, the appellant (BONITS) appealed on the grounds that: (a) the master failed to apply or properly apply the applicable legal principles to the summary judgment application; (b) the respondent has no real prospect of successfully defending the counterclaim and/or of proving any specific obligation imposed on BONITS under the agreement, and the master failed to make any such finding and, in any event, there was no reasonable basis upon which he could have so found; (c) the master erred in that he was unable to and/or did not attempt to identify why the court would be in a better position at trial rather than on any application for summary judgment to resolve the resulting trust issue; (d) the master ought not to have determined the application for information which had, by agreement with the parties, not been argued before him and, having done so, the master failed to properly apply the test set out in CPR 34.2(2) and/or consider the factors that he was required to consider pursuant to CPR 34.2(3); and (e) the learned master erred in ordering BONITS to pay Belmont's costs of the application.

Held: making the orders at paragraph 77 of this judgment, that:

1. A court may give summary judgment in a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the issue or the defendant has no real prospect of successfully defending the claim or issue. This is a discretionary exercise by the judge or master hearing the application. The test of real prospect of success means that the claimant or defendant, as the case may be, must have a claim or defence that is more than merely arguable. Further, it is trite that the summary judgment procedure is unsuitable for claims or issues which would necessitate the court embarking upon a mini trial to resolve issues which ought to be properly tried. In this case, the learned master correctly set out the applicable legal principles and then considered whether the matter was an appropriate case to engage the summary judgment procedure. He held that there are issues to be further examined at trial such as the fundamental dispute as to the purpose of the transfer of the shares and whether the Facility Agreement had been terminated due to repudiation or whether it had been rescinded. The master having identified and considered the correct test and applicable principles would no doubt have had the 'no real prospect of successfully defending the claim' test in mind in determining that this was not a suitable case for summary judgment. Accordingly, this first ground of appeal fails.

   Rule 15.2 of the **Civil Procedure Rules (Revised Edition) 2023** applied; **Didier and others v Royal Caribbean Cruises Ltd, Royal Caribbean Cruises Ltd v Medical Associates Ltd and others** (2016) 89 WIR 277 applied; **RBTT Bank Caribbean Limited v Financial Services Authority** SVGHCVAP2021/0005 (delivered 25th January 2023, unreported) applied; **Comodo Holdings Limited v**

Renaissance Ventures Ltd BVIHCMAP2014/0032 (delivered 3rd May 2016, unreported) applied; **Hallman Holding Ltd v Webster and Another** [2016] UKPC 3 applied; **B.B. Inc v Lewis Hamilton** GDAHCVAP2015/0035 (delivered 7th April 2017, unreported) applied.

2. The mere fact that the parties have conflicting views on the legal and beneficial ownership of the shares and the ramifications of the transfer of the shares back to Belmont in light of Belmont's claim for breach of contract and other causes of action, suggests that summary judgment is inappropriate at this stage. The resulting trust issue on the counterclaim raises questions of the proper construction of the agreement, whether the agreement had been terminated, and whether BONITS re-transferred the Memoranda of Transfer to Belmont by mistake, which issues have to be considered in the context of Belmont's claim against BONI for breach of the Facility Agreement. Belmont has never asserted recission in the strict sense of recission *ab initio*, but instead, Belmont has maintained a claim for repudiation. Further, Belmont's claim for damages does not affirm the enforceability of the agreement, as damages is a remedy that is available to Belmont upon termination of the contract. Belmont's defence cannot be said to be hopeless and unsustainable. This ground of appeal therefore fails.

3. The transcript of the proceedings before the master on 4th October 2023 clearly shows that the learned master accepted that he would not have to determine the appellant's Part 34 application at that point of the proceedings, a position agreed upon by both parties, with the result that no oral argument was entertained by the master in relation to the said application. This notwithstanding, the master, having reserved judgment, nevertheless considered and determined the Part 34 application. In doing so, he did not notify the parties of his intention to do so, nor did he invite them to make submissions on the application, but relied solely on the written submissions of the parties and gave judgment thereon refusing the application. Having clearly accepted that the application would not have been determined, the master ought not to have determined the application at all.If he subsequently changed his position and intended to do so, he ought not to have rendered judgment on it unless he had at least subsequently indicated to counsel his intention to do so and invited oral or further written submissions on this limb of the appellant's application. These failures went to the fairness of the proceedings leading to the determination of the Part 34 application which, accordingly, must be set aside. This being the clear position, this ground of appeal succeeds, and the order made by the learned master dismissing the appellant's Part 34 application is set aside.

4. The CPR Part 34 procedure for request for information is intended to clarify a claimant's or defendant's pleaded case so as to ensure that the other side understands clearly the case it has to answer. The test for granting an order pursuant to CPR 34.2 is whether the information requested is necessary in order to dispose fairly of the claim or to save costs. In deciding whether this requirement has

been met, the court ought to carefully examine the pleaded cases and issues on both sides, and not take to stringent a view of the outcome of such issues. The pleadings need only be sufficiently clear for the other side to be able to identify the cause of action and to understand the nature of the case it has to answer. The learned master fell into error when he took a wholesale approach in his consideration of the requests for information and collectively dismissed them all. It was incumbent on the learned master to have examined each of the seven categories of requests for information and determine, in respect of each category, which, if any, had met the test in CPR 34.2(2) having regard to the likely benefit which will result if the information is given; the likely cost of giving it and whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order. The order dismissing the appellant's Part 34 application having been set aside, the said application is remitted to the High Court to be case managed and, to the extent necessary or appropriate, for hearing and determination by a different master.

Rule 34.2 of the **Civil Procedure Rules (Revised Edition) 2023** applied; **Neil Cave et al v Carl Burke et al** ANUHCVAP2021/0004 (delivered 11th November 2022, unreported) applied; **McPhilemy v Times Newspapers Ltd** [1993] 3 All ER 775 applied.

5. Where a court decides that a costs order would be appropriate, the general rule is that costs follow the event. The court may depart from the general rule but must state the reasons for its decision. The precise terms of a costs order can be affected by whether a party has been successful in only a part, but not in the whole proceedings. In this case, the appellant has had partial success in its appeal being successful only on the issue of the master's dismissal of its Part 34 application. Notwithstanding that this limb of the appeal is considered to be secondary, in succeeding on this aspect of the appeal, the appellant can be said to have succeeded on two important grounds namely: (1) the master ought not to have considered and rule on the Part 34 application without first indicating his intention to do so and giving counsel an opportunity to make submissions or additional submissions thereon, if they so chose; and (2) having decided to do so, the master adopted the wrong approach to a Part 34 application and failed to consider each request and to say why it ought not to be granted. For these reasons, this aspect of the appeal cannot be described as a 'minor' matter, and, accordingly, a 25% reduction would be both fair and appropriate in the amount of costs on the appeal to be awarded to the respondent.

Rule 64.6 of the **Civil Procedure Rules (Revised Edition) 2023** applied; **Sun Vessel Global Limited v HQ Aviation Limited et al** BVIHCMAP2022/0017 (delivered 9th January 2023, unreported) applied.

JUDGMENT

[1] **FARARA JA [AG.]:** This is an interlocutory appeal against the judgment and order of the learned master delivered on 27th November 2023 whereby the master dismissed the appellant's application pursuant to rule 15.2 of the **Civil Procedure Rules (Revised Edition) 2023** ("**CPR**") for summary judgment on its counterclaim in respect of shares in a development scheme in Nevis, and for an order pursuant to CPR 34.2 for further information (or "the Part 34 application").

Background

[2] The dispute between the parties arose out of an agreement entered into by the respondent, Belmont Holdings SKN Limited ("Belmont") (who was the claimant in the court below) on the one hand and Bank of Nevis International Limited ("BONI") and the appellant, Bank of Nevis International Trust Services Inc ("BONITS") on the other hand, for BONI to finance the construction of some units in a development owned by Belmont known as the Belmont Gardens Condominium Development ("the Development"). Prior to entering into this agreement, Belmont maintained a banking relationship with BONI whereby BONI provided retail banking services to the respondent company.

[3] The terms of the agreement between the parties were set out in a Facility Agreement dated August 2020. The Facility Agreement consisted of two parts, clauses 1 and 2. Clause 1 provided that as consideration for the novation, sale and transfer by Belmont of its interest in 27 shares representing 6 units in the Development to BONITS, a wholly owned subsidiary of BONI, BONI would make available to Belmont a loan in the total sum of USD$875,000.00 for the development and construction of Belmont Gardens Block G of which:

(i) A sum of USD$437,500.00 or 50% of the construction costs of Block G shall be drawn down by way of loan to Belmont.

(ii) A sum of USD$437,500.00 or 50% of the construction costs of Block G shall be drawn down and shall represent project equity investment to be held by BONITS and or its nominees in trust for BONI under agreement to convert the sum as equity for BONITS.

[4] Clause 2 provided that:

> "(i) Upon completion of this agreement, [Belmont] shall deliver up to Attorneys representing BONITS an executed Memorandum of Transfer transferring its interest in the twenty seven (27) shares in Block G of Belmont Gardens Inc representing six (6) units which together shall vest in BONITS upon completion of construction representing the legal and beneficial ownership of six units.
>
> (ii) Following the transfer in 2(1) above, upon sale of the 27 shares by BONITS, BONITS shall pay the sum of USD$40,000.00 for each share sold to Deon Daniels as consideration for brokering this agreement."

[5] Pursuant to the Facility Agreement, the initial loan facility of USD$437,500.00 was disbursed to Belmont and Belmont executed and delivered the Memoranda of Transfer transferring its interest in 27 shares (or 6 units) to BONITS. Subsequently, four shares were sold generating USD$800,000.00 which was deposited into Belmont's business account that it held with BONI. Belmont gave instructions to transfer USD$160,000.00 to BONITS and USD$40,000.00 to Deon Daniel as his brokerage fee.

[6] Belmont claims that the agreement broke down when BONI failed to disburse the second loan facility of USD$437,500.00, thereby breaching the Facility Agreement by failing to make available the total facility of USD$875,000.00.

[7] In April 2021, Mr. Michael Prest on behalf of BONI and BONITS demanded that all monies owed by Belmont be repaid by 30th June 2021. Belmont complied with the demand and repaid all outstanding amounts owed to BONI by 16th June 2021. On said date, Belmont by way of letter to BONI, requested that all security documents held pursuant to the Facility Agreement be returned, namely the 'six (6)

Memorandum of Transfer documents deposited with BONI/BONITS'.[1] On 26th July 2021, BONITS returned all security documents, which were described as Blank Certificate Title Forms (12 sets) and Memorandum of Transfer (of the 6 units in the Development). Belmont contended that this marked the termination of the Facility Agreement with neither party having any continued obligations under the said agreement.

[8] Subsequently, Belmont gave instructions to BONI to wire specific amounts to its account at the St. Kitts Nevis Anguilla National Bank Limited. This was confirmed to have been done by BONI on 17th February 2022, but it was noted that the funds had been returned from St. Kitts Nevis Anguilla National Bank Limited to Belmont's account on 15th February 2022. To date, BONI has failed to transfer the said sums. Additionally, on or about 15th June 2022, BONI failed or refused to honour another request from Belmont to wire specific sums of money to the company, Michael Lambie Interiors, as instructed.

[9] On or about 18th August 2022, Belmont received a debit advice via post showing that the sum of USD$160,000.00 had been removed from its account as "monies due to BONITS". Belmont claims that no authorisation was given to the Bank to debit its account in the said sums or for the said purpose. Belmont disputed the payment to BONITS alleging that the loan facility agreement had been rescinded and closed and demanded BONI to repay all monies held in Belmont's business account and that the account be closed. BONI did not comply with the request. Belmont claims that it has not had access to its account or money since June 2022.

[10] Consequently, Belmont filed a claim against BONI for breach of agreement, breach of mandate, fraudulent misrepresentation, fraudulent conversion, breach of fiduciary duty and unjust enrichment. By Amended Claim Form and Statement of Claim filed on 9th May 2023, Belmont added BONITS as a 2nd defendant to the claim. Belmont

[1] Amended Bundle of Documents for Appeal, Affidavit of Deon Daniel page 234.

sought relief in the form of damages (special and general), an account of funds, interest and costs.

The Counterclaim and Applications

[11] On 8th June 2023 and 9th June 2023 respectively, BONITS and BONI each filed defences and counterclaims to Belmont's Amended Statement of Claim. They both denied that there was any breach of the Facility Agreement. This appeal however only focuses on BONITS' counterclaim and the subsequent applications filed on its behalf.

[12] In its counterclaim BONITS pleaded that it was not obliged to return any documents relating to the 27 shares or 6 units to Belmont and had done so by mistake. Its argument on its counterclaim centered on the presumption of a resulting and/or constructive trust which arose when it transferred the shares back to Belmont on 26th July 2021, without any consideration. It claimed that Belmont held the Memoranda of Transfer of the shares on resulting trust and/or constructive trust for BONITS, on the basis that BONITS transferred the shares or Memoranda of Transfer back to Belmont for no good reason or for which there was no commercial justification and did not do so by way of a gift. Therefore, Belmont held the security documents on resulting and/or constructive trust for BONITS and/or as nominee for BONITS. However, BONITS submits that Belmont has failed to deliver the documents to BONITS, in breach of the said trust, resulting in it suffering loss and damage. In its counterclaim BONITS seeks a declaration that Belmont holds the documents on trust for it; an order requiring Belmont to deliver up the documents; and an enquiry into the loss and damage suffered by BONITS as a consequence of Belmont's breach of trust.

[13] In addition, BONITS filed an application on 14th July 2023 for orders pursuant to CPR 34.2 and 15.2. With respect to the Part 34 aspect of the application, BONITS had previously sent a notice to Belmont's legal practitioners on 11th June 2023

pursuant to CPR 34.1, requesting that Belmont provide the information set out in the notice within a reasonable period of receipt of the notice. Belmont having not provided the information nor sought an extension to do so, BONITS filed an application for specific disclosure and sought an order pursuant to CPR 34.2 that Belmont provides ‘the information sought in the CPR 34.1 Request for Information served on Belmont on 11 June 2023’. It was admitted however in subsequent filings that Belmont had provided some but not all of the information in the request.

[14] Regarding the CPR 15.2 limb of the application, BONITS sought an order for summary judgment in its favour on its counterclaim. The application was based on the grounds that: (i) the shares were transferred to BONITS pursuant to clause 2 of the Facility Agreement. The transfer was not by way of security, it extinguished the interest of Belmont in the shares and contained a warranty by Belmont that the shares were sold to it free from all encumbrances except to pay the brokerage fee to Deon Daniels; (ii) BONITS was not obliged to return any documents relating to the shares; (iii) the counterclaim can be resolved on the construction of the Facility Agreement and the admitted ‘vesting’ of shares in BONITS; (iv) the resulting trust arising in favour of BONITS upon the transfer of the documents arises as a matter of law and; and (v) Belmont has no real prospect of successfully defending the counterclaim.

The judgment in the court below

[15] BONITS’ application for orders pursuant to CPR 34.2 and 15.2 came on for hearing before the master on 4th October 2023. By judgment dated 27th November 2023, the learned master dismissed the application for summary judgment and for specific information with costs. With respect to the summary judgment aspect of the application, the learned master found at paragraphs 50 – 53 that:

> “[50] The above complexities suggest that the counterclaim cannot be resolved through construing the agreement’s literal text. There’s a fundamental dispute about whether the shares constituted consideration for BONI and BONTIS (sic) entering into the agreement with the claimant [Belmont]. Determining the

entitlement of BONTIS (sic) to the shares hinges on whether BONI fulfilled its contractual obligations.

….

[52] I disagree with the Second Defendant's (sic) [BONITS] that the counterclaim simplifies down to resolving the issue of a resulting trust. In my view, this perspective oversimplifies the interconnected issues raised in both the claim and counterclaim.

[53] The Second Defendant's [BONITS] argument that the resulting trust issue is unaffected by whether BONI was obligated to provide the second drawdown is difficult to follow. Any such obligation could only arise if the contract were still in effect or if the repudiatory breach was acknowledged. These issues are triable and unsuitable for summary judgment."

[16] The master then considered the request for information and summarised the 'quite extensive' request into seven categories. He reasoned at paragraphs 61 and 62 of his judgment that:

"[61] Having considered the extremely extensive request, I must agree with [Belmont]. The pleaded case, by which [Belmont] is bound is quite clear. [BONITS'] request is unduly onerous and far from necessary for it to have sufficiently understood the case. This is apparent from its defence and counterclaim file (sic) and also the application for summary judgment.

[62] … All matters in dispute can be resolved in the usual course of disclosure and witness statements. Ordering the provision of the information sought at this stage would be to call upon [Belmont] to telegraph all its evidence and arguments."

[17] Having dismissed the application, the master ordered costs on the application against BONITS, summarily assessed in the sum of $2,000.00.

The Appeal

[18] Being dissatisfied with the judgment of the learned master, the appellant appealed to this Court. By notice of appeal filed on 31st January 2024, BONITS disputes several of the master's findings in law and/or of fact. From the notice of appeal and the written submissions, the grounds of appeal can be distilled as follows:

a) The master failed to apply or properly apply the applicable legal principles to the summary judgment application

b) The respondent has no real prospect of successfully defending the counterclaim and/or of proving any specific obligation imposed on BONITS under the Agreement, and the master failed to make any such finding and, in any event, there was no reasonable basis upon which he could have so found.

c) The master erred in that he was unable to and/ or did not attempt to identify why the court would be in a better position at trial rather than on any application for summary judgment to resolve the resulting trust issue.

d) The master ought not to have determined the application for information which had, by agreement with the parties, not been argued before him and, if he was, the master failed to properly apply the test set out in CPR 34.2(2) and/or consider the factors that he was required to consider pursuant to CPR 34.2(3).

e) The learned master erred in ordering BONITS to pay Belmont's costs of the application.

Summary Judgment – CPR 15.2
Appellant's submissions

[19] The appellant argues that there are compelling reasons why the dismissal of its application for summary judgment on its counterclaim should be overturned by this Court. The thrust of its submissions revolves around the argument that Belmont has no real prospect of successfully defending the counterclaim.

[20] BONITS first seeks to impugn the master's approach to the summary judgment application. It avers that the master erred in law when he failed to apply the relevant legal principles applicable to summary judgment to the application before him. BONITS submits that the master failed to make any finding that Belmont had a real

prospect of successfully defending the counterclaim. Had the master correctly applied the principles, he would have recognised that Belmont was unable to identify and/or show a real prospect of proving any specific obligation imposed on BONITS under the Agreement. BONITS also contends that the learned master was unable to and/ or did not attempt to identify why the court would be in a better position at trial rather than on any application for summary judgment to resolve the resulting trust issue. Had the master applied his mind to these matters he would have granted the appellant's application.

[21] BONITS underscores that its counterclaim is based on a presumption of resulting trust. BONITS submits that it is clear from the Facility Agreement that there was to be no security provided for the loan financing. Therefore, when Belmont transferred the shares to BONITS pursuant to Clause 2 of the Facility Agreement, it was not by way of security. The transfer extinguished all and any interest of Belmont in the 27 shares representing the 6 units in the Development. The appellant asserts that the shares were to become assets of BONITS, not BONI. The consequence of the transfer was that the shares were vested in BONITS as the legal and beneficial owner. Accordingly, BONITS submits that it was not obliged to return any documents relating to the transfer of shares, to Belmont. In this regard, having mistakenly returned the documents or done so on grounds for which there was no commercial justification, the effect was that Belmont held and holds the documents on resulting and/or constructive trust for BONITS and/or as nominee for BONITS.

[22] BONITS also argues that Belmont has failed to rebut the presumption of a resulting trust on the basis that Belmont does not assert or cannot assert that the transfer of shares by BONITS to Belmont was a gift. In support of this argument, the appellant relied on the case of **Chen v Ng**[2] which it submits is an authority for the proposition that 'save in the case where the presumption of advancement applies, where an

[2] [2017] 5 LRC 462.

asset or money is transferred for no consideration, there is a rebuttable presumption that the transferee holds the asset or money on resulting trust for the transferor'.

[23] The appellant further submits that Belmont is unable to defend the counterclaim because Belmont does not seek rescission of the Facility Agreement nor that it be set aside, be declared void, or that it otherwise be a nullity. In absence of any of such claims Belmont has no footing on which to defend a resulting trust claim as Belmont cannot prove that there was no contract to begin with. In fact, as the appellant contends, Belmont's claim for damages affirms the enforceability of the Facility Agreement.

[24] The appellant also contends that there is no proper claim made by Belmont against BONITS. It argues that none of the alleged breaches of mandate, alleged breaches of the Facility Agreement, the alleged fraudulent misrepresentations and/or conversions, or the alleged breaches of fiduciary agreement asserted against BONI can be asserted against BONITS. In other words, it is unclear why Belmont has a claim against BONITS. The appellant submits that Belmont's claim for damages is framed as a claim against BONI and BONITS but in reality, it is only a claim against BONI. In reiterating this point, the appellant makes the submission that even if Belmont has a valid claim for breach of contract, Belmont's remedy lies in damages against BONI and not BONITS.

[25] Furthermore, BONITS asserts that Belmont's position on the status of the Facility Agreement is variable and inconsistent. The appellant's submission on this point is that Belmont's primary case is one for damages. However, Belmont contends in the Amended Statement of Claim that the agreement had been 'rescinded and closed'[3] but in its Reply and Defence to BONI's counterclaim, it asserts that the Facility Agreement was 'voided'.[4] The appellant posits that these legal concepts are

[3] Amended Statement of Claim, paragraph 32.
[4] Appellant's Reply and Defence, paragraph 12.

inconsistent with Belmont's claim for damages for breach of the same agreement. A further inconsistency, the appellant submits, is that Belmont also seems to assert that the agreement was 'wrongfully repudiated' or that the actions of BONI and BONITS 'ought to be viewed as a repudiatory breach'. In the appellant's view, 'the consequence of an accepted repudiatory breach, or indeed a repudiatory breach that is not accepted, is a claim for damages – it does not give rise to a claim that the agreement can be set aside, void or a nullity'.[5]

[26] The appellant also takes issue with the master's finding that 'determining the entitlement of BONITS to the shares hinges on whether BONI fulfilled its contractual obligations…The resolution is directly linked to whether the court agrees with [Belmont's] assertion that the agreement was rescinded'. Here, the appellant argues that the master fell into error because whether BONI breached the terms of the Facility Agreement has no impact on BONITS' entitlement to the shares. Additionally, the appellant submits that the master made a 'critical mistake' as contrary to the master's view that Belmont was seeking to rescind the Facility Agreement, Belmont in fact affirmed the Facility Agreement, thus there is no rescission issue for the court to determine.

[27] The appellant also challenges the costs order made by the master in that the master erred in ordering BONITS to pay Belmont's costs of the application summarily assessed at the sum of XCD$2,000.00. This ground of appeal is dependent on whether the appellant succeeds on the appeal. If this Court agrees that the master did not err, then his costs order was correct and ought to stand. Conversely, if the Court decides in favour of the appellant, then it follows that the costs order must be set aside.

[28] In the circumstances, the appellant asks this Court to set aside the order made by the learned master and to enter summary judgment for BONITS on the counterclaim;

[5] Appellant's Skeleton Arguments on Appeal, paragraph 17(b).

order Belmont to transfer the shares back to BONITS forthwith; and order Belmont to pay BONITS' costs of the application for summary judgment and the claim and the costs of the appeal.

Respondent's submissions

[29] The respondent's position is that there are a number of issues, both factual and legal, in dispute and a number of complex issues which make the matter unsuitable for summary judgment. The respondent submits that the appellant appears to have simplified the Facility Agreement to only the shares being transferred by Belmont to BONITS and has ignored that the transfer was 'subject to the terms and conditions set out in the agreement' and are not isolated. In oral submissions, counsel for the respondent stated that any transfer or delivery of the share documents would have been premised on BONI providing the total facility sum which it failed to do in breach of the agreement. In the appellant's view, given the varying interpretations of the said agreement and its 'complexities', the counterclaim cannot be determined in isolation and should be determined at trial.

[30] The respondent also rebuts the appellant's assertion that its claim in the court below is inconsistent and variable. It argues that there is clear evidence of a repudiatory breach detailed in the affidavit of Deon Daniel filed on 4th August 2023 with supporting documentation as to the respondent's response to the breach, the nature of the breach and whether the repudiatory conduct was accepted by the respondent. Belmont contends that BONI's failure to provide the second sum was never denied by BONI/BONITS' representatives after they had been written to by Mr. Deon Daniel inquiring about the failure to pay the agreed second sum of USD$437,500.00. BONI/BONITS' response was simply to demand that the respondent clear the existing balance on the loan facility (which Belmont complied with). Belmont then went on to request that letters be written to Nagico Insurance and Sagicor Insurance confirming that BONI/BONITS no longer had interest in the Development and requested the return of the Memoranda of Transfer documents. As such, Belmont

submits that the subsequent request for the return of the security documents and acceptance by the respondent of the said documents 'was objectively clear confirmation that the respondent had elected to accept the breach (repudiatory) of BONI/BONITS, bringing about an end to the Facility Agreement'.[6] Another indication that Belmont had considered the Facility Agreement brought to an end, was the subsequent claim for damages after the documents had been returned to it instead of claiming for specific performance. This shows, the respondent submits, that it was under the impression that all obligations were terminated and the contract rescinded as reflected in the Amended Statement of Claim. Furthermore, the respondent submits that while the claim is primarily based on a breach of the Facility Agreement, the claim also includes claims of fraudulent misrepresentation, conversion and unjust enrichment in relation to both BONI and BONITS. It therefore cannot be said that there is no claim made out by Belmont against BONITS.

[31] The respondent also denies that BONITS is the legal and beneficial owner of the shares. The respondent contends that the transfer of the 27 shares representing the six units did not vest the legal and beneficial ownership of the shares in BONITS but rather it was upon the completion of construction when such legal and beneficial entitlement would accrue as per Clause 2 of the Facility Agreement. It is no surprise therefore that the respondent also denies holding any document on trust for BONITS or that there is any obligation placed upon it to deliver up any such documents to BONITS. It argues that the 'vesting' of the legal and beneficial ownership of shares would have occurred at a specific time, that is, upon the completion of the construction. The respondent says that these are all issues in dispute, directly relevant to resolving BONITS' counterclaim. The respondent therefore submits that 'while BONITS has apparently trivialized the issue of the shares being vested in BONITS, thus forming the basis of its counterclaim for a resulting trust... there are a

[6] Respondent's submissions on appeal, paragraph 27.

number of issues which arise which debunk BONITS' contention that Belmont has no real prospect of defending said counterclaim'.[7]

[32] In this regard, the respondent submits that the master correctly concluded that there are live issues related to the construction of various clauses on the Facility Agreement thus rendering the claim unsuitable for summary judgment.

Analysis and Discussion

Whether the master failed to apply or properly apply the relevant legal principles

[33] An application for summary judgment begins with a consideration of rule 15.2 of the CPR which states:

> "15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the –
>
> (a) claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) defendant has no real prospect of successfully defending the claim or issue."

[34] CPR 15.2 confirms that granting summary judgment is a discretionary exercise by the judge or master hearing the application. It is a case management decision[8] aimed at disposing of cases or issues that do not require a full trial due to the absence of genuine issues of material fact.

[35] In **Didier and others v Royal Caribbean Cruises Ltd, Royal Caribbean Cruises Ltd v Medical Associates Ltd and others**,[9] Pereira CJ explained:

> "In disposing of a claim summarily, the court would essentially consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly."

[7] Respondent's submissions on appeal, paragraph 35.
[8] See B.B. Inc v Lewis Hamilton GDAHCVAP2015/0035 (delivered 7th April 2017, unreported).
[9] (2016) 89 WIR 277 at paragraph 23.

[36] As enunciated in numerous cases 'real prospect of success' means a case or defence that is more than merely arguable. As reiterated by this Court in **RBTT Bank Caribbean Limited v Financial Services Authority**:[10]

> "The test of 'real prospect of success' on a summary judgment application means that the claimant or defendant must have a case or defence that is more than merely arguable. There must be a 'realistic' as opposed to a 'fanciful prospect of success'. A claim would be considered fanciful 'where it is entirely without substance or where it is clear beyond question that the statement of case is contradicted by all documents or other materials on which it is based'."

[37] It is not in dispute that the master correctly identified the principles applicable to the court's approach to summary judgment.[11] After 'setting the stage' the master, at paragraphs 41–49, aptly summarised the case for BONITS and Belmont's defence. At paragraph 50, the master concluded that the 'complexities' raised by the legal issues of the counterclaim and by Belmont's defence, were issues that were triable and unsuitable for summary judgment.

[38] In **Comodo Holdings Limited v Renaissance Ventures Ltd**,[12] Blenman JA noted that '[i]t is trite that the summary judgment procedure is unsuitable for claims or issues which would necessitate the court embarking upon a "mini-trial" or to resolve issues which ought to be properly tried'. In **Hallman Holding Ltd v Webster and Another**[13] the Board of the Privy Council commented that 'it will often be appropriate to determine a dispute about a short point of law or the construction of a simple contract by summary judgment, where the legal issues between the parties are straightforward and the court is satisfied that there is no need for investigation into the facts which would require a trial'.

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[10] SVGHCVAP2021/0005 (delivered 25th January 2023, unreported).
[11] See paragraphs 26-28 of the judgment.
[12] BVIHCMAP2014/0032 (delivered 3rd May 2016, unreported).
[13] [2016] UKPC 3 at paragraph 17.

[39] Thom JA, in **B.B. Inc v Lewis Hamilton**,[14] noted that:

> "In summary, in determining a summary judgment application, the court would consider first whether it is an appropriate case to engage the summary judgment procedure. This is a case management decision. In the event that the court determines that it is an appropriate case for the summary judgment procedure, the court would consider the pleadings and affidavit evidence of the parties. Thereafter, applying the test of whether the claimant or defendant as the case may be has no real prospect of succeeding, the court may do one of three things: (i) enter summary judgment on a particular issue; (ii) enter summary judgment on the entire claim; or (iii) order that the claim proceed to trial."

[40] In my view, the master did not err in applying or did not fail to apply the correct principles. In determining the application for summary judgment, the master correctly set out the applicable legal principles and then considered whether the matter was an appropriate case to engage the summary judgment procedure. This was within the remits of his case management powers to do. The case law has emphasised repeatedly that summary judgment is unsuitable for matters of law or of mixed law and fact that require a trial. The master highlighted that there was a fundamental dispute as to the purpose of the transfer of the shares; that determining BONITS' entitlement to the shares hinged on whether BONI fulfilled its contractual obligation; that there were interconnected issues raised in both the claim and counterclaim; and that there was the issue of whether the Facility Agreement had been terminated due to repudiation or whether it had been rescinded (reverting the parties to the pre-contract stage). These are issues to be further examined at trial.

[41] BONITS also contends that the master erred in that he did not make any finding that Belmont had a real prospect of successfully defending the counterclaim. The master did not expressly state in his judgment that Belmont had shown a real prospect of successfully defending the counterclaim, however that much can be gathered from the master's conclusion that the matter was not appropriate for summary judgment and the consequential dismissal of the application. The master, having identified and

[14] GDAHCVAP2015/0035 (delivered 7th April 2017, unreported).

considered the correct principles would no doubt have had the 'no real prospect of successfully defending the claim' test in mind. This much can be observed in the master's judgment where he emphasised in bold text, the part of the excerpt from the case of **Didier** where Pereira CJ said, "a defendant who puts forward a defence which clearly cannot stand up to the claimant's pleaded case will have no real prospect of successfully defending the claim". The master cannot therefore be faulted in this respect.

Whether the respondent has a real prospect of successfully defending the counterclaim

[42] BONITS asserts that the respondent had no real prospect of successfully defending the counterclaim and/or of proving any specific obligation imposed on BONITS under the Agreement.

[43] As the master highlighted at paragraph 43 of his judgment, BONITS' argument centers on the presumption of a resulting trust arising from the transfer of shares back to Belmont on 26th July 2021, without any consideration. BONITS' claim for resulting trust is based on its purported ownership or beneficial and legal interest in the shares when they were transferred to it by Belmont pursuant to the Facility Agreement. It argues that the act of transferring the shares extinguished all and any interest of Belmont in the 27 shares or 6 units. The transfer of the shares back to Belmont was a mistake that created a presumption of resulting trust which presumption had not been rebutted by Belmont. Belmont on the other hand disputes any purported beneficial or legal ownership of the shares by BONITS as there was no 'vesting' of interest in BONITS upon the transfer of the shares. Any 'vesting' of interest was to occur upon the completion of the construction of Block G of the Development, which did not occur. Belmont also contends that nowhere in the counterclaim has BONITS confirmed the status of construction so as to confirm that the legal and beneficial ownership had been vested in anyone besides Belmont.

BONITS argues that the Court is able to determine the claim independently of any claim that Belmont might have against BONITS for breach of the Facility Agreement.

[44] In my respectful opinion, the mere fact that the parties have conflicting views on the legal and beneficial ownership of the shares and the ramifications of the transfer of the shares back to Belmont in light of Belmont's claim for breach of contract and other causes of action suggests to me that summary judgment is inappropriate at this stage. The resulting trust issue on the counterclaim raises questions of the proper construction of the agreement; the question of whether the agreement had been terminated or is to be treated as still existing; the question of whether the legal and beneficial interest of the shares was transferred by the Memoranda of Transfer or upon the completion of the construction of the units; the question of whether the transfer was gratuitous or for no consideration; the question of whether BONITS re-transferred the Memoranda of Transfer to Belmont by mistake. These issues also have to be considered in the context of Belmont's claim against BONI for breach of the Facility Agreement, breach of mandate, fraudulent misrepresentation, fraudulent conversion and unjust enrichment. All Belmont had to prove was that it raised a real prospect of a contrary case.

[45] I am also not persuaded by the appellant's assertion that its counterclaim can be decided independently of any claim that Belmont might have against BONI. The issue of the transfer and ownership of the shares is directly linked to BONI's obligations under the loan facility. It is in dispute what these obligations were and if they were fulfilled. Furthermore, BONI's claim is based on its purported interest in the shares by virtue of a constructive and/or resulting trust and seeks specific performance. As highlighted by the master in his judgment when he was considering BONI's application for summary judgment,[15] "resolving the fundamental disagreement between the parties regarding whether the Facility Agreement terminated due to rescission and/or breach by [BONI and BONITS] is essential

[15] See paragraph 31 of the judgment.

before the court can address the issue of specific performance". I agree with this observation.

[46] The master thereafter at paragraphs 50 and 51, while considering BONITS' application for summary judgment found that the entitlement of BONITS to the shares hinged on whether BONI fulfilled its contractual obligations. The resolution of this, he stated, is directly linked to whether the court agrees with Belmont's assertion that the agreement was rescinded and if affirmed 'the parties revert to the pre-contract stage, potentially nullifying BONITS' entitlement to the shares directly implicating the agreement's construction'.

[47] The **Halsbury's Laws of England**[16] succinctly explains the term rescission in this way:

> "The word 'rescission' is used in two different senses. In the strict sense, it means the exercise by a party to a contract of a right to have the contract avoided ab initio… 'Rescission' is, however, frequently and confusingly used in a broader sense to describe a different act, namely, the acceptance by one party to a contract of a repudiatory breach of contract by the other party. Acceptance of repudiation discharges both parties from further performance of their executory obligations under the contract, but the contract is not avoided ab initio and the innocent party may claim damages for breach of contract."

[48] In my opinion, Belmont has never asserted rescission in the strict sense of rescission ab initio. While in its defences and replies to BONI's and BONITS' counterclaims it used the words 'rescinded' and 'voided' interchangeably (I will return to this point later in the judgment), Belmont has always maintained a claim for repudiation. In its written submissions, Belmont submitted that "it is submitted that the subsequent request for the returned (sic) of the security documents and acceptance by [Belmont] of said documents was objectively clear confirmation that the respondent had elected

[16] Halsbury's Laws of England, 5th Edn, Vol 95.

to accept the breach (repudiatory) of BONI/BONITS, bringing about an end to the Agreement."[17]

[49] I cannot say however that this ambiguity had any significant bearing on the master's consideration of whether BONITS' claim can be decided independently of any claim Belmont might have against BONI. The resolution of the issues relating to the transfer of shares and ownership of same has to be considered in light of the obligations of the parties under the contract and whether the court finds that BONI had breached those obligations and whether the breach was accepted by Belmont thereby bringing the contract to end.

[50] BONITS' also asserts that Belmont's defence to BONITS' counterclaim is so 'variable and inconsistent' that it does not disclose any reasonable ground upon which Belmont can realistically successfully defend the counterclaim. It contends that Belmont in its Amended Statement of Claim asserts that the Facility Agreement had been 'rescinded and closed' which is inconsistent with a claim for damages. On the other hand, Belmont claims a repudiatory breach and damages. By claiming the latter without claiming rescission in the alternative, BONITS argues that Belmont affirmed the agreement and waived its right to claim it was rescinded.

[51] As discussed in paragraph [48] above, Belmont has used the words 'rescinded' and 'voided' interchangeably in its pleadings. In its Amended Statement of Claim it asserts that the Facility Agreement had been 'rescinded and closed'.[18] In its reply and defence to BONI's counterclaim it sometimes says that the Agreement was voided and other times 'rescinded/wrongly repudiated'. In its reply and defence to BONITS' counterclaim it argues that the Agreement had been repudiated. In its written submissions, Belmont submits that BONI/BONITS' refused to perform its contractual obligations 'going to the root of the agreement' and that it had elected to

[17] Respondent's submissions on appeal filed 7th May 2024 at paragraph 27.
[18] Amended Statement of Claim at paragraph 32.

accept the repudiatory breach of BONI/BONITS' bringing the Agreement to an end.[19] Counsel for the respondent in oral submissions has also admitted before this Court that the pleadings could have been better drafted, however she does not agree that the pleaded case is unsustainable.

[52] While I do accept that the terms 'voided' which may suggest rescission in its strict sense and repudiation have been used interchangeably in the respondent's various filings, I do not agree with counsel for the appellant that Belmont's claim is so plainly bad that it has no legs upon which it can stand to defend the counterclaim. I reiterate my earlier assessment that Belmont maintains a claim for repudiation. As stated in the excerpt from **Halsbury's**, rescission is often used in a broader sense to mean a repudiatory breach. Belmont has always asserted that the agreement had been brought to an end and that the obligations of the parties thereunder ceased. In all the pleadings, I have not observed Belmont using the word rescinded or rescission to mean rescission ab initio and that the contract had been void from the beginning. Belmont's claim for damages does not affirm the enforceability of the contract as damages is a remedy that is available to Belmont upon termination of the contract. This remedy can be sought in conjunction with other reliefs where an injured party is seeking damages for loss caused by the non-performance of the contract. I do not find that Belmont's defence is hopeless and unsustainable. Accordingly, and for the reasons given above, the learned master was correct to dismiss the appellant's application for summary judgment, and this aspect of its appeal fails.

CPR 34.2 – Request for Information

Appellant's submissions

[53] The appellant submits that the master ought not to have determined the Part 34 application. The appellant avers that while the application was formally listed before the Court on 4th October 2023 and written submissions had been filed by the parties, the application was not argued at the 4th October 2023 hearing. That this is the

[19] See Respondent's Submissions on Appeal at paragraphs 26-28.

correct position of what transpired on 4th October 2023 is confirmed by the transcript of the proceedings provided to the Court under cover of a letter dated 9th September 2024 from the legal practitioners on record for the respondent. Briefly, learned counsel for the appellant's invitation to the master that its Part 34 application be stood over pending the outcome of its summary judgment application and to be returned to at some time in the future if necessary, was accepted by the learned master. In its written submissions, the appellant elaborates that the learned master:

> "…appears to have forgotten that the part of the Application dealing with Further Information was not argued before him following the Parties, and the learned Master, agreeing at the hearing that it would be otiose to do in the event that the learned Master granted summary judgment, and that such part of the application should therefore await his decision on the summary judgment part of the application."

[54] By not hearing counsel, the appellant submits that the master deprived himself of being shown by counsel what information had been required and what information was not required.

[55] However, in the event that the Court concludes that it was appropriate for the master to determine the application, the appellant submits that the master erred in that he failed to properly apply the test set out in CPR 34.2(2) and/or consider the factors that he was required to consider pursuant to CPR 34.2(3).

[56] As to the test to be applied, the appellant avers that the master wrongly applied his own test of whether providing the information was 'unduly onerous and far from necessary for BONITS to have sufficiently understood the case'. Additionally, the master, having separated the request for information into seven categories, proceeded to treat them as if they were all in one category and dismissed them. In the circumstances, the appellant submits, the purported exercise of discretion was flawed and falls to be set aside.

[57] The appellant argues that the purpose of the application for information was to get or clarify information on the respondent's claim because it is 'so badly pleaded'. Furthermore, the appellant notes that the master himself indicated in his judgment that it was 'difficult to follow' how the resulting trust argument is unaffected by the issue as to whether BONI was required to provide the second tranche of USD$437,500.00. In this regard, the appellant submits that any difficulty in understanding the same arose primarily because of the paucity of information pleaded by Belmont and that its evidence in opposition to the application for summary judgment is so brief. The appellant avers that this makes the master's refusal of the application 'odd' given that some of the information requested would likely have clarified Belmont's position and made this issue easier for, inter alia, the learned master to understand.

[58] In the circumstances, the appellant prays that this Court, if it should agree that the master was entitled to determine the application, to go on to either: i) make an order requiring Belmont to provide the information sought; or ii) remit the matter to another master to determine what information Belmont ought to provide.

Respondent's submissions

[59] The respondent did not address specifically in its written submissions whether the learned master ought to have dealt with the Part 34 application. However, counsel for the respondent when questioned by this Court, responded that she was 'surprised' to see that the master had dealt with the Part 34 application in his judgment.

[60] In any event, the respondent for the most part contends that the information requested was for further information on matters of evidence and as such the application ought not to have been brought. Additionally, 'the request appeared

designed for obtaining further explanation on matters put in issue on the existing statement of case and is therefore tantamount to abuse'.[20]

[61] Counsel for the respondent admits that while that the claim could have been better drafted, the case that the appellant has to answer is still clear. In the respondent's view, the master correctly found that the application for information ought not to have been granted and was unnecessary at that stage of the proceedings.

Discussion

Whether the master ought to have determined the application

[62] As mentioned at paragraph [53] above, the Court has belatedly received from counsel a copy of the transcript of the proceedings before the learned master on 4th October 2023, which unquestionably confirms that the master had accepted and agreed with counsel for the appellant that he would not at that stage of the proceedings deal with the appellant's Part 34 application, with the result that no oral argument was entertained by the master in relation to the said application. Counsel for the parties were also agreed that neither were required to present oral arguments on the matter and that the master, in subsequently giving judgment on the appellant's Part 34 application, solely relied on the written submissions of the parties.

[63] This being the clear position as shown by the transcript of the proceedings, the master ought not to have determined the application at all or if he had changed his position and intended to do so, he ought not to have rendered judgment on it unless he had at least subsequently indicated to counsel his intention to do so and invited oral or further written submissions on this limb of the appellant's application. To not do so, is to unfairly place both parties in a disadvantageous position which, I am certain, was not the master's intention. This being the clear position, this ground of appeal succeeds, and the order made by the learned master dismissing the appellant's Part 34 application must be set aside. This notwithstanding, I will

[20] Respondent's submissions on appeal, paragraph 77.

nevertheless address the submissions by the appellant that in determining the Part 34 application the learned master committed errors of principle such that, in any event, his dismissal order ought to be set aside on its merits.

Whether master's exercise of discretion flawed

[64] In so far as the master determined the application for request for information, the Court will only intervene if the decision is so plainly bad or so blatantly wrong such that the decision cannot be allowed to stand. The issue to be decided is whether the master committed an error in that he failed to properly apply the test set out in CPR 34.2(2) and/or consider the factors that he was required to consider pursuant to CPR 34.2(3).

[65] CPR 34.2 so far as is relevant, provides that:

> "(2) An order may not be made under this rule unless it is necessary to dispose fairly of the claim or to save costs.
> (3) When considering whether to make an order, the court must have regard to –
> (a) the likely benefit which will result if the information is given;
> (b) the likely cost of giving it; and
> (c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order."

[66] The CPR Part 34 procedure for request for information is intended to clarify a claimant's (or defendant's) pleaded case so as to ensure that the other side understands clearly the case it has to answer. The test for granting an order pursuant to CPR 34.2 is whether the information requested is necessary in order to dispose fairly of the claim or to save costs.

[67] In **Neil Cave et al v Carl Burke et al**,[21] I, writing on behalf of this Court, explained that:

> "A court in ascertaining whether this requirement has been met by an applicant, ought to take a broad view of the claim and of the issues of fact and of law pleaded by both the claimant and the defendant, but which are, at that stage

[21] ANUHCVAP2021/0004 (delivered 11th November 2022, unreported).

in the proceedings, yet to be considered and determined. The judge ought, therefore, to carefully examine the pleaded cases and issues on both sides, and not take too stringent a view of the likely outcome of such issues. This is necessary having regard to the requirement for fairness in CPR 34.2(2) as between both the claimant and the defendant."

[68] The master at paragraphs 61 and 62 of his judgment set out his reasons for dismissing the request for information application. He reasoned that: (i) he agreed that Belmont's case was quite clear; (ii) that BONITS' request was unduly onerous and far from necessary for it to have sufficiently understood the case; (iii) that all matters in dispute can be resolved in the usual course of disclosure and witness statements; and (iv) making the order for information at this stage would necessitate Belmont telegraphing all its evidence and arguments.

[69] Several cases from this Court such as **East Caribbean Flour Mills v Ormiston Ken Boyea**,[22] **Ian Peters v Robert George Spencer**,[23] **Shaista Trading Company Limited d.b.a Diamond Republic v First Caribbean International Bank (Barbados) Ltd**,[24] and **National Lotteries Authority v Jerome De Roche**[25] have adopted and applied the dictum of Lord Woolf MR in **McPhilemy v Times Newspapers Ltd**[26] that the need for extensive pleadings is reduced by the requirement that witness statements be exchanged. The pleadings need only be sufficiently clear for the other side to be able to identify the cause of action and to understand the nature of the case it has to answer. Lord Woolf MR in **McPhilemy** further said:

> "As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements pleadings frequently become of only historic interest."

[22] SVGHCVAP2006/0012 (delivered 16th July 2007, unreported).
[23] ANUHCVAP2009/0016 (delivered 22nd December 2009, unreported).
[24] ANUHCVAP2018/0021 (delivered 26th April 2021, unreported).
[25] GDAHCVAP2021/0025 (delivered 21st November 2022, unreported).
[26] [1993] 3 All ER 775.

[70] These principles are relevant to the instant matter to the extent that it was reasonable for the master to consider whether any dispute could be resolved or an issue clarified during the process of disclosure or on the exchange of witness statements, so as to determine whether making an order pursuant to CPR 34.2 at this stage would be necessary, would likely result in any benefit or would save costs.

[71] The master, however, fell into error when he took a wholesale approach in his consideration of the requests for information and collectively dismissed them all. It was incumbent on the learned master to have examined each of the seven categories of requests for information and determine, in respect of each category, which, if any, had met the test in CPR 34.2(2) having regard to the likely benefit which will result if the information is given; the likely cost of giving it and whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order. I wish to make clear that this does not preclude a court, in appropriate circumstances, to consider as a group essentially similar requests or requests which would properly permit of them being considered and disposed of, one way or another, when applying the test in CPR 34.2(2). For the reasons given above, I agree that the master's exercise of discretion is flawed and the order made ought to be set aside. Needless to say, the appellant's success on this issue inevitably affects the costs award made by the master in the court below.

[72] In light of the conclusions reached above on both limbs of the appellant's submissions against the master's dismissal of its Part 34 application, and considering the matter in the round, in my view the appropriate order would be that the order dismissing the appellant's Part 34 application be set aside and the said application remitted to the High Court to be case managed and, to the extent necessary or appropriate, for hearing and determination by a different master. The appellant mentioned in its submissions that some of the information requested has been given, which counsel for the appellant says was provided in the affidavit of Mr. Deon

Daniel filed on 4th August 2023 in response to the appellant's application. These answers have to be identified and considered alongside the 'remaining requests'. Furthermore, the appellant has not identified with any specificity in its submissions which of the factors under CPR 34.2(2) and (3) do each of the categories of requests meet why the court should make an order compelling the respondent to provide the information. Counsel for the appellant submits that this was intended to be done at the oral hearing before the master.

Costs

[73] Imbedded in CPR 64.6(1) is the Court's discretionary power to award costs 'where it decides' to do so.[27] Where the Court decides that a costs order would be appropriate, the general rule is that costs follow the event. The Court may depart from the general rule as per CPR 64.6(2) but must state its reasons for its decision.

[74] The precise terms of a costs order can be affected by whether a party has succeeded on particular issues even if the party has not been successful in the whole proceedings.[28] I consider the case of **Sun Vessel Global Limited v HQ Aviation Limited et al**[29] where this Court followed the approach in **Rosalind Nicholls et al v Richard Rowe and Mark Secrist et al**.[30] Gonsalves JA [Ag.] in giving the judgment of the Court recounted that: "In **Rosalind Nicholls**, this Court found that the appellants and respondents had some measure of success but that the respondents had succeeded on the major issues in the appeal and had overall success in defending the appeal. It therefore adopted the approach set out in Blackstone's Civil Practice and awarded the respondent ninety percent of its costs, applying a ten per

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[27] See SLUHCVAP2023/005 heard together with SLUHCVAP2023/006 and SLUHCVAP2023/007 Columbus Communications (St.Lucia) Limited dba Flow v Mark Maragh; Richard Frederick v Mark D. Maragh; Mark D. Maragh v McDowall Broadcasting Corporation (MBC) Limited et al (delivered 22nd May 2024, unreported) at paragraph 15.
[28] Civil appeal No. 10 of 2003 Rochamel Construction Limited v National Insurance Corporation (delivered 24th November 2003, unreported) at paragraph 8.
[29] BVIHCMAP2022/0017 (delivered 9th January 2023, unreported).
[30] SKBHCVAP2011/0015 (delivered 21st September 2018, unreported).

cent reduction in the amount to account for what it described as the minor success of the appellants".

[75] In **Sun Vessel** the respondents had succeeded in resisting grounds 1 and 2 of the appeal and the appellant succeeded on ground 3 of the appeal. At the hearing in which the Court handed-down or delivered its judgment, the Court read the orders of the Court which indicated that there would be no order as to costs. Counsel for the respondents sought an opportunity before any consequential order was perfected, to make submissions on the appropriate costs order for the costs of the appeal. The respondents argued that they were the successful party as they had succeeded on the main part of the appeal (the interest issue). They also argued that the ground on which the appellant had been successful (the costs of foreign lawyer issue) only made up about 6% of the sum secured on the main part of the appeal. The Court, in rendering its decision, considered and ruled that in a case like the one before it where the only relief sought was financial, a determination of who was the successful party on appeal must depend on the financial outcome consequent upon the appeal itself. This pointed to the respondents. However, the Court did not entirely disregard the fact that the appellant had been successful on ground 3. The Court did not consider ground 3 to be a minor issue as it occupied a substantial part of the argument before the Court. Therefore, the Court made a 20% reduction in the award and ordered the appellant to pay the respondents 80% of the respondents' costs on the appeal.

[76] The appellant has had partial success in its appeal. It has been successful only on the issue of the master's dismissal of its CPR Part 34 application. I consider this limb of the appeal to be 'secondary', and also one which has not taken up much of the Court's time and costs. Notwithstanding, it is not lost on me that in succeeding on this aspect of the appeal, the appellant succeeded on two important grounds, that is: (1) the master ought not to have considered and rule on the Part 34 limb of the application without first indicating his intention to do so and giving counsel an opportunity to make submissions or additional submissions thereon, if they so chose;

and (2) having decided to do so, the master adopted the wrong approach to a Part 34 application and failed to consider each request and to say why it ought not to be granted. For these reasons I would therefore not describe this aspect of the appeal as a 'minor' issue. In the circumstances, I find that a 25% reduction would be both fair and appropriate in the amount of costs on the appeal to be awarded to the respondent.

Disposition

[77] For the foregoing reasons, the orders of the Court are as follows:

(1) The appeal is allowed in part.

(2) The appeal against the order of the master at paragraph 65(3) of the judgment whereby he refused BONITS' application for summary judgment filed on 14th July 2023 is dismissed and the said order, is affirmed.

(3) The appeal against the order of the master at paragraph 65(3) of the judgment whereby he refused BONITS' Part 34 application for further information filed on 14th July 2023 is allowed and the said order set aside.

(4) The appellant's Part 34 application for further information is remitted to the High Court to be case managed and determined before a different master.

(5) The order of the master at paragraph 65(4) of the judgment whereby he ordered BONITS to pay Belmont's costs of the application summarily assessed in the sum of XCD$2,000.00, is set aside and varied to XCD$1,600.00.

(6) BONITS shall pay 75% of Belmont's costs on the appeal to be assessed by a judge or master of the High Court, if not agreed by the parties within 21 days of this judgment.

I concur.
Mario Michel
Chief Justice [Ag.]

I concur.
Vicki-Ann Ellis
Justice of Appeal

By the Court

Chief Registrar