IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G 96 OF 2015

BETWEEN:

HIGHGATE SECURITIES LTD.

Plaintiff

AND

B & C CAPITAL LTD.

Defendant

Appearances:	Mr. David Harby of Loeb Smith for the Plaintiff Mr. Stuart Diamond of Diamond Law Attorneys for the Defendant
Heard:	7 September 2015
Draft Judgment circulated:	14 September 2015
Perfected Judgment circulated:	30 September 2015

EX TEMPORE JUDGMENT

The Application

1. I have before me the Plaintiff's Summons dated 20 July 2015 applying for an order, pursuant to GCR O.19, r.7, for judgment to be entered in its favour against the Defendant for default of Defence. It seeks the making of the orders set out in its Statement of Claim dated 17 June 2015. The orders sought are:

   (i) Pursuant to O.43, r.2 forthwith provision by the Plaintiff of:

   (a) a statement of account showing the current total Portfolio Asset Summary in the Plaintiff's account with the Defendant with account number xxxx42 ("the Account");

(b) a statement of account showing the current Portfolio Valuation Summary in the Account;

(c) a statement of account showing the current Transaction Summary in the Account;

(d) an account of all fees charged to the Account including an account of the calculation of those fees; and

(ii) An order that the Defendant shall forthwith transfer the assets held in the Account to the Plaintiff.

2. The Defendant opposes this application.

3. I also have before me the Defendant's Summons dated 23 July 2015. The first paragraph in the Summons sought an order pursuant to GCR O.72, r.3 that the cause be transferred to the Financial Services Division. This application was opposed by the Plaintiff. I considered that application as a preliminary point at the outset of the hearing and in a brief Ex Tempore Ruling gave my reasons for refusing the application, indicating that I would go on to deal with the Plaintiff's afore-mentioned Summons. I made it clear in the ruling that this was based only on the current circumstances and on the limited submissions made to me and it should not fetter a Judge taking a different view on the nature of the case when it later came before him.

4. The Defendant's Summons also contained a number of paragraphs relating to an application brought under the Arbitration Law (2012 Revision) ("the Law"). All of the parties agreed that if the arbitration proceedings were to continue then they would need to be transferred to the FSD pursuant to GCR O.73, r.5 and O.72, r.(1)(2)(n) and therefore I was unable to make the orders in the Summons. For completeness sake, the parties were made aware that I am not an FSD Judge and therefore am restricted as to what matters I can hear and orders I can make.

The Background

5. The Plaintiff is licensed by the International Financial Services Commission in Belize as a Securities Dealer/Trader. The Defendant is a company incorporated in the Cayman Islands which carries out business as an Asset Management, brokerage and investment banking firm a to corporations and individuals. On 1 August 2013 the Plaintiff entered into the Investment Account Application and Investment Account Agreement ("the Agreement"). It is claimed that, under the Agreement, the Defendant agreed to act as an intermediary and/or hold assets on behalf of the Plaintiff in account number xxxx42. The Defendant claims that bonds came from the AMC account owned by Mr Speight at DMS Bank and were introduced by the Plaintiff to the Defendant. The Plaintiff contends that the Plaintiff did not introduce the Bonds to the account, but that they were transferred from a third party account to Highgate's account at the Defendant. Prior to July 2014 Mr. Speight had been the Plaintiff's contact with the Defendant. This came

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to an end after he pled guilty to charges by the US Securities and Exchange Commission for fraudulent offering of securities.

6. In his affidavit evidence Mr. Mendes stated that the account fell into debit, for example, stating that by 20 November 2014 that it was in the amount of US$207,137.44. As set out at paragraph 29 of Mr. Koch's affidavit filed on 20 August 2015, it is not accepted that the account was in debit for that amount. It is clear that there is a significant factual and arguable dispute in relation to that issue between the parties. At paragraph 13 of his affidavit Mr. Mendes referred to a letter of commitment to the Defendant dated 25 March 2014 and signed by Mr. Koch, the CEO of the Plaintiff, undertaking to pay custody fees to the Defendant incurred upon Mr. Speight's instructions. Mr. Mendes stated that from November 2014 there had been a series of emails between him and Mr. Koch concerning the Account, but prior to the exchange Mr. Koch had not questioned the applied custody fees, charges or interest.[1]

7. Mr. Mendes stated that by email dated 8 December 2014 he requested funding to address the debit situation on the Account. In his email in reply dated 9 December 2014 Mr. Koch disputed the custody fees. Thereafter emails were exchanged between the parties concerning the dispute. Mr. Koch claimed that the statements were erroneous and required amendment. His primary concern related to the fees charged to the Account. Mr. Koch questioned:

[1] In written comments provided to the Court after the draft transcript of the ruling was provided to the parties the Plaintiff commented that it avers prior to November 2014 Mr. Koch did question the applied custody fees, charges and interest.

(i) fees incurred from August 2012 prior to the Account becoming operational on 1 January 2014;

(ii) the level of the custody fees changed each quarter when the number of assets had not changed;

(iii) the charging of debit interest when he submitted that the Account had a positive balance;

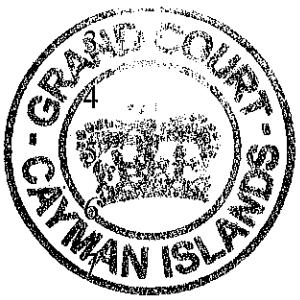
(iv) the charging of fees for assets not held by the Plaintiff; and

(v) the fees accrued on third-party assets held in the Account due to the alleged failure of the Defendant to act in accordance with the Plaintiff's instructions in respect of the Account.

8. In his affidavit Mr. Mendes claims that, as the Plaintiff has failed, neglected or refused to deposit assets into the Account to bring it into good standing, pursuant to the Agreement, the Plaintiff sold some of the securities and assets to cover the debit.

9. This resulted in an email being sent from the Plaintiff's attorney to the Defendants on 11 March 2015 in which a number of allegations were made. On 20 March 2015 the Defendant's attorneys replied contesting the allegations and sought replies to attached and detailed further and better particulars about them. These were not replied to. During the hearing, Mr. Diamond made it clear that the lack of replies to this request was not being submitted as being one of the reasons why the Defence had not been filed.

10. On 30 March 2015 the Defendant's attorneys sent an email to the Plaintiff's attorney stating the:



> *"Matter is now a dispute in accordance with the said Account Agreement. As such, we invoke the "Grievance Procedure" stipulated in clause 23 thereof and request the dispute be referred to a single Arbitrator to be agreed or, in default, appointed under the said Clause. We now invite your client to agree on an Arbitrator so the matter may be referred without further delay."*

11. The Plaintiff did not at the time specifically address the contents of this email. They now contend that this is not a matter that is governed by the arbitration clause in the Agreement as it relates to the Plaintiff's proprietary rights. At paragraph 28 of his affidavit Mr. Mendes makes it clear that the dispute is not only in relation to the Plaintiff's proprietary claim, but it also relates to the Plaintiff's alleged indebtedness to the Defendant. Although Mr. Mendes has chosen not to attach a draft Defence and Counterclaim to this affidavit, he makes it clear that this would be an issue for determination in the proceedings commenced by the Plaintiff. The Plaintiff submits that the Defendant failed to pursue the arbitration in a timely fashion, and when they chose to do so they were out of time.

12. On 19 May 2015 the Plaintiff's attorneys wrote stating that they believed the Defendant had committed a number of criminal offences and issued a *"final demand"* for the release of all assets, including third-party assets. They made it

clear in the letter that if their demands were not met, then civil legal proceedings would be promptly commenced.

13. Proceedings were initiated by the Plaintiff by means of a Writ of Summons and a Statement of Claim, both filed on 17 June 2015. These were served on the Defendant on 19 June 2015. The Defendant filed its Acknowledgment on 3 July 2015 indicating an intention to defend. The due date for filing the Defence was 17 July 2015.

14. On 8 July 2015 the Defendant's attorneys wrote to the Plaintiff and provided them with a copy of the Acknowledgment and they also provided a statement for account xxxx42. In the email they stated:

> *"Without prejudice to our client's right to contest the said proceedings (which right we reserve) we request Further & Better Particulars of your client's claim as pleaded."*

This request specifically related to the Statement of Claim and the Reply was requested within 14 days. It is contended by the Defendant that this information was required to enable it to file a Defence in an informed manner, and the failure by the Plaintiff to provide the replies is one of the reasons why the Defence was not drafted. The Plaintiff contends that this request was a delaying tactic and that it was inconsistent with the Defendant's contention that this matter must go to arbitration. It is also submitted that if the Defendant genuinely felt it was required to enable a Defence to be properly drafted then an application should have been

made pursuant to GCR O.18, r.12(3) and at the same time seek an extension of time for filing the Defence.

15. On Thursday, 16 July 2015 at 4:12 PM, the Defendant's attorney emailed the Plaintiff with a draft copy of the arbitration Summons which is now before the Court. It was accompanied with a Listing Form and a request that the same be returned by 9:00 AM the following morning. The Plaintiff's attorneys replied by email on the same evening arguing that the arbitration provision of a clause 23 of the Agreement did not "*bite.*" The Plaintiff also commented that the Request for Further and Better Particulars was vexatious and its purpose was to delay the matter and that a formal response to it would be sent shortly. The attorneys made clear that the Request for Further and Better Particulars and the intended Summons did not affect the deadline date for the Defendant to file a Defence. The Defendant's attorneys replied on 17 July 2015 indicating that they had refrained from filing the arbitration Summons, but would do so if the Listing Form was not returned pursuant to the Practice Note. They also made it clear that the particulars were required "*in order that we may fully know and, if necessary at a later stage, plead a Defence and Counterclaim to the same*" and stated that any delay in the matter being resolved was due to the lack of agreement from March 2015 by the Plaintiff to appoint an arbitrator.

16. The Friday, 17 July 2015 due date for filing of the Defence having passed, the Plaintiff filed the default Summons currently before me on Tuesday, 21 July

2015. Only two days later, 23 July 2015, the Defendant filed its arbitration Summons.

17. On 20 August 2014 a two page summary of account was provided by the Defendant. On 29 August 2015 the Defendant returned share certificates to the Plaintiff in Eurocan Holdings and Aventura Equities. On 31 August 2015 further documents were sought by the Plaintiff from the Defendant.

18. I have regard to this background as well as the details contained in the affidavits filed by Frank Speight, Peter Koch and Fernando Mendes. Although the Plaintiff expressed concern about the admission of the Second Affidavit of Mr. Mendes, it was not forcefully opposed. The Court indicated that it would consider the contents of that affidavit and if the Plaintiff felt this would cause prejudice without an adjournment then an application could be made. No such application was made by the Plaintiff who was content to proceed.

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19. The Court has received the skeleton arguments prepared by each attorney. I have carefully considered the contents of both skeleton arguments and I thank Counsel for providing this helpful material.

The Law

20. GCR O.19, r.7(1) provides that in the matter before me if the Defendant fails:

> *"to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of*

the defence, apply to the Court for judgment, and on the hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim."

21. When considering this rule due regard must be had to the note 19/7/14 in Supreme Court Practice 1999 which states that:

"Although para. (1) of the rule is expressed in mandatory terms, the rule is not mandatory but discretionary, and the court retains its discretionary power whether to give judgement or to extend the parties time to plead when it is just to do so (Wallersteiner v Moir [1974] 1 W.L.R. 991; [1974] 3 All E.R. 217, CA)."

22. The nature of the discretion and the approach to be taken by the Court when exercising it is helpfully set out by Lord Denning M.R. in ***Wallersteiner*** when he states at page 232f in the All England Law Reports stated that:

"*Although the word 'shall' is used*" in the rule "*it is clear from the authorities that it is not imperative but discretionary. The court will not enter judgment which it would afterwards set aside on proper grounds being shown: see Graves v Terry (1882) 9 QBD 170; Gibbings v Strong (1884) 26 Ch D 66. A judge in chambers has a discretion which he will exercise on the same lines as he will set aside a judgment in default. He will require the party to show that he has a good defence on the merits. This is a time–hallowed phrase going back for a hundred years: see Watt v Barnett (1878) 3 QBD 363; Farden v Richter (1889) 23 QBD 124 at 130. It has been explained by Lord Atkin as meaning that the applicant would produce to the court evidence that he has a prima facie defence (see Evans v Bartlam). The applicant must produce evidence by*

affidavit showing that he has such a defence. The judge will also himself require the parties default to pay the costs occasioned by his default. But ultimately it is for the discretion of the judge..."

23. In the oft quoted case of ***Evans v Bartlam*** [1937] AC 473 Lord Atkins sets out how this discretion should be exercised. At Page 480, his Lordship states:

"I agree that both rules...give a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the Applicant must produce to the Court evidence that he has a prima facie defence."

24. Lord Atkins also describes the reasoning behind this discretion at page 480 where he states:

"The principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that only has been obtained by a failure to follow any rules of procedure."

25. Paragraph 13/9/18 of the Supreme Court Practice 1999 sets out the principles which the Courts have oft applied in setting aside Default Judgments. They are as follows:

"DISCRETIONARY POWERS OF THE COURT - The discretionary power to set aside a default judgment which has been

entered regularly is unconditional, and the Court should not lay down rigid rules which deprive it of jurisdiction. The purpose of the discretionary power is to avoid the injustice which may be caused if the judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the Court should pay heed, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the Defendant has no defence, and because, if the Defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also, as a matter of common sense the court will take into account the explanation of the Defendant as to how the default occurred. The foregoing general indications of the way in which the court exercises discretions are derived from the judgment of the Court of Appeal in the Saudi Eagle [1986] 2 Lloyd's Rep. 221 at page 223. From that case the following propositions may be derived:

(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction." Thus the Court must form a provisional view of the probable outcome of the action."

(b) If proceedings are deliberately ignored this conduct, although not amounting to an estoppel at law, must be considered "in justice" before exercising the Court's discretion to set aside."

It is contended that, in the matter before me, the Defendant, although he may not have deliberately ignored the proceedings, has acted in a dilatory manner towards them. Despite this, the Plaintiff rightly primarily concentrated on the real issue,

which concerns the merits of the Defence on the pleadings before me. Although it may have been helpful if the Defendant had exhibited a draft defence and counterclaim to Mr. Mendes' affidavit, a failure to do so does not preclude him arguing that there is a Defence. I accept that the Court must form a provisional view of the probable outcome if the application is refused and the Defence developed."[2]

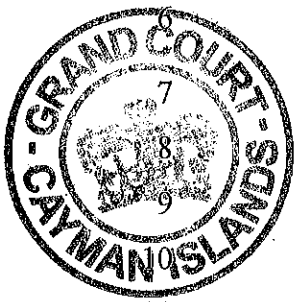
26. I have regard to the above-mentioned sentiments of Lord Atkins and also the test to be applied in deciding to set aside judgment obtained in default of defence which was considered by the Court of Appeal in the well-known case of ***Day v Royal Automobile Club Motoring Services Ltd*** [1999] WLR 2150. In ***Day v RAC***, Ward J. considered the note in Supreme Court Practice 1999, Vol.1, p.160, para. 13/9/18 which he stated caused him concern. I endorse his view that each case should be looked at using one's common sense, having regard to the specific facts that arise. I also accept his view that the Court should be "*very wary of trying issues of fact on evidence where the facts are apparently credible and are set against the facts being advanced by the other side.*" Having regard to local circumstances, I share Ward J's hesitancy in elevating the test, as is apparently set out in the White Book, to be solely a "*real likelihood that a defendant will succeed,*" but rather it should be whether there is an arguable case which carries a degree of conviction. Care should be taken not to usurp the function of the trial

[2] Sir Roger Ormrod in Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc. [1986] 2 Lloyds' Rep. 221.

judge at such an interlocutory hearing by judging facts contained only in affidavits and reaching a provisional view of the probable outcome.

27. Ward J. following his review of ***Evans v Bartlam***, ***Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc (the Saudi Eagle)*** and ***Grimshaw v Dunbar*** [1953] 1 Q.B. 409 stated:

> *"At the heart of the discretionary exercise, therefore, is the need to do justice. Justice has to be done both to the Plaintiff and to the Defendant and, especially in this day and age, to the whole process of the administration of justice in the Courts."*



28. The Plaintiff contends that no adequate explanation has been proffered by the Defendant for failing to file a Defence. Although the Defendant may have been, to a degree, dilatory in his approach to this matter, it is not a case in which he has totally ignored the proceedings. He did file his Acknowledgement on time. His explanation for failing to file the Defence on time is partly that he was seeking further and better particulars which he said he required to enable him to do so partly because of the view that the arbitration Clause 23 in the Agreement had been triggered. Although the non-receipt of Replies to the Request for Further and Better Particulars not an overly attractive reason for non-compliance with the Rules, especially as it could have been addressed by making an application for information under O.18, r.12 coupled with an application to extend time for filing the Defence, it seems that his approach may have arisen from the legal advice that the Defendant had been given.

29. It is contended by the Plaintiff that, if the Defendant generally sought to rely upon the arbitration provision, such an application should have been filed before the deadline for the filing of the Defence had passed. Secondly, it is submitted that in any event under the Clause 23 of the Agreement there is a 60 day time limit within which to refer the matter which ran from the Defendant's 30 March 2015 email. Thirdly, it is submitted that as the matter involves the Plaintiff's proprietary rights the arbitration clause is not activated as the wording in Clause 23 provides that disputes should be referred to a single arbitrator but:

> *"will not be construed to oust the jurisdiction of the Courts in the Cayman Islands in the relation of the proprietary right of the Customers in respect of Accounts."*

30. It is evident that there was a delay from the 30 March 2015 email in which the Defendant was seeking to invoke the arbitration clause and the issue of the arbitration application on 23 July 2015. However, Clause 23 requires both parties to agree the single arbitrator. The Plaintiff did not reply in detail to the March letter in which its agreement was sought, although it later indicated that it felt that any such referral was not appropriate and was only motivated by the Defendant's desire to cause further delay. The Clause requires both parties to reach that agreement within 60 days of the request. The Clause does not mean that the matter cannot be referred to arbitration after 60 days, because after 60 days if agreement has not been reached the reference shall be made to an arbitrator appointed by the senior partner of a major accounting firm in the Cayman Islands. The Defendant is not precluded from making that application after the 60 days

and I do not accept the Plaintiff's submission that the Defendant was contractually bound to do so within 60 days. Although it is arguable that the Plaintiff's concern in dispute is based on its proprietary rights, it is also arguable and clear from Mr. Mendes' affidavit that the Defendant's concern in the dispute which was part of the basis of it seeking to invoke arbitration in March 2015 is debits on the Account.

31. I have carefully considered Mr. Harby's submission that the effect of GCR O.12, r.8 and the filing of an Acknowledgment by the Defendant means that it has submitted to the proceedings and is unable to argue for a stay on the ground that the question should be substituted to arbitration as its arbitration Summons was not filed within the time limit for the service of the Defence. GCR O.12, r 8(6) which provides that where an Acknowledgment has been filed it shall be treated as a submission by a defendant to the jurisdiction of the Court in the proceedings unless the defendant has made an application in accordance with GCR O.12, r.8(1). Paragraph (1) provides that a defendant who wishes to dispute the jurisdiction of the Court on any ground should give notice of intention to defend the proceedings and then within the time limit for the service of a defence apply to the Court for an order setting aside the writ, or a declaration that the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action.

32. Section 9(1) of the Law provides that:

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> *"Where a party to an arbitration agreement institutes proceedings in the court against another party to that agreement in respect of any matter which is the subject of the agreement, either party to the agreement may, at any time after acknowledgment of service and before delivering any pleading or taking any step in the proceedings to answer the substantive claim, apply to court to stay the proceedings so far as the proceedings relate to that matter."*

This provision would enable the application to stay to be made at any time after the filing of Acknowledgement, as long as a Defence or any other step had not been taken to answer the substantive claim. The Defendant says that is the position it finds itself in having not filed a Defence.

33. Section 9(2) of the Law provides that:

> *"The court to which an application has been made in accordance with subsection (1) shall grant a stay unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."*

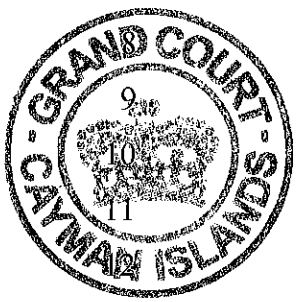
34. Mr. Harby contends that sections 9(1) and (2) do not apply as section 3(2) states that:

> *"The provisions of this Law apply to every arbitration under any other enactment whether enacted before after the commencement of this Law, except in so far as – (a) this law is inconsistent with that other enactment or with any other rules or procedure is authorised thereunder; or (b) that other enactment otherwise provides."*

Mr. Harby contends that having regard to GCR O.12, r.8(1) the period after the Acknowledgment referred to in section 9(1) cannot go beyond the due date for the service of a defence, otherwise this would be inconsistent with the GCR.

35. GCR O.73, r.6 sets out the procedure for service of the application for a stay of legal proceedings made in the FSD. Paragraph (2) provides:

> *"Where a question arises as to whether an arbitration agreement has been concluded or as to whether the dispute which is the subject – matter of the proceedings falls within the terms of such an agreement, the court may determine that question or give directions for its determination, in which case it may order the proceedings to be stayed pending the determination of that question."*



This rule does not restrict the timing for making any application for a stay.

36. Having regard to all of the above provisions, I am not satisfied that the Defendant will be necessarily precluded from applying to stay the writ proceedings in the FSD. The effect of GCR O.73, r.5 and GCR O.72 r.1(2)(n) is that application will have to be made in the FSD. Having regard to the fact that an arbitration application may only be brought in the FSD, it would not be appropriate for me to fetter a Judge of that Division's discretion concerning the appropriateness of arbitration proceedings in this case and of granting a stay. All I can say, on the information before me, is that it is arguable that that is the proper course to deal with some of the issues which have been raised in the affidavits before me.

Conclusion

37. I have carefully considered the full submissions, but as Lord Wright said in ***Evans v Bartlam:***

> *"In matters of discretion no one case can be authority for the other" and "that discretion...must be exercised according to commonsense and according to justice" (Gardner v Jay (1885) Ch. D 50, at 58).*

38. I bear in mind all of the above principles and, in particular, that at the heart of this discretionary exercise, I must do justice to both the Plaintiff and the Defendant. I have considered herein the number of disputed facts which emerge from the affidavits, in particular concerning the charging of fees and alleged debit on the accounts require a reasoned assessment to do justice to the case.

39. After due consideration, I find that the Defendant has shown there to be a strong arguable defence on the merits which carries some degree of conviction. There are issues that are more properly ventilated and conclusively ruled upon at trial rather than at this interlocutory hearing. I am of the opinion that a further opportunity should be given to him to have it heard on the merits.

40. However, I do not intend at this time to give any directions concerning an extension of the time for the Defendant to file his Defence. It would be inappropriate for me to do so as I transfer the Defendant's arbitration Summons to the FSD. If after hearing from the parties a Judge of the FSD concludes that the

arbitration clause has not been triggered and that the stay should not be granted, then the parties may return to the Civil Division for further directions. Accordingly, I do not order judgment to be entered in favour of the Plaintiff and against the Defendant for default of defence.

41. Although there has not been an inordinate delay in this matter, I am conscious that there are issues surrounding the level of custody fees and debit interest which have been charged on the Account. The Defendant has provided some details on the instalment form of the level of those charges. In order to clarify, and hopefully narrow some of the issues, having regard to my wide discretion under the Overriding Objective to case manage and the parties agreeing that I have the jurisdiction to make such orders, I feel it appropriate for the Defendant to give further written clarification about those charges. I therefore order that it gives an account of all fees charged to the account, including an account of the calculation of those fees. This should be done within 21 days of receipt of this perfected Judgment.

Costs

42. If costs cannot be agreed, I afford the opportunity to both parties to file written submissions on costs within 21 days of receipt of this perfected judgment. I will thereafter provide the parties with a brief written ruling on costs.

THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT

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