

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

2
3 **CAUSE NO. G 96 OF 2015**
4

5
6 **BETWEEN:**

7 **HIGHGATE SECURITIES LTD.**

8 **Plaintiff**

9 **AND**

10
11 **B & C CAPITAL LTD.**

12 **Defendant**
13
14

15 **Appearances:**

Mr. David Harby of Loeb Smith for the Plaintiff

16 **Mr. Stuart Diamond of Diamond Law Attorneys for the**
17 **Defendant**

18
19 **Heard:**

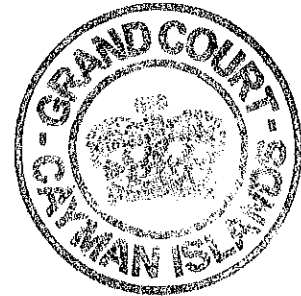
7 September 2015

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21 **Submissions on costs:**

21 October 2015

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23 **Draft Judgment circulated: 1 March 2016**

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25 **Final Judgment delivered: 3 March 2016**
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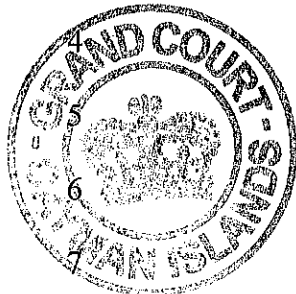


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29 **JUDGMENT - COSTS**
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31

32 **THE APPLICATION**

33 1. On 30 October 2015 I delivered my Ex Tempore Judgment at the end of the
34 hearing of the Plaintiff's opposed Summons dated 20 July 2015 in which it was
35 applying for an order, pursuant to GCR O.19, r.7, for judgment to be entered in its
36 favour against the Defendant for default of Defence. The Plaintiff also sought the
37 following orders set out in its Statement of Claim dated 17 June 2015:

38 (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 transfer the assets held in the Account to the Plaintiff.

2. At the hearing I also considered the Defendant's Summons dated 23 July 2015. An opposed order pursuant to GCR O.72, r.3 transferring the cause¹ to the Financial Services Division was sought. 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 it. The Defendant's Summons also contained a request for various orders to be made 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 further orders sought in the Summons.

¹ My emphasis by underlining.

1 **THE BACKGROUND**

2 3. The background of the case is set out in paragraphs 5 to 17 of the Transcript of
3 the Ex Tempore Judgment. I do not intend to repeat the details herein.

4

5 **THE ORDERS MADE ON 7 SEPTEMBER 2015**

6 4. On the Defendant's Summons, no order was made save that the Summons was
7 transferred to the Financial Services Division.

8

9 5. In relation to the Plaintiff's Summons, judgment in default of Defence was not
10 entered. However, having regard to the Overriding Objective, I ordered the
11 Defendant to give to the Plaintiff an account of all fees charged to the Plaintiff's
12 account with the Defendant (account xxxx42) including an account of the
13 calculation of all such fees. I did not give any directions concerning the extension
14 of the time for the Defendant to file its Defence, as I felt it inappropriate to do so
15 due to the transfer of the Defendant's Summons for arbitration orders to the
16 Financial Services Division. I gave leave to the parties to apply to a Judge sitting
17 in the Civil Division for further directions if a Judge of the Financial Services
18 Division concluded that the arbitration clause had not been triggered and that a
19 stay of the proceedings in the Civil Division should not be granted. Having regard
20 to the overlap arising out of the issues raised in each party's Summons, it is clear
21 that I felt it appropriate to await the outcome of the Defendant's application to be
22 brought in the Financial Services Division before actively case managing the
23 proceedings initiated by the Plaintiff.



1 6. I gave the reasons for the orders made in the Ex Tempore Ruling. I concluded² by
2 stating:

3 *"If costs cannot be agreed, I afford the opportunity to both parties*
4 *to file written submission on costs.....I will thereafter provide the*
5 *parties with a brief written ruling on costs."*
6

7 This is the promised written ruling. I apologise to the parties for the delay in
8 providing the same.
9

10 **NATURE OF COSTS HEARING**

11 7. I considered the written submissions from both Counsel on the issue of costs filed on 21
12 October 2015.
13

14 **THE LAW IN RELATION TO THE AWARDING OF COSTS**

15 8. GCR O.62, rr.4 (2) and (5) provide:

16 *"(2) The overriding objective of this Order is that a successful*
17 *party to any proceeding should recover from the opposing party*
18 *the reasonable costs incurred by him in conducting that*
19 *proceeding in an economical, expeditious and proper manner*
20 *unless otherwise ordered by the Court.*

21 (3) ...

22 (4)

23 (5) *If the Court in the exercise of its discretion sees fit to make any order*
24 *as to the costs of any proceedings, the Court shall order the costs to follow*
25 *the event, except when it appears to the Court that in the circumstances of*



² As recorded at paragraph 42 of the Transcript of the Ex Tempore Judgment.

1 the case some other order should be made as to the whole or any part of
2 the costs."

3
4 9. The award of costs is in the discretion of a trial judge, but the discretion should be
5 exercised along well-settled lines. The basic principle set out in GCR O.62, r.4 is
6 that costs should follow the event, except where it appears in all the circumstances
7 of the case that some other order should be made as to the whole or any part of the
8 costs. Therefore, I have a wide discretion to do justice between the parties,
 although this discretion must be exercised judicially, having regard to the
 underlying principle that the "real winner", as distinct from a nominal winner, is
 generally entitled to his costs. Further, I should not embark on a minute
 examination of all the various issues and the time taken to determine every issue,
13 but should consider the event or outcome of the litigation and, in the light of that
14 consideration, any timely offers of settlement that were made, and should use a
15 broad brush in attempting to arrive at a just result.

16
17 10. The general rule governing the award of costs to a successful Defendant was laid
18 down by Atkin L.J. in *Ritter v Godfrey* [1920] 2 KB 47 at 60:

19 *"In the case of a wholly successful defendant, in my opinion the*
20 *judge must give the defendant his costs unless there is evidence*
21 *that the defendant (1) brought about the litigation, or (2) has done*
22 *something connected with the institution or the conduct of the suit*
23 *calculated to occasion unnecessary litigation and expense, or (3)*
24 *has done some wrongful act in the course of the transaction of*
25 *which the plaintiff complains."*
26

1 **PLAINTIFF'S SUBMISSIONS ON COSTS**

2 11. The Plaintiff seeks its costs, contending that it has been successful on its own
3 Summons and that the Defendant was unsuccessful on its Summons. The Plaintiff
4 contends that although default judgment was not entered, the Plaintiff should be
5 considered as the successful party as the Court made an order in relation to the
6 account of fees charged to the Plaintiff's account, an order which was sought at
7 paragraph 2 (iv) of its Summons. It is submitted that the judgment in default
8 application was caused by the Defendant's default in filing a Defence within the
9 time period allowed and, although the Court ordered that the Defendant should be
10 given a further opportunity to have its case heard on the merits, it should not be
11 viewed as being "*a victory for the Defendant and a loss for the Plaintiff.*" The
12 Plaintiff contends that the party in default would be expected to pay the costs of
13 the application and "*it would be wrong for the Plaintiff to have to meet the cost of*
14 *its Summons which was caused by the Defendant's default.*"

15

16 12. It is submitted that the Defendant was unsuccessful in its Summons, which the
17 Plaintiff describes as being premature. It is submitted that the application for a
18 transfer of the Plaintiff's Cause to the Financial Services Division was considered
19 as a primary issue at the hearing and was refused. It is submitted that what was
20 transferred under the Court's order was not the Plaintiff's Cause but only the
21 Defendant's Summons. It is submitted that it is the Defendant's Summons rather
22 than the Plaintiff's Cause that may take the matter outside of the jurisdiction of
23 the Civil Division and that the Defendant has, in any event, failed to file that
24 Summons in the correct Division of the Grand Court.



1 13. It is contended that the Defendant's Summons was premature. The Plaintiff
2 highlights that the Defendant did not file its Arbitration Summons until 23 July
3 2015, which was two days after the Plaintiff had filed its Summons and six days
4 after the deadline for the filing of the Defence. It is submitted that prior to the
5 expiry date for the filing of its Defence the Defendant could have (i) applied for
6 an extension for its filing; (ii) applied for a stay and an order to refer the matter to
7 arbitration; (iii) set an earlier deadline for compliance with a request for further
and better particulars (prior to the deadline for filing of its Defence) and; (iv)
9 applied for an order that the Plaintiff provide further and better particulars prior to
10 the deadline for filing a Defence. It is submitted that the Defendant should not
have filed its Summons before the Court had considered the Plaintiff's Summons
12 for judgment in default.

13

14 **DEFENDANT'S SUBMISSIONS ON COSTS**

15 14. In relation to its own summons, the Defendant contends that costs should be
16 reserved as the Court ordered that this Summons should be transferred to the
17 Financial Services Division for determination with no substantive orders being
18 made. It is submitted that it would be premature order to make any order as to the
19 costs, and that determination of the cost issue be better left to a Judge of the
20 Financial Services Division who will hear the fully argued Summons.

21

22 15. In the alternative, it is argued that the Defendant should be awarded part of its
23 costs as it was partly successful by having the Summons transferred to the
24 Financial Services Division.

1 16. The Defendant seeks costs contending that the Plaintiff was unsuccessful on its
2 Summons. It is argued that the primary order sought by the Plaintiff was an order
3 for judgment in default of Defence and the Plaintiff failed in respect of its
4 Summons. It is contended that the Plaintiff also failed to obtain an order for the
5 Defendant to provide the information sought in paragraph 2 of that Summons.
6 Further, the Defendant also argues that the Plaintiff failed in seeking an order for
7 it to transfer assets held in the account to the Plaintiff.

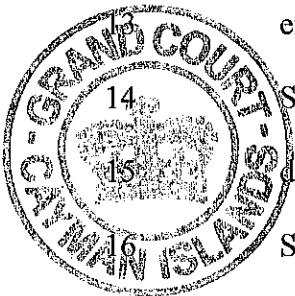
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9 17. In the alternative it is, as with its own Summons, argued that it may be premature
10 to make an order for whole or part of the Plaintiff's costs before the Defendant's
11 Summons has been adjudicated upon by a Judge of the Financial Services
12 Division. The Defendant contends that, if its submission is right that the
13 arbitration had already begun once a dispute was declared and it invoked the
14 grievance procedure and the arbitration clause in the agreement was relevant and
15 properly triggered, the Plaintiff wrongly ignored, refused or neglected the
16 reference to the arbitration and its attempt to avoid the same by issuing its Writ
17 and Statement of Claim was "*wholly wrong, misconceived ab initio.*"

18
19 **CONCLUSION**

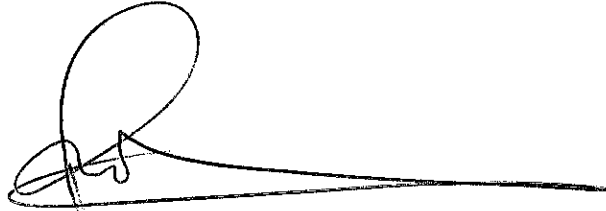
20 18. Having carefully considered the submissions, I share the Defendant's view that it
21 would not be appropriate at this stage for this Court to make part or whole orders
22 in relation to the costs of the Defendant's Summons. I am also of the same view
23 in relation to the Plaintiff's Summons. If the Arbitration arguments are upheld, it

1 may be that a better informed determination on the issue of costs in relation to the
2 Defendant's Summons can be made by a Judge of the Financial Services Division
3 or, if necessary, by a Judge of the Civil Division. The outcome of the proceedings
4 in the Financial Services Division may have a bearing on what order for costs, if
5 any, should be made, in relation to the Plaintiff's Summons. For example, it may
6 emerge that the Defendant was justified for non-filing of a Defence if it is held
7 that the matter should be dealt with in the Financial Services Division and not the
8 Civil Division.

9
10 19. In my judgment I noted that the Defendant may have been "*to a degree, dilatory*
11 *in his approach to this matter.*" I also noted that it was not a case in which the
12 proceedings had been totally ignored. Neither party has been fully successful in
13 either Summons. The Plaintiff's Cause has not been transferred to the Financial
14 Services Division as sought by the Defendant; it is on hold and its future will
15 depend on the determination of the Defendant's Summons in the Financial
16 Services Division. Although the Plaintiff was not successful in obtaining
17 judgment in default, I have permitted the Defendant the opportunity to file a
18 Defence but did not give directions about that pending the determination of the
19 applications in the Financial Services Division. If the civil proceedings will
20 restart, I may consider whether any prejudice caused by the delay can be remedied
21 by an award of costs and more fully comment on the merits of each party's
22 application for costs.
23



1 20. Accordingly, having regard to GCR O.62 r.4 and the principles set out herein, I
2 order that the costs of the Plaintiff's Summons and of the Defendant's Summons
3 be reserved.

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8 **THE HON. MR. JUSTICE RICHARD WILLIAMS**
9 **JUDGE OF THE GRAND COURT**

