Neutral Citation Number [2023] EWHC 9 (SCCO)

Case No: SC-2019-BTP-000531

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 23/12/2022

Before :

SENIOR COSTS JUDGE GORDON-SAKER

- -

Between :

Deutsche Bank AG	**Claimant**
- and -	
Sebastian Holdings Inc.	**Defendant**
-and-	
Alexander Vik	**Defendant for costs purposes**

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Miss Pippa Manby (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Mr Tom Morris (instructed by **Brecher LLP**) for **Mr Vik**

Hearing date: 17 November 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR COSTS JUDGE GORDON-SAKER

Senior Costs Judge Gordon-Saker :

1. This judgment concerns the costs of the detailed assessment proceedings. It is the sixth reserved judgment in these proceedings.

The underlying proceedings

2. The Defendant is a company incorporated in the Turks and Caicos Islands. The claim against it was for damages relating to the operation of accounts maintained by the Defendant with the Claimant for trading in foreign exchange, equities and other financial products. Following a 44 day trial in the Commercial Court, on 8th November 2013 Cooke J. gave judgment for the Claimant in the sum of just over US$243m and ordered the Defendant to pay 85 per cent of the Claimant's costs of the action on the indemnity basis. The Defendant's counterclaim for damages for breach of contract in excess of US$8 billion was dismissed. The Defendant was also ordered to pay the Claimant £32m plus non-recoverable value added tax of just over £2.5m on account of costs.

3. On 3rd December 2013 Cooke J. gave permission for Mr Alexander Vik to be joined as a party to the proceedings for the purposes only of costs and on 13th September 2016 an order was made that Mr Vik was to pay the Claimant's costs awarded against the Defendant. Mr Vik was the sole director of and shareholder in the Defendant and he was found to have controlled the proceedings.

4. Appeals by the Defendant against the order made following trial and by Mr Vik against the non-party costs order were unsuccessful.

5. This was a huge case and was hard fought. The Claimant's disclosure involved the manual review of over 1.5 million documents. The parties served 54 statements of witnesses of fact and 40 experts' reports. The experts' reports ran to over 6,500 pages. Written opening submissions ran to over 1,700 pages. Written closing submissions ran to over 2,700 pages. The judgment is 428 pages. Both parties instructed teams of counsel. The Claimant is credited on the title page of the judgment with 2 Queen's Counsel and 2 junior counsel and the Defendant with 1 Queen's Counsel, 1 Senior Counsel and 3 junior counsel.

The detailed assessment proceedings

6. The detailed assessment proceedings were also huge and were equally hard fought. They started in 2017, shortly after the Court of Appeal had refused Mr Vik permission to appeal the non-party costs order, when the Claimant applied for directions in relation to the bill that it wished to serve. That application was predicated on the assertion that "to produce a detailed bill which is compliant with the information specified and contained in Practice Direction 47 could take up to two years and cost [the Claimant] approximately GBP2.5 million".[1] The Claimant expressed concern that it would not recover those costs from either Mr Vik or the Defendant.

7. The Claimant sought directions that the detailed assessment should be heard in two tranches. The first would deal with preliminary issues, including the fees of the experts

[1] Application notice 27th July 2017

and counsel, which would be subject to separate points of dispute and replies. Once the preliminary issues had been decided, the Claimant would serve a "hybrid bill" in three parts, divided chronologically, with scope for separate points of dispute and replies in relation to each part.

8. Because a paying party is entitled to know at the outset what is claimed, I declined to make the directions sought. I did however indicate that the proposed form of hybrid bill should be capable of fair assessment. What was proposed was not dissimilar to a paper Part 47 compliant bill. The principal difference was that, apart from attendances at conferences, consultations and hearings, all of the profit costs claimed (including routine communications and attendances) were to be recorded in the documents schedules. That was necessary probably because the Claimant's solicitors had recorded their time in composite entries and those entries formed the basis of the proposed schedules.

9. The outcome of the hearing was a standard set of directions for service of the bill, points of dispute and replies with 15 days listed for preliminary issues and 30 days listed for the remainder of the assessment.

10. The bill was served a little over a year later, on 25th January 2019. It was in the sum of £53,388,736 (being 85 per cent of £62,105,855) and was in the form anticipated. The first 1,577 items formed the chronological part of the bill down to completion of the order following judgment. The next 283 items were disbursements, including the experts' fees. Including counsels' fees, the disbursements were over £30m. There were then 40 documents schedules, one for each month, of which, individually, 7 were over £1m and 15 were between £½m and £1m. The documents schedules ran to over 2,000 pages. Over the course of the detailed assessment hearing, some of these schedules were amended and re-amended.

11. Mr Vik served points of dispute (289 pages) in July 2019. Although the Defendant was served with notice of commencement of detailed assessment, it has played no part in the proceedings. Replies were served in December 2019. The composite document is 483 pages.

12. The first hearing took place over 3 days in February 2020 and was concerned with the first 3 issues raised in the points of dispute, namely: (i) the rate and period of interest that should be allowed on the Claimant's costs; (ii) the scope of the costs order; and (iii) the exchange rate that should be used in relation to sums claimed in a foreign currency.

13. As to the first, the Claimant contended for interest at the Judgment Act rate. Mr Vik contended for either no interest, because the bill was not properly particularised, or interest at a lower, compensatory rate for reduced periods. I concluded that the Claimant was entitled to interest at the Judgment Act rate and that, because Cooke J. had already made an order for interest, it was not open to me to make a different order. However, because of the delay in pursuing the detailed assessment proceedings, I disallowed 12 months' interest in addition to the period that the Claimant had already conceded.

14. As to the second issue, I decided that Mr Vik was not liable to pay costs which fell within certain interlocutory costs orders as they did not fall within the scope of the

non-party costs order. As to the third issue, I accepted Mr Vik's contention that, where the Claimant had paid disbursements in United States dollars, the appropriate exchange rate is that at the time of payment rather than that at the time the bill was drawn. Finally, I refused the Claimant's application for an adjournment of the remainder of the detailed assessment so that it could put in further particulars of the work done by Deloitte. In the event, those further particulars, in the form of summaries of the work done in each month, were served in time for the detailed assessment.

15. The next hearings took place in April and May 2020, remotely, and were concerned with preliminary issue 4 (whether the fees of Deloitte were properly recoverable as costs) and the assessment of counsel's brief fees and refreshers. Following my decision that the fees of Deloitte were properly recoverable as costs (subject to being reasonably incurred and reasonable in amount), Mr Vik served supplementary points of dispute in relation to the fees of Deloitte and Navigant and in relation to the fees of counsel, other than refreshers, for work done after delivery of their briefs. The Claimant served supplementary replies in October 2020.

16. Following hearings in November and December 2020, in March 2021 I handed down a reserved judgment on the reasonableness of the fees of Deloitte (which were about £24m). One of the issues in relation to those fees was the extent to which they related to work done on initial margin. By paragraph 4 of the second order made on 22nd February 2013 Cooke J. ordered that the Claimant was to pay the Defendant's costs in any event of the Claimant's withdrawn allegation in defence of the counterclaim that, had the Claimant been obliged to calculate Value at Risk on the Defendant's FX portfolio, it would have been entitled to or would have calculated a single initial margin amount for each transaction which would apply throughout the lifetime of those transactions. This was raised as preliminary issue 6 in the original points of dispute, but, although raised as a preliminary issue, it could be decided only by reference to the particular items in the bill. The Claimant conceded 0.5 per cent of Deloitte's fees over a 7 month period.[2] I concluded that the work done by Deloitte on initial margin had been limited and made my own broad estimate in arriving at the total numbers of hours that I allowed for Deloitte in the relevant months.

17. The hearing days in March 2021 were concerned with the assessment of the fees of Navigant (about £3.28m). These were also the subject of preliminary issue 5, which had been stood over. The Claimant had conceded 12 per cent of the fees to take into account the work done on initial margin. I concluded that was a little too low and disallowed 15 per cent. In total, I allowed just under £2.3m in respect of Navigant's fees.

18. The remainder of the hearing days in 2021 and 2022 were taken up with the chronological part of the bill and the 40 document schedules. Some of the smaller schedules took less than a day to assess and the larger schedules took about 2 days each to assess. Amended and re-amended schedules for a number of months were served by the Claimant which made concessions in relation to the time spent on initial margin and work done on the amended statements of case.

19. There were recurring criticisms articulated on behalf of Mr Vik in relation to how the Claimant's solicitors had recorded their time. These were broadly that the descriptions

[2] As explained in the letter from the Claimant's solicitors dated 9th June 2020.

were inadequate to identify precisely what work had been done and that most composite entries did not divide the time spent between different tasks. It was difficult to tell how, often very long days and long periods of time had been spent. In most of the 40 *ex tempore* judgments that I gave in respect of the schedules I referred to examples of these entries.

20. To attempt to show what work was being done, Mr Merrell, the Claimant's costs lawyer, took me at length through the tasks that had been done in each month and through the documents that he had been able to find for that month in the Claimant's solicitors' files. This was a painstaking exercise in what I referred to a number of times as "forensic archaeology". The files were stored on a server[3] (in no obvious order, which precluded any structured pre-reading), and it was clear, and I think not in issue, that Mr Merrell was not able to find a large proportion of the documents that had existed at the time that the work was done. There were, for example, very few attendance notes or file notes. Most of the documents that I was taken to were emails, but clearly they were also not complete.

21. The way in which time was recorded and the absence of significant parts of the files led, in part, to the substantial reductions that I made in respect of the documents schedules. It was also clear to me, going through the schedules, that greater reductions needed to be made, than had been conceded, to the Claimant's solicitors' profit costs in respect of the work done on initial margin in the relevant months. The lawyers had been significantly more engaged in this than the experts.

22. At the end of the detailed assessment Mr Vik asked me to reconsider my decisions on the Deloitte fees in relation to the work done on initial margin. I declined to do so, as nothing raised on his behalf had not been available to him at the time that the fees were considered initially and I remained of the view that the work done by Deloitte on initial margin was limited.

23. By my calculation, the detailed assessment has lasted about 97 days, including the preliminary issues hearings.[4] This is, I think, unprecedented. It is over twice as long as was originally anticipated by the 2017 directions order and over twice as long as the trial (although opening and closing submissions at the trial were in writing).

24. Why did it take so long, even for a large bill? For a number of reasons. First, most of the hearing was held remotely as a result of the Covid pandemic and remote hearings take longer. Second, Mr Vik chose to challenge virtually every item in the bill. Third, the forensic archaeology exercise which I have attempted to describe above. Fourth, the parties did not settle once they had a sufficient indication of the court's direction of travel. Many issues in detailed assessment are repetitive, or have similar themes, and the court's reasoning can readily be applied to other items. For example, if the court has allowed an average of x per cent on the first few document schedules, it is quite likely that the parties will agree that percentage for the remainder.

25. Of course the court cannot impose an agreement between the parties. If the paying party wishes to address the court on each item in the bill, and each one of the

[3] "Relativity"

[4] In my judgment of 17th November 2022 [2022] EWHC 2920 (SCCO), I suggested that it had lasted 104 days. However I may have included days which had been listed but not used. Those representing Mr Vik thought that it was fewer than 104 days. Those representing the Claimant had not kept a tally.

document schedules and each one of the 28 Deloitte bills (which, alone, took 12 days), the court has no alternative. In the absence of agreement, those items would not have been assessed.

The rules about the costs of detailed assessment proceedings

26. Rule 47.20 of the Civil Procedure Rules provides that:

> "(1) The receiving party is entitled to the costs of the detailed assessment proceedings except where—
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> (a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or
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> (b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings.
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> …
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> (3) In deciding whether to make some other order, the court must have regard to all the circumstances, including—
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> (a) the conduct of all the parties;
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> (b) the amount, if any, by which the bill of costs has been reduced; and
>
> (c) whether it was reasonable for a party to claim the costs of a particular item or to dispute that item.

Submissions on behalf of Mr Vik

27. On behalf of Mr Vik, Mr Morris submitted that the Claimant should not have all of its costs of the detailed assessment proceedings and that the court should give Mr Vik his costs of the Claimant's 2017 application, the costs of the first three preliminary issues (heard in February 2020) and the costs of preliminary issue 6 (initial margin). Further, in respect of the remainder, Mr Morris submitted that the Claimant should be allowed only 60% of its costs, to be assessed on the standard basis.

28. The parties have been able to agree that the amount allowed on the bill is £36,527,259.11. The bill has been reduced by just over 31 per cent, or about £16.8m, despite the assessment being on the indemnity basis. The Claimant will therefore recover only about £2m more than the payment on account made in 2014 (£1.5m of the excess having been paid following an interim costs certificate ordered in July 2021). Only two offers had been made by the Claimant, of £17.8m in addition to the payment on account, in March 2019 and an offer in November 2017.

The costs of the 2017 application

29. It is not uncommon to hold a directions hearing in a case where the bill is large and the detailed assessment is likely to be lengthy. Occasionally, directions are requested before the bill has been drawn, because the receiving party is unsure about the format

that the court would prefer. However, in my experience, that tends to be in group actions where a large number of individual bills will be prepared in addition to the common costs bills.

30. Apart from the size of the bill and the length of the detailed assessment, this case was, procedurally, straightforward. There was only one receiving party and one set of costs to be assessed. While I would expect there to be a directions hearing after the bill and points of dispute had been served, there was no need for one before. The directions were sought only because the Claimant wished to do something different and, in that respect, it can be said to have lost the application. The bill that was served could have been served without the need for an application. The costs of the application and of the hearing on 11th December 2017 were reserved. The appropriate order in my view is that the Claimant should pay Mr Vik's costs of the application (including the hearing) in any event on the standard basis to be assessed summarily with the costs of the detailed assessment proceedings.

The costs of preliminary issues 1-3

31. It could be said that there are rarely preliminary issues in detailed assessment, in the sense of an issue the outcome of which may bring an end to the assessment. There are merely some issues which come before other issues, and they may be general rather than relating to specific items.

32. It seems to me that preliminary issues 1 to 3, although hived off to an earlier listing, were part of the detailed assessment hearing. They could have been dealt with at any time. While the scope of the costs order would sensibly be taken near the beginning of the hearing, interest is often dealt with at the end and the issue about the exchange rate could conveniently have been decided when the relevant disbursements were being assessed.

33. Mr Vik largely lost on the interest issue (the argument was more about the rate than the period of delay), largely succeeded on the scope of the costs order and was successful on the exchange rate issue. That a receiving party has failed on an issue is unlikely to be a good reason to deprive it of part of the costs of the detailed assessment proceedings, unless a substantial part of the proceedings related to that issue.

34. It seems to me that the two issues on which Mr Vik succeeded would not, by themselves, justify a different order. As the notes in the White Book[5] explain, any winning party in a complex case is likely to fail on one or more issues. These issues were just part of the detailed assessment. The time spent on them would be less than 3 per cent of the total length of the hearing, although, given the involvement of leading counsel, it is likely that the relevant proportion of the total costs will be a little higher.

35. The appropriate course, in my judgment, would be to take the costs of these issues into account, in the event that I make an order that the Claimant is entitled only to a proportion of its costs.

[5] Volume 1, the last paragraph of 44.2.10

The costs of preliminary issue 6

36. Despite the terms of paragraph 4 of the second order made on 22nd February 2013, the Claimant did not exclude the costs of initial margin when drafting the bill. Its reply to preliminary issue 6 was dismissive:

> "Whilst SHI's own wasted costs may have been significant, this does not mean that the costs incurred by DBAG were also significant. DBAG considers that the time associated with drafting the two paragraphs in question was de minimis, and no allowance has been made. "

37. It was not until its solicitors' letter dated 9th June 2020, that the Claimant recognised "that the other costs of the Initial Margin argument also fall within the scope of the PTR item". That letter made concessions of £321,366, principally in relation to the document schedules (£135,373) and the fees of Navigant (£135,568).

38. Some further concessions were made by the Claimant in relation to documents time in a schedule to its solicitors' letter dated 15th March 2021.

39. At various points during the detailed assessment I expressed frustration that these costs had been claimed in the bill, that their inclusion had not been addressed properly by the Claimant when Mr Vik raised the question in his initial points of dispute, and that no concessions were made until the detailed assessment was underway. When concessions were made, the Claimant served amended documents schedules, which will have required careful consideration by those representing Mr Vik.

40. I asked for an explanation, which was provided in a letter from the Claimant's solicitors dated 14th October 2022. The Claimant, through its solicitors, apologised and explained that the inclusion of these costs had been inadvertent. No explanation was offered as to why the bill had not been corrected after the point was raised in the initial points of dispute. Rather the letter concentrated on the events after 9th June 2020.

41. Of course, mistakes will be made. However it is particularly unsatisfactory that a party does not correct its mistake when that is pointed out. As I apparently said during submissions on the October 2012 documents schedule:

> "Here we have fairly obviously the bank claiming costs to which it is not entitled and when that has been pointed out they should really be bending over backwards to get it right at the next available opportunity, rather than having concessions wrung out of them by the painful process we are going through at the moment".[6]

42. When assessing the documents time for the relevant months, August 2012 to February 2013, we did spend considerable time trying to identify work which may have related to initial margin. That process was hampered by the way in which the Claimant's solicitors recorded their time and by their incomplete files. It is fair to say that those

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[6] According to the skeleton argument of Mr Morris para 31

representing Mr Vik went up a number of byways which did not lead to work done on initial margin, but it would be difficult to criticise them for doing so given the way in which time was recorded.

43. This work should have been identified when the bill was drawn and excluded at that stage, with a clear explanation. That it was not, and that concessions had to be wrung out of the Claimant during the assessment hearing, would inevitably lead to the suspicion that not enough was being conceded; a conclusion which I had no difficulty in reaching in my decisions on the relevant months.

44. The Claimant's conduct of this issue, in my judgment, merits a reduction in the costs of the assessment process. For the purposes of CPR 47.20(3)(c) it was not reasonable for the Claimant to have claimed the costs of the work done on initial margin, either initially or following service of the points of dispute. Mr Vik will have incurred costs which would not have been incurred had the work done on initial margin been omitted. It is likely that there would still have been argument about whether the omissions were sufficient, but it would have been limited.

The amount by which the bill has been reduced

45. Mr Morris submits that the substantial reductions achieved by Mr Vik should be reflected in the costs order. An overall reduction of about 32%, including a reduction in the solicitors' profit costs of about 40%, is significant on an assessment on the indemnity basis.

46. While the reductions are indeed significant, I do not think that the Claimant should suffer a different result by reason of the assessment being on the indemnity basis. That would reward Mr Vik for the conduct which led to the order for costs on that basis.[7]

47. An overall reduction of about one-third would not, in my experience, ordinarily lead to a different order. Mr Vik could have protected himself, in relation to the costs of assessment, by making a Part 36 offer. However he made no offers at all. When reminded of the obligation[8] to state in an open letter accompanying the points of dispute the sum he offered to pay in settlement, he offered nothing.

The length of the assessment

48. The length of the hearing was due in large part to 3 factors. First, the way in which time was recorded by the Claimant's solicitors. Second, the lack of documents, and in particular attendance and file notes, in the Claimant's solicitors' files. The consequences of this were recognised by Christopher Clarke J, as he then was, in *Fattal v Walbrook Trustees (Jersey) Ltd* [2009] EWHC 1674 (Ch):

> "Here the reduction was very large and the reason for the reduction was in large measure because the solicitors had failed to keep attendance notes. Such a failure materially contributes to the length and cost of assessment proceedings… [It] leads to

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[7] The findings made as to the veracity of the evidence of Mr Vik and Mr Johansson and the contrived nature of the defences, many of which did not pass "the red face test". See the transcript of the judgment on costs, 8th October 2013, p.1 line 23.

[8] PD 47 para 8.3.

> a scrambling around among the papers when the costs are queried to seek to work out what was done at different stages often without any clear answer, followed by a guessing game on the part of the Costs Judge."

49. In that case the decision of the costs judge to disallow the receiving party's costs as the bill had been reduced by over 60% was upheld on appeal.[9]

50. The third factor was the decision by Mr Vik to challenge almost every item in the bill, to which I have referred above.

51. There may be a superficial attraction to concluding that these factors should cancel each other. However that would be wrong. A paying party who has caused the assessment to be prolonged will, in the ordinary way, pay for the costs (on both sides) of that prolongation by virtue of the usual order. However a paying party should not pay for the costs of prolongation caused by the receiving party.

52. The prolongation of the detailed assessment caused by the absence of attendance notes and other documents and by the way in which time was recorded by the Claimant's solicitors (vague and composite entries) does, in my view, justify a different order.

Conclusions

53. The prolongation of the detailed assessment by the Claimant, the claim for the costs of initial margin and, to a much lesser extent, the failure on the issues of the scope of the costs order and the exchange rate, do not justify an order for costs in Mr Vik's favour but do justify an order that the Claimant should not be entitled to all of its costs of the assessment. In considering the percentage that should be disallowed I should bear in mind the costs which Mr Vik will have incurred, in particular in relation to the prolongation and the time spent on initial margin. Inevitably the court's approach to this has to be broad, but in my judgment justice would be done by depriving the Claimant of 30% of its costs.

Indemnity basis costs

54. On behalf of the Claimant, Miss Manby submitted that the Claimant should have its costs of the assessment on the indemnity basis. While it can certainly be said that the detailed assessment hearing was "out of the norm", that was the result of the conduct of both parties, as I have attempted to describe above. In my judgment it would not be appropriate to order that the Claimant's costs be assessed on the indemnity basis.

Order

55. Accordingly the order that I would make is:

    i) That the Claimant should pay Mr Vik's costs of the application dated 27th July 2017 in any event on the standard basis to be assessed summarily with the costs of the detailed assessment proceedings.

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[9] He decided not to make a similar order in respect of the bill of another party, which was reduced by 31.4%.

ii) That Mr Vik shall pay 70 per cent of the Claimant's costs of the detailed assessment proceedings on the standard basis to be assessed summarily.