Neutral Citation Number: [2023] EWHC 3105 (Comm)

Case No: CL-2021-000369

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**KING'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 December 2023

**Before** :

**Mr Justice Andrew Baker**

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**Between :**

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|---|---|
| **Frasers Group PLC** | **Claimant** |
| **- and -** | |
| **(1) Saxo Bank A/S** | **Defendants** |
| **(2) Morgan Stanley & Co International** | |

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**Lord Wolfson KC and Mark Wassouf** (instructed by **Reynolds Porter Chamberlain LLP**) for the Claimant
**Camilla Bingham KC** (instructed by **Clifford Chance LLP**) for the Second Defendant

Hearing date: **1 December 2023**

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# Disclosure Rulings
# (Approved Transcript)

**Mr Justice Andrew Baker** **Friday, 1 December 2023**

(**11:28** am)

Ruling 1 by **MR JUSTICE ANDREW BAKER**

1. In relation to Mr MacLeod, I am satisfied that Lord Wolfson KC is correct to concede that his application would have to be made out under paragraph 18 of the practice direction, requiring him to satisfy the court that what is now sought going beyond what Morgan Stanley has done *de bene esse*, and to an extent under protest but in the hope of avoiding an application, is necessary. I am very far from persuaded that any further time and costs spent listening to audio files for Mr MacLeod outside the key date range that has already been listened to, yielding nothing, is a necessary exercise for the disclosure as a whole to have been reasonable and proportionate for the purposes of trial.
2. In relation to the searches by reference to a couple of aspects picked up in two audio calls, for convenience we can cross-reference those as the points arising out of rows 12 and 16 of appendix A, in relation to the further searching by reference to "MA", and in relation to the inventive suggestion that the throwaway reference to Goldman as, in theory, the sort of bank to which one might give up a trade gives rise to a reasonable requirement for additional searches to be ordered, in my judgment the application is speculative. They are individually, potentially, not massive exercises in comparison to the no doubt very extensive exercise that has already been undertaken by way of Extended Disclosure in the case; but they seem to me no better than old fashioned fishing expeditions, reading far too much into passing comments for a suggestion that it can be seen that the disclosure exercise undertaken has fallen short of a sufficient, reasonable and proportionate search for the trial process to be fairly conducted by reference to the disclosed documentation that have then been provided.

**Mr Justice Andrew Baker** **Friday, 1 December 2023**

(**12:06** pm)

Ruling 2 by **MR JUSTICE ANDREW BAKER**

1. I am grateful to counsel for their submissions on the two aspects on which I did not effectively give a ruling already, on the basis that I wanted to hear Ms Bingham KC expanding what she had said in writing and then hear from Lord Wolfson KC in reply before I took a final view.
2. Having had the benefit of those submissions, I am not persuaded on either topic that it is necessary, just or appropriate to make any order.
3. In relation to the proposal that there now be a fresh set of searching for communications between Morgan Stanley and Saxo in the run-up to or around the time of the creation of the positions in respect of which the margin call in due course came to be made, in my judgment Ms Bingham powerfully demonstrates that there is no real likelihood in this case of there being any such material that would be of relevance to the issues in the case, such as to make it a reasonable, proportionate exercise to undertake.
4. At a superficial level, Lord Wolfson's observation in reply that one must keep in mind the potential distinction between what may have happened and may have been discussed after the margin call was imposed on the one hand, and what the experts say they would normally expect to happen prior to the position being created on the other hand, makes a fair point. However, it ultimately simply misses the gravamen of the submission in response, which is that when examined, the post-margin call reaction and communications in this case shout very loudly that there cannot have been relevant conversations or communications of the kind in which the claimant could potentially be interested. That is, I agree with Ms Bingham, on the material that the court has been shown, the only realistic explanation.
5. Add to that the timing of this application, made now in the overall scheme of the litigation, quite close to trial, long after the primary disclosure has been given, and after a prior application, in part resolved by agreement, in part contested and resolved by ruling for further

and better disclosure, and in my judgment it has become time to say that enough has been enough. Indeed, in a number of areas, as it seems to me, the likelihood is, for reasons outlined in Ms Bingham's skeleton and in Ms Carty's evidence for this application, it is probably a case now of more than enough has become enough. That is to say that overall Morgan Stanley's additional searching without obligation to search, and to the extent it was ordered by Bright J. after a contest to undertake some further searches, has proved to be more than might otherwise, with hindsight, really have been required or expected of them by way of reasonable and proportionate searching.

6. Turning back then to the application as regards Mr Thomas, what I have just been saying about timing is of particular relevance to that part of the application.

7. Lord Wolfson's overarching observation in reply that ultimately the trial will be -- I paraphrase -- confronted, or he might say hampered, by the fact that there has not been a New York based custodian or a New York end audio disclosure, may be correct. However, that is an example at this stage, as it seems to me, of a submission that proves rather too much. Were it possible to say in some bright line or overarching fashion that it is plainly not satisfactory, given the nature of and evidence concerning this margin call decision, for the disclosure not to extend in terms of custodians and audio transcripts to New York, that would have been a matter for Jacobs J to have been asked to rule upon when disclosure was originally ordered, when his ruling was that the disclosure ordered by reference to the custodians identified appeared to cover the likely important ground, absent clear evidence emerging from the primary round of disclosure that some critical individual had been left off.

8. Adding to that the fact, as explained by Ms Carty, that even if not every single one of the bits and pieces of the evidence on which the claimant has now relied, but at least substantial evidence of involvement of whatever kind it was by Mr Thomas was available to the claimant since February 2023, and yet this application was not made first time round to Bright J, and

the fact that, as it seems to me, clearly the better interpretation of the key conversation relied on (page 592 of the bundle) is that advanced by Ms Bingham, and overall my conclusion is that it is not demonstrated to be necessary to do justice to this case at trial, by reference to the parties being able to be satisfied and the court being able to be satisfied that the Model D disclosure exercise has been done reasonably and proportionately, for Mr Thomas to be added at this late stage as a custodian.

9. So for those reasons I am against the application on the two remaining aspects on which, for the reasons I gave earlier, in, effectively, an initial partial ruling, I did take full argument.

**Mr Justice Andrew Baker** **Friday, 1 December 2023**

(**12:47** pm)

Ruling 3 by **MR JUSTICE ANDREW BAKER**

1. I shall assess the costs summarily. Subject to two important factors, one of which probably has a greater quantitative impact than the other, I would have found myself saying that for an application of this type and scope, and bearing in mind the degree to which the application, as initially formulated, was wider than the remaining live issues that were pressed and which I have then dealt with today, I would not have been expecting to find myself regarding as reasonable and proportionate figures above something like the following:

    - £10,000 on general attendances;
    - £20,000 for work on documents;
    - £6,000 for the solicitors' attendance at the hearing, on top of £5,000 or so for work at the solicitors' end, including preparation of the cost schedule, in final preparation for the hearing;
    - a brief fee, plus any prior advisory work or drafting assistance, for experienced junior counsel of say £25,000 or so; and
    - the shared cost of transcript;

    and I make that something like £66,500 in total.

2. The first, possibly quantitatively more minor, aspect is this. It plainly was appropriate, probably indeed necessary really, for counsel briefed in the case to be involved, if at all possible. If the fact is, as Ms Bingham KC indicates, that the juniors involved in the case were not available to deal with this particular matter and bearing in mind relative to her, if I may say so, distinction, the level of fees in fact charged given the nature of the hearing, it seems to me that there is sufficient justification for Ms Bingham having taken this application and therefore counsel's fees having been a fair bit higher than the £25,000 or so that I identified,

including at the level of what is reasonable for Lord Wolfson KC's clients to be required to pay.

3. The second factor is this. I am persuaded by what I have seen of the way the application was formulated, evolved and was pressed, that although I was not persuaded to suggest that a detailed assessment would be on the indemnity basis, it will reasonably have required a degree of attention and work in response that, other things being equal, might well have been thought disproportionate. The respondent to an application must to a certain extent manage as best it can what is thrown at it and I have no doubt, on what I have seen of the application for the purposes of today, that the approach taken to and the nature of the application will in that way have aggregated to a significant extent what might otherwise have been the burden of costs in responding to the application.
4. Bearing that factor in mind particularly and also the observation I made about Ms Bingham's attendance, it seems to me that it is right to uplift what I might otherwise have thought, more in the abstract, would be a reasonable sort of bill for this application, by about 50%, and then allow for the fact that counsel has unavoidably proved to be more expense. Adjusting in that way, in my judgment overall the reasonable and proportionate recovery of costs, and therefore the figure at which the second defendant's costs will be summarily assessed, is £120,000.