Neutral Citation Number [2022] EWHC 2920 (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: 17/11/2022

Before :

SENIOR COSTS JUDGE GORDON-SAKER

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Between :

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

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

Hearing dates: 19th & 20th October 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 request by Mr Vik that I reconsider the decisions made in relation to the fees of Deloitte LLP.

2. For present purposes, I need not describe again the underlying proceedings, as that was attempted in paragraphs 9 to 16 of the judgment that I am now asked to reconsider: [2021] EWHC B4 (Costs) ("the Deloitte judgment"). To bring matters up to date, in July 2022 Mr Vik was found guilty of contempt in respect of his failures to provide information and to produce documents and was sentenced by Moulder J. to 20 months' imprisonment, suspended on conditions. That conviction is of no relevance to this judgment, but I am pleased to record that the committal proceedings had no discernible impact on the temperature of the concurrent detailed assessment proceedings.

3. The detailed assessment hearing commenced on 26th April 2020 and, so far, by my calculation, has lasted 104 days (including a 3 day preliminary issues hearing in February 2020). Upon the handing down of this judgment, the assessment of the Claimant's bill will have been completed, apart from the costs of the detailed assessment.

4. The fees of Deloitte were the subject of preliminary issue 4 (whether they were recoverable in principle) which was argued over a number of days in April and May 2020 and resulted in a reserved judgment dated 5th June 2020: [2020] EWHC B24 (Costs). Following my conclusion that they were recoverable in principle, the fees were assessed following argument over 12 days in November and December 2020, with the reasons for my decisions recorded in the Deloitte judgment.

5. The fees were claimed in monthly invoices (items 1707 to 1734 in the bill). The sums allowed, as against the sums set out in the invoices (before discounts), were:

Item in bill	**Month covered by invoice**	**Amount claimed before discounts US$**	**Amount allowed before discounts US$**
1707	July/August 2011	103,388	79,582
1708	September 2011	169,108	106,406
1709	October 2011	173,206	126,720
1710	November 2011	52,196	28,454
1731	August 2013	12,955.75	4,720
	US$ total	**510,853.75**	**345,882**
Item in bill	**Month covered by invoice**	**Amount claimed before discounts £**	**Amount allowed before discounts £**
1707	July/August 2011	138,572	124,727
1708	September 2011	202,635	135,691.50
1709	October 2011	210,190	141,650.50
1710	November 2011	298,272	201,752
1711	December 2011	241,836	184,154
1712	January 2012	801,693.73	619,462
1713	February 2012	1,106,747.20	797,480.50

1714	March 2012	1,049,335.38	872,920
1715	April 2012	700,081.20	561,044
1716	May 2012	937,896.14	825,588
1717	June 2012	893,524.96	679,984
1718	July 2012	1,150,975.08	815,806.03
1719	August 2012	1,086,391.14	857,104.40
1720	September 2012	1,233,426.81	927,843
1721	October 2012	1,515,884.61	1,109,413
1722	November 2012	1,973,747.64	1,504,987
1723	December 2012	1,361,840.01	1,062,667
1724	January 2013	1,723,960.26	1,270,482
1725	February 2013	1,864,036.16	1,414,468
1726	March 2013	1,907,039.10	1,436,505
1727	April 2013	1,799,066.12	1,258,816
1728	May 2013	1,681,152.98	1,207,495
1729	June 2013	1,660,778.93	1,076,316
1730	July 2013	1,358,937.19	855,877
1731	August 2013	388,719.48	271,727
1732	September 2013	38,858.19	27,146
1733	October 2013	28,556.54	20,731
1734	November 2013	57,610.75	22,790
	£ total	**27,411,764.60**	**20,284,626.93**

6. In effect, I allowed about 74% of the time claimed in Pounds Sterling; the reductions being £7,127,137 and US$164,971.

7. As I explained in the Deloitte judgment, the sums allowed fell to be reduced further by (i) the discounts agreed between the Claimant and Deloitte (para 169); (ii) a percentage discount to reflect the 8 hour cap (para 172); and (iii) the concessions made by the Claimant (paras 178, 179, 180), save in relation to initial margin.

Initial margin (preliminary issue 6)

8. In relation to initial margin, I explained the parties' contentions and my approach at paragraphs 26 to 28, 173 and 174 of the Deloitte judgment:

> "26. 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.
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> 27. It is not in issue that the Claimant cannot recover the fees of Deloitte in relation to the calculation of the initial margin. There is however an issue as to how those fees should be calculated. The Claimant's case is that the relevant fees should be identified

> and deducted. Mr Vik's case is that the invoices are not sufficiently detailed to allow that. It is submitted on his behalf that the better approach is to identify the reasonable cost of each expert's report taking into account that nothing can be allowed for work touching on the initial margin.
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> 173. The concession made in relation to work done on initial margin, 0.5% of Deloitte's invoices for the months August 2012 to 8th February 2013, is explained in the Claimant's solicitors' letter dated 9th June 2020. In broad terms, Deloitte had used Navigant's initial margin calculations and they were used by Mr Millar only in the calculations for a limited number of trades in 2 margin approaches. Mr Inglis had then inputted Mr Millar's margin approaches in his own calculation.
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> 174. Rather than take the Claimant's broad estimate of the work done on initial margin, I have made my own in arriving at the total numbers of hours that I have allowed. In doing so I have accepted that the amount of work done on initial margin was limited."

9. Because my decisions in relation to Deloitte's fees were made in a broad way, it is impossible for me now to recount the factors that I took into account in relation to any particular month, save insofar as they were recorded in the judgment, or explain the weight given to any particular factor in comparison to another.

The fees of Navigant Consulting Inc.

10. Mr Malik of Navigant was called on behalf of the Claimant to give expert evidence on the ways in which trades are classified and on the valuation of some of the transactions. It was not in issue that Mr Malik had done work in calculating initial margin, which figures were then used by Deloitte, and that the Claimant should not be entitled to the cost of that work. I explained the ways that the parties approached this and my conclusion in my judgment on Navigant's fees dated 18th June 2021 ([2021] EWHC B10 (Costs)) at paragraphs 37, 40 and 43:

> "37. The report included some time spent on Initial Margin, which the Claimant conceded in principle. In their letter dated 9th June 2020 the Claimant's solicitors conceded the total sum of £135,568.79 in respect of the invoices from August 2012 to February 2013 on the basis that Mr Malik had been instructed to calculate Initial Margin "in respect of a limited number of trades".[1] On behalf of Mr Vik, Mr Williams QC submitted that the sums conceded were insufficient. As an example, he referred to the work done in November 2012. The Claimant had conceded £7,350 (plus 2 per cent), but all of that related to work done on valuations and nothing had been conceded in relation to the time spent on Initial Margin in the report.

[1] The initial margin argument applied to 91 of the 1,060 FX trades executed by the Defendant.

> 40. In respect of the concession of the work done on Initial Margin, Miss Manby explained that this had been based on contemporaneous records. In addition to the time identified, the Claimant was willing also to concede a further 2 per cent of Navigant's fees over the relevant period, out of an excess of caution. The total concession was about 12 per cent of Navigant's fees as against the proportion of fees charged by Dr Drudge on Initial Margin, which had been calculated at 10 per cent.
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> 43. In respect of the time spent on Initial Margin, in my view the Claimant's concession is a little too low. Initial Margin made up a significant part of the report (pages 37 to 44 of 44 pages), given that the first 15 pages were by way of introduction and summary. It is difficult to identify the work done on Initial Margin precisely, because of the brief descriptions in the time recording. I accept that Initial Margin was the least significant of the three principal components because of the limited number of trades involved. However, as against the 12 per cent calculated by the Claimant's lawyers, it seems to me that 15 per cent would be more realistic in relation to the relevant invoices.[2] The further reductions are set out in the table at the end of this judgment."

Mr Vik's request for reconsideration

11. Mr Vik requests that I reconsider the fees allowed for Deloitte for the months from July 2012 to February 2013 in view of information that has come to light over the course of the assessment of the Claimant's solicitors' profit costs. I have not been asked to reconsider the fees allowed in respect of the work done by Navigant.

12. That Mr Vik wished to make this request was raised last year and 2 days were listed to deal with it. The request is supported by a 44 page skeleton argument.

The power to reconsider

13. It is not in issue that the detailed assessment has not concluded. The final costs certificate has not been issued and the request was heard before the assessment of the costs of drafting the bill. Nor can it be in issue that Mr Vik's intention to ask the court to reconsider these items was raised well in advance. In their letter to the court dated 17th August 2021, Mr Vik's solicitors advised that:

> "… the Paying Party considers that the court's findings on his liability to pay the fees of Deloitte and Navigant may need to be revisited on the basis that any order which is based on them will involve the Paying Party being ordered to pay costs for which he is not liable. This is something on which submissions will be made in due course."

[2] Items 1737 to 1743.

14. In my experience it not infrequently happens on detailed assessment that, during the hearing, a party asks the court to reconsider a decision on an earlier item in the light of something that has become apparent subsequently.

15. Miss Manby's submissions were not that the court did not have jurisdiction to reconsider, but rather that it should not exercise its discretion to do so. The decisions were made following a 12 day hearing, nothing new has been raised and, given that the reductions for initial margin were wrapped up in the overall reductions from the monthly invoices, it would be necessary to reassess all of the fees for the relevant months in full.

A little more on initial margin

16. The Defendant alleged that, in breach of contract, the Claimant had failed correctly to calculate the margin requirements of the Defendant's portfolio. The Claimant's primary case was that it was not obliged to calculate and report on the margin requirements; alternatively, that the obligation was waived by the instruction that it accept transactions which the Defendant knew that the Claimant would not be able to value or margin.

17. The Claimant conceded that its systems could not produce accurate valuations or calculate margin requirements for some of the trades which the Defendant carried out. The Defendant contended that, had it done so, the Defendant would have breached the trading limits and been stopped from further trading before it ran up such significant losses. Deloitte and the Defendant's expert, Dr Drudge, were required to build models to establish what the margin requirements would have been had they been calculated correctly.

18. In August 2012 the Claimant raised the further argument that, in respect of some transactions, it could have fulfilled its contractual obligations by producing an initial margin – a single, fixed margin amount that was calculated to cover the lifetime of the transaction – calculated by an analyst as a percentage of the purchase price of a security that the bank required to be covered. In essence, this was an argument that, in relation to certain types of trades, the Claimant would have been entitled to have calculated margin differently and that, had it done so, different margin figures would have been produced which would have affected the dates upon which the limits were breached.

19. In broad terms, Mr Malik of Navigant produced the calculations of the initial margins, which the Claimant contended would have been used, and Deloitte then used them to input into the calculations of the margin requirements. In respect of the Defendant's FX portfolio, six different margin approaches were calculated by Deloitte, of which two used the initial margin figures produced by Mr Malik and the other four used the Value at Risk model devised by Deloitte. The margin calculations made by Mr Millar of Deloitte were then used by Mr Inglis of Deloitte to calculate the dates of the alleged trading limit breaches.

20. After the experts' meeting in January 2013, the Claimant decided to abandon its case on initial margin and, on 22nd February 2013, the Claimant was ordered to pay the costs thrown away.

A little more about the pleaded case on initial margin and the order about costs

21. The limited scope of the initial margin argument is apparent both from the pleaded case and the order that the Claimant pay the Defendant's costs of the argument.

22. Paragraph 4 of the second order dated 22nd February 2013 provided that:

> "The Bank is, in any event, to pay SHI's costs (to be assessed if not agreed) thrown away by the Bank's withdrawn allegation (as contained in paragraphs 130.7A(e)(1) and (g) of its draft Re-Re-Amended Reply and Defence to Counterclaim dated 5 November 2012) that, had the Bank been obliged to calculate Value at Risk on SHI's FX Portfolio including the Exotic Derivatives Transactions and other complex transactions (as defined in the Re-Re-Amended Defence and Counterclaim), it would have been entitled to, and/or would, have calculated a single initial margin amount for each such transaction applicable throughout the lifetime of those transactions."

23. The relevant paragraphs of the pleading were:

> "130.7A(e) For the avoidance of doubt, and to the extent relevant, had DB been obliged to calculate VAR in respect of the Said Transactions[3], DB would have been entitled to perform such obligation by
>
> (1) calculating a single initial margin amount for each of the Said Transactions applicable throughout the lifetime of that transaction; such calculations would have been made by members of DB's exposure management team applying their own judgement of the particular risk parameters in respect of each individual trade and other factors including the perceived prevailing market conditions (including as further explained in witness evidence served on SHI under cover of Freshfields' third letter to Travers Smith dated 31 August 2012); "
>
> "(g) If, contrary to DB's case, damages fall to be assessed on the basis of the method of calculating VAR in respect of the Said Transactions which would in fact have been adopted by DB, DB's primary case is that this would have been the method set out at sub-paragraph (e)(1) above. If that method is found not to be contractually compliant, DB's case is that it would have used the method set out at sub-paragraph (e)(2) above[4]."

24. As Miss Manby pointed out, this was a fifth alternative to the Claimant's case that it was not contractually obliged to calculate margin requirements.

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[3] Defined in para 130.7A(a) as the Said TPFs and OCTs

[4] Sub-para (e)(2) contended that the Claimant could, in the further alternative, have devised a pricing model for determining the values of the Said Transactions.

Deloitte's involvement

25. I remain of the view that the involvement of Deloitte in the initial margin argument was not as great as Mr Vik contends. The formulation of the case on initial margin was largely for the lawyers, on the instructions of the Claimant. The calculation of initial margin was largely for Mr Malik. The decision to abandon the argument that initial margin would have been contractually compliant (once the figures had been produced by the experts) was also largely for the lawyers.

26. Having now trawled through the available work product twice, and despite the best efforts of Mr Morris (his skeleton argument paras 47 to 62), there is no evidence of any involvement by Deloitte in relation to initial margin before August 2012. The first discussion about initial margin would appear to have been between the Claimant and its solicitors on 1st August 2012.

27. While there are references in the documents schedule to communications with Deloitte about initial margin, there is nothing to suggest any significant involvement by Deloitte in the drafting of that part of the VaR note or pleading which dealt with initial margin. In his skeleton argument (para 64) Mr Morris suggested that this document had been "drafted by Deloitte". However in oral submissions he suggested that it had been "developed" by the Claimant's solicitors with "assistance" from Deloitte. While I think that latter analysis must be correct, there is nothing to suggest any substantial assistance in relation to this aspect of the articulation of the initial margin argument.

28. While there are some references in the documents schedule to communications with or involvement by Deloitte in relation to initial margin there is nothing to suggest any significant involvement. Essentially this was a mixed argument of fact and law. The facts would be for the Claimant's witnesses. The law would be for the lawyers. It is not surprising that Deloitte would be asked to comment on the Claimant's factual witness statements dealing with initial margin. However the four statements were short and there would have been limited scope for any Deloitte involvement.

29. Deloitte was more heavily involved in VaR calculations; but not initial margin.

30. In September 2012, when the amended pleading in relation to initial margin was served, Deloitte's involvement seemed to be more in relation to the VaR aspects than initial margin. While Deloitte were doubtless involved in the responses to the Defendant's requests for further information, initial margin was only a part of that. Mr Morris' skeleton argument at paragraphs 78 to 117 seeks to draw in other work over September to December under the umbrella of initial margin – VaR, ValLib, GEM, equities margining. However, these were nothing to do with initial margin.

31. I am satisfied that the work done in relation to developing and pleading the initial margin argument was primarily done by the Claimant's solicitors and counsel. I accept that Deloitte's involvement increased once Mr Malik had produced the calculations of initial margin which were then used by Mr Millar and Mr Inglis. But, even then, initial margin was a relatively small part of the work done on the reports, and I have already taken that into account in the reductions that I have made. I am also satisfied that the decision to abandon the initial margin argument, taken in January and implemented in February, was also largely for the lawyers. Deloitte's involvement was not significant.

32. There is, in my judgment, simply no reason to alter the decisions that I made over 18 months ago. As Miss Manby put it, there has been no "Eureka" moment, or smoking gun. Everything that Mr Morris has relied on has come from either the document schedules or the Deloitte monthly summaries, all of which were available back in the winter of 2020, when we first looked at this. No analysis by Acumen of the work done by Deloitte on initial margin, suggested in the letter from Mr Vik's solicitors to the court dated 17th August 2021 (in support of Mr Vik's application to extend time for payment of the interim costs certificate) has been produced or relied on.

33. That I made more significant reductions in respect of initial margin when assessing the work done by the Claimant's solicitors as described in the documents schedules, does not lead inexorably to the conclusion that similar reductions need to be made in relation to the fees of Deloitte. There was, very obviously, more work done in relation to this by the solicitors.

34. Accordingly I decline to alter the allowances that I made in relation to items 1707 to 1734.