Recovering the Costs of Detailed Assessment Proceedings

21 March 2023

Introduction. In *Deutsche Bank AG v. Sebastian Holdings Inc. and Alexander Vik* [2023] EWHC 9 (SCCO), Senior Costs Judge Gordon Saker considered who should pay the costs of the longest-ever detailed costs assessment proceedings.

Pursuant to CPR 47.20, the usual position is that the receiving party is entitled to its costs of the detailed assessment proceedings unless the court makes some other order in relation to all or part of the costs of the proceedings. In deciding whether to make some other order, the court must have regard to all of the circumstances including (i) the conduct of the parties, (ii) the amount, if any, by which the bill has been reduced and (iii) whether it is reasonable for a party to claim the costs of a particular item or to dispute that item.

Mr Vik submitted that he should be entitled to the costs of certain interim applications and that in respect of the remainder, the claimant should only be allowed 60% of its costs which should be assessed on the standard basis.

Background. The claimant ("DBAG") was successful in its claim against Sebastian Holdings following a 44-day trial in 2013 and was awarded 85% of its costs on the indemnity basis. In 2013, Mr Vik was joined to the proceedings for costs purposes, following which, in 2016, he was ordered to pay the costs which had been awarded against Sebastian Holdings.

The underlying proceedings were described as "*huge*" and "*hard fought*" by the judge who noted that DBAG's disclosure involved the review of over 1.5 million documents, the parties served 54 witness statements and 40 expert reports, and the written closing submissions ran to over 2,700 pages.

The detailed assessment proceedings, which began in 2017, "*were also huge and were equally hard fought*". At the outset of the costs proceedings, DBAG applied for directions in relation to the bill of costs it wished to serve, submitting that producing a compliant bill would take two years and cost £2.5m. DBAG sought directions that the detailed assessment should instead be heard in two tranches: the first tranche would deal with

preliminary issues including counsel and expert fees, and the second tranche would involve DBAG serving a "hybrid bill" in three parts, divided chronologically. That application was refused on the basis that the paying party is entitled to know the amount being claimed at the outset, and, accordingly, approximately one year later, DBAG served a bill of costs followed by points of dispute from Mr Vik.

There followed a number of preliminary issue hearings to deal with the rate of interest, scope of the costs order, the exchange rate to be applied, the recoverability of Deloitte fees and the assessment of counsel's brief and refresher fees, followed finally by hearings in 2021 and 2022 which dealt with the chronological part of the bill, i.e. solicitor fees.

Judgment. As to the directions hearing DBAG had sought at the outset of costs proceedings, the judge held that those directions "*were sought only because the Claimant wished to do something different* [from the usual bill of costs] *and, in that respect, it can be said to have lost the application*". Accordingly, DBAG was ordered to pay Mr Vik's costs of that application on the standard basis to be summarily assessed.

As to the other preliminary issues (interest, scope of the costs order, etc.), the judge did not consider it appropriate to deny DBAG its costs on each issue where it had been unsuccessful, noting "*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. […] The appropriate course, in my judgment, would be to take the costs of the issues into account, in the event that I make an order that the Claimant is entitled only to a proportion of its costs*".

While the judge noted that the court "*cannot impose an agreement between the parties*", it was clear that he was unimpressed by the parties' failure to 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*".

Mr Vik repeatedly criticised the way that DBAG's solicitors had recorded their time, submitting that the time narratives were inadequate to identify precisely what work had been done and that most entries were composite and did not divide time spent between different tasks. In order to show what work had been done, DBAG's counsel took the judge "*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 (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. 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".

Mr Vik argued that his having successfully reduced the amount to be recovered by DBAG (there had been an overall reduction of 32%) should be reflected in the order as to costs of the detailed assessment. The judge did not agree, noting that Mr Vik could have protected himself in relation to the costs of the detailed assessment by making a Part 36 offer. He had in fact made no offer at all despite having been reminded by DBAG of his obligation under PD 47 to make an open offer alongside the points of dispute.

The judge was however minded to reduce the amount of the costs of the detailed assessment recoverable by DBAG due to it having been responsible for the prolongation of the proceedings. He held that "*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*". He therefore ordered that Mr Vik pay 70% of DBAG's costs of the detailed assessment to be assessed summarily on the standard basis.

Comment. This judgment is a helpful reminder to practitioners of the importance of detailed narratives split out by task when recording time as well as the importance of keeping attendance and file notes. It highlights the fact that while, of course, the court cannot impose a settlement, it will take a dim view of parties who do not behave reasonably and take account of the court's "*direction of travel*". And crucially, parties should always consider protecting themselves against the costs of detailed assessment proceedings with a Part 36 offer.

* * *

Please do not hesitate to contact us with any questions.

LONDON

Christopher Boyne
cboyne@debevoise.com

Doreena Hunt
dhunt@debevoise.com