IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
KING'S BENCH DIVISION
[2024] EWHC 55 (Comm)

No. CL-2021-000369

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 4 January 2024

Before:

HIS HONOUR JUDGE PELLING KC

B E T W E E N :

FRASERS GROUP PLC — Claimant

- and -

(1) SAXO BANK A/S
(A Company Incorporated in Denmark)
(2) MORGAN STANLEY & CO. INTERNATIONAL PLC — Defendants

MR A BELTRAMI KC and MR A TEMPLE (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Claimant.

THE FIRST DEFENDANT did not appear and was not represented.

MS C BINGHAM KC (instructed by Clifford Chance LLP) appeared on behalf of the Second Defendant.

J U D G M E N T

(via Microsoft Teams)

JUDGE PELLING:

1 This is the hearing of an application by the second defendant ("Morgan Stanley") for an order that it be permitted to amend its defence. Most of the amendments have been consented to and the two that remain controversial are relevant to quantum. The amendments are significant. The claim is valued currently at about €47 million and the effect of the amendments, if permitted and successful at trial, will reduce the value of the claim by €33 million and €18 million respectively. The application is opposed by the claimant on the basis that there is no satisfactory explanation as to why it is being made at this stage when the trial is due to start on 19 February 2024, that what is alleged cannot be made good without expert evidence for which there is no relevant permission and the balance of prejudice lies in refusing the application.

2 In summary, the applicable principles are:

(a) There is a distinction to be drawn between applications for permission to amend that are either late, or very late, or neither;

(b) in relation to applications other than very late applications, the applicant must show that they have a real (as opposed to a fanciful) prospect of success: see *Elite Property Holding Limited v Barclays Bank plc* [2019] EWCA Civ 204 per Asplin LJ at [41] ("merits test");

(c) in deciding whether the merits test is satisfied, it is not appropriate to conduct a mini-trial and the issue should normally be addressed by considering what it is proposed should be pleaded by way of amendment. Unless it is clear as a matter of law that the proposed claim or defence (as the case may be) is bound to fail, or the factual basis of the proposed amendment is entirely without substance, the merits test will be satisfied and no more attention should be paid to the merits of what it is proposed should be pleaded: see *Three Rivers District Council v Governor and Company of The Bank of England* [2003] 2 AC 1, per Lord Hope at [95]; *Okpabi & Ors v Royal Dutch Shell plc* [2021] 1 WLR 1924, per Lord Hamblen at [103] applied to late (as opposed to very late) applications for permission to amend; and *CNM Estates (Tolworth Tower) Limited v Carvill-Biggs & Anr* [2023] EWCA Civ 480, per Sir Geoffrey Vos MR at [77];

(d) assuming the proposed amendments pass the merits test, and are satisfactory in terms of clarity and particularity, then whether an application should succeed or fail depends on an assessment of where the balance of injustice lies between the applicant if the application is refused and the injustice to the opposing party and other litigants in general (if relevant) if the amendment is permitted;

(e) in carrying out that balancing exercise, it is necessary to take account of the nature of the proposed amendments, the quality of the explanation for its timing and the consequences in terms of work wasted and consequential work to be done: see *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) per Carr J (as she then was) at 38(d)-38(f); and *Nua Interiors Limited v Brady* [2018] EWHC 2586 TCC at [18].

3 In this case it is necessary to be clear from the outset as to what is common ground. First, the claimant does not allege that, looking at the proposed amendments, either is bound to fail as a matter of law or is insufficiently clear or insufficiently particularized; nor is it alleged that the proposed amendment is very late (as opposed to late), so that the principles

that apply to a very late application (that is one where the result of granting it will be that a trial date will be lost) are of no application in this case.

4 One issue that surfaced at a relatively late stage in the argument related to the evidence that would be needed to make good at trial what Morgan Stanley wishes to allege by way of the contested amendments. Mr Beltrami KC's submission was that to make good the proposed amendments at trial it would be necessary for Morgan Stanley to adduce expert evidence for which currently there is no permission, and thus I should conclude that the proposed amendment so lacks a factual basis that permission for the proposed amendment should be refused on the basis that they entirely lack substance.

5 Ms Bingham KC submitted this point should be rejected as without substance because:

(i) it was made for the first time at the hearing and is nowhere mentioned in Mr Beltrami's skeleton submissions;

(ii) on a proper analysis the current order permitting expert evidence is in wide enough terms to include evidence necessary to make good the case set out in the amendments;

(iii) even if the current order is not wide enough to encompass what is required to make good the proposed amendments, it should be varied now so as to permit the relevant evidence to be adduced;

(iv) in any event, if otherwise the proposed amendment passes the merits test summarised earlier, then whether expert evidence in support of it is admitted or not is immaterial to the application because it is open to Morgan Stanley to attempt to make good the points, alleged either by way of submission on the documents at trial and/or by cross-examination of the factual witnesses.

6 It was this point, which surfaced late in the application, that caused me to reserve judgment, largely because it was necessary for me to consider material that I had not considered as part of the pre-reading exercise, given the timing on which the point arose. Given the urgency that surrounds the application, this led me to agreeing to give judgment remotely on 4 January, that is today. I was asked if I would notify the parties by e-mail of the outcome before then. In the end, I provided such a notification to my clerk for onward transmission on 24 December 2023 and forwarded it to counsel by e-mail on 27 December 2023. I indicated that I would grant permission for the proposed amendments and give reasons in this judgment.

7 Before turning to the point in detail, I should set out in summary what this claim is for and why the proposed amendments matter. I do so only to the extent necessary to explain the decision and reasons for it. Nothing I say is intended to prejudge any substantive issue that arises in the case and should not be treated by either party as doing so.

8 In essence, Morgan Stanley provided clearing services for the claimant's trades in put and call options in a German registered public company called Hugo Boss. The claimant placed its trades with the first defendant and Morgan Stanley provided the first defendant with a clearing service under a contract between it and the first defendant. That contract permitted Morgan Stanley to make margin calls and to close out the trading positions it was clearing in

the event that the margin calls it made were not complied with. The circumstances in which Morgan Stanley was entitled to impose a margin call are in dispute.

9 Morgan Stanley imposed a margin call, or purported to do so, on 25 May 2021. The detail does not matter, but the call was not satisfied, these proceedings were commenced and an application for an injunction made to restrain Morgan Stanley from closing out the claimant's trading positions. The injunction was granted and, by 15 June 2021, all the existing trading positions had been placed with other brokers and the injunction was then discharged. That left the damages claim which currently is proceeding against Morgan Stanley alone.

10 Until July 2022, the pleaded claim was to recover €6 million, being €3 million-odd in respect of wasted expenditure and €3 million alleged to be profits lost caused by the margin call which it is alleged meant the claimant was unable to profit by selling further Hugo Boss short calls. That changed in the Autumn of 2022, when, on 7 October 2022, a re-amended particulars of claim was served so as to make a new claim that, but for the margin call, the claimant would, in August 2021, have executed further Hugo Boss put options that, if placed, would have yielded profits of €54 million-odd. The claimant's case is that it was unable to trade further options until 25 October 2021, when it was able to enter into a contract with HSBC. The claimant seeks to make this claim good by reference to a series of counterfactual trades it maintains would have been entered into but for the margin call.

11 Morgan Stanley's opposed amendments are two in number. The first is an amendment to the re-re-amended defence at paragraph 86(ee) so as to allege that the claimant should have mitigated its losses by executing trades similar to the alleged counterfactual trades as soon as it regained access to the market via HSBC in October to November 2021. The plea is in these terms:

> "Further or alternatively, it was open to Frasers to place the alleged counterfactual trades, or trades 'colourably similar' thereto, once it regained access to the market in October or November 2021. Had Frasers done so, it would have obtained premiums of approximately €33,928,000 thereby eliminating, alternatively very substantially reducing, any losses suffered. By failing to do so, Frasers had caused its own loss and/or failed reasonably to mitigate the alleged losses it suffered..."

If permitted and made good, Morgan Stanley alleges that the effect of this plea will be to reduce the Frasers' total claims by about €33.9 million.

12 The second proposed amendment to the re-re-amended defence at paragraph 86 (ff) alleges that, had the claimant executed the alleged counterfactual trades, this would have reduced the premiums it earned from the actual HSBC trades executed in December 2021 and the claimant should be required to give credit for that element. This allegation is proposed to be pleaded in these terms:

> "Further or alternatively, had Frasers entered into the alleged counterfactual trades in addition to the trades subsequently concluded with HSBC, Frasers earlier entry into the alleged counterfactual trades would have depressed the premiums that Frasers would have earned

> from the trades it actually entered into, as particularised in Appendix 2 Frasers' response, dated 20 July 2022, to Morgan's Stanley Part 18 request, dated 18 June 2022. Frasers must give credit for that sum, which is estimated at €19 million; alternatively, no less than €11.4 million."

If allowed and made out, Morgan Stanley alleges that the overall effect would to reduce the claimant's claim by between €11million and €19 million.

13 Against that background I return to Mr Beltrami's point that, as things currently stand, permission to adduce the expert evidence necessary to make good these points has not been sought or granted and Ms Bingham's answers to them.

14 In my judgment, Ms Bingham's first point, that the point was not set out in Mr Beltrami skeleton, is not an answer if otherwise his submission that currently there is no permission to adduce expert evidence to support the point is correct, and his implied submission that the point cannot be made good otherwise than by expert evidence is also correct. I also reject Ms Bingham's third point that if I concluded that there was currently no permission to adduce the expert evidence necessary to make good the proposed amendments, I should simply vary the current order permitting expert evidence by widening it to permit the necessary evidence to be adduced. I take that view because there is no application either to vary the existing consent order or to adduce the necessary evidence. Although Ms Bingham complains that this point was not deployed in this way in Mr Beltrami's skeleton, the point about the scope of permitted expert evidence was referred to in both the evidence in answer to the application and earlier correspondence set out as long ago as 30 October 2023, to which Morgan Stanley's solicitors responded the next day as follows:

> "We do not agree that Mr Harris's report goes beyond the permitted scope of the quantum expert evidence. Your assertion that this is 'admitted in paragraph 3.3 of the Harris report' is plainly unsustainable. Paragraph 3.3 of Mr Harris's report explicitly states that he was not asked to consider the issues listed there in regard to assessing the questions listed in paragraph 3.1 and 3.2. All three 'illustrative examples' given in your letter are points that bear obvious relevance to the feasibility and overall financial outcome of the counterfactual trades within the counterfactual scenario presented by your client. It would be unduly artificial for the parties and their experts to ignore the broader factual scenario in which the counterfactual trades would have occurred when assessing these issues. Such a narrow approach would not assist the court.
>
> In addition, contrary to the assertion in your letter, the points addressed by Mr Harris properly arise out of our client's current pleaded case. However, without waiving privilege, this will be put beyond doubt in our client's draft re-re-amended defence.
>
> Your client's quantum expert Mr Ammermann will, therefore, need to address these issues in due course. To the extent your client is not willing for Mr Ammermann to deal with these issues now, we are preached prepared to instruct Mr Harris not to raise them at the joint meeting scheduled for 2 November 2023. However, that approach is

> inefficient given the inevitability that Mr Ammermann will need to address them at some point, most obviously in his reply expert report."

15 The evidence in support of the application repeats this approach and added the assertion that there was ample time before trial for the claimant's expert to consider the new points. All this ignores the procedural point made by the claimant. In my judgment, unless Ms Bingham can make good her second point, that is that the additional expert evidence required comes within the scope of the existing order, or her fourth point, that is that it is realistically arguable that the proposed amendments can be made good otherwise than by resort to expert evidence for which permission has currently not been obtained, then the inevitable consequence is this application must fail either on the basis it cannot pass the merits test unless and until an application has been made to adduce the necessary expert evidence or on the basis that the prejudice to the claimant in granting the application would outweigh the prejudice suffered by Morgan Stanley in refusing to grant it.

16 I consider Ms Bingham's fourth point does not assist her. It is not realistically arguable that the points raised by the proposed amendments could be made good to the level required by cross-examination of factual witnesses. It would not be open to Ms Bingham to cross-examine the claimant's expert on the points if the points are outwith the scope of the expert evidence currently permitted. Even if it was, it is overwhelmingly likely to be answered on the basis that the expert concerned had been instructed to consider and for that reason had not considered the points.

17 I turn, therefore, to the real point, which is whether the scope of the consent order made by Cockerill J, on 21 December 2022, would permit the the additional evidence to be adduced if the amendment were permitted. That order includes a series of recitals, including the fourth, which is in these terms:

> "And upon the second defendant confirming its agreement that expert evidence is reasonably required on option trading in relation to the lost revenue that the claimant alleges it would have been able to generate out of additional put and call options but for the second defendant's conduct...."

The order then goes to provide, at paragraph 1:

> "Paragraph 9 of the directions order be amended to add paragraph (c) as follows:
>
> 'Each party has permission to call at trial evidence from one expert in each of the following disciplines:
>
> …
>
> (c) options trading quantum in relation to the put and call options set out in paragraph 61.1 and 61.2 of re-amended particulars of claim:

(i) the extent to which the alleged or any comparable trades could have been executed in the market as the claimant pleads; and

(ii) an evaluation of the strike prices and premiums that the claimant could have achieved in the market from the execution of the alleged comparable trades...'"

18 Mr Beltrami submits that it is plain the order cannot extend to the issues raised by the opposed amendments because they had not been thought of, much less pleaded at the date when the consent order was agreed. The order was made on 21 December 2022 and the issues encompassed in the opposed amendment had not surfaced as potential issues before 5 May 2023 at the earliest. He draws attention to the fact that, in its current iteration, paragraph 86 (ee) of the defence pleads:

> "If, which is not admitted, Frasers fail to secure access to the market in order to trade further short puts or calls at any time prior to 16 November 2021, it thereby acted unreasonably and failed to mitigate its losses; that Frasers could and should have secured access to the market...had it so wished."

Mr. Beltrami submits that this plea relates to an alleged failure by Frasers to mitigate its losses by gaining access to the market prior to 16 November 2021. I agree with that submission and reject Ms Bingham's suggestion that it was an entirely general plea of failure to mitigate because that is simply to misread what is currently pleaded.

19 It is necessary then to consider the first proposed amendment, the text of which I set out earlier. As is apparent from the text, it refers to what it is alleged Frasers should have done "*...once it regained access to the market...*"; whereas what is currently pleaded is what is alleged should have happened before that point. I accept Mr Beltrami's submissions as far as they go on this issue, but, in my judgment, they break down when the general wording of the consent order is considered. Of course, that language would apply only to questions in issue as they were pleaded at the date when the order was made. However, the issue that arises is whether the order would permit the additional evidence necessary if the opposed amendments were permitted.

20 In my judgment, they would for the following reasons. Firstly, it is common ground that the language in the consent order is wide enough to cover the mitigation issues that are currently pleaded. There is, therefore, no room for the suggestion that currently no evidence relevant to the alleged failure to mitigate has been permitted. That being so if permission is given to widen the scope of the defendant's mitigation case, I see no reason why the evidence necessary to make good the plea as amended should be treated as falling outside the scope of the current order. That approach is consistent with what Mr Beltrami says in his skeleton submissions. He relies on the phrase "*as the claimant pleads*" but that does not assist him if I give permission to amend the defence in the terms sought. There is otherwise no complaint in the skeleton that what Morgan Stanley seek to plead falls out with the scope of the consent order and the challenge focuses on when Morgan Stanley first instructed its expert, Mr Harris, to consider the point. For these reasons, I accept Ms Bingham's submission that, if permission is granted, the expert evidence necessary to make good or challenge the point comes within the scope of the expert evidence permitted by the consent order.

21 In summary, therefore, the opposed amendments are late, but not very late, are sufficiently clearly pleaded and particularised and pass the threshold merits test applicable to late amendments.

22 It follows that whether permission should be granted turns on the balance of prejudice resulting from either granting or refusing the application. This concerns the quality of the explanation offered for the application being made when it was, the prejudice that would be suffered by the claimant if the amendment is permitted and the prejudice that would be suffered by Morgan Stanley if the amendment was not permitted. Contrary to the suggestion made by the claimant, this is not a linear question, with a poor explanation for lateness always being decisive in refusing the application. The process in most cases will be evaluative, although in some cases of lateness the lack of an explanation may be decisive.

23 I turn, therefore, to the delay in raising these points earlier. Although much is made of the point that the issue could have been pleaded earlier in the history of the claim, that point of itself does not go very far in the context of this case. On 27 September 2023, Jacobs J recorded in his order of that date that Morgan Stanley had consented to the claimant's re-re-amended particulars of claim, but then ordered as follows:

> "...
>
> 2. The claimant shall file and serve its re-re-amended particulars of claim within 7 days of the date of this order.
>
> 3. The second defendant shall provide the claimant with a draft re-re-amended defence within 7 days of service of its final expert report..."

24 On 29 September 2023, the re-re-amended particulars of claim were served, on 20 October 2023, Morgan Stanley served its expert reports and, on 8 November 2023, the draft re-re-amended defence was provided within the time identified by Jacobs J in the order referred to as earlier, as extended by agreement. Thus, the claimants have had the proposed amendments since 8 November 2023. It took the claimant until 27 November 2023 to consent to the various proposed amendments other than those currently in dispute and to indicate it opposed the amendments that I am now considering. Whilst it is true that the amendments result from Morgan Stanley's expert evidence served on 20 October 2023, that does not explain why the points were not taken earlier. The point that is made by the claimant is that the substance of the case to which the opposed amendments respond had been pleaded since October 2022. Whilst the figures changed subsequently, the principle was clear and it is submitted that there was no reason not to deploy each the points now relied on much earlier.

25 I agree with that. I asked Ms Bingham about that and, in truth, there is no satisfactory answer to that point, although, in my judgment, it is mitigated to an extent by the order made by Jacobs J referred to a moment ago. Any delay that occurred thereafter is explained by the directions given by him and the extensions then agreed by the parties. There was no reason why instructions to consider the points raised by the proposed amendments could not have been given to the claimant's expert while the process leading to the joint memorandum was taking place given those instructions could not reasonably be thought to be interfering with that process, particularly if the instructions had been to deal with the issue in a supplemental report. In fact, the joint memorandum was signed on 28 November 2023 and

supplemental reports exchanged on 15 December 2023, a week before the hearing of this application. Thus, this mitigates the complaint by the claimant of delay.

26 In my judgment, the delay that occurred does not of itself justify refusing permission to amend, although I accept the claimant could have raised this issue at any time after October 2022.

27 I turn then to the more wide-ranging issues of prejudice. As to that, the claimant accepts that its expert has time to address the issue properly before trial albeit that it would distract attention from preparation for trial. In my judgment, that is significantly less potent in this case than in others because the claimant's case is well-resourced with solicitors and counsel. I regard the disruption that would be caused as being of limited weight in the circumstances.

28 The real point, however, is that any prejudice to the claimant will be outweighed by that suffered by the defendant if not permitted to plead the points it seeks to rely on. It is not suggested that these points are unarguable. As I have explained, the financial implications on the claims faced by Morgan Stanley are clearly significant if the points succeed at trial. By the same token, the effect of not permitting the amendments will give the claimant a substantial financial benefit to which it would not otherwise be entitled, assuming the points made by Morgan Stanley by way of the proposed amendments were to succeed at trial.

29 It is not suggested the amendments will result in wasted work. The work to be done is only additional in the sense of being done later than would otherwise be the case. In my judgment, the disruption that will be caused to the claimant's expert having to undertake up to an additional ten days of work is outweighed by the significance of the points in relation to Morgan Stanley's case. It follows, therefore, that those factors which might justify refusing permission (the lack of an explanation as to why the point was not deployed earlier and the disruption that would be caused by permission being given now) are outweighed by the substantial impact of the points, which it is accepted they are at least realistically arguable; that the points can properly be addressed by the claimant's expert in the time that remains between now and trial; and that the expert evidence necessary to make and resist the proposed amendments comes within the scope of the expert evidence that is currently permitted assuming permission is given.

30 All of these factors firmly lead to the conclusion, in my judgment, that permission should be granted and I grant permission accordingly.

L A T E R

31 The two issues I now have to resolve concern aspects of the costs of the application I determined a moment ago. As Ms Bingham rightly says, there is a distinction to be drawn between, on the one hand, the costs of and occasioned by the making of the application for the amendment and the costs that will follow from the fact that the amendments have been permitted.

32 So far as the second of these factors are concerned, the conventional principle is that the amending party must pay the other party's costs of addressing the amendment. Ms Bingham submits that it would be contrary to the approach of the parties in earlier amendments in relation to amendments by the claimant and that the appropriate order to make is costs in the case in relation to the consequential costs of the amendment. So far as that is concerned, I accept Mr Beltrami's point that the general principle should not be lightly departed from,

and merely because it was departed from on and earlier occasion in this litigation does not lead to the consequence it should be on this one.

33 I agree that the general principle should apply and, therefore, that Morgan Stanley must meet the costs consequential upon the late amendments that it has made.

34 The issue which then remains is as to what I should do in relation the cost of the application. Mr Beltrami submits that the primary result should be that the order be costs in the case because, of the various amendments sought, ultimately his clients conceded all bar the two that I was forced to resolve by the judgment I delivered a moment of ago. Ms Bingham's response to that is that that is wrong. The proposed amendments were substantial, none had been agreed by the time the application for permission to amend was issued and those that were agreed were only agreed after the application had been admitted.

35 In my judgment, therefore, the position is this. The application for permission to amend was necessary because the proposed amendments had not been agreed prior to it being issued. Whilst some of the amendments were agreed subsequently, the two that I dealt with by the judgment I delivered a moment ago remained in contest until the end. I do not for a moment suggest that anyone was acting unreasonably, outside the norm or anything else in relation to the resistance of the application. But the application was resisted. The successful party was the defendant who sought the make the amendments. Therefore, on conventional principles, the costs of the application must be paid by the unsuccessful party, which in this context is the claimant.

36 Therefore, the order that I propose to make is that costs of and occasioned by the application for permission to amend must be paid by the claimant. The costs consequential on the amendments must be paid by the Morgan Stanley in accordance with the conventional principles.

L A T E R

37 The task I now have to undertake is the summary assessment of the defendant's costs of the application for permission to amend. These costs are to be assessed on the standard basis. It, therefore, follows that I should permit recovery of costs only to the extent of the work that it was reasonable and proportionate to carry out, and in respect of such work should only permit recovery of a sum which is both reasonable and proportionate in amount.

38 The first issue which has to be addressed concerns the hourly rates, which it is accepted are substantially in excess of the guideline rates. The guideline rates were amended as recently as three days ago to take account of inflation, and other factors I think as well, in the period since the guideline rates were last fixed. Whilst I fully accept that guideline rates are not to be treated as a fee that applies in all circumstances and for all purposes, it is nonetheless a very significant starting point, with, by definition, any increase on the guideline rates having to be justified on reasonableness and proportionality grounds.

39 Once it is accepted that this is a London 1 case, and I accept that it is, the justification for departing from the guideline rates becomes one which requires clear justification, particularly having regard to the point made by Mr Beltrami that by Commercial Court standards this is not a high value claim, albeit one which is worth in excess of €40 million.

40 I take fully into account that the fact that this was an application of importance for both parties. I take account of the value of the claim as a factor to be borne in mind when

arriving at proportionality, but come firmly to the conclusion that, notwithstanding the value and importance of the application, the application was one which engaged well-established legal principles and is the sort of application which is dealt with in other litigation at relatively what it costs and involving relatively modest amounts of chargeable time. In those circumstances, it seems to me that it would be wrong to assess costs other than by reference to the adjusted guideline rates which applied since 1 January. So, therefore, I assess the costs on the basis of the guideline rates as adjusted three days ago.

41 There are a number of other points which are made by Mr Beltrami. They break down to this. First of all, it is said that the work on documents is in excess of what is reasonable and proportionate, having regard to the very significant hours that have been worked. He makes the point that estimated further work for the period from 19 December is unjustified, at any rate on paper, and, given the size of the fee payable to leading counsel, that is bound to be something which one takes into account in arriving at the appropriate work on document figure.

42 Dealing, first, with the estimated further work for the period of 19 December, I accept the explanation that there was some material that was served after that date which had to be considered. It strikes me, however, that 30 hours of chargeable time by reference to that is in excess of what is reasonable and proportionate. Rather than attempting to adjust each hourly period of time claimed by each of six fee earners concerned, what I propose to do is simply to reduce that across the board by one third. So, for the purposes of calculating the sum which is recoverable, the hours that are claimed must be multiplied by the amended guideline rates and then one-third deducted from that.

43 So far as the work on documents is concerned, again there are substantial numbers of hours involved, including, particularly: drafting the application draft order and the witness statement in support, for which 19.3 hours it is claimed; the preparation for the hearing, including dealing with the timetable for the hearing and hearing bundle, which apparently involved another 15 hours; the preparation of Ms Carty's sixth statement, which apparently involved a further 24 hours of chargeable time; and culminating with the cost statement preparation, which apparently took a further 6 hours. All these times are in excess of what is reasonable and proportionate. Rather than attempting to adjust the hours arrived at for each of the fee earners for each of the categories, I propose to address each of the categories in turn.

44 So far as the first category, drafting the re-amended defence application, is concerned, I would reduce the sum otherwise recoverable by 25 per cent. Thus, the way in which that must be calculated is to take the number of hours claimed, multiple it by the adjusted hourly rate and then deduct 25 per cent.

45 So far as considering the claimant's evidence in response, I allow that in the hours which are claimed.

46 So far as Carty 6 is concerned, a similar adjustment must be made to that, namely a reduction by 25 per cent, as directed in relation to drafting the re-re-amended defence application.

47 So far as reviewing and commenting on the skeleton is concerned, I allow the hours claimed for that as asked as being reasonable in the circumstances.

48 So far as preparation for the hearing is concerned, I apply to that the same adjustment that I applied to the re-re-amended defence application, that is to reduce the sum otherwise recoverable by 25 per cent.

49 So far as the cost statement preparation is concerned, I reduce that by half. There is no justification for spending over 6 hours on preparing a summary costs statement in relation to an application which is down to last for 3 hours.

50 With those adjustments, I assess the costs on a summary basis.

L A T E R

51 This is an application for permission to appeal. The test which I have to apply is well-established by the rules and is whether or not there is a realistic prospect of success in the Court of Appeal or some other the reason for granting permission. Only the first of those two possible grounds is relied upon and the question, therefore, becomes whether there is a realistic prospect of success.

52 In my judgment, there is none at all in the circumstances of this case. This was from first to last a case management decision that had to be made.

53 So far as the interpretation of the order is concerned, I can see no realistic basis for arguing that it could not apply to the proposed amendments given the general terms in which it is expressed. More generally, this was a late, but not a very late, amendment. It was not suggested it could not be accommodated in the time available and the consequences of not permitting the amendment would be very unfair and unconscionable if the point raised by the proposed amendments were to succeed at trial.

54 In those circumstances permission, is refused.

CERTIFICATE

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