



Case No: SC-2019-BTP-000531
AGS/1704493

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice,
London, WC2A 2LL

Date: 05/06/2020

Before :

MASTER GORDON-SAKER

Between :

DEUTSCHE BANK AG

Claimant

- and -

SEBASTIAN HOLDINGS INC

Defendant/Part 20
Claimant

-and-

MR ALEXANDER VIK

Defendant for costs
purposes only

Mr Nicholas Bacon QC and Mr James MacDonald (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**

Mr Benjamin Williams QC and Mr Tom Morris (instructed by **Brecher LLP**) for **Mr Vik**

Hearing dates: 20, 21, 22, 23, 24, 27, 28, 29, 30 April, 1, 4, 5, 6, 7 May 2020 (by Skype)

This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 4 pm on Friday 5 June 2020

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.

.....
MASTER GORDON-SAKER

Master Gordon-Saker :

1. This judgment:
 - a) sets out the reasons for my decision on preliminary issue 4 in the points of dispute: that the fees of Deloitte LLP for the work detailed in paragraph 2.2 of the Summary dated 13th December 2019 (core bundle F/1) are properly recoverable as costs of the action, subject to a determination of whether they were reasonably incurred and reasonable in amount and subject to the disallowance of fees which should properly form part of Deloitte's overheads, such as qualitative reviews and risk assessment; and
 - b) sets out my decisions in respect of counsel's fees for the trial of the action.

The background

2. Pursuant to an order dated 8th November 2013, the Claimant is entitled to 85% of its costs of its claim against the Defendant, Sebastian Holdings Inc., to be assessed on the indemnity basis. The order followed a 44 day trial in the Commercial Court. On 10th October 2016, Mr Vik, a defendant for costs purposes only, was ordered to pay the Claimant's costs awarded against the Defendant.
3. The Claimant is an international bank. The Defendant is a company incorporated in the Turks and Caicos Islands. As Cooke J. found, the Defendant was a special purpose vehicle and "the creature company" of Mr Vik, who was its sole director and shareholder and had effective control of the proceedings.
4. The claim and counterclaim arose out of a trading relationship between the Claimant and the Defendant over 2006 to 2008. In summary, the Defendant and Mr Vik conducted foreign exchange, equities, futures and options trading through the Claimant. That trading was supported by collateral. Following the financial turbulence in 2008, and the resulting losses incurred by the Defendant and Mr Vik, the Claimant made substantial margin calls some of which were not met. The margin calls were in part due to the fact that the Defendant's trading had been under-margined due to errors and shortfalls in the Claimant's reporting and margining systems. The Claimant's claim was for the balances owing on the Defendant's trading accounts.
5. Much of the Defendant's trading had been carried out by its trader Mr Said. The Defendant contended, inter alia, that Mr Said's authority to trade had been limited by oral agreements made between Mr Vik and the Claimant and that the Claimant had allowed Mr Said to exceed those limits and to trade in transactions for which he had no authority. Further the Defendant contended that the Claimant was in breach of its obligations to record and report on Mr Said's trades and to warn Mr Vik of the risky trades that he was entering into. But for these breaches, it was said, the Defendant would not have incurred the losses flowing from Mr Said's trades. Further, because of the Claimant's errors in margining, the Defendant alleged that it had been forced to close out valuable positions, incurring further significant losses. But for those losses, it would have invested those funds in accordance with a "Hypothetical Portfolio"

which would have earned substantial profits. Until trial the Defendant contended that its losses exceeded US\$103bn.

6. At trial, Cooke J. did not accept that the oral agreements alleged by the Defendant had been made or that Mr Said's trades exceeded his authority. While there had been failures in the Claimant's margining systems, he found that the Defendant had been aware of those failures and had taken advantage of them. He also found, *inter alia*, that the Defendant had the ability to meet the margin calls and had not been forced to close out its positions. The Claimant recovered judgment for US\$243m and successfully defended the counterclaim, reduced at trial to a sum still in excess of US\$8bn.
7. This was a huge piece of litigation and was hard fought. There were substantial interlocutory skirmishes, including over jurisdiction. The Claimant's disclosure involved the manual review of over 1.5 million documents, with about 200,000 documents disclosed. The parties served 54 statements of witnesses of fact and 40 experts' reports. There were 10 joint 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 ran to 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.
8. The costs claimed by the Claimant against the Defendant and Mr Vik are in excess of £53m. The Defendant did not serve points of dispute and, so far, has neither attended nor been represented at the detailed assessment hearing which presently is adjourned part-heard.

Preliminary issue 4 – the points of dispute

9. The fees of Deloitte are claimed at items 1,707 to 1,734 in the bill. They are described as disbursements paid directly by the Claimant in respect of "Forensic Loss, Margin Calculation, Equity Valuation and Computer Forensic experts and litigation advisors". The total sum claimed is apparently about £24m.
10. The points of dispute served by Mr Vik complain that the information disclosed by the Claimant in respect of Deloitte's fees is insufficient. At that time the Claimant had served only Deloitte's invoices, which contained limited information. For example the first invoice, for July and August 2011, (item 1,707) identifies the fee earners by name, their grades and daily rates, and the time each person spent on each day, but does not identify the work that they were doing. In later invoices further information is provided and the amount of time spent by each fee earner in respect of specific workstreams is identified. The invoices between February and May 2012 identify workstreams with a broad description of the work being done. From June 2012 the workstreams are identified rather more baldly. For example the invoice for June 2012 (item 1,717) shows the following headings without further description: "Leadership team and project management", "Claim", "Counterclaim", "Litigation Support", "Experts" and "Disclosure Review". These headings change as the case progresses.
11. Mr Vik served a request for further information under CPR Part 18 with his points of dispute and he complained in the points of dispute that he had no idea of the activities

done, the identities of the individuals, their experience, charge out rates, why it was necessary to do the work and how the work related to the issues upon which Deloitte gave expert evidence.

12. The Claimant chose not to answer the request for further information directly and, given that the information sought would be the subject of litigation privilege, the Defendant chose not to press for a response. Instead the Claimant provided a 22 page narrative account of the work done¹ dated 13th December 2019 (“the Summary of Work Performed”) which was produced under the oversight of Miss Elizabeth Gutteridge, one of the lead partners at Deloitte.

13. At the directions hearing on 31st January 2020 the parties agreed that the court should decide as a preliminary issue:

Whether the Court should (1) analyse the evidence served by the Claimant in response to Mr Vik’s request for further information dated 26 July 2019 and if so, (2) give directions addressing the sufficiency of that evidence; and (3) if so, whether the evidence relied on by the Claimant is sufficient, and, if not, what further evidence the Claimant is to serve and by when.

14. At the hearing of the preliminary issues I decided that it was not for the court to advise a party on whether its evidence is good enough and, if not, how to plug any deficiency. The Claimant offered to produce further monthly summaries describing the work done by Deloitte but, fearing that they would not be produced in time for the assessment, requested an adjournment, which I refused.

15. The Claimant has however produced monthly summaries for July 2011 to December 2011 which give a better description of the work done in those months. As I understand it the Claimant has now served further summaries for the remaining months.

16. After the complaint about the lack of information as to what Deloitte was doing, Mr Vik contends in preliminary point 4 of the points of dispute that he is not liable to pay any of their fees for 10 reasons:

- 1) Mr Vik cannot be liable for fees incurred before the date on which permission was granted for forensic accountancy evidence. That argument was not pursued by Mr Williams QC on behalf of Mr Vik.
- 2) Work done in identifying and extracting data from the Claimant’s systems for disclosure should have been done by the Claimant. Further this work did not require expert forensic accountancy skills.
- 3) Mr Vik should not be liable for work done “educating, liaising [and] appraising” the Claimant of the nature of its own systems. This information should have been available to the Claimant from its own employees.
- 4) Mr Vik should not be liable for work done in “addressing, investigating and opining on the errors, inaccuracies and inconsistencies” in the Claimant’s

¹ Summary of work performed by Deloitte LLP on behalf of Deutsche Bank AG in the English Action from July 2011 to November 2013

systems including work done on structured data, unstructured data or which arose from the Claimant's own systems failings. The last did not result from the proceedings and in any event should have been done by the Claimant's own staff.

- 5) The extensive work of reconstruction undertaken by Deloitte was not required by the orders permitting expert evidence.
 - 6) Mr Vik should not be liable for the work done in "addressing, investigating and opining" on the inadequacies of the Claimant's systems or their inability to book, value or margin the transactions, or to report MTM and margin calculations. Again, it is said, this work arose from the failings in the Claimant's systems and should have been carried out by the Claimant's own staff.
 - 7) The work done by Deloitte in assessing the sums claimed by the Claimant (specifically the sums under the Equities Account/GPF agreements and the FX Account/FX agreements) arose from the failings in the Claimant's systems and should have been undertaken by the Claimant's own staff. The Claimant should have been able to quantify its own claim.
 - 8) Mr Vik should not be liable for work done outside the scope of the orders directing expert evidence, including work done on the Hypothetical Portfolio, the issues outside the scope of paragraph 4 of schedule 1 of Order 1 of 10th October 2012,² and the experts' meetings in January, February, April and May 2013.
 - 9) Mr Vik should not be liable for any costs exceeding any estimates given to the court pursuant to CPR 35.4(2).
 - 10) Mr Vik should not be liable for work which did not constitute expert activities within the scope of the orders permitting expert evidence, or which could have been undertaken by the Claimant or its solicitors at lesser cost. The workstreams described as "litigation support", "disclosure" and "data support" appeared to fall within that category.
17. Finally, upon the production of "detailed time sheets" it was likely that Mr Vik would contend that the hourly rates of certain fee earners are unreasonable and that there will be multiple instances of duplication, non-progressive work and work which could have been delegated.

Preliminary issue 4 – Deloitte's role in the litigation

18. The work done by Deloitte fell under 6 main workstreams, identified in the Summary of Work Performed:

² Paragraph 4 permitted forensic accountancy expert evidence on "What value (or what range of values) could properly have been calculated as representing the margin requirement for the Equities Account (as defined in the RRADCC) on (a) 3 September 2008, and (b) 22 October 2008, pursuant to the terms of the applicable contractual documentation in circumstances (i) where that account included the Vik FX transactions and (ii) where that account did not include the Vik FX transactions."

1) Data and systems

This involved identifying the relevant systems used by the Claimant, identifying the data in the systems that was relevant to the issues in the proceedings, considering whether the data should be disclosed, extracting the data in a way that would make it accessible to the parties' experts and providing information to the Defendant's experts to assist them with understanding the data and the Claimant's systems. Deloitte also attended meetings with the Defendant's experts (Acumen and Capital Market Risk Advisers, and later Grant Thornton) to answer their questions on the data and systems and produced substantial documents for them summarising the data and systems. This work is explained in greater detail in paragraphs 2.3 to 2.7 of Deloitte's Summary of Work and paragraphs 51 and 52 of the Claimant's disclosure statement (core bundle J/1).

2) Disclosure reviews

This involved considering the documents in the Claimant's disclosure for the purpose of the expert work and the preparation of the trade list, reconciliations and matrices. This involved considering about 200,000 documents from the Claimant's unstructured data disclosure over two periods in 2012.

3) The trade list, reconciliations and matrices

The order made by Eder J. dated 17th February 2012 required the parties to meet to agree lists of the transactions entered into by Mr Said through the Claimant and the FX Transactions entered into by the Defendant through Mr Vik which the Claimant booked to the Equities Account, to be based on draft lists to be provided by the Claimant's expert to the Defendant's expert, and to identify the trade data disclosed relating to those transactions. The meetings are described in paragraph 22 of the first witness statement of Mr Inglis dated 17th May 2012 (core bundle J/3).

Deloitte produced a list of trades conducted by the Defendant in respect of both the Global Prime Finance ("GPF") and the Foreign Exchange ("FX") prime brokerage arrangements, which was amended following meetings with the Defendant's experts who had produced their own list of trades. Following the appointment of Grant Thornton as the Defendant's forensic accountancy experts, further amendments were made and an adaptation of the lists was produced by Deloitte for both parties' experts to use.

Work was also done by Deloitte in producing reconciliations:

- i. A cash flow matrix and cash flow reconciliation which presented the cash flows arising on individual FX trades on

each of the relevant dates in the dispute. They were produced to the Defendant's experts.

- ii. A realised profit and loss matrix showing the cash flows associated with each FX trade when they were realised rather than settled.
- iii. An FX account balance matrix to identify when the trading limits alleged by the Defendant were breached. This showed the daily FX account balances over the relevant 2 years.
- iv. A reconciliation of the balances of the Defendant's "pledged account" at DB Suisse over the same period.

4) Expert reports

Expert reports were produced by Deloitte in 4 areas:

- i. Mr Inglis (forensic accountancy) – dealing with the valuation of the claim and the counterclaim and the errors and inaccuracies in the Claimant's systems. Considering the effects of the alleged trade limits under 6 scenarios, the direct losses alleged by the Defendant under 7 scenarios and the loss of profits alleged by the Defendant under 6 scenarios. Analysing the margin calls made under 6 scenarios and 6 different margin approaches. Calculating the range of values for margin requirements. Analysing the Defendant's hypothetical portfolio. Analysing the errors alleged by the Defendant and the possible effects of any errors and inaccuracies in the Claimant's systems.
- ii. Mr Millar (value at risk) – calculating the value at risk using three different approaches, and the credit support amount, using six margin approaches, for every business day in the period in respect of the Defendant's FX trade populations for six alternative scenarios.
- iii. Mr Robinson (market value) – the range of market values of certain shareholdings in 9 companies.
- iv. Mr Sealey (computer forensics) – the authenticity of the hypothetical portfolio.

Meetings were also held between Deloitte and Mr Malik of Navigant who provided expert evidence on behalf of the Claimant in respect of the classification of trades and the valuation of positions.

5) Litigation support

This work involved attending the case management conferences at which work to be done by Deloitte would be considered, commenting on requests for further information and responses to requests made by the Defendant, the preparation of witness statements by Deloitte

personnel, attending at court during the trial to assist with questions and issues which arose, calculating interest, meeting and communicating with the Defendant's experts (Grant Thornton) and answering their queries, assisting the Claimant's solicitors with answering questions by the Defendant, and contributing to the opening and closing submissions.

6) Leadership team and project management

Apparently about 200 people at Deloitte were engaged in work on this case at some stage. They needed to be managed and there had to be a senior interface with the Claimant's solicitors. It is recorded at paragraph 2.58 of the summary that:

A small number of individuals (approximately six) were responsible for conducting an independent qualitative and professional standards review as part of Deloitte's quality and risk management processes.

That, it seems to me, should be part of Deloitte's overheads, rather than charged for separately. It is a requirement of Deloitte that they risk manage and review the quality of their service. It is not a consequence of the litigation.

Preliminary issue 4 – Mr Vik's case in outline

19. Mr Vik's argument is not that all of Deloitte's fees are not recoverable, but that much is not. In particular the Claimant is not entitled to recover fees for work in marshalling the facts for the experts, or general assistance in the litigation, or which resulted from deficiencies in the Claimant's own systems and records. The Claimant, it is said, must prove that the work done was of an expert nature, that it falls within the scope of the costs order and that the work was of and incidental to the litigation. Where the work is properly of an expert nature, the Claimant must prove the amount of time spent by each fee earner before the court can consider the reasonableness of the charges.
20. Mr Vik argues that, even though the assessment of the Claimant's costs is on the indemnity basis, the Claimant must still prove what was done and why. The benefit of the doubt given to the receiving party in an assessment on the indemnity basis by CPR r.44.3(3) does not enable that party to recover by assertion rather than proof. Where there is a lack of evidence which could have been provided, the court should not be anxious to plug the gap by approximation.

Preliminary issue 4 – the Claimant's case in outline

21. The Claimant contends that the recoverability of Deloitte's fees has already been the subject of judicial determination. When ordering the Defendant to pay the costs, Cooke J. rejected the Defendant's argument that it should not be liable for the costs of reconstructing the Claimant's records and systems. On the appeal from the order that Mr Vik should pay the costs, the Court of Appeal concluded that there was no reason why Cooke J. should have excluded the experts' fees from the costs which Mr Vik should be liable to pay.

22. The work done in extracting the data and analysing the data extracted could not have been done by the Claimant's own employees or its solicitors. The work done as a result of the deficiencies in the Claimant's systems was required only because of the claim and counterclaim. This is not legal work, that is, work normally done by lawyers.

Preliminary issue 4 – the legal principles relevant to whether Deloitte's fees are recoverable in principle

23. Costs will be recoverable in principle if they fall within each of three strands identified by Megarry V-C in *Re Gibson's Settlement Trusts* [1981] Ch 179 at 186:
- 1) they must be of use and service in the claim;
 - 2) they must be relevant to an issue in the claim; and
 - 3) the need for the work must be attributed to the paying party's actions or omissions.
24. Recoverable costs must arise from the litigation and costs are not recoverable if they are merely the costs of being a litigant.³ The costs of marshalling the facts are generally not recoverable because they are the costs of being a litigant. However, as Dr Friston suggests, each case will turn on its own facts.⁴
25. Despite that suggestion I was referred to a number of authorities.
26. In *Re Nossen's Patent* [1969] 1 All ER 775, the United Kingdom Atomic Energy Authority was entitled to its costs of a claim for compensation for infringement of letters patent. The Authority claimed the cost of research and experiments carried out by its own staff to investigate the scope of an exclusion set out in the main claim of the letters patent and the accuracy of a representation in the body of the specification. The taxing master allowed some of these costs.⁵ On appeal, Lloyd-Jacob J. reduced the sums allowed but accepted that, in principle, a party may recover costs in respect of technical work done by its own staff:

The established practice of the courts has been to disallow any sums claimed in respect of the time spent by the litigant personally in the course of instructing his solicitors. In the case of litigation by a corporation, this has not been strictly applied,

³ *London Scottish Benefit Society v Chorley* [1884] 13 QBD 872 at 877 per Bowen LJ: "only legal costs which the Court can measure are to be allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessarily caused by the course which it takes. Professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual."

⁴ *Friston on Costs* (3rd ed) 49.107

⁵ "I allowed, broadly speaking, the fees and salaries of those actively engaged in the experiments. I also allowed the costs of the materials and stores used, and electricity, steam, water, etc. I did not allow the overhead expenses for buildings, plant and equipment, nor did I allow works and group overheads. The expenses in connection with the [authority's] qualified staff carrying out these experiments are allowable only on the basis of qualifying fees in connection with expert evidence necessary to the defence of the action. This I considered right as the experiments would otherwise have been carried out by outside experts. I allowed not only the charges I have indicated for the experiments, but also certain charges of the patents staff on making searches and enquiries."

for it has been recognised that, if expert assistance is properly required, it may well occur that the corporation's own specialist employees may be the most suitable or convenient experts to employ. If the corporation litigant does decide to provide expert assistance from its own staff, as happened in this case, the taxing master has to determine the appropriate charge to allow. For an outside expert, the normal assessment would be based on current professional standards, and this in suitable cases would include a proper proportion of the overhead costs of running his office or laboratory, that is, of the costs necessarily incurred by him in his capacity as a consultant, as well as a profit element on such expenditure.

27. An example of the general rule on fact-marshalling is *Richards & Wallington (Plant Hire) Ltd v Monk & Co* [1997] Costs LR 79. Bingham J. (as he then was) upheld the taxing master's decision that the cost of work done by two employees of the receiving party in formulating a claim under an earth-moving contract were not recoverable:

... these two gentlemen were engaged on a factual exercise; they were certainly not independent experts; they were not, in truth, acting as experts at all and, in my judgment, these costs fall within the ordinary costs that a litigant must bear of digging out his own factual material, through his own employees, to prove his own case. Had outside experts been introduced to carry out this work then it by no means seems to me to follow that it would in any event have been recoverable as a cost of the litigation.

28. Both *Nossen* and *Richards & Wallington* were considered by Stanley Burnton J. (as he then was) in *Admiral Management Services Ltd v Para-Protect Europe Ltd* [2003] 1 Costs LR 1. Costs were sought by the claimant for work done by its own employees in examining the computers of the defendants, who had previously worked for the claimant. Following *Nossen*, it was held that:

the reasonable costs of the claimant's expert employees in investigating, formulating and presenting the claims against the defendants from the time that the claimant formed its suspicion of their wrongs that were the subject of the claim in these proceedings may qualify for an order for costs.

...

If a sufficiently high level of expertise is required in order to recover from such a computer documents evidencing wrongs committed by that or other defendants, in my judgment the recovery of those documents might be the subject of expert evidence, and in any event may properly be the subject of an order for costs. There is no sufficient distinction between such work and that carried out in *Nossen's* case and made the subject of a costs order. Similarly, if a sufficiently high level of expertise is required to ascertain whether documents saved on a

computer are derived or copied from documents of the claimant, that work too may be the subject of an order for costs.

29. However the issue arose on an argument about the incidence of costs rather than on appeal from a detailed assessment and the court left the question of whether this work was sufficiently expert or not to the assessment.
30. In *Sisu Capital Fund Ltd v Tucker* [2005] EWHC 2321 (Ch) the respondent liquidators and administrators, partners at KPMG, sought to recover the costs of employees of their firm in doing work which “if undertaken by a litigant (or his employees) who instructs solicitors and counsel, would not ordinarily give rise to a liability to a paying party under a costs order, for instance, time spent in reviewing documents for disclosure, in assisting in the preparation of witness statements and in attending court hearings”. The respondents’ argument was that they should be in a similar position to solicitors who acted for themselves. Following the authorities referred to above, Warren J. concluded:

Accordingly, in my judgment it is only those parts of the KPMG costs which fall within the *Nossen* principle which can be brought into account on the detailed assessment. I do not understand that any part of the costs which are, on that basis, to be brought into account have arisen as a result of time spent by the office-holders personally. However, for my part, I can see no difference in principle between time spent by an employee of KPMG and time spent by the office-holders personally and would allow time spent by the office-holders personally on truly expert matters to attract the same costs treatment as time spent by employees.

31. The Competition Appeals Tribunal has sensibly concluded that technical knowledge available in-house which is required for the day-to-day operation of the business would not qualify as expert evidence: *Floe Telecom v Office of Communications* [2006] CAT 18.
32. Apart from a spanner thrown into the works by HH Judge Thornton QC in an unreported decision in the Technology and Construction Court, which was thrown back out by Warren J. in *Sisu*, the authorities are fairly consistent: the costs of work done by the employees of a litigant which is of an expert nature and not simply the marshalling of facts may be recoverable in principle.
33. Of course in the present case we are not concerned with the costs of work done by the Claimant’s employees. The submission on behalf of Mr Vik is that some of the work done by Deloitte should have been done by the Claimant’s employees and that it was fact-marshalling rather than expert work. Conversely the argument on behalf of the Claimant is that this was expert work, had it been done by the Claimant’s staff the cost would be recoverable, and the cost of having it done by outside contractors should also be recoverable in principle.

Preliminary Point 4 – the indemnity basis

34. Because of the complaint in preliminary point 4 that the fees of Deloitte were not clear, both leading counsel addressed me on the effect of this being an assessment on the indemnity basis. The relevant provisions in the rules are:

44.3

(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

- (a) on the standard basis; or
- (b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

- (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
- (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

44.4

(1) The court will have regard to all the circumstances in deciding whether costs were –

- (a) if it is assessing costs on the standard basis –
 - (i) proportionately and reasonably incurred; or
 - (ii) proportionate and reasonable in amount, or
- (b) if it is assessing costs on the indemnity basis –
 - (i) unreasonably incurred; or

(ii) unreasonable in amount.

35. The differences between assessments on the standard basis and on the indemnity basis are therefore: (1) on the indemnity basis the court may allow costs which are disproportionate; and (2) on the indemnity basis the receiving party receives the benefit of any doubt as to reasonableness. I was referred to a number of authorities where judges have referred to the burden of proof in assessments on the standard basis and the indemnity basis. It seems to me however that these are simply restatements of the rules rather than authority for a different approach.
36. In an assessment on the indemnity basis the court is not permitted to allow costs which have been unreasonably incurred or are unreasonable in amount: r.44.3(1). While it will resolve any *doubt* which it may have as to whether the costs were reasonably incurred or were reasonable in amount in favour of the receiving party (r.44.3(3)), it must still be satisfied that the costs claimed were actually incurred by the receiving party and that they fall within the scope of the costs order. Insofar as a receiving party with the benefit of an indemnity basis costs order cannot simply assert that it has incurred a sum of costs without evidence, then there can be said to be an evidential burden on it. Put another way, the receiving party will have to produce to the court sufficient information to enable it to decide whether the costs were reasonably or unreasonably incurred or are reasonable or unreasonable in amount. The task set under r.44.3(1) cannot be conducted in a vacuum.

Preliminary Point 4 – are Deloitte’s fees recoverable in principle?

37. The answer, to my mind, is an obvious “Yes”.
38. First, the work done by Deloitte identified in the Summary of Work Performed was expert work or work incidental to expert work.
39. Second, the work was of such magnitude that the Claimant could not reasonably be expected to do it in-house. However had this work been done in-house by the Claimant’s own staff, it would have fallen within the *Nossen* principle, and the costs of doing it would have been recoverable.
40. Third, the work, including the work spent in remedying the gaps in the Claimant’s data and systems, was required only because of the Defendant’s failure to pay the sums due to the Claimant and the Defendant’s pursuit of an unsuccessful counterclaim. Although Mr Williams QC asserted, on behalf of Mr Vik, that the Claimant would have been required to correct errors in its systems in any event, there was absolutely no evidence of that.⁶ That in 2011 and 2012 the Claimant was filling

⁶ These arguments are not new. On Mr Vik’s appeal from the non-party costs order, Moore-Bick LJ recorded: “Mr. Cogley [Leading Counsel for Mr Vik] submitted that even if the judge had been entitled to make an order for costs against Mr. Vik, he ought to have excluded from the Bank’s costs the very considerable amount (about £23 million) which represented the fees of the forensic accountants who were instructed to calculate the position of Sebastian on a daily mark-to-market basis throughout the period of trading. Those were records which, it was said, the Bank should have maintained in the ordinary course of business; Mr. Vik could not fairly be held responsible for the costs of creating records that ought to have existed in any event. Mr. Foxton [Leading Counsel for the Claimant], however, said that the Bank did not ordinarily keep records of that kind, because it was unnecessary to concern itself with a client’s fluctuating exposure; what mattered was the value of a position when it was closed out. It became necessary to construct a history of Sebastian’s trading only because it alleged in its defence that the Bank had been in breach of an agreement to

the gaps and correcting the errors in its systems for the period from 2006 to 2008 would suggest the very opposite. Clearly this work was done only because of the claim and counterclaim.

41. Data and systems

While identifying and extracting data relevant to the claim and counterclaim could be described as marshalling the facts, or marshalling the evidence, the size and complexity of this task made this expert work. 60 proprietary and third-party systems were investigated and data was extracted from 23 systems. While one might expect a party to have an understanding of its own systems, the number of systems and the different types of transactions covered by those systems would very obviously make this work suitable for experts. The 23,000 hours spent on this work,⁷ make this fairly obviously work which could not be done by an in-house team at even a well-resourced international bank. Even if it had been done in-house it would fall into the sort of in-house expert work envisaged by Stanley Burnton J. in *Admiral* and the costs would be recoverable on that basis.

The expertise of this work is demonstrated by the documents produced by Deloitte which explained the systems and the interactions of the systems (described in paragraph 2.6 of the Summary of Work Performed) and is also demonstrated by the 29 hours of meetings with the Defendant's experts at which the systems and data extracted from them were explained (described in paragraph 27 of the narrative to the Claimant's bill).

42. Disclosure reviews

The work done by Deloitte involved reviewing about 200,000 documents from the Claimant's unstructured data disclosure to inform the work done on the experts' reports and the lists, reconciliations and matrices which they prepared. Although carved out as a separate workstream it is work which was ancillary to the other workstreams and so stands or falls with them.

43. The trade list, reconciliations and matrices

The production of a draft trade list prepared by the Claimant's expert was a requirement of the order of Eder J. dated 17th February 2012. This was clearly expert work as was the preparation of the reconciliations and matrices listed in paragraph 2.14 of the Summary of Work Performed. This is the sort of work that expert forensic accountants do. It is not the marshalling of facts, it is the analysis of the data which has been extracted.

Insofar as work was done to produce that data because of failings in the Claimant's systems, it is in my view still expert work and, because the work done was attributable to the Defendant's acts or omissions, it is properly recoverable against the

ensure that in the course of its trading Sebastian's exposure did not exceed certain daily limits based on market valuations and that transactions outside those limits were unauthorised." [2016] EWCA Civ 23

⁷ Paragraph 26 of the Claimant's bill narrative

Defendant and therefore against Mr Vik. There is no evidence that it would have needed to be done but for the claim and counterclaim.

Cooke J. was of the same view for, when giving reasons for his decision on the costs of the action, he said:⁸

[Leading counsel for the Defendant] then referred to the deficiencies in the bank's 19 systems, and said that much cost was incurred in that context. The whole of that exercise essentially occurred because of the stance which SHI was taking. First, of course, Mr Said wanted to trade EDTs and OCTs that he knew DBAG's systems were incapable of valuing, and it was SHI that put valuation and margin in issue, and thereupon the investigation of the bank's systems took place, at enormous cost.

44. Experts' reports

Patently this is expert work.

45. Litigation support

In principle the work described is recoverable because it is ancillary to the expert work of preparing the experts' reports and analysing the data. Although I anticipate that some of the work described could sensibly be challenged on the basis that it was not reasonably incurred, that is not the issue that presently I am deciding.

46. Leadership team and project management

Again this is recoverable in principle because it is ancillary to the expert work. Oddly all or most of the work done by Mr Inglis is attributed to this workstream even though he was the main Deloitte expert. However that is not a reason to disallow it. As I stated during the hearing, time spent "conducting an independent qualitative and professional standards review as part of Deloitte's quality and risk management processes" should fall within their overheads rather than be chargeable separately. It does not fall within any of the three strands in *Re Gibson's Settlement Trusts*.

Preliminary issue 4 – has the Claimant produced sufficient evidence of Deloitte's fees?

47. It is still too early to answer this question because the further details of the work done have been provided to Mr Vik only since the hearing to which this judgment relates. While I cannot therefore answer this question finally, I can give an indication as the further details are, I understand, similar to the monthly summaries already served.

48. In my experience no other profession records its time in the same way as solicitors. Not even counsel. Paragraphs 5.12 to 5.22 of Practice Direction 47 sets out detailed requirements for how solicitors' work should be claimed in a bill. There are no similar requirements for disbursements.

⁸ Judgment on costs 8th November 2013

49. Paragraph 5.2 of Practice Direction 47 requires the receiving party to serve with the bill “copies of the fee notes of counsel and of any expert in respect of fees claimed in the bill” and “written evidence as to any other disbursement which is claimed and which exceeds £500”.
50. In most detailed assessments, the fee notes of the experts instructed will contain limited information. Often they will be for a gross sum without a breakdown. Sometimes there will be a breakdown itemising the work that was done and the hourly rate. But I do not recall ever seeing an experts’ fee note which contains the same level of detail as that required of solicitors.
51. This is not the first detailed assessment in which I have seen very large sums claimed for work done by accountants with only broad descriptions of the work done. We will not have the working papers of Deloitte or attendance notes or file notes made by them. We will probably have only the products of their work, communications between them and the Claimant’s solicitors and attendance notes of meetings at which both they and the solicitors were present. There will therefore be evidence of the work that they did. Whether that evidence justifies the time claimed in any particular fee note will have to await the line by line assessment.
52. Inevitably the way that disbursements are claimed means that they are assessed with a broad brush. The court cannot scrutinise every item of work done by an expert in the way that it scrutinises work done by solicitors. Provided that there is evidence to show the work that was done by the expert then the court can make an assessment of whether it was reasonable for the receiving party to incur the cost of doing that work and whether the sum claimed is reasonable. Where the assessment is on the indemnity basis and the court has doubt as to whether it was reasonable to incur the cost of doing the work or whether the sum claimed is reasonable (but not doubt as to what work was done) the receiving party will get the benefit of that doubt.

Counsel’s fees for trial

53. The objections to counsel’s fees are contained in Mr Vik’s points of dispute at 377, 379, 387, 435, 437, 438, 445, 446, 461, 478, 484, 496, 501, 506, 510 and 513. Broadly, Mr Vik contends:
 - 1) Counsel’s brief fees are unreasonable in amount.
 - 2) Leading counsel’s refresher fees are unreasonable in amount.
 - 3) Separate fees for work done by Mr Foxton QC after delivery of the brief are not recoverable.
 - 4) Refreshers paid in respect of non-sitting days are not recoverable.
 - 5) Work done on skeleton arguments, opening submissions and closing submissions are included in counsel’s brief fees.
54. The submissions of Mr Williams QC and Mr Bacon QC on these issues were interposed on day 13 of the detailed assessment hearing. By then I had already made decisions on a significant number of counsel’s fees in respect of interlocutory

hearings, consultations, advice and drafting, including a decision that the reasonable hourly rate for Mr Foxtton QC was £700 rather than £750.

55. Four counsel were instructed to represent the Claimant at trial: Mr Foxtton QC, Miss Tolaney QC, Mr King and Mr MacDonald. All were closely involved before the trial. Miss Tolaney QC took silk in 2011 and so, for the first couple of years of these proceedings, was a junior. As I have stated at least several times during the course of the detailed assessment, it seems to me, given the size and weight of the case, that it was reasonable for the Claimant to instruct 2 Queen’s Counsel and 2 junior counsel.
56. The brief fees claimed and offered by Mr Vik are:

Counsel	Brief fee claimed	Mr Vik’s offer
Mr Foxtton QC	£1,500,000	£750,000
Miss Tolaney QC	£900,000	£600,000
Mr King	£496,000	£300,000
Mr MacDonald	£400,000	£200,000

Counsel’s fees – the principles of the assessment of brief fees

57. There is no real issue between the parties as to the correct principles to be applied on the assessment of brief fees. Both Mr Bacon QC and Mr Williams QC took me to a well-known passage in the judgment of Pennycuick J. in *Simpsons Motor Sales (London) Ltd v Hendon Corpn* [1964] 3 All ER 833 that the reasonable brief fee that should be allowed is the fee that:

... a hypothetical counsel, capable of conducting the case effectively, but unable or unwilling to insist on the higher fees sometimes demanded by counsel of pre-eminent reputation, would be content to take on the brief: but there is no precise standard of measurement and the judge must, using his or her knowledge and experience, determine the proper figure.

58. In the course of oral submissions Mr Bacon QC suggested that in considering this passage one should bear in mind that the learned judge was applying the rather more stringent test under r.28(2) of the Supreme Court Costs Rules 1959,⁹ whereas on this assessment there is no test of necessity.
59. While I would have a natural reluctance to cast aside a test that costs judges have been applying daily for nearly 60 years, it seems to me that Pennycuick J.’s formulation is as good a definition of reasonableness as it is of necessity and propriety. In any event it remains binding on me as it continues to be referred to as correct: see, for example paragraph 24 of the judgment of Hickinbottom J (as he then was) in *Evans v SFO* [2015] EWHC 1525 (QB).
60. Mr Bacon QC sought to rely on the amount of counsel’s fees incurred by the Defendant. Based on the Defendant’s schedule of costs for the Pre-Trial Review he

⁹ “...there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.”

put these at about £7.5m, being what was then incurred and estimated plus 10%, as suggested by the Defendant's leading counsel. As against that the Claimant has incurred total counsel's fees of about £6.3m.

61. Again there was no real dispute as to the law on comparison. Mr Bacon QC submitted that it is legitimate to have regard to the sums paid by the Defendant, quoting the decisions in *Lord High Chancellor v Wright* [1993] 1 WLR 1561 and *Lord Chancellor v Rees* [2008] EWHC 3168 (QB). To those could be added the comments of Lawrence Collins J. (as he then was) in *Orwin v British Coal Corporation* [2003] EWHC 757 (Ch), referring to *Simpsons Motor Sales*:

In these days, where summary assessment has proved a very useful tool in doing justice and preventing unnecessary applications, I am sure that looking at the fees incurred by the opposing party has become a more important factor (although still in no way conclusive) in the assessment process than it was in 1964. I see no reason why this should not also be true in the process of detailed assessment.

62. Mr Williams QC did not disagree that comparison is a relevant factor but warned of the dangers of an arms race where each side is willing to incur the cost of pre-eminence.
63. I accept therefore that the fees incurred by the Defendant are a relevant factor. However we have no information as to what part of the estimated £7.5m related to brief fees or refreshers. It may be that the Defendant's counsel were more involved in work before trial and that a larger proportion of their fees relates to that and a smaller part relates to the trial. We simply do not know.
64. Finally, Mr Bacon QC reminded me of the 8 pillars of wisdom in CPR 44.4(3). It seems to me that all of those factors apart from the last (as there was no costs budget) are relevant in this case.
65. Another factor in the assessment of brief fees is what work was included in the fee. Before turning to the reasonableness of the amount of the fees I must first decide the other issues raised by Mr Vik, apart from those relating to refreshers.

Counsel's fees – separate fees for work done after delivery of the brief

66. The Claimant disclosed to the court, but not to the Defendant, letters from counsel's clerks setting out the terms on which the brief fees were agreed. With the consent of Mr Bacon QC I read out the relevant parts of the letters. In relation to the fees of Mr Foxtton QC the agreement was that the brief fee of £1.5m would "cover all preparation from the 12th November 2012 and other work carried out relating to and/or in connection with the case ... from the date when the first stage payment is due." "Opening written submissions are included within the brief fee." However "evidential work – witness statements, experts reports and pleadings" done before 8th December 2012 was not included.
67. At paragraphs 26 to 28 of his skeleton argument on brief fees Mr Williams QC identifies 69.4 hours of work done by Mr Foxtton QC after delivery of the brief on 12th

November 2012 for which separate charges have been made. They include preparing for and attending consultations, perusing papers, reviewing research, working on and reviewing experts' reports, working on the case and carrying out research.

68. The leading authority on what is and is not included within a brief fee remains the decision of Hobhouse J. (as he then was) in *Loveday v Renton (No 2)* [1992] 3 All ER 184:

In assessing a brief fee it is always relevant to take into account what work that fee, together with the refreshers, has to cover. The brief fee covers all the work done by way of preparation for representation at the trial and attendance on the first day of the trial. But in heavy litigation, particularly where there is a team of barristers and experts, additional work is involved in ensuring that the client is properly represented and his case fully developed beyond simply appearing in court. In this litigation counsel had to meet together to consider their strategy and tactics and prepare material. They also had to have meetings with their experts, including meetings with experts from abroad, prior to their going into the witness box to give their evidence. Some of these meetings were lengthy and took place at weekends.

...

Skeleton arguments, dramatis personae, chronologies etc are now required for a wide range of proceedings in court and in chambers. To some extent it has always been an incident of advocacy that forensic documents may have to be produced. Unless some different agreement is made, the brief fee must take all this into account.

69. Accordingly he upheld the disallowance of fees for inter-counsel consultations after the date of delivery of the brief and disallowed the fees for the preparation of final written submissions, as these were respectively part of the preparation for and representation at trial, which were covered by the brief fee.
70. Mr Williams QC referred to the decision of Cooke J. in *XYZ v Schering Health Care* [2004] EWHC 823 (QB):

It is plain from this decision [*Loveday*] that there is no basis for charging as separate items meetings with experts which are part of the preparation for trial after delivery of a brief. No matter what limited opportunity there has been beforehand to meet with experts and to understand the contents of their reports, this is preparation for the trial which should be included in the brief, which itself should be fixed at a sum which is sufficient to include all such matters. It is only in a very exceptional case that there would be scope to depart from this principle. If the whole shape of a case were to change by reason of an amendment to pleadings or a fresh expert report was adduced

which fundamentally changed the nature of the dispute, then it may be possible to say that there is work which falls outside the ambit of the original brief.

71. At present I can decide this only as a matter of principle. I have not had the benefit of submissions on the individual items objected to.
72. A party may of course agree whatever it likes in relation to the payment of counsel's fees. However it cannot recover from the paying party costs which it is not liable to pay. If the Claimant is not liable to pay separate fees for work done which falls within the agreed brief fee, it cannot recover them from Mr Vik.
73. The only exclusion from the brief fee for work between 12th November 2012 and 8th December 2012 is "evidential work – witness statements, experts reports and pleadings". It will be necessary to look at the work done in the individual items challenged in this period as they can be allowed only if they fall within that exception. Otherwise they fall within the agreed brief fee.
74. As to the exclusion, it is important to remember that both *Loveday v Renton* and *XYZ v Schering* involved the assessment of counsel's fees in legal aid cases. As Hobhouse J. commented, the brief fee takes everything into account "unless some different agreement is made". That cannot be done in a legal aid case where no fee has been agreed and the court is assessing what a reasonable fee would be after the event. It could however be done in the present case. Where counsel has charged separately for work which would normally fall within the brief fee, and the entitlement to make a separate charge has been agreed, the appropriate course is to take that into account when assessing the reasonableness of the brief fee. There is no basis for disallowing these separate charges provided that they fall within the agreed exclusion, were reasonably incurred and are reasonable in amount.

Counsel's brief fees – work done on skeleton arguments, opening submissions and closing submissions

75. Similar principles apply to this work.
76. First one must look at what was agreed. The fees letter for Mr Foxton QC provides that work done after 12th November 2012, save for the excluded work, is included in the brief fee. The letter provides expressly that "opening written submissions are included within the brief fee". However:

If the Judge adjourns specifically for the preparation of written closing submissions, whether in lieu of oral submissions or in addition to them, Counsel will charge at their refresher rate pro rata for the preparation of such submissions.
77. The fees letter for Miss Tolaney QC and Mr MacDonald provided that the brief fee included the skeleton argument, the CMCs and PTR listed in January and February 2013 and "any other similar hearings listed within the brief fee period". Again it was agreed that:

If the hearing adjourns specifically for the preparation of written submissions, in lieu of or in addition to oral submissions, the daily refresher rates will be applied.

78. The fees letter for Mr King provided that the brief fee covered work done from 1st January 2013 but did not include work done on final/closing written submissions which would be charged at the agreed hourly rate.
79. Mr Vik's objection in relation to the opening submissions is that further junior counsel were used to check the references to the trial bundle in the skeleton argument and opening submissions. Given that each counsel's brief fee included their work on the skeleton argument and opening submissions, the work checking the references should have been done by them. On behalf of the Claimant, Mr Bacon QC submits that this was additional work which fell outside the briefs.
80. It seems to me that the argument is really whether these fees for additional counsel were reasonably incurred and that this is something for the line by line assessment. But in considering the reasonableness of counsel's brief fees I should take into account that they did not do this checking, whether or not it was reasonably required.
81. In relation to the closing submissions Mr Vik's objection was that these should be included in the brief fee. Having been told of the terms on which counsel's fees were agreed, Mr Williams QC accepted that there could be reasonable charges for this work, as it was not included in the brief fees. However that should be reflected in the assessment of the brief fees.
82. In relation to the assessment of the separate fees for the closing submissions Mr Williams QC reminded me of the comments of Cooke J. at the end of his judgment following trial:¹⁰

The written submissions of the parties, whilst ultimately obviating the need by agreement for long oral submissions, were extended to cover such a wide range of arguments as to be almost unmanageable. The process also had the effect of detracting from the traditional approach in closing submissions where the Court has the opportunity to question, challenge and probe the arguments made. It would be highly regrettable, in my view, if in future substantial litigation, the oral tradition was subverted and replaced by lengthy submissions of the kind with which the Court was faced here.

83. The decisions as to whether counsel's fees for work on the closing submissions were reasonably incurred and reasonable in amount should therefore follow in the line by line assessment as I was not addressed on these fees specifically.

Counsel's fees – refreshers on non-sitting days

84. I mention this here as it may also have an impact on the reasonableness of counsel's brief fees.

¹⁰ [2013] EWHC 3463 (Comm) paragraph 1593

85. The fee letter of Mr Foxton QC provided that refreshers would be earned if he worked on any non-sitting days, excluding weekends. If the start of the trial was delayed, further days spent in preparation would be charged as refreshers.
86. The fee letter of Miss Tolaney QC and Mr MacDonald also provides for the payment of refreshers for days scheduled for trial when the court does not sit or if the trial is delayed “and counsel continue to work on the matter”.
87. The fee letter of Mr King provides that the brief fee does not cover “non-sitting weekdays during the course of the hearing”, periods during April when counsel was not required in court and the Whitsun vacation week. For the latter two, time would be charged at an hourly rate.
88. The trial was due to commence on 9th April 2013 but the start was delayed to 22nd April.
89. Mr Williams QC submits that, following *Loveday v Renton*, fees charged by counsel for non-sitting days are not recoverable because work done on those days falls within the scope of counsel’s brief fees and refreshers. The passage in the judgment of Hobhouse J. on which he relies is:

It appears that on this day the court did not sit but that counsel understandably took the opportunity to work in chambers as part of their continuing task of keeping themselves prepared to represent the plaintiff in court. The taxing master pointed out that refreshers were only payable whilst the trial was actually proceeding and referred to Order 62, Appendix 2, Part I, paragraph 2(2)(b)(i). Accordingly such work must be taken into account in assessing the brief fee and the refresher rate and cannot be separately charged for. It is not done pursuant to any separate instructions delivered by the solicitor or authorised by a certificate. The taxing master correctly said: “Such time must be subsumed either in his basic fee or his refreshers.” He correctly disallowed the item.

90. On behalf of the Claimant, Mr Bacon QC submits that this ignores the commercial reality and the common practice of paying additional fees for non-sitting days.
91. Again I think that there is a difficulty with relying on this part of the judgment in *Loveday v Renton* in a privately funded case. Work on non-sitting days was disallowed because it “is not done pursuant to any separate instructions delivered by the solicitor or authorised by a certificate”. In the present case it was agreed expressly that if the court did not sit on a day when it was due to sit and counsel worked on this case on that day, counsel would be entitled to separate payment. In that way the solicitors authorised the payments and, as between them and counsel and them and their client, the client is liable to pay those fees and counsel is entitled to them. As between counsel and those instructing them that seems perfectly reasonable. If the trial had started on the due date and there had been no non-sitting days the trial would have concluded sooner and counsel would have been free to undertake work on other matters. As it happened counsel undertook additional work because of the delays.

92. Because of the agreements made it seems to me that counsel are entitled to these additional fees. They are therefore recoverable in principle, although it remains open to Mr Vik to argue that they were not reasonably incurred (e.g. if counsel was not in fact working on this case on the relevant day).
93. However the agreements that counsel should be paid for non-sitting days must also be a factor in considering the reasonableness of the brief fees. Had there not been these agreements, counsel's brief fees would have covered the risk of delay to the start of trial or working on non-sitting days.

Counsel's fees – the reasonableness of the brief fees

94. I should perhaps start with the words of the learned trial judge at the end of the judgment:

1591. Costs must follow the event. The costs figures which appear in the pre-trial checklists are huge. The parties were represented by four and five counsel respectively and the volume of work conducted by both firms of solicitors and experts was enormous.

1592. I must pay tribute to the manner in which the trial was conducted by counsel in terms of co-operation between the parties on the best use of the court's time, the timetabling of witnesses and the consideration given to the trial judge with volumes of material to absorb in witness statements and expert evidence, as well as a trial bundle of significant size and overwhelmingly complex numbering on the Opus 2 Magnum system. The skill with which arguments were put forward and issues addressed was impressive.

95. Mr Williams QC submitted on behalf of Mr Vik that the brief fee of Mr Foxton QC was prima facie unreasonable in amount given the reduction in the hourly rate allowed from £750 to £700 and that the trial took place in the aftermath of a recession when there had been little inflation in legal costs. He accepted that with the brief delivered in November 2012 and the trial due to start in April 2013, the brief fee covered about 5 months. He suggested that this would give an annual income of over £3.5m which was indicative of the particularly high fees sometimes demanded by counsel of pre-eminent reputation. Further he pointed to the additional £600,000 paid to Mr Foxton QC over the fee paid to Miss Tolaney QC as evidence that this was a premium for pre-eminence. The brief fee of £750,000 offered by Mr Vik would be equivalent to over 1,000 hours at £700 per hour which, in the 5 months before trial, would be equivalent to 9 hours per day over 6 days every week.
96. On behalf of the Claimant, Mr Bacon QC told me that the fees of all 4 counsel were negotiated down. In the case of Mr Foxton QC his clerk was initially asking for £1.65m. Mr Bacon QC pointed to the substantial commitment – effectively 9 months from November 2012 to August 2013. These were not the particularly high fees of the pre-eminent. An example of that, he suggested, would be the rumoured brief fees in *Berezovsky v Abramovich*, which was tried in 2012.

97. It is not in issue that this was titanic litigation involving huge sums of money. Because of the sums involved, or potentially involved, it was of importance even to very wealthy parties. It was extremely complex and document heavy. In terms of weight I would put it towards the top end of work in the Commercial Court. I have no doubt that all of the counsel instructed will not have been working on much else from the delivery of their briefs until the conclusion of the hearing, a period of about 9 months. Mr Bacon QC submitted, and I think he is correct, that the pool of hypothetical counsel capable of conducting this case was small.
98. It is not part of the court's function to determine what the reasonable annual earnings of members of the Bar should be. A comparison with the fees of counsel incurred by the Defendant, while a factor, cannot be a significant factor when we do not know how those fees were structured or how the work was divided between counsel, solicitors and experts. A calculation based on hourly rates is not helpful when it can only be based on assumptions as to the hours worked and when, in any event, brief fees are not the product of hours spent multiplied by hourly rate. Ultimately the assessment has to be based on the court's own experience, applying the test suggested by Pennycuick J. and the factors listed in CPR 44.4(3).
99. Given the size of the case and the burden that he assumed, even where some of that burden was shared with others, I cannot say that the brief fee of £1.5m for Mr Foxton QC was unreasonable. It does not fall foul of Pennycuick J.'s test. I think that it bears a reasonable relationship to the fee paid to Miss Tolaney QC, given the difference in seniority and their respective roles in the litigation. Reasonableness is never a single figure and this fee is towards the top end of what I would consider to be reasonable for a fee agreed in 2012 particularly having regard to the work which was agreed to fall outside of the brief fee (post-brief preparation, refreshers on non-sitting days and closing submissions). I do not have a doubt that it was a reasonable fee. However if I did, the Claimant would have the benefit of it.
100. In relation to the brief fee of Miss Tolaney QC, Mr Williams QC pointed out that she had taken silk only in 2011 and had the benefit of a leader and two specialist juniors. Mr Bacon QC told me that her clerk had initially sought a fee of £1.3m and that the fee was the subject of extensive negotiation directly involving the client. I am happy to accept that this fee was the subject of negotiation but counsel's clerk's initial pitch is of course nothing more than that.
101. There are no rules of thumb or conventions regarding the appropriate ratios of fees between first leading counsel and second leading counsel. Miss Tolaney QC will have assumed a significant burden in relation to the areas of the case which were devolved to her but she will not have had the overall burden or responsibility assumed by Mr Foxton QC. A ratio of about two-thirds of the fee of the senior leader seems to me about right.
102. Taking into account the size of the case and the commitment required, applying the test of the hypothetical counsel, and allowing for the exclusion of non-sitting days and closing submissions, I cannot say that a fee of £900,000 is unreasonable.
103. The ratios of the brief fees of Mr King and Mr MacDonald to the fees of leading counsel are also roughly appropriate. There was, and in my view still is, a rule of thumb that junior counsel should be entitled to one-half of the fees of leading counsel,

subject to the junior doing more or less than would normally be expected: *F v F (Ancillary Relief: Costs)* [1995] 2 FLR 702 at 710. That becomes less helpful where there is more than one leader or more than one junior.

104. Mr Bacon QC told me that Mr MacDonald's fee was negotiated down from £650,000. He sought to justify the higher fee of Mr King, who played a lesser role in the trial, on the basis of his seniority. Mr King was called in 1998 and took silk in 2017. Mr MacDonald was called in 2005 and has not yet taken silk.
105. Again similar factors apply. Their brief fees expressly exclude work which would normally be included in the brief fee. But they also had to make a significant commitment to this huge case. I cannot say that their brief fees of £496,000 and £400,000 respectively are unreasonable.
106. Accordingly I would allow all of the brief fees as claimed.

Counsel's fees – the refreshers

107. Only the refreshers of leading counsel are objected to.
108. As against £7,000 per day for Mr Foxton QC and £5,000 for Miss Tolaney QC, Mr Vik offers £6,000 and £4,000 respectively. In the course of oral submissions Mr Williams QC accepted a slight increase to £4,200 for Miss Tolaney QC.
109. Mr Williams QC pointed out that although Miss Tolaney QC's hourly rate increased only from £475 to £500 in November 2012, her refreshers increased from £4,000 (for attending CMCs) to £5,000. However I think that one must take into account that refreshers for trial will reflect the burdens of trial and that the court's task is to consider the reasonableness of what is claimed, rather than the reasonableness of an increase (possibly from a low base). Mr Williams QC submitted that the refreshers charged by both leading counsel were out of kilter with the time spent.
110. It seems to me that refreshers should be assessed in a similar way to brief fees: what fee would the hypothetical capable but not pre-eminent counsel be willing to accept for each day in court? Like brief fees, refreshers are not based on time spent. That I have allowed a reduced hourly rate for Mr Foxton QC would not therefore in itself lead to a reduced refresher.
111. It seems to me that £5,000 would have been an unremarkable refresher for leading counsel in an unremarkable commercial case in 2013. I note that the refreshers of Mr King and Mr MacDonald of £3,500 and £3,000 have not been challenged by Mr Vik. This was however a remarkable case which to my mind easily justifies the refreshers claimed.