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: 18 June 2021

Before :

SENIOR COSTS JUDGE GORDON-SAKER

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Between :

DEUTSCHE BANK AG	**Claimant**
- and –	
SEBASTIAN HOLDINGS, INC.	**Defendant/Part 20 Claimant**
- and –	
MR ALEXANDER VIK	**Defendant for costs purposes only**

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Miss Pippa Manby (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Mr Ben Williams QC and Mr Tom Morris (instructed by **Brecher LLP**) for **Mr Vik**

Hearing dates: 17, 18 & 19 March 2021 (by video)
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 10.30am on Friday 18th June 2021

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Judgment Approved

Senior Costs Judge Gordon-Saker :

1. This judgment sets out my decisions on items 1578 and 1735 to 1749 in the Claimant's bill of costs, being the fees of Navigant Consulting Inc., paid (other than item 1578) directly by the Claimant. The total of those items as claimed in the bill is about £3.28m plus value added tax. However, following concessions by the Claimant, the total now

claimed is £3,061,569.50 plus value added tax.[1] The concessions are in respect of the costs of work on Initial Margin (£135,568.79), the costs of attending an experts' meeting on 29th January 2013 (£550), attending conferences on 5th and 7th December 2012 which have been disallowed (£3,700) and the costs of work done in respect of the proceedings in the United States (£85,565). The effect of the last is that item 1749 is disallowed completely and only £1,520 plus value added tax is claimed in respect of item 1748.

2. A concession of £28,280 excluding value added tax (in respect of the summarily assessed costs of a case management conference) had been made in the bill incorrectly against item 1738, rather than 1736. However that does not affect the total.

3. I need not rehearse the background to this case, which I last attempted to summarise only recently in paragraphs 9 to 16 of my judgment on the fees of Deloitte: [2021] EWHC B4 (Costs).

4. Mr Vik's case on Navigant's fees is set out at preliminary issue 5 and objection 538 of the points of dispute, objection 9 of the supplementary points of dispute and paragraphs 111 to 149 of the skeleton argument of Mr Williams QC and Mr Morris dated 11th November 2020. As with the fees of Deloitte, the parties have approached the assessment of the fees of Navigant in a broad brush way. The objections and the offers made by Mr Vik are directed at the work done, rather than at the individual invoices. However it is not in issue that my decisions should be in relation to each invoice, as interest will need to be calculated separately for each.

5. Navigant was a management consultancy firm. The product of the work done was the preparation of a number of expert's reports by Mr Pawan Malik and his attendance at trial to give evidence. Mr Malik ran the capital markets advisory and derivatives solutions practice of a subsidiary of Navigant. The reports were concerned with two principal areas: (1) how the trades said by the Defendant to be outside the scope of Mr Said's authority would be categorised ("trade classification") and (2) the valuation of certain transactions carried out by the Defendant[2] ("trade valuations").

6. Navigant's invoices were rendered monthly between July 2012 and November 2013 for work done from 6th June 2012 to 18th October 2013. The invoices were accompanied by summaries showing the fee earners, their hourly rates and the amounts of time spent in the month under various headings and also the amount of time spent on each day on each task by each fee earner by reference to the same headings.

7. Five reports by Mr Malik were served and he was party to two joint memoranda:

   i) 6th December 2012 – First report on trade classification.

   ii) 14th December 2012 – First report on trade valuations.

   iii) 8th February 2013 – Joint memorandum with Mr Millar and Dr Drudge on trade valuations.

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[1] The amended figures are set out in a schedule to the letter from the Claimant's solicitors to Mr Vik's solicitors dated 1 March 2021.

[2] Exposure valuations, Close out valuations and Initial Margin amounts.

iv) 18th February 2013 – Joint memorandum with Professor Wystup on trade classification.

v) 6th March 2013 – Response to Dr Drudge's report on trade valuations.

vi) 15th March 2013 – Supplemental report on trade classification.

vii) 7th June 2013 – Third report on trade valuations.

8. For the two reports on trade classification, the first two reports on trade valuations and the two experts' meetings and joint memoranda, Mr Vik has offered £454,550 plus value added tax.

The first report on trade classification – 6th December 2012

9. The report runs to 83 pages with 77 pages of appendices. It is suggested on behalf of Mr Vik that the total time spent in producing the report was about 1,272 hours, excluding time recorded as research, of which Mr Malik spent 306 hours. On that basis the total cost is about £430,530, against which Mr Vik offers £108,000 calculated as to 160 hours of Mr Malik's time and 40 hours of a junior analyst's time. That is about 24% of the sum claimed.

10. Mr Vik's principal objection is that the work should have been done by Mr Malik himself rather than the more junior fee earners at Navigant who did not have his experience and therefore had to carry out extensive research. The purpose of the report was to identify how the disputed transactions should be categorised, based on how different market participants would have referred to them. The conclusions would therefore have been based on Mr Malik's undoubted experience of the market.

11. At pages 121 to 124 of the supplementary points of dispute, Mr Vik sets out his case as to how long each chapter of the report and each appendix should reasonably have taken to draft. 120 hours is suggested for the body of the report and 8 hours for the appendices. The balance of the 160 hours offered is for reading in and liaising.

12. By reference to the time summaries which accompanied the invoices, it is said that most of the research and analysis, as well as most of the time drafting the report, was carried out by junior fee earners at hourly rates of either £300 or £175. There was then extensive amending and re-drafting of the report by the same analysts following comments by Mr Malik and the Claimant's solicitors. It is said on behalf of Mr Vik that almost 300 hours of junior fee earners' time was spent on amendment and re-drafting, which could have been avoided had Mr Malik written the report himself.

13. The Claimant's replies to the supplementary points of dispute suggested that Mr Vik's approach was "overly simplistic". Each individual trade (many of which were highly complex) had to be carefully examined by reference to the market standards at the times that the trade was executed. Further Mr Malik had to have regard to the views of other market participants, and not just his own views. That required research, an example of the product of which was referred to by Cooke J. in his judgment following the trial at paragraph 485:

> Mr Malik's evidence was that, in his experience, which was substantial in the area, market participants would classify TPFs and Pivot TPFs as currency options. He produced trade publications and research documents which spoke about the matter confirming that view. Articles by representatives of BNP Paribas, HSBC, ICICI Bank and Unicredit in such publications as SuperDerivatives and FX Week reveal this market understanding to which Mr Malik testified. He referred to ISDA surveys in 2004 and 2008. He said that quants, pricing people who had worked with him and clients he had spoken to all referred to them as options, particularly those he advised in 2007-2008, often in relation to deals done in 2006 or earlier.[3]

14. In the course of her submissions on behalf of the Claimant, Miss Manby took me through correspondence between the parties' solicitors in which they each requested copies of the documents referred to by the experts on trade classification and also to a number of passages in the cross-examination of Mr Malik in which he was challenged on the adequacy of the material that he had produced as to the categorisation of trades at the relevant times.

15. It seems to me that the work reasonably done by Navigant on the production of Mr Malik's first report on trade classifications was significantly greater than that suggested on behalf of Mr Vik. While the disputed transactions were identified by reference to 10 trade types,[4] Navigant had to consider the documents relating to each of the disputed transactions.[5] These transactions had taken place between 4 and 6 years earlier.

16. I have to bear in mind that it was a central plank of the Defendant's counterclaim that the Claimant had permitted Mr Said to enter into exotic derivatives transactions or other complex transactions that were not authorised by the Defendant.[6] The classification of those transactions, the subject of this report, was crucial to that.

17. While Mr Malik would be responsible for his evidence, in my view, given what was required, it was reasonable for him to delegate much of the work to more junior fee earners. Mr Vik's objection, given the offer that he has made, is not to the principle of delegation, but to the amount. The submission by Mr Morris, on behalf of Mr Vik, that the work could have been done at lower cost had Mr Malik done more of it himself, I think misses the point of the evidence required. His instructions were:

> to provide [his] expert opinion on whether a number of trades identified by SHI, as allegedly outside the scope of the authority conferred on Klaus Said by SHI (the "Disputed Transactions), would be categorised in certain ways.[7]

18. While perhaps only he could say how he would have categorised the disputed transactions at the relevant times, he had also to consider how "market participants"

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[3] [2013] EWHC 3463 (Comm)
[4] Mr Malik's report of 6th December 2012 para 2.1.1
[5] Listed in Mr Malik's report of 6th December 2012 appendix C
[6] Re-Re-Amended Defence and Counterclaim paras 77 to 82
[7] Mr Malik's report of 6th December 2012 para 1.2.1

would have referred to them.[8] As Cooke J. commented, "the market view is what counts".[9] Ascertaining the market view will have required significant research, the product of which is the list in section 6 of appendix C to the report and the articles referred to by Cooke J. in the passage of the judgment quoted above. Clearly it would be more economical for that research to be conducted by junior fee earners. So too, it seems to me, would much of the work underlying the conclusions reached in the report, including, for example, the work done in analysing the disputed transactions.

19. Given the work that was required, Mr Vik's offer is, in my view, unrealistic. However it seems to me that 1,272 hours is too much to be reasonable, even allowing for the importance of this evidence in defending a massive counterclaim. The degree of burnishing of the report clearly exceeds "the lowest amount which [the claimant] could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances".[10]

Reply evidence on trade classification

20. Following the service of Mr Malik's first report on trade classification, the report of Professor Wystup, the Defendant's expert, was served. That ran to 83 pages. Mr Malik and Professor Wystup met, for five and a half hours, in January 2013 and agreed a joint memorandum, which was dated 18th February 2013. That runs to 24 pages. Mr Malik then produced a supplemental report on trade classification, of 60 pages, dated 15th March 2013. Those representing Mr Vik have calculated that, in total, about 1,624 hours was spent by Navigant's fee earners on this.

21. Mr Vik offers 125.5 hours at Mr Malik's hourly rate for this work, together with 10 hours of analyst's time (at £300 per hour) for proof-reading, formatting and compiling the supplemental report and 5.5 hours for attending the meeting with Mr Malik. The offer for Mr Malik's time is calculated as to 40 hours considering Professor Wystup's report, 15.5 hours preparing for and attending the joint meeting, 10 hours for agreeing the joint memorandum and 60 hours for drafting the supplemental report.

22. In respect of the supplemental report, again Mr Vik's principal objection is that more work should have been done by Mr Malik and less by the other fee earners, as the basis for it was his own knowledge and experience. As a particularly egregious example of expensive research, Mr Morris drew my attention to the attendance of Mr Watson-Brown, charged at £400 per hour, for 4 hours attending the British Library "to identify and order industry journal of the day and search for specific instruments".

23. An unusual feature of this case was that Professor Wystup had been approached to give evidence on behalf of the Claimant, before he was approached to give evidence on behalf of the Defendant, and had expressed views to the Claimant's solicitors which were inconsistent with those that he expressed in his reports. This was the subject of a witness statement by Professor Wystup served during the trial. Cooke J. dealt with this pithily:

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[8] Mr Malik's report of 6th December 2012 para 2.1.3
[9] [2013] EWHC 3463 (Comm) para 496
[10] *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm), per Leggatt J (as he then was).

> Whilst professing a consciousness of his duties to the Court, Professor Wystup, both in his reports and in his oral evidence, was a very unsatisfactory expert. He was partisan and argumentative and sought to argue questions of construction of the contracts rather than focussing on the question of how the market understood the position. His views, expressed in the telephone call, were close to those of Mr Malik, at a time when he was anticipating that he might give expert evidence on behalf of DBAG. When consulted by SHI, he changed his views to give diametrically the opposite opinion without any qualifications or reservations and without any explanation of any kind until he was faced with the notes of what he had said in the telephone call in August 2011. I did not therefore find him an expert upon whose market views I could rely.[11]

24. It was submitted on behalf of Mr Vik that Navigant would have no role to play in this particular aspect. I agree. However it seems to me that there was a role for Navigant in combing through material published by Professor Wystup to look for inconsistencies with what he was now saying. That work would not be reasonable in most cases. However there was a significant amount at stake in this case and the Claimant was entitled to present its case proficiently.

25. In my view Mr Vik's offer heavily underestimates what was reasonably required for that proficient presentation. While the joint memorandum is a list of what is agreed and not agreed, that would be the culmination of considerable preparatory work in identifying areas of agreement and disagreement, the nature of the disagreement, the arguments available to narrow the gaps and the agenda for the meeting. The length of the meeting was limited by the time available to Professor Wystup and some areas could not be explored in that time.[12]

26. The supplemental report dated 15th March 2013 required not only an analysis of and response to Professor Wystup's report, and a consideration of how that was changed by the experts' meeting and joint memorandum, but also further research. There are examples of the product of that research throughout the report.[13] Even a casual reading of the report would lead one to the inevitable conclusion that this task could not have been completed in the time offered by Mr Vik.

27. As part of the work done over this period, Navigant produced a "primer" of about 25 pages which set out an overview of the foreign exchange market, an explanation of economic terms and a glossary.[14] The primer was agreed between the parties. It was dismissed, on behalf of Mr Vik, as cut and pasted from Mr Malik's report. However, as with everything else in this case, it had to be prepared carefully and Cooke J. found it helpful. Unlike almost everything else in this case, the cost of producing it was not challenged directly in the points of dispute. On behalf of Mr Vik, Mr Morris submitted that there was a general challenge to Navigant's work on trade valuations in objection 538 in the original points of dispute. However, as the Court of Appeal made clear in

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[11] [2013] EWHC 3463 (Comm) para 477
[12] Meeting agenda – appendix A to the joint memorandum 18th February 2013 and para 7
[13] One example is para 4.1.6, but there are many
[14] Trial bundle 8, document 38D

Ainsworth v Stewarts Law LLP [2020] EWCA Civ 178, "points of dispute must be drafted in a way which enables the parties and the court to determine precisely what is in dispute and why" (at para 38). Given the particularity with which Mr Vik's legal team have approached this assessment, the Claimant's legal team could reasonably have assumed that the work on the primer was not challenged in principle. I will take it into account when considering the reasonableness of the time overall, but not as a standalone point of principle. In any event, insofar as Cooke J. found it helpful, I would have concluded that the reasonable costs of preparing it are recoverable.

28. Miss Manby took me through a number of documents which illustrated the extent of some aspects of the work that was carried out. However, as with the first report on trade classification, I have no doubt that too much time was spent on this work to be reasonable, even for the proficient presentation of a complex case involving huge sums of money. That is, I think, the result of too much burnishing by multiple fee earners.

The first report on trade valuations

29. The scope of the report on trade valuations is set out at paragraphs 1.4.4 and 1.4.5 of the report, namely to provide assessments of the Claimant's exposure valuations, Initial Margin amounts and close out valuations. These were to be used by Mr Millar and Mr Inglis of Deloitte. It is not suggested that this work was not reasonably required. The issue is as to the amount of the fees for doing it.

30. Mr Williams QC drew a comparison with the work, and the cost of the work, done by Dr Drudge, the Defendant's expert. He was the counterpart not only of Mr Malik, but also of Mr Millar of Deloitte who reported on the credit support amounts and value at risk. Dr Drudge's total fees were US$502,587.50, excluding expenses. Mr Williams QC told me that was equivalent to about £327,000, of which about £231,500 related to the initial work on valuations. Navigant's fees for its first report were in excess of £1m. Dr Drudge's first report took about 926 hours, as against an estimated 3,000 hours for Navigant.

31. That, Mr Williams QC submitted, was all the more surprising given that the experts reached broadly similar valuations. The explanation, he suggested, lay in the different approaches to modelling. Dr Drudge used a ready-made Heston model, whereas Navigant built their own model, as was explained in Mr Malik's first witness statement.[15] While it is accepted that both experts would have had to calibrate their models, it is argued on behalf of Mr Vik that Navigant could have used an off-the-shelf model. It is also argued that more time would be spent calibrating a purpose-built model than one that was tried and tested.

32. The Claimant's case, as articulated in the replies at page 137, is that building a model "was the most convenient and optimal way to proceed" and "permitted Navigant to price the various instruments across all the dates that they needed to be priced but also to provide the flexibility to interrogate data, the model and the pricing". Off-the-shelf systems, it is said, "do not provide the flexibility to interrogate data retrospectively". The Navigant model allowed for faster changes. One parameter could be changed

[15] Pawan Malik, 11 July 2012, para 25

without recommencing the entire process and thousands of trades could be computed overnight.

33. It is difficult to discern precisely how much work was done by Navigant in building the model. Neither counsel ventured a figure for the cost of producing the model, as opposed to calibrating it, although it was suggested in the Points of Dispute that about 950 hours were spent building and calibrating the model and over 600 hours spent obtaining, cleaning and processing the data needed for the valuation runs. By reference to the time records attached to the invoices, only a very modest amount of time was spent on "model prep" where there is no reference also to calibration.

34. As against the total time of 1,550 hours spent by Navigant on modelling and valuation, Mr Vik offers 264 hours.

35. In the context of this case, and in particular the huge sums of money involved, I cannot say that it was unreasonable for the Claimant to permit or instruct Navigant to design and build its own model, if Navigant's expert view was that this would be the most accurate way of arriving at the valuations of the trades. It would appear that far more work was involved in calibrating the model, some of which would have been required whether the model was built from scratch or taken off the shelf. While I have no doubt that it was reasonable to incur the cost of building a model, I do have a doubt as to whether the time spent building it was reasonable. However, the Claimant must have the benefit of that doubt.

36. Mr Malik's first report on trade valuations ran to over 40 pages with a further 20 pages of appendices. Mr Williams QC calculated that Mr Malik spent 305 hours on the report, and another senior fee earner, Mr Rennie, spent 62 hours. Both were charged at £600 per hour. In addition there were 1,321 hours spent by fee earners charging £400 per hour and 1,300 hours by junior fee earners. The total time was about 3,000 hours.

37. The report included some time spent on Initial Margin, which the Claimant conceded in principle. In their letter dated 9th June 2020 the Claimant's solicitors conceded the total sum of £135,568.79 in respect of the invoices from August 2012 to February 2013 on the basis that Mr Malik had been instructed to calculate Initial Margin "in respect of a limited number of trades".[16] On behalf of Mr Vik, Mr Williams QC submitted that the sums conceded were insufficient. As an example, he referred to the work done in November 2012. The Claimant had conceded £7,350 (plus 2 per cent), but all of that related to work done on valuations and nothing had been conceded in relation to the time spent on Initial Margin in the report.

38. In the Points of Dispute Mr Vik offered 100 hours of Mr Malik's time for drafting the report and 50 hours of analyst's time at £400 per hour for drafting, proof-reading, formatting and compiling. The thrust of Mr Vik's objection is that too much time was spent by too many people.

39. On behalf of the Claimant, Miss Manby pointed to the large number of spreadsheets which underlay the report.[17] The report explained the calculations of exposure for each of the 1,060 transactions in the trade list at the close of business on each day between

[16] The Initial Margin argument applied to 91 of the 1,060 FX trades executed by the Defendant.
[17] They are in the trial bundle at bundle 6 tab 29A.

1st December 2006 and 23rd October 2008 and close-out valuations for all trades at 7 dates.

40. In respect of the concession of the work done on Initial Margin, Miss Manby explained that this had been based on contemporaneous records. In addition to the time identified, the Claimant was willing also to concede a further 2 per cent of Navigant's fees over the relevant period, out of an excess of caution. The total concession was about 12 per cent of Navigant's fees as against the proportion of fees charged by Dr Drudge on Initial Margin, which had been calculated at 10 per cent.

41. The amount of time spent by Dr Drudge and the cost of his work are factors which I should and do take into account. However they are not conclusive. While on the one hand Dr Drudge was facing both Mr Malik and Mr Millar, on the other hand he was not instructed to report on close out valuations. A comparison of his work against that of Mr Malik was not made by the judge at trial. However, as between Dr Drudge and Mr Millar, the evidence of Mr Millar was preferred.[18]

42. I have no doubt that the work done by Navigant to produce the valuations required was very detailed and time consuming. I also have no doubt that the amount of time claimed both for producing the calculations and for preparing the report which explained the calculations, was too much to be reasonable. I accept that this work had to be done carefully, but I think there is too much time spent by too many people. Again it is not unreasonable for Mr Malik to be assisted by junior fee earners in preparing the report. However there is a great deal of input, not only by a number of Navigant fee earners, but also by others. For example, on 6th November 2012, 3 Navigant fee earners met with the Claimant's solicitors, on 7th 2 met with the Claimant's solicitors, on 9th 2 attended an "expert report page turning meeting" with the Claimant's solicitors, on 16th 2 met with the Claimant's solicitors and Deloitte, and on 26th 3 Navigant fee earners met with counsel. This suggests a degree of burnishing which is obviously unreasonable.

43. In respect of the time spent on Initial Margin, in my view the Claimant's concession is a little too low. Initial Margin made up a significant part of the report (pages 37 to 44 of 44 pages), given that the first 15 pages were by way of introduction and summary. It is difficult to identify the work done on Initial Margin precisely, because of the brief descriptions in the time recording. I accept that Initial Margin was the least significant of the three principal components because of the limited number of trades involved. However, as against the 12 per cent calculated by the Claimant's lawyers, it seems to me that 15 per cent would be more realistic in relation to the relevant invoices.[19] The further reductions are set out in the table at the end of this judgment.

The joint memorandum and reply report on valuations

44. Dr Drudge met with Mr Millar and Mr Malik on 22nd January 2013, following which a memorandum dated 8th February 2013 was produced. Mr Malik then wrote a reply report dated 6th March 2013.

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[18] [2013] EWHC 3463 (Comm) para 548
[19] Items 1737 to 1743.

45. Before the meeting, Navigant would have needed to consider Dr Drudge's report dated 20th December 2012 (88 pages). Mr Williams QC suggested that 40 hours should be sufficient for that. The meeting lasted 4.7 hours and he suggested 10 hours for work on the joint memorandum. That would be a total of 54.7 hours for Mr Malik with 4.7 hours for an analyst to take a note of the meeting. He relied on the fact that only a small part of the memorandum referred to the work done by Navigant.

46. Paragraphs 2.1 to 2.4 of the memorandum relate to the agreement and disagreement in respect of the valuations. However that is 40 per cent of the text of the memorandum if the introduction is ignored. I think that there would have been much more work reasonably involved in considering Dr Drudge's report and calculations and in preparing for the meeting than Mr Vik's offer would suggest.

47. Mr Malik's reply report was about 20 pages long plus exhibits. Mr Malik compares his own exposure valuations with those of Dr Drudge, notes that Dr Drudge had not been instructed to produce close out valuations and notes that he had not considered Initial Margin further, following the amendments to the Claimant's pleaded case.

48. Having taken me through the report, Mr Williams QC suggested that 70 hours of Mr Malik's time would have been sufficient for drafting the report, together with 10 hours of analyst's time for calculations, checking, formatting and compiling.

49. Again it seems to me that Mr Vik's offer undervalues the work that was required. The presentation of the figures masks the work done to calculate the figures and the time spent considering Dr Drudge's calculations and conclusions. However yet again I cannot avoid the conclusion that too much time was spent to be reasonable. It is said on behalf of Mr Vik that the total time recorded on the report is 475 hours. While there is considerable time spent by a number of fee earners first drafting, and then reviewing, the report, there is less time spent discussing it with the Claimant's lawyers.

Mr Malik's preparation for trial

50. The points of dispute suggest that about 1,000 hours were spent by Navigant's fee earners between 1st March 2013 and 3rd July 2013. That includes about 192 hours responding to requests from counsel. Mr Vik's objection is to the amount of time spent. Mr Malik gave evidence on 2nd July 2013 (day 38). Up to May 2013 he had spent over 1,100 hours working on this case and had prepared 5 reports. Mr Vik offers a further 50 hours for trial preparation.

51. On behalf of the Claimant, Miss Manby reminded me that Mr Malik was addressing two areas. He had to read and analyse the reports of Professor Wystup and Dr Drudge. Professor Wystup had criticised Mr Malik's evidence as misleading. Miss Manby took me through a number of documents, which had not been disclosed to Mr Vik's representatives, to demonstrate the work done in commenting on the Defendant's experts' reply reports, commenting on Professor Wystup's witness statement (which explained his change of position) and assisting with questions for the cross-examination of Professor Wystup, Dr Drudge and (to a limited extent) Mr Vik. Miss Manby pointed to the importance of the trade classification evidence. By her calculation the total trial preparation by Navigant was 315.75 hours, being 128 hours for Mr Malik and 187 hours for other fee earners.

52. Clearly Mr Malik's evidence was important to the Claimant's case and he needed to prepare properly. However by the time that he came to prepare for trial, he had spent a considerable amount of time on his evidence and that of the other experts. In my view the total time claimed is unreasonable (even on the indemnity basis) but the offer of 50 hours is unrealistically low for the detailed work required.

The final report on trade valuations

53. Mr Malik's third report on trade valuations, dated 7th June 2013, was prepared during the trial. The report arose from an amendment to the Defendant's pleaded case. At paragraph 104(6A1) of the Re-Re-Re-Amended Defence and Part 20 Counterclaim the Defendant contended that the Claimant "failed to inform Mr Said that it was unable to, and/or was in fact failing to, carry out any, or any complete or accurate, calculations of the capital required in order to allocate capital appropriately, and/or was failing to allocate capital in the Pledged Account properly or at all, and/or notify SHI of the capital requirements of its FX trading to the extent that any were calculated".

54. Mr Malik was asked to report and analyse the information available to Mr Said from the Claimant and from Bloomberg in 2008. The resulting report was about 8 pages long with 79 pages of graphs and tables.

55. Mr Williams QC submitted that the cost of the report appeared to be about £77,000, but a further £49,000 in fees had been incurred on value at risk in April 2013. He objected to the cost in principle on the basis that no permission in advance had been granted for this evidence, which was not referred to in cross-examination or in the judgment. In the alternative, only a small sum should be allowed for it.

56. Miss Manby submitted that it had not become necessary to use this evidence because the Defendant failed on liability in respect of its counterclaim. Cooke J. had recognised that much of the expert evidence would become redundant as a result of his findings on liability.[20] The report had however been referred to in both the Claimant's closing submissions[21] and the Defendant's closing submissions.[22] In respect of the time taken on the report, Miss Manby submitted that was 147 hours at a cost of about £62,000.

57. The correct viewpoint is that evocatively suggested by Sachs J. (as he then was) in *Francis v Francis and Dickerson* [1956] P 87 at 95, namely "that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client". Less often quoted is the continuation of that passage: It "is wrong for a taxing officer to adopt an attitude akin to a revenue official called upon to apply rigorously one of those Income Tax Act Rules as to expenses which have been judicially described as 'jealously restricted' and 'notoriously rigid and narrow in their operation'".

58. Applied to this case it seems to me that it was reasonable for the Claimant to instruct Mr Malik, as "an experienced FX market participant"[23] to report on the information that was available to Mr Said. There was no objection to the deployment of the report and I

[20] [2013] EWHC 3463 (Comm) para 40.
[21] Trial bundle, volume 0, tab 6, p.49 para 122 and p.80 para 163 (graph).
[22] Trial bundle, volume 0, tab 45, p.3864 paras 1263-1278.
[23] Freshfields' letter of instruction 6 June 2013.

have no doubt that, had it become necessary, the court would have granted permission for its use.

59. I accept that an analysis of what information was available 5 years earlier would have been time-consuming. However in my view the time claimed (which appears to be about 190 hours) is too high to be reasonable.

Preliminary issue 5

60. Preliminary issue 5, in the original points of dispute, objected to the recovery of the costs of work done before the formal instruction of Mr Malik as an expert in November 2012. Sensibly, that is not now pursued. There are then set out 14 categories of work which it is said should not be recoverable. In submissions, Mr Morris pursued only a few of them.

61. Too much time had been spent on research by junior fee earners. No further time, he submitted, should be allowed than that offered by Mr Vik for the reports. Mr Morris urged me to take an holistic approach to Navigant's invoices, taking into account Mr Vik's objections to individual items.

62. Not enough time had been conceded by the Claimant for the work done in respect of the Case Management Conference in July 2012. The Claimant had initially conceded £28,280 plus value added tax from the invoice for September 2012 (item 1738). In fact the work had been done in July 2012 and the Claimant seeks to adjust the figures claimed in the bill by adding back £28,280 to item 1738 and deducting that sum from the invoice for work done in July 2012 (item 1736).

63. The work that is conceded is listed in an attachment to an email from Navigant to the Claimant's solicitors dated 17th July 2012. The work was done between 4th and 16th July 2012 and is identified as category 1 in the July invoice. Mr Morris sought to identify other work done in respect of the July CMC which had not been deducted: 21st June, a meeting with Freshfields and Deloitte; 22nd June, Ms Swain reviewing "CMC doc"; 4th July, Ms Cannon "meeting with client" (although her 2 hours the same day drafting a memo regarding Mr Niculescu's witness statement is included in the Claimant's concession); 11th July, Ms Cannon reviewing a "Deloitte witness statement"; 12th & 13th July, Ms Cannon reading witness statements; 18th July, Mr Malik reviewing Mr Robson's statement; 19th July, Ms Lyons reviewing witness statements; 24th July, the day before the CMC, a number of fee earners meeting with the Claimant's solicitors and Deloitte.

64. Mr Morris submitted that all of the work listed in category 5 in Navigant's invoices ("document review/meetings") for the relevant period should be disallowed. I accept that, on the face of it, work done reading and reviewing witness statements in the weeks up to the CMC were costs which should have been claimed under the costs order made at the time and are not now recoverable. But I cannot conclude that all of the category 5 work related to the CMC and should be disallowed. It is clear from the invoices that over this period most of the work being done was in relation to the first reports on trade classification and valuations. Where I have a doubt, the Claimant has the benefit of it. In reaching my decisions on the sums that should be allowed in respect of Navigant's fees I have deducted the few times which are identified as work done on the witness statements and which have not already been conceded.

65. The Claimant has conceded Navigant's time in attending 2 conferences which were disallowed on the line by line assessment. However Mr Morris submitted that too many fee earners were involved in too many meetings with the Claimant's solicitors and Deloitte. He gave me a large number of examples between August 2012 and January 2013, noting that there were 40 hours of meetings in November and December 2012 and another 22 hours in January 2013. As I have already indicated, in my view too much time was spent by Navigant to be reasonable, even on the indemnity basis, and I have taken this into account in the sums I have allowed.

66. There was no direct challenge by Mr Vik articulated in either version of the points of dispute as to Navigant's hourly rates. Further, the offers made by Mr Vik in the supplementary points of dispute appear to be based on the rates charged by Navigant. Mr Morris sought to sidestep these obstacles by submitting that the Claimant could and should have negotiated with Navigant a similar discount to the 15% reduction agreed with Deloitte and that the Court should apply a similar reduction to Navigant's fees.

67. This argument was not articulated in advance of the hearing and it would be unfair to allow Mr Vik to raise it now, when the Claimant has not been able to produce evidence either as to market rates or as to the availability of a discount or any attempts to secure one.

68. However even were the objection to be allowed, it is difficult to see how it would go anywhere. Navigant and Deloitte are not directly comparable. Deloitte were undertaking work on a very different scale to that of Navigant and doubtless the discount reflected that. There is nothing to suggest that the undiscounted rates charged by Navigant did not reflect the market or were unreasonable unless discounted.

Item 1578 – September 2011

69. Navigant was instructed to advise on the classification of the Defendant's transactions in the context of the contracts between the parties and to consider the Defendant's request for further information and the Claimant's reply. The work was done over one month and will have involved understanding the case, research and data gathering, analysis of the trades and reporting. Of the just over 80 hours spent, Mr Malik's time was 32.5 hours. The split between the different grades of fee earners seems reasonable and there is no reason to adjust that. It seems to me that the only issue is the amount of time spent. Even allowing for time spent getting to grips with the case, the total is a little too high to be reasonable and I would allow 90 per cent, which is £32,013.

Item 1735 – June 2012

70. 323.75 hours were spent, of which 42.7 hours were spent by Mr Malik, 111.95 hours by Ms Cannon and Ms Barham (at £400 per hour), 72.4 hours by Ms Swain (at £300 per hour) and 60.2 hours at the analyst rate of £175 per hour. Work was done on both trade classification and valuation, with Ms Cannon working more on trade classification and Ms Barham working more on valuation. I can see nothing wrong with the split of work between fee earners and the work that is described is unobjectionable, given my view on creating the model. This is the first month of work towards the expert's reports. While work had been done the previous September, that was limited to trade classification, was not geared towards a formal expert's report and was 8 months earlier. The only sustainable objections are in relation to a very limited amount of work done

for the July 2012 case management conference and my general conclusion that too much time was spent overall, burnishing the work product. I would allow 85 per cent as being reasonable, which is £99,136.01.

Item 1736 – July 2012

71. 432.45 hours were spent, of which 87.6 hours were spent by Mr Malik. Most of the work was done on valuation (225.6 hours). 157 hours were done at the £400 rate, 90 hours at the £300 rate and 90 hours at the analyst rate. 55.05 hours were identified as work done on witness statements and the case management conference and have been deducted. For the reasons given above, in my view the Claimant has conceded most of the work done on the case management conference, but not all of it. There does seem to be more time spent than one would anticipate as reasonable and I would allow 80 per cent after the deduction, which is £107,398.40.

Item 1737 – August 2012

72. 625.55 hours were spent, of which 56.6 hours were spent by Mr Malik. 340.9 hours were spent on valuations, of which Ms Cannon spent 93.6 (108.8 overall) and Ms Swain 131.8 (195.7 overall). Over 90 per cent of the research and data gathering was done at the analyst rate. Again I cannot see anything wrong with the split between fee earners. While I have a doubt about the amount of time spent building and calibrating the model, the Claimant has the benefit of that. I would make a modest deduction for the number of fee earners working on the report and client meetings and allow £176,000.

Item 1738 – September 2012

73. 1,204.2 hours were spent, of which 176.7 hours were spent by Mr Malik. Again, most of the work was done on valuation (741.7 hours). Of that, 342 hours were by fee earners charged at £400 per hour and 203 hours for Ms Swain, charged at £300. The overall analysts' time was 256 hours. Again there is an impression of too much time spent by too many fee earners. I will take just two examples. First, on 5th September, 3 fee earners met with the Claimant's solicitors for 1 hour and 30 minutes regarding "valuation progress and timeline for deliverables". Mr Morris suggested that this was client management and not recoverable. Reasonable time discussing a timetable in my view is recoverable. However only one of the three appears to have spent time in advance of the meeting preparing for it. Second, on 14th September, Ms Swain spent 4.3 hours "Updating report following [Mr Malik's] redrafting" and then 3 hours on "Further report updates. Reorganising. Updating for clarity". That is out of a total of 14.5 hours for Ms Swain recorded that day. If Mr Malik had done the re-drafting (and he records 10.75 hours on the 2 reports that day), why was it necessary to spend so much time updating it? Again I would allow 80 per cent as being reasonable, which is £312,850.96.

Item 1739 – October 2012

74. 1,247.25 hours were spent, of which 142.85 were spent by Mr Malik. Again the majority of the time was spent on valuation (738.9 hours) and the valuation report (78.4 hours). The trade classification report was worked on principally by Ms Lyons, who spent 88.5 hours on it, much of which was reviewing and amending following comments by counsel. Again, across both reports I think that there is too much time fine-tuning. I accept that there was much work to be done on the valuations and that

work had to be careful and accurate, but there is a lot of reviewing and rewriting by multiple fee earners. Again I would allow 80 per cent, which is £280,826.62.

Item 1740 – November 2012

75. 791.1 hours were spent, of which 91.25 were spent by Mr Malik. 419 hours were spent on valuation and the valuation report. 282 hours were spent on the trade classification report, of which just under 150 hours were spent at the analyst rate. This was the month before the reports were due to be served and one would expect to see communication with the Claimant's solicitors. Not all of the time is recorded in category 1 (33.75 hours). Time is recorded in other categories for "clarification" calls and "addressing Freshfields' comments". There is a lot of reviewing, editing and polishing. As reasonable, I would allow 75 per cent of the time claimed after the deductions, which is £167,770.95.

Item 1741 – December 2012

76. 811.15 hours were spent, of which 144.3 were spent by Mr Malik. 100.4 hours were spent on the trade classification report, 180.45 on "trade valuations, IM and analytics", 176.6 on the valuations report, 202.75 on "research phase II, reply report, Wystup articles" and 80.2 on "opposing expert reports – review and analysis". 326 hours were spent by fee earners charged at the £400 rate and 150 at the analysts' rate. There is a great deal of work reviewing and revising the reports in the days before they were served. Clearly one would expect to see some work in finishing them. However, taking into account the time already allowed, the time claimed is unreasonable. As one would expect, there is significant work following receipt of the Defendant's experts' reports. However some of this should have been delegated; such as Mr Watson Brown's trip to the British Library. Taking those factors into account, I would allow 70 per cent as being reasonable, which is £198,310.49.

Item 1742 – January 2013

77. 915 hours were spent, of which 160.9 were spent by Mr Malik. 543.9 hours were spent on trade classification and 337.45 on valuations. Clearly the Navigant fee earners had to get to grips with the Defendant's experts' reports in advance of the joint meetings towards the end of the month and work was being done on the joint memoranda and reply reports. Again the impression is of too many fee earners doing too much reviewing and polishing. I would allow 75 per cent as being reasonable, which is £235,337.36.

Item 1743 – February 2013

78. 550.5 hours were spent, of which 80.25 hours were spent by Mr Malik. 339 hours were spent on trade classification and 210 on valuation. The work done involved completing the joint memoranda and working on the reply reports which were to be served the next month. Again there is much time reviewing the reports. I would allow 80 per cent, which is £148,525.76.

Item 1744 – March 2013

79. 547.25 hours were spent, of which 113.65 were spent by Mr Malik. Most of the time was spent on the trade classification reply report (409.85 hours), with 79.7 hours spent on the valuation reply report and 47.7 hours spent on "ad hoc analysis requested by counsel" which appears to have related to trade valuations. The time spent drafting and reviewing the reply report, by multiple fee earners, stands out. In my view the total time is unreasonable and I would allow 80 per cent, which is £156,549.60.

Item 1745 – April 2013

80. 217.25 hours were spent, of which 39 hours were spent by Mr Malik. The reply reports had been served the previous month and the work done comprised 123.3 hours on VaR analysis, 61.6 hours on "analysis following request from counsel" and 32.35 hours on the FX primer. The requests from counsel appear largely to have related to the valuations. The work done on VaR appears to have been an analysis both of the figures and, to a limited extent, of the parties' respective arguments. I have already expressed a view on the primer. The rest of the work is largely number crunching. I cannot say that the time spent was either unreasonably incurred or unreasonable in amount.

Items 1746 & 1747 – May & June 2013

81. The same workstreams were undertaken in these 2 months and it is convenient to take them together. 1,362.1 hours were spent, of which 259.35 were spent by Mr Malik. The work done related to Mr Malik's third report on trade valuations (191.4 hours), trial preparation (1,050.05 hours) and 103.15 hours were spent on analysis requested by counsel. 17.5 hours of Mr Malik's time was spent attending the trial.

82. The time spent on the third report and the time spent responding to counsel's queries appears somewhat too high to be reasonable. However the time spent on trial preparation appears obviously too high to be reasonable. I appreciate that this time includes assisting with the preparation of the cross-examination of the Defendant's expert witnesses. Clearly this evidence was important in a case of huge value and of course Mr Malik had to be on top of the material. But he had been closely involved in the preparation of the Claimant's experts' reports and in the analysis of the Defendant's experts' reports over the previous year. In my judgment the reasonable allowance for these two invoices would be no more than 60 per cent, which would be £136,354.20 for May and £162,820.20 for June. That is intended broadly to reflect about 50 per cent of the time spent on trial preparation and 75 per cent of the remainder.

Item 1748 – July to September 2013

83. Most of the work in this invoice has been conceded by the Claimant on the ground that it related to the proceedings between the parties in the United States. Only £1,520 is still claimed. That is the total of the first 5 entries in the time ledger. Broadly the work related to reviewing the closing submissions and reviewing the dual currency range trades. The total time is 4.4 hours. In my view it was reasonable for Navigant to be involved in this work and I cannot say that the time spent was unreasonable.

Conclusion

84. The total sum allowed for these items is £2,297,064.55, as set out in the table below.

Item		**Amount claimed excluding VAT after concessions**	**After further reduction for Initial Margin**	**Amount allowed excluding VAT**
1578	September 2011 - invoice no. 343467/152796 dated 6 October 2011	£35,570.00		£32,013.00
1735	June 2012 - invoice no. 367018/152796 dated 2 July 2012	£116,630.60		£99,136.01
1736	July 2012 - invoice no. 370303/158766 dated 10 August 2012	£134,248.00		£107,398.40
1737	August 2012 - invoice no. 373382/158766 dated 14 September 2012	£198,222.64	£192,138.10	£176,000.00
1738	September 2012 - invoice no. 375275/158766 dated 4 October 2012	£403,413.08	£391,063.70	£312,850.96
1739	October 2012 - invoice no. 378120/158766 dated 8 November 2012	£362,118.52	£351,033.27	£280,826.62
1740	November 2012 - invoice no. 381098/158766 dated 12 December 2012	£230,758.64	£223,694.60	£167,770.95
1741	December 2012 - invoice no. 385201/158766 dated 15 January 2013	£292,363.88	£283,300.70	£198,310.49
1742	January 2013 - invoice no. 386965/158766 dated 7 February 2013	£323,709.46	£313,783.15	£235,337.36
1743	February 2013 - invoice no. 389419/158766 dated 7 March 2013	£187,052.68	£185,657.20	£148,525.76
1744	March 2013 - invoice no. 392025/158766 dated 5 April 2013	£195,687.00		£156,549.60
1745	April 2013 - invoice no. 394577/158766 dated 7 May 2013	£81,651.00		£81,651.00
1746	May 2013 - invoice no. 397361/158766 dated 10 June 2013	£227,257.00		£136,354.20
1747	June - 3 July 2013 - invoice no. 399613/158766 dated 5 July 2013	£271,367.00		£162,820.20
1748	8 July - 30 Sept 2013 - invoice no. 408094/158766 dated 4 October 2013	£1,520.00		£1,520.00
1749	November 2013 - invoice no. 410704/158766 dated 6 November 2013	0		0
	TOTAL	£3,061,569.50		**£2,297,064.55**