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Case No: LM-2018-000237

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A, 1NL

Date of Judgment: 22 June 2020

Before :

MR. ADRIAN BELTRAMI QC

Sitting as a Judge of the High Court

- -

Between:

TARGET RICH INTERNATIONAL LIMITED

Claimant

and

FOREX CAPITAL MARKETS LIMITED

Defendant

- -

Gerard McMeel QC (instructed by The Brooke Consultancy LLP) on behalf of the Claimant

Francis Tregear QC (instructed by Streathers Solicitors LLP) on behalf of the Defendant

Hearing dates 8, 9, 10 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.

Covid-19 Protocol: This Judgment was handed down by the Judge 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 Monday 22 June 2020.

ADRIAN BELTRAMI QC:

INTRODUCTION

1. This is a claim for damages for breach of contract and negligence. The Claim Form was issued on 7 December 2018 and the trial was heard over the course of 3 days between 8 and 10 June 2020. The Claimant (**TRI**) was represented by Mr Gerard McMeel QC and the Defendant (**FXCM**) by Francis Tregear QC. I am grateful to Counsel for their assistance.

2. TRI is a private limited company registered in the Republic of Seychelles. It was incorporated on 20 March 2012 for the purposes of foreign exchange investment. Ms Wan-Hsien Yu (**Madame Yu**) is the sole director and shareholder of TRI.

3. FXCM is a private limited company registered in England and Wales, which operates as the provider of an online foreign exchange trading platform. It is part of a wider group of companies carrying on business in several jurisdictions and which has been referred to in the evidence as **FCM**. FXCM is authorised by the Financial Conduct Authority (**FCA**) under the Financial Services and Markets Act 2000 (**FSMA**) to provide regulated products and services.

4. From 2012, TRI operated a series of accounts with FXCM, trading various currency pairs on margin. This included speculation on EUR/CHF (ie the Euro and the Swiss Franc), in respect of which TRI was, at least by 2015, *'long'* on EUR. In other words, it held a number of open trades, the success of which was dependent upon an appreciation of the EUR against the CHF.

5. Prior to 15 January 2015, the Swiss National Bank (**SNB**) had maintained an effective cap on the value of the CHF as against the EUR, at 1 EUR to 1.20 CHF. What this meant was that, whilst the CHF could depreciate against the EUR, the SNB would intervene to prevent it from appreciating beyond the 1.20 level. On 15 January 2015, the SNB announced the removal of this cap. This announcement, which appears to have taken the market by surprise, led to what has been termed the **Swiss Flash Crash**, an immediate period of great volatility, in which the value of the CHF soared against the EUR before eventually stabilising, at something just above parity, by the afternoon.

6. A decline in the value of the EUR against the CHF was damaging to TRI's open positions. It had for this reason put in place a "*stop loss order*" (**SLO**), or more accurately a series of SLOs, which were instructions that its open positions should be automatically closed out in the event that the EUR/CHF rate reached 1.17911. It is common ground that exchange rates being offered to FXCM by its liquidity providers passed that barrier shortly after the SNB announcement. It is also common ground that the SLOs were not executed by FXCM at that time. The immediate reason for this was that the volatility in the market had (within 1 minute of the announcement) triggered "*system circuit breakers*" (**SCBs**) which temporarily suspended both pricing and trading on FXCM's platform. In the event, the SLOs were executed at around 1.30 pm on 15 January 2015, at rates of about 1.03. All the trades made losses.

7. As I explain below, there is a dispute as to the scope of TRI's claim. Put neutrally for the moment, the complaint is that FXCM acted in breach of contract and negligently in failing to execute the SLOs when they were triggered shortly after the SNB announcement. TRI seeks as damages the amount which it is said to have lost by reason of the later executions at disadvantageous exchange rates.

THE WITNESSES

8. Madame Yu gave evidence on behalf of TRI. That evidence was conveyed over Skype and through a translator. Madame's Yu's witness statement set out the background facts, from TRI's perspective. For whatever reason, I did not gain very much assistance from Madame Yu's oral evidence, which was rather argumentative and, at times, confused. It is clear that she feels strongly about the merits of TRI's case. However, I am satisfied that she gave her evidence honestly. One particular area of confusion concerned the extent of her or TRI's experience in foreign exchange trading, where the answers she gave did appear to vary, although it may be that the questions put to her were not fully understood. For the purposes of my Judgment, and to the extent that it matters, I proceed on the basis of Madame Yu's witness statement and the Particulars of Claim, to the effect that TRI and/or Madame Yu had experience of foreign exchange trading from 2006 to 2015.

9. FXCM's sole witness was Mr Marco Konte (**Mr Konte**), whose evidence was also given over Skype. Mr Konte is an employee of FCM Global Services LLC, which provides back office support to customer facing entities in the FCM group. His

witness statement explained in detail the operation of FXCM's platform, the events of 15 January 2015 and the impact on TRI's positions. His oral evidence confirmed and supplemented that material. It was plainly given honestly and with a view to assisting the court.

10. In truth, this is not a case in which there are any material disputes of fact. Both witnesses provided helpful factual background, which enabled me to consider the legal issues which then arise.

NARRATIVE

FXCM's business

11. FCM began trading in New York City in 1999. It was one of the early developers of electronic, retail trading platforms in the foreign exchange market. It operates as what Mr Konte describes as a "*mini exchange*" . It gathers in market prices to buy or sell currency from liquidity providers, such as banks, and offers those prices to customers through the trading platform. FXCM was the UK customer facing entity within FCM.

12. There were (and still are) two models, "*no dealing desk*" and "*dealing desk*". The former was the most common model and that which operated on TRI's accounts. On that model, FXCM would pass on to its clients the best prices offered by the liquidity providers with a fixed mark up for each currency pair. It would not itself act as market maker or take unhedged positions (which could be done under the dealing desk model). FXCM also offered its clients the facility to trade on margin, with a comparatively small security deposit. This meant that for every one unit of currency held on its account, the client could hold exposure equivalent to a multiple of thousands.

13. The key to FCM's operations was its matching engine software. Liquidity providers would send quotes in live streams of digital information which were then fed into the matching engine. Each quote would contain a bid or ask price and an amount in respect of a currency pair (such as EUR/CHF). The amount is the volume of the first currency in the pair that the liquidity provider is willing to trade at the specified price. Bid prices on EUR/CHF are prices for the sale of EUR against CHF. Ask prices on EUR/CHF are prices for the purchase of EUR against CHF.

14. The quotes received from the liquidity providers would be sorted and re-sorted through the matching engine into a book of quotes so that the highest bid and lowest ask were then made available to the client (with the price also at this stage including the mark up). This was referred to internally as the "*best bid/offer*" (**BBO**). It is in the nature of foreign exchange that availability and prices would change on a continuous basis and so the BBO would be regularly updated.

15. In the event that a client chose to trade an available amount and at an available price it would submit an order to FXCM. A completed transaction would involve two trades: a trade between the client and FXCM and a "*back to back*" trade between FXCM and the liquidity provider on the same terms, but for the mark up. I shall have to consider below precisely when it was that each contract between FXCM and the client was concluded, and what were its terms.

16. FXCM produced, and provided to TRI, an "*Order Execution Policy*" (**OEP**). This is one of the documents said by TRI to constitute its contract with FXCM and I consider its contractual significance below. For present purposes, it is helpful to refer to its descriptions of the nature of the business undertaken by FXCM and the different sorts of orders that could be placed..

17. Under the heading "*Application of Best Execution Obligation*":

    > "*FXCM is obliged to take all reasonable steps to obtain, when executing orders, the best possible result for its clients ('best execution') taking into account the execution factors (noted below) where FXCM acts on behalf of a client.*
    >
    > *"In circumstances where FXCM acts as principal on own account and does not consider it acts on a client's behalf and does not assume responsibility to provide best execution, FXCM will notify a client so that they are properly informed.*
    >
    > *"Whenever there is a specific instruction from a client FXCM shall execute the order following the specific instruction and compliance with that specific instruction will be treated as satisfaction of the best execution obligation."*

    The, or at least the question of any, duty to provide best execution, and any breach thereof, are important aspects of TRI's claim and are addressed further below.

18. Under the heading "*No Dealing Desk*":

    > "*FXCM provides forex execution through a straight through processing, or No Dealing Desk forex execution model. In this model, FXCM passes to its clients the best prices that are provided by one of FXCM's liquidity providers with a fixed mark-up for each currency pair. In this model, FXCM does not act as a market maker in any currency pairs. As such, FXCM is reliant on these external providers for currency pricing. Although this model promotes efficiency and competition for market pricing, there are certain limitations to liquidity that can affect the final execution of your order."*

    In this passage, FXCM describes the execution model which I have summarised and makes reference to the possibility of liquidity risk.

19. Under the heading "*Order Execution Risks*" and the sub-heading "*Gapping/Volatility*":

    "*There may be significant market movement after a news announcement or economic event or between the close and re-opening of a market which will have a significant impact on the execution of a pending order. Clients should be aware of the following risks associated with volatile markets, especially at or near the close of the standard trading session:*

    - *An order may be executed at a substantially different price from the quoted bid or offer, or the last reported trade price at the time of order entry, or an order may be only partially executed or may be executed in several shapes at different prices; and*
    - *Opening prices may differ significantly from the previous day's close."*

    This passage is relied upon by FXCM as amounting to an apposite risk disclosure. For present purposes, I observe that it specifies that the placing of an order did not by itself guarantee the terms of the trade.

20. Under the heading "*Order Handling"* and the sub-heading "*Order types*", there were described various different types of orders, including the following:

    "***Market Order** – is an instruction to buy or sell at the next available market price. Please note that pursuant to market conditions there may be a difference between the price selected on FXCM's Online Facility and the final execution price received. This difference may be less favourable or more favourable than the original quoted price and is a function of market liquidity.*

    *"**Limit Order** – is an instruction to buy or sell at your specified price or better and may be used to either open or close a position. Please note that a limit order may be triggered by the market trading through or gapping over your specified price. In the event that market conditions trigger a client's limit order for execution, it may only execute at a price equal to or better than a client's specified rate. Limit order guarantees price but does not guarantee execution.*

    "A limit order to buy at a price below the prevailing market price will be executed at a price equal to or less than the specified price.

    "A limit order to sell at a price above the prevailing market price will be executed at a price equal to or more than the specified price.

> *"**Stop Order** – A stop order is an order to buy or sell at a specified price and may be used to open or close a position. Please note that a stop order may be triggered by the market trading through or gapping over a client's specified price.*
>
> *"In the event that market conditions trigger a client's stop order for execution it will become a market order upon execution. This means that a client's final execution price may be less favourable or more favourable depending on market conditions. Stop order guarantees execution but does not guarantee price.*
>
> *"A stop order to sell at a price below the prevailing market price will be executed at the next available market rate, which can be less favourable, or more favourable than a client's specified rate."*

The difference between these orders is tolerably clear. A market order is placed by the customer and will be executed at the market price, even if that differs from the price at the time of the order. A limit order is triggered automatically by market movements but can be executed only at or better than the specified price. A stop order (which is a SLO) is also triggered automatically and will be executed at the market price.

The trading relationship between FXCM and TRI

21. TRI became a customer of FXCM in 2012. It submitted an online application form on 3 March 2012. In that form, TRI had to provide certain trading and financial information, amongst which it confirmed that:

    a. It had 10 years' experience of trading currencies through interbank or OTC foreign exchange, with a weekly frequency of trades.

    b. It had carried out transactions in significant size on the relevant market at an average frequency of 10 per quarter over the previous twelve months.

    c. Its net worth was between £1m and £4,999,999, with liquid assets of between £100,000 and £249,999.

    d. It had a personal assets portfolio, including cash and/or other financial instruments, of at least £500,000.

    e. It had read, understood and agreed to FXCM's terms of business.

    f. It had read and understood FXCM's order execution policy and various other policy documents.

22. Thereafter, TRI opened and operated several accounts, through which it obtained access to FXCM's trading platform. The first account, No. 3400042016 (**2016**), was opened on 22 May 2012. This was set with Japanese Yen (JPY) as its base currency, which meant that the account was funded by JPY and all profits and losses were accounted for in JPY. Subsequently, it opened further accounts which were set with US Dollars (USD) as the base currency: Account Nos. 1906190131 (opened 3 June 2012) (**0131**), 1906190752 (opened 20 June 2012) (**0752**)and 1906211168 (opened 24 March 2014) (**1168**)[1].

23. As at the end of 14 January 2015, namely the day before the Swiss Flash Crash, TRI had open positions on two of its four open accounts:

    a. Account 0131: TRI held no open positions. There was a small positive cash balance of US$1.17 on the Account.

    b. Account 0752: TRI held cash of US$95,629.93 on the Account. It also held 12 open EUR/CHF positions, worth EUR 630,000, together with a number of open USD/JPY positions which are not otherwise relevant.

    c. Account 1168: TRI held cash of US$313,249.50. It also held 6 open EUR/CHF positions, worth EUR3 million, together with an open EUR/USD position not otherwise relevant.

    d. Account 2016: TRI held no open positions. There was a positive cash balance of JPY 277.

24. The open EUR/CHF positions had been struck at rates marginally over 1.20. In each case, TRI was a buyer of EUR, such that the success of the trade depended on the appreciation of the EUR against the CHF. However, TRI had also placed SLOs on all these positions at 1.17911. The purpose of the SLOs was to limit TRI's losses in the event that the EUR depreciated against the CHF.

The Swiss Flash Crash

25. As will be seen, events moved very quickly on the day of the Swiss Flash Crash, such that it is in places necessary to describe changes over the course of seconds.

26. The announcement by the SNB was made on the morning of 15 January 2015 at 09:30 GMT. Mr Konte's evidence was that, whilst the SNB had scheduled a policy announcement for that morning, his own expectation, at least, was that nothing would change. Instead, it was announced that SNB's EUR/CHF policy was being abandoned with immediate effect. According to Mr Konte, "*This was a startling turn of events, to me and my colleagues in the London office, and to the market.*"

[1] TRI held two further Accounts, Nos. 86026848 and 1906221782 but these had been closed with zero balances before January 2015.

27. The announcement lasted about 40 seconds. Prior to the announcement, the lowest BBO for bid was around 1.20085/6, with a narrow range between providers. By 09:30:47, the BBO price had dropped below 1.20 and the range was widening. At 09:30:54 the BBO bid price dropped below the level of TRI's SLOs to 1.17896. This triggered the SLOs at 09:30:56, at which time the orders were marked as "*executing*" within FXCM's software.

28. At 09:30:57, however, the SCBs were triggered. These were internal barriers, also referred to as "*seatbelts*", which were constructed within the software of the foreign exchange platform and manually set. According to Mr Konte, the existence of such barriers is standard in the foreign exchange world; further, they are intended for client protection, in order to ensure that trades are executed at legitimate rather than aberrant rates. There were two types of SCBs and both were triggered at around the same time. Pricing SCBs set limits on the updating and publication of the BBO where new prices that came into the matching engine were sufficiently different from the last BBO. Mr Konte was not able to identify precisely which price triggered the pricing SCBs but has pointed out that the prices at 09:30:57 were all much lower than the EUR/CHF bid price of 1.17551 in the previous second at 09:30:56, and the best one recorded was 1.16563, nearly 100 "*pips*" lower. A "*pip*" is a measure to the 4th decimal point, or one ten thousandth. At any rate, when the pricing SCBs triggered, updates to the BBO ceased, with the consequence that no new BBO prices were generated and automatic trades (such as under SLOs) were stopped.

29. The other type of SCBs were trading SCBs. These were triggered if the underlying price matched with a customer's trade was more than 100 pips away from the price at the moment when the customer placed the order or was automatically deemed to do so (for example, by reason of SLOs). Trading SCBs operated on an order by order basis, and prevented an order being executed if the price was sufficiently divergent. The range of 100 pips, described as "*maximum slippage",* was manually set but had not been changed for several years. The effect of the trading SCBs was to prevent the execution of a SLO at a price more than 100 pips below the order level. However, the pricing SCBs had already halted automatic execution of SLOs on EUR/CHF.

30. Quite apart from the price volatility which triggered the SCBs, the announcement also led to a sharp reduction in liquidity. This was significant, or at least would have been significant even without the SCBs. FXCM's sell positions which were held back from automatic execution by the SCBs totalled 1 billion currency units. Under normal trading conditions, liquidity providers would be expected to offer around EUR 60 million of liquidity on a revolving basis. At 09:06, there were still 58,498,677 lots available behind the bid prices quoted. But by 09:31, this had decreased to 28,163,917 and by 09:35 to 19 million.

31. In addition, as the value of the EUR sank against the CHF, price volatility increased. By 09:31:08 (ie around 30 seconds after the announcement had finished), only one liquidity provider offered any prices at all to the matching engine, with the EUR value

dropping to CHF 1.10943. At 09:31:43, there were three bid prices, but these were at 1.15566, 1.00374 and 1.0039001, giving a highly volatile range of around 1500 pips. And at 09:33:32, Citibank quoted a bid price of 0.63745.

32. At 09:42, TRI opened a fresh market order on Account 0752 to buy EUR/CHF at a price of 0.97992. This increased TRI's exposure to EUR, on the speculation that there would be a rally from that point. This trade was closed at 10:30 and TRI booked a small profit.

33. Without tracking all the prices as they changed over each second, it suffices to say that they remained volatile for about 40 minutes. By 10:10, it seems that pricing began to stabilise at around 1.044-1.047, with volumes increasing from near zero levels to 14 million. At 10:13:12, FXCM's Trading Desk and Production Team decided manually to reset the pricing SCBs, on the basis that sufficient stability had returned. The result was that the matching engine once more generated BBO prices from quotes received. And at 10:23, the trading SCBs were reset.

34. However, even after both sets of SCBs had been reset, TRI's SLOs were still not executed. The reason for this was that such trades were precluded by the maximum slippage parameter of the trading SCBs: TRI's stop order price at 1.17911 remained more than 100 pips above the bid price in the BBO available in the trading platform. The same applied to many of the 1 billion worth of lots pending execution.

35. In the event, and in order to clear these trades, FXCM temporarily suspended the maximum slippage parameter, in effect disapplying the trading SCBs for the relevant SLOs. The backlog of orders was then fed into the market from around 13:30. TRI's open positions were closed between 13:34 and 13:35 at prices around 1.03. The consequence was that all the positions were loss-making. The losses on Account 1168 totalled US$122,396 and on Account 0752 totalled US$584,976.55. Taking into account the cash balances on all the Accounts, TRI was left with an overall deficit of US$298,493.12. This was written off by FXCM as a gesture of goodwill.

The Aftermath

36. In May 2015, TRI lodged a complaint with the Financial Ombudsman. This was adjudicated upon by letter dated 22 October 2015. It was concluded that FXCM had treated TRI fairly, and the complaint was rejected. Madame Yu was of the view that "*The assessment and analysis of the claim was nothing short of being abysmal*". She asked the Ombudsman to reconsider and provided for this purpose further information. However, Madame Yu then instructed solicitors to act on TRI's behalf (The Brooke Consultancy LLP, **TBC**), and on 11 February 2016 they wrote to withdraw the complaint.

37. On 3 January 2017, TBC made a complaint to the FCA about the FCA's supervision of FXCM and its failure to order FXCM to compensate TRI. As part of this complaint, TRI referred to the FCA's power under section 348(1) of FSMA to award

administrative restitution or compensation. By letter dated 11 July 2017, the complaint was refused because the investigator was satisfied that the FCA had acted reasonably. This decision was taken to the Complaints Commissioner who, by report dated 13 November 2017, rejected the complaint.

38. On 7 December 2018, and following pre-action correspondence, the Claim Form was issued.

The Claim

39. The Particulars of Claim, which were attached to the Claim Form, are brief. The critical allegations are as follows:

    a. At [4], that the contract between TRI and FXCM incorporated express and implied terms including, without limitation, "*FXCM's standard form Terms of Business, its Order Execution Policy, the COBS rules in relation to the conduct of investment business, and specific instructions given by TRI to FXCM.*" The COBS rules are the rules contained within the Conduct of Business Sourcebook issued by the FCA pursuant to section 138 of FSMA by way of implementation of the Markets in Financial Instruments Directive 2004/39/EC (**MiFID**).

    b. At [19], that the "*stop loss price*" was a specific instruction and hence an express contractual term of the contract (**the stop loss price term**).

    c. The contract also contained a number of express alternatively implied terms, namely:

        i. At [20], that FXCM should take all reasonable steps to obtain, when executing orders, the best possible results for its clients (**the best execution term**).

        ii. At [21], that FXCM should establish and implement effective arrangements for complying with the best execution term and, in particular, should establish and implement an order execution policy to allow it to obtain, for its client orders, the best possible result in accordance with that obligation (**the order execution policy term**).

        iii. At [22], that FXCM should, whenever there was a specific instruction from the client, including the stop loss order, execute the order in accordance with the specific instruction (**the specific instruction term**).

        iv. At [23], that FXCM should execute the stop loss order promptly, fairly and expeditiously (**the fair and timeous execution term**).

   d. At [25], there were concurrent duties of care in tort not to impose the SCBs and/or to execute TRI's stop loss order.

   e. At [27], FXCM acted in breach of contract or negligently in failing to execute TRI's stop loss order and/or by the imposition of the SCBs. The general thrust of the complaint is that FXCM "*deployed*" SCBs, which had the consequence that it "*was systematically committed to overriding clients' stop loss orders*".

   f. At [28], TRI suffered loss and damage in that, had the SLOs been executed, its losses would have been limited to US$100,000. Instead, it lost all of its money employed in foreign exchange trading, said to be US$591,489.60.

40. By Order dated 15 March 2019, TRI was obliged to serve on FXCM a copy of every written agreement on which the claim was based and to provide by way of further information particulars of the provisions relied upon for the express terms alleged. In compliance with that Order, TRI served Further Information dated 22 March 2019, to which was appended:

    a. FXCM's Terms of Business dated 20 June 2014 (in Chinese) (**ToB**); and

    b. The OEP (in English and Chinese) dated 1 January 2014.

    TRI identified the terms relied upon as contained in these documents and also specific Rules in COBS, which were said to be incorporated by reference into the contract.

41. FXCM's Defence was served on 11 April 2019. I draw the following central elements from it:

    a. At [5], FXCM admits that TRI's trading was governed by the ToB (exhibiting a copy in English) but otherwise denies the contractual framework alleged by TRI.

    b. At [20], and in response to the allegation of the stop loss term:

       i. It admits that the stop loss level was specified and that the instruction was a stop order within the meaning in the OEP.

       ii. It denies that FXCM agreed to execute any trade at the stop loss level and relies on clause 9.5 of the ToB, to which I refer below.

       iii. It denies that the OEP had contractual force, relying on clauses 1.2 and 1.3(a) of the ToB.

       iv. It makes reference in any event to the provisions in the OEP in respect of "*Gapping Volatility*" referred to at paragraph 19 above.

v. It concludes by contending that even if (which it denies) FXCM was contractually bound to execute the SLOs and the OEP did have contractual force in relation thereto, FXCM's obligation was only to close TRI's positions at the next available market rate, with no allegation that this was not done.

c. At [21], it denies each of the further contractual terms alleged by TRI and, specifically, contends that the rules in COBS were neither incorporated nor implied.

d. At [22], it denies any duty of care at common law, on the basis that the parties' rights were defined by the ToB.

e. At [23], it denies the allegations of breach.

f. At [24] – [26], it relies on a *force majeure* provision at clause 25 of the ToB.

g. At [28], it admits that the consequence of the trading was that TRI lost all of the cash on its Accounts, amounting to US$408,981.07 but otherwise denies the case on loss.

42. So far as the contractual framework is concerned, it is necessary to distinguish between different elements. Although the Particulars of Claim refer to "*the contract*", there were in fact a series of contracts. The ToB took the form of a framework agreement. Each individual trade would then constitute its own separate contract, governed by both the ToB and the specific terms of that trade. The claims of breach of contract are for breach of these trade contracts.

THE ISSUES

43. As it appears to me, the following issues arise for determination, each of which I will consider in turn:

a. ***Issue 1:*** what is the scope of TRI's pleaded case?

b. ***Issue 2***: what was the contractual framework governing TRI's trading with FXCM?

c. ***Issue 3***: did the trade contracts contain the express or implied terms alleged?

d. ***Issue 4***: did FXCM owe a concurrent duty of care in tort as alleged?

e. ***Issue 5:*** in the events which occurred on 15 January 2015, did FXCM act in breach of contract or negligently in the manner alleged?

f. ***Issue 6***: was the *force majeure* provision at clause 25 engaged and if so to what effect?

g. ***Issue 7***: If there was a breach of contract or negligence, what damage has been suffered by TRI?

Issue 1: what is the scope of TRI's pleaded case?

44. At Particulars of Claim [19], the case advanced by TRI is that FXCM was obliged by way of express term to execute the SLOs at the stop loss price. That case is, and this was confirmed in oral submissions, that FXCM was obliged to close all of the positions at the SLO price of 1.17911. The further alleged terms follow on from and/or mirror this primary term. There is a single allegation of breach and a single claim for damages, at [28], as follows:

> "*In consequence of FXCM's breach of contract and/or negligence TRI has suffered loss and damage in that had the stop loss order been executed TRI's losses would have been limited to US$100,000. Instead, TRI lost all of its money employed in forex trading, the best particulars of which TRI can provide at present are direct losses in the sum of US$591,489.60.*"

45. As I have mentioned above, FXCM in its Defence took the point that, absent the claim that the SLOs should have been executed at the stop loss price, there was no alternative claim that, if such price was unavailable, they should have been executed at some different (and if so what) price. No Reply was served in response. The point was then repeated by FXCM in its Opening submissions.

46. In Closing submissions, and whilst confirming that its primary case was that the SLOs ought to have been executed at the stop loss price, TRI sought to advance an alternative case, to the effect that FXCM was in breach of contract in failing to execute the SLOs at a price which was available in the market after the point at which the SLOs were triggered. By reference to the evidence of Mr Konte, TRI submitted that there was a price of 1.17597 at 10:23, and that this price could and should have been achieved. This was said to amount to a breach of one or more of the terms pleaded.

47. FXCM objected to what it contended was a material expansion of TRI's case, which had not been pleaded, even though the point had been expressly taken in the Defence. Further, it was said, to advance such an alternative case, it would have been incumbent on TRI not only to plead it but to specify the different price which could and should have been achieved, as well as to plead a necessarily different damages claim. And had it done so, the resolution of such a claim would have required both expert evidence (as to the bids which were in fact in the market and available to be

executed) and a more detailed factual examination of what could and would have been done on FXCM's platform absent the SCBs, including as to the counterfactual treatment of FXCM's backlog of 1 billion units of orders. None of these matters was explored, so FXCM submitted, because there was no such case.

48. TRI submitted that the matter was sufficiently pleaded and that the claim for loss merely represented the "*best particulars*". It also suggested that expert evidence would not have been allowed because the issue related to FXCM's platform rather than the market more generally. But I am not satisfied that any of these points provides a satisfactory answer. The alternative claim is on my reading of the Particulars of Claim not pleaded and nor, it seems, was FXCM's overt position on this point even gainsaid. And I do consider that such a claim would have engaged a much more detailed factual and probably also expert analysis for the purpose of determining whether, absent the SCBs, FXCM could in fact have executed the SLOs, and if so, when and at what price, given the massive fluctuations in prices, the withdrawal of liquidity and the pressure of transactions for other clients of FXCM (and, no doubt, in the market generally). That is a very different exercise to the narrow question of whether FXCM was obliged to close out the SLOs at the stop loss price, a question which is not, or not directly, market dependent.

49. Indeed the selection of the alternative price of 1.17597 underscores the unsatisfactory and potentially unfair core of this new way of putting the case without the necessary evidential enquiry. Mr Konte's evidence, for the purpose of demonstrating the market disruption caused by the SNB announcement, included a number of examples of price movements in its aftermath. The price of 1.17597 was, he said, the maximum execution price on the system at 10:23. It was not explained by TRI why that would be a relevant time for picking the price at which the SLOs ought to have been executed. But, in any event, Mr Konte was not giving this price for the purpose of identifying a market price that was in fact available. On the contrary, the purpose of his evidence was to show that, even at 10:23, prices on FXCM's system were still unreliable. He went on to explain both that (a) the minimum execution price at the same minute was 0.93967; and (b) both the maximum and the minimum prices on the system were "*substantially different from the prices offered by liquidity providers at 10:23*" because of delays in the booking system caused by the crash.

50. In the circumstances, I agree with FXCM that there is no alternative case pleaded and that, in the absence of the evidence necessary to explore and determine such a case, TRI should not be able to advance one. The only case, accordingly, is that FXCM should have closed out the SLOs at 1.17911.

Issue 2: what was the contractual framework governing TRI's trading with FXCM?

51. The parties are agreed that their contract was comprised of (at least) the ToB. The English language version attached to the Defence is dated 20 June 2014, which I assume superseded a previous version referred to in TRI's online application form in 2012. It was common ground that I can proceed on the basis that the 2014 version is

the operative document for the purpose of the present dispute. Similarly, the OEP attached to the Defence is dated 1 January 2014. Again, this is the operative document for present purposes.

52. There are nevertheless two sub-issues which need to be resolved:

   a. Does the Agreement include terms contained in the OEP?

   b. Does the Agreement include the rules contained in COBS?

Does the Agreement include terms contained in the OEP?

53. Clause 1.2 of the ToB is the following terms:

> "*The Company's agreement with the Client consists of several documents that can be accessed through the Company's website, Trading Facility, or upon request, and specifically comprises:*
>
> *(a) these Terms (including the Schedules and Annexures);*
>
> *(b) the Rate Card;*
>
> *(c) any application or form that the Client submits to open, maintain or close an Account; and*
>
> *(d) any specific terms and conditions relating to the Company's websites, which will be displayed on the relevant website,*
>
> *which are together referred to as the Agreement. This Agreement constitutes the entire agreement between the Client and the Company with respect to the subject matter hereof and supersedes all prior or contemporaneous oral or written communications, proposals, agreement or representations with respect to the subject matter.*"

54. This is then followed by clause 1.3:

> "*There are additional documents and information available to the Client upon request, which provide more details about the Company and its services, but which do not form part of the Agreement. These include:*
>
> *(a) The Company's "Best Execution Policy", which explains certain aspects of how the Company quotes prices and deals with Orders and Transactions…*"

The reference to the "*Best Execution Policy*" is a reference to the OEP.

55. It is in reliance upon these provisions that FXCM contends that the OEP is a "*non-contractual*" document, that is, one which does not form part of the Agreement and which contains no terms which are legally binding as between TRI and FXCM. This is said to follow from the express terms of the two provisions, and to be re-inforced by the "*entire agreement*" clause.

56. I was directed to *The Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347, in which Andrew Burrows QC, sitting as a Judge of the High Court, discussed the meaning of an entire agreement clause. As the Judge said, such clauses come in many different forms, but the meaning of the clause before him was said to be as follows:

> "*Looked at as a whole, clause 5.1 is seeking to make clear that the terms of this contract, and no other agreement govern. In other words, one cannot go outside the provisions of this agreement… to determine what the parties have agreed.*"

57. Although the agreement in that case was, inevitably, in different form, this is to my mind an apt description of what was intended by the entire agreement clause in the ToB. Indeed, clause 1.3 complemented and clarified the entire agreement clause by identifying particular documents which were available but which did not form part of the contract, whether expressly or impliedly.

58. TRI's pleaded case involves the bare assertion that the OEP forms part of the contract. During the trial, it submitted that clause 1.3(a) was in some way inconsistent with COBS or otherwise offended the "*main object*" of the Agreement. I consider (and reject) TRI's broader case about COBS below. But, in any event, there is nothing in clause 1.3(a) which is inconsistent with COBS. That there is an obligation at COBS 11.2.22R to provide information to the client on the order execution policy does not mean that that policy must become a term of the contract. Nor does this definitional section conflict with the Agreement's "*main object*", whatever that might be (although I do consider this question for a different purpose below). In my judgment, there is no reason not to construe clauses 1.2 and 1.3 on their face and in accordance with their plain meaning, such that the OEP did not form part of the contractual agreement between the parties, whether by express or implied term.

Does the Agreement include the rules contained in COBS?

59. It is TRI's case that all of the rules contained in COBS, or at least all those rules which might pertain to the operation of a foreign exchange trading platform, formed part of the Agreement between TRI and FXCM. Counsel confirmed that it was also

TRI's case (albeit that this formed no part of the claim) that all of the rules contained in **CASS** (the FCA's Client Asset Sourcebook) formed part of the Agreement. When I asked what else formed part of the Agreement, I was told that there might be other sets of rules but that those were the relevant ones. It was confirmed that neither MiFID nor FSMA formed part of the Agreement.

60. As I understood the argument, it was put on three bases:

    a. First, that the COBS rules were implied into the Agreement as a matter of law, and that this was necessary to give effect to MiFID under European law. The same argument was said to create parallel duties of care in tort.

    b. Second, that the COBS rules were expressly incorporated by reference into the ToB.

    c. Third, that the COBS rules were implied into the agreement as a matter of fact.

Case law

61. Over the last decade, the English and Scottish courts have been presented with a number of cases in which claimants who allege that they have been the victim of regulatory misconduct have sought to advance causes of action against authorised entities for breach of FCA rules. Under section 138D of FSMA (formerly section 150), a right of action for breach of COBS rules is accorded to a "*private person*", the meaning of which is contained in regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulation 2001 (SI 2001 No. 2256) (**the Regulation**). This includes, so far as relevant "*any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind.*"

62. In *Titan Steel Wheels Ltd v The Royal Bank of Scotland plc* [2020] EWHC 211, [2010] 2 Lloyds Rep 92, David Steel J held that this definition should be given a broad effect so as to exclude corporate entities carrying on business of any kind. This had the consequence of largely confining the statutory cause of action to individuals. That decision has been considered and followed at first instance, including by Flaux J in *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2012] EWHC 7, [2012] PNLR 15. In the absence of a direct statutory cause of action, companies have either challenged the decision or sought to achieve the same result by an alternative legal route such as incorporation or implication, or indeed duty of care. It is, therefore, instructive, to review how cases in this field have been dealt with.

63. *Grant Estates Ltd v The Royal Bank of Scotland plc* [2012] CSOH 133 was a decision of Lord Hodge, in the Outer House of the Court of Session. The claim, as with several of the succeeding cases, involved allegations of mis-selling of an interest rate swap. The pursuer, Grant Estates, alleged that the defender bank had breached various of the rules in COBS and also in MiFID. Amongst the questions raised was whether

such alleged breaches could be made the subject of a claim in a civil action. The bank's terms of business included the following provision at clause 2.2:

> "*Where these Terms conflict with Applicable Regulations, the latter shall prevail. Applicable Regulations shall include the FSA Rules, the rules of any other relevant regulatory authority or exchange and any applicable laws and regulations in force from time to time…*"

64. Grant Estates argued (i) that the distinction drawn in (what was then) section 150 of FSMA and the Regulation between individuals and corporate entities was not authorised by MiFID and that the Regulation should be construed in a way compatible with EU law; and (ii) that the Regulation should in any event be construed narrowly and that *Titan Steel Wheels* was wrongly decided.

65. In what was, with respect, a full, careful and detailed Judgment, Lord Hodge rejected both arguments. On the first, he held that MiFID did not require a Member State to provide protection to a customer by means of a direct right of action against the authorised person and nor did the United Kingdom choose to confer such a right when it implemented MiFID. On the contrary, section 150 and the Regulation were a response to a different perceived mischief which ante-dated MiFID. In this context, Lord Hodge also noted that the FSMA regime nevertheless accorded several regulatory remedies, at [47]:

> "*But, as Mr Clark pointed out, the United Kingdom legislation provides regulatory remedies for breaches of the COBS rules. This is consistent with recital 58 of the 2004 directive which envisaged that member states would designate competent authorities to enforce the obligations created by MiFID. The FSA can enforce the COBS rules by public censure (FSMA section 205) or by imposing a financial penalty (FSMA section 206). The court on the application of the FSA or the Secretary of State can make a restitution order requiring payment to the FSA if it is satisfied that a person has contravened a requirement imposed under FSMA (FSMA section 382). Particularly relevant to the customer is the power given to the FSA to require an authorised person to pay compensation to persons who have suffered loss or an adverse effect as a result of contravention of such a requirement (FSMA section 384). These regulatory remedies, which implement MiFID, do not distinguish between natural and non-natural persons.*"

66. On the second point, at [59] Lord Hodge reached a conclusion similar to that of David Steel J in *Titan Steel Wheels*.

67. That then led to the further argument that clause 2.2 of the bank's terms of business should be construed as incorporating certain of the COBS rules into the contract. Lord Hodge did not agree, at [67]:

> *"In my view it has the effect that the terms of business cannot qualify or exclude duties imposed on RBS under the COBS rules. Thus the contract cannot be pleaded against a complaint to the FSA that RBS had broken those rules. It might be argued that the sentence is unnecessary if that were all that it sought to achieve, but the sentence has value as a clarification. Does it go further and create contractual rights out of the COBS rules? In my opinion it does not. If it had been intended to incorporate obligations under COBS into the parties' contract I consider that the terms would have stated that clearly. The terms did not. A customer of RBS might rely on the sentence in the civil courts to prevent the bank from enforcing a provision which adversely affected the customer's ability to obtain a regulatory remedy, if there were such a provision. But that is very different from making the COBS rules into contractual rights. "*

68. In *Green & Rowley v The Royal Bank of Scotland plc* [2013] EWCA Civ 1197, the claimants alleged that an interest rate swap had been mis-sold. As individuals, they could in theory take advantage of the right of action available under section 150 of FSMA for breach of the Conduct of Business (**COB**) rules which were the predecessors of COBS. Such a claim was not, however, advanced, because it was believed that it was statute barred. Accordingly, a claim was made in tort, which failed before the Judge, who held that the bank owed no advisory duties at common law. On appeal, the argument was that the bank nevertheless owed a common law duty in tort to comply with the COB rules.

69. The claimant's argument, which bears close relation to that submitted by TRI, was summarised by Tomlinson LJ at [20]:

> *"Mr Berkley submitted that where a bank undertakes a regulated activity, here arranging or executing a relevant transaction, in circumstances where failure to comply with a statutorily imposed regulation, here COB Rule 5.4.3, is likely to give rise to damage to the counterparty, robbing it of its informed choice, a duty of care arises at common law which is co-extensive or concurrent with that imposed by statute."*

70. The Court of Appeal did not agree. At [23], Tomlinson LJ, with whose Judgment Hallett and Richards LJJ agreed, trenchantly rejected the submission in a finding which must form part of the *ratio* of the decision:

> *"Mr Berkley's argument is in my view misconceived. It amounts to saying that the mere existence of the COB Rules gives rise to a co-extensive duty of care at common law. This proposition invites the question "why?" Mr Berkley accepted that not every statutory duty will generate a co-extensive duty of care at common law. It is no answer to the question what feature of the instant statutory duty, if there is a relevant statutory duty, gives rise to a co-extensive duty of care at common law to assert, as Mr Berkley did, that the Bank was undertaking a regulated activity in circumstances where a failure to comply*

> *with COB Rule 5.4.3 would be likely to cause loss. Parliament has provided, by s.150 of the Financial Services and Markets Act 2000 , a remedy for contravention of the rule in the shape of an action for breach of statutory duty, or at any rate an action akin thereto. There is no feature of the situation which justifies the independent imposition of a duty of care at common law to advise as to the nature of the risks inherent in the regulated transaction."*

And see also at [30]:

> *" I therefore reject the suggestion that the Bank here owed to Messrs Green and Rowley a common law duty of care which involved taking reasonable care to ensure that they understood the nature of the risks involved in entering into the swap transaction. The existence of the action for breach of statutory duty consequent upon contravention of a rule does not compel the finding of such a duty – indeed for the reasons I have already given it rather tells against it. Mr Berkley's further argument that such a cause of action would afford protection to those who, not being a "private person" cannot avail themselves of a cause of action for breach of statutory duty, is an invitation to the court to drive a coach and horses through the intention of Parliament to confer a private law cause of action upon a limited class. Equally misconceived was his argument in reply that those who begin life as "Category A" claimants should be protected after expiry of the relevant period of limitation by a small incremental development of the circumstances recognised to give rise to a duty of care at common law."*

71. In *Bailey v Barclays Bank plc* [2014] EWHC 2882, the claimant company sought permission to amend its Particulars of Claim so as to include an allegation that the defendant bank was in breach of certain of the COBS rules when an interest rate swap was novated to the company in 2011. HHJ Keyser QC, sitting as a Judge of the High Court, refused permission to amend, holding that the allegations of breach were not themselves properly arguable. Although not strictly necessary for his decision, the Judge went on to consider, and rejected as also unarguable, the claim that the alleged breaches could give rise to a civil cause of action available to the company.

72. The first argument was that the company had a direct cause of action under section 150 of FSMA. This involved a submission that *Titan Steel Wheels* had been wrongly decided but the Judge concluded that that point was not reasonably arguable. The second argument was that the COBS rules had been incorporated as contractual obligations of the bank, with reliance being placed in particular on the following provision in the bank's retail client agreement:

> "*1.4 This Agreement and all Transactions are subject to Applicable Regulations. If there is any conflict between this Agreement and any Applicable Regulations, the latter will prevail…"*

Applicable Regulations were defined to mean the rules of the (then) FSA or any other relevant regulatory authority and the rules of the relevant market and all other applicable laws, rules and regulations.

73. The Judge indicated that he would have refused permission to amend on this ground alone, on the basis that the retail client agreement merely reflected the existence of the regulatory regime but without incorporating the terms of that regime into the contract. He said the following, at [55(2)]:

> *"The plain reading of the Retail Client Agreement does not in my judgment support the Company's case. Clause 1.4 makes a clear contrast between the contractual terms and the Applicable Regulations. Its point is that the relationship between the parties is governed by a regulatory framework and that any provision made by the contract will nonetheless be subject to the requirements of that regulatory framework. That is perfectly intelligible and sensible and does not involve incorporation of the COBS Rules into the contract."*

74. The company was granted permission to appeal at an oral hearing on a number of points [2015] EWCA Civ 667. In respect of incorporation, Kitchen LJ said the following at [14]:

> *"It seems to me that there is considerable force in the judge's conclusion that clause 1.4 draws a distinction between the terms of the contract and the applicable regulations. However, Mr Berkley has persuaded me that this too is a point which merits consideration by this court.*"

The case was in the event compromised and the appeal was not heard.

75. The next case in the relevant sequence is *NRAM plc v McAdam* [2015] EWCA Civ 751 [2016] Bus LR 232. This was a case involving the Consumer Credit Act 1974 (the **CCA**) rather than any FCA rules. The claimants had entered into unsecured credit agreements with borrowers, including the defendants. Each agreement stated in its heading and elsewhere that it was a fixed sum loan agreement regulated by the CCA and included express terms setting out the rights which the CCA conferred on a borrower under a regulated agreement. In fact, the agreements with the defendants had not fallen under the CCA because the loan amounts exceeded the maximum threshold of £25,000. The defendants alleged that the agreements had by their terms nevertheless incorporated relevant provisions of the CCA.

76. The defendants' case was rejected by the Court of Appeal, which concluded that there was no express incorporation of the CCA. The court held that, in contrast to earlier cases which had been relied upon, there were simply no words of incorporation. Specifically, the phrase "*regulated by*" was a statement of fact rather than a word of incorporation. As Gloster LJ said at [24]: "*The language could not be clearer: the*

rights arise under [the CCA] (by virtue of the regulated status of the agreement), not by virtue of a term of the contract."

77. Meanwhile, and although *Bailey* was at that point still subject to a pending appeal, a similar approach to that of HHJ Keyser QC was adopted by HHJ Moulder, sitting as a Judge of the High Court, in her Judgment after a trial in *Thornbridge Ltd v Barclays Bank plc* [2015] EWHC 3430. This was another claim in which it was alleged, amongst other things, that the defendant bank had breached COBS rules. The claimant company argued that the rules had been expressly incorporated by the identical clause it its agreement with the bank and that the Judge should not follow *Bailey*.

78. HHJ Moulder rejected this argument and reached the same conclusion as HHJ Keyser QC, through a process of similar reasoning. As for the function of clause 1.4 in the agreement, she said, at [136]:

> *"It is dealing with the possibility of conflict –it is not intending to introduce into the contract an open ended right for the other party to rely on other provisions of domestic law where no such right exists independently. This conclusion is consistent with the reasoning of HHJ Keyser in Bailey."*

79. The question of incorporation of FCA rules was considered again, and in greater detail, by HHJ Waksman QC, sitting as Judge of the High Court, in *Flex-E-Vouchers Ltd v The Royal Bank of Scotland plc* [2016] EWHC 2604. This was an application by the defendant bank to strike out paragraphs in the Particulars of Claim. The allegation was, again, of breach by the bank of regulatory rules, which breach was said to give rise to a private law right of action. It was alleged that the rules were expressly incorporated or were otherwise implied into the customer agreement, clause 2.3 of which was in the following terms:

> *"For the purposes of these Terms, applicable regulations shall include the FSA Rules, the rules of any other relevant regulatory authority or exchange and any applicable laws and regulations in force from time to time ... Where these Terms conflict with Applicable Regulations, the latter shall prevail."*

80. The Judge first made the following preliminary observations:

    a. So far as concerned the COBS rules, FSMA had legislated as to the class of persons who could bring a claim for breach of statutory duty. Such breaches were only actionable at the suit of a private person. Hence, if the terms were to be implied into the agreement this would "*fundamentally cut across a statutory scheme which enabled a certain class of person to have a direct remedy and others not to."*

b. The fact that one may not have a remedy for breach of statutory duty does not mean that a claimant affected by an alleged breach of any of the rules had no remedy at all. The Judge referred to both the possibility, in certain limited circumstances, of a complaint to the Financial Ombudsman and, more importantly, the opportunity to make a complaint to the FCA, which had the power to impose disciplinary sanctions.

c. The case was not one where it could be said that, if there were not the implied terms, someone who claimed to be a victim of mis-selling was deprived of any remedy at all, as there would still be the benefit of the common law and all claims available thereunder.

81. Moving on to the case for express incorporation, the Judge considered and rejected all of the arguments put forward:

a. Reliance was placed on a clause in the agreement which said that the bank was authorised and regulated by the (then) FSA and subject to the FSA rules but it was ultimately accepted that this was no more than a statement of fact.

b. So far as concerned the first part of clause 2.3, it was said that the word "*applicable*" before "*regulations*" was a word of incorporation. The Judge rejected this on the ground that this had merely a definitional purpose.

c. As for the second part of clause 2.3, the Judge held that this meant only that if there was something in the express terms which actually conflicted with the applicable regulations then the terms had to be cut down accordingly. He referred to both *Bailey* and *Thornbridge*, concluding at [41] that he had, "*no hesitation in following the two very clear authorities on terms which are wider than this, alleged to create incorporation in the cases of Bailey and Thornbridge.*"

d. The claimant next relied upon clause 6.3, which provided that, *"You acknowledge and accept, in the ordinary course of business, that we will deal with you on a principal to principal basis. We will not, therefore, be acting on your behalf and, accordingly, we will not owe you any duty of best execution under applicable regulations."* It was submitted that the words "*owing you a duty",* were words of incorporation. This was also rejected, at [43]:

"The obvious sense is that, because on any view duties are owed, the question is how they can be enforced under the applicable regulations. Where the duties depend on whether the bank is acting on behalf of the other party or whether both of them are acting as principal to principal makes an important difference because, if it is principal to principal, then the duty of best execution provisions in the applicable regulations will not apply. All this clause is doing is determining and expressing what the relationship between

the parties is in this underlying contract for the purpose of the applicable regulations. In my judgment, it goes no further than that."

e. Clause 7.2 provided that, *"In accordance with our regulatory obligations we seek to ensure that any conflicts that arise between our interests and those of our clients ... are properly managed."* Again, the Judge refused to identify any words of incorporation, on the basis that this merely described the conflicts policy.

f. Finally, clause 21.1 was to the effect that "*Nothing in these Terms will exclude or restrict any liability that we owe you under FSA Rules."* This was said by the company to make plain that there was liability under rules incorporated in the agreement. The Judge disagreed, at [50]: "*What that clause is doing is simply making plain that there is nothing in the terms which could apply as a contractual exclusion or restriction on any other remedies or duties which might be available. Contractual exclusions can be directed to other claims, or other potential claims; and this is making it plain that that is not the case with this agreement."*

82. Having analysed the detailed provisions relied upon, the Judge concluded that the case for incorporation was unarguable. That conclusion also rendered the alternative case for implication equally hopeless because, given the multiple references to the rules in the terms but the absence of any express incorporation, the objective interpretation was that there was no such intention. However, applying then what he described as "*the implied term arguments in their classic form*", the Judge held that the alleged implied terms were neither obvious nor necessary, pointing in particular to the fact that there was a limited statutory remedy under section 138D of FSMA.

TRI's first submission: mandatory implication as a matter of law

83. The first way in which TRI puts its case is that the COBS rules are necessarily implied into the Agreement as a matter of EU law. The partner to this argument is that, for the same reason, FXCM owed duties of care in tort to comply with the COBS rules. To be clear as to the ambit of this case, from which TRI did not shrink, it is unaffected by the particular terms of the Agreement, or indeed the terms of any agreement between any parties. On TRI's submission, the COBS rules are without exception implied into every agreement of every authorised entity conducting investment business and each such entity also owes duties of care in tort to like effect.

84. The source of this submission, which FXCM characterised as "*ambitious*", is the decision of the European Court of Justice in *Genil 48 SL v Bankinter SA* [2013] Bus LR 1132. This was a preliminary ruling on a reference from the Court of First Instance in Madrid, one of the questions being whether or not, in the event that a bank failed to undertake a suitability or appropriateness assessment required under article

19 of MiFID, the resultant interest rate swap was void *ab initio.* The European Court explained that the consequences of non-compliance were matters of national law, at [57]:

> *" It should be noted that, although article 51 of Directive 2004/39 provides for the imposition of administrative measures or sanctions against the parties responsible for non-compliance with the provisions adopted pursuant to that Directive, it does not state either that the member states must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing article 19(4) and (5) of Directive 2004/39 , or what those consequences might be. In the absence of EU legislation on the point, it is for the internal legal order of each member state to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness: see Littlewoods Retail Ltd v Revenue and Customs Comrs (Case C-591/10) [2012] STC 1714 , para 27 and the case law cited."*

85. The reference to *Littlewoods Retail* was to the following, at [27]:

> *" In the absence of EU legislation, it is for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation (simple or 'compound' interest). Those conditions must comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible (see, to that effect, San Giorgio, paragraph 12; Weber's Wine World, paragraph 103; and Case C-291/03 MyTravel [2005] ECR I-8477, paragraph 17)."*

86. TRI itself described the passage in *Genil* as "*Delphic*". The critical clause, on its case, comprises the words "*subject to observance of the principles of... effectiveness."* This was not itself a new concept in European law but TRI contends that it focussed attention on the legal significance of MiFID. In short, it should be taken to mean that any transposition of MiFID into English law (through COBS) had to render also the "*effective*" enforcement of rights for breach of obligations under MiFID. TRI submitted that such enforcement should find expression in implied contractual terms and duties of care in tort.

87. If correct, this submission would have profound consequences, as regards MiFID and its replacement MiFID II (2014/65/EU), and I suspect also many other regulatory or administrative measures. Yet, TRI did not identify a single authority in England which lent any support to the proposition, or which even mentioned *Genil*. The only material which was provided to me was a Chapter by Mr Danny Busch, a Professor of

Financial Law at Radboud University, Nijmegen, in a collection of essays published as *Agency Law in Commercial Practice (ed. Busch, MacGregor and Watts, OUP 2016).* In Chapter 9, headed "*Agency Law and Principal Dealing under the Markets in Financial Instruments Directive"*, Professor Busch considers *Grant Estates* and suggests at [9.81] that it is "*questionable*" whether that decision is compatible with the European principle of effectiveness. At [9.82], he goes on to say that "*it could be inferred*" from *Genil* that civil courts are bound to hold that a contractual clause which is less stringent than MiFID cannot be applied, although he accepts that this argument is "*not as strong*".

88. I do not accept TRI's submissions and accordingly reject the contention that that the COBS rules were implied into the agreement between TRI and FXCM as a matter of law. Equally, I reject the partner allegation that FXCM owed duties of care in tort to like effect. This is for the following reasons in particular.

89. First, TRI's legal theory is directly incompatible with a consistent series of decisions in England and Scotland. For TRI to be right, each of *Grant Estates*, *Green & Rowley*, *Bailey*, *Thornbridge* and *Flex-E-Vouchers* must have been wrongly decided, in whole or in part. The cases either decide, or proceed on the basis that, there is no direct right of action for breach of the rules of COBS other than through section 150/138D of FSMA. Further, Lord Hodge held in terms at [48] that *"MiFID does not require a member state to provide protection to a customer by means of a direct right of action against the authorised person"*. I am not persuaded that I should depart from these decisions, even if (in the case of *Green & Rowley*) I were able to do so, on the strength of an oblique clause in a preliminary ruling in 2012 and an equivocally expressed article in 2016.

90. Second, I am of course bound by the *ratio* in *Green & Rowley*, which includes that the mere existence of the rules of COB does not give rise to a co-extensive duty of care at common law. TRI contended that this did not transfer into the present case because the rules of COB had implemented a different and less prescriptive European regime, and that the analysis is markedly different under MiFID. I do not accept that this is correct. Tomlinson LJ's judgment includes a careful consideration of the circumstances in which private law claims for damages may arise, which is as applicable under COBS as under COB. Although *Green & Rowley* was concerned only with duties of care, the reasoning is equally applicable to TRI's analytically identical case on implied terms. Furthermore, Tomlinson LJ explicitly relied upon the fact that Parliament had, through section 150 of FSMA, conferred a statutory cause of action on a limited class of persons. The duty of care there alleged would "*drive a coach and horses through the intention of Parliament*". Exactly the same objection arises to TRI's legal theory. TRI was forced to argue that Tomlinson LJ (and other judges, from Lord Hodge onwards) had fundamentally misunderstood the legal significance of section 150/138D, which should instead be seen as granting additional and "*for the avoidance of doubt*" rights to private persons rather than signalling an intention not to grant rights to non-private persons. I reject that interpretation which,

amongst other things, and as FXCM submitted, would render section 150/138D otiose and eccentric.

91. Third, even engaging with the TRI argument, I do not accept the premise on which it is founded. That premise is that the implementation of MiFID has not been sufficient to render "*effective*" the enforcement of rights for breach of its obligations. However, this does not mean that there must be a ready cause of action in private law for breach of every regulatory obligation. Indeed, that would be inconsistent with the very point made in *Genil* that MiFID does not provide for the consequences of breach and that this is a matter for the internal legal order of the member states. As indicated in the passage cited from the *Littlewoods* case, the highest it can be put is that the provisions of national law must not render the exercise of rights practically impossible. I do not accept that such a situation has arisen. On the contrary, as highlighted by Lord Hodge in *Grant Estates*, and as referred to also by HHJ Waksman QC in *Flex-E-Vouchers*, there are several routes to regulatory enforcement. The Financial Ombudsman may be one possibility. More significantly, Lord Hodge referred to provisions in FSMA pursuant to which complaints may be made, action may be taken and compensation may be awarded. Even leaving aside the further and more complex question of the consequences of an ineffective implementation of a regulatory Directive (and I pause to note FXCM's submission that this would not translate into the direct creation of private law rights anyway), it is simply not the case that the exercise of rights is practically impossible.

92. On this latter point, and although I have been addressing the argument in the abstract, it is of some significance to have regard to the facts of this case. These proceedings were brought only as a last resort, after TRI's other avenues for redress had been unsuccessful. As I have mentioned, TRI did in fact seek redress from the Financial Ombudsman and, thereafter, made a complaint to the FCA that it ought to have received compensation. These attempts failed because they were rejected on the facts, not because the enforcement of rights was practically impossible.

TRI's second submission: express incorporation

93. Unlike the more broad ranging submission on EU law, TRI's case on express incorporation is specific to the facts. It is for TRI to demonstrate that, on a proper construction of the ToB, the rules of COBS and CASS were incorporated by reference. Because this turns on the specific terms of the ToB, previous case law in which similar sorts of arguments have been made on differently worded contracts is not of direct application. However, such case law is instructive, especially where the context is the same and where the same or similar themes emerge.

94. There are some cases in which a background set of rules has been held to be incorporated into an agreement by the use of express words. In *Larussa-Chigi v CS First Boston Ltd* [1998] CLC 277, Thomas J held that a document which stated that transactions would be "*governed by*" a Code of Conduct established by the Bank of England achieved the incorporation of that Code. And in *Brandeis (Brokers) Ltd v*

Black [2001] 2 Lloyds Rep 359, an agreement which was said to be "*subject to*" regulatory rules was held by Toulson J to have the same effect.

95. In a number of other cases, including several of those which I have summarised above, attempts have been made to argue a case of express incorporation, normally of the COBS rules, on a more general basis. In broad terms, claimants have sought to fuse the existence of regulatory obligations with contractual rights agreed between the parties by drawing attention to instances where regulatory rules were mentioned or even described within a set of contractual terms. Such attempts have been uniformly unsuccessful. Whilst the court will give effect to clear expressions of incorporation, the cases demonstrate a consistent recognition that regulatory obligations are distinct from contractual rights, that they may operate in parallel without fusion and, in particular, that mere references in contractual terms to the existence and content of regulatory obligations will not, or at least will not lightly, be treated as an incorporation of any specific obligations mentioned, let alone of the rules as a whole.

96. There is no provision in the ToB to the effect that the Agreement is "*governed by*" or "*subject to*" the rules of COBS, and so, insofar as TRI sought to rely upon *Larussa-Chigi* and *Brandeis*, they do not assist its case. TRI nevertheless submitted that, as a matter of construction of the ToB as a whole, and in accordance with what were said to be conventional principles, the rules of COBS (and CASS) were incorporated on a wholesale basis. This was for the following reasons:

97. First, it was pointed out that there were many references in the ToB to the rules of the FCA (at least 13), to MiFID (at least four), to FSMA (at least three) and to the Regulation (at least three). FXCM dismissed this exercise as a "*word search audit*". Other than to note that (i) it is entirely unsurprising that a contract with an authorised entity should make reference to its regulation; and (ii) TRI's argument proves too much because none of MiFID, FSMA or the Regulation are said to have been incorporated by their multiple references, I see no value in this point.

98. Second, it was said that, in at least four areas, the ToB specified how FXCM would comply with the rules of COBS and in such circumstances "*assumed the binding effect*" of the rules. These were client classification (clause 5); client money (clauses 14 & 15); conflict of interest (clause 17); and appropriateness (clause 22). It is not necessary to recite the terms in each of the four areas relied upon but I shall make reference by example to the terms on client classification and appropriateness, so as to explain the argument:

    a. In respect of client classification:

    "*5.1 In compliance with [MiFID] and with the implementation into the English legislation (through changes to [FSMA], secondary legislation and the FCA Rules), the Company classifies its clients into three main categories: Eligible Counterparties, Professional Clients and Retail Clients.*

> *"5.2 The Company attaches different levels of regulatory protection to each category and hence to Clients within each category. In particular, Retail Clients are afforded the most regulatory protection…*
>
> *"5.3 The Company shall treat the Client as a Retail Client at the time an Account is opened. However, if the Client satisfies the definition of either a Professional Client or Eligible Counterparty, the Company may unilaterally reclassify the Client according to such criteria…*
>
> *"5.4 The Company offers its Clients the possibility to request reclassification and thus to increase or decrease the level of regulatory protections afforded…."*

b. In respect of appropriateness:

> "22.2 *If, on the Client's own initiative, the Client asked the Company to provide it with execution-only dealing services in Non-Complex Product, the Company is not required to assess the appropriateness of the instrument or the Service provided or offered to the Client. As a result, the Client will not benefit from the protection of the FCA Rules on assessing appropriateness…"*

99. TRI drew my attention to particular words or phrases in these, and other similar, provisions. So it was contended, for example, that the word "*afforded*" in clause 5.2 was a "*word of incorporation*". Similarly, TRI submitted that the term in clause 22.2 specifying that the client would not "*benefit*" from the protection of the rules if it requested an execution only dealing service in non-complex products, signalled an understanding that the client would benefit from other protections and that the concept of benefit indicated that the rules were thereby incorporated into the ToB.

100. I do not accept this argument. As a starting point, there are no words in the ToB remotely redolent of an express incorporation of terms. Where parties to a contract wish to incorporate the terms of another agreement or a set of regulatory rules, this can be done with express and obvious words of incorporation. The absence of any such words, whilst not in and of itself absolutely determinative, points firmly in the direction that there was no such contractual intention. Second, I do not accept that the absence of words of incorporation can be made good by an "*assumption*", even if it can be established, that a set of rules is "*binding*". I was shown no authority to support that proposition. Third, and most fundamentally, the assumption in the present case does not lead to the conclusion suggested. This is because of a lack of precision in the use of the word "*binding*". I am prepared to accept that clauses 5, 14, 15, 17 and 22 are drafted in a way which recognises that the rules of COBS are binding on FXCM. That is because they are binding on FXCM by way of regulatory obligation and it is unremarkable that the ToB should acknowledge them. That does

not mean, however, that they have become, or in some way are assumed to have become, binding as between FXCM and TRI as a matter of contractual obligation.

101. Third, reliance was placed on clause 29.1, in the following terms:

> "*Nothing in these Terms shall exclude or restrict any duty or liability owed by the Company to the Client under [FSMA] or the FCA Rules (as may be amended or replaced from time to time).*"

As TRI accepted, this clause is very similar to clause 21.1 of the agreement considered by HHJ Waksman QC in *Flex-E-Vouchers*. The Judge was of the view at [50] that that clause had "*nothing to do with incorporating the FSA rules*". I reach the same conclusion in this case and for the same reasons.

102. Ultimately, TRI's argument reflects the same themes that can be seen in the cases that I have referred to, culminating in *Flex-E-Vouchers*, namely a wish to fuse regulatory obligation with private law contractual rights (and so achieve, by this alternative route, the circumvention of section 138D of FSMA). As explained by Lord Hodge in *Grant Estate*s, these are separate types of obligation. Whilst the parties may always expressly agree to incorporate a set of rules into their agreement, there is no analytical support for what would be at best an inadvertent incorporation merely by reference to or description of regulatory obligation.

TRI's third submission: implication as a matter of fact

103. As what I understood to be a final fallback argument, TRI contended that the rules of COBS should be implied into the ToB as a matter of fact. This was for two reasons. First, it was said that the ToB were largely incomplete and, specifically, contained few "*hard edged*" obligations on the part of FXCM. The implication of the rules of COBS was on this basis said to be necessary, by analogy with *Liverpool City Council v Irwin* [1977] AC 239. Second, TRI submitted that the "*officious bystander"* test would be satisfied, as the parties would say if asked that the rules of COBS should of course be implied into a contract with an authorised entity.

104. In my judgment, neither of these submissions is well founded. The *Liverpool City Council* point assumes what it seeks to prove, namely that the ToB are deficient for failing to include the rules of COBS. I do not agree that that is the case. The ToB are perfectly workable without the implication of the rules. Recourse to the officious bystander is somewhat curious, given that the argument for implication of the same rules in similar circumstances has already been considered by the court, most recently in *Flex-E-Vouchers*, and the court has concluded that it does not even pass the summary judgment test. HHJ Waksman QC set out at [16] a summary of principles derived from the decision of the Supreme Court in *Marks & Spencer plc v BNP*

Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] AC 742, and at [53]-]62] explained why the implication of the rules of COBS in that case was neither obvious nor necessary. I adopt this reasoning and reach the same conclusion in the present case.

Issue 3: did the trade contracts contain the express or implied terms alleged?

105. As described at paragraph 39 above, TRI's pleaded case relies upon one express term and four express alternatively implied terms. Each of the terms is said to be required by the OEP. The four express alternatively implied terms are also said to be required by rules of COBS. Before considering each of these terms in turn, it is necessary to begin with the ToB themselves.

106. The ToB operated as a framework agreement between the parties, regulating their rights and obligations generally and in respect of specific transactions. Each transaction would in turn constitute a distinct contract in its own right, governed by the ToB and the specific terms applicable to it. Under the definitions in the ToB, a "*Transaction*" is:

> "*a contract in a financial instrument or any other contractual arrangement entered into between the Client and the Company including a Margined Transaction as defined in these Terms.*"

107. Further relevant defined terms are:

a. Confirmation: "*a notification from the Company to the Client confirming the Client's entry into a Transaction*".

b. Market Order: "*an Order to enter the Market at the best current price offered by the Company at that time*".

c. Order: "*an instruction to purchase or sell a CFD Contract, a Rolling Spot Forex Contract, a Spread Bet Contract, and/or any other products offered by the Company from time to time, at a price quoted by the Company as appropriate*".

d. Trading Facility: "*the password protected online or downloadable electronic facility where the Client can trade with the Company under these Terms*".

108. Paragraph 9 of the ToB, under the heading "*Dealing Between the Company and the Client*" is to the following effect:

> "*9.1 In accordance with these Terms, the Client may request an indicative quote, provide the Company… with oral or electronic instructions… or otherwise trade with the Company as follows…*
>
> *"9.3 Any instruction sent via the Trading Facility or by telephone shall only be deemed to have been received and shall only then constitute a valid instruction when such instruction has been recorded by the Company and confirmed by the Company to the Client orally or through the Trading Facility. An instruction shall not constitute a binding Transaction between the Company and the Client even if accepted by the Company. A binding Transaction between the Client and the Company will only occur when an instruction is accepted, executed, recorded and confirmed by the Company to the Client through the Trading Facility, trade Confirmation and/or Account Statement…*
>
> *"9.5 The Company may, at its discretion, refuse to accept any instruction from the Client , without giving any reasons or notice to the Client. Additionally, the Company may refuse to execute any instruction with or without reason or notice and the Company may cancel any instructions previously given by the Client provided that the Company has not acted on the Client's instructions. Acceptance of any instructions does not constitute any agreement or representation that the Company will execute the instructions. A valid contract between the Client and the Company will only be formed/closed and/or an instruction will only be executed when the Client receives a trade Confirmation from the Company or the Trading Facility shows that an instruction has been executed (whichever is earlier)."*

109. On their face, the meaning and effect of these terms is not susceptible to any real doubt. An express structure is set up to regulate the interaction between the Client and FXCM and to determine the precise incidence of legal obligation. In a market such as foreign exchange and where FXCM in effect acts as intermediary rather than market maker, it is of commercial importance that there be clarity as to the creation, nature and scope of legal obligation.

110. On the express provisions of the ToB, the placing of an order by the customer (a) does not in law constitute an acceptance of a preceding offer; and (b) falls to be accepted, so as to create binding legal relations, not when it is received or even begun to be acted upon but only when the transaction has been confirmed to have been executed, either on the Trading Facility or by way of trade Confirmation.

111. FXCM submitted that the OEP, whilst not a contractual document itself, was a shared policy document which formed part of the contractual matrix relevant to the construction of the ToB. I agree with that. The OEP is fully consistent with what is said in clause 9 and, specifically, confirms that FXCM gives no commitment as to the price at which a transaction will execute.

112. TRI resisted this interpretation of clause 9 of the ToB for the following reasons:

a. That clause 9.5 is inconsistent with legal obligations under MiFID/COBS. I have rejected the submission that the COBS rules formed part of the ToB and so this argument must fail. In any event, and as explained below, the clause is not inconsistent with COBS.

b. That clause 9.5 offends against the "*main object*" rule, because the "*essential obligation*" was to execute customer's orders. This is a bootstraps argument. The main object must derive from the contract itself and TRI points to no clause which is inconsistent with clause 9.5. It is not enough to construct a theory as to what, for the purposes of the litigation, TRI would like the contract to say. In a general sense, it could be said that the main object of the Agreement was to enable TRI to have access to FXCM's foreign exchange platform and to trade in foreign exchange. But clause 9.5, which specified the contractual basis on which this trading would take place, implements rather than subverts that object.

c. That the court should construe the clause in a way which gives it lawful effect. This seems to be an argument based on implied terms, which I have rejected.

113. Although I have determined that the rules of COBS were not included within the ToB, I should make it plain that the overall analysis and outcome would be the same, even if the rules were included, whether by incorporation or implication. This is because TRI's case proceeds upon a misunderstanding of what the rules of best execution in fact say.

114. The best execution rules are contained within COBS 11. The principal rule is at COBS 11.2.1R:

> "*A firm must take all reasonable steps to obtain, when executing orders, the best possible result for its clients taking into account the execution factors.*"

The best execution factors include such matters as price, costs, speed and size.

115. This obligation is concerned with the mechanics of the execution process rather than with the merits of the underlying transaction. See *Forsta AP-Fonden v Bank of New York Mellon SA/NV* [2013] EWHC 3127 at [274] per Blair J:

> *"The duty of best execution has to do with the mechanics of acquiring or selling securities, not the merits or otherwise of the trade…As BNYM says, the duty of best execution is a duty that, by definition, applies only on the execution of a client order. It has nothing to do with the underlying investment decision."*

116. In other words, the rule is concerned not with whether the authorised entity should execute an order, or indeed whether and if so at what point the entity comes under a legal obligation to do so, but as to the mechanics of how an execution in fact takes place. As such, the rule does not in any way impinge on, or even traverse the same ground as, clause 9.5 of the ToB. For as long as, pursuant to clause 9.5, FXCM has no obligation to execute an instruction, the best execution rule is simply not engaged.

117. I anticipate that a confusion has arisen by reason of subsequent provisions in COBS 11. At COBS 11.2.6R to COBS 11.2.18G, there are various rules and guidance paragraphs about execution factors and the need for an order execution policy. COBS 11.2.19R is then as follows:

> "*Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction.*"

118. It is the language of "*specific instruction*" which is carried into the Particulars of Claim and which may be seen to inform the direction of TRI's case. I can understand the argument that, if this rule imposed an unrestricted legal obligation on an authorised entity immediately to comply with every instruction which it received, then there might be a tension with clause 9.5. I am in no doubt, however, that is not what the rule means:

a. COBS 11 is concerned with best execution, in accordance with the execution factors. As Blair J noted, this is about mechanics. A rule, buried in COBS 11, that an authorised entity assumes a legal obligation immediately to comply with every instruction it is given would be a rule of a wholly different order. As well as being impossibly open-ended, it would be concerned not with the mechanics of execution but with the contractual relationship between entity and client. It would also be a rule rendering the sort of business undertaken by FXCM on the no dealing desk model incapable of operation.

b. In its proper context, COBS 11.2.19R has a much narrower function, which is that it qualifies the best execution rule at COBS 11.2.1R. The normal rule is that the entity must comply with best execution in accordance with the execution factors. However, if the client gives an instruction which has specific features attached to (for example, as to cost or time), then the best execution obligation is modified so that it is satisfied by compliance with those features.

c. This interpretation of COBS 11.2.19R is made clear from the terms of MiFID itself., where both the obligation and its qualification are set out together in article 21(1):

> *"Member States shall require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. Nevertheless, whenever there is a specific instruction from the client the investment firm shall execute the order following the specific instruction."*

119. When COBS 11.2.19R is properly understood as a qualification to the best execution rule, it can be seen, again, that there is no inconsistency with clause 9.5. That clause makes clear that the mere transmission of an order does not create a binding obligation on FXCM to do anything. That applies as much to a Market Order as to a Stop Loss Order. By definition, in the absence of a binding obligation, no duty to comply with best execution has arisen.

120. With that explanatory background, I turn now to the terms which are alleged in the Particulars of Claim. The first, at [19], is the "*express contractual term*" to comply with the SLOs at the stop loss price. As explained orally, TRI submitted that this became a binding term of each contract as soon as the SLO was placed. I do not agree. There was certainly no such express term and nor was there any implied term (which would of necessity be inconsistent with clause 9.5). On the contrary, pursuant to clause 9.5 of the ToB, the mere placing of the SLOs did not create a contract with an obligation upon FXCM to comply.

121. In any event, and even leaving aside the effect of clause 9.5, I would reject the pleaded term. The stop loss price was set at a level of great specificity, to five decimal points. The no dealing desk model operated by FXCM for TRI placed FXCM as an intermediary between liquidity providers and its clients. It would not have been known at the time of the placing of the SLO whether any liquidity provider would ever make an offer at the precise stop loss price, nor whether FXCM would be able to secure that offer. Hence, TRI's case must be that the SLO imposed an obligation on FXCM to take its own position at the stop loss price, and so engage in a substantively different sort of business, namely as a market maker, whether or not the corresponding price was available in the market. There is nothing at all in the contractual documents to support such a case.

122. The four alternative terms, which are pleaded as express or implied, amount in substance to variations of the term at Particulars of Claim [19]. Dealing with each briefly:

   a. The best execution term: I have rejected the claim that either the OEP or COBS 11.2.1R were incorporated or implied into the ToB.

   b. The order execution policy term: this would seem to be parasitical upon the best execution term, and fails for the same reasons.

c. The specific instruction term: in my view this is the same as the stop loss term and fails for the same reasons.

d. The fair and timeous execution term: this would seem to be a variation of the best execution term, and fails for the same reasons.

Issue 4: did FXCM owe a concurrent duty of care in tort as alleged?

123. For the reasons given at paragraphs 83 to 92 above, the answer to this question is No.

Issue 5: in the events which occurred on 15 January 2015, did FXCM act in breach of contract or negligently in the manner alleged?

124. In circumstances where I have found that none of the pleaded duties was owed, whether in contract or in tort, it follows that FXCM did not act in breach of those duties.

125. TRI has advanced a number overlapping arguments. In order to place the points in some sort of hierarchy, I confirm the following:

126. First, and as explained at paragraphs 44 to 50 above, the true scope of the claim is limited to the case that FXCM was obliged to secure, yet failed to secure, the stop loss price. I have rejected the existence of any such duty, for the reasons I have given. For the avoidance of doubt, even if, contrary to my Judgment (a) clause 9.5 were in some way disapplied; and (b) both the OEP and the rules of COBS were incorporated or implied into the ToB, the claim would still fail. There was no obligation, on any basis, to secure the stop loss price (and I note that this was stated in express terms in the OEP).

127. Second, if TRI had been able to broaden its case in the way it sought to do in Closing, then it would still have failed. Clause 9.5 of the ToB would have precluded the broader claim. Further even if, contrary to my Judgment, both the OEP and the rules of COBS were incorporated or implied into the ToB, the claim would still have failed, because none of these were inconsistent with or could in some way disapply clause 9.5.

128. Third, if TRI had been able to broaden its case and if, contrary to my Judgment (a) clause 9.5 were in some way disapplied; and (b) both the OEP and the rules of COBS were incorporated or implied into the ToB, the claim would still have failed. In that event, even if TRI had established that that there was a binding contractual obligation on FXCM to execute the SLOs once they had been triggered, in accordance with some form of best execution rule, then I would not have found that

FXCM breached such an obligation. The immediate reason why the SLOs were not executed was the imposition of the SCBs but TRI presented no coherent case as to why this amounted to a failure of best execution. The only evidence before me was that of Mr Konte, to the effect that SCBs were both market standard and intended for customer protection. That TRI might now be dissatisfied with the effect of the SCBs (although it is not known what would have happened without them and indeed TRI could conceivably have ended up in a worse position) does not mean that it was a breach of any best execution duty (if owed) to place such safeguards within the platform's software.

Issue 6: was the force majeure provision at clause 25 engaged and if so to what effect?

129. The relevant provisions of the ToB were as follows:

> "*25.1 Since the Company does not control signal power, its reception or routing via Internet, configuration of the Client's equipment or reliability of its connections, the Company shall not be liable for any claims, losses, damages, costs or expenses, including attorney's fees, caused directly or indirectly, by any breakdown or failure of any transmission or communication system…or for any cause preventing the Company from performing any or all [of] its obligations, any act of God, war, terrorism, malicious damage, civil commotion, industrial acts, any Exceptional Market Event, or acts and regulations of any governmental or supra national bodies or authorities which in the Company's opinion prevent an orderly market in relation to the Client's Orders ("a Force Majeure Event").*
>
> *"25.2 Upon the occurrence of a Force Majeure Event, the Company shall use commercially reasonable efforts to resume performance… Upon occurrence of a Force Majeure Event, all of the Company's obligations under these Terms of Business shall be immediately suspended for the duration of such Force Majeure Event…"*

130. Exceptional Market Event was defined as, "*the suspension, closure, regulation, imposition of limits, special or unusual terms, excessive movements, volatility or loss of liquidity in any relevant market or underlying instrument, or where the Company reasonably believes that any of the above circumstances are about to occur."*

131. Given my findings above, this issue does not strictly arise for determination, so I shall deal with it briefly. I accept that, on the evidence of Mr Konte, the significant volatility in the EUR/CHF exchange rate in the aftermath of the SNB

announcement on 15 January 2015 constituted an Exceptional Market Event within the definition in the ToB. As he graphically described it, the dramatic volatility in pricing, the divergence of views between liquidity providers, the increase in spreads and the compression of liquidity were symptoms of an exceptional event in the very market in which FXCM operated, namely foreign exchange. Indeed, the reason that the SCBs were deployed, namely that extreme divergences raised doubts as to the validity of prices in the market, demonstrates the disruption which was caused. I am satisfied that there was excessive movement, excessive volatility and excessive loss of liquidity with the meaning of the definition.

132. TRI submitted that I should construe the *force majeure* clause strictly as, in effect, an exclusion clause, but in my judgment the clause is engaged by the events in question whatever approach I take to construction. It also submitted that the clause was so wide that it offended the *"main object"* rule, where a central object of the contract was for this purpose said to be to allow speculation in volatile markets. This is a rather self-serving characterisation of the object of the Agreement, and I find no inconsistency in a clause which suspended obligations in exceptional circumstances.

133. Finally, it was common ground that the clause would need to satisfy the reasonableness test under the Unfair Contract Terms Act 1977. There is no reason in principle why a *force majeure* clause engaged by an exceptional market event is inherently unreasonable. TRI submitted that (i) the closing words of clause 25.1 introduce a purely subjective test but, whatever the merits or demerits of that point in itself, those words do not apply to an Exceptional Market Event; and (ii) the clause is one-sided and for the sole benefit of FXCM with no corresponding benefit to TRI. The reasonableness test must be assessed in the round, within the contract as a whole, rather than by reference to the specific benefit of individual clauses. In any event, as an Exceptional Market Event could adversely affect both FXCM and its clients, I do not accept the premise.

134. In all the circumstances, I am satisfied that a clause suspending obligations in the exceptional circumstances described satisfies the reasonableness test and accordingly, if, contrary to my Judgment, relevant obligations had been owed by FXCM, the effect of the clause would have been to suspend those obligations. In that event, no breach would have been committed.

Issue 7: If there was a breach of contract or negligence, what damage has been suffered by TRI?

135. I deal with this point, again, briefly, so that all aspects are covered:

a. On the pleaded claim, the correct measure of loss would have been the difference between the cash balance which TRI lost on its accounts and the losses which it would have suffered had the SLOs been closed out at the stop

loss price. On the evening of 14 January 2015, the total amount of cash held was in the region of US$409,000. All of that money was lost (and a negative balance was written off). On the basis of some fairly rough and ready calculations, TRI submitted that it would have lost around US$100,000 had the SLOs been executed at the stop loss price. FXCM did not ultimately challenge that figure. Hence the recoverable loss would have been in the region of US$309,000 had the claim succeeded.

b. If TRI had been able to advance the broader, unpleaded claim, and had it been successful, then the calculation of loss would have been much more difficult because there would have needed to be a counterfactual as to the price that could and should have been obtained had FXCM complied with whatever obligations it was found to have owed. It was for this purpose that TRI advanced the figure of 1.17597 in Closing. However, for reasons I have explained, that was an unreliable figure and there was no alternative, or indeed mechanism to identify an alternative, such that this would have been little more than a guess. But that problem serves to highlight the evidential deficiency in that unpleaded claim.

DISPOSITION

136. The claim is dismissed.