

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: 10 December 2021

Before :

MR ANDREW HOCHHAUSER QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between :

NICOLAS DE BOINVILLE
- and -
I G INDEX LIMITED

Claimant

Defendant

The Claimant in person

David Mayall (instructed by Martin Shepherd Solicitors LLP) for the Defendant 1

Hearing dates: 14 and 15 November 2020 [reading], 16, 17, 18, 19, 23, 24 November 2020 and
4 February 2021

APPROVED JUDGMENT

I direct that pursuant to CPR PD 29A para 6.1 no official shorthand note shall be taken of this
Judgement 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 Friday 10 December 2021 at 4:30pm**

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Background

1. The Claimant, Mr Nicholas de Boinville, brings claims against the Defendant, a provider of Spread Betting Services on an ‘execution only’ basis, for damages for breach of contract, breach of fiduciary duty, misrepresentation and a statutory claim under section 150 (which was replaced on 1 April 2013) by section 138D of the Financial Services and Markets Act 2000 (“**FSMA**”) for damages for alleged breaches of the applicable Conduct of Business Sourcebook (“**COBS**”) Rules, contained in the Handbook of Financial Services Authority (the “**FSA**”) and from 1 April 2013, its successor the Financial Conduct Authority (the “**FCA**”).
2. The Claimant opened an account with the Defendant on 18 January 2012 (the “**Account**”), and the relevant agreement against which his claims fall to be considered is the Defendant’s September 2009 Customer Agreement (the “**Customer Agreement**”). I shall turn to its relevant terms (the “**Terms**”) shortly. The Claimant used the Account to open and close spread bets.
3. Section 150 of FSMA provided that:

“A contravention by an authorised person of a rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.”
4. Section 138D(2) of FSMA provides in similar terms that:

“A contravention by an authorised person of a rule made by the Financial Conduct Authority is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.”
5. It is common ground that:
 - (1) the Defendant was at all material times an “*authorised person*” authorised by the FSA and then the FCA under FSMA to perform regulated activities.
 - (2) Spread bets, being contracts for differences, were at all material times a “*specified investment*” under Article 85 of Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 and a regulated activity within the meaning of section 22 of FSMA.

- (3) The Claimant is a “*private person*”, as defined in Regulation 3 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations (57 2001/2256). In addition, the Claimant is classified as a “*Retail Client*” under COBS 3.4.1R, which designation afforded him the highest levels of regulatory protection under rules made pursuant to the Financial Services and Markets Act 2000. I shall set out below the other relevant provisions of the COBS Rules.
- (4) The Claimant is, and was at all material times, very experienced in financial services and, in particular, spread betting, as he acknowledges at paragraph 3 of his witness statement dated 8 September 2020 (the “**First Witness Statement**”). He was therefore well aware of the substantial risks involved in placing spread bets, and historically he had lost money as a client of the Defendant in the 1980s. Indeed, at paragraph 5 thereof, he states that after losing that money, he stopped trading and his account lapsed, whereupon, at the invitation of the founder of the Defendant, Mr Stuart Wheeler, he was subsequently engaged by the Defendant as a consultant to its then nascent Sports Spread Betting business for which he was remunerated for three years from its profits. This occurred many years before the incidents of which he now complains.

The Claimant’s Claims

6. The Claimant has three separate claims:

- (1) A claim for losses arising from an allegation that the Defendant wrongfully withdrew £250,000 from the Account at 13:24 on 1 June 2012 (the “**Transfer Claim**”). This claim was the subject of a settlement agreement evidenced by an email dated 6 June 2012 from the Claimant to a Ms Jody Dunn on behalf of the Defendant (the “**Settlement Agreement**”). In order to succeed on this claim, the Claimant has to obtain rescission of the Settlement Agreement. He seeks to do so on the basis of negligent misrepresentation by the Defendant. The representations on which he relies are set out at paragraph 38 and 38A of the Amended Particulars of Claim.
- (2) A claim for losses arising from those occasions when the Defendant is alleged to have failed to adhere to its regulatory duties of COBS 2.1 (Client’s Best Interests)

and COBS 11.2.1 (Best Execution) when in receipt of Claimant's customer margin liquidation orders/"flags" (the "**Best Execution Claim**").

- (3) A claim for losses arising from alleged misrepresentations made by the Defendant's Compliance Department to the Financial Ombudsman Service (the "**FOS**") in 2013 and 2014. (the "**FOS Claim**").

The Counterclaim

7. The Defendant brings a counterclaim, arising from the Transfer Claim. If the Settlement Agreement is set aside, the Defendant claims £112,500, representing the sum paid under the terms of the Settlement Agreement and alleged extra losses on the Cable positions, less any further losses the Claimant is able to prove on the remaining DAX and AUD positions, to which I will later refer.

Representation

8. Although earlier in the proceedings he had been represented by solicitors and Counsel, who settled the pleadings on his behalf, the Claimant was a litigant in person throughout the hearing, and the subsequent application on 4 February 2021. I commend him for the measured and courteous way in which he conducted himself, both when giving evidence and when making submissions. He clearly feels a genuine sense of grievance in relation to what he regards as extremely bad treatment by the Defendant, but in general he kept his emotions in check. The Defendant was represented by David Mayall of Counsel. I am grateful to both the Claimant and Mr Mayall for their helpful written and oral submissions.

Witnesses

9. The Claimant was the only witness who gave evidence in support of his claims.
10. The Defendant called the following four witnesses who were the subject of cross-examination:
11. Mr Rob Pike, who is currently Head of the Defendant's UK Premium Client Management. In 2012 he was working for the Defendant as a Premium Client Manager, and he was the client manager dealing with the Claimant from 24 May 2012.
12. Mr Peter Tubb, who commenced employment with the Defendant in September 2002 and is currently its Head of Trading Services. In 2012 he was Head of Trading Operations.

He never met nor spoke to the Claimant and spoke to him only through Mr Pike, the Claimant's Premium Client Manager.

13. Mr Gareth Richardson, who joined the Defendant as an employee immediately after university. By 2012 he had been promoted by the Defendant to a Senior Dealer. He was the dealer who dealt with the Claimant's account on 1 June 2012.
14. Mr Kypros Zoumidou, who is currently the Chief Executive Officer of Brightpool Limited which is part of the IG Group of Companies. He joined the Defendant as Head of Compliance on 24 May 2010 and in 2012 dealt with certain of the Claimant's complaints. He met the Claimant in January 2013 and corresponded with him thereafter.
15. In addition, there were two other witnesses in relation to whom the Defendant had served witness statements, but who were not cross-examined. They were as follows:
16. Mr Joe Ryan, who is currently the Defendant's Head of Futures and Foreign Exchange. He joined the Defendant on a graduate scheme in 2006. By 2012 he was Dealer, although he had no direct contact with the Claimant and was unable to give direct evidence on the Claimant's transaction from his personal knowledge. He did not recall ever speaking to the Claimant and he had no involvement with him in relation to the Transfer Claim, or the events which led up to it.
17. Ms Ellen Rogers, who commenced employment with the Defendant in February 2010. She took a year out of the business between 2012 and 2013. She is currently the Defendant's Head of Compliance Monitoring Assurance. She had no dealings with the Claimant and only became aware of his complaints on her return to work in 2013, when the matter was referred to the FOS and thereafter when it was referred to the Defendant's Legal Department. As she states at paragraph 4 of her witness statement dated 13 December 2019, "*I would have had no significant involvement*".
18. The parties reached an agreement in relation to the two statements of Mr Ryan and Ms Rogers, whereby they were submitted without cross-examination and the Claimant was at liberty to make submissions as to their weight and relevance. As can be seen, neither witness could give direct personal evidence in relation to any dealings with the Claimant and in my judgment, they added little to the resolution of the issues I had to decide.

19. I find that each of the witnesses who were cross-examined were doing their best to assist the Court and gave honest evidence, but the difficulty with their testimony is that they were dealing with events which occurred 7 or 8 years earlier and recollections had, unsurprisingly, faded, particularly in the case of Mr Zoumidou.
20. In relation to the Claimant, it is clear that he has a real sense of grievance at the way that he feels he was treated by the Defendant. In my view this has coloured his testimony to a considerable degree and, it is important to look at that evidence against the transcripts of the telephone calls and the contemporaneous documents, particularly in relation to the Transfer Claim and the FOS Claim which are the more reliable record of events.
21. I also bear in mind the dicta of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) concerning the reliability of oral evidence based on recollection of events occurring several years ago:

“Whilst everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony” [15];

“Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time” [18];

“Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial...The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness’s memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events” [20];

*“In light of these considerations, **the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known probable facts** ... Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth”* [22] (Emphasis added).

22. I have adopted the approach indicated in paragraph 22 of the *Gestmin* decision in relation to all the witnesses of fact. Fortunately, in this case, a great deal of the relevant evidence consists of contemporaneous documents, agreements, policies, emails and transcripts of telephone conversations.

Spread Betting

23. Before turning to the three claims, I should say something about the nature of spread betting which has been carefully considered in earlier authorities. I will then turn to the relevant provisions of the COBS Rules and the Customer Agreement.
24. In his opening written submissions, Mr Mayall drew my attention to a passage at [2]-[6] in the judgment of Rix LJ in *Spreadex Ltd v Battu* [2005] EWCA Civ 855, which helpfully describes the nature of spread betting in the following terms:

“Spread betting”

[2] Spread betting is not so much or not merely a bet, although it can be described as such, as a form of contract for differences. It enables a customer to take a position on a market (or an event) for a very small stake. Thus, if the Dow Jones Index is, say, at 10,000, one can "buy" or "sell" the market at a spread around the index of, for the sake of example, 10 points either way, 9,990 to 10,010. If one buys, one is betting that the market will rise above 10,010. If one sells, one is betting that the market will fall below 9,990. If one buys and the market rises, one stands to gain £1 for every point that the index exceeds 10,010. If one sells and the market falls, one stands to gain £1 for every point that the index drops below 9,990. If, however, one calls the market wrong, then one will stand to lose £1 for every point that the index exceeds the spread point in the wrong direction. Thus, if one sells at 10,000 with a sell spread point at 9,990, one will make £1 for every point the market falls below 9,990 and lose £1 for every point the market rises above 9,990. Until the bet or "trade" is closed, the gains and losses are merely "running" gains or losses. They are real enough, but constantly changing with every change in the index, and have not yet been fixed. Closing the bet will fix the position, win or lose. Unlike a classic bet, the customer can of course lose more than his stake. Indeed, on the example given, of a sale spread point of 9,990 when the market is at 10,000, if the market does not move an inch, the customer will lose £10 for every £1 staked. Nor, again unlike a classic bet, are his winnings fixed at the outset by an agreement on odds. In theory winnings based on rising markets are infinite (in practice of course they are not) and losses based on falling markets are limited only in so far as they cannot exceed the consequences of a fall in the index to zero.

[3] Normally, of course, to gain by £1 for every rise (or fall) of a single point in a stock market index such as the Dow Jones would take an investment of significantly more than £1. In effect, one's £1 bet commands a position in the market significantly greater than the stake. In other words, there is a large element of gearing in the trade, and the situation is correspondingly volatile.

Where the market in question is itself in a volatile phase, the risks become even greater. Thus, if the Dow Jones is capable of moving within a range of 100 or 200 points in a single day, the customer can be £100 to £200 richer or poorer per £1 stake within a matter of hours of his trade. On a trade of £100, those figures become £10,000 to £20,000.

[4] The spread betting operator who accepts these trades does not bet against the customer but lays off the trade elsewhere. Ultimately, I suspect, the trade is accumulated in some form of derivative transaction on a futures exchange, but I do not know. The operator, however, by laying off the bet elsewhere seeks to profit by means of the spread. The means by which it does that, and the terms on which it does that, however, are not a matter for the operator's customer: nor, in the present case, have the applicable terms been disclosed.

[5] If the customer's trade is efficiently laid off, the spread betting operator does not retain a market risk, but, since its customer is open to volatile swings and losses which are potentially out of all proportion to his initial stake, it does retain a credit risk, which it has to be able to monitor closely. Typically, it seeks to limit that risk by controlling the level of its customers' trading and by taking security for its customers' exposure.

[6] Such security, or margin arrangements, may take two forms, responding to two kinds of risk. Even at the outset of a trade, indeed at the outset of a relationship, the operator may require funds to be deposited with it as security for the customer's potential losses. The size of such a deposit may reflect, of course, the level of the customer's trading and also the volatility of a market in which that trading takes place. The more volatile the market, the greater can be the potential losses. Secondly, security for running losses already incurred in open trades may be required."

25. I would also refer to the helpful summary in the decision of HHJ Pelling QC, sitting as a Judge of the High Court in *Quinn v I G Index Ltd* [2018] EWHC 2478 (Ch) at [3]-[10].

The Legal Framework

26. I have already referred to sections 150 and 138D(2) of FSMA. I now set out the relevant COBS Rules on which the Claimant relies in relation to his claims:

- (1) COBS 2.1.1R which provides

"The client's best interest's rule

2.1 A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule)"

- (2) COBS 2.1.2R which provides that

"a firm must not, in any communication relating to investment business seek to exclude or restrict or rely on any exclusion or restriction

of any duty or liability it may have to a client other than under the regulatory system.”

- (3) COBS 2.1.3G which provides that

“(1) In order to comply with the client's best interests rule, a firm should not, in any communication to a retail client relating to designated investment business:

(a) seek to exclude or restrict; or

(b) rely on any exclusion or restriction of;

any duty or liability it may have to a client other than under the regulatory system, unless it is honest, fair and professional for it to do so.

(2) The general law, including the Unfair Terms Regulations (for contracts entered into before 1 October 2015) and the Consumer Rights Act 2015, also limits the scope for a firm to exclude or restrict any duty or liability to a consumer.”

- (4) COBS 4.2R which provides that:

“(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading”.

- (5) COBS 4.3R which provides that

“(1) A firm must ensure that a financial promotion addressed to a client is clearly identifiable as such”.

- (6) COBS 11.2.1R which provides that:

“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.”

- (7) COBS 11.3R which provides that:

“A firm...which is authorised to execute orders on behalf of clients must implement procedures and arrangements which provide for the prompt, fair and expeditious execution of client orders, relative to other orders or the trading interests of the firm.”

27. COBS 2.1.1 and COBS 2.1.2 are both designated by the FCA as Overarching rules for regulated firms, whilst COBS 11.2.1 is designated as an Overarching obligation.
28. The Defendant accepts that it was subject to the COBS regulatory regime, the Rules and Guidance relied upon by the Claimant, and that it could not and cannot contract out of its

regulatory duties. This is reflected in Term 1(3) of the Customer Agreement. It also accepts that pursuant to section 138D of FSMA a breach of any of the COBS rules is actionable by the Claimant, but submits that, given the wording of that section, such action is limited to breaches of Rules and not the Guidance. I accept that submission.

The Relevant Terms of the Customer Agreement

29. The Customer Agreement contained the following terms:

- (1) Term 2(9): *“In respect of Financial Spread Bets we will take all reasonable steps to provide you with best execution in accordance with the FSA rules and our Order Execution Policy when we execute Bets on your behalf. The arrangements we put in place to give you best execution will be detailed in our Order Execution Policy. A Summary Order Execution Policy is available on our website or by post on request. Unless you notify us to the contrary, you will be deemed to consent to our Order Execution Policy when this Agreement comes into effect.”*
- (2) Term 3(3): *“We operate a policy of independence which requires our employees to act in your best interests and to disregard any conflicts of interests in providing our services to you. In addition, we have in place organisational and administrative controls to manage the conflicts of interests identified above such that we can be reasonably confident that risks of damage to clients as a result of any conflict will be prevented. These organisational and administrative controls are set out in our Conflicts Policy, a summary of which (our Summary Conflicts Policy) is available on our website or by post on request.”*
- (3) Term 10, entitled **“Betting procedures – general”**, which provided: *“Situations not covered by this Agreement (4) in the event that a situation arises that is not covered under these Terms or the terms of the Supplementary Documents, we will resolve the matter on the basis of good faith and fairness and, where appropriate, by taking such action as is consistent with market practice and/or paying due regard to the treatment we receive from any hedging broker with which we have hedged our exposure to you arising from the Bet in question.”*
- (4) Term 14, entitled **“Deposits and Margins”**, which provides:

Deposits

(1) Upon opening a Bet you will be required to pay us the Deposit for that Bet, as calculated by us (“Deposit”). Note that the deposit for certain Bets (for example, Bets on Shares) will be based on a percentage of the notional value of the Bet and therefore the Deposit due for such Bets will fluctuate in accordance with the notional value of the Bet. Deposit is due and payable to us immediately upon opening the Bet (and for Bets that have a fluctuating Deposit based on a percentage of the notional value of the Bet, immediately on the opening the Bet and thereafter immediately on any increase in the notional value of the Bet taking place) unless (not applicable here)...

Margin

(2) At all times during which you have open Bets, you must ensure that your account balance, taking into account all realised and/or unrealised profits and losses (P&L) is equal to at least the Deposit that we require you to have paid to us for all of your open Bets. If there is any shortfall between your account balance (taking into account P&L) and your Deposit requirement you will be required to deposit additional funds into your account (“Margin”). Margin will be due and payable to us immediately on your account balance (taking into account P&L) falling below your Deposit requirement unless (not applicable here)....

General

(3) Details of Deposit and Margin paid and owing by you are available by logging onto our Electronic Betting Service or by telephoning our dealers. You acknowledge: (a) that it is your responsibility to be aware of, and further that you agree to pay, both the Deposit and Margin required at all times for all bets that you to open with us; (b) That your obligation to pay Margin will exist whether or not we contact you regarding an outstanding Margin obligation; and (c) that your failure to pay any Deposit or Margin required in relation to your Bets will be regarded as an Event of Default for the purposes of Term 16(2)...

(6) We are not under any obligation to keep you informed of your account balance and Margin required (i.e. to make a “Margin Call”) however if we do so the Margin Call may be made by telephone, post, fax, email or text message. The Margin Call will be deemed to be made as soon as you are deemed to have received such notice in accordance with Term 13(10). We will also be deemed to have made a demand for Margin if (a) we have left a message requesting you to contact us and you have not done so within a reasonable time after we have left such a message; or (b) If we are unable to leave such a message and have used reasonable endeavours to attempt to contact you by telephone (at the telephone number last notified to us by you) but have been unable to contact you at such number. Any message that we leave for you requesting to contact us should be regarded by you as extremely urgent unless we specify to the contrary when we leave the message. You acknowledge and accept that what constitutes reasonable time in the context of this Term may be influenced by the state of the Underlying Market and that, according to

the circumstances, that could be a matter of minutes or even immediately. It is your responsibility to notify us immediately of any change in your contact details with alternative contact details and ensure that our calls for Margin will be met if you will be uncontactable at the contact address or telephone number notified to us (for example because you are travelling or on holiday or are prevented from being in contact because of a religious holiday). We will not be liable for any losses, costs, expenses or damages incurred or suffered by you as a consequence of your failure to do so.

(5) Term 15, entitled **Payments and Set Off**, which provides:

(4) We will be under no obligation to remit any money to you that would reduce your account balance (taking into account running profits and losses) to less than the Deposit and Margin payments required on your open Bets. Subject thereto and to Term 15(5) money standing to the credit of your account will be remitted to you if requested by you. Where you do not make such a request, we will be under no obligation to you, but may at our absolute discretion, remit such monies to you. All bank charges however arising will, unless otherwise agreed, be for your account. The manner in which we remit monies to you will be at our absolute discretion, having utmost regard to our duties under law regarding the prevention of fraud and money laundering. We will normally remit money in the same method and to the same place from which it was received. However, in exceptional circumstances we may, at our absolute discretion, consider a more suitable alternative.

(5) You will pay interest to us on any sums due in respect of any Bet and any other general account fees (for example, market data fees) that you failed to pay on the relevant due date. Interest will accrue on a daily basis from the due date until the date on which payment is received in full, at a rate not exceeding 4% above our applicable reference rate from time to time (details available on request) and such interest will be payable on demand.

(6) Term 16, entitled “**Default and default remedies**”, which provides:

“(1) each of the following constitutes an “Event of Default”:

(a) Your failure to make any payment (including any Deposit or Margin payment) to us or to an Associated Company of ours in accordance with the conditions set out in Terms 14 and 15;

(b) your failure to perform any obligation due to us;

(c) where any Bet or combination of Bets or any realised or unrealised losses on any Bet or combination of Bets opened by you results in you exceeding any credit or other limit placed upon your dealings...

(2) if an Event of Default occurs in relation to your account(s) with us or in relation to any account(s) held by you with any Associated

Company of ours, we may at our absolute discretion at any time and without prior notice;

(a) close or part-close all or any of your Bets at a Closing level based on the then prevailing quotations or prices in the relevant Underlying Markets or, if none, at such levels as we consider fair and reasonable and/or delegate or place an Order on your account with the aim of reducing your exposure and the level of Deposit/Margin or other funds owed to you by us;

(b) convert any Currency balances on your account into another Currency...”

(4) in the event of your failing to meet the demand for Deposit or Margin or your being in excess of any credit or other limit placed on your account, we may exercise our reasonable discretion to allow you to continue to place Bets with us, or allow your open Bets to remain open, but this will depend on our assessment of your financial circumstances.

(5) you acknowledge and agree that, if we agree to allow you to continue to place Bets or to allow your open Bets to remain open under Term 15(4), this may result in your incurring further losses. in closing out Bets under this Term 16, it may be necessary for us to ‘

(6) you acknowledge and agree that in closing out Bets under this Term 16, it may be necessary for us to ‘work’ the order. This may have the result that your Bet is closed out in tranches at different bid prices open brackets (in the case of Sells) or offer price (in the case of Buys) resulting in an aggregate closing level for your bet that results in further losses being incurred on your account. You acknowledge and agree that we shall not have any liability to you as a result of any such wording of your bets.

The Implied Terms contended for by the Claimant within the Customer Agreement

30. At paragraphs 9 and 10 of the Amended Particulars of Claim, the Claimant contends that:

- (1) it was an implied term of the Customer Agreement that the Defendant would discharge its contractual obligations with reasonable skill and care, and in particular with that degree of skill, care and diligence to be expected of a reasonably competent and prudent FSA regulated online investment platform (pursuant to section 13 of the Supply of Goods and Services Act 1982 or otherwise). This is admitted by the Defendant.
- (2) in order to get business efficacy to the customer agreement it was an implied term that the Defendant:

- (a) would exercise any discretion fairly and in the best interests of the claimant in the circumstances; and
- (b) would not transfer or otherwise deal with the Claimant's money without his authorisation.

This is denied by the Defendant on the basis that the Customer Agreement sets out the circumstances and ways in which the Defendant can exercise any discretion or otherwise transfer or otherwise deal with the Claimant's money. It is therefore not necessary to imply such terms in order to give business efficacy to that agreement. I accept the Defendant's submissions in this regard, save that in my judgment, the exercise of the absolute discretion under Term 16(2) and 16(3) is subject to an implied term that it will not be exercised in a manner which is irrational, perverse, capricious or arbitrary [see *Clarke v Nomura* at [40] per Burton J, *Mallone v BPB Industries* [2002] EWCA Civ 126 at [36]-[37] per Rix LJ, *Braganza v BP Shipping Ltd* [2015] UKSC 1 [2015] UKSC [2015] UKSC 17 at [30] per Lady Hale JSC, [53] per Lord Hodge JSC and [103] per Lord Neuberger JSC and in relation to closing out positions in trading options on European exchanges, *Euroption Strategic Fund Limited v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm) (the "**Euroption case**") at [105] per Gloster J, who there described it as "a duty to act rationally". That is different to the way the implied term is formulated at paragraph 10.1 of the Amended Particulars of Claim.

The Regulatory Obligations contained in the FSA's Principles of Business

31. It is common ground that when assessing the standard of reasonable skill and care owed by the Defendant, it is necessary to have regard to the statutory duties contained in the FSA's Principles of Business ("**PRIN**"), in particular:
 - (1) to conduct its business with integrity (PRIN 2.1.1(1));
 - (2) to conduct business with due skill care and diligence (PRIN 2.1.1(2));
 - (3) to take reasonable care to organise and control its affairs responsibly and effectively (PRIN 2.1.1(3));
 - (4) to observe proper standards of market conduct (PRIN2.1(5));
 - (5) to pay due regard to the interests of its customers and treat them fairly (PRIN 2.1.1(6));

- (6) to pay due regard to the information needs of the client, and to communicate information to him in a way that is clear, fair and not misleading (PRIN 2.1.1(7));
- (7) to arrange adequate protection for the clients' assets when it was responsible for them (PRIN2.1.1(10)).

The obligations contended for by the Claimant imposed upon the Defendant pursuant to the FSA Handbook's Client Asset Source ("CASS").

32. It is common ground that pursuant to Term 17(1), the Defendant agreed (i) to treat all monies received from the Claimant in accordance with the FSA rules relating to money received by the Defendant from the Claimant, and (ii) that under the CASS rules, the Defendant was obliged to hold the Claimant's money pursuant to the statutory trust set out in CASS 7.7. There are a number of other duties pleaded in paragraph 15 of the Amended Particulars of Claim. There is a dispute as to whether the Defendant was subject to any other broader financial duties. Those pleaded in paragraph 15.2 to 15.4 of the Amended Particulars of Claim are admitted. It is a somewhat moot point because the Claimant makes no claim based upon any breach of the obligations set out at paragraph 15 of the Amended Particulars of Claim.

The FSA Handbook

33. It is common ground that pursuant to the rules in the FSA Handbook under the heading Dispute Resolution: Complaints ("**DISP**"), the Defendant was obliged to:
- (1) operate an effective and transparent complaints procedure (DISP 1.3);
 - (2) investigate complaints competently, diligently and impartially, obtaining additional information as necessary (DISP 1.4);
 - (3) assess complaints fairly, consistently and promptly (DISP 1.4); and
 - (4) cooperate with the Financial Ombudsman Service (DISP 1.4).

Fiduciary Duties contended for by the Claimant

34. At paragraph 18 of the Amended Particulars of Claim, the Claimant admits that the current version of the Defendant's Summary Order Execution Policy provides that the Defendant will not operate as a fiduciary with respect to order execution. He makes no admissions as to whether that was the position in relation to the trades in question that

are the subject of the Best Execution Claims. Insofar as that was not expressly so provided, the Claimant contends that the Defendant otherwise owed fiduciary duties:

- (1) to act in the Claimant's best interests;
- (2) not to place itself in a position where its own interests conflicts with Claimant;
- (3) not to act to its own advantage (without the Claimant's prior informed consent).

Those duties are denied by the Defendant on the basis that the duties it owed the Claimant are “fully contained in the Agreement and the statutory regulations earlier referred to”. Given that the relationship with the Claimant was an “execution only” one, I accept the Defendant's submission in this regard.

The Duty of Care owed to the Claimant by the Defendant contended for by the Claimant

35. At paragraphs 19 and 20 of the Amended Particulars of Claim, it is alleged that:

- (1) The Defendant owed the Claimant duties of care in tort of like content and to like effect as the duties and contractual duties set out above;
- (2) Alternatively, the Defendant owed the Claimant a duty of care at common law by virtue of the fact that it assumed responsibility for the management of the Claimant's money and/or the execution of his trades.

This is disputed by the Defendant. Applying the analysis in the *Eurooptions* case at [132]-136], I do not accept the common law duties contended for by the Claimant, in particular that there were duties at common law, akin to those imposed by statute referred to above, or that there was any additional obligation at common law imposed upon the Defendant, given that it was operating an execution only service. The Defendant had not assumed responsibility for the management of the Claimant's money and its obligations in relation to the Claimant's money are set out in the Customer Agreement and the statutory regulations referred to above. I would add that given the way in which the Claimant has formulated his claims, drafted by Counsel, I cannot see what this adds in terms of establishing liability or enhancing quantum.

The Transfer Claim and the Counterclaim

36. Before turning to the Settlement Agreement, it is necessary to set out the material factual background.
37. As stated earlier, the Claimant opened an account with the Defendant (the “**Account**”) in January 2012. As earlier indicated, it was not the first time that he had had an account with them. He accepted in cross-examination that he had read and understood the Customer Agreement and the Risk Disclosure Agreement and that he consented to be bound by it. In March 2012 he lost the original bank debit card which he had registered and which he had used to fund his account. He registered a new one on 11 April 2012. He started trading in about April 2012 and he was successful. By late May 2012 he had a substantial credit balance in his account.
38. On 24 May 2012 at 9.07am Mr Pike telephoned the Claimant to introduce himself. The transcript of the call indicated that the Claimant said that, with one major exception, he was “very satisfied and very impressed”. That exception related an earlier erroneous margin call which made no sense to the Claimant, and which was corrected. It was a cordial call and as a result a lunch was arranged for the two of them to take place on 31 May 2012.
39. Later that day there was a further telephone call between the Claimant and Mr Pike when the Claimant asked the Defendant to transfer £75,000 to his bank account. Between 25-31 May 2012 the Defendant debited £60,000 from the Account in tranches of £20,000, which he received on 29, 31 May and 1 June 2012 respectively.
40. On 31 May 2012, in a telephone call with one of the Defendant’s employees called Emma (her surname does not appear on the transcript), the Claimant was told that, as a result of a policy on the part of the card issuers, there is a daily limit of £20,000 which can go back to a bank debit card and those transfers could take between 3-5 working days. The Claimant queried that. He was told that he could request a telegraphic transfer (“**TT**”) in which case there was no limit, and the transfer would take place on the same day. Mr Pike had informed the Claimant that the Defendant would need to produce evidence of the link between the cancelled and current bank debit cards against his bank account in order for the TT facilities to be made available from the Account.

41. At the lunch on 31 May 2012 the Claimant brought a copy of his bank statement to provide evidence of link to his current bank debit card (but not the cancelled one) to establish the TT facilities. He asked for £250,000 to be transferred from his Account to his bank account (the “**Transfer**”). At that time there were ample sums in the Account. There was still a further £15,000 to be remitted pursuant to the earlier request for the return of £75,000 and at the time the Claimant had no open positions and thus had no requirement for maintenance margin. He never rescinded the request for the Transfer. The Claimant made no mention of the fact that he was shortly to take out a number of large positions the following day.
42. On the morning of 1 June 2012, the Claimant started dealing again. The Claimant placed several bets online. In particular he placed bets totalling £1,000 per point on the US Dollar:Pound Sterling exchange rate (the “**Cable Positions**”), £750 per point on the Germany 30 Stock Index (the “**Dax Position**”) and £500 per point on the Australian Dollar:US Dollar exchange rate (the “**AUD Position**”). The placing of those bets required the Defendant to provide a margin deposit. His net equity on the account (cash plus or minus running profits or losses), however, was more than sufficient to cover the deposit. In the event that his bets performed badly, further margin would be required. At paragraph 19 of his First Witness Statement, the Claimant states: “*However, the size of my account's positions and the trading losses they were incurring had soon invalidated the previous day's Transfer Request since £250,000 was soon no longer available to be withdrawn.*”
43. At 11.44am that day¹, Mr Pike emailed the Claimant, saying that he needed to see the statement from the original card, “*then we can set up TT instructions and get reasonable sums moved over.*” Some three minutes later, the Claimant called Mr Pike to express his irritation at the Defendant’s continued prevarication in setting up the required TT facility. This was in part because there was a weekend and two bank holidays approaching, which would mean further delays. He said: “*It's a week in which case I've been messed around*”. Neither he nor Mr Pike made an express reference to the Transfer Request.

¹ All the telephone conversations are recorded and have been transcribed, but as Mr Pike points out at paragraph 11 of his first witness statement dated 16 July 2020, the timings are one hour out, and are stated to be one hour behind the actual time they took place.

44. At 11.47am that day Mr Pike called the Claimant to explain why it was necessary to see evidence of the original card on the bank statement. Again, the Defendant made no mention to Mr Pike of the substantial trades he had carried out earlier in the day.
45. At 11.49am on 1 June 2012 the Claimant telephoned one of the employees called Alwyn, an employee of the Defendant (his surname does not appear on the transcript), to find out about information and announcements happening that day. The United States Non Farm Payroll announcement (the “**Non Farm Payroll Data Announcement**”) was due to be made that day at 1.30pm UK time. That would impact upon the positions the Claimant had taken.
46. At 1.06pm the Claimant called Mr Joe Egan in the Defendant’s credit department. He said he was “*becoming decidedly uncomfortable with the delay in getting his funds back*”. He said: “*And this has taken over a week to resolve and I’m getting mightily fed up.*” He was specifically asked how much money he was looking to be returned, and he replied, “*I can’t remember*”. This is a somewhat surprising statement to say the least, given he had made a request for the Transfer only the day before. I do not, however, find that the Claimant was trying deliberately to conceal the Transfer request from Mr Egan.
47. At 1.22pm Mr Pike telephoned the Claimant and informed him that he had spoken to the Head of Credit and said: “*The TT is being sent right now to the account you sent details for.*” No sums were mentioned. The Claimant simply thanked him. He did not countermand the Transfer Request or inform Mr Pike of his earlier trading that day. The Transfer was made some two minutes later at 13:24:32. At the time there was in the Account the sum of £304,977.64. The consequence of that withdrawal, however, was that there was insufficient money left in the account to cover margin payable on his open Bets.
48. At paragraph 27 of his First Witness Statement , the Claimant states:

“At 13:24:32, IG withdrew £250,000 from my IG account and sent it to my bank account despite:

(a) IG’s credit control systems showing IG that such a sum was not then available to be withdrawn.

(b) The Positions needing to be liquidated first in order to release the £133,000 deposit back into my account in turn to enable £250,000 to be withdrawn. IG themselves provide the explanation for this on P.132 of their

2012 Annual Report: "...deposit against the risk of the open position ...will be released on the closing of the position: it is still your money but is not available for withdrawal from the account whilst the position is open".

(c) The Transfer being in breach of IG's client payment process at 14:38 on 7 June 2012.

(d) The Transfer's immediate effect would have been to create an 'Event of Default' on my account as set out in Term 16 of the [Customer Agreement].

(e) No attempt having been made by IG to ensure that I was aware of the consequences set out in (a), (b) and (c) above.

(f) No dispensation having been either sought from nor given by me for IG to affect the Transfer in light of these highly irregular and improper circumstances."

49. At paragraphs 27-28 of the First Witness Statement, he continues:

"27. At 13:24:32, there was only c. £176,500 of unencumbered funds available on my IG account. Notwithstanding that there were no credit facilities available for my account type, IG provided an immediate £78,500 credit facility in order to enable the Transfer to be made prior to IG's subsequent liquidation of the Positions. I confirm that this bridging facility was neither requested nor authorised by me.

28. At the time, IG did not disclose to me any of sub-Paras 26(a), (b), or (d), or Para 27 above, rather chose to misrepresent the truthful position..."

50. At 13:24:32, The Claimant's account was flagged up on the Defendant's Close Out Monitor (the "COM"). This occurs when a client's account is in significant default so that the net equity within it, i.e., cash on account plus or minus running losses falls to less than 50% of the deposit or margin required on a client's open position.

51. Thereafter the following events occurred in relation to the Claimant's trades referred to in paragraph 42 above, Mr Richardson closed the Claimant's Cable Positions in full in three tranches:

- (1) at 13:26:21 the first tranche was closed;
- (2) at 13:26:53 the second tranche was closed;
- (3) at 13:27:23 the third tranche was closed.

52. By the time the last tranche was closed, the market had moved further against the Claimant and the Account was at 91%, rather than 100%. Mr Richardson justified this

course by reference to Term 16(4) to (6) of the Customer Agreement. At paragraph 10 of his witness statement dated 13 December 2019, he stated:

“there is always increased volatility around the time of the Non Farm Payroll Information being announced on the first Friday of each month. Furthermore, the Claimant's position were large positions which required manual intervention. I decided to close the Cable Positions in order to bring the Claimant back on side. This was done in three tranches...” At paragraph 12, he continued: “No decision was taken to close the DAX positions at that particular time as it was not necessary. The Claimant’s account was at 91% which was satisfactory and perfectly normal in the circumstances.”

After the Non Farm Payroll Data Announcement was made at 13:30, the markets quickly moved further against the Claimant's remaining positions. His account was again flagged up on the COM as he was once again in significant default. As a result, the Claimants’ remaining positions were closed by another of the Defendant’s dealers, Mr McSherry. One tranche of his DAX position was closed at 13:32:16, the second tranche of the DAX at 13:32:27 and the AUD at 13:32:54.

53. Mr Pike telephoned the Claimant at 13:40:24. Mr Pike informed the Claimant (incorrectly) that when the TT was sent, he had more than enough cash to hold his positions but that it was the release of the United States Non-Farms Payroll Information that had caused his positions to be closed. He said:

“...I obviously want to know what you want to do because you know your positions are closed but I don't want to have the conversation sort of 10 minutes down the line they shouldn't have been closed etc etc, because the money's come out. When the money was sent you had more than enough cash to hold your positions but obviously the number as you know moved it so much that it's closed those positions out.”

54. At 14:11:54 the Claimant telephoned Mr Pike. He pointed out that his Cable Positions had been closed before the Non-Farm Payroll Data Announcement was released. Mr Pike said that he was not aware of that but would look into it.
55. At 14:36:37, Mr Pike telephoned the Claimant. The relevant parts of that conversation are as follows (in which I have emphasised particular parts of the exchanges):

“NdB: Hello?”

RP: Nic it’s Rob

NdB: Yeah hi Rob.

RP: Right the situation is the sending the 250 did put you on call hence it closed your [over speaking 0:11]. [Cable Positions – appear to be the words used]

NdB: Yeah I could just see it, it's bloody difficult to know what. And let me tell you straight away nobody other than the person that actually did it in all everyone's best interest blah, blah, blah, and of course but it turned out to be a nightmare, sods law strikes again.

RP: Yeah no it's been a bloody horror show. I've been running around trying to get to the bottom of it and you know yeah the system what happened is the head of credit's done it and he's said you know yes he's taken on board that you know who you are I've been talking to etc. etc. and said right I'll put it through and the timing you know has been a nightmare for it.

*NdB: It has been a nightmare and the other thing so that you know I was asked how much I want, I said I don't care I just want a system which is working **but quarter of a million of course came from what you and I discussed yesterday etc. etc. and you did the best thing you could because that's we talked that was yesterday but it didn't take into account, I don't know where it all ends up. It's a nightmare.** [emphasis added]*

RP: Yeah I think you know we need to probably agree now where this goes...

*RP: Well you can't do or we just do it over the phone I mean just tell me what are you thinking **because you know the system I suppose from the letter of the law we're going to say yes we've carried out your instruction.***

NdB: Yeah² but my instructions weren't to do the quarter of a million that was yesterday but when the positions weren't open.

***RP: Right.** [emphasis added]*

*NdB: Is where I would come from. **You know you and I speak the same language Rob we want to sort this out sensibly.***

***RP: Yeah absolutely.** [emphasis added]*

NdB: And in fairness to both sides not just dare I say one. So I've never come across this before if I'm perfectly honest and I don't suppose you have that often either.

RP: No it's something yeah we've acted in the best interest for both parties and sort of that's the trouble.

NdB: I entirely agree. The error was whoever took the money off when it wasn't there to be taken off.

RP: Yeah. Well look I suppose I mean getting down to it are you saying you want those cable positions on?

² The Claimant insists that he said "No" not "Yeah"

NdB: Well, [laughs].

RP: *The way I tell you I'll be absolutely blunt with you is the fact is if you turn round to me and say look I want those positions on [over speaking 3:12] your error we need to crystallise it and then we'll argue about the money rather than it run up and on.*

NdB: *Agree. Funnily enough I think you've got the right balance there. **I mean what I could go on and say is I want the whole lot on but I'm not going to do that because that's monstrously unfair and I think what you said just now is to say put the cables on would be the right answer.*** [emphasis added]

RP: *Yeah I briefly sort of mentioned it to the head of trading. They can't sanction putting those on at the original levels. How it works would be we'd give you the, you put the £750 of cable on as normal at these levels and then we will, so look your position is correct and then we will have to argue about where we stand and whose error it is over the money so we can't say to you right you can have them back down at 07 you have to have them here and then let the go up.*

NdB: *No I think well my view is that would be the equitable solution. **Give me the cables back and leave it at that not all the others because I could go after all the others back.*** [emphasis added]

RP: *What the DAX as well?*

NdB: *Yeah if the money hadn't been taken off.*

RP: *Yeah but no the money coming off didn't take, didn't take your DAX through it was the 70 point movement in payrolls that took the DAX off.*

NdB: *Yeah but with the quarter of million in there it wouldn't have done.*

RP: *No true but equally you know...*

NdB: *You see what I mean? And I'm not going to get silly like that I'm not the sort of person.*

RP: *You know that's with hindsight if it had carried on trading.*

NdB: *Of course it is and all these things are in hindsight from everyone's point of view **but I do think the equitable thing would be to put the cable back as it was when it shouldn't have been taken off.***

RP: **Right okay.**

NdB: *And leave it at that.*

RP: *Okay I can't...*

NdB: ***Not at these levels at the, if you can have a word with them on that basis.*** [emphasis added]

RP: I can't, they won't, that's not going to happen right now because what they're going to say to you is or what they're going to say is we're acting in, you and I have acted in best interest, the guy in credit taking the 250 off is going to say the same thing.

NdB: No but he shouldn't do because he's wrong.

*RP: No but to draw the line in the sand we're going to have to say look, well put it this way the only way I'm going to get those positions on now is here and then let's talk about it and then you know we're more than happy to talk about it but I can't put them back in at original levels at this very moment in time. So if we can put them in now then at least we've got your position correct and you're not happy but your exposure is correct and our exposure is correct and then we'll have to discuss you know and then **I think if an error is found our part then we talk about you will get the money it's just a question of we need to get the position correct because if to goes another 200 high which I'm talking about you know.***

NdB: No I agree with that. Okay put them back on. [Emphasis added]

RP: Okay so we'll do them here. My next question is there's probably no money in your account.

NdB: And I can't put it back in because it won't have hit my account yet.

RP: It doesn't hit your account until about four I mean it will get done two day. OK let me sort that one second, one second pause [pause]. I think it was 750 I'll check.

NdB: It was. [Pause]

RP: Okay right I can put them on here but obviously sort of we're dealing on credit on our part because you've got nothing on the account you know I need to sort of on the line have your word that you'll pay when the hot funds hit your account that you will show an undertaking to pay some of the funds to us to cover these and then we can sort of go on from there. So I'll put the, it was 750 I think wasn't it?

NdB: It was, it was 750.

RP: 750 OK let's see where we are now in the spot so it's trading at 15399. Actually go short 750 cable at 99. OK I'll put those on now.

NdB: And I'll send you an email setting out what I think the right thing is. Okay?

RP: Yeah absolutely.

NdB: these are recorded I take it these [over speaking 8:17].

RP: Yeah these lines are fine and obviously fund wise when the TT hits your account if you could fire some back to us.

NdB: yeah I think I'm limited to I think I'm limited to 50 a time there's nothing I can do. Whatever I do on the card today and whatever you call the thing on Monday.

RP: Yeah, yeah. Fine if you fire an email straight to me then we can start sorting this out and then I'm sure we'll clear it up it's just one of those nightmare scenarios

NdB: It's a horrendous [inaudible 8:54]. The only person who made an error in my humble opinion was the guy who took the money off when it shouldn't have been taken off.

RP: Yeah, yeah. I mean we're sort of both dealing with numbers that we'd spoken about yesterday.

NdB: Exactly and sods laws has struck yet again.

RP: And with the markets being the way they are it's very hard to keep track of everything.

NdB: Indeed.

*RP: **Okay well look I'll wait for your email and I'll put the position back on now.***

*NdB: **Alrighty.** [emphasis added]*

RP: Okay thanks

NdB: Bye now."

56. At 15:01 the Claimant sent an email to the Defendant in the following terms:

Dear Rob,

WP

Summary as to where I think we are:

- 1. At lunchtime yesterday, I asked you to arrange a return to me of 250,000 pounds and I complained about the fact that I had been asking for money to be returned to me for a week or so and had only rec'd 20,000 pounds*
- 2. This morning I opened various positions such that at 12hr30 I was long of 1000 cable, 750 dax and 500 aus.*
- 3. I went into a meeting outside of our officers at 12hr30.*
- 4. IG credit dept then went to great lengths to explain to me why they would not return my monies. They asked me how much I wanted back to which I responded to the effect "I do not care, I just want an efficient system in place so I can get my monies back."*
- 5. You called me a few moments later to say that you had got them to agree to pay me £250k.*

6. *I returned to the office at about 13hr 40 and saw that all my positions had been closed.*
7. *You called me very soon thereafter to confirm same. You told me that the system had closed all my positions as a result of the market falling steeply after the 13hr30 US figures which were bad. You told me that this had not been caused by the removal of £250K from my account and that there had been sufficient margin in my account to carry the positions when it was debited.*
8. *Upon analysis all the transactions on my account, I saw that the GBP positions had been closed before the figs. I called you and asked you to check if the information given to you/me Re the £250K debit NOT being the cause of my positions being closed was correct.*
9. *You called me to confirm that it was indeed the £250k payment which caused the GBP positions to be closed and the Dax/AUS followed soon thereafter when the market fell away.*
10. *You asked me whether I wanted the GBP positions re-instated. I said yes. You told me that at this stage you could not re-instate it at all the levels at which IG had closed it out but at current market price.*
11. *I said that for me the equitable solution was for the GBP to be reinstated at the level at which it was closed out, and on that basis I would not look for redress for the Dax/AUS positions also been closed out which also would probably not have happened but for the removal of the £250k from my account.*
12. *You said that you could not agree to that at this stage and we agreed that I would write to you. You told me that all IG phone calls were taped.*
13. *I asked you to put stops on my positions at the level at which my GBP be was closed out by IG in line with my thinking in 11 above. You duly placed them for me (unconditionally)*

*Rob, for all sorts of obvious reasons the quicker this can be resolved/agreed the better. I fully accept that you personally were acting in my best interests throughout. I remain curious as to why your credit department debited my account the £250K when there was insufficient equity **to a material degree** in my account to do so.*

Let me know of any errors etc I have made in the above.

Kind regards

Nic.”

57. Mr Pike replied at 16:33:40 stating :

“The only point I disagree on if pushed would be point 9 where you say the Dax/AUD positions were closed as result of the TT. The positions were still intact prior to the 13:30 number but the 60 point sell-off essentially put the

positions on call. Admittedly the absence of the £250k meant the positions did not run further however there was more than sufficient margin to carry the trades prior to the number.” [emphasis added]

58. At 16:33:50 there was a further telephone conversation, which was interrupted, the material parts of which are as follows:

“NdB: Hello?

RP: Nic It’s Rob

NdB: Yeah hi Rob

RP: Fine I’ve just pinged you back an email it’s just really I suppose a subjective point in that slightly disagree with you on point nine.

NdB: Hold on I haven’t got it in front of me.

RP: It was purely me just saying look the DAX and the Aussie position were more than covered prior to the numbers so yes granted if the 250 was on there they would have run further but the 250 coming out did not cause them to close unlike the cable. [emphasis added]

NdB: [Inaudible 0:36] which is why I think that’s [inaudible 0:38] I mean if [inaudible 0:42] the statement it had been taken out the 250 the [inaudible 0:47] would be closer but the thing here is great because you were being [inaudible 0:54]...

RP: Sorry Nic the line has really gone fuzzy.

NdB: I’m in a dodgy place. [Inaudible 1:05] as I said to you earlier

RP: Okay I’ll call you right back... [call interrupted]

NdB: Rob.

RP: Hi

NdB: Yeah this is much better for me. Now I take your point but as I say it’s arguable that had the 250 not being taken out of course they would still be there etc. etc. etc. but as they say I fully accept you doing it, not you but IG were doing it in my best interest well you certainly were. IG in giving me back the 250 from the day before but it’s just a mess the whole things a mess. [emphasis added]

RP: Yeah okay

NdB: an unfortunate one.

RP: I will now I’ll get this over to the people who sort of are going to deal with it.

NdB: Just thinking without knowing the figures if there’s £88,000 of deposit on the 1,000 it would have been way under, it would have been marginal

whether the 250 came out the actual equity would have been much lower than that. So that is a surprise they did it.

RP: Yes I mean look I suppose I...

NdB: Your guess is as good as mine as to what the position was.

RP: I am slightly surprised it happened and you know. 37

NdB: The system shouldn't how it should it?

RP: I'm surprised that it does allow it I don't know where the sort of in the effort to you know I suppose make up for lost time'

NdB: Somebody overwrote it or whatever.

RP: I don't know if they can override it I mean I'm speculating so probably actually find out directly from them so I'm going to forward it over to the head of trading who will get on the case with it all. The only, I suppose we are slightly hamstrung now is the bank holiday I don't know if they're in Monday, Tuesday.

NdB: Well I'm certainly not in. I'm around. Are you Monday, Tuesday?

RP: No but I mean you know if correspondence or mobile phone calls need to be made I'm on the end of a phone I just don't know whether, your timescale, I agree we need to get this done as soon as possible so.

NdB: When these things are open ended it can get very tricky.

RP: Sure I'm happy from the point of view that suppose the dispute is open ended but the actual position is that the money is a finite amount now we're talking between the level you closed at and the level you're back open at so that we know where...

NdB: Yeah I'm being slightly harder than that in my saying if you don't agree to that I reserve the right and all that bollocks.

RP: Are you?

NdB: Aren't I? I do think that is equitable and but if it's not it's not and I'll obviously to listen to my lot.

RP: Well then let me fire it over to the person that you know is going to deal with this and then I will do my utmost to speed it up and get things done quickly.

NdB: And Rob thank you personally I've got no [over speaking 3:05].

RP: No it's a combination of market conditions and [over speaking 3:09] and one thing.

NdB: It's absolute sods law.

RP: I'm sure we'll sort it out it won't be a problem.

NdB: Alright mate.

RP: Bye... ”

The Settlement Agreement

59. On 6 June 2012 Mr Pike telephoned the Claimant to inform him that IG had decided to credit his Account with the sum representing the difference between the level at which the Cable Positions had been closed out and the level at which they had been reinstated. As a consequence, in an email to Jody Dunn timed at 13:11 on 6 June 2012 the Claimant agreed:

“I shall have no claim of whatever sort against IG for the closing of the DAX and the AUS/USD positions by IG on Fri 1st June following the removal of £250k from my IG account.”

60. There was therefore a settlement agreement (the “**Settlement Agreement**”). As the Claimant states at paragraph 40 of the Amended Particulars of Claim:

“The Claimant accepted the settlement offer by email on 6th June 2012. He was paid £91,525 by the Defendant. The settlement was stated as being in full and final settlement for the losses occasioned by the closure of the Positions.”

The Claim to Set Aside the Settlement Agreement

61. The Claimant now seeks to set aside the Settlement Agreement, relying upon negligent misrepresentation by the Defendant. His case is put on at paragraphs 38, 38A (a further amendment made at the hearing by an email dated 16 November 2021 timed at 13:54:33), 41, 43 and 44 in the following terms:

*“38. At 16:33:50³ on 1 June 2012 the Defendant (by the Account Manager) telephoned the Claimant. During the course of that conversation, the Defendant represented that Cable Position had been closed as a consequence of the transfer but stated that **there was more than sufficient ‘margin’ in the Claimant’s IG Account to support the Claimant’s DAX and AUD Positions, at the release of the payroll data and they had been closed, not as a result of the transfer but as a result of the adverse movement in the market following the release of the payroll data. The same was repeated by way of email later that day”***

The amendment at paragraph 38A states

*“**In addition at 16:33 1 June 2012 the Defendant represented by email that ‘The Positions were still intact prior to the 13:30 number’.**”*

³ This was amended by the Claimant’s email dated 16 November 2020, and further discussion as to the correct time of the relevant conversation.

Paragraph 41 states:

“The representations regarding the reason for the closure of the DAX position was not corrected before the Settlement Agreement.”

Paragraph 43 states:

“The Defendant’s representation that the Claimant’s DAX position had been closed, not as a result of the Transfer, but as a result of the adverse movement in the market following the release of the Payroll Data, was intended by the Defendant to be relied upon by the Claimant and in accepting the Settlement Offer, the Claimant relied thereon as he was intended to.”

Paragraph 44 states:

*“In fact, the representation in relation to the DAX position was false, as, because of the Transfer, when adverse movements in the market occurred prior to the release of the Payroll Data, the Claimant’s IG account had insufficient collateral and/or margin to support the DAX position, resulting in an order to close the position before the release of the Payroll Data **and but for the Transfer there would have been sufficient collateral and/or margin to support the (sic) both the DAX and AUS positions after the release of the Payroll Data.**”*

The Law Relating to a Misrepresentation Claim

62. In order to succeed in such a claim, the Claimant has to show:

- (1) the alleged representations were made;
- (2) those representations were false;
- (3) he relied upon the representations in the sense that they “*operated on his mind and caused him, or helped to cause to him, to act as he did*”, the burden of proof being on the representee. (See *Spencer Bower & Handley: Actionable Misrepresentation* 5th Edition 6.01-6.02.) In this case the Claimant must establish that he relied upon the pleaded representations when entering into the Settlement Agreement.

Discussion and Conclusion on the Transfer Claim and the Counterclaim

63. I will take each of the pleaded representations in turn.

64. “...*the Cable Position had been closed as a consequence of the Transfer...*” As Mr Mayall accepted, this representation was made, but he submitted it was true and it was the very reason why the Defendant offered the Settlement Agreement. I agree and do not understand the Claimant to argue the contrary. The Claimant was originally misinformed

by Mr Pike as to the reason for the closure of the Cable Position, but this was corrected by him well in advance of the Settlement Agreement, as the Claimant acknowledged at point 9 of his email of 1 June 2012, timed at 15.01 [see paragraph 56 above] . In my judgment this does not amount to a misrepresentation.

65. “...*there was more than sufficient margin in the Claimant’s IG Account to support the Claimant’s DAX and AUD positions, at the Release of the Payroll Data.*” This was stated by him both in his email timed at 16:33, referred to in paragraph 38A of the Amended Particulars of Claim, as well as in the conversation, commencing at 16:33:50, when Mr Pike said: “...*Admittedly the absence of the £250k meant the positions did not run further however there was more than sufficient margin to carry the trades prior to the number.*” It is apparent that the Claimant relies upon the evidence of Mr Richardson that, after the closure of the Claimant’s Cable Positions, the margin ratio was only 91%, rather than 100% – see paragraph 32 of the Amended Particulars of Claim. The fact remains, however, that the 9% margin shortfall did not result in the closure or cut back of any of the other positions, which were not closed until after the Non Farm Payroll Data Announcement, because of its adverse impact on the Claimant’s remaining positions.
66. Matters were not helped by the fact that in October 2012, some months after the Settlement Agreement had been entered into, in the course of an investigation into his Best Execution complaint, (to which I will return shortly), the Claimant received a document from the Defendant, which purported to show that the Dax Position was closed at 13:26:21, the same time as the first and second tranches of the Cable Position were closed, before the Non Farm Payroll Data Announcement. This suggested that its closure was as a consequence of the transfer of the £250,000. It was, unfortunately, incorrect. I accept the Defendant’s evidence that this was not a document taken directly from the system, but one compiled by a member of staff who no longer works at the Defendant. It does not tally with the actual data taken from the system (see p1174 of the Bundle) and the snapshot of the COM taken at 13:30:04, showing the Dax Position is still open at that time (see p993 of the Bundle), and at 13:32:16 showing one of the Dax Positions to have been closed but one still open (see p982 of the Bundle).
67. Furthermore, it is obvious that the information contained in that document was incorrect. It purports to show that the status of the Claimant’s account at 13:31:15 was that he had

Running Losses of £135,275. If the only position left open at that time had been the AUD, then that bet alone could not have shown a loss of that amount at that time.

68. Again, looking at:

(1) the last sentence of paragraph 32 of the Amended Particulars of Claim, which states:

“Pursuant to ~~which the COM Order~~, the Claimant’s DAX Position was closed at 13:32:27, resulting in the Claimant realising an immediate loss in the sum of £102,325.”; and

(2) the Claimant’s annotations to the Defendant’s chronology, none of which challenge the stated timings of the closing of the DAX Position,

the Claimant does not appear to challenge the fact that the DAX Position was not closed until after the Non Farm Payroll Data Announcement.

In my judgment this is the true position, and it happened as a result of the adverse impact on both the DAX and AUD Positions caused by the Non Farm Payroll Data Announcement, rather than the Transfer. The documentary evidence and that given by Mr Richardson, both of which I accept, shows there was no order⁴ or action taken to close the DAX Position before the Non Farm Payroll Data Announcement was made. Therefore, there was no misrepresentation made by Mr Pike in this regard.

69. During the hearing it became apparent that the main thrust of the Claimant’s complaint was that the Defendant could and should have closed out the DAX Position because of the 9% margin shortfall. But the fact is the Defendant didn’t close out the DAX Position then. Mr Pike was cross-examined about this, although Mr Richardson’s evidence referred to at paragraph 52 above was not seriously challenged by the Claimant. In my judgment Mr Richardson was entitled to rely on the discretion afforded to him under Term 16(4), and given the comparatively small margin shortfall, it was reasonable for him to do so.

⁴ The COM flag referred to in paragraph 32 of the Amended Statement of Claim was not an order. It was an alert to a dealer that an investigation was required. I note that the words “COM Order” have been deleted in the amendment to the Particulars of Claim, and the word “which” refers to the “COM System flag...” in the earlier sentence. In those circumstances no order is generated until a dealer makes a decision that the position has to be closed. Mr Richardson made no such decision.

70. “And they (the Dax and AUD Positions) had been closed, not as result of the Transfer, but as a result of the adverse movement in the market following the release of the Payroll Data.” In the light of my judgment in relation to the representation at paragraph 65 above, and the pleading in the last sentence of paragraph 32 of the Amended Particulars of Claim, in my judgment this did not amount to a misrepresentation. It was accurate.
71. Finally, “That the Positions were still intact prior to the 13.30 number” The meaning of the word “intact” must be that they were still open positions, which they were. This was true. In my judgment this does not amount to a misrepresentation. This amendment relates to the DAX Position, given the plea at paragraph 43 of the Particulars of Claim, which only refers to that position. It is to be noted, there is no reference to or reliance upon the AUD Position or the fact that it was closed as a result of the adverse movement in that position caused as a result of the Non Farm Data Announcement.
72. The Claimant’s Transfer Claim therefore fails at the second hurdle, because none of the representations relied upon are false and the Defendant was not negligent when making those. By reason of the Settlement Agreement not being set aside, the Counterclaim does not come into play, and it is not necessary for me to consider it.
73. For completeness I would make clear that I have carefully considered all the points taken by the Claimant in his oral and written closing statement. In relation to the several points made at paragraph 1 of his written closing statement, none of these carry any weight given the full and final settlement of those claims in the Settlement Agreement, as pleaded at paragraph 40 of the Amended Particulars of Claim. None of the matters set out in detail in paragraph 2 of the Claimant’s written closing statement, which I do not recite here, persuade me that any of the pleaded representations relied upon, referred to above, were false.
74. Paragraph 44 of the Particulars of Claim does not contain any separate misrepresentation but instead makes the following averment by amendment:

“In fact, the representation in relation to the DAX position was false, as, because of the Transfer, when adverse movements in the market occurred prior to the release of the Payroll Data, the Claimant’s IG account had insufficient collateral and/or margin to support the DAX position, resulting in an order to close the position before the release of the Payroll Data and but for the Transfer there would have been sufficient collateral and all margin

to support the (sic) both the DAX and AUS positions after the release of the Payroll Data.”

75. As to those words added by amendment, as Mr Mayall submitted, correctly in my view, this allegation of falsity does not appear to relate to any pleaded representation. It does not appear to be suggested that Mr Pike represented that, but for the Transfer, there would not have been sufficient collateral and/or margin to support the Dax and AUD Positions after the release of the Non Farm Payroll Data. Announcement. Indeed, from the telephone and email exchanges set out above it is clear that Mr Pike was accepting the opposite.
76. It is also quite clear that the Claimant was fully aware during the communications between him and Mr Pike, which preceded the Settlement Agreement, that if no money had been returned to him from the Account, despite his Transfer request, his Dax and AUD Positions would probably not have been closed out. It was on that basis, and with that knowledge, that he entered into the Settlement Agreement. In my judgment there was no representation made by Mr Pike to the contrary, and even had there been, the Claimant was himself clearly aware of the true position from the discussions between them and entered into the Settlement Agreement on that basis. It is clear that he was keen to reach a compromise as soon as possible and was content for his compensation given in return for the full and final settlement contained in the Settlement Agreement to be calculated on the basis of the Cable Positions alone.

The Best Execution Claim

77. After the Settlement Agreement, the Claimant continued to trade with the Defendant. Between 1 June and 16 October 2012 there were many occasions when the Claimant failed to provide margin with the result that he was in significant default, so that some of his open positions were closed. The details of those positions are to be found at pp678-685 of the Bundle.

The Claimant’s Submissions on the Best Execution Claim

78. As can be seen from paragraph 51 of the Amended Particulars of Claim, the complaint is that:

“The Defendant has repeatedly failed to apply best execution when closing the Claimant’s positions following an order placed by its COM system, by delaying and/or allowing a delay in executing the order and consequently

resulting in loss caused by adverse market movement during the period or delay.” [emphasis added]

There are 10 transactions relied upon between 1 June 2012 and 16 October 2012, with alleged delays, ranging from over 2 minutes 50 seconds [transaction B] to over 11 minutes [transaction C].

79. At paragraph 50 of the Amended Particulars of Claim, this is said to be a breach of Term 2(9) of the Customer Agreement (although paragraph 52 expands this to include Term 3(3) as well), and/or COBS 11 (although paragraph 52 expands this to include COBS 2.1), and/or the implied terms set out at paragraph 31 above, and/or the Defendant’s alleged fiduciary duty, and/or the Defendant’s common law duty, whereby the Defendant was obliged to obtain the best possible result in the circumstances for the Claimant when executing orders placed by its COM system. The amounts claimed in relation to each cause of action appear to be the same.
80. The COM system can be closed either automatically or manually, The Defendant’s complaint relates to manual closure. As the Claimant makes clear at paragraph 75 of his witness statement:

“All IG’s executions effected for my account through its trading platform were compliant with its BE duties to me. My BE claim is limited to a small number of manual executions transacted under IG’s COM Policy when IG’s dealers claimed discretion under Term 16 and did not adhere to IG’s Order Execution Policy [OEP] at the instant of my account breaching its SLL when COM generated its customer margin liquidation order(s).”

81. The complaint therefore relates to the alleged failure to apply “best execution” when closing out those positions promptly, once they had been flagged on the COM.
82. In relation to his pleaded case, the way it is put in his written opening submissions (and there is much there which goes beyond the pleaded case) can be seen from paragraphs 13.3-13.6, which state:

“13.3 As has also been adduced above, D frequently and unfairly availed itself of the discretion afforded by Term 16 of the CA in circumstances where D had no legitimate interest in doing so. Consequently, C was denied his legitimate interest that

a) C’s Positions were then automatically liquidated (whether manually or otherwise) following any breach of his IG Account’s SLL until brought back ‘on-side’.

b) all Positions were closed in accordance with D's Order Execution Policy providing C with the protection of Best Execution at the time the SLL was breached.

13.4 In availing itself of such unnecessary discretion, and denying C his legitimate interests D thus

a) failed to adhere to the FSA's High Level Principle 2.1.6: "A firm must pay due regard to the interests of its customers and treat them fairly".

b) Breached COBS 2.1.1. when D adopted a policy of discretion as to the closure of C's positions once his IG Account had breached its SLL [14.1], and/or

c) Breached COBS 11.2 when failing to liquidate positions in accordance with its Order Execution Policy when C's IG Account breached its SLL [14.3] and

d) Breached COBS 2.1.3. when operating its discretionary policy in b) above when it was not 'honest, fair and professional for it to do so'.

13.5 D's breaches of these said regulatory duties constituted a breach of both the Contract between the parties and the Statutory Duties owed to C [27,61].

*13.6 D denies it has a duty to comply with either COBS 2.1.1 or COBS 11.2 when the liquidation level on C's IG Account as **specified by D** is reached. D says "**there is certainly no obligation upon the Defendant to close a bet immediately the COM system flags up the default**" (75). It is C's case that D is wrong for all or any of the following reasons:*

a) D specifically confirms that it closes positions immediately in its Annual Reports (Para 9.5.c. above)

*b) D alone **specified** a liquidation level and has no entitlement to then withdraw that protection from retail clients without due cause.*

D is unable to produce any evidence that its policy is compliant with FCA regulations. C offered to withdraw his BE claim in toto had D been able to do so."

The Defendant's COM Policy at the Material Time

83. As the Claimant pointed out in evidence, the Defendant published under the Supplementary Documentation section of its website an amount of information in relation to the COM. For example,

- (1) COM was defined in the Glossary of the 2012 Annual Report as "*The Group's automatic real-time position-closing system.*"

- (2) *“...If subsequently the client’s intraday losses increase such that their total equity falls below the specified liquidation level [SLL], positions will be liquidated immediately”.* (IG Annual Report for year 1 June 2012-31 May 2013)

I would point out that none of the documents referred to in the Claimant’s evidence are relied upon as part of his pleaded case settled by Counsel.

84. On 20 September 2012 the Claimant filed a complaint with the Defendant concerning its COM Policy close-outs, the salient parts of which are extracted at paragraph 81 of his First Witness Statement as follows:

“(a) IG had been in breach of its own OEP [Order Execution Policy] which stated: “When we open and close Financial Bets with you, we will take all reasonable steps to achieve the best possible result for you...”.

(b) “...the prices posted to my account by IG when controlling the auto-close-out of my positions themselves were demonstrably not the best available to IG at the time the IG system identified my account (as) eligible for close-out.”

(c) “There is no acceptable reason yet understood by me as to why IG did not close out my positions as soon as the system marked them for close-out by a simple click of a button within a few seconds of the system creating the alert.”

(d) “The lack of transparency shown by IG evidenced by the fact that neither the 50% SLL nor the preventing of client access to the trading platform when an account was on COM were disclosed”.

The Defendant’s Submissions in relation to the Best Execution Claim

85. The Defendant’s position can be seen from paragraph 5 of its Amended Defence and Counterclaim, which states:

“...It is denied that the closing of a bet under Term 16 [of the Customer Agreement] amounts to the execution of an order in accordance with the Execution Order Policy. The COM system does not place an order. It flags up when an account is significantly in default under Term 16. The Defendant is then entitled, but not obliged to close or part close all or any of the open positions. This may, in certain circumstances be done automatically. It is, however, admitted that if the Defendant does decide to close out any such bet (whether automatic or otherwise) then, in closing such Bets and subject to Term 16(5) above, the Defendant is obliged to take all reasonable steps to provide best execution in accordance with the FSA rules and the order execution policy.”

86. Mr Mayall submitted that there are three questions which fall to be considered:

- (1) In the event of default is the Defendant obliged by any contractual provision, statutory duty or other duty to close out the positions within a certain timescale or, indeed, at all?
 - (2) In closing positions as a result of an act of default is the Defendant subject to the duties of best execution set out in COBS or any other duty?
 - (3) If the Defendant is subject to any duty as set out above, was it in breach of that duty?
87. In relation to the first question, he submitted that there was no duty, statutory, contractual, or otherwise, on the Defendant to close out a customer's position either immediately that customer becomes in default, or immediately he becomes in significant default or at any particular time thereafter.
88. In support of that proposition, he relied on a number of authorities, including the decision of Supperstone J in *Ehrentreu v I G Index* [2015] EWHC 390 (QB) and on appeal at [2018] EWCA (Civ) 79. In his judgment, Flaux LJ, giving the only reasoned judgment, with whom Davies and Lindblom LJ agreed, dismissed Mr Ehrentreu's appeal from the Order of Supperstone J, which dismissed his counterclaim for breach of contract and breach of statutory duty. It is to be noted, however, that there was no appeal from the judge's findings that the respondent, the Defendant in this case, was not in breach of statutory duty. In his decision, Supperstone J referred to the abolition of COB 7.10.5R on 1 November 2007. That rule had imposed the following obligation on a firm, such as the Defendant:

"A firm must close out a private customer's open position if that customer fails to meet a margin call made for that position for five business days following the date on which the obligation to meet the call accrues, unless:

(1)(a) the firm has received confirmation from a relevant third party that the private customer has given instructions to pay in full; and

(b) the firm has taken reasonable care to establish that the delay in its receipt is owing to circumstances beyond the private customer's control; or

(2) the firm makes a loan or grants credit to the private customer to enable that customer to pay the full amount of the margin call in accordance with the requirements of COB 7.9.3R (Restrictions on lending to private customers)."

89. The FSA decided that COBS rule 7.10.5R on 1 November 2007 should be deleted. At [14]-[15], Flaux LJ stated:

“14...In summary, the reasoning of the FSA, after consultation, was that the deletion would not have a material impact on consumer protection, because the margin requirements related to execution-only and non-advised transactions with consumers who were relatively sophisticated and it was market practice to close margin accounts in deficit in a shorter period than five days. High level MiFID requirements being introduced at that time did not include margin requirements.”

90. Accordingly, with effect from 1 November 2007, COBS 2.1.1R came into force, which provides:

“A firm must act honestly, fairly and professionally in accordance with the best interests of its client . (The client best interests rule)... There is no equivalent in the new COBS of the former COB 7.10.”

91. At [17] he recorded:

“The judge held at [99] that the respondent was not in breach of its statutory duty under COBS 2.1.1R to act in the appellant's best interests by not closing out his bets in the relevant period between 15 September and 14 October 2008. He said that in reaching that conclusion he had regard to:

“(1) the fact that it is clear from the evidence that after 7 years the Defendant was a sophisticated and experienced trader, (2) he had made payments in the past when requested to do so: (3) he promised to make the payments requested during this period and in making those promises he intended the Claimant to accept them; and (4) the general principle behind the rules is that consumers should take responsibility for their decisions.”

Significantly, there is no appeal from that conclusion that in not closing out the bets, the respondent had not failed to act in the best interests of the appellant and so was not in breach of statutory duty.

92. The court at first instance and on appeal was considering Term 16 which was worded in part in different terms to that which appears in the Customer Agreement which I am considering. In particular it contained at differently worded Term 16(4). For completeness I recite Term 16(4)-(6) of that agreement below:

“(4) You acknowledge that:

where you have failed to pay a deposit or margin call in respect of one or more Bets five business days after such payment becomes due, we are (except as provided in Term 16(5) below) obliged to close out such Bets;

where one or more bets exceed the credit or any other limit placed by us upon your dealings; and you remain in excess of your credit limit for five or more business days, we will:

(i) close any or all of such Bets; and

(ii) refuse to open any further Bets until payments sufficient to bring you within your credit limit have been received by us...

(5) Subject to the FSA Rules, in the event of your failing to meet a demand for deposit or margin or your being in excess of any credit limit placed on your account, we may exercise our reasonable discretion to allow you to continue to place Bets with us, or allow your open Bets to remain open, but this will depend on our assessment of your financial circumstances."

(6) You acknowledge that, if we agree to allow you to continue to place Bets or to allow your open Bets to remain open under Term 16(5), this may result in your incurring further losses." [emphasis added]

93. At [36]-[38], Flaux LJ was clear that Term 16(4) of that Customer Agreement, despite the inclusion of the word "obliged", was not a provision for the benefit of the customer. At [37]-[38], he explained his conclusion as follows:

"37...in my judgment, on its true construction, Term 16(4) is not a provision for the benefit of the customer. The use of the words "You acknowledge that" at the beginning of the provision seem to me to be more naturally conveying that the customer acknowledges that what follows is a provision essentially for the protection of the respondent rather than the customer. This is borne out by the use of the same words at the beginning of Term 16(6), an acknowledgment that if a decision is made to leave open bets under Term 16(5) this may lead to the customer incurring further losses, clearly intended to foreclose any complaint by the customer about such losses in the future.

36. As already noted, Mr Wilkinson placed considerable reliance on the use of the words in Term 16(4): "we are....obliged to close out such Bets" in support of his case that the provision imposed an obligation on the respondent to close out the appellant's position which was, at least in part, for the benefit of the appellant. I consider that, in their context and, in particular the juxtaposition with: "You acknowledge that" , these words do not have that effect. Rather the meaning of "we are obliged" is "we will have to do it" , thus making it clear to the customer that, subject to the application of Term 16(5), this is what will happen, in order to ensure that the customer has no cause for complaint if his positions are closed down. The provision ensures certainty and, in that sense can be said to be intended to protect the respondent and its customers generally, but it is not intended to protect the individual customer against his own gambling addiction or considered choices."

94. Mr Mayall submitted the position here is *a fortiori* because there is no equivalent of the words "we are obliged to close out such bets." Consequently, there is therefore no duty, statutory, contractual or otherwise to close out a customer's position either immediately

that customer becomes in default, or immediately that customer becomes in significant default or at any particular time thereafter.

95. Turning to the second question, in closing positions as a result of an act of default is the Defendant subject to the duties of best execution set out in COBS or any other duty?
96. Relying on the decision of Gloster J (as she then was) in *Euroption Strategic Fund Limited v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm), to which I have earlier referred at paragraphs 31 and 36 above, Mr Mayall submitted that the only duty imposed upon a person exercising its right to close out positions in the event of default was a duty to act honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally. No further duty was imposed either by section 13 of the Supply of Goods and Services Act 1982, COBS 2.1.1, COBS 11.2.1, or any other duty of care owed in tort. (See: [105]-[135], and in particular [105], [110], [117],[126]-[135]).
97. Mr Mayall further submitted that there is no pleaded allegation in this case that the Defendant was acting dishonestly, not in good faith, arbitrarily, capriciously, perversely or irrationally. What there is, is a plea at paragraph 52(C) of the Amended Particulars of Claim that in breach of the implied term, “the Defendant failed to exercise any discretion fairly and in the best interest of the Claimant in the circumstances.” That is not the same thing. In *Mallone v BPB Industries*, at [36], Rix LJ stated:
- “...On the other hand the concept of ‘without reasonable or sufficient grounds’ seems to me to be too low a test. I do not consider it is right that there be simply a contractual obligation on an employer to act reasonably in the exercise of his discretion, which would suggest that the court can simply substitute its own view for that of the employer.”
98. Mr Mayall submitted that, applying the analysis of Jacobs J in *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Limited v Mr Wayne Charlton, Financial Conduct Authority* [2018] EWHC 2878 at [122], properly understood, the duty of best execution has to do with the mechanics of acquiring or selling securities. It has nothing to do with the anterior decision as to whether or not (in this case) the Claimant’s positions should be closed or not. It is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself.
99. The Defendant accepted that if it does decide to close a bet it is obliged to take all reasonable steps to provide best execution in accordance with the FCA rules and the

Order Execution Policy. This is in relation to the mechanics of the closing of positions. No complaint is made about this.

100. At [122] of the *Berkeley Burke SIPP Administration Ltd*, Jacobs J referred to *Bailey v Barclays Bank* [2014] EWHC 2882 (QB) a decision of HHJ Keyser QC sitting as a Judge of the High Court, where he stated at [34]-[35]:

“34. The fourth COBS Rule alleged to have been breached is 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 “execution factors” are defined in the glossary to mean: “price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of an order”. The alleged breach of this rule is as follows:

“[T]he Defendant failed to take reasonable steps to achieve the best possible result when taking into account the execution factors. In particular, similar products were available at the time of the transaction on far better terms and rates.”

*35. This allegation is misguided and rests on a misunderstanding of the Rule. It is directed not to the merits of the transaction or the decision to enter into it but to the way in which the decision to enter into the transaction is implemented. As Blair J said in *Första AP-fonden v Bank of New York Mellon SA/NV* [2013] EWHC 3127 (Comm) at [274]:*

“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 [the defendant] 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.”

101. Mr Mayall pointed to the fact that in the course of the hearing the Claimant relied on various documents and conversations in support of his Claim. Those are not referred to or relied upon in his pleaded case. In his evidence he did not claim to have seen or relied upon those at the material times. Any duty said to arise as a result of any document/conversation would have to be specifically pleaded setting out exactly the circumstances in which it arose and how it led to the imposition of a duty upon the Defendant.
102. Turning to the third question: *“If the Defendant is subject to any duty as set out above was it in breach of that duty?”* Mr Mayall submitted that there was no evidence of breach.

103. The only allegation of breach of duty in the Best Execution Claim relates to the time taken between the account being flagged and positions being closed. There was no expert or other evidence as to the market circumstances at the time of any particular trade and, thus, no evidence upon which the Court could conclude that the time taken was unreasonable.
104. In any event, even on the Claimant's case as it emerged during the hearing, he was not suggesting that there was any duty to close out positions immediately when the 50% limit was reached. He accepted, as described by Mr Richardson, that the COM system flagged accounts for a dealer to investigate. The dealer would then have to check why the account had been flagged, whether it was, for example, due to a pricing error or other error, would have to work out what positions needed to be closed in order to bring the account back onside, would have to work out what, if any, hedging positions would need to be unpicked, would have to work out what liquidity there was in the market and what would be the best way of unravelling the position. All of this could take time from the point when the dealer first took over the account. Even before that time, there may have been a large number of accounts flagged, and the dealer would have to work out in what order the accounts should be dealt with.
105. Given the nature of markets, unless there were specific facts alleged which would make it clear that the relevant market was going to move in a particular direction, any delay was just as likely to be to the Claimant's benefit as to his detriment.
106. Insofar as the Claimant complains that the Defendant's systems prevented him from closing out his positions himself as soon as COM had flagged his account and until the necessary action had been taken, the Claimant does not purport to have attempted to close his positions himself other than on one of the 10 occasions complained about, that of 5 September 2012 – Amended Particulars of Claim paragraph 51(H), it is clear from the evidence of Ellen Rogers at paragraph 8 of her witness statement dated 13 December 2019 that the Claimant could, in the relevant period, have telephoned his Premium Manager or anyone in the Trading Services Team and placed an order to close his positions himself by telephone. It is accepted that he was unable to do so online. The reason why this was not possible was in order to prevent there being duplication of orders and to prevent there being a distortion of the market generally. As accepted

by the Ombudsman in his Final Decision on the Best Execution complaint this was perfectly reasonable.

107. Finally, Mr Mayall submitted in relation to the quantum claimed in relation to the Best Execution Claim, the numerous discrepancies between the sums claimed in the Amended Particulars of Claim and the alleged losses set out in Spreadsheet 1 (Consolidated Losses), indicated there was no reliable evidence as to any loss suffered.

Discussion and Conclusion in relation to the Best Execution Claim

108. I have reached the conclusion that the Best Execution Claim based upon solely the delay complained of in paragraph 51 of the Amended Particulars of Claim fails.
109. I do so for the following reasons.
110. In relation to the contractual claim, the starting point is Term 16(2) which confers an entitlement (not an obligation) within the exercise of the Defendant's absolute discretion to close all or part of any Bet where there has been a failure to provide Margin amounting to an Event of Default. To this has to be added Term 16(4), which confers a contractual reasonable discretion to keep open a Bet, where there has been a failure to meet a demand for Margin and an acknowledgement by the Claimant in Term 16(5) that if the Bet is allowed to remain open this may result in further losses. It is clear that applying the Court of Appeal decision in *Ehrentreu*, Term 16 of this Customer Agreement is not for the benefit of the customer, particularly since this version, unlike the earlier one, contains no "obligation" to close out the Positions in default after five business days.
111. There is no plea that the Defendant's exercise of its discretion was irrational, perverse, capricious or arbitrary. Nor in my judgment looking at the transactions complained of could there be. The Claimant accepted that the COM system flagged accounts for a dealer to investigate, and if there were closures to be made to work out what order to close the various Positions. That would take time, as described in paragraph 104 above. The plea that there was an implied term that "the discretion would be exercised fairly and in the best interest of the Claimant in the circumstances," is unsustainable for the reasons given at paragraph 97 above by reference to *Mallone v BPB Industries*.

112. I accept the analysis of the Defendant at paragraph 5 of the amended Defence and Counterclaim that the COM system does not place an order. It simply flags up when an account is significantly in default under Term 16.
113. Turning to the second question posed by Mr Mayall, having regard to the authorities relied upon by the Defendant set out above, I am satisfied that, to use Mr Mayall's words, there is no duty, statutory or otherwise, on the Defendant to close out a customer's position either immediately that customer becomes in default, or immediately he becomes in significant default or at any particular time thereafter.
114. In my judgment, reflecting the decision of Jacobs J in the *Berkeley Burke Administration* case, applying *Bailey v Barclays Bank* and *Första AP-fonden v Bank of New York Mellon SA/NV*, the Best Execution policy does not apply to the antecedent decision whether to close a Position, but the mechanics of carrying it out, that decision having been taken. There has therefore been no breach of COBS 2.1.1, 2.1.3 or 11.2.
115. The case that the Defendant has had to meet relates only to one based on delay. That is the sole complaint. Insofar as there was to be specific reliance on any documents or conversations, that should have been part of the pleaded case. It was not. In any event, I doubt that, even if this had been done, it would not have affected the conclusions that I have reached at paragraphs 111-114 above.
116. I would also add that to the claims based on any fiduciary duties or duties at common law, they are unsustainable for the reasons given at paragraphs 34 and 35 above. If there were such duties, there would have been no breaches of them for the reasons I have found that there were no breaches of contractual or statutory duty.
117. Finally, in relation to the third question posed by Mr Mayall, even were the Defendant subjected to the duties contended by the Claimant, I find that there has been no breach of them. There is insufficient evidence to establish that the conduct of the Defendant was unreasonable. I repeat the point made in paragraph 104 above. The Claimant himself could have taken active steps to close out the Positions, having failed to provide sufficient margin and, with one exception, did not do so – see paragraph 106 above.
118. For these reasons I dismiss the Best Execution Claims.

The FOS Claim

119. On 26 October 2012 the Claimant alleged that Marianne Davey of the Defendant's Compliance Team wrote to the Claimant, stating, *inter alia* that best execution did not apply to orders that were raised via its COM system. The Claimant maintains that that assertion was wrong.
120. On 26 April 2013 the Claimant made a formal complaint to the FOS, concerning, *inter alia*, the Defendant's failure to comply with its best execution obligations.
121. On 10 May 2013 Mr Zoumidou, the Head of Compliance, wrote to the Defendant, which was in response to a letter dated 13 March from the Claimant, that in turn had followed a meeting between Mr Zoumidou, Ms Jody Dunn and the Claimant on 16 January 2013.
122. In his letter Mr Zoumidou stated:
- "The process by which orders are closed on the COM system is that when positions reach the liquidation level set on the account, an order is generated and sent to the dealing desk to be executed. All orders that are received by the dealing desk are subject to our execution policy whether they are created as a result of the COM system or received by other means..."*
123. On 26 April 2013, the Claimant had made a formal complaint to the FOS concerning, *inter alia*, the Defendant's failure to comply with its best execution obligations.
124. The complaint having been made by the Claimant, the Defendant provided written submissions to the FOS, including as part thereof the letter dated 26 October 2012, referred to at paragraph 119 above, but not Mr Zoumidou's letter dated 10 May 2013, which included the passage recited at paragraph 122 above.
125. On 25 October 2013, the FOS wrote to the Claimant and the Defendant stating, *inter alia*:
- "The best execution rules that apply in [the Claimant's case] only relate to the business' obligation to execute orders on terms most favourable to the client. I am not persuaded that the closure of the positions in the event of a default can be considered an order; Therefore, I do not consider that IG has broken the best execution rules."*
126. The Claimant alleges that this finding was based upon incorrect statements provided by the Defendant and was wrong as a matter of law, and that as a consequence the Defendant was in breach of contract, namely Terms 10(4) and 3(3) and the implied term to discharge its contractual obligations with due skill and care and diligence and/or was negligent.

Further he maintains that the failure to provide the FOS with Mr Zoumidou's letter of 10 May 2013 was a breach by the Defendant of COBS Rules 4.2 and/or 4.5 and/or 2.2, and DISP 1.4.

127. These breaches give rise to an entitlement to damages, representing the opportunity to obtain an award of compensation from the FOS and the legal costs incurred by him, namely £10,065, including VAT.

The Defence to the FOS Claim

128. The defence denies that the letter of the 26 October 2012 stated that best execution did not apply to orders raised by its COM System. The letter pointed out that the COM system flagged up an account as requiring funds and indicated that the Defendant did not have to take any action in this scenario. It went on to state:

"...However, the Close Out Monitor is in place to try and minimise the chances of a client incurring a debit balance and whilst IG endeavour to close positions sooner than later, this is not a regulatory requirement, nor does it fall under best execution...I cannot stress enough that the operation of COM is not an order filling mechanism it is only triggered by an event of default on your account."

129. In relation to Mr Zoumidou's letter of May 2013, the Defendant averred that the true meaning of the letter is that the best execution policy applied to all closures including closures initiated by COM, but that the best execution policy has no application to the issue of when a decision is taken to close bets in accordance with Term 16.
130. It is denied that the FOS finding was based on incorrect statements provided by the Defendant, nor was it wrong in law.
131. In the Defendant's written opening submissions, there is a further point made, although it does not appear to have been specifically pleaded, namely:

"The letter from the FOS of the 25 October 2013 was the conclusion of an adjudicator at the FOS. The final decision of the Ombudsman on this complaint (Bundle page 318) is dated 1 July 2014. Whether or not the letter of 10 May 2013 had been sent to the FOS before, it was undoubtedly sent on 6 January 2014 (see email and acknowledgement at Bundle page 744). Thus, the Ombudsman had this letter when reaching his final decision.

The Ombudsman's final decision on this complaint, and on the Transfer complaint (Bundle page 301) rejected both complaints for, essentially, the same reasons as set out above. In particular the Ombudsman found that there was no evidence of any false representation which induced the

Claimant to enter into the Settlement Agreement, that Best Execution did not apply in circumstances where the Defendant was closing positions as a result of default.”

132. It does, however, come within the general denial, which was pleaded, namely that the FOS finding was not based on incorrect statement provided by the Defendant, referred to at paragraph 130 above.
133. Mr Mayall submitted that the Ombudsman, Ms Louise Bardell, correctly decided that Best Execution did not apply when the Defendant was closing positions as a result of default, and that it was perfectly reasonable for the Defendant to block online closing by the customer of any positions when the Defendant was dealing with the matter pursuant to a COM flag.
134. He contended that for that there was no breach of any contractual, statutory or other duty on the part of the Defendant in respect of the FOS claim. Furthermore, it was denied that any alleged breach caused the Claimant to suffer any loss or damage. The complaint was rejected by the FOS in line with the fair and reasonable principles upon which it considers such complaints. The Claimant did not exercise his right to take the matter to the Ombudsman. The incurrence of legal costs was not as a consequence of any breach of any duty by the Defendant.

Discussion and Conclusion on the FOS Claim

135. Having found that the Best Execution Claim fails, it follows that the Ombudsman reached the correct decision. Her decision was not based on incorrect statements from the Defendant, and therefore there was no breach of any duty, contractual, statutory or any other duty and as a result no loss has been suffered by the Claimant. That is an end of the matter.
136. However, for the sake of completeness, it is worth looking at some material extracts of Ms Davey’s letter of 26 October 2012, beyond that specifically referred to in the Defence. In it she stated as follows:

“You believe that IG is in breach of its own Order Execution Policy. I can, however, confirm that this is simply not the case. When an Event of Default occurs on an account the resulting closure of any positions is not an “Order”. An order is a specific instruction from a client to open or close a position and as IG operates on an execution only basis, orders will only be carried out on an account after direct instruction from a client. There is no “order” from a

client when a position is closed on the Close Our Monitor. The operation of the Close Out Monitor is a credit control mechanism, which is triggered in the event of a default, to try to minimise the chances of a client incurring a debit balance on their account. It is not a mechanism that a client should use to manage their positions nor is it the equivalent of using a stop or a limit. The operation of the system will only be invoked when you do not have enough funds on your account to support your positions in their entirety and the positions are closed at prevailing levels at the time that action is taken on your account. IG do not “elect the price to close your position at...

You also state in your letter that IG justifies the price when your account qualified for the “Automatic Close Out System”, (ACOS). I would, however, liked stress that you do not simply “qualify “for having positions closed out. If margin is due on your account at a certain level it is flagged as requiring funds indeed even if there is £1 due on your account, your account is in default. Technically, IG do not have to take any action in this scenario as the onus is on yourself to monitor your account and ensure that there are enough funds to support your positions...”

137. There then follows the passage relied upon by the Defence referred to at paragraph 128 above, namely:

“However, the Close Out Monitor is in place to try and minimise the chances of a client incurring a debit balance and whilst IG endeavour to close positions sooner than later, this is not a regulatory requirement, nor does it fall under best execution...I cannot stress enough that the operation of COM is not an order filling mechanism it is only triggered by an event of default on your account.”

138. It seems to me that this is fair description of the contractual position.

139. Turning to Mr Zoumidou’s letter of 10 May 2013, it is worth reciting some extracts from that, which preceded the extract relied upon by the Claimant, quoted at paragraph 122 above:

“I think it is a vital part of understanding the way in which IG manage cases where insufficient margin remains on clients’ accounts. You expressed the view that IG should automatically place stops when clients open positions as others spread betting operators did – we confirmed this is not how IG products were operated and the option to place stops was available to you but you did not choose to utilise them on all occasions...

On a number of occasions, you chose to allow the margin level to reduce without taking the requisite action of adding funds or reducing the positions yourself which meant that IG was forced to close positions through the use of our COM system or closeout monitor. Having reviewed your account I do not agree that IG's actions have caused unnecessary detriment to the closing price you received on your transactions and I feel that considering the market conditions, IG acted in your best interests when obtaining a price at which

your positions could be closed in line with our execution policy and that you were treated fairly at all times...”

140. It has, however, been drawn to my attention by the Claimant that the assertion on behalf of the Defendant (recited at paragraph 131 above), that before reaching her final decision on 1 July 2014, the Ombudsman, dealing with this complaint, reference number 1381-5710, had the benefit of both letters, is incorrect. The reason for this is that when the letter of 13 May 2013 was sent to the FOS on 6 January 2014, it was in relation to a separate complaint, reference number 1494-2637, being heard by a different Ombudsman. I therefore do not base my dismissal of the FOS claim on the basis that Ms Bardell had both letters before her when she made her final decision on 1 July 2014.

Conclusion

141. For the reasons given above all three of the Claimant’s claims are dismissed.
142. I would invite the parties to agree a form of draft Order, if possible. If there are rival versions, please could they be indicated in track-changes. I intend to hand down this Judgment remotely at 2pm on Friday 10 November 2021 by circulation to the parties’ representatives by email and release to Bailli. I will deal with any consequential matters then, if that is convenient to the Claimant and the Defendant’s legal representatives, failing which I will deal with them at a later mutually convenient date.
143. It only remains for me once again to thank the Claimant for the way in which he has conducted the proceedings and both sides for their helpful submissions. I would also offer my sincere apologies for the delay in handing down this judgment, which in significant part has been caused by personal issues, resulting from family illness.